

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2017/03739

In the matter between:

ETUNA ASHIPALA

PLAINTIFF

and

JEROBEAM HAINANE

DEFENDANT

Neutral citation: *Ashipala v Hainane* (HC-MD-CIV-ACT-DEL-2017/03739) [2019] NAHCMD 91 (8 April 2019)

Coram: PRINSLOO, J
Heard: 18 March 2019
Delivered: 08 April 2019
Reasons: 10 April 2019

Flynote: Motor vehicle collision – Court to decide whether plaintiff discharged onus of proof on a preponderance of probability – Defendant makes a U-turn in front of the

plaintiff's motor vehicle resulting in a collision – Negligence – Defendant acted negligently and is the sole cause of the accident

Summary: A collision occurred between the plaintiff's motor vehicle and a white Opel Corsa pick-up motor vehicle at an intersection of Independence Avenue and Richard Kamuhukua Street. The intersection is a traffic light controlled intersection, which controlled the traffic from the side-street being Richard Kamuhukua Street and Independence Avenue, which is a dual carriage way leading from Katatura to the city and *visa versa*. As the plaintiff was entering the intersection the defendant suddenly and without any indication or warning proceeded to make a U-turn across the plaintiff's lane at the intersection.

Held that: The defendant was a poor witness while plaintiff gave acceptable and credible explanation of how the collision occurred. The version of the defendant is fraught with inconsistencies and contradictions and stand to be rejected.

Held further that: The defendant's negligent driving by attempting to execute the unexpected U-turn obstructed the right of way of plaintiff and is the main cause of the collision and the resultant damages. Court granted judgment in favour of the plaintiff.

ORDER

1. Judgment is granted in favour of the plaintiff for payment in the amount of **N\$ 61 280.22**.
2. Interest on the aforesaid amount at the rate of 20% per annum, calculated from the date of judgment until date of final payment.
3. Costs of suit. Such cost to include the cost of one instructing and one instructed counsel.

JUDGMENT

PRINSLOO J:

Introduction

[1] This is a claim based on a motor vehicle collision wherein the plaintiff claim damages to her motor vehicle in the amount of N\$ 61 280.22. Ms Etuna Ashipala, the plaintiff and lawful owner of the motor vehicle, issued summons against the defendant, Mr Jerobeam Hainane and claims from the defendant the amount of N\$ 61 280.22, being the reasonable costs to repair her motor vehicle to its pre-collision condition, interests on that amount at the rate of 20% per annum from the date of judgment until the final date of payment and costs of suit. It should be noted that the claim amount was amended as discussed in paragraph [6] hereunder.

[2] The defendant has however defended the claim and filed a plea to the plaintiff's particulars of claim.

The plea

[3] In his plea the defendant denies any wrongdoing or negligence on his part but pleaded in the alternative that should the court find that he was negligent, which he denies, then the plaintiff's negligence was a contributing cause of the collision. Further thereto, the defendant pleaded that if the plaintiff has suffered damages then the defendant is not liable for the whole of such damages but only for a portion thereof as may be determined by court in terms of section 2 (a) and (b) of the Apportionment of Damages Act 34 of 1956.

[4] The defendant did not file a counterclaim against the plaintiff for the damage caused to the vehicle he was driving.

The pre-trial order

[5] At the commencement of the trial it was placed on record by Mrs Garbers-Kirsten, appearing on behalf of the plaintiff, that one of the issues that initially had to be determined at trial regarding the ownership of the vehicle in question was resolved and it became common cause that the plaintiff was the owner of the grey Volkswagen Amarok N 57250 W.

[6] Mrs Garbers-Kirsten also moved for an amendment in respect of the claim amount from N\$ 72 095.96 to N\$ 61 280.22. Mr Bugan appearing on behalf of the defendant confirmed that this amendment was by agreement between the parties. Therefore as there was no prejudice to any of the parties the court allowed the said amendment.

