REPUBLIC OF NAMIBIA

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

CASE NO: HC-MD-CIV-ACT- DEL-2019-05125

In the matter between:

MIDWAY RECOVERY AND TRANSPORT CC **PLAINTIFF**

and

PAUL SIEGFRIED HEIGAUSEB **DEFENDANT**

Neutral Citation: *Midway Recovery and Transport CC v Heigauseb* (HC-MD-CIV-ACT-DEL-2019/05125 [2021] NAHCMD 349 (30 July 2021)

CORAM: SIBEYA J
Heard: **23 -24 March and 15 April 2021.**
Order: **23 July 2021**
Reasons: **30 July 2021**

Flynote: Motor vehicle accident – Negligence – Failure to keep a proper look out – What constitutes negligence – Plaintiff and defendant involved in motor vehicle collision – Plaintiff suing for damages – Defendant counterclaimed but later withdrew the counterclaim – Court reaching the conclusion after analysing the evidence in totality that the defendant's version is more probable than that of the Plaintiff and is the cause of the accident.

Summary: On 17 May 2019 at around 19h47 on Hosea Kutako Drive, Windhoek near the Pionierspark cemetery opposite Puma Service Station, two motor vehicles collided. This involved the plaintiff's motor vehicle and the defendant's motor vehicle

and both vehicles sustained damages. The plaintiff's motor vehicle was driven by its employee Johnathen Goliath while the defendant drove his motor vehicle.

In the particulars of claim, the plaintiff pleaded that the collision occurred solely out of the negligent driving of the defendant, however, the defendant countered and alleged that the collision was caused by Mr. Goliath. The defendant alleges that he applied a degree of care and took steps to avoid the collision. This version is disputed by the plaintiff.

Held – It is expected that a driver who intends to turn right or change lanes should ascertain whether there is following traffic, clearly signal his intention to so turn, constantly observe the following traffic in the rear-view mirror and refrain from turning until it is opportune and safe to do so. A driver should continuously and attentively look in his rear-view mirror to establish whether there is following traffic and the position of such traffic. One look in the rear-view mirror may not be sufficient to qualify as a proper lookout. The circumstances of a particular matter may require the driver to look repeatedly in his rear-view mirror especially where there is following traffic. A driver is under duty to warn following traffic that he intends to turn to his right. He must therefore signal his intention clearly and timeously. The driver must further not turn right just because he signalled to so turn, he must turn when it is safe, opportune and when the manoeuvre will not obstruct or endanger other traffic.

Held – An indication to turn right does not entitle one to turn right, it signifies that the driver intends to turn right when it is safe and opportune to so turn right. Mr. Goliath, by his own version, did not turn right when it was safe and opportune to do so, that is why he could not observe the defendant's following vehicle, which could not have fallen from the sky, therefore by his own version, Mr. Goliath did not keep a proper lookout and therefore drove negligently.

Held – The version of the defendant that he was faced with a sudden emergency after the Ford Ranger moved to the left side and the plaintiff's vehicle was reversing onto his lane and thus creating a sudden emergency is found to be more probable. The events created an unexpected danger. On the spur of the moment, he swerved to the left side in attempt to avoid the collision and in the shortest time and opportunity, he managed to swerve to the left side to avoid the collision. This action

by the defendant fits bolt and nut with what is expected of a reasonable person similarly placed.

ORDER

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1. The plaintiff's claim against the defendant is dismissed with costs.

2. The defendant's counter-claim was withdrawn on 24 March 2021 and the defendant was ordered to pay the plaintiff's taxed wasted costs occasioned by the counterclaim up to and including the 24th day of March 2021.

3. The matter is regarded finalised and removed from the roll.

JUDGMENT

SIBEYA J:

Introduction

[1] Driving a motor vehicle requires a driver to exercise a high degree of care, skill and to be considerate to other road users. The law demands that drivers must always keep a proper look out, failing which, such drivers could be held liable for negligence. In this matter, two motor vehicles from the same manufacturer, Toyota, collided against each other in what the parties claim to be two different lanes.

[2] The plaintiff instituted action and claimed an amount of N$46 028.83 plus interest at the rate of 20% percent per annum and costs allegedly arising from damages caused to its motor vehicle. Plaintiff claims that a collision occurred between its motor vehicle and the vehicle driven by the defendant and which collision was solely caused by the defendant. The defendant disputed the claim and filed a

counterclaim for damages in the amount of N$70 000.00 allegedly caused to his vehicle by the plaintiff.

[3] The trial commenced on 23 March 2021. On 24 March 2021, the defendant, whilst persisting in his defence against the plaintiff's claim, withdrew his counterclaim and tendered taxed wasted costs occasioned by such counterclaim. Consequently, the counterclaim was regarded finalized and the court ordered as such. The only live claim is therefore the claim in convention by the plaintiff to which this judgment is devoted to.

