

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. I 3961/2014

In the matter between:

GEAR TRANSPORT CC

PLAINTIFF

and

SPRINGBOK TOURING OF NAMIBIA (PTY) LTD

DEFENDANT

Neutral Citation: *Gear Transport CC v Springbok Touring of Namibia (Pty) Ltd (I 3961/2014) [2019] NAHCMD 233 (8 July 2019)*

CORAM: MASUKU J

Heard: 12 – 16 September 2016; 14 – 18 November 2016; 30 January – 3 February 2017; 18 – 21 April 2017; 29 September 2017; 13 March 2018; 18 April 2018

Delivered: 8 July 2019.

Flynote: Motor vehicle accident – in determining negligence – reasonable driver test to be applied – apportionment of damages – culpable conduct of driver considered.

Law of Evidence: How to resolve factual disputes where parties' versions are disparate - Expert witness – what constitutes – expert evidence v factual evidence – factual evidence generally more weighty – probability thereof a determining factor.

Summary: Two vehicles, being a truck and a bus, belonging to the plaintiff and defendant respectively, collided. Both parties claimed that the other was negligent and owing to the negligence alleged, caused the collision. It is the plaintiff's case that the amount of N\$822, 735.75 which it claims is in respect of the truck-tractor being damaged beyond economical repair, being the difference between the fair and reasonable value of the plaintiff's truck prior to the accident and the post-collision amount of N\$24 380, a fair and reasonable assessment fee in the amount N\$ 13, 805 and the salvage value of N\$5 000.

In its plea, the defendant denied liability for the collision and instead filed a counterclaim, alleging that the collision was the result of the negligent driving of the plaintiff's driver. It claimed payment of an amount of N\$ 855, 185.75, interest thereon and costs. The said amount is made of N\$ 847,000, being the fair and reasonable value of the defendant's vehicle prior to the collision and an amount of N\$ 13, 805.75, being an amount in respect of a fair and reasonable assessment fee. The amounts for the liability were agreed inter partes.

In the alternative, the defendant prayed that in the event the court found that the driver of the defendant's vehicle was negligent, the court should hold that the plaintiff's driver was also negligent. Finally, the defendant prayed that the plaintiff's claim should be dismissed with costs.

Both parties called witnesses in support of their respective cases. For the plaintiff, two expert witnesses were called. The defendant called one expert witness and two eyewitnesses as well as one other witness. It is common cause that the evidence adduced by the parties is at variance in most of the critical parts.

Held that: It is critically important to first have regard to the proper approach that the court should have to situations where disparate versions are placed before court by witnesses, be they of fact or experts.

Held further that: In the circumstances, the approach suggested in *Life office of Namibia Ltd v Amakali* is condign 'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, the 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 a variety of subsidiary factors, not necessarily in order of importance, such as, (i) the witness' candour and demeanour, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) 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.'

Held that: The court is at large to depart from what is otherwise very good law cited in the *Kenny* judgment, namely, that the evidence of an eye witness should generally carry more weight. The court found that this case is one of those exceptions where it would be dangerous to do so, given the serious and deep-rooted imperfections of these witnesses of fact.

Held further that: In dealing with expert evidence, it is not mere opinion of the witness which is decisive but his ability to satisfy the court that because of his special skill, training, or experience, the reasons for the opinion which he expresses are acceptable.

Held that: Defendant's expert witness does not qualify to be regarded as an expert and that in holding himself out to be an expert, he committed rudimentary mistakes.

Held further that: the driver of the defendant's vehicle was negligent in not directing his vehicle to his left side of the road in order to avoid a collision.

Held that: The court is required to place itself in the position of the driver of the vehicle at the time of the occurrence of the accident and judge whether he or she exercised the care which a reasonable person in his position would have.

Held further that: the defendant's driver failed to live up to the requisite standards of the reasonable person.

Held that: The evidence does not suggest that the plaintiff's driver was culpable in any manner to warrant apportionment of damages in the circumstances.

Court finding that plaintiff by admissible evidence, has satisfied the onus thrust upon it and that defendant failed to prove by admissible evidence that plaintiff's driver was negligent and consequently ordering defendant to pay to plaintiff the amount of N\$801,627.50 in damages with costs. Court dismissing the defendant's counterclaim.

ORDER

1. The defendant is ordered to pay to the plaintiff the amount of N\$ 801,727.50, in respect of damages sustained by it as a result of a motor vehicle collision with the defendant's vehicle.
2. The defendant is ordered to pay interest on the amount stated in paragraph 1 above, at the rate of 20% tempore morae from date of judgment to the date of final payment.
3. The defendant's counterclaim is dismissed.
4. The defendant is ordered to pay the costs of the action, consequent upon the payment of one instructing and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

MASUKU J:

Introduction

[1] 28 January 2014, will go down as a sad day in the history of Namibian road usage. On the evening of that day, at around 19:30, near Okahandja, along the Otjiwarongo Main Road, a horrendous road accident claimed seven lives. In this carnage, two vehicles, being a truck bearing registration number N77266W and a bus, bearing registration number N92876W collided. Among those who passed on were the respective drivers of the said vehicles.

The parties

[2] The plaintiff is a Close Corporation, duly incorporated in terms of the relevant laws of this Republic. It has its principal place of business situate at Erf 264 Kitaar Street, Wanaheda, Windhoek. The defendant, on the other hand, is company, duly registered in accordance with the Company laws of this Republic. It has its place of business situate at 24-26 Nguni Street, Northern Industrial, Windhoek.

