

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2019/05100

In the matter between:

MUVARI CONNIE TJIURUTUE

PLAINTIFF

and

HELENA AMUYAGELE

FIRST DEFENDANT

Neutral citation: *Tjiurutue v Amuyagele* (HC-MD-CIV-ACT-DEL-2019/05100) [2021]
NAHCMD 315 (2 July 2021)

Coram: RAKOW, J

Heard: 10, 11, 12 and 21 May 2021

Delivered: 2 July 2021

Flynote: Motor vehicle accident - plaintiff and defendant involved in motor vehicle collision - Plaintiff suing for damages - Res Ipsa Loquitor-principle - the presumption of negligence on the application of the rule operated against the defendant – Defendant has the duty to rebut the presumption by furnishing satisfactory explanation - Negligence - Failure to keep a proper lookout – Failure to adequately

exercise control over a motor vehicle - mutually destructive versions – court to decide which version is more probable.

Summary: The plaintiff instituted action against the defendant for damages suffered as a result of a motor vehicle collision, which occurred between the plaintiff and a vehicle driven by the defendant at the time. The facts are that the two vehicles were traveling in the opposite direction and the defendant's vehicle left its lane and drive in the plaintiff's lane, and caused an accident as a result. The defendant contended that she was faced with a sudden emergency when a fuel tank truck partly encroached on her lane which caused her to partly leave the road surface and then return onto the road, causing her to swerve into the lane of the oncoming traffic and then causing the accident with the vehicle of the plaintiff.

Held that, the fact that the defendant drove on the wrong side of the road and caused the accident, is prima facie proof of the negligence of the said driver.

Held further that, the duty to disprove the allegation of negligence, therefore, rests with the defendant.

Held that, the defendant was negligent in that she did not exercise proper control of her vehicle when she returned into her lane, which caused her vehicle to move into the lane of the oncoming traffic which resulted in the collision with the plaintiff.

Held further that, the version of the plaintiff showed on the balance that it was the defendant who drove her vehicle in a manner that was negligent in the circumstances, resulting in the accident.

Held that, the plaintiff had proven her case on a balance of probabilities and that the defendant had failed to rebut that she drove in a negligent manner. The plaintiff's claim was upheld.

ORDER

1. The plaintiffs' claim succeeds and defendants must pay to the plaintiff the sum of N\$199 179.62
 2. Interest at the rate of 20% per annum from the date of judgment to date of payment.
 3. Cost of suit
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JUDGMENT

RAKOW, J:

[1] The plaintiff, Ms. Tjiurutue instituted action against the defendant Ms. Amuyagele for damages caused when she lost control over the vehicle she was driving, and which, as a result, collided into the vehicle of the plaintiff, causing damages to the amount of N\$199 179.62. The accident occurred on the main road between Usakos and Swakopmund, near Arandis early morning at about 6h30 on 22 December 2017.

[2] The vehicle which the plaintiff was driving was a maroon 2014 Nissan Juke, which was insured by Quanta Insurance. The white GWM Steed pick-up that was driven by the defendant, did not belong to her but to one of the passengers in the vehicle, a certain Rakel Shimhanda, who with her nephew on her lap, sat next to the defendant, Ms. Amuyagele.

[3] The defendant pleaded that the said collision was caused by a petrol tanker truck that swerved into her lane of driving and as a result, she had to swerve off the road and back onto the road again to avoid the collision with the said truck. This resulted in her slightly losing control over her motor vehicle which resulted in the said collision.

[4] The quantum of the damages was not disputed and the parties agreed on the amount of N\$199 179.62. The only issue in dispute is whether or not the accident was caused by the fuel truck veering into the lane in which the defendant was driving, causing the defendant to drive in such a manner that she bumped into the

vehicle of the plaintiff. This issue deals with whether the defendant was negligent or not. Some other issues were raised that needs resolution during the trial, such as whether or not the plaintiff was the owner or bona fide possessor of the vehicle as the vehicle was subject to a Hire Purchase agreement of Bank Windhoek and whether the accident happened near Arandis on the main road between Usakos and Arandis, however, during the trial it transpired that these issues are not really in dispute. The legal practitioner for the plaintiff informed the court that she intends to apply that the defendant presents her case first as the evidentiary burden has shifted to the defendant. The defendant did not dispute this. The court agreed with the plaintiff and the defendant was asked to present her case first.