[7] In the pre-trial order the issues of fact the court was called upon to adjudicate was the following:

'1.2 Whether the defendant was negligent in that he, inter alia:

- 1.2.1 collided with the plaintiff's vehicle;
- 1.2.2 failed to stop at a traffic controlled intersection indicating red to his direction of travel;
- 1.2.3 made an illegal U-turn;
- 1.2.4 failed to keep a proper look-out;
- 1.2.5 failed to apply the brakes of his vehicle timeously or at all, alternatively drove a vehicle whose brakes were not functioning properly or not functioning at all;
- 1.2.6 failed to keep control over his vehicle, alternatively proper control, in the further alternative full control over his vehicle;
- 1.2.7 failed to exercise due care and precaution whilst driving **this** vehicle;
- 1.2.8 failed to have due regard to the other road users;

1.2.9 failed to avoid a collision in circumstances which, with the exercise of reasonable care, he could have and should have done so,

And, if it is found that the defendant was negligent, to what degree was he negligent.

1.3 Whether the plaintiff was negligent and contributed to the collision and if it is found that the plaintiff was negligent, to what degree she was so negligent.

1.4 Whether the plaintiff suffered damages in the amount of N\$ 61 280.22¹

[8] The issues of law to be resolved at the trial is the respective degrees of negligence and apportionment of damages of the plaintiff.

Common cause facts

[9] The following facts appear to be common cause between the parties:

9.1 On or about 20 March 2015 and at or near the intersection of Independence Avenue and Richard Kamuhukua Street, a collision occurred between the plaintiff's motor vehicle, a 2014 model, grey Volkswagen Amarok pick-up (hereinafter referred to as the 'Amarok') with registration number N 57250 W, there and then being driven by a Petrus Ashipala, the husband of the plaintiff, and a white Opel Corsa pick-up motor vehicle (hereinafter referred to as the 'Opel Corsa') with registration number N 52865 W, there and then being driven by the defendant.

9.2 That the intersection is a traffic light controlled intersection, which controlled the traffic from the side-street, being Richard Kamuhukua Street and Independence Avenue, which is a dual carriage way leading from Katutura to the city and *visa versa*.

9.3 Richard Kamuhukua Street joins Independence Avenue in the form of a T-junction and as a result the traffic traveling from Katutura towards the city cannot turn right at the intersection.

¹ As amended.

9.4 On the right hand side of the dual carriage way there is a permanent barrier erected as well as a pavement next to the road.

9.5 The accident occurred at approximately 15h00.

Evidence adduced

Plaintiff

[10] Two witnesses were called to testify on behalf of the plaintiff, namely, Petrus Ashipala, in his capacity as driver of the vehicle and Heinrich Herman Claassens, in his capacity as an expert.

[11] Mr Petrus Ashipala's is the husband of the plaintiff. His evidence was that he was the driver of the grey Volkswagen Amarok and he drove on a dual carriage way, namely Independence Avenue, from Katutura to town and that he was in the right hand lane as he was approaching the traffic light controlled intersection. He testified that at the time he was driving approximately 60 km/h. As he approached the intersection he had right of way, as the traffic lights were green. Whilst approaching the traffic light controlled intersection the defendant was driving in the left lane, also travelling in the same direction on Independence Avenue. He testified that as they were about to enter the intersection the defendant suddenly and without any indication or warning proceeded to make a U-turn across his lane at the intersection.

[12] Mr Ashipala further testified that at the time when the defendant executed this unexpected U-turn the defendant's vehicle was approximately 3 meters in front of the Amarok and at that time the defendant already started to make the U-turn. He testified that as soon as he observed the defendant making the U-turn he immediately applied the brakes of his vehicle, however the distance was too short to bring his vehicle to a standstill or avoid the accident. The witness further stated that he could also not take evasive maneuvers like swerving to the right as there was a pavement and permanent

barrier on the right hand side of the road and other traffic to his left. As a result, the left front part of his vehicle impacted with the right mid-section of the defendant's vehicle.

[13] Mr Ashipala further testified that the sole cause of the collision was the defendant's reckless and irresponsible action as the defendant failed to observe the prevailing traffic conditions and proceeded to make a U-turn across his lane of travel causing the collision and damaging his vehicle.