The pleadings

[3] Following the collision referred to in para 1 above, the plaintiff approached this court, seeking payment of an amount of N\$822, 735.75, interest thereon at the rate of 20% per annum, calculated from the date of judgment, to the date of final payment and the costs of suit. The plaintiff avers that the said collision occurred as a result of the defendant's driver, Mr. Robert Bekker's negligent driving. It is alleged in this regard that the said driver was negligent in the following respects:

- (a) he failed to keep his vehicle under proper control, thereby veering into the lane of on-coming traffic, at a time when it was inopportune and dangerous to do so'
- (b) he drove the said vehicle at a speed that was excessive in the prevailing circumstances;

(c) he failed to apply his brakes timeously or at all; and

(d) he failed to avoid a collision with the plaintiff's truck when he could and should have done so.

[4] It is the plaintiff's case that the amount claimed above is in respect of the truck tractor being damaged beyond economical repair, being the difference between the fair and reasonable value of the plaintiff's truck prior to the accident and the post collision amount of N\$24 380, a fair and reasonable assessment fee in the amount N\$ 13, 805 and the salvage value of N\$5 000.

[5] In its plea, the defendant denied liability for the collision and instead alleged that the collision was the result of the negligent driving of the plaintiff's driver. It claimed payment of an amount of N\$ 855, 185.75, interest thereon and costs. The said amount is made of N\$ 847,000, being the fair and reasonable value of the defendant's vehicle prior to the collision and an amount of N\$ 13, 805.75, being an amount in respect of a fair and reasonable assessment fee.

[6] The particulars of the plaintiff's driver's negligence alleged by the defendant in its counter-claim, are the following:

(a) he drove the said vehicle into the lane of the on-coming traffic when it was dangerous and inopportune to do so;

(b) he failed to keep a proper look-out;

(c) he drove the vehicle at an excessive speed in the circumstances;

(d) he failed to avoid a collision when he could and should have done so; and

(e) he failed to apply his brakes timeously or at all.

[7] In the alternative, the defendant prayed that in the event the court found that the driver of the defendant's vehicle was negligent, the court should find that the plaintiff's driver was also negligent in one or more of the respects mentioned in the immediately preceding paragraph. Finally, the defendant prayed that the plaintiff's claim should be dismissed with costs. The defendant also filed a counterclaim, following upon the allegations mentioned above. Needless to say, the plaintiff filed a plea to the counterclaim. I do not find it necessary to traverse all the averrals in the said documents as the averrals covered above fairly mirror the claim and counter-claim. It is essentially a trade of allegations and counter-allegations.

The pre-trial order

[8] In terms of the pre-trial order, which the court issued, the following were the issues that the court was called upon to resolve:

- (a) the negligence, if any, of the respective sets of drivers in the respects set out in the pleadings;
- (b) whether the plaintiff suffered damages in the amount of N\$ 882, 735.75 and whether the defendant sustained damages in the count of N\$ 885, 185.75;
- (c) the respective degrees of negligence of the respective drivers, if any.

[9] Issues that were recorded as being common cause are the following:

- (a) The citation of the parties and the court's jurisdiction to hear the matter;
- (b) The plaintiff was the owner of the Scania R240 Truck Tractor;
- (c) That on 28 January 2014, at approximately 19:30, approximately 20 km from Okahandja on the Otjiwarongo Main Road, the accident described in the introductory parts of the judgment occurred;

- (d) That the plaintiff's vehicle was driven by Mr. P. Nangaku, so acting in the course and scope of his employment with the plaintiff;
- (e) That the defendant's vehicle was driven by Mr. Robert P. Bekker.

[10] Under this head, although this was not agreed to in the pre-trial order, it is important to mention that during the course of the trial, it became common cause that during the accident, the point of impact was in the line of travel of the plaintiff's truck, meaning that the defendant's vehicle, the bus, left its lane and veered into the plaintiff's truck's lane of travel and that the collision occurred in the truck's lane. The expert witnesses appeared only to differ in regard to the extent of the encroachment of the bus into the truck's lane of travel rather than the fact of encroachment.

[11] Another fact that appears common cause from the evidence, is the state of the road on the evening in question, when the accident occurred. It is accepted as a fact that it had been raining on the day in question and as such, the road was wet and some puddles of water would have collected on the road, particularly on the indentations caused by heavy traffic on the respective lanes.

[12] It must also be mentioned that the parties agreed that the court would confine its determination to the issue of liability. This is because the parties agreed that in the event of the court finding any of the parties liable, amounts for the liability were agreed *inter partes*. In the event of the defendant being found liable, the damages agreed would be N\$ 801, 627.50. On the other hand, if the court finds the plaintiff liable, the damages payable to the defendant would be N\$ 747, 591. 32.

[13] This agreement is most welcome, as it alleviates the burden on the court to determine the damages due, especially taking into account that the determination of damages is not always tantamount to a walk in the park. It can be a vexing and

complicated issue at times. The agreement then dispensed with the expert witnesses the parties may have had to call in respect of the assessment of damages.

The evidence

[14] Both protagonists called witnesses in support of their respective cases. For the plaintiff, two expert witnesses were called, namely, Mr. Johan Joubert and Mr. Martin Graham. I record that there was no application for absolution from the instance at the close of the plaintiff's case. As a result, the defendant immediately called its witnesses as well, namely Mr. D. A. Burger; its expert, Mr. D. Viljoen; and two eye witnesses, namely, Mr. S. Shipulwa and Mr. S. Ituula. The main aspects of the said witnesses' evidence will be recounted in turn below.

Mr. Johan Joubert (Expert)

[15] Mr. Joubert is employed as the Managing Director of Traffic Accident Reconstruction Services (Pty) Ltd and is an expert in accident reconstruction, accident analysis, cause analysis, interpretation of the law and traffic consultant. He boasts over 20 years in specialist experience in traffic and accident reconstruction including analysis of speed trends, accident rates, correlation between speed and accidents.

