

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: HC-MD-CIV-ACT- DEL-2018/00133

In the matter between:

**AUGUSTO FINASIU GAWAB**

**PLAINTIFF**

And

**MINISTER OF HEALTH & SOCIAL SERVICES**

**FIRST DEFENDANT**

**OLAVI NAKALE**

**SECOND DEFENDANT**

**Neutral citation:** *Gawab v Minister of Health & Social Services* (HC-MD-CIV-ACT-DEL-2018/00133) [2021] NAHCMD 146 (26 February 2021)

**Coram:** TOMMASI J  
**Heard:** 26 - 27 October 2020.  
**Oral Submissions:** 30 October 2020  
**Delivered:** 26 February 2021  
**Reasons:** 06 April 2021

**Flynote:** Practice – Motor Vehicle Accident – Apportionment of Damages vis-à-vis Contributory Negligence – what constitutes – Vicarious Liability of employer for the negligent driving of its employee considered.

**Summary:** Before court is a claim for damages arising from a motor vehicle collision. The plaintiff was the driver of a Mercedes Benz 320i and the second defendant was the driver of a Toyota Dyna Truck. The evidence before court is that the second defendant entered the main road from a side road without stopping or indicating his intention to turn right. He thereafter immediately executed another right hand turn into the driveway of the incinerator. The plaintiff, having seen the defendant entering without stopping or indicating decided to overtake the second defendant who was traveling slow and without regard for the solid line.

Held that: The second defendant, entering the main road was required to approach and enter to main road with due care particularly having seen the plaintiff approaching.

Held further that: The driving of the second defendant was without consideration of the other road users and deviates from the norm of what is expected of a reasonable driver.

Held that: The plaintiff failed to have a proper lookout and failed to avoid the accident when, by the exercise of reasonable care, he could have done so.

Held further that: The failure of the second defendant to stop when entering the main road and without indicating would have alerted any reasonable driver to be cautious.

Held that: the plaintiff overtook the second defendant's truck when it was neither safe nor opportune to do so and is therefore liable for negligently contributing to the collision.

Held further that: the second Defendant is liable for the damages of the plaintiff and so is the first defendant by virtue of the fact that it is vicariously liable for the negligent driving of the second defendant. Defendants' counterclaim dismissed

Court finding that the plaintiff must succeed in his claim but to the extent of only 60 % thereof with costs. The plaintiff is found to be liable for negligently contributing to the collision.

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### ORDER

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Judgement is granted for the plaintiff against the defendants jointly and severally, the one paying the other to be absolved in the following terms:

1. Payment in the sum of N\$345 476.44, less 40% thereof;
2. Interest at the rate of 20 % per annum calculated from the date of this judgment until the date of payment;
3. Costs of suit
4. The defendants counterclaim is dismissed with costs.
5. The matter is removed from the roll and regarded as finalised.

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### JUDGMENT

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TOMMASI J,

[1] This is a claim for damages arising from a motor vehicle collision which occurred on 15 July 2016. The plaintiff was the driver of a BMW 320i, registration number N194-436W and the second defendant was the driver of a Toyota Dyna Truck, registration number, GRN 27544, the property of first defendant.

[2] An inspection *in loco* revealed that the accident took place on a road linking the Katutura Central Hospital with Windhoek Central Hospital, at the entrance of the gate leading to the incinerator. It is common cause that the plaintiff was driving from Katutura Central Hospital in the direction of Windhoek Central Hospital (hereinafter referred to as the main road); and that second defendant came from a side road and

joined the main road at a T-junction in front of the plaintiff so that both vehicles were traveling in the same direction prior to the collision. The evidence of the second defendant was that he was carrying medical waste in red plastic bags which was destined for the incinerator. The gate of the incinerator was located almost immediately to the right from the T-junction. The trajectory of the Dyna Truck, driven by the second defendant, can be described as a wide U-turn coming from the side road and immediately turning to the right toward the gate of the incinerator. There is a stop sign painted on the road surface and a yield road sign regulating traffic coming from the side road joining the main road. There was furthermore a solid line on the surface of the main road.