Defendant's case

[5] The Defendant elected to testify herself and called two other witnesses, Ms. Rakel Shimhanda and Mr. Frans Ekandjo. She testified that she was looking for a lift to Tsandi in the Omusati Region and was informed that she should speak to Ms. Rakel Shimhanda as she was traveling to Tsandi and was looking for someone to drive her vehicle. She contacted Ms. Shimhanda and they agreed that she would be driving the vehicle of Ms. Shimhanda from Walvis Bay to Tsandi. On 22 December 2017, they left Walvis Bay at about 06h00 in Ms. Shimhanda's white GWM Steed double cab pickup truck. The defendant testified that she drove the vehicle, while Ms. Shimhanda with Thomas David on her lap sat in the passenger seat next to her and Mr. Petrus Ipinge and Frans Ekandjo sat at the back.

[6] Approximately 20 km after Arandis there was a sharp curve to her left on the road and after it a bridge. Whilst approaching the bridge she notices an oncoming truck with an oil tank driving from the direction of Usakos. As the truck approached their vehicle she noticed that the truck was driving in the middle of the road, with the dividing middle line of the road passing in the middle of the truck. She testified that she then reduced her speed and flickered her lights. The truck was encroaching upon the left lane in which she was traveling. She started reducing speed and flickering her headlights but the truck continued driving in the middle of the road. The other people in the vehicle also saw the truck driving in this way.

[7] As she was faced with a sudden emergency, she decided to move their vehicle to the far left side of the road. The vehicle started shaking when the left wheels went onto the ground shoulder of the road at the side of the road. This was before the truck passed them. She then tried to move the vehicle back onto the road, in her lane. At the time that the truck passed their vehicle, it caused a lot of wind to hit the vehicle she was driving. At the same time, she attempted to move her vehicle back in her lane but she oversteered entered the lane of the oncoming traffic before bringing the vehicle back in her lane of travel. She never saw that she hit the plaintiff's vehicle which was traveling behind the truck, but as she testified, it must have been at the time she drove into the lane of the oncoming traffic, thereafter their vehicle went off the road on the left-hand side and started spinning where she eventually managed to bring it to a standstill.

[8] After they came to a standstill she noticed that their vehicle was slightly damaged. There was a dent on the left side of the vehicle and the tow bar was damaged. The backlight was also broken and a tyre had burst. They went to the vehicle where the plaintiff was seated and found her with a wound on her arm. She never saw the two other pick-ups behind the truck, neither did she see any other persons assisting the plaintiff to get out of her vehicle. She testified that she did not have the name of the driver of the truck or the vehicle registration number although the driver stopped at the scene. Mr. Frans Ekandjo however took down the registration number but no longer had the number. The truck driver left before the police arrived on the scene. They gave their statements to the police officer at the scene but had to retrieve the registration disk from the police station in Arandis after they changed the tyre, before they could continue to Tsandi.

[9] The next witness to testify was Ms. Rakel Shimhanda. She testified that she is the owner of the GWM pickup and was traveling with the defendant on 22 December 2017 to Tsandi. She was sitting in the passenger's seat in front with her little cousin on her lap. She saw the truck coming from Usakos towards Arandis driving in their side of the lane. She testified that she saw that the defendant tried to avoid an accident by moving a bit to the left side but the vehicle started shaking and the defendant tried to return to her lane on the road just as the truck passed them and that caused their vehicle again to go off the left side of the road and then she could

not recall what happened further. She testified that they replaced the tyre after the police arrived and that they did not go to the police station to report the accident. She testified that they went to the police station to retrieve their disk before proceeding with their journey.