[16] He testified that on 28 January 2014, he received a brief to do a reconstruction of the accident which involved the plaintiff's and defendant's vehicles as fully described above.

[17] Owing to his broad knowledge in accident reconstruction, it was his evidence that the approaching Scania truck tractor "the truck tractor" moved over into the lane of

the oncoming Scania Marcopolo bus “ the bus” prior to the accident and the driver of the bus then having to swerve to the right and applied brakes to avoid a collision with the tractor was so extremely unlikely that he was of the opinion that they could not have seen the position of the bus they were travelling in or the position of the approaching truck in relation to the road that it just appeared to them that the truck tractor was in its incorrect lane.

[18] According to this witness it would have almost been impossible for the driver of the truck tractor to have brought his truck tractor combination back into the correct lane in a straight line after he completed an S-movement with a fully loaded truck tractor to have caused the skid marks as explained in his analysis.

[19] He further testified that it was much more likely that it appeared to the three witnesses that the approaching truck tractor was approaching the bus in its incorrect lane as they were not able to see the road layout in front of the bus as a reference to determine in which lane the vehicles were travelling in relation to one another.

[20] It was his testimony that although the maximum permitted speed for the bus allowed on the road is 100 km/h, the speed of the bus was too high for the prevailing circumstances as the road was wet and it was raining.

[21] According to Mr. Joubert, after analysing the physical evidence, the witness statements and the exclusion of any mechanical defects on the bus, his expert opinion is that the accident was caused by the driver of the bus that was travelling at a speed that was too high for the prevailing circumstances and that as a result of the driver of the bus losing control of the bus, it veered into the lane of the oncoming truck tractor and semi-trailer combination.

[22] His further expert opinion and testimony was that based on the right shoulder impact of the road, the total opposite side of the road in which the bus was travelling in prior to the accident and the impact damage to the bus was to the left front half of the bus, that the bus would have left the road and possibly rolled irrespective of any other vehicle being on the road at the time. According to the witness, the bus would have been in an accident even without having collided with the bus.

[23] His testimony was that on 3 march 2014, he inspected the truck tractor described above after it was involved in a collision and after having assessed the damages to the vehicle, it was his expert testimony that, the vehicle was damaged beyond economical repair and that the difference between the fair and reasonable market value of the truck immediately prior to the collision was N\$789 550, less the salvage value of the wreck of N\$5 000 together with the fair and reasonable tow-in costs after the collision of N\$24 380 and the assessment fees in the amount of N\$650 bring the actual damages of the plaintiff to N\$809 580.

Mr. Martin Graham

[24] Is a qualified A grade diesel mechanic since 1973, self-employed and specializes in rebuilding heavy duty truck transmissions and engines. He testified that his focus is on product design problems in the field as well as design modifications and implementing same in the aftermarket service field. He also acts as a consultant to the truck industry in workshop management and training on specific product related issues. He further testified that he consults as Vehicle Mechanical Analyst to various stakeholders.

[25] Mr. Graham testified that he received a brief to do a mechanical inspection on the vehicles as fully described above and prepared a comprehensive written report. His

testimony was that during his visit to the accident site and assisting Mr. Joubert with recording the actual on site dimensions and data left by each vehicle, it was measured, recorded and established that the subject truck's brakes in conjunction with the trailer brakes in a combination was working and efficient.

[26] According to Mr. Graham, the subject truck tractor was well maintained and relatively new in truck life terms and it was by this inspection of the subject truck that it was, in his expert opinion, clear and established beyond reasonable doubt that no mechanical failure was found or could be established that could have caused the accident and also taking into account the fact that this truck was operated in conjunction with a trailer.

Mr. David Peter Viljoen (Expert)

[27] Is the founder and owner of Dave's Traffic Consultancy whose primary focus is inter alia reconstruction of accidents. His testimony is that he has since 2005 specifically focused on accident reconstruction and investigation of accidents and that he has testified in court on accident investigations and accident reconstruction.

[28] He testified that he was appointed to investigate the accident which occurred between the plaintiff and defendant's vehicles. He further testified that he inspected the trailer and bus, took measurements and photos of the vehicles and also received photos from witnesses that were travelling on the bus and compiled a report.

[29] Mr. Viljoen's further testimony was to the effect that after his analysis of the evidence and the witness statements, his expert testimony was that the accident was caused by the driver of the truck tractor who drove it on the wrong side of the road in

rainy weather conditions, whilst the road was wet and that by so doing, he created a sudden emergency situation which resulted in the accident despite attempts by the bus driver to avoid the accident.

[30] According to Mr. Viljoen, he found the actions of the bus driver to have been those of a reasonable person under the circumstances.

Mr. Dirk Adriaan Burger

[31] Mr. Burger is employed as General Manager by Namdeb Diamond Corporation (Pty) Ltd. He was informed of the accident by the Namdeb Safety & Health Superintendent on 28 January 2014. He testified that he visited the accident scene on the morning after the accident had occurred and upon arrival at the scene, the bus had already been towed away, whereas the wreckage of the truck tractor was being loaded on a recovery vehicle.

[32] It was his testimony that he took 29 pictures of the wreckage on site, the road indicating the skid marks and road markings as well as the wreckage of the bus. Subsequent to viewing the remains of the bus, he proceeded to visit the injured employees from the bus at the Okahandja hospital.

Mr. Sebulon Shipulwa

[33] Mr. Shipulwa was an occupant on the bus. He testified that he boarded the bus bound for Oranjemund, in Tsumeb at around 15h00 and that the accident occurred at around 19h30 some 20 km outside of Okahandja. He testified further that it was raining and as a result, the road was wet.

[34] It was his testimony that he was sitting at the back of the bus in the second row of seats from the back on the left side and that the speed of the bus was about 80 km/h.