[14] During cross-examination Mr Ashipala vehemently denied that he was traveling at an excessive speed prior to the accident. He stated that if this was a high speed impact then the airbags of the Amarok would have deployed. The witness further denied that the vehicle of the defendant spun as a result of the impact.

[15] Mr Ashipala was confronted by Mr Bugan with the fact that the impact occurred in the intersection and therefore he could have swerved his vehicle to the right hand side in order to avoid the collision. In this regard the witness reminded counsel that prior to the intersection he could not swerve to the right due to the barriers next to the road and further that once the vehicles entered the intersection he was unable to swerve because of the position of the defendant's vehicle, being in his lane of travel. The witness further pointed out that he was travelling at 60 km/h at the time and the distance between the vehicles were less than three (3) meters.

[16] Mr Ashipala further testified on a question posed by defendant's counsel that if the defendant changed lanes when it was safe to do so, as implied by counsel, the defendant must have seen his vehicle approaching in the right hand lane.

Heinrich Herman Claassens

[17] Mr Claassens testified that he is a Motor Vehicle Assessor/ Specialist Adjuster and is currently employed by Santam Namibia and was so employed when he assessed

the damage to the 2014 grey Volkswagen Amarok Double Cab registration number N 57250W.

[18] The witness stated that he has 35 years' experience in assessing damage to motor vehicles and his *curriculum vitae* is attached to his witness statement, which was admitted as an exhibit to the proceedings. The witness further stated that in order to improve his skills he attended various courses within his field of expertise.

[19] Mr Claassens testified that on 27 March 2015 he assessed the plaintiff's vehicle and established the nature and the extent of the damage to the vehicle as such that the fair, reasonable and necessary repair costs thereof were in the amount of N\$ 61 280.22, which included the excess payment of N\$ 3 064.01.

[20] The witness also handed in photographs taken during the assessment, which depicts the damage to the Amarok. These photographs together with the comprehensive assessment of damage report was admitted into evidence as exhibits.

[21] During his evidence-in-chief the witness was invited to comment on whether the damages sustained by the Amarok could be associated with a high speed collision or not. In the opinion of the witness the impact in question was a low speed impact. In support of this statement the witness stated that he basis his opinion on the severity of the damage sustained by the vehicle. He stated that in a case of a high speed impact the airbag would deploy and the safety belt system would lock and would therefore be damaged. Mr Claassens stated that he did not observe any of these damage to the vehicle and therefore concluded that the vehicle was travelling at a low speed at the time of impact.

Defendant

[22] From the onset I need to point out that the defendant made substantial changes to his witness statement at the time of reading it into the record. At this stage the court

will summarize the evidence of the witness to include the amendments that he made but I will return to the issue of the amendments later in the judgment.

[23] The defendant, Mr Hainane, testified that on the date in question he was traveling in an Opel Corsa pick-up on Independence Avenue from Katutura towards the city. He was travelling in the left hand lane of the dual carriage way. As he was approaching the traffic controlled intersection the traffic lights were green and then turned to 'yellow'. He saw that there were many cars in front of him and decided to change lanes to the right hand lane as there were no cars in the right hand lane. He testified that he double checked and put on his indicator to change lanes to his right.

[24] Whilst in the process of changing lanes he saw an Amarok approaching at high speed from behind without reducing speed, apparently rushing to make the traffic lights which changed to 'yellow'. The Amarok then collided with the rear wheel of the Opel Corsa causing it to spin, leading to a second impact.

[25] Mr Hainane stated that after the impact he heard the driver of the Amarok say, whilst he was busy inspecting the damage, that he saw the defendant's vehicle indicating to the right and thought that the defendant was going to make a U-turn, which Mr Hainane stated, was not the case. Mr Hainane testified that he had no intention of making a U-turn. He merely wanted to change lanes and then proceed straight in his original direction of travel. He submitted that his manoeuver was safe and that no negligence can be attributed to him.

[26] Mr Hainane also presented a photograph depicting the damage to the Opel Corsa, which he took with his cellular phone at the scene of the accident. This photograph was not previously discovered and only produced the first time during trial.

