



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-ACT-DEL-2018/00645

In the matter between:

MARTIN SIKANDA

PLAINTIFF

and

MARA EVA BESSINGER

DEFENDANT

Neutral citation: *Sikanda v Bessinger* (HC-MD-CIV-ACT-DEL-2018/00645) [2019]
NAHCMD 537 (06 December 2019)

Coram: USIKU, J

Heard on: 16 – 17 September 2019 and 19 September 2019

Delivered: 06 December 2019

Flynote: Negligence – Motor vehicle collision – Whether collision due to negligence of defendant – Defendant pleading sudden and unexpected blackout resulting in her

inability to control vehicle – Defendant’s involuntary act not giving rise to delictual liability – Plaintiff to establish that defendant’s negligence consisted of a voluntary act – Plaintiff not discharging onus of proving that defendant’s conduct was due to a voluntary act – Plaintiff’s action dismissed.

Summary: Plaintiff instituted action against defendant for damages arising from motor vehicles collision. The defendant denied negligence and pleaded that the collision was due to defendant having suffered a sudden and unexpected blackout prior to the collision, resulting in her losing control of the vehicle. The court held that the onus is on the plaintiff to prove that the defendant’s negligence consisted in a voluntary act on the part of the defendant. The plaintiff has not discharged such onus. The court dismissed plaintiff’s action.

ORDER

1. The plaintiff’s claim is dismissed.
2. The plaintiff is ordered to pay the costs of the defendant, such costs to include costs of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and regarded finalised.

JUDGMENT

USIKU, J:

Introduction

[1] The plaintiff instituted action against the defendant for damages in the amount of N\$ 571 233.04, plus interest, arising from a motor vehicle collision between a 2015 Audi

vehicle, owned and driven by the plaintiff and a 2008 Toyota Vitz vehicle, owned and driven by the defendant.

[2] The plaintiff alleges that the sole cause of the collision was due to the negligence of the defendant, in that she, among other things, moved her vehicle onto its incorrect side of the road, into oncoming traffic where it collided with the plaintiff's vehicle.

[3] Apart from denying negligence, the defendant pleads that she did not consciously steer her vehicle into the plaintiff's vehicle, but that at the material time, the defendant suffered a sudden and unforeseen blackout which resulted in her losing control of the vehicle.

[4] In support of the plaintiff's claim, the following witness gave, namely: Martin Sikanda, ("the plaintiff"), Gift Lubinda ("Mr Lubinda"), Dirk Swanepoel ("Mr Swanepoel") and Isaac Smit ("Mr Smit"). For the defendant, the defendant Mara Eva Bessinger ("the defendant"), gave evidence.

The plaintiff's evidence

[5] The plaintiff deposed that the collision in question occurred on 18 May 2016 at about 16:00, on Hendrik Witbooi Drive. The plaintiff was driving from the University of Namibia, main campus, Windhoek. In the passenger seat, was Mr Lubinda. He stopped at a three-way intersection controlled by a stop-sign. When it was safe to do so, he proceeded and entered onto Hendrik Witbooi Drive, in the southerly direction.

[6] As he got onto Hendrik Witbooi Drive he noticed an oncoming vehicle approaching from the opposite direction on its incorrect lane approaching straight towards his vehicle. Since the plaintiff was uncertain of the intentions of the oncoming driver, the plaintiff brought his vehicle to a standstill, on the road. He could not reverse, as there were other vehicles behind him. He could not turn to his left side as there was

a ditch. Furthermore he could not turn to his right-side as there was a raised concrete pavement forming an island separating the two-lanes for traffic heading in opposite directions.

[7] The oncoming vehicle (the defendant's vehicle) advanced and collided with the plaintiff's vehicle, head-on and veered to its right-side as a result of the impact and ended up in a ditch facing its opposite direction.

[8] According to the plaintiff, the defendant's vehicle did not show any sign of slowing down or swerving, in an effort to avoid the collision.

[9] The police arrived later. The police tested the alcohol-intake of both the plaintiff and the defendant. Both tested negative.

[10] Under cross-examination, when invited to comment on the defendant's defence of suffering a blackout, the plaintiff related that he is not 100% certain that the defendant suffered a blackout. He stated that the defendant's conduct in swerving from her correct side of the road into the lane of oncoming traffic, avoiding hitting the raised island-pavement, coupled with the defendant's claim that she regained consciousness at some point but did not apply brakes, shows that the defendant was in some way negligent.

[11] Mr Lubinda testified that he was a passenger in the plaintiff's vehicle on the material day. As the plaintiff's vehicle entered onto Hendrik Witbooi Drive, Mr Lubinda observed the defendant's vehicle approaching from the front, on its incorrect side of the road. The plaintiff brought his vehicle to a standstill. The defendant's vehicle advanced and slammed into the plaintiff's vehicle, head-on. He, together with the plaintiff, later went to a hospital for medical attention. After he came from the hospital he learnt that the accident was due to the defendant having had a blackout.