[10] Frans Ekandjo testified next. He made several changes to his witness statement and explained that someone, whom he did not understand so well, phoned him before he went out to sea to take down his witness statement. He also could not hear that person well. He was in a hurry as the boat going to sea was waiting for him and therefore did not give a lot of attention to the witness statement. It was his testimony that he was offered a lift to the North by Rakel Shimhanda in her motor vehicle. He testified that they were driving from Arandis to Usakos and that a Juke motor vehicle was driving behind a fuel tank truck, which he observed drove in the middle of the road towards them. The fuel truck had two tanks of oil. He testified that their vehicle left the road and he saw no other vehicles behind the fuel truck. He never saw the drivers or other persons of the two other pickup vehicles. He spoke to the driver of the fuel tanker and also recorded the registration number of the fuel tanker on his cellphone and later gave it to Rakel.

Plaintiff's case

[11] The plaintiff testified that she is the owner of a 2014 Nissan Juke motor vehicle which at that time was still under a Hire Purchase Agreement with Bank Windhoek but she was the bone fide possessor of the said vehicle as per her certificate of Deregistration. She was driving from Usakos towards Arandis and drove behind two pick-up trucks and a Total Fuel Carrier truck. After she crossed a bridge, the road curved to the right and she observed an approaching vehicle swerving from side to side. She could not say how many times the vehicle swerved as she was concentrating on the vehicle in front of her and her vehicle was then sideswiped by the oncoming vehicle. She remained in her vehicle and remember one of the drivers of the pick-up trucks coming to assist her to get out of her vehicle. She also remembers sitting in one of the pick-up trucks when a lady came to her and said she is so sorry for what happened. She accepted that as the driver of the vehicle that bumped into her.

[12] The plaintiff then called Mr. Hermanus Jacobus de Wet who was also traveling from east to west on the road between Usakos and Arandis that morning. He was driving a Ford Ranger pickup truck and was pulling a camping trailer. About 30 km from Arandis he was driving behind a Total Fuel Carrier truck. He testified that he specifically observed the driving of the truck and that the driver drove with the utmost caution and within the lane of the truck. He noticed an approaching vehicle leaving the road surface and returning to the road surface, then passing the fuel truck and coming directly towards his vehicle. He steered off the road and checked behind him as his friend and colleague, was traveling in the vehicle behind him. He saw the vehicle behind him also pulling from the road but that the vehicle behind his friend's vehicle was sideswiped by the vehicle coming from the front. They assisted the driver of the Juke vehicle and waited until the police arrived on the scene. He further indicated that it was a wind-still morning and that as such no wind or air or very little wind or air would be created when a truck drive past.

[13] During cross-examination, he testified that the fuel carrier had only one trailer and was about 23m in length. He further maintained that the approaching vehicle left the road only after the front piece of the truck already passed the vehicle. He believes that the reason why the vehicle swerved was that the driver corrected the vehicle too soon after leaving the road surface. He further insisted that the truck, he, his friend behind him, and the plaintiff traveled strictly in their lane. He was further of the opinion that even if the truck encroached slightly on the lane of the defendant, the defendant could still have passed the truck by driving slightly to the side.

Applicable Legal Principles

Res Ipsa Loquitor-principle

[14] 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 most likely happened in the manner asserted by the plaintiff or in the manner 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 alleges¹.

[15] What we started with, in this trial, is the principle of *Res Ipsa Loquitor*. The fact that the defendant drove on the wrong side of the road and caused the accident, is prima facie proof of the negligence of the said driver. The learned author Cooper in *Delictual Liability in Motor Law*² said the following:

'Where a motor vehicle drove onto the incorrect side of the road and collided with an approaching vehicle, it has been held *res ipsa loquitor* because the only reasonable inference was that the defendant's driving onto the incorrect side of the road at an inopportune moment was due to his failure to exercise proper care. Proof that a vehicle was on its incorrect side of the road at the time of the collision (it is held) is prima facie proof of the driver's negligence.'

[16] In *Road Contractor Company Limited v Jorge*³ this approach was also followed where a motor vehicle swerved into the lane of an oncoming truck and caused an accident whilst in the lane of the oncoming truck.

[17] The duty to disprove this allegation, therefore, rests with the defendant. Cooper in *Delictual Liability in Motor Law* (supra) further continued and states:

'The explanation expected of the defendant will depend upon the nature of the case and the relative ability of the parties to contribute evidence on the issue. Mere theories or hypothetical suggestions will not avail the defendant. A defendant must do more than merely show that his explanation may reasonably possibly be true. His explanation must be supported by a substantial foundation of fact and be sufficient to destroy the probability of negligence presumed to be present before the testimony adduced by him.'