[27] During cross-examination the defendant conceded that there were settlement negotiations during mediation but that once a settlement was proposed by the plaintiff

he was given time to think about the matter and he thereafter changed his mind as he was not in agreement with the facts.

[28] The witness was further confronted during cross-examination regarding the amendment to his witness statement. Mr Hainane testified that he drafted a hand written statement to his counsel, which counsel redrafted to comply with the Court Rules by putting it into numbered paragraphs.

[29] Mr Hainane conceded that in his original witness statement he does not mention two impacts by the plaintiff's vehicle but stated that he has the right to amplify his statement and insisted that there were two impacts.

[30] Mr Hainane testified on questions posed by Mrs Gabers-Kirsten that on the day in question he approached the intersection and there were two to three vehicles in front of him and the traffic lights changed from green to amber. He was already in the intersection and decided to change lanes. He checked his rearview mirror and his side mirror and it was clear. Approximately three minutes (3) later he changed lanes by entering the lane in which the plaintiff was travelling and this is when the first impact occurred. This impact was on the right rear wheel arch causing the vehicle to spin and which resulted in the Amarok striking the defendant's vehicle again but more to the middle of the vehicle. Because of the impact the passenger that was seated on the back of the Opel Corsa was flung off the vehicle but he did not sustain serious injuries. According to Mr Hainane the Opel Corsa sustained damage to the value of N\$ 6 800.00, which he settled with the owner of the vehicle.

[31] The witness disagreed that he was the cause of the accident. He submitted that the driver of the Amarok had the opportunity to avoid the collision and he did not do so. He stated that the driver of the **Amarok** ~~other vehicle~~ only had right of way if the traffic lights were green and he (Mr Hainane) was already in the intersection.

Onus

[32] It is common cause that the plaintiff bears the onus to prove the defendant was negligent on a preponderance of probabilities. In *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone*² the Supreme Court found that even where there is no counterclaim but each party alleges negligence on the part of the other, each party must prove what it alleges.

[33] Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary, he must tell the remainder of the story, or take a risk that judgment be given against him³.

Evaluation and analyses of the evidence:

[34] The evidence by Mr Ashipala was clear and concise and to the point. He stated that he was in no hurry and only drove approximately 60 km/h. This evidence of Mr Ashipala was confirmed to a certain extent by Mr Claassens. This is specifically regarding the nature and the type of damage that he observed on the Amarok and which Mr Claassens classified as damage sustained at slight speed. This is directly contradictory to Mr Hainane's version that the driver of the Amarok approached at high speed and without reducing speed collided with his vehicle. The damage to neither the Amarok nor the Opel Corsa appears to support the defendant's version.

[35] Mr Ashipala's version of how the accident occurred also appears consistent with the location of the damage to the respective vehicles. This witness was taken to task as to why he did not swerve to avoid the accident as the impact occurred in the intersection

² Case No SA 13/2008 (at para16 - 17) delivered on 09 February 2009.

³ *Shuudeni vs Minister of Environment and Tourism* (HC-MD-CIV-ACT-DEL-2017/01042) [2018] NAHCMD 107 (20 April 2018) at

but the witness was able to explain in detail what limitations he experienced at the time in respect of barriers and the pavement and the fact that the defendant's vehicle was in any event blocking the way, preventing him from swerving his vehicle to avoid the accident.

[36] The evidence of Mr Claassens stands uncontested for the better part thereof. It is clear that he has the qualifications of an expert and is therefore, due to his peculiar knowledge of panel beating, able to assess the damage to the plaintiff's vehicle and assess what the fair, reasonable and necessary repair costs of the damage would be. Mr Claassens clearly applied his mind to the matter at hand and he assessed the value of the damage as N\$ 10 000.00 (ten thousand Namibia Dollars) less than that of Star Body Works, who did the initial quotation. This reduced figure is absolutely to the benefit of the defendant.

[37] The positive findings that this court made regarding the witnesses for the plaintiff cannot be extended to the evidence of Mr Hainane. Mr Hainane was a poor witness to say the very least. To crown it all Mr Hainane changed his witness statement on the day of trial in material respects. The court got the distinct impression that the amendments to his witness statement were as a result of him having heard the evidence on behalf of the plaintiff. The defendant therefore adapted his version in reply to that of the plaintiff.