[35] He testified that he saw a truck approaching the bus from the opposite direction, that is, travelling north from the direction of Okahandja towards Otjiwarongo. According to Mr. Shipulwa, he could clearly see the truck moving from the one side of the road to the other side of the road and coming into the lane in which the bus was travelling and at which point he heard the driver screaming and applying the brakes. It was upon the application of the brakes that the bus swerved towards the right and the truck tractor then swerved back into its lane and then back into the lane of the bus, hitting the bus on its left front side.

[36] According to Mr. Shipulwa, when the bus came to a standstill, he climbed through the window in order to get out of the bus. He immediately noticed that he was injured but was still mobile and started assisting the other passengers. He also testified that at the time of the accident, there were no other vehicles immediately present at the scene of the accident.

Mr. Simon litula

[37] Mr. litula was also an occupant of the bus when the collision between the plaintiff's and defendant's vehicles collided. He was travelling from Tsumeb to Oranjemund. He testified that he was sitting on the left side of the bus in the fourth row of seats from the front and that when the accident happened, it was raining and the road was wet.

[38] His testimony is that he was wide awake when the collision occurred. He was sending a text message to his brother when he suddenly heard the bus driver screaming and at which point he looked up and saw a truck approaching the bus from the opposite direction travelling in a northern direction towards Otjiwarongo, driving in the lane the bus was travelling in. According to Mr. litula, the driver of the bus applied brakes and the bus started to swerve to the right. He testified further that he then removed his seat belt and got up to move to the other side and it was at this point that the truck hit the bus on the left side and he was thrown out of the bus.

[39] It was his further testimony that despite his injury, he was able to move around and assist the other passengers before help arrived and they were eventually all taken to the hospital.

[39] According to Mr. litula, the statement that he supposedly gave to the police was incorrect in as far as it stated that the bus was speeding. It was his testimony that the bus was travelling at normal speed and not speeding and also that the bus had overtaken a truck long before the accident occurred and not immediately before the accident as was stated in his witness statement to the police.

Analysis of the evidence

[40] It is common cause that the evidence adduced by the parties is at variance in most of the critical parts. It should also be mentioned at this juncture, that one of the unfortunate aspects, is that both drivers, who may have served to shed more light on the events, unfortunately were ushered painfully into the celestial jurisdiction and may not assist the court in establishing the events from their respective perspectives.

[41] In this regard, it must necessarily be mentioned that what the court has at its disposal are two different types of witnesses who were called to testify, namely, expert witnesses, who were not present at the time of the collision but some of whom attended the scene within a few days of the occurrence of the accident. The second category, is that of witnesses who were on the defendant's bus when the accident occurred. A proper approach to the evidence of these two classes of witnesses will have to be determined in due course.

[42] Before indulging in an assessment exercise of the evidence led, it is critically important to first have regard to the proper approach that the court should have to situations where disparate versions are placed before court by witnesses, be they of fact or experts. What is the proper approach in those circumstances?

[43] In *Life Office of Namibia Ltd v Amakali*¹, the court followed the beaten track established by *SFW Group Ltd v Martell CIE And Others*², where the following lapidary remarks were made:

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, the 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 a variety of subsidiary factors, not necessarily in order of importance, such as, (i) the witness' candour and demeanour, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) 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.'

¹ 2014 NR 1119 (LC) at 1129-1130.

² 2003 (1) SA 11 (SCA), p 14H-15E.

[44] In dealing with the instant case, I will have regard to those aspects of the approach suggested above that will be considered useful and applicable in attempting to resolve the disparities in the evidence in this matter.

[45] I should, in this wise, also deal with the proper approach to the evidence led. As intimated earlier, there are two different classes of witnesses paraded by the parties, namely, witnesses of fact, i.e. eye witnesses and expert witnesses. The question that often confronts the court in this wise, particularly in cases of motor vehicle collisions, is how to deal and weigh the evidence of factual witnesses vis-à-vis that of expert witnesses.

[46] Ms. Bassingthwaighte, in her written submissions, referred the court, in this regard, to a case where this question was answered with great aplomb. In *Motor Vehicle Assurance Fund v Kenny*³, where the court expressed itself thus:

'Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles. Tompkin's concession, therefore, that there are too many unknown factors in any collision to warrant a dogmatic assertion by an expert as to what must have happened seems to me to have been a very proper one. An expert's view of what might have probably occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence of an eye witness is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view.'

³ 1984 (4) SA 432 (E) p 436-437A.

[47] I will start with the evidence of the eye witnesses. In this regard, it must be accepted that the plaintiff did not call any eye witness. It relied solely on expert evidence as encapsulated above. The only eye witnesses were called by the defendant. The effect of their evidence, is that just before the collision occurred, the plaintiff's truck veered into the bus's lane and returned to its lane. Thereafter, the collision then occurred.

[48] Mr. Van Zyl, counsel for the plaintiff, went on the offensive and urged the court not to place decisive reliance on the defendant's witnesses of fact, namely, Mr. Shipulwa and litula. His attack was premised on argument that the said witnesses' evidence is devoid of credibility for the reason that there were material contradictions in their respective sets of testimony. This is so, Mr. Van Zyl argued, when one has regard to the written statements the said witnesses made to the police immediately after the accident.

[49] It was his further argument that it could not be denied that the collision was a traumatic experience for both witnesses and that both did not have a lot of time to observe the events before the collision in the instant case. It was finally his case that when regard is had to the objective factors and evidence observed at the scene of the accident, the court would be well justified in rejecting their version of events. For that reason, he strongly submitted that the court should regard their evidence as improbable and therefor liable to be rejected. Contemporaneously, he further urged, the court should rely on the evidence of the plaintiff's experts.