The parties and their representation

[4] The plaintiff is Midway Recovery and Transport CC, a close corporation duly registered in terms of the laws of the Republic of Namibia, with its principal place of business situated at No. 1, Aviation Road, Windhoek.

[5] The defendant is Paul Siegfried Heigauseb, a Namibian male residing at Erf 4483, Moria Street, Soweto, Katutura, Windhoek. Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as "the parties".

[6] The plaintiff is represented by Mr. Z. Duvenhage while the defendant is represented by Mr. B. Isaacks.

Background

[7] On 17 May 2019 at around 19h47 on Hosea Kutako Drive, Windhoek near the Pionierspark cemetery opposite Puma Service Station, a collision occurred between two Toyota motor vehicles. This involved the plaintiff's motor vehicle with registration number N 49866 W and the defendant's motor vehicle with registration number N 162-388 W and both vehicles sustained damages. The plaintiff's motor vehicle was driven by its employee, Johnathen Goliath, (hereinafter referred to as Mr. Goliath) while the defendant drove his motor vehicle.

[8] In the particulars of claim, the plaintiff pleaded that the collision occurred solely as a result of the negligent driving of the defendant, in that:

(a) He allegedly failed to keep a proper look-out by failing to take cognizance of the plaintiff's vehicle, notwithstanding plaintiff indicating his intention to change lanes;

(b) He allegedly failed to apply his breaks timeously or at all;

(c) He drove at a speed in excess of the speed limit;

(d) He failed to keep a reasonable following distance from the vehicle driving in front of him;

(e) He failed to take reasonable steps to avoid the collision.

[9] The defendant took issue with the said averments and placed the cause of the collision right at the door step of Mr. Goliath by alleging that it was Mr. Goliath's negligence that caused the collision. The defendant alleges that he applied a degree of care and took steps aimed at avoiding the collision. This version of events alleged by the defendant is disputed by the plaintiff.

Issues for determination

[10] In terms of the pre-trial order of 01 October 2020, this matter was referred to trial on the following relevant issues:

(a) The positions of the vehicles relative to each other and the road at the time of collision and the period leading to the collision;

(b) Whether any one of the two drivers was negligent?

(c) Whether both drivers were negligent and if so, the percentages of their contributions?

(d) Whether the plaintiff suffered damages in the amount of N$46,028.83?

(e) Analysis of duty of care, breach and causation.

[11] Seized with the opportunity to address the above-mentioned issues, it is now convenient to consider the evidence led by the parties.

Inspection *in loco*

[12] On the agreement of the parties, the court conducted an inspection *in loco* of the place of the collision. The following observations were made and recorded from the inspection *in loco*:

(a) That both vehicles travelled from north to south on a three-lane road;

(b) That the collision occurred across Puma Service Station;

(c) That the parties could not agree on the point of impact as according to the plaintiff, the collision occurred in the middle lane while the defendant stated that it was in the inner right lane.

Plaintiff's case

[13] In striving to prove its case, the plaintiff commenced with leading the evidence of Mr. Goliath.

[14] Mr. Goliath testified, *inter alia*, that: he is employed by the plaintiff as a driver. He testified further that on 17 May 2019, he drove a Toyota Hilux motor vehicle with registration number N 49866 W from the northern to the southern direction on Hosea Kutako Drive. This is a three-lane road and there was a vehicle that had broken down at the right-hand shoulder of the three-lane. His testimony was further that as he drove in the middle, he reduced his speed, checked if it was safe to cross over, indicated to turn into the right lane in order to assist the vehicle that was broken down. There was another vehicle, a Ford Ranger pick-up, driving directly behind him. The driver of the Ford Ranger crossed over to the left lane. While he was in the

process of crossing over to the right lane in order to proceed to the broken-down vehicle, a collision occurred. The right rear end of the plaintiff's vehicle collided with the front right corner of the defendant's vehicle.

[15] He also testified that after the collision, his vehicle came to a stand-still on the far-right side of the road on top of the island facing the northern direction, while the defendant's vehicle stopped on the furthest left side of the road.

[16] Mr. Goliath testified further that the defendant caused the collision as he failed to keep a proper lookout by failing to take cognisance of the plaintiff's vehicle, notwithstanding the plaintiff's vehicle indicating to change lanes. He further testified that the defendant failed to apply his brakes, failed to adequately control his vehicle, failed to exercise a degree of care, failed to avoid the collision and drove at an excessive speed and recklessly.[1] The negligent driving of the defendant caused the plaintiff the damages in the amount of N$46 028.83.