[3] The plaintiff pleaded that the sole cause of the collision was the negligence of the second defendant, in the course and scope of his employment with first defendant. The plaintiff's vehicle was damaged beyond reasonable repair as a result of the collision and the plaintiff claimed that he suffered damages in the sum of N\$385 515.50 being the difference between the pre-accident value of the vehicle and the salvage value of the wreck, the tow-in and salvage services in the sum of N\$3 591.45, the car rental charges and expenses in the sum of N\$7 440.96.

[4] The defendants in turn pleaded that the plaintiff was the sole cause of the accident referring to the duties of a driver when passing a vehicle as provided for in section 329 (1) & (2) of the Road Traffic and Transport Regulations, 2000. The defendants counterclaimed that they suffered damages for the repair of the truck in the amount N\$52 567.54 as a result of the collision.

[5] The date, place, registration numbers of the vehicle and the identity of the drivers of the respective vehicles are not in dispute. The parties furthermore settled the quantum of damages in the sum of N\$345 476.44 for the plaintiff and N\$52 567.54 for the defendant. The parties informed the court before the commencement of the trial that the issue of the ownership of the respective vehicles were no longer in dispute. The agreed issues thus remaining for determination are; (a) the respective parties' contributory negligence, if any and if applicable, the ratio; and (b) The liability of the respective parties.

[6] The plaintiff, a medical doctor, testified that he was traveling on the Katutura Central Hospital grounds in a southern direction. He recalled that he reduced his speed when he was going over a speed hump and was driving approximately 45 km/h. He had right of way and was driving straight when he saw second defendant approaching a stop sign from a western direction i.e. coming from the side road on his right hand side. The second defendant turned to the right in front of the plaintiff without stopping at the stop sign and without giving an indication of his intention to turn to the right. The second defendant was not driving very fast when he joined the main road. The plaintiff moved over to the right hand lane in order to overtake the second defendant. He corrected this statement which constituted his evidence in chief and testified that he did not overtake the defendant but he tried to avoid the collision by swerving to his right. He was next to the second defendant when all of a sudden, without indicating his intention to do so, the second defendant again turned right toward the incinerator and collided into the left side of his vehicle. The second defendant's truck overshot and came to a standstill in the bushes whilst the plaintiff's vehicle came to a standstill in the driveway of the incinerator. During cross-examination the plaintiff admitted knowing what the Truck was carrying at the time, i.e. medical waste destined to be incinerated.

[7] The second defendant, a driver employed by the first defendant, testified that he was on his way to the incinerator. He approached the main road from a side road. He slowly approached the yield sign and checked for traffic coming from both directions. The road was clear and he turned right into the main road whilst indicating his intention to do so. He travelled on the main road for about 5 meters and indicated that he intends to turn right. He was in the middle of this turn when he heard a bang and realised that he was hit by a BMW. He suspected that the BMW was traveling at a high speed as the road was clear when he entered it. He got out of the vehicle and inspected his vehicle. The damages were to the right hand side of the vehicle on the driver's side and the right front wheel burst on impact. The plaintiff's vehicle was positioned slightly beneath his truck and his bonnet and windshield were damaged. He testified that his indicator was still on after the impact and the plaintiff went into his truck to put it off. He admonished the plaintiff for tampering with the evidence and put the indicator back on again. An unfriendly exchange then ensued.

[8] The defendants called a further witness, Mr. Ndove, who is also a driver in the employ of first defendant. He testified that he was transporting medical personnel on that day. He followed a BMW which in turn was following the Dyna Truck. He corrected his statement to reflect that he was driving behind the truck and the BMW was behind him. As he approached the gate of the nurse's home, he noticed that the BMW was driving at a high speed as it overtook the Dyna Truck. He could see a collision was about to occur and he flashed his lights to alert the BMW but it was too late as the truck had already turned into the driveway of the incinerator. He drove to the scene and stopped to investigate. He confirmed that the plaintiff's vehicle was slightly beneath the truck with damage to its bonnet and windshield. He observed an unfriendly exchanged between the drivers of the respective vehicle.

