

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC– MD-CIV-ACT-DEL-2018/04249

In the matter between:

**HELLMUTH RAINER AHRENDT**

**PLAINTIFF**

and

**THE MINISTER OF SAFETY & SECURITY**

**FIRST DEFENDANT**

**D.J. KANGANI**

**SECOND DEFENDANT**

**Neutral citation:** *Ahrendt v The Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/04249) [2020] NAHCMD 401 (7 September 2020)

**Coram:** RAKOW, AJ

**Heard:** 20 May 2020, 18 June 2020; 17 & 29 July 2020

**Delivered:** 7 September 2020

**Flynote:** Negligence — What constitutes — Requirement that motorist must keep proper look-out — Such requirement being that motorist must scan road in all directions in order to anticipate and thus avoid imminent danger.

*Evidence* — Onus of proof — When discharged — Versions of plaintiff and defendant mutually destructive — Must be proved that version of party burdened with the *onus* is true and that of the other party false — Estimate of credibility of witness inextricably bound up with consideration of probabilities of case.

**Summary:** On 1 August 2017 and at the three-way intersection at Nelson Mandela Avenue and Jan Jonker Street, Windhoek, a collision occurred between a motor vehicle driven by the plaintiff's wife and a motor vehicle driven by the second defendant. Plaintiff sued the defendants alleging that the sole cause of the collision was caused by the negligence of the second defendant. The defendants deny that they were negligent in any of the respects alleged or at all and further deny that they were the sole cause of the collision.

At the commencement of the trial the parties had agreed that the only issue for determination was whether the cause of the collision was the negligent driving of the second defendant or the negligent driving of the plaintiff. The evidence demonstrates that the two versions of the protagonists are mutually destructive.

*Held*, that the two versions of the plaintiff and the defendant are mutually destructive. The approach then is that the plaintiff can only succeed if she satisfies the Court on a preponderance of probabilities that her version is true and accurate and therefore acceptable and that the other version advanced by the defendants is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities.

*Held*, that a proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions sometimes called "a general look-out." It was held that the second defendant failed to have a proper look out.

*Held*, further that the Court finds the plaintiff's version of the events more probable than the version of the defendants.

*Held*, furthermore that in view of the fact that the Court accepted the plaintiff's version of events the Court concluded that when the defendant overtook the stationary vehicles he miscalculated the place where he had to return to his lane of driving. The Court therefore found that the defendant failed to keep a proper lookout on the road ahead of him and that he failed to avoid the collision when it was reasonably expected of him to avoid the collision and that the defendant was negligent and that such negligence was the sole cause of the collision.

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### ORDER

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1. The plaintiffs' claim succeeds and defendants must pay to the plaintiff the sum of N\$39 183.47.
2. Interest at the rate of 20% per annum from date of judgment to date of payment.
3. The defendants must pay the plaintiff's costs. The costs to include the costs of one instructed and one instructing counsel.

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### JUDGMENT

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#### **RAKOW, AJ:**

[1] In this action plaintiff claims damages in the sum of N\$39 183.47 plus interest on that amount. The plaintiff's claim is in respect of damages occasioned to his motor vehicle in a road collision that occurred on or about 1 August 2017 and at the three-way intersection at Nelson Mandela Avenue and Jan Jonker Street, Windhoek, Republic of Namibia. The plaintiff had in the meantime passed away and the

executors of the estate proceeded with the matter on behalf of the estate. The necessary permission was also produced in court for the matter to proceed.

[2] The plaintiff's motor vehicle, a Volkswagen Touran, registration number N 60186 W, was at the time of the collision driven by a Mrs Helga A. Ahrednt (the plaintiff's wife), while the second defendant, who is employed by the Ministry of Safety and Security and was acting within the course and scope of his employment with first defendant, drove a motor vehicle, Registration Number POL 8213, the motor vehicle belongs to the first defendant. The quantum of damages for the plaintiff's motor vehicle was agreed between the parties this being an amount of N\$39 183.47.