[12] Under cross-examination, Mr Lubinda stated that he cannot dispute that defendant suffered a blackout. He added that he cannot dispute that, because he is not a medical doctor.

[13] Mr Swanepoel related that on the material day, he was driving along Hendrik Witbooi Drive, behind the plaintiff's vehicle. He noticed the defendant's vehicle approaching from the front, on its incorrect side of the road. He was able to see the defendant's oncoming vehicle because his vehicle is a higher vehicle, (a Prado). From his vantage point, Mr Swanepoel observed that the driver of the defendant's vehicle was slumped over the steering wheel, as the defendant's vehicle advanced towards the plaintiff's vehicle.

[14] In Mr Swanepoel's opinion, there was nothing that the plaintiff could have done to avert the imminent collision. The defendant's vehicle hurtled on and collided with the plaintiff's vehicle.

[15] According to Mr Swanepoel, when the defendant's vehicle was advancing towards the plaintiff's vehicle, the defendant at all times remained slumped over the steering wheel, up to the collision.

[16] After the collision, Mr Swanepoel parked his vehicle. He approached the defendant's vehicle and opened the driver's door. The driver (the defendant) looked dizzy, confused and disoriented and appeared to be in a state of shock.

[17] An ambulance later arrived and the defendant was put in the ambulance.

[18] According to Mr Swanepoel, at the point when the plaintiff's vehicle entered into Hendrik Witbooi Drive, the defendant's vehicle was already on its incorrect side of the road, approaching from the opposite side.

[19] Furthermore, under cross-examination, Mr Swanepoel testified that it is possible that the defendant had suffered a blackout.

[20] Mr Smit, the plaintiff's last witness, gave evidence as an expert on the quantum of the damages. He testified that he is an estimator and assessor. On or about 23 May 2016, he assessed the plaintiff's damaged vehicle. By virtue of his qualifications and experience, he is in position to give expert opinion that the plaintiff's vehicle was damaged beyond economical repair, as a result of the impact of the head-on collision. Furthermore, in his expert opinion, the plaintiff suffered damages in the amount of N\$ 571 233. 04, and that such amount constitutes fair and reasonable damages suffered by the plaintiff in the circumstances.

The defendant's evidence

[21] The defendant testified that on 18 May 2016, she was driving along Mandume Ndemufayo Road. She recalls turning left at an intersection leading in the northerly direction.

[22] At some point, while driving along Hendrik Witbooi Drive towards the University of Namibia intersection, she suffered a sudden and unexpected blackout (loss of consciousness) which she had never experienced before.

[23] According to the defendant, when she regained consciousness, she was approximately 40 metres away from the three-way intersection controlled by a stop sign. In her opinion, and considering the measurements of road markings, she must have been travelling in the incorrect, oncoming traffic lane, unconscious, for a distance of not less than one hundred metres, before the accident.

[24] The defendant testified further that, when she regained consciousness, she saw the plaintiff's vehicle approaching from the opposite direction, and then she realized she was travelling in an incorrect traffic lane. She attempted to swerve her vehicle to her right-hand side, but it was too late. The defendant's vehicle collided with the plaintiff's vehicle. Later, the police arrived. She informed the police that she suffered a blackout. She was later taken to a hospital.

Submissions

[25] Advocate Nekwaya, ("counsel for the plaintiff") submitted that the defendant did not furnish evidence suggesting that she suffered a blackout. Furthermore, the defendant has not shown that a person afflicted by a blackout is incapable on controlling a vehicle.

[26] Counsel for the plaintiff further submitted that the defendant had conceded that she drove the vehicle for a long distance while under the spell of the sudden blackout. It is improbable, counsel submits, for a driver to drive correctly in her lane without any swerve, if her version that she suffered a blackout is to be believed. Counsel for the plaintiff, therefore, submitted that the defendant's version is inconsistent with common experience of any motor vehicle driver.

[27] On the issue of who bears the onus of proof, counsel for the plaintiff submitted that the onus is on the plaintiff to prove her case on a preponderance of probabilities. This onus does not shift. But where a prima facie case is established by the plaintiff and the defendant has raised a defence of automatism, the material essence of which reposes within the defendant's personal knowledge, such defence places an evidential

burden on the defendant to adduce and tender evidence which negatives the prima facie case of negligence. Counsel for the plaintiff cited the case of *Sibeko v Road Accident Fund 2012 JOL 28650 GSJ para 10*, as authority for the above proposition.

