

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: Renette Valerie Louw v Kaleb Shapumba	Case No: HC-MD-CIV-ACT-DEL-2019/03464
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Rakow, J	Date of hearing: 3; 4; 7 and 8 December 2020 11 February 2021
	Date of order: 16 March 2021 Reasons Delivered: 19 March 2021
Neutral citation: <i>Louw v Shapumba</i> (HC-MD-CIV-ACT-DEL-2019/03464) [2021] NAHCMD 117 (16 March 2021)	
Having read the record of proceedings as well as submissions made by counsels for the applicant and the respondent: IT IS HEREBY ORDERED THAT: 1. Judgment is granted for the plaintiff in the amount of N\$188 622 2. Interest on the aforesaid amounts of N\$188 622 at 20% per annum from date of	

judgement.

3. Costs of suit granted to the plaintiff.

Reasons for orders:

Rakow J,

Introduction

[1] The plaintiff in this matter instituted action against the defendant for damages suffered to her vehicle during an accident that took place on 3 March 2019 at approximately 15h00 in Akureyri Street, Windhoek. The plaintiff is Renette Valerie Louw, a major female and the owner of a Suzuki motor vehicle with registration N157 977W and the defendant is Kaleb Shapumba a major male, who was the driver of a BMW X5 motor vehicle with registration N860 086W. The vehicle of the plaintiff was driven by one Benecia Wells and the plaintiff was a passenger in the said vehicle.

[2] The plaintiff claims that the defendant collided with the front part of her vehicle and the sole cause of the accident was the negligent driving of the defendant in that he, inter alia, failed to keep a proper lookout for other vehicles, particularly the vehicle of the plaintiff which was stationary on the road surface behind his vehicle; after he reversed onto the road surface from the driveway, he continued to reverse his vehicle for an excessive distance at a time when it was dangerous and inopportune to do so.

[3] Alternatively, he failed to keep his vehicle under control thereby allowing it to move backwards onto the road surface and collide with the plaintiff's stationary vehicle; drove at an excessive speed in the circumstances; failed to apply his brakes timely or at all and failed to avoid a collision when by the exercising of reasonable care he could have and should have been able to do so. As a result of his negligence, the defendant caused damages to a total of N\$188 622, which include fair and reasonable tow-in costs incurred, fair and reasonable car rental fees incurred by the Plaintiff for renting a replacement vehicle for a period of 30 days and fair and reasonable costs incurred to assess the damage to her vehicle.

[4] The defendant denied that he was negligent and avers that the plaintiff's driver was negligent and the sole cause of the accident. At the onset of the trial the parties admitted the damages and the only issue remaining was to determine who was at fault.

Evidence of the parties

[5] The plaintiff, Ms Louw testified that she and the driver of the vehicle, Ms Wells, were driving on 3 March 2019 at approximately 15h00 up the road in Akureryri street and they were driving slowly as they were searching for an address. They passed the house where the defendant, Mr. Shapumba at that stage was inside the yard, busy reversing to the outside of the yard. They drove past him and reached the top of the hill where they turned around and started moving down the hill again. The road condition at that stage was very bad and caused them to drive slowly.

[6] They noticed that the vehicle which Mr Shapumba's was driving stood on the road, they came to a stop about 3 meters behind his vehicle and she could still see the rear tyres of Mr. Shapumba's vehicle. Their vehicle was stationary and suddenly Mr. Shapumba started to reverse his vehicle up the road and collided with the front part of her vehicle. They got out of their vehicles and Mr. Shapumba informed them that he did not see their vehicle. The police was called to the scene and they also reported the matter to the Windhoek police station.

[7] The driver of the vehicle of Ms Louw, Ms Wells testified next. She indicated that she was driving the vehicle of Ms Louw on that day and she was driving up the street, which was on a steep hill, very slowly as she was looking for an address of a house. She saw the vehicle of Mr Shapumba reversing from a yard as they passed him in the street. She turned their vehicle around and started driving down the street again when she noticed his vehicle stationary in the road. She stopped Ms Louw's vehicle approximately 3 meters behind the vehicle which Mr. Shapumba was driving and waited to see what he intended to do as the road was too narrow for her to pass his vehicle and he did not indicate that he was going to turn in any direction.

[8] Shortly after they stopped, Mr. Shapumba without any prior warning engaged his motor vehicle's reverse and proceeded to bump the vehicle she was driving. This happened very suddenly and she could only apply the horn of the vehicle but could not

do anything else to avoid the collision.