[9] The Road Accident Form was handed into evidence. The following was recorded as the plaintiff's description of the accident: 'I was driving straight and the driver of the truck did not stop at the stop sign, come (*sic*) in and I tried to overtake him on the right and he still did not indicate to the right saying he did not see me turn right crashing into my car.' The second defendant's description of the accident reads as follow: 'I came at junction. I did not see any car. I start moving I saw the car come few seconds later. I further tried to turn right, accident occurred.' The second defendant's report to his employer was also handed into evidence. The report second defendant gave to his employer reads as follow: 'I came from Katutura Hospital at Police Station side. When I came at T-junction, I stop, I see the car was far for me. I proceed, when I turn, he also overtaking me then he bump me.'

[10] In evaluating the evidence before court, I am guided by what was stated in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 where Eksteen AJP stated the following:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where 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 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.'

[11] The plaintiff's claim is that the second defendant was negligent in *inter alia*, failing to keep a proper look out, failing to indicate his intention to make a right-hand turn while the plaintiff was overtaking his vehicle on the right-hand side; executing a right hand turn without allowing the plaintiff's vehicle to pass before he turned right; turning right without satisfying himself that it was safe and opportune to do so and satisfy himself as to the presence of overtaking traffic before turning right. Defendant in turn alleges that the plaintiff, *inter alia*, failed to keep a proper lookout; failed to show his intention to overtake; failed to observe the solid line before overtaking; failed to satisfy himself that there were no obstructions in the road before overtaking; and was traveling at an excessive speed.

[12] It is common cause that: (a) the plaintiff was traveling on the main road where there was a solid line prohibiting overtaking; (b) the defendant entered the main road from a side road. There are however completely different versions of what happened before the second defendant joined the main road and what happened directly afterwards when the second defendant executed the second right hand turn.

[13] The second right-hand turn of the second defendant must not be viewed in isolation. It was preceded by the second defendant coming from a side road joining the main road and thereafter almost immediately turning to the right. The plaintiff admitted seeing the truck before it entered the main road. The second defendant however testified that he approached the yield sign, checked left and right for oncoming traffic and proceeded to turn right as there were no oncoming vehicles. This does not explicitly state that he stopped. During cross-examination he however

testified that he stopped. In his report to his employer however he admitted having seen the plaintiff but stated that he was far. It is far more plausible that second defendant did not stop at the stop/yield sign but decided to proceed to enter the main road as he perceived the plaintiff's vehicle to have been far off. The latter version rings true despite his protestations to the contrary during cross-examination.

[14] The speed of the plaintiff was not seriously challenged. I pause to comment that Mr. Ndove was a poor witness. His testimony in chief differed from his testimony during cross examination. His evidence is not reliable. I therefore accept the testimony of the plaintiff that he was driving at approximately 45 km/h as he provided a plausible explanation.

[15] The plaintiff's version is that the second defendant failed to stop at the stop sign and failed to indicate his intention to turn into the main road and likewise failed to indicate his intention to execute the second turn immediately to the right. This was disputed.

[16] The testimony of the second defendant that the plaintiff alighted the truck to put off the indicator is treated with some circumspection. This version was not put to the plaintiff and the two passengers of the Dyna truck were not called to confirm this incident although they filed witness statements to this effect. No reason was advanced for their failure to testify. I further note that Mr. Ndove did not confirm the second defendant's version that the plaintiff entered his vehicle to switch off indicator although he claims to have been there at the time. The plaintiff's version that the second defendant did not indicate his intention to turn right at the stop/yield sign and that he failed to indicate his intention to turn right in the direction of the incinerator, under these circumstances is found to be plausible.

[17] I accept that both parties saw each other and that second defendant decided to enter the main road without stopping guided by the distance he perceived to be between him and the plaintiff. I further accept the second defendant further failed to indicate his intention to turn into the main road and further failed to indicate his intention to immediately execute a second turn right into the driveway of the incinerator.



[18] In *Marx v Hunze 2007 (1) NR 228 (HC)* Parker AJ at page 230, paragraph 5, emphasised the general rule as provided for in Section 81 of the Road Traffic and Transport Act, 1999 (Act 22 of 1999) which reads as follows:

'No person shall drive a vehicle on a public road without reasonable consideration for any other person using the road.'

