REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2017/01173

In the matter between:

ELIA NAILENGE **PLAINTIFF**

and

THE MUNICIPAL COUNCIL OF THE CITY OF WINDHOEK **DEFENDANT**

Neutral citation: *Nailenge v The Municipal Council of the City of Windhoek* (HC-MD-CIV-ACT-DEL-2017/01173) [2019] NAHCMD 46 (7 March 2019)

Coram: PARKER AJ
Heard: **4 – 5, 6 and 13 February 2019**
Delivered: **7 March 2019**

Flynote: Delict – Negligence – Sudden emergency – Court held that failure of plaintiff driver to drive at reasonable speed and keep proper lookout contributed to collision – Accordingly, emergency self-created and so plaintiff cannot rely on it for succour – Defendant on its part failed to discharge burden of proving special defence that street where collision occurred was closed to traffic – Court held further that if a party sets up a special defence, onus of proving that defence is on the party raising it – Consequently, court attributed contributory negligence to defendant also for the collision.

Summary: Delict – Negligence – Sudden emergency – Plaintiff driver swerved his motor vehicle to avoid collision at vicinity of an intersection where defendant's personnel had dug out a section of the street in order to repair burst water pipe – Court finding that plaintiff approached intersection at unreasonable speed and failed to keep proper lookout – Court finding further that no evidence was placed before court to establish the street in question was closed to traffic at the relevant time – Court rejecting plaintiff's reliance on sudden emergency as self-created – Court concluding collision caused by contributory negligence of the parties.

ORDER

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(1) Judgment for plaintiff –

(a) in respect of claim 1, to the following extent:

(i) 50 per cent only of the claim of N$283 483;

(ii) N$4 000 only of the claim of N$56 095; and

(b) in respect of claim 2, to the following extent:
N$30 000.

(2) Defendant is to pay 50 per cent only of plaintiff's costs, and such costs include costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

Introduction:

[1] Plaintiff, represented by Mr Muhongo, instituted proceedings against defendant for damages, which, according to plaintiff, arose from plaintiff's motor vehicle's collision at a spot where defendant's personnel had excavated a section of the road in close vicinity of the intersection of Nelson Mandela and Metje Streets ('the intersection') in Klein Windhoek (in Windhoek) in the wee hours of 30 January 2016. Plaintiff puts the time 'at or around 04h00'. The intersection is controlled by traffic lights. At the relevant time it was raining and foggy. Street lights lit the locus of the collision. The importance of these facts will become apparent shortly.

Claim 1

[2] Plaintiff claims damages in the amount of N$339 579 in respect of claim 1. Plaintiff pleads that the cause of the collision was the negligent act or omission of defendant; and he puts forth the following as the basis of his averment, namely, that defendant failed to -

(a) sufficiently place warning signs indicating that road works and/or an excavation was being conducted ahead;

(b) place the necessary speed reduction signs as would be expected in these circumstances;

(c) sufficiently or, at all, barricade the excavated area;

(d) have the excavation area sufficiently illuminated with illumination lights;

(e) have the excavation area sufficiently illuminated and demarcated with flashing warning lights and/or beacons;

(f) have the excavation area sufficiently demarcated with reflective material;

(g) cause to have chevron boards with directional indications erected at or before the excavation site and in front of the excavation; and

(h) cause to have personnel stationed at the excavation site with red warning flags and other reflective material in order to flag down and warn oncoming traffic.

[3] On its part defendant, represented by Ms Garbers-Kirsten, denies plaintiff's foregoing averments, which I have set out in subparas (a), (b), (c), (d), (e), (f), (g), and (h) in para [2] above. Defendant puts forth the following as its line of defence to each of plaintiff's aforementioned averments, namely, that 'defendant closed the road on or before 29 January 2016 in Klein Windhoek at the intersection of Metje and Nelson Mandela Streets'. It is worth noting that the defendant's defence that the road was closed was specifically pleaded. The significance of this important note will become apparent shortly when I consider which party bears the onus to prove what matter in these proceedings.