[28] On the other hand, Advocate Ravenscroft-Jones (“counsel for the defendant”) submitted that the burden of proving defendant’s negligence and the causal connection between that negligence and the damages suffered by the plaintiff, falls upon the plaintiff. A prima facie inference of negligence would have arisen because evidence established that the defendant had driven on the incorrect side of the road. However, the burden of proof does not shift. What still has to be established is whether on all the evidence and the probabilities, the plaintiff discharged the onus on a preponderance of probabilities. Counsel for the defendant cited the case of *Molefe v Mahaeng 1999 (1) SA 562 (SCA)* as authority for the foregoing proposition. Counsel for the defendant therefore contends that the plaintiff has not proved on a balance of probabilities that the defendant acted willfully or negligently, and that his action be dismissed.

Analysis

[29] A claimant seeking to recover damages inflicted upon his or her vehicle is required to show:

- a) conduct on the part of the driver,
- b) unlawfulness of such conduct,
- c) negligence on the part of the driver,
- d) damages suffered by the plaintiff, and
- e) the causal relationship between the conduct and damages sustained.¹

¹ Isaacs and Leveson: The Law of Collisions in South Africa: 8th Edition. HB Klopper p.1.

[30] In order to succeed, the plaintiff has to meet all the above requirements, which have to be simultaneously present. Failure to prove any one requirement will result in the failure of the claim for recovery of damages.²

[31] As far as conduct is concerned, there must be a voluntary human act, for delictual liability to arise. Conduct will be absent if there is no human act which is voluntary.³

[32] In order to counter a plea of sudden blackout, the plaintiff must show that the defendant was aware of her condition and the possible consequences of driving with such a condition nonetheless elected to drive the motor vehicle.⁴

[33] I shall analyze the evidence in the present matter with the foregoing legal principles in mind. First I shall consider the extent to which the evidence and the surrounding circumstances support or contradict the defendant's version that she suffered a sudden blackout.

[34] The evidence of the plaintiff was that when he noticed the defendant's vehicle for the first time, the defendant's vehicle was already on its incorrect side of the road. The defendant's oncoming vehicle did not show any sign of slowing down or swerving in an effort to avert the imminent collision. Both the defendant and plaintiff tested negative when tested for alcohol-intake.

² Ibid: p.2.

³ Ibid: p.3.

⁴ Ibid: p.119.

[35] According to Mr Swanepoel's evidence, he observed that the defendant was slumped over the steering wheel as the defendant's vehicle advanced towards the plaintiff's vehicle. In the circumstances, Mr Swanepoel cannot rule out that the defendant had suffered a blackout.

[36] On the evidence, it is apparent that the defendant has maintained from the outset that the accident was due to a sudden blackout she experienced.

[37] It does not appear to me, nor was it alleged, that the defendant had left her correct traffic lane, turned into the incorrect lane of incoming traffic, in an endeavour to overtake the vehicles ahead of her.

[38] The evidence that appears to challenge the defendant's defence of the sudden blackout, is from the plaintiff who deposed that he does not believe that the defendant suffered a blackout. His lack of such belief is based on the fact the defendant managed to leave her correct side of the road, avoided hitting the raised island-pavement and that when she, according to her version, regained consciousness, and failed to apply her brakes.

[39] The facts raised by the plaintiff, as set out above, do not by themselves, negative existence of a blackout. In the absence of evidence showing that the defendant, in driving the way as she did, acted consciously or voluntarily, the facts set out by the plaintiff for his belief, are not sufficient, in my opinion, to constitute proof that the negligence relied upon consisted of a voluntary act on the part of the defendant.

[40] Having regard to the totality of the evidence adduced in this matter, and despite the shortcomings in the defendant's testimony, I am satisfied that the evidence shows as a matter of probability that the defendant had suffered a blackout.

[41] According to the defendant the blackout was sudden and unexpected and as such she could not exercise control over her vehicle. On the evidence, it is unlikely, notwithstanding the defendant's own version, that the defendant had regained consciousness just before the collision. Had that been the case, then Mr Swanepoel would not have observed the defendant's head slumped over the steering wheel. On this aspect I take the version of Mr Swanepoel as the more probable version, than that of the defendant.

Conclusions

[42] In conclusion, I am of the opinion that the onus lies with the plaintiff to establish that the defendant was negligent and that her negligence consisted of a voluntary act.⁵ In the present matter I am not satisfied that the plaintiff has discharged the onus of proving that the defendant's conduct in driving on the incorrect side of the road was due to defendant's voluntary act. For the foregoing reasons, the plaintiff's action falls to be dismissed.

[43] As regards costs, I am of the opinion that the general rule that costs follow the event, must find application in this matter.

[44] In result, I make the following order:

⁵ Molefe v Mahaeng 1999 (1) SA 562 at 568 H-J.

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the costs of the defendant, such costs to include costs of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and regarded finalised.

B Usiku
Judge

APPEARANCES:

PLAINTIFF:

Adv. Eliaser Nekwaya

Instructed by Kloppers Legal Practitioners

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DEFENDANT:

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