And further that:

'This wise prescript should be the starting point of my enquiry. It has been held that a driver travelling along a main road is entitled to assume that the traffic approaching from a minor crossroad will not enter the intersection unless it is safe to do so. In *Victoria Falls and Transvaal Power Company Ltd v Thornton's Cartage Co Ltd De Waal* JP stated that the duties of a driver entering an intersection from a minor road have been stated as follows:

When a person driving a car approaches a street which is a main thoroughfare, or in which he is aware that there is likely to be a considerable amount of traffic, he must approach the intersecting street with due care and be prepared to expect traffic. His first duty is to see that there is no traffic approaching from his right, and then to look for traffic approaching from his left.'

[19] In *Mlenzana v Goodrick & Franklin Inc 2012 (2) SA 433 (FB)* the court on page 439 para 22 stated the following:

'There is a duty in certain circumstances for a driver to look in his side-view mirror before turning to the right. The court has held that a motorist whose intention it is to execute a right hand turn has a duty to satisfy himself that any signals which he may have given of his intention so to turn had actually been seen and heeded by the other road users — *Brown v Santam Insurance Co Ltd and Another 1979 (4) SA 370 (W)* at 374A – B per Cilliers AJ; *Butt and Another v Van den Camp 1982 (3) SA 819 (A)*.'

[20] The second defendant, entering the main road was required to approach and enter to main road with due care particularly having seen the plaintiff approaching. Having entered the main road he was required to indicate his intention to turn to the right which he failed to do and furthermore to ensure that doing so would not endanger the oncoming vehicle of the plaintiff which he knew was approaching. The driving of the second defendant was without consideration of the other road users and deviates from the norm of what is expected of a reasonable driver. His

negligence has thus been properly established. The defendants' counterclaim for this reason stands to be dismissed.

[21] The plaintiff, from the outset and in his pleadings, claims that he wanted to overtake the defendant but changed this version when he started his testimony to state that he swerved to the right to avoid colliding with the second defendant. The latter version is however improbable. It is unlikely that he would swerve in the direction the second defendant was turning. His first version ring true and I consider the latter version to be recent fabrication.

[22] In *Gerber v Minister of Defence and Another 2014 (4) NR 1147 (HC)*, page 1154, para 15(b) the court referred to the matter of *Nogude v Union and South-West Africa Insurance Co Ltd*, where 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 pp. 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 pp. 405H – 406A.).

Driving with virtually blinkers on (*Rondalia Assurance Corporation of SA Ltd v Gonya 1973 (2) SA 550 (A)* at p. 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case.'

[23] I have also considered Regulation 329 (1) & (2) of the Road Traffic and Transport Regulations, which regulates vehicles intending to pass any other vehicle travelling in the same direction on a public road and the effect of the solid line. The plaintiff further failed to have a proper lookout and failed to avoid the accident when, by the exercise of reasonable care, he could have done so. The failure of the second defendant to stop when entering the main road and without indicating would have alerted any reasonable driver to be cautious. The plaintiff however overtook the second defendant's truck when it was neither safe nor opportune to do so. He is

therefore liable for negligently contributing to the collision. I assess the negligence of the defendant to be 60% and that of the plaintiff to be 40%.

[24] The court, in light of the fact that the plaintiff's negligence contributed to the collision, must apportion the damages in terms of the Apportionment of Damages Act, 34 of 1956. Second Defendant is liable for the damages of the plaintiff and so is first defendant by virtue of the fact that it is vicariously liable for the negligent driving of the second defendant.

[25] The judgment of this court is that the plaintiff succeeds in his claim but to the extent of 60 % thereof. It follows, therefore, that the plaintiff is entitled to his costs, since he has been successful substantially. The counterclaim of the defendants is dismissed with costs.

[26] It is therefore the order of this court that judgment is granted for the plaintiff against the defendants jointly and severally, the one paying the other to be absolved in the following terms:

1. Payment in the sum of N\$345 476.44, less 40% thereof;
2. Interest at the rate of 20 % per annum calculated from the date of this judgment until the date of payment;
3. Costs of suit
4. The defendants counterclaim is dismissed with costs.
5. The matter is removed from the roll and regarded as finalised.

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M A TOMMASI  
Judge

APPEARANCES:

PLAINTIFF:

Mr. B. Viljoen  
Of Viljoen & Associates

DEFENDANT:

Ms. M. Meyer  
Of the Office of the Government Attorney