[3] The plaintiff's particulars of claim allege that second defendant was the sole cause of the collision in that he was negligent in one or more of the following respects:

- 6.1 he failed to keep a proper lookout;
- 6.2 he failed to keep his vehicle under proper control;
- 6.3 he failed to avoid the collision when, by the exercise of reasonable care, he could and should have done so;
- 6.4 he drove at an excessive speed under the circumstances;
- 6.5 he failed to apply brakes timeously or at all, alternatively drove a vehicle with a defective braking system;
- 6.6 he failed to adhere to a three way stop sign;
- 6.7 he crossed a three way stop without satisfying himself that it was safe and opportune to do so; and
- 6.8 he failed to satisfy himself as to the presence of Plaintiff's vehicle before crossing a three way stop.'

[4] The defendants denied the allegations and pleaded as follows to the plaintiff's particulars of claim;

'4. Each and every allegations contained herein are denied and the plaintiff is put to the strictest proof thereof.

5. Without derogating from the generality of the aforesaid denial and solely in amplification thereof, the Defendants further deny that the Plaintiff suffered damages to an amount of N\$39 183-47 or any damages at all; and denies the reminder of the allegations herein contained, as if specifically traversed and puts the plaintiff to proof thereof.'

[5] The parties, in terms of Rule 26(6) of the High Court Rules, filed a draft pre-trial order which an order of court was made on 20 September 2019. In terms of the pre-trial order the parties listed about seven factual issues which were in dispute between them and on which I had to make a determination. At the commencement of the trial the parties had agreed on further issues and the only issue which remained for determination was whether the cause of the collision was the negligent driving of the second defendant or the negligent driving of the plaintiff.

#### Plaintiff's case

[6] The plaintiff called one witness, Helga A. Ahrendt, who testified that she is a major female and that she was the driver of the vehicle of the Plaintiff, a Volkswagen Touran vehicle with registration number N 60186 W on 1 August 2017. She further testified that the Plaintiff was the registered owner of the said vehicle. She drove on Nelson Mandela Avenue in a southern direction towards Jan Jonker Street. When she reached the T-junction at Nelson Mandela Avenue, she applied her brakes and came to a standstill. She indicated that she intended to turn right and looked for any approaching vehicles from left and right. On her right side, numerous vehicles were waiting in Jan Jonker Street for their turn at the three-way stop. When she had right of way, she proceeded to execute a right-hand turn into Jan Jonker Street.

[7] Whilst she was executing the right-hand turn, she saw the vehicle of the first defendant, driven by the second defendant, POL 8213 approaching the three way

stop intersection from the western direction on the wrong side of the road. The second defendant overtook the que of stationary vehicles in the right-hand lane of Jan Jonker Street and was still in the lane of the oncoming vehicles. The second defendant further did not stop at the three way stop street and collided head-on into her vehicle. She further testified that she did not hear any sirens when she turned and in her opinion, the second defendant caused the accident when he overtook the que of stationary vehicles, failed to keep a proper look-out when he entered the three-way stop and drove on the wrong side of the road.

[8] She handed up the initial certificate of registration for the Volkswagen Touran indicating the name of the owner as HR Ahrendt with the first date of registration being 4/1/2007. She testified that this document was the registration for the vehicle involved in the accident with registration number N60186W. During cross examination, it was put to her that the document presented by her does not reflect the registration of the vehicle. She indicated that according to the document, the register number of the vehicle N60186W was RSD924. She was further questioned as to whether the accident was a head-on collision and she explained that her vehicle was bumped at the front and that the collision occurred in her side of the lane in the intersection. When it was put to her that the witnesses for the defendants would testify that they were on the left side of the road, she denied it and said they were on the right side as there was a que on the left side.

#### Defendants' case

[9] The defendants called two witnesses to testify on their behalf. The first witness Mr Enghono Paulus testified that he was seated in the front next to the driver in the vehicle that was driven by the second defendant with registration number POL 8213. He further testified that while he was on official duty escorting diamonds from a certain company from Prosperita to Hosea Kutako International Airport, he was deployed in the vehicle POL 8213 which was the leading vehicle of the 4 vehicle escort. On their way from the side of Maerua Mall at the three way stop next to the South African High Commissioner, POL 8213 was involved in a motor vehicle accident with the vehicle with registration number N60812W.