[9] She heard Mr Shapumba apologize to Ms Louw and indicating that he did not see them. He further informed them that he was intending to reverse up the street to park the vehicle where they usually park vehicles at the opposite side of the road, a little higher up in the street. During cross-examination she denied that she bumped Mr Shapumba when he was reversing out of the yard.

[10] Mr Shapumba testified that he was reversing out of his yard with the vehicle and looked in his rear view mirror and saw no vehicles, just to have the vehicle of Ms Louw collide with the vehicle he was driving as he entered the road. He testified that the vehicle of Ms Louw came around a corner and was driving at a high speed and he only saw it when it bumped into his vehicle. He had reversed about 3 meters onto the road surface when the accident happened, but he never came to a standstill on the road. It was his testimony that he was reversing from his yard, from where the vehicle was parked, at a right angle into the road. Mr Shapumba also testified that he checked in his mirror the whole time when he pulled out of the yard and whilst reversing uphill but never saw the vehicle of Ms Louw. He did not see them pass his house the first time either. He also indicated that for the fact that the street in front of the house where he was reversing from was now paved, the house did not change. He could also not say whether or not Ms Wells applied her brakes.

[11] Mr Mathias testified on behalf of Mr Shapumba and he indicated that he saw when the vehicle of Ms Louw bumped into the one driven by Mr Shapumba. He further indicated that they have changed the house since 2019 by adding some structures and a high gate. He testified that Mr Shapumba was reversing out of the yard when Ms Wells drove into Mr Shapumba's vehicle at a high speed. He was also the person who opened the gate for Mr Shapumba before going upstairs from where he viewed the accident. He did not see the first time Ms Louw's vehicle drove past the house. According to him, Mr Shapumba's vehicle was still busy turning into the road when it was hit.

[12] The police report completed by both the parties was also handed in as an exhibit. It indicates that vehicle A was travelling straight. In terms of the key to the plan, vehicle A was the vehicle of Ms Louw. Vehicle B driven by the Mr Shapumba was reversing when

the accident happened. Under description of the accident, both drivers wrote that Mr Shapumba was reversing from his yard and bumped the vehicle of Ms Louw.

Inspectio in loco

[13] After all the evidence was lead, the court and the legal practitioners visited the scene of the accident. The road follow a steep uphill gradient, between 30 – 45 degrees and there was barely a sidewalk. The road is also fairly narrow and would not normally accommodate two vehicles driving next to each other. One can see clearly all the way up the road to the T-junction at the top of the road and the vehicles passing at the top of the road are visible. The area where Mr. Shapumba was reversing to, to park the vehicle on the opposite side of the road, is about 10 meters away from the current gate. The top of the road or T-junction is about 30 meters away from the gate of the residence of Mr. Shapumba.

Evidence not in dispute

[14] The Plaintiff, Ms Louw was the owner of the vehicle that collided with the vehicle driven by Mr. Shapumba. The Defendant, Mr Shapumba did not see Ms Louw's vehicle when it travelled past his house the first time and also did not observe the said vehicle when he reversed out of the yard. The road was further a narrow gravel road and generally the road surface was in a bad condition.

Legal considerations

[15] The plaintiff bears the onus to prove that the defendant was negligent on a balance of probabilities. The general approach when dealing with rear-end collisions is described by HB Kloppers in *The Law of Collisions in South Africa*¹ at page 78 as follows:

‘A driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent.’

[16] Accordingly, as stated in *Ninteretse v Road Accident Fund*²

‘(t)he driver who collides with another from the rear can escape *prima facie* liability for negligence by providing an explanation that shows that the collision occurred because of the

¹ 7th Edition; 2003 published by Butterworths.

² (29586/13) [2018] ZAGPPHC 439 (2 February 2018) also see *Haakuria v Kanguuehi* (HC-MD-CIV-ACT-DEL- 2019/00060)[2020] NAHCMD 330 (4 August 2020).

negligence of the driver of the other vehicle or due to other intervening circumstances.’

[17] The plaintiff therefore needs to provide an explanation which shows that it was the negligence of the Mr Shapumbu that caused the accident. The versions put forward by Ms Louw and Ms Wells on the one hand and Mr. Shapumbu and Mr. Mathias differed and can be considered as mutually destructive. If the court finds that the version set forward by the plaintiff and her witness is true and correct, the plaintiff’s claim must succeed, if the version of the defendant is correct, then the claim against the defendant must be dismissed.