[17] Mr. Goliath conceded in cross-examination that considering that he was changing lanes, he had a duty to ensure that it was safe for him to so change lanes before embarking on such exercise. He further admitted to a question from Mr. Isaacks that the duty of care was more on him compared to the following vehicle as by his own version he intended to change lanes.

[18] In cross-examination, he testified that while driving from north to south, the broken-down vehicle which was on the opposite lanes for oncoming traffic had hazard lights switched on and people from that vehicle stopped him. Mr. Isaacks questioned Mr. Goliath based on the accident report which he made to a police officer, which was received into evidence and marked Exhibit "C". The said accident report reveals that Mr. Goliath reported the accident to the police as follows:

> 'On the 17th May 2019 at around 20h00 I was driving on Hosea Kutako Road towards our yard and then Mr P S Heigauseb with Toyota N 162388 W bumped me from the back while I was driving and I would like the insurance company to repair our motor vehicle.'

[1] Exhibit "A".

[19] Mr. Goliath agreed with Mr. Isaacks that he did not inform the police officer who compiled the accident report about the version that he was stopped by the people from the broken-down vehicle and that he then drove over towards the said vehicle to offer assistance. When a subsequent question was posed by Mr. Isaacks that he left out such version of driving over to assist a broken-down vehicle because it did not happen, Mr. Goliath had no comment.

[20] It was further testimony by Mr. Goliath that when he changed lanes, he intended to stop on the island between opposite traffic, despite acknowledging that vehicles are not allowed stop at the island.

[21] Mr. Goliath further agreed to a question from Mr. Isaacks that when he changed lanes, he must be more careful as he would not know the speed at which vehicles behind him would be driving. He again acknowledged that it was more his duty to be careful at changing lanes than the vehicle behind him.

[22] In further cross-examination, it was put to him that he could not conclusively say that the defendant drove at an excessive speed as he testified. He agrees to the suggestion save to say that the heavy impact on his vehicle made him conclude that the defendant's vehicle must have been driven at an excessive speed. What is apparent from his testimony is that he could not convincingly state that the defendant drove at an excessive speed.

[23] Mr. Goliath was further asked as to whether he observed the defendant's vehicle before he changed lanes, to which he stated that he did not see the defendant's vehicle as he only saw the Ford Ranger pick-up. The driver of the Ford Ranger did not testify. Mr. Goliath's testimony was further that when the Ford Ranger moved to the left lane, he did not observe the defendant's vehicle. It was only while changing lanes that he only heard the impact.

[24] He was further questioned whether his vehicle had lights on top, to which he agreed and extended his response with a statement that when he indicated to change lanes, he also switched on the lights on top of his vehicle. This version is new as it featured nowhere in his pleadings, his witness statements or his evidence in

chief. It is not surprising that this status quo tempted Mr. Isaacks to suggest that the version of switching on the lights on top of the vehicle was a fabrication.

[25] The defendant's version that Mr. Goliath was reversing from the island onto the road when the collision occurred was disputed by Mr. Goliath. Mr. Goliath however agreed that the collision occurred on the further right lane of the road. In re-examination, however, Mr Goliath testified that the collision occurred on the right side of the middle lane.

[26] Mr. Isaacks put to Mr. Goliath that the defendant swerved to the left side of the road in order to avoid the collision. To this version, Mr. Goliath first disputed and stated that the defendant never swerved to the left because had he so swerved, then the defendant's vehicle would not have collided with his vehicle's right rear end. When questioned further how he reached this conclusion without having observed the defendant's vehicle, Mr. Goliath stated that he is unable to say whether the defendant swerved his vehicle to the left or not as he did not observe the defendant's vehicle prior to the collision.

[27] The plaintiff further called Ryan van Der Heever, a sole member of the plaintiff, who testified that the plaintiff was the owner of the Toyota Hilux motor vehicle with registration number N 49866 W and produced a certificate of registration of the said vehicle.[2]

[28] The plaintiff led the evidence of its last witness, Riaan Eysele (hereinafter referred to as Mr. Eysele), an estimator and insurance assessor. He testified that in June 2019, he assessed the damages to the motor vehicle with registration number N 49866 W and formed an opinion that the vehicle was repairable. It was repaired and plaintiff suffered damages in the fair and reasonable amount of N$46 028.83[3] which included costs of repair, fees incurred for towing the damaged vehicle and excess payment made by the plaintiff.

[29] In cross-examination, Mr. Eysele testified that he arrived at the aforesaid fair and reasonable amount of repair after having regard to three quotations as the

[2] Exhibit "E": Certificate of registration for Toyota Hilux dated 27 September 2016.

[3] Exhibit "K" and Report Exhibit "M".

electronic system must have been off. The said quotations were however not produced in evidence to demonstrate the basis of the amount for damages suffered and claimed.