[10] He indicated that before the three way stop, they found two vehicles that made a complete stop and gave them right of way to proceed and they passed those vehicles by going into the lane of the oncoming vehicles. While they were in the middle of the intersection, a vehicle with registration number N60812W drove from Nelson Mandela road and collided with POL 8213. He added that after the accident the driver of the plaintiff's vehicle stressed to them that she was sorry as she did not hear any sounds of the siren nor did she see any flashing blue light on the vehicle involved. He testified that all three police vehicles had blue lights on and sirens on to notify all the other road users to give right of way and the accident happened.

[11] Mr Paulus testified that he was not paying attention to the speed of the vehicle and that their vehicle was plus minus 10 meters away from the intersection when they overtook the stationary vehicles and returned back to the left side of the road. He testified that after the second defended overtook the two stationary private vehicles, he proceeded to the junction and there was a vehicle with registration number N60186W that was indicating to turn to the right, into Jan Jonker. According to his evidence the accident took place in the intersection, but the left side of the intersection.

[12] During cross examination he was asked what the distance was when he saw the plaintiff's vehicle. He indicated that they could already see the plaintiff's vehicle indicating to turn to the right after they had returned back to the left lane after overtaking and it was plus minus 10 meters away from the intersection. He further agreed with Mr Diedericks, counsel for the plaintiff, that police vehicles or any emergency vehicles must exercise caution and should not proceed when it is not safe to do so. He was also confronted with the fact that he failed to mention that their vehicle returned back to the left lane after overtaking in his statement and he confirmed that he indeed did not mention it in his witness statement.

[13] The second witness that testified on behalf of the defendants, testified that on the day in question (i.e the 1<sup>st</sup> day of August 2017) he was on official duty when the second defendant was involved in an accident. The second defendant was driving a police vehicle with registration no POL 8713 which belong to the NAMPOL traffic unit. It was a diamond escort operation which consisted of three police vehicles and

a consignment pick-up vehicle. The vehicles had flashing lights and their sirens were on. He was driving a back-up vehicle, which belongs to Special Reserve Force Division and their vehicle was at the back of the escort. He further testified that at the junction of Jan Jonker road and Nelson Mandela road, the NAMPOL traffic vehicle was involved in a slight head on collision with a blue Tauran, registration number N60186W. He indicated that he did not see the collision as he was at the back. He only saw that an accident happened when he was passed by proceeding with the escort. He indicated that he passed the accident on the right and not on the left side.

[14] Having summarized the evidence, I now turn to deal with counsel submissions. Mr Diedericks who appeared for the plaintiff submitted that the probabilities favour the plaintiff. He submitted that the evidence of Mrs Ahrendt was not seriously challenged during cross examination. In fact to a large extent she is corroborated by the evidence of the one witness of the defendant who was a passenger in the POL 8213. It is thus to be accepted that the plaintiff has proven that (a) she drove the private vehicle; (b) that she came to a complete stop at the intersection; (c) that she indicated her intention to turn right; (d) that the defendant driver did not stop at the intersection; (e) that the defendant driver approached the intersection from the lane of oncoming traffic; (f) that the collision occurred in the middle of the intersection turning into the direction from which defendant's driver was approaching. He further submitted that the defendants' evidence stands to be rejected as to how the collision occurred.

[15] Mr Tibinyane who appeared for the defendants submitted that it is in the defendants view that the Volkswagen driver as a reasonable driver intending to execute a right turn at an intersection would take a proper lookout for traffic from the opposite direction before entering the intersection. Notwithstanding the fact the versions of the two witnesses were not precisely the same pertaining to detail, bearing in mind the lapse of time since 2017 and the fact that their police declarations were taken in respect of the collision involving a Police vehicle and not taken for civil proceedings of this nature. The second witness remained credible and steadfast in his version of events and did not contradict himself even under cross-



examination. The first witness was mostly without contradictions and consistent in material respects as well as unshaken in cross-examination.

### Applicable Legal Principles

[16] Having dealt with the evidence adduced by the parties I now turn to deal with the applicable legal principles and applying them to the facts in deciding whether on the probabilities the accident more likely happened in the way asserted by plaintiff or in the way described by the defendant. The Supreme Court of Namibia has said 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.<sup>1</sup>

[17] In this matter the evidence demonstrates, that the two versions of the protagonists are mutually destructive. The approach then is that set out in *National Employers' General Insurance Co Ltd v Jagers*<sup>2</sup> as follows:

'(The plaintiff) can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[18] The reason for the accident, the plaintiff says, was that the second defendant failed to keep a proper lookout, he crossed a three way stop without satisfying himself that it was safe and or opportune to do so, failing to satisfy himself as to the

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<sup>1</sup> Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone Case No SA 13/2008 (unreported) at 16 - 17 para 24).