[4] There are two plaintiff witnesses, namely, plaintiff and Dr Sibasthiaan Shituleni, a specialist orthopaedic surgeon, whom plaintiff says he consulted for injuries he says he suffered as a consequence of the collision. Defendant also called two witnesses, namely, Mr Freddy Melvin Louw, Manager of U Right 24/7 Recovery, which towed plaintiff's motor vehicle from the scene of the collision to its resting place, which is under the control and custody of plaintiff. Plaintiff says the vehicle was damaged beyond economical repair. The last defendant witness is Sgt Errol Oneil Terblancho van Rooyen, a traffic officer of the City Police (of the defendant's), who attended at the scene.

[5] Going by the pleadings, this emerges. As mentioned previously, defendant denies all plaintiff's averments as set out in paras (a) to (h) of para [2] above, and

over and above sets up one rehearsed line of defence, namely, as I have mentioned previously ‘defendant closed the road on or before 29 January 2016 in Klein Windhoek at the intersection of Metje and Nelson Mandela Streets’. The denials on their own would have drawn no onus dischargeable by defendant because, after all, plaintiff has to prove that which he alleges in the aforementioned paras (a) to (h) of para [2] above on the basis that the burden of proof lies on him or her who assets (*Pillay v Krishna*) 1946 AD 946). But the defendant has not only denied every averment of plaintiff’s, but it has also raised a special defence thereto, namely, that ‘the defendant closed the road on or before 29 January 2016’. That being the case, the onus of proving that defence is on the defendant, which has raised it. (P J Schwikkard, *Principles of Evidence* (1997), pp 400-401)

[6] Indeed, in the instant case, the application of that principle becomes even more apposite because, if defendant succeeded in proving what it asserts, that would sound a death knell for the allegations by plaintiff. Accordingly, it is to this special defence that I now direct the enquiry.

[7] In that regard, I gather from Sgt van Rooyen’s evidence that when he arrived at the scene of the collision, road signs and drums fitted with reflectors, as well as reflective tape, were lying around at the scene of the collision. I did not hear van Rooyen to testify that the street had been closed to traffic. The street having been closed does not appear in van Rooyen’s sworn statement that he had made to his principals, which was made soon after the collision; neither does it appear in his examination-in-chief-evidence, represented by his witness statement, as clarified and elaborated. And Van Rooyen must know if the road had been closed at the relevant time; after all, he was a traffic officer of the City Police. Common sense and common human experience tell me that when a road or street that normally carries traffic is closed, that road or that street is closed to traffic, and there is no thoroughfare; and there is usually a sign carrying the legend ‘Road Closed’ or suchlike legend. The significance of common human experience as an important factor in the assessment of evidence was put in sharp focus by the Botswana Court of Appeal in *Bosch v State* [2001] BLR (C A), relied on in *State v Manuel Alberto Da Silva* Case No. CC 15/2005 (HC); and *Nepolo v Burgers Equipment and Spares Okahandja CC* (I 2352/2012) [2015] NAHCMD 53 (12 March 2015

[8] In the instant proceedings, Sgt Van Rooyen, a City Police traffic officer, did not testify that any of the signs he saw strewn over the scene of the collision carried 'Road Closed' legend or suchlike legend; neither did he use the word 'closed' in his entire testimony. Mr Louw also did not testify that any of the sign boards and road signs he saw strewn over the scene carried the legend 'Road Closed' or suchlike legend. If such a sign had been placed at the locus of the accident, it is inexplicable that no evidence to that effect was placed before the court, particularly when the talismanic special defence of the defendant was that the road had been closed at the relevant time. It is not explained why it was impossible or difficult to get hold of the person who closed the road and who placed a sign or signs to that effect to testify, when the road having been closed is the main frame of defendants plea, as I have said previously, to all the allegations in the plaintiff's particulars of claim (as set out in para [2] above).

[9] Having considered all the evidence, leaving nothing relevant out, I find that defendant has failed to prove its special defence. I conclude that the street in question was not closed to traffic at the relevant time.