[18] The principle in the current matter can find application in that it is the opinion of the court that unless the defendant can show that she was not negligent when she bumped into the vehicle of the plaintiff, which was driving in its correct lane, it must be accepted that the defendant was indeed negligent and therefore caused the said

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

² W.E. Cooper, *Delictual Liability in Motor Law*, Juta & Co, 2006 at p 101 (together with authorities therein referred).

³ *Road Contractor Company Limited v Jorge* (I3287/2014) [2016] NAHCMD 296 (30 September 2016) at 35.

accident. The defendant's defense is based on the fact that a sudden emergency occurred when she was faced with a truck that partly encroached on her lane which caused her to partly leave the road surface and then return onto the road, causing her to swerve into the lane of the oncoming traffic and then causing the accident with the vehicle of the plaintiff.

Two mutually destructive versions

[19] The evidence demonstrates, that the two versions of the protagonists are mutually destructive. The approach then is that as set out in *National Employers' General Insurance Co Ltd v Jagers*⁴ 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 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.'

[20] In a South African case, *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*⁵, which has been quoted in this jurisdiction with approval, Nienaber JA explained the process that must be used to assess the evidence as follows:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on

⁴ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E).

⁵ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* (427/01) [2002] ZASCA 98 (6 September 2002).

- (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 a variety of subsidiary factors, not necessarily in order of importance, such as

- (i) the witness' candour and demeanour in the witness-box,
- (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 extracurial statements or actions,
- (v) the probability or improbability of particular aspects of B his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on

- (i) the opportunities he had to experience or observe the event in question and
- (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

Findings on the evidence presented

[21] The court finds that the accident took place in the lane in which the plaintiff was driving.

[22] The court finds that there were indeed two pick-up vehicles between the fuel truck and the Juke vehicle of the plaintiff although these vehicles were not seen by the defendant or any of her witnesses. The court finds further that the driver of at least one of these vehicles, Mr. de Wet, assisted the plaintiff after the accident.

[23] The court is sensitive to the fact that the witness Mr. de Wet, admitted that he is employed by Momentum Life Insurance, and the initial insurance company of the plaintiff, Quanta Insurance Limited was taken over at some stage after the accident occurred and Momentum Short term Insurance now owns the initial insurance company. The witness however explained that it is two separate entities that belong to the same mother company, Momentum. It is further also true that at the time that the claim was submitted, the insurer was Quanta Insurance Limited.

[24] Although the pick-up vehicles were driving behind the fuel truck, neither the defendant nor her witnesses observed these vehicles. The court finds that at least the defendant should have noticed these vehicles as they pulled off the road to avoid being hit by the vehicle she was driving.

[25] The court further finds that the defendant partly left the road surface and returned to her lane of travel after the fuel truck already passed. When she returned to her lane of travel she over-steered which cause her vehicle to move into the lane of the oncoming vehicles. She was at least in the lane of the oncoming traffic for a significant distance, long enough for two vehicles traveling behind the fuel truck to leave the road for them to avoid a collision. This is also supported by the evidence given by the defendant.

[26] The defendant was negligent in that she did not control her vehicle properly when she returned into her lane, which caused her vehicle to move into the lane of the oncoming traffic which then caused the collision with the plaintiff. This movement was not caused by the possible encroachment of the fuel truck in her lane as this truck already passed when she returned to her lane and over-steered which caused her to move into the lane the plaintiff was traveling in and causing her to hit the side of the vehicle of the plaintiff and ultimately being responsible for the damage so caused.

Conclusion

[27] In the result I make the following order:

1. The plaintiffs' claim succeeds and defendants must pay to the plaintiff the sum of N\$199 179.62
2. Interest at the rate of 20% per annum from the date of judgment to date of payment.
3. Cost of suit

E RAKOW

Judge

APPEARANCES:

PLAINTIFF:

M Rix
Of Delport Legal Practitioners
Windhoek

DEFENDANT:

J Hamunyela
Of Appolos Shimakeleni Lawyers
Windhoek