[18] *In Absolute Logistics (Pty) Ltd v Elite Security Services CC*³ Parker J said the following at para 6 –

‘I must follow the approach that has been beaten by the authorities in dealing with such eventuality; that is to say, the proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. (See *Harold Schmidt t/a Prestige Home Innovations v Heita 2006 (2) NR 555 at 559D.*) Additionally, from the authorities it also emerges that where the onus rests on the plaintiff and there are two mutually destructive stories he 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 version advanced by the defendant is therefore false or mistaken and falls to be rejected. (*National Employers’ General Insurance Co. Ltd v Jagers 1984 (4) SA 437 (E)*); *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA)*; *Shakusheka and Another v Minister of Home Affairs 2009 (2) NR 524*; *U v Minister of Education, Sports and Culture 2006 (1) NR 168*’

[19] The process the courts in Namibia apply when dealing with two mutually destructive versions is perhaps best summarized in *Ndabeni v Nandu*⁴ where Masuku AJ said the following regarding the approach to make a finding on these issues:

‘The question is, how should the court approach the issues so as to make a finding on the disputed issues? In *SFW Group Ltd And Another v Martell Et Cie And Others (2003 (1) SA 11 (SCA)* at page 14H – 15E) Nienaber JA suggested the following formula, which has been adopted

³ (I 1497/2008) [2011] NAHC 82 (17 March 2011).

⁴ (I343/2013)[2015]NAHCMD 110 (11 May 2015).

as applicable even in this jurisdiction in the case of *Life Office of Namibia Ltd v Amakali* (2014 NR 1119 (LC) page 1129-1130):

‘The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues, a 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 variety of subsidiary factors, not necessarily in order of importance, such as

- (i) the witness’s 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 . . .’

[20] Our courts further defined in *Nogude v Union and South-West Africa Insurance Co Ltd*⁵ what is considered a proper look out. Jansen JA said the following:

‘ 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 718H0719B*). 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 build-up area, of the pavements on the side of the road as well” (*Nehaus, 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 554 B*) would be inconsistent with the standard of the reasonable driver in the circumstances of this case.’

[21] From reading the legal principles regarding a duty of care of drivers when reversing a vehicle, it is clear that our courts have concluded that there is an extra duty of care on these drivers to keep a proper look-out.⁶

⁵ 1975(3)SA 685 (A) at 688 A-C.

Evaluation of evidence and applying the legal principles

[22] In resolving the factual dispute between the parties in this matter, the court took into account the credibility of the various factual witnesses, their reliability and the probabilities. The court accepted that Ms Wells was driving slowly as she and Ms Louw explained that the road was bad and they were looking for a specific address. The court also except their evidence that they turned around at the top of the street and drove down towards the residence of Mr. Shapumba. As they were driving up the street and back again, the two witnesses of the defence should have been able to see them if they paid attention to their surroundings.

[23] I therefore find that it is highly unlikely that Mr Shapumba could see them speeding around a turn in the road as he testified that he never saw their vehicle. Nor Mr Shapumba or his witness could testify for the same reason whether Ms Wells applied her breaks timeously and the court therefore find the evidence by Ms Wells and Ms Louw that their vehicle indeed came to a stop before the accident as more probable, taken into account that two vehicles cannot safely pass one another in the road because it is so narrow.

[24] The version of Mr Shapumba that he kept a proper look-out for other vehicles and did not see any, is highly improbable as the visibility until the top of the road is clear and he should therefore have seen the vehicle of Ms Louw approaching. The court therefore finds that he failed to keep a proper lookout when he reversed his vehicle out of his yard and into the road, as well as he when he started to reverse up the road to the designated parking spot. His was therefore negligent in failing to keep a proper lookout.

[25] For those reasons, I make the following orders:

1. Judgment is granted for the plaintiff in the amount of N\$188 622
2. Interest on the aforesaid amounts of N\$188 622 at 20% per annum from date of judgement.

⁶ See Venter v Dickson 1965 (4) SA 22 (E); Wessels v Johannesburg Municipality 1971 (1) SA 479 (A) and also R v Grobler 1928 PH O 18;

3. Costs of suit granted to the plaintiff.	
Judge's Signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff/ Respondent	Defendants/ Applicants
Mr Pretorius Of Francois Erasmus & Partners Windhoek	Ms Hamunyela Of Appolos Shimakeleni Lawyers Windhoek