The defendant's case

[30] The defendant testified as the sole witness for his case. He testified that on 17 May 2019 at about 19h47, on Hosea Kutako Drive, he was driving from the northern to southern direction when a collision occurred between his motor vehicle which he drove and the plaintiff's vehicle driven by Mr. Goliath. The defendant testified further that the collision was caused by the negligent driving of Mr. Goliath who failed to take cognisance of the defendant's oncoming vehicle, failed to yield and give the defendant the right of way, failed to keep a proper lookout and failed to stop his vehicle or apply breaks.

[31] He testified that on the said date, while he was driving behind a Ford Ranger in the furthest right lane of the three-lane road he observed two vehicles on an island. He drove at a speed of about 55 to 60 kilometres per hour and the visibility was twilight. Suddenly, the Ford Ranger moved to the middle lane and at this point the vehicle of the plaintiff was reversing from the island onto the right side of the road where he was driving. The defendant testified further that he tried to avoid the collision by swerving to the left side of the road, but plaintiff's vehicle was too close. His vehicle's right front corner collided with that of the plaintiff's right rear corner on the furthest right lane. The collision resulted in his vehicle being damaged beyond economic repair.[4]

[32] In cross-examination, the defendant testified that before reaching the place where the collision occurred, there are traffic lights which he drove past while behind the Ford Ranger up to the place of the collision. When pressed by Mr. Duvenhage about the distance at which he followed the Ford Ranger before the collision, the defendant said that it was about 4 meters.

[33] In further cross-examination regarding the cars on the island, the defendant initially testified that he observed two vehicles, one of which tried to reverse from the

[4] Exhibit "N".

island and later said he saw three vehicles on the island. He further said that he remembers that the breakdown, referring to the plaintiff's vehicle, was reversing from the island when the collision occurred.

[34] Mr. Duvenhage cross examined the defendant on the content of the accident report where such accident report suggests that the defendant followed a pick-up and in front of the pick-up was a breakdown vehicle. The report further suggested that the breakdown vehicle made a U-turn. It was at this stage according to the accident report, that the defendant bumped onto the breakdown vehicle as his sight was obstructed. The correctness of this version was disputed by the defendant who persisted that what he informed the police officer who recorded the accident report was that the breakdown vehicle was reversing from the island and further that the aspect of the U-turn is probably the police officer's misunderstanding of the defendant's version.

[35] Mr Duvenhage further put to the defendant that Mr. Goliath drove in the middle lane in front of the Ford Ranger and further that the defendant followed the Ford Ranger to which the defendant disagreed. The defendant persisted that he drove in the farthest right lane and that is where the collision occurred.

Analysis of evidence

[36] It is an established principle of law that he who alleges bears the burden of proof of such allegation on a balance of probabilities to sustain his or her claim. In discussing the burden of proof and evidential burden, *Damaseb JP* in *Dannecker v Leopard Tours Car and Camping Hire CC*[5] stated the following:

'[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows*:* The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a

[5] *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.'

[37] The evidence led reveals clear disparities between the version of the plaintiff and that of the defendant. Our courts are accustomed to adjudicating matters where versions of the parties stand in contrast.

[38] In *Ndabeni v Nandu*[6] and *Life Office of Namibia v Amakali,*[7] the court quoted with approval the following passage from *SFW Group Ltd And Another v Martell Et Cie And Others,*[8] where it was stated that:

'The technique generally employed by our 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 (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; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his 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. . .'

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[6] *Ndabeni v Nandu* (I 343/2013) [2015] NAHCMD 110 (11 May 2015).

[7] *Life Office of Namibia v Amakali* (LCA78/2013) [2014] NALCMD 17 (17 April 2014).

[8] *SFW Group Ltd And Another v Martell Et Cie And Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.

[39] Guided by the aforesaid approach, I proceed to assess the credibility and reliability of the witnesses together with the probabilities of the case and the evidence as a whole.

[40] I find it commanding to commence by setting out the following facts which are common cause between the parties:

(a) That the collision between the plaintiff's vehicle driven by Mr. Goliath and the defendant's vehicle driven by the defendant occurred on 17 May 2019 at around 19h47 on Hosea Kutako Drive opposite Puma Service Station;

(b) That prior to the collision, both vehicles travelled from the northern to the southern direction on a tarred road with three-lanes;

(c) That there was a Ford Ranger that drove in front of the defendant's vehicle prior to the collision;

(d) That there is an elevated island separating the flow of traffic between oncoming and ongoing traffic;

(e) That the plaintiff's vehicle sustained damages on the right rear corner while the defendant's vehicle sustained damages on the front right corner as a result of the collision.