[38] The amplifications, as the defendant referred to it, was clearly done without the blessing and knowledge of his legal representative, who cross-examined Mr Ashipala with the facts provided to him by the defendant from their consultation and on the strength of the witness statement filed.

[39] Then at the eleventh hour the defendant threw the proverbial cat amongst the pigeons by 'amplifying' his witness statement with a version that was never put to the plaintiff's witnesses.

[40] There are material differences between the initial witness statement of the defendant and the one that the defendant read into the record. The main paragraphs amended by the witness was paragraph 5, 6 and 7. It is important to note these 'amendments' and I will therefore repeat them verbatim:

[41] Paragraph 5:

'5. There was another lane next to me going in the same direction, I checked and made sure that there were no cars approaching or in the lane of my right-hand side. I then put on my indicator and started to turn my vehicle to enter the lane on my right hand side.'

Changed to:

'I saw there were many vehicles in front of me and I decided to change lanes to my right as there were two lanes going into the same direction. There was no car in the said lane so I proceed. I double checked and made sure there were no cars and I then put on my indicator and started to turn my vehicle into the right side lane.'

[42] In respect of paragraph 6:

'6. Whilst in the process of doing so, I saw a Volkswagen Amarok coming from behind at a very high speed and without reducing his speed hit my vehicle on the right-hand side resulting in the fact that the vehicle spinned around.'

Changed to:

'In the process of doing so I saw a Volkswagen Amarok coming from behind at a very high speed, probably rushing for the yellow light, and without reducing speed hit my vehicle on the rear wheel on the right hand side resulting in the fact that the vehicle spinned around before the second impact between the rear wheel and right door and the car came to a standstill.'

[43] And lastly in respect of paragraph 7 of the witness statement the defendant further stated:

'7. The driver of the Amarok informed me that he saw me indicating to turn to the right and that he thought as going to make a U-turn (which was not the case).'

Which changed to:

'Immediately after the impact I heard the driver of the Amarok when he was busy inspecting the damage to his car saying he saw my car indicating for so long to the right that he thought I was going to make a u-turn, which was not the case.'

[44] These are fundamental changes in the witness statement that Mr Bugan was clearly not aware of otherwise he would have put the correct version to the witnesses during cross-examination. Mr Bugan also stated as much in court. This court takes a dim view of the way in which the defendant attempted to discredit an officer of the court when he was put on the spot during cross-examination in this regard.

Further issues with the defendant's case

[45] The issues with the defendant's version does not stop at the contradictory witness statements. During cross-examination, the defendant tried his utmost to convince the court that he executed a safe lane change and that the driver of the Amarok approached at high speed resulting in the primary impact. The defendant even handed in a photograph to try and support his double impact version.

[46] The only thing that the photograph manage to illustrate is that the Amarok ended up flush against the Opel Corsa with its left front bumper against the middle of the Opel Corsa, between the petrol cap and the driver door pillar. It is highly improbable that the Opel Corsa spun twice and that the Amarok struck it at the same place as the 'first/primary impact'. There is no indication of the damage above the wheel arch that the defendant refers to.

[47] On a question by the court put to the defendant it became clear that the Opel Corsa did not spin but at the most moved or slid approximately one (1) meter from point of impact to point of standstill. Given that scenario the defendant had difficulty in explaining how the damage was caused to the middle right hand side of his vehicle and how the vehicle ended up at the angle that it did as there was no spin.

[48] During cross-examination the defendant conceded that he did not keep a proper lookout before and during the collision, in spite of him amending his witness statement to state that he checked in the rear view mirror and side mirror to make sure that it was safe to change lanes and then proceed to do so. However, during his oral evidence the defendant stated that he executed this maneuver of changing to the right hand lane only three minutes later. I am not sure if the defendant has a concept of how long three minutes or 180 seconds is. In the ordinary course of things three minutes counts for nothing but on a busy road a lot can happen in three minutes. It will be highly irresponsible and negligent to change lanes only three minutes after a driver ensured that the road is clear. Even if the court accepts that the defendant is mistaken as to the time that lapsed before he executed the lane change, defendant must have seen the Amarok if he kept a proper lookout.