[50] I will start with the evidence of Mr. litula. First, his in his evidence, he stated that the entire body of the truck and its trailers was on the lane of the bus's travel. In cross-examination, he admitted that there are certain portions of what he testified to that were

not in the statement he made to the police when the events were fresher. For instance, he stated that he was sitting on the fourth row of seats on the left side of the bus but this was not stated in the statement to the police. When asked about this discrepancy, it was his evidence that he was not asked about these issues by the police and that in any event, when the statement was recorded by the police, he was confused.

[51] The witness further stated that his recorded statement was incorrect in the sense that the bus driver never applied brakes but merely swerved the bus to his right hand side. He also stated that he attributed certain words to his statement to the police that do not appear in witness' statement, thus rendering his testimony not credible. He further did not mention in the earlier statement that he removed his seat belt and moved to the other side as the bus was likely going to collide with the truck on the side he was sitting.

[52] This witness conceded that he was shocked at the accident and contradicted himself on a few matters, besides the embellishing of the statement he had made earlier to the police, with factors that are important and which would ordinarily be expected to have been included when the events were more fresh. The fact that he appeared to remember these much later is suspect as human memory does not *certeteris paribus*, improve with time.

[53] Another issue to note, is that he states that he only noticed that something was amiss when he heard the bus driver scream. At that point, he states, he saw the truck beginning to move onto the side of the bus's lane of travel yet in his statement to the police, he said the entire body of the truck had moved over and he attributed the inconsistency to the language and translation. At the same time, the witness testified that the events happened fast like lightning and that he was afraid and traumatized, for which one cannot blame him. I, however, reject this shifting positions in his evidence as

it renders his evidence, on very crucial matters, not worthy of credit. I will not mention all the criticisms in this judgment.

[54] It is also important to view his evidence from the prism of the objective facts. It was agreed that the bus driver did actually apply his brakes and this was evidenced by brake marks crossing the barrier line from the lane of travel of the bus into the lane of travel of the truck. Furthermore, if the witness' evidence was true that the whole truck and its trailer had moved into the line of travel of the bus, then the accident would not have occurred where it did. The point of impact would have been on the lane of travel of the bus. It is a proven fact that the truck was fully loaded and it would not have been easy for it to move, as the witness insinuates, from one lane to the other, particularly in the light of its trailers which were also loaded.

[55] During his sojourn in the witness box, as the witness testified, I took the opportunity, at the same time, to observe his demeanour and he did not strike me as an impressive witness. He was clearly ruffled by the pointed and searching cross-examination. He cannot, in my opinion, be said to have come through unscathed. For the above reasons, the court cannot rely on this shifty and unreliable evidence, which is not consistent, in any event with the probabilities of the case.

[56] I now turn the attention to the second eye witness, namely, Mr. Sebulon Shipulwa. His evidence-in-chief, has already been chronicled above. He confirmed, in cross-examination that the bust was travelling at 80km/hour and when asked how he could tell that it was travelling at that speed, he informed the court that if you are a passenger in a vehicle, you can tell how fast it is travelling. It was his evidence that the bus was not travelling at 120km/hour. He conceded that what he stated was his estimation of the speed.

[57] He confirmed his evidence that the driver of the bus applied his brakes and the bus moved to its right and the truck moved into the bus lane and then back to its correct lane. He conceded that this was not told to the police. He stated further, in cross-examination, that he was sitting at the back of the bus, actually, on the second row from the back of the bus. This, he admitted, he did not state to the police in the statement recorded from him because he was not asked. Furthermore, he testified that when he heard the collision, he hid himself in the bus.

[58] It also became clear that this witness mentioned certain events in his evidence, which were not included in his earlier statement made to the police, when the events were still fresh. It was put to him that a person sitting in the front parts of the bus has a better view of the events than one sitting at the back of the bus and he reasoned that it depends whether the person in front is concentrating on the events or not. When asked what happens if both are concentrating, he became evasive in his answer, stating that he did not know – and could not tell the difference. He actually denied that if he had been sitting in front, he would have had a better view than he did at the back end of the bus. Later, he conceded that he would have a better view if he was sitting in the front.

[59] He was then quizzed on how far the truck was when he saw it for the first time. He testified that it was 500 or 700 metres away. When questioned further on this, Mr. Shipulwa testified that he did not know how far the bus was from the truck. Coming back to the bus and the truck, it was his testimony that he saw the truck in its lane coming towards the bus and then suddenly, the truck was on the lane of the bus and seeing doomsday approaching very fast, as it were, he decided to hide himself on the left side of the bus behind a seat so that he could not see what was happening in front of him. He was unable to say how much time there was between him seeing the truck and the collision.

[60] I am of the considered view that it would be precipitous to rely on the evidence of this particular witness as he suffers from the same malady, if I may call it that, as the other, Mr. Iitula. He seems to have remembered more intricate details much later than he did when the events would have been fresh. More importantly, this witness was sitting at the far end of the bus and it is clear that he could not have seen what happened in front of him, as he was deprived of a good view by his choice of seat. As a result, he could not tell the distance the two vehicles were from each other.

[61] Furthermore, he testified that he went to hide just before the collision, which is not unexpected, but that evidence does not assist the court in the circumstances. In the premises, it becomes difficult to accept and rely on his evidence that the truck moved into the lane of the bus as he claims, particularly considering where he was seated in the bus. Furthermore, the version of the truck moving into the bus's lane just before the collision, as stated earlier, is rendered not worthy of acceptance by the fact that the truck was loaded and the collision occurred on the truck's correct lane. On his version, it would have been difficult for the truck to have moved quickly into its correct lane so soon before the accident occurred.