[41] In the analysis of the evidence in order to determine as to who is to blame for the collision, I will take into consideration the evidence in totality with special focus on the material and relevant part of the evidence.

[42] Mr. Duvenhage submitted that at the time of the accident, the visibility was clear and the stretch of the road where the collision occurred was straight. While there appears to be less contestation on the visibility, it should be stated that the defendant who testified about the visibility said that it was twilight. There was however no suggestion that the visibility was not clear. I therefore accept that the visibility was clear.

[43] Mr. Duvehange further submitted that by virtue of the fact that the right front corner of the defendant's vehicle collided with the right rear corner of the plaintiff's vehicle, it is indicative that the defendant bumped the plaintiff's vehicle from behind. He further submitted that as a result of bumping the vehicle from behind, the defendant negligently caused the collision unless if the defendant demonstrates that he was not negligent.

[44] It is settled law that where there is a rear-end collision, the driver who collides with the rear of a vehicle in front of him is *prima facie* negligent unless he can show that he was not negligent.[9] Therefore, in the absence of evidence to the contrary, it must follow that such negligence was the cause of the collision.[10]

[45] The above principle in my view finds adequate application to a collision of vehicles where it is apparent that the vehicle following the other directly collided with the rear of the vehicle in front. This can be a situation where the front part of a vehicle directly collides against the rear of the vehicle followed. This is contrary to the current matter where the collision occurred at the right rear corner of the plaintiff's vehicle and the right front corner of the defendant's vehicle. I therefore hold the view that the above principle does not find application to the present matter.

[46] Having decided that the aforesaid principle is foreign to the facts of this matter, it follows that the evidence must be assessed in order to determine the cause of the collision. The plaintiff bears the onus to prove that Mr Goliath did not drive negligently but that it was the defendant who was negligent. In the analyses of the evidence, the court may draw inferences and balance probabilities. The approach to probabilities was eloquently stated as follows in *Ocean Accident and Guarantee Corporation LTD v Koch*:[11]

'As to the balancing of probabilities, I agree with the remarks of Selke, J in Govan v Skidmore, 1952 (1) SA 732 (N) at p.734, namely: "… in finding facts or making inferences in

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[9] *H B Kloppers: The Law of Collision in South Africa* 7th ed p.78. *Maletzky v Haindongo* (HC-MD-CIV-ACT-CON-DEL-2018/02063) [2020] NAHCMD 506 (O5 November 2020) para 13.

[10] *Union and South West Africa Insurance Co Ltd v Bezuidenhout* 1982 (3) SA 957 (A) at 966 A-B; *Gerber v Road Accident Fund* (11/3022) [2015] ZAGPJHC 155 (26 June 2015).

[11] *Ocean Accident and Guarantee Corporation LTD v Koch* 1963 (4) SA 147 (A) at 159B-D.

a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed, para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one". I need hardly add that "plausible" is not here used in its bad sense of "specious", but in the connotation which is conveyed by words such as acceptable, credible, suitable. (Oxford Dictionary, and Webster's International Dictionary)'

[47] Mr Goliath testified that while driving in the middle of the three lanes, he indicated to turn right with intention to cross the inner right lane in order to stop on the island. Mr Duvenhage submitted that the defendant followed the Ford Ranger too closely at a distance of about four meters that he did not keep a reasonably safe distance resulting in failure to keep a proper lookout.

[48] There is no exact following distance in meters authorised for vehicles. The closest that our jurisdiction comes to clarify the following distance is provided for in s 342(1)(b) of the Road Traffic and Transport Regulations, 2001 which provides that:

'A person driving or having a vehicle on a pubic road may not follow another vehicle more closely than is reasonable and prudent having regard to the speed of the other vehicle and the traffic on and the condition of the roadway, or more closely than is prescribed in these regulations'

[49] When the legal representatives of the parties were asked to state the permitted following distance between vehicles, they only submitted that it must be a reasonable distance. Mr. Duvenhage extended his response by referring to the internationally recognised distance of 2 – 3 seconds. Although no evidence was led on the said 2 – 3 seconds rule, a brief research uncovered that the 2 – 3 seconds rule is internationally applied as a guideline for safe following distance with no binding force. While taking cognisance of the 2 – 3 seconds rule, it should be remembered that in our jurisdiction, what matters is keeping a reasonably safe distance.

[50] It can be appreciated why the Legislature deliberately did not specify the safe and reasonable vehicle following distance in meters. This is attributed to the fact that a safe following distance may depend on the speed of the vehicles, the weight of vehicles, conditions of the road and the visibility. A distance of 4 meters, as a matter of example, may be a reasonable following distance to one but not to the other. One

vehicle may react swiftly with braking and manoeuvring to avoid a collision compared to other. Equally, one driver may promptly react and control a vehicle within a shorter distance than the other, hence restricting the vehicle following distance to meters would not cater for all the said circumstances and more.