[49] During cross-examination the defendant asserted that he intended to change lanes in the intersection but then intended to continue with his original direction of travel. The version of the defendant is neither consistent with the damage sustained by the vehicles nor is it consistent with the position in which the vehicles came to a standstill after the accident. It should also be pointed out at this stage that the defendant elected not to call the two passengers who were in the vehicle with him to come testify and thereby corroborate his version. This is in spite of the fact that these witnesses are available to testify. From the failure to call these witness the court can draw a negative inference that these witnesses will not support the defendant's version.

[50] There was no double impact between the Amarok and the Opel Corsa. This is clearly a fabrication by the defendant to explain the final position and angle of his vehicle. The evidence before this court supports the version of Mr Ashipala that the defendant attempted to execute a U-turn. This is why the damage is not towards the rear of the defendant's vehicle but instead in the middle of the vehicle.

[51] In conclusion, the version of the defendant is fraught with inconsistencies and contradictions and stand to be rejected.

Contributory Negligence

[52] The next issue to consider is if the plaintiff was contributory negligent, as alleged by the defendant in the alternative.

[53] The evidence of plaintiff made it clear that the U-turn attempt by defendant was unexpected and caused a situation of an imminent collision. Mr Ashipale applied brakes but could not take evasive action due to the barrier and the pavement on the right side of the road and also given the fact that there was other traffic on the road.

[54] The defendant's negligent driving, by attempting to execute the unexpected U-turn, obstructed the right of way of plaintiff and the defendant is therefore the main cause of the collision and the resultant damages.

[55] I can find no contributory negligence on the part of the plaintiff.

Negligence

[56] The test for determining negligence has been clearly set out in a number of cases, Muller, AJ (as he then was) in the matter of *Beukes v Mutual & Federal Insurance Co Ltd*⁴ adopted the test enunciated by Holmes, JA⁵ as follows:

'Generally, culpa, or negligence, arises if a *diligens paterfamilias* in the position of the party concerned would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and would take reasonable steps to guard against such occurrence, and the party concerned in fact fails to take such steps. (See *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430) Applied in traffic cases to the driving of a motor vehicle, the concept of negligence takes account of the codes and conventions which normally govern the movement of vehicular traffic on public roads. Users of the road, whether they be vehicle drivers or pedestrians, normally regulate their conduct on the supposition that these codes and conventions will be generally observed by other users. Consequently, a departure from these codes and conventions will often give rise to a situation which is unexpected and dangerous and, in certain circumstances, will amount to negligence. The concept of negligence on the road also takes account of the fact that the driving of a motor vehicle under modern traffic conditions demands a substantial degree of skill and experience and that in certain circumstances *imperitia culpa adnumeratur*. (*Beswick v Crews* 1965 (2) SA 690 (A) at 705)'.⁶

[57] Having accepted the plaintiff's version of the events, I must conclude that, had the defendant kept a proper look-out and acted like a reasonable driver by not executing a sudden U-turn the accident could have been avoided. It does not matter which version of the defendant the court considers, he acted negligently and is the sole cause of the accident.

[58] My order is therefore as follows:

⁴ 1990 NR 105 (HC).

⁵ *Griffiths v Netherlands Insurance Co of SA Ltd* 1976 (4) SA 691 (A) at 695G-H.

⁶ Also referred in *Smith v Mediva Fisheries (Pty) Ltd and Another* (I 429/2012) [2013] NAHCMD 152 (06 JUNE 2013) at paragraph 20.

1. Judgment is granted in favour of the plaintiff for payment in the amount of **N\$ 61 280.22**.
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3. Costs of suit. Such cost to include the cost of one instructing and one instructed counsel.

JS Prinsloo
Judge

APPEARANCES

APPELLANT: H GARBERS-KIRSTEN (with her B Erasmus)
Instructed by PD Theron & Associates

RESPONDENT: D Bujan
Of Harmse Attorneys