[62] A further difficulty is that the evidence of these two witnesses on some material issues differs. One perfect example, is that Mr. Iitula testified the bus did not apply its brakes, yet Mr. Shipulwa, testified in the opposite direction. On this aspect, it would appear that the objective evidence, accepted by the parties did confirm that the bus driver did apply his brakes and that is when the bus veered into the truck's lane.

[63] One should not be seen to be too hard on the witnesses as it is apparent from their evidence that the situation was stressful for them and frightening at the same time, as they were literally facing death eyeball to eyeball. This, in particular, without heaping the blame on them, renders it unsafe, in the circumstances, to rely on their evidence,

considering the inherent contradictions and the objective facts, which as discussed above, appear to conspire against the acceptance of their evidence.

[64] I accordingly find that this court is at large, for the reasons addressed above, to depart from what is otherwise very good law cited by Ms. Bassingthwaighte in the *Kenny* judgment quoted above. As stated in the said judgment, the evidence of eye witness should generally carry more weight. This is one of those exceptions where it would be dangerous to do so, given the serious and deep-rooted imperfections of these witnesses of fact.

[65] In this regard, I will refer to the words that fell from the lips of Geier J in *Taranah Logistics CC v Super Cool Trading CC*⁴, where, in dealing with the applicable principles, stated the following regarding the approach in *Kenny*, namely:

- 'a) that it is a general approach only;
- b) that this general approach is to the effect that direct credible evidence of what happened in a collision should carry greater weight than the opinion of an expert;
- c) that the general approach is to be adopted where there is direct and credible evidence
- d) that it is only when such direct evidence is so improbable that its credibility is impugned, that an expert's opinion, as to what may or may not have occurred, can persuade a court to his view; and
- e) that this can only occur where the expert can assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his/her special skill, training or experience the reasons for the opinion, are acceptable.'

I agree entirely with the exposition of the law in this regard.

⁴ (I 2382/2015) [2018] NAHCMD 62 (22 March 2018).

[65] This leaves the court in the situation where it has to consider the issue of liability from the perspective of the expert evidence provided by the parties. In this regard, it should be mentioned that some of the objective facts will obviously play a role in the determination of the liability in this matter. It is to that very matter of liability that I now turn.

Expert testimony

[66] As indicated in the nascent parts of this judgment, the parties resorted to expert evidence to support their respective cases. The plaintiff had no witness of fact to call but Messrs. Joubert and Graham, as earlier indicated. The defendant, in this phase of the case, called Mr. Viljoen as its only expert witness.

[67] Before the issue of the expert testimony presented can be analysed, there is a very important issue that the plaintiff's counsel raised both in cross-examination and in his written submissions. This is the million dollar question whether the defendant's 'expert' witness is possessed of all the requisites to adorn him with the title 'expert witness'. It is that question that must first be determined. If the court finds that the plaintiff's arguments, with reference to the relevant legal principles, are correct, then the court may have to discard the evidence of Mr. Viljoen. If not, then regard will be had to what he stated and the court will play its proper role and make its findings, where appropriate, with the assistance of the experts properly so-called.

[68] In *Salem Party Club and Others v Salem Community and Others*⁵, the SCA cited with approval the sentiments expressed by Addelson J in *Menday v Pretorial Assurance*

⁵ (20626/14) [2016] ZASCA 203; [2017] 1 All SA 712 (SCA) 13 December 2016).

*Co. Ltd*⁶, where the court explained the proper approach to expert evidence in the following language:

'In essence the function of an expert is to assist the Court to reach a conclusion on the Court itself does not have the necessary knowledge to decide. It is not mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable.'

[69] The question that has to be immediately determined is whether Mr. Viljoen falls within the category of persons who may be said to possess 'special skill, training or experience', within the meaning ascribed to expert evidence above. During the trial, he was taxed by Mr. Van Zyl on his expertise and I regret to say that he did not come out well, having regard to the questions posed and the answers he returned in that bruising battle of wits.

[70] It became apparent from reading Mr. Viljoen's curriculum vitae that for the majority of his life, he was a police man, working primarily in the traffic department. It appears that he started working as traffic officer in 1969 for the South West African Administration. He ended up working for the Municipality of Windhoek in 2005, where he rose to the level of Superintendent in the traffic department. He then opened a consultancy which engaged in reconstruction and investigation of accidents, among others.

[71] With his vast experience in the traffic department over so many years, he held himself out to be an expert in the matters under consideration in this case. Mr. Viljoen admitted under cross-examination that he did not have the necessary qualifications. In particular, he admitted that he had no qualifications for engineering; has no training in physics and mathematics. He admitted that he was not a qualified engineer nor does he hold any university degree.

⁶ 1976 (1) SA 565 (E) at 569B-C.

[72] In the circumstances, I hold the view that he does not qualify to be regarded as an expert, who should, as held above, be possessed of the requisite skill training or experience. In this regard, it should be pointed out that in holding himself out as an expert, he committed rudimentary mistakes. One glaring example, and on which he was quizzed, was his description of the road where the accident occurred as a dual carriage in his report. When this was pointed out to him in cross-examination, and put to him that the road in question was two lanes with vehicular traffic travelling in opposite directions, he admitted he was wrong and stated, 'Yes. What I said was technically wrong'.

[73] There are further aspects of his evidence which leave in their wake, spasms of disquiet. One of these is that Mr. Viljoen never inspected the plaintiff's vehicle at all but that notwithstanding, he had the temerity to 'opine' that the said truck was not in a roadworthy condition and that this contributed to the accident. This, it must be mentioned, goes on a head on collision with the findings and conclusions of Mr. Graham, an expert, who literally tore the remaining parts of the truck apart, checking every nook and cranny. He opined that the said vehicle was in a road worthy condition. It must be recalled that Mr. Graham was not invited to Namibia at the behest of the plaintiff but the Road Safety Authority. Mr. Viljoen did not know what ABS stands for and literally threw himself into a pool of a technical field in which he cannot swim.