[51] The defendant testified that he followed the Ford Ranger in the right lane at a distance of about 4 meters and driving at a speed of about 55 to 60 kilometres per hour. Determining whether this was a reasonably safe following distance is a very difficult question. This question in my view should be addressed in consideration of the surrounding circumstances of the events leading to the collision.

[52] The evidence of Mr. Goliath offers no assistance on this subject. This is because he testified that he never saw the vehicle of the defendant prior to the collision. When it was put to him in cross-examination by Mr. Isaacks that the defendant immediately prior to the collision swerved his vehicle to the left side in attempt to avoid the collision, Mr Goliath disputed such assertion and stated that had the defendant swerved to the left then defendant's vehicle would not have collided with the right side of his vehicle. When pressed further, he conceded that he has no knowledge about whether the defendant swerved his vehicle or not or any position of the defendant's vehicle to that matter prior to the collision as he did not see it but only felt the impact. It puzzles one's mind why Mr. Goliath would dispute what he did not observe, only to change his mind and agree after follow up questions.

[53] It is reasonably possible that if the plaintiff's vehicle was indeed reversing from the island onto the right lane where the defendant claims to have been driving then by swerving to the left side, the front right corner of the defendant's vehicle could collide with the rear right corner of the plaintiff's vehicle. Such unfolding of events is not an impossibility.

[54] At the commencement of the trial, the defendant sought to amend his witness statement with the inclusion of the version that the collision occurred as Mr. Goliath was reversing from the island onto the right lane where the defendant drove. Although the application to amend the defendant's witness statement was belatedly made, the plaintiff raised no objection thereto, resultantly the witness statement was amended accordingly with the plaintiff's consent. The version of the reversing vehicle

by and large constituted the evidence of the defendant to which he stuck throughout his testimony.

[55] Mr. Duvenhage submitted that the defendant proffered another version that the collision occurred when Mr. Goliath attempted to make a U-turn on the highway. The alleged version of the defendant that Mr. Goliath made a U-turn which caused the collision features nowhere in the defendant's initial witness statement or the amended witness statement. The said version only appears in the accident report allegedly made by the defendant which report is separate from that made by Mr. Goliath.

[56] The defendant agreed to a question by Mr. Duvenhage that he instructed the police officer to complete the accident report and he signed it in confirmation of its content. When the version that the plaintiff's vehicle made a U-turn and that collision was put to him as the event that he related to the police officer, the defendant disputed and said that what he explained to the police officer was that the plaintiff's vehicle was reversing from the island and the aspect of the U-turn was probably how the police officer just put it. He further testified that he explained to the police officer that he followed the Ford Ranger in front of him and he could not see ahead of that vehicle as it obstructed his view and only saw the plaintiff's vehicle when the Ford Ranger moved to the middle lane on the left side of the road.

[57] Notwithstanding the fact that the defendant disputed the content of the accident report, particularly the version of the U-turn and that the Ford Ranger gave the right of way to the plaintiff's vehicle, the plaintiff made no attempt to have the said accident report received into evidence or attempt to call the police officer who authored the accident report to testify. This approach was astounding in the face of the fact that the defendant disputed the version of events recorded in the accident report.

[58] What credence could be afforded to the content of the accident report in light of the said disputes raised? I hold the view that if the plaintiff intended to place reliance on the content of the accident report considering the disputes raised, it should have applied to have the said report received into evidence or at the very least call the author of the report to come and testify about what he was informed by

the defendant and what he recorded. The failure by the plaintiff to apply for the accident report to be received into evidence or call the author of the report to testify renders the disputed contents of such report a non-starter. It also follows that nothing turns on the allegations of the U-turn only contained in the said accident report.

[59] I must point out that the parties locked horns on the position of the point of impact with Mr. Goliath testifying that it was at the far-right side of the middle lane while the defendant insisted that it was in farthest right lane. Notwithstanding such disparity, the version that remains of the defendant is that he observed the plaintiff's vehicle reversing from the island onto his lane (the farthest right lane) and is where the collision occurred. If this version is accepted as the more probable one, then in my view it cannot be considered that he drove unreasonably close to the Ford Ranger to the extent that he did not keep a proper lookout. This finds support in the evidence that the defendant followed the Ford Ranger until such time that the Ford Ranger suddenly moved to the middle lane and the plaintiff's vehicle was reversing from the island onto the defendant's lane, whereby the defendant swerved to the left side in order to avoid the collision without success.

[60] Mr. Goliath's testimony that he never saw the defendant's vehicle prior to the collision begs for an address. It was testified that the stretch of the road prior to the collision is straight and the visibility at the time of the collision was clear. Per his testimony Mr. Goliath, while driving in the middle lane, reduced his speed, indicated to turn right destined for the island where he intended to stop.