[10] But that is not the end of the matter. On the facts and in the circumstances of the case, I am not prepared to hold that plaintiff did not contribute to the collision. On his own admission, plaintiff's case was that there were not sufficient warning signs placed properly at the locus of the collision to warn sufficiently users of the street who drove on the street at the relevant time of the impediment or danger (being the dug-out section of the street and the heap of earth that stood there) to traffic in the vicinity of the place of the collision. It was also his case that any warning signs that were there had been placed too close to the impediment or danger so much so that he could not have been sufficiently warned to have enabled him to avoid the collision. Which is which?

[11] From the foregoing, the only reasonable conclusion to draw is that as he drove along the street in question, plaintiff was not aware of his surroundings; and so, he could not have kept a proper lookout at the immediate surroundings before the collision. The two desperate versions he maintained (mentioned in the end of

para 10 above), gives me the impression that plaintiff gave the two versions in order to hide the truth or he was mistaken as to his surroundings. In my view, therefore, plaintiff failed to keep a proper lookout, as I have found.

[12] That is not all. Plaintiff's testimony was further that the locus of the collision was foggy; it was raining; and was not well lit. If that was the case, I cannot accept plaintiff's evidence that there were no warning signs or that the warning signs were not properly placed as they should. Besides, if it was raining and foggy and the area was not well lit, it has not been explained why plaintiff failed to switch on the main beam of the vehicle's headlamps, as he should. He testified that he did not switch on the main beam of the vehicle's headlamps. One would have thought that the main beam of the vehicle's headlamps are there to enable the driver of the vehicle to see better in the kind of conditions that plaintiff described.

[13] Furthermore, plaintiff testified that he had maintained the speed of about 60 kph when he drove through the traffic lights because they had turned green and they gave him right of way. I should say this: The fact that he had right of way did not give him the license to drive through an intersection without due care (see *Marx v Hunze* 2007 (1) NR 228 (HC); *Mungunda v Wilhelmus* (I 2354/2014) [2015] NAHCMD 149 (25 June 2015) with the same speed as he had been driving before approaching, and driving through, the traffic lights, particular when in his own testimony, it was raining at the relevant time; and it was foggy; and the area in question was not well lit. And, what is more; plaintiff did not switch on the main beam of the vehicle's headlamps, as he was expected reasonably to do, as Ms Garbers-Kirsten appeared to suggest.

[14] Consequently, I find that plaintiff did not approach the intersection at reasonable speed, and he did not keep a proper lookout. If plaintiff had done all that, which were reasonable to do, it would not have been necessary for him to have undertaken the risky and ineffectual manoeuvre he executed in an attempt to avoid the collision, and then rely on sudden emergency. I hold that the emergency was self-created, as Ms Garbers-Kirsten submitted; and so, plaintiff cannot rely on it for succour.

[15] For the sake of completeness, I say that I have not overlooked Louw's evidence that he smelt alcohol on plaintiff's breath when he spoke to plaintiff while plaintiff sat in his vehicle after the collision. As a matter of law, Louw is expressing an opinion. In our law an opinion is relevant and admissible if it can assist the court or tribunal in deciding an issue in the proceeding. See Hoffman & Zeffert, *The South African Law of Evidence* (4th edn, 1988), following *R v Vilbro* 1959 (3) SA 223 (A). Louw's opinion is respectfully rejected on the basis that it cannot assist the court in determining objectively whether at the relevant time plaintiff had been driving under the influence of alcohol making it impossible for him to drive with due care.

[16] Based on these reasons, I hold that plaintiff contributed to the collision by his own measure of negligent driving. It remains to assess the degree of negligence attributable to the parties. On the facts, and guided by the principle enunciated in *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A) at 837 G-H, which *Hunze v Marx* relied on, I assess the degree of negligence attributed to the parties to be in equal measure. It follows that in my judgment, plaintiff succeeds in his claim 1, but to the extent of 50 per cent only of his claim under claim 1 (in para 10 of the POC).

[17] Under claim 1 in para 11 of the POC the evidence is that plaintiff has to date paid only N$4 000 to the service provider. It will, therefore, be unsatisfactory and unreasonable to allow the entire amount of N$56 095. Lest I forget; I should say that it is beneath the duty of the court to concern itself with speculative claims based on a game of chance, of the kind described by plaintiff respecting the claim regarding the service provider's charges.