[74] Another aspect of the evidence adduced by Mr. Viljoen in cross-examination related to the impact speed. He admitted in court that his calculation was incorrect and that his conclusion in his report was therefore wrong. I should also mention that his theory that the plaintiff's vehicle encroached to the lane of the bus was proved to have been incorrect in his examination of Exhibit "K". In any event, the plaintiff's witnesses took pictures of what they described as the brake marks of the plaintiff's vehicle, which were on the truck's vehicle's lane of travel, thus dispelling the notion that the truck had encroached on the other lane before the accident. He admitted eventually under

pressure of intense cross-examination that the truck would not have crossed over its lane to the bus's lane.

[75] Another aspect, which painted Mr. Viljoen's colours to the mast related to the fact that although he attended the scene of the accident, he, unlike the plaintiff's witnesses, made markings on the road to assist them in making findings and calculations. In the battle of wits that carried on for a very long time, with Mr. Van Zyl at full throttle, he asked the following questions of Mr. Viljoen, as recorded in my notes:

Q: You did not mark the road with yellow lines or any colour to show the marks.

A: No. It can be seen on the photograph.

Q: Is it not the best practice to do so?

A: I received training that marks can be made before the motor vehicles are removed. I did not do it but it would have assisted if I had done so."

[76] One other issue worth mentioning relates to some marks that were found on the lane of the bus. Mr. Viljoen 'opined' that these were those of the bus and stated that he relied in that regard on his reliance on the report compiled by Mr. Burger, who is himself not an expert. He later admitted that those brake marks were of a truck driven by a Mr. Arnold, which was behind the bus. He was hard pressed to explain this and I dare say that he did not come out of this round unscathed. His version was proved to have been false.

[77] There are many highly unsatisfactory aspects of the said witness' evidence which I need not traverse in this judgment. I only picked on a few for the purpose of showing that the said witness is not an expert witness and that the court may not, in the

circumstances, place reliance on his 'findings'. In this regard, I have pointed at a few areas of grave concern that show that the court should, in the circumstances, debunk his evidence.

[78] Another witness, Mr. Dirk Adriaan Burger, was also called by the defendant, as an expert as well. He testified that he was an engineer and had investigated several accidents. The wheels came off immediately under cross-examination. He admitted that he has no formal training in motor vehicle accidents and reconstruction of scenes of accidents. It was his evidence that he had enormous experience in accidents in mines as an engineer. He also admitted that he did take superficial any measurements at the scene to try and depict the scene but he could not point to them nor were they included in his witness' statement. He alarmingly, or maybe not, could not tell the difference between a skid mark, a brake mark and a scuffle. His testimony was not only inadmissible, as he is not an expert in the field at play, but simply did not advance the defendant's case one inch.

Findings of fact

[79] In view of the evidence that was adduced before court, I am of the view that the evidence of the eye-witnesses that the truck encroached onto the bus's lane, for reasons stated earlier, cannot be relied upon. In this regard, I accept the finding of Mr. Joubert, that given the size of the truck, it is unlikely that the driver of the plaintiff's truck could have been able to drive the truck back onto its correct lane just before the accident, in an S movements, as it were.

[80] It is not disputed that the accident occurred on the truck's lane of travel, clearly showing that the bus left its lane and collided with the truck on the incorrect lane. This gives rise to a Latin phrase *res ipsa loquitur* translated, the thing speaks for itself. In this

regard, the evidence *prima facie* points to negligence on the part of the defendant's driver.

[81] What is clear, in the circumstances, and is found for a fact, is that the bus driver, was travelling at a speed of 100km per hour. The condition of the road, it was established in evidence, was wet and that some pools of water had collected on the road, which could conduce to hydro planning if brakes were applied. With the version that the plaintiff's bus moved onto the incorrect lane, discarded, then the allegation of a sudden emergency must also fall away.

[82] Even if I may be wrong on that score, I am of the considered view that if the plaintiff's vehicle, did encroach onto the defendant's vehicle's lane, an allegation which has been rejected by the court, the defendant's driver was, however, negligent in driving his vehicle at such speed under wet conditions, which resulted in the vehicle skidding on him applying brakes. As a result, the bus skidded into the lane of the on-coming truck. More importantly, he should have swerved the vehicle to his right side and thereby avoid the collision.

[83] The learned author Klopper⁷ states the following:

'A driver, faced with an approaching vehicle on the incorrect side of the road has the duty to take at least three steps, namely, to: reduce speed, turn as far as possible to the left and hood continuously. In these circumstances, it is incumbent on the driver on the incorrect side of the road to give way as soon as possible and for the driver who is being approached to take reasonable steps to avoid a collision. A driver should not attempt to avoid a collision under these circumstances by moving to his incorrect side of the road due to the risk that the approaching driver may return to his correct side of the road. . .'

⁷ Klopper HB, The Law of Collisions in South Africa, 7th ed, Lexis Nexis, p 56-57.

[84] In the premises, it appears to me, and I find for a fact, that the driver of the defendant's vehicle was negligent in not directing his vehicle to his left side of the road in order to avoid the collision. Had he done so, the collision would, in all probability, have been avoided and the loss of life ameliorated, if not avoided altogether.

[85] In dealing with the defence of sudden emergency, to the extent necessary, seeing as it has been rejected on the evidence, one finds comfort in the principles set out in the head note of *Palm v Elsey*⁸ where the following is recorded:

'Held, on the evidence, that if defendant had been keeping a proper look-out, he should have seen the rock earlier than he did and, therefore, that, if he was faced with a sudden emergency, it was of his own making. Held, further that, on the other hand, if he had seen the rock earlier, that the evidence indicated that he had sufficient time in which to decide how far to his left it was necessary to swerve and that, had he driven as a reasonably careful and skillful driver would have done, he would have avoided the rock without any difficulty. Held, accordingly, that defendant was liable for the damages'.