[61] Ueitele J in *Von Wielligh v Shaumbwako*[12] said the following in para 28-29 regarding the duties of a driver who intends to move away from his path and turn either left or right:

'Generally the law places a stringent duty on motor vehicles that turn out of their path of travel, whether to the left or to the right, and a less onerous duty upon the following motorist who wishes to overtake.[13] The duty of the motorist ahead who wants to make a turn has been the subject of many decisions of the courts in South Africa, not all of which have

[12] (I 2499/2014) [2015] NAHCMD 168 (22 July 2015) para 27-28; Joseph Sheehama v Josef Stallin Nehunga, Supreme Court case No. SA 13/2019 delivered on 07 April 2021 para 29.

[13] *Cooper W E Motor Law, Volume* 2 at 87-9.

been harmonious.[14] Despite the discord in the decisions the courts have formulated the test which may be applied to determine whether a driver of a motor vehicle that turns out of his or her path of travel has complied with the obligations generally applicable to him or her. In the case of *S v Olivier*[15] Miller J (as he then was) formulated the test as follows:

> "…the inquiry is: was it opportune and safe to attempt the turn at that particular moment and in those particular circumstances? Whether it was opportune and safe, or not, will depend upon whether a *diligens paterfamilias* in the position of the driver at that time and in the circumstances then prevailing would have regarded it as safe. (Cf. *Kruger v Coetzee,* 1966 (2) SA 428 (AD) at p. 430). In that inquiry, assumptions which may have been made by the driver and the extent to which the driver kept under observation other vehicles, are together with other incidents relevant to the occasion, factors to be taken very much into account, but no one of these factors will necessarily or even probably provide the answer to the ultimate question."

[28] The test laid down by Miller, J in the *Olivier's* case, was again applied in the case of *Boots Co (Pty) Ltd v Somerset West Municipality*[16] where Comrie, AJ said the test is:

> "…whether it was opportune and safe to attempt the turn at that particular moment and in those particular circumstances and whether the *diligens paterfamilias* in the position of the driver at that time and in those circumstances would have regarded it as safe."'

[62] It is expected that a driver who intends to turn right or change lanes should ascertain whether there is following traffic, clearly signal his intention to so turn, constantly observe the following traffic in the rear-view mirror and refrain from turning until it is opportune and safe to do so. A driver should continuously and attentively look in his rear-view mirror to establish whether there is following traffic and the position of such traffic. One look in the rear-view mirror may not be sufficient to qualify as a proper lookout. The circumstances of a particular matter may require the

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[14] *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A), *R v Miller* 1957 (3) SA 44 (T); *Sierborger v SA Railways and Harbours* 1961 (1) SA 498 (A); *R v Cronhelm* 1932 TPD 86; *Johannesburg City Council v Public Utility Transport Corporation Ltd* 1963 (3) SA 157 (W), *R v Fratees* 1932 CPD 308; *Hobbs v Guthrie* 1938 CPD 410; *Davidson v Cape Town City Council* 1965 (2) SA 559 (C) and *Kruger v Coetzee 1966* (2) SA 428 (A).

[15] *S v Olivier* 1969 (4) SA 78 (N).

[16] *Boots Co (Pty) Ltd v Somerset West Municipality* 1990 (3) SA 216 (C).

driver to look repeatedly in his rear-view mirror especially where there is following traffic. A driver is under duty to warn following traffic that he intends to turn to his right. He must therefore signal his intention clearly and timeously. The driver must further not turn right just because he signalled to so turn, he must turn when it is safe, opportune and when the manoeuvre will not obstruct or endanger other traffic. His mere signal to turn is an indication that he intends to turn at an opportune moment. He must satisfy himself that the following traffic has seen and is reacting to his signal that is why he must continuously observe the following vehicles in his rear-view mirror.[17]

[63] From the proven facts, I find that Mr. Goliath did not continuously observe the following vehicles. To his credit, he could probably have looked once in his mirror and saw the Ford Ranger but he surely did not continuously observe the following vehicle, hence he could not see the defendant's vehicle prior to the collision. Mr. Goliath acknowledged that as the driver who intended to change lanes, he had more of a duty of care at changing lanes than the following traffic. From his testimony, it is apparent that he indicated to turn right while in the middle lane and then began to turn to the right. This cannot be equated to a driver who makes a turn to the right when it is opportune and safe to do so. Quite far from it.

[64] It is settled law that an indication to turn right does not entitle one to turn right, it signifies that the driver intends to turn right when it is safe and opportune to so turn right. I hold the view that Mr. Goliath, by his own version, did not turn right when it was safe and opportune to do so, that is why he could not observe the defendant's following vehicle, which could not have fallen from the sky. By his own version, I find that Mr. Goliath did not keep a proper lookout and therefore drove negligently.