[18] It is important to make the point that the foregoing conclusions are unaffected by the affidavit made by Silas Itembu which formed part of the record. The present is an action proceeding; and so, I pay no heed to Itembu's affidavit, the allegations therein were not tested by cross-examination. Averments made in the affidavit remain unproven and, therefore, irrelevant.

Claim 2

[19] In his Particulars of Claim ('POC'), plaintiff claims, 'As a further direct result of

defendant's negligent actions as pleaded supra, the plaintiff sustained a fracture to his left scapula'. He claims further that the 'injury caused the plaintiff to (suffer) suffers from' the conditions adumbrated in paras 13.1 to 13.4 of the POC. On its part, defendant sets up the plea that defendant has no knowledge of the allegation, and so, is unable to admit or deny them; and so plaintiff is put to proof of the averments.

[20] In his effort to so prove the allegations of the injuries and the consequences of them, plaintiff called as witness Dr Shituleni. From Dr Shituleni's evidence and his 'Medical Report', I find as follows: (a) The date of the Report is 31 October 2016). (b) The injuries to the left scapula/glenoid fracture were severe, and they were managed conservatively. (c) Plaintiff did not undergo surgery. (d) Plaintiff attends 'follow-ups' in order to have his range or motion improved and shoulder function restored. (e) Current management of the plaintiff's condition consists of pain medication and rehabilitation programmes with physiotherapy. (f) In October 2016, the prognosis was that it was too early to predict outcome of the treatment plaintiff was receiving. The Doctor stated the general, long term situation in these terms, namely that, commonly, this may lead to post-traumatic osteoarthritis if the glena-humeral joint with pain and loss of optimal shoulder function.

[21] These conclusions about the Report are important: The Report was compiled some two years and four months ago. The aim of the regular follow-ups was to improve range of motion and restore shoulder function. Plaintiff continued with follow-ups on outpatient basis. In October 2016 there was a moderate impingement of Rotar Cuff. That was over two years ago. It has not been established that any improvement and restoration achieved in October 2016 had stagnated as at February 2019. It is not established that plaintiff will be on pain medication for the rest of his life as from October 2016. It is also not established that physiotherapy that plaintiff was undergoing in October 2016 will not attain any benefits to improve his condition. The Doctor admitted in October 2016 that it was too early to predict outcomes then. In that regard, it is not established whether the generality put forth by the Doctor has to date applied to plaintiff so much so surgery is considered in the immediate period.

[22] I have set out the findings and conclusions thereon in paras [20] and [21] to make the following point, namely, that, given those facts, it is unreasonable for plaintiff to pull out of his hat the amount of compensation he now seeks from defendant, being N$100 000. I am not persuaded that the speculative amount is reasonable: No fair basis is established for it. That being the case, on the facts and in the circumstances of the case, I am inclined to grant only N$60 000 in respect of claim 2; and since I have found as respects claim 1 that plaintiff contributed to the collision to a degree of 50 per cent, plaintiff is entitled to 50 per cent only of the N$60 000.

Costs

[23] It now remains to consider the question of costs. Based on the foregoing findings of fact and in the circumstances of the case and the conclusions reached, it will not be fair and just for the court to grant plaintiff all his costs. I am inclined to grant 50 per cent only of his costs.

Conclusion

[24] Based on all these reasons, I order as follows:

(2) Judgment for plaintiff –

(b) in respect of claim 1, to the following extent:

(i) 50 per cent only of the claim of N$283 483;

(ii) N$4 000 only of the claim of N$56 095; and

(b) in respect of claim 2, to the following extent:
N$30 000.

(2) Defendant is to pay 50 per cent only of plaintiff's costs, and such costs include costs of one instructing counsel and one instructed counsel.

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C Parker

Acting Judge

APPEARANCES:

PLAINTIFF:	T MUHONGO **Instructed by Tjitemisa & Associates, Windhoek**
DEFENDANT:	H GARBERS-KIRSTEN **Instructed by Koep & Partners, Windhoek**