<sup>2</sup> 1984 (4) SA 437 (E) at H 440E – G: Also see Harold Schmidt t/a Prestige Home Innovations v Heita 2006 (2) NR at 556.

presence of the plaintiffs vehicle before crossing a three way stop and failing to return back to his right lane after overtaking.

[19] The defendants version on the other hand is that their vehicles had blue lights and sirens on which where loud enough for the plaintiff to have heard them like the other vehicles and give them right of way however the plaintiff still proceeded to execute her right turn resulting into the collision.

[20] *In Rex v Marais 1946 CPD 26 at 266* it was held that “the driver of a fire engine, even though entitled to proceed against a red light without fear of prosecution, would not rush headlong into the intersection, and thus disregard the common law duty cast upon him to so regulate his movements so as not to come into collision with traffic lawfully proceeding across the intersection”.<sup>3</sup>

[21] In the matter of *Robinson Bros v Henderson*<sup>4</sup> where Solomon, CJ said:

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

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<sup>3</sup> *Moreba v Road Accident Fund (7616/04) [2006] ZAGPHC 61 (10 June 2006).*

<sup>4</sup> 1928 AD 138 at 141-2.

(b) In the matter of *Nogude v Union and South-West Africa Insurance Co Ltd*<sup>5</sup>, Jansen, JA said:

'A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out": cf *Rondalia Assurance Corporation of SA Ltd v Page and Others* 1975 (1) SA 708 (A) at 718H-719B). It means - "more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity". He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well." (*Neuhaus, NO v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A) at 405H-406A.). Driving with "virtually blinkers on" (*Rondalia Assurance Corporation of SA Ltd v Gonya* 1973 (2) SA 550 (A) at 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case.'

## Conclusion

[22] Applying the legal principles I outlined above, I find the plaintiff's version of the events more probable than the version of the defendant. I say so for the following reasons: Both the defendants witness made statements to the Namibian Police Officer on the day of the collision when the details were still fresh in their minds and consulted with their legal representative at the drafting of their further statements and both omitted to mention that the second defendant returned back to his left lane after overtaking the stationary vehicles that gave them right of way.

[23] It was not disputed that the plaintiff had right of way i.e. that at the time she entered the intersection. The second defendant proceeded to execute his turn when it was inopportune to do so, i.e. as per the second witness testimony he saw the plaintiff's vehicle 10 metres away from the intersection. Therefore there was sufficient time for the second defendant to avoid the collision. There is further no evidence before this court that he tried to avoid the said collision by applying his brakes or swerving to avoid the plaintiff's vehicle.

[24] I am therefore of the view that the second defendant entered the intersection when it was not safe to do so. He did so without due consideration and regard to

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<sup>5</sup> 1975 (3) SA 685 (A) at 688A-C.

other road users. He did not stop, or keep a proper lookout, or yield when entering the intersection. In my view the conduct of the driver of the emergency vehicle was negligent. Having accepted the plaintiff's version of the events, I must conclude that, had the second defendant kept a proper look-out, he would have noticed the plaintiff's vehicle which was executing its right turn. In view of the fact that I accepted the plaintiff's version of events I conclude that when the defendant overtook the stationary vehicles he continued to drive on the wrong side of the road, when entering the intersection.

[25] In the circumstances, I come to the conclusion that the plaintiff has proven that the accident is to be attributed to the negligent driving of the first defendant's driver.

In the result I make the following order:

1. The plaintiffs' claim succeeds and defendants must pay to the plaintiff the sum of N\$39 183.47.
2. Interest at the rate of 20% per annum from date of judgment to date of payment.
3. The defendants must pay the plaintiff's costs. The costs to include the costs of one instructed and one instructing counsel.

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E RAKOW  
Acting Judge

APPEARANCES

PLAINTIFF:

Adv J Diedericks  
Instructed by Viljoen & Associates  
Windhoek

1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANTS:

LK Tibinyane  
Of Government Attorneys  
Windhoek