[65] I further need to determine whether the defendant drove negligently as well or not or contributed to the collision. The proven facts that the right rear corner of the plaintiff's vehicle collided with the right front corner of the defendant's vehicle demonstrates that at the time of the collision, the said vehicles were not travelling in the same direction. The evidence further established that the defendant swerved his vehicle to the left side of the road in attempt to avoid the collision with the plaintiff's

[17] See *Bata Shoe Co v Moss* 1977 (4) SA 16 (W); See also: *Sebokolodi v Road Accident Fund* (24047/11) [2014] ZAGPPHC 745 (26 September 2014) para 20

vehicle which was reversing. This manoeuvre, according to the defendant, was not successful resulting in the collision at the corners of the vehicles. I further find that the resting places that the two vehicles found themselves, the plaintiff's vehicle on the far-right side on the island and the defendant's vehicle on the far-left side, supports the version of the defendant. This is so because the defendant testified that he was already swerving to the left when the collision occurred and the plaintiff was reversing from the island.

[66] I find the version of the defendant more probable considering the parts of the vehicles that collided with each other. It is highly probable that as Mr. Goliath was reversing onto the road and the defendant swerved to the left side to avoid the collision, the accident occurred with the closest part of the defendant's vehicle to that of the plaintiff being the right front corner colliding against the right rear corner of the plaintiff's vehicle. The fact that the defendant did not manage to avoid the collision or did not apply brakes under the circumstances would not necessarily be indicative of not keeping a proper lookout or unreasonable following distance.

[67] A principle that appears to mature with age like wine was set out in *R v Cawood*[18] that:

> 'A man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger.'

[68] A driver is entitled to assume that those who are travelling in particular lanes or in the opposite direction will continue in their path and will not suddenly and inopportunely cross lanes or cross to opposite traffic.[19]

[69] I find the version of the defendant that he was faced with a sudden emergency after the Ford Ranger moved to the left side and the plaintiff's vehicle was reversing onto his lane and thus creating a sudden emergency more probable. The defendant was suddenly confronted with the Ford Ranger moving to the left side and the

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[18] 1944 GWL 50 at 54.

[19] *Rustenburg v Otto*, 1974 (2) SA 268 (C); *Old Mutual Fire and General Insurance Co of Rhodesia (PVT) LTD and Others v Britz and Another* 1976 (2) SA 650 (RAD).

plaintiff's vehicle reversing onto the road creating an unexpected danger. On the spur of the moment, he swerved to the left side in attempt to avoid the collision. I find that in the shortest time and opportunity, he managed to swerve to the left side in order to avoid the collision. I find that the said action of the defendant fits bolt and nut with what is expected of a reasonable person similarly placed.

[70] In the premises, I reject the plaintiff's version of the events leading to the collision that Mr. Goalith was still in the middle lane turning to the right lane when the collision occurred. I accept the defendant's version as it is more probable than that of the plaintiff who was reversing from the island onto the road at the time of the collision.

[71] In view of the findings made and conclusions reached, I find it academic to venture into the debate on whether or not the plaintiff succeeded to prove the quantum. No further mention of quantum is therefore made.

Conclusion

[72] I find that Mr. Goliath failed to keep a proper lookout when he reversed onto the road without having regard to the other road users. I further find that the sudden change of the lane by the Ford Ranger from the right lane to the middle lane on the left and the reversing of the plaintiff's vehicle created an emergency in which the defendant attempted to avoid the collision by swerving to the left side.

[73] In the premises of the above conclusions and findings, this court accepts the version of the defendant to be probably true and rejects that of the plaintiff as being highly improbable and unreliable. In the premises, I find that the collision was caused solely by the negligence of Mr. Goliath. I further find that no contribution of negligence can be attributed to the defendant for the collision that occurred.

Costs

[74] No compelling reasons were placed before this court why costs should not follow the event. The court could further not find persuasive reasons to deviate from

the said established principle on costs. Consequently, the defendant is awarded costs.

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

1. The plaintiff's claim against the defendant is dismissed with costs.

2. The defendant's counter-claim was withdrawn on 24 March 2021 and the defendant was ordered to pay the plaintiff's taxed wasted costs occasioned by the counterclaim up to and including the 24th day of March 2021.

3. The matter is regarded finalised and removed from the roll.

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O S SIBEYA

JUDGE

APPEARANCES:

PLAINTIFF:	Z Duvenhage Fisher, Quarmby & Pfeifer Windhoek
DEFENDANT:	B Isaacks Of Isaacks & Associates Windhoek