I fully associate myself with the findings of the court in this matter, although the actual circumstances may have differed. The principle remains fully applicable in my view, to the instant case.

[86] I am also of the considered view that the defendant's driver was also negligent in driving the vehicle at the speed of 100km per hour, particularly considering the conditions that prevailed at the time, namely, that the road surface was wet. This fact, coupled with him applying brakes on the wet surface, I find, caused the vehicle to veer off into the lane of the plaintiff's vehicle, where it is accepted that the collision occurred.

⁸ 1974 (2) SA 381 (C).

He could have, in my view, avoided the accident by exercising a bit of prudence in the circumstances.

[87] It must be mentioned that the fact that a driver is driving a vehicle within a prescribed limit, whether internal, as in the case of a company prescribing to its drivers the speed limit on different types of road surfaces, or external, in the case of speed limits imposed on all users of public roads, does not always translate to that driver not being negligent, if the prevailing conditions require that a lower speed be engaged so as to enable the driver to avoid any unforeseen incident that might result in an accident.

[88] Ms. Bassingthwaighte argued that the speed of the plaintiff's driver, namely, 83 km/hour was negligent in the circumstances. She argued that if the truck driver was travelling at less than that speed, he might have been able to bring the truck to a stop before the accident occurred, resulting in the bus veering off the road without colliding with the truck.

[89] I do not agree with the proposition in this case for the reason that from the evidence, it appears that it was actually the bus that left its correct lane, crossed the barrier line into the opposite lane and there collided with the plaintiff's truck. It cannot, in those circumstances, be said that had the plaintiff, who remained on his lane, and was travelling within the speed limit, and applied his brakes in order to avoid the accident, be found to have been negligent because his vehicle would have been slower and could thus avoid the accident.

[90] In fact, if the truck had been travelling at a faster speed, it can, by parity of reasoning, be argued that it may have avoided the accident so that by the time the bus veered onto its lane, it would have already passed the bus. In that event, it could be argued that the driver was negligent for driving slower. If the defendant's driver had

managed to keep his vehicle on the correct lane, which he was bound to do, the accident may never have occurred. He failed to do so and was, in so failing, negligent. I accordingly find that the argument does not hold and it is accordingly rejected.

[91] As I draw the matter to a close, it is important to have regard to an admonition set out in *Johannes v South West Transport (Pty) Ltd*⁹ that a court dealing with a case of a motor vehicle collision should pay particular regard. The court expressed itself as follows:

'Each case in which it is said that a motorist is negligent must be decided on its own facts. Negligence can only be attributed by examining the facts of each case. Moreover, one does not make inferences on a piecemeal approach. One must consider the totality of the facts and then decide whether the driver has exercised the standard of conduct the law requires. The standard of care required is that of which a reasonable man would exercise in the circumstances. In all cases the question is whether the driver should reasonably in all the circumstances have foreseen the possibility of a collision.'

[92] I have, in considering all the circumstances of this matter, and the evidence adduced, come to the conclusion that the defendant's driver did not drive the vehicle with reasonable care and skill in the circumstances. He did not apply the requisite degree of care and caution that a reasonable driver in the circumstances would have been expected to. As a result, the accident occurred but which would have been avoided if he had exercised due caution and care in the circumstances.

Conclusion

⁹ 1992 NR 385 (HC) at 358.

[93] In these cases, the court is required to place itself in the position of the driver of the vehicle at the time of the occurrence and judge whether he or she exercised the care which a reasonable person, in his or her position would have exercised in the circumstances. In doing so, the court should not judge the conduct of the driver with hindsight, examining his conduct in the placid atmosphere of the courtroom.¹⁰

[94] The questions I have asked are the following: would a person in the position of the defendant's driver have foreseen the reasonable possibility of his conduct causing patrimonial loss?; would he have taken reasonable steps to guard against that harm?; and did he fail to do so? I have answered them in the positive, thus finding that the defendant's driver failed to live up to the requisite standards. By the same token, the evidence does not suggest that the plaintiff's driver was culpable in any manner, to warrant apportionment of damages in the circumstances.

[95] In view of all the considerations above, I am of the considered view that the plaintiff has, by admissible evidence, satisfied the onus thrust upon it, namely that the defendant's driver did not bring to bear the standard of conduct that was required in the circumstances. By the same token, the defendant failed to prove by admissible evidence that the plaintiff's driver drove the vehicle in a manner that was negligent in the circumstances.

Erratum

[96] When the order was issued in this matter, I inadvertently omitted to include a prayer dismissing the defendant's counterclaim. This has been rectified, hence the order appearing below differs from the previous order, to the extent that an order dismissing the defendant's counterclaim has been included.

¹⁰ Cooper W E, Delictual Liability in Motor Law, Juta & Co, 1996, p 76.

Order

[97] In view of the conclusion reached above, I am of the considered view that the following order is condign:

1. The defendant is ordered to pay to the plaintiff the amount of N\$ 801,727.50, in respect of damages sustained by it as a result of a motor vehicle collision with the defendant's vehicle.
2. The defendant is ordered to pay interest on the amount stated in paragraph 1 above, at the rate of 20% tempore morae from date of judgment to the date of final payment.
3. The defendant's counterclaim is dismissed.
4. The defendant is ordered to pay the costs of the action, consequent upon the payment of one instructing and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

PLAINTIFF: Mr. Van Zyl
Instructed by: Francois Erasmus and Partners, Windhoek.

DEFENDANT: Ms. Bassingthwaighte
Instructed by: ENS Africa|Namibia, Windhoek.