

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2021/04111

In the matter between:

BALU FREDERIKU PETRUS

PLAINTIFF

and

MUYAMBANGO SILEZE

DEFENDANT

Neutral Citation: *Petrus v Sileze* (HC-MD-CIV-ACT-DEL-2021/04111)
[2023] NAHCMD 305 (8 June 2023)

Coram: MAASDORP AJ

Heard: 17-21 April 2022

Delivered: 8 June 2023

Flynote: Law of delict – Motor vehicle collision – Damages – Mutually destructive versions – Onus on the Plaintiff to prove on a balance of probabilities that his version is to be believed – demeanour of witnesses and credibility of their versions not to be considered in isolation but against all undisputed facts and inferences from real evidence.

Summary: The plaintiff claimed N\$ 271 265.53 for damages to his vehicle caused by a motor vehicle collision in December 2020. The collision claimed the lives of two innocent passengers and left several others seriously injured.

The plaintiff essentially alleged that the defendant had been the sole cause of the collision in that he had failed to keep a proper lookout before executing a U-turn to his right, across the path of oncoming traffic. The defendant denied that he had been negligent in any of the respects alleged, or at all. He pleaded that the sole cause of the collision had been the negligent driving of the plaintiff. He claimed the plaintiff had been driving at a high speed and had overtaken the defendant's vehicle on the right side of the road before returning to the left lane without maintaining a reasonable distance.

Held that: the assessment and comparison of the demeanour of the witnesses favoured the plaintiff, who had kept to his version during trial and answered questions during cross examination carefully and convincingly, whereas defendant and his witnesses had changed material parts of their witness statements when testifying. However, on a comprehensive assessment of the oral evidence against the documentary and real evidence, it was found that the plaintiff, who bore the onus, failed to prove that his version about the cause of the accident is more probably true and that of the defendant is false.

Held *further that*: the inferences drawn from the location of the plaintiff's vehicle after the collision and skid marks depicted on the photo plan indicate that the plaintiff's motor vehicle, while travelling from Tsintsabis to Tsumeb, crossed over from the left lane into the right lane; while in right lane, the plaintiff braked hard and went off the shoulder of the road onto the gravel while still braking, and then returned into the right lane. Close to the broken white line in the centre of the road, where the skid marks stopped, the vehicles collided. The plaintiff's vehicle, having travelled left immediately before the crash, flipped over to its left, and ended up on the left side of the

road. These inferences are irreconcilable with the plaintiff's version of the accident.

ORDER

1. The plaintiff's claim is dismissed.
2. The plaintiff shall pay the defendant's costs of suit, which do not include costs of the defendant's counterclaim that was abandoned on Wednesday, 19 April 2023.
3. The matter is finalised and removed from the roll.

JUDGMENT

MAASDORP AJ:

Introduction

[1] Two vehicles collided on a Sunday morning. Both cars were damaged. Both owners sued. Only the plaintiff's claim remains as the defendant abandoned his counterclaim. Quantum of damages is not in dispute. The sole question is whether the damage to the plaintiff's vehicle was occasioned by the defendant's negligence as pleaded in the plaintiff's particulars of claim. In answering this question, the court was faced with this predicament: what should it do, when the demeanour of a witness and the credibility of his version if weighed against the majority of the undisputed facts point in one direction, while seemingly indisputable contrary inferences from the real evidence point in another.

[2] Fortunately the authorities contain ample guidance. The relevant parts of the guidance can be summarised as follows: be careful of relying on demeanour as it can be highly deceptive;¹ avoid piecemeal assessment of the credibility of witnesses;² and, trust the inferences from the real evidence as long as the inferences are properly drawn from objective facts, accord with the general probabilities, and the inferences are the more natural among the conceivable conclusions.³

Undisputed factual background

[3] It was around 10h45 on Sunday morning, 13 December 2020, when a fatal motor vehicle collision on the national road between Tsumeb and Tsintsabis claimed the lives of two innocent passengers and left several others seriously injured. There will soon be a criminal trial dealing with the question of criminal responsibility. This action is not concerned with criminal responsibility. It is only about liability for the damages sustained to the plaintiff's vehicle.

[4] The majority of the material facts are not in dispute. The plaintiff and the defendant were the drivers and owners of the vehicles involved in the collision. The plaintiff drove a Toyota Hilux pickup and the defendant a Nissan Station Wagon. There were four passengers in the Toyota and three in the Nissan. Both vehicles were travelling from Tsintsabis to Tsumeb, thus north to south. They enjoyed clear skies and excellent visibility. The Nissan was the

¹ *The Motor Vehicle Accident Fund of Namibia v Lukatezi Lennox Kulobone*, unreported Supreme Court judgment delivered on 5 February 2009, par 51.

² *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* - 2003 (1) SA 11 (SCA) par 5.

³ WE Cooper, *Delictual Liability in Motor Law*, Juta, 1996, 476 – 477; *Per* Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 ALL ER 722 at 733M, approved in Namibia in, amongst others, *Bourgwells Ltd (Owners of MFV Ofelia) v Shepalov and Others* - 1998 NR 307 (HC) at 312C-G; *Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) par 30, quoting with approval from *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A – D.

lead vehicle. For some reason, the vehicles then collided. The cause of the collision is disputed.

[5] It is not disputed that the vehicles collided close to the centre of the road. The impact on the vehicles was on the front right fender and headlight of the Nissan, and the front left headlight of the Toyota. Following the impact, the Toyota overturned and flipped over several times before ending up on the far-left side, off the road surface and on the gravel. Thus, on the left of the south bound lane in which both vehicles had been traveling before the collision. The Nissan did not overturn. Where exactly it ended up is unclear - next to a tree on the right side of the road, says the plaintiff; next to the right side of road, says the defendant. Nothing turns on this slight disagreement. It was agreed that the Nissan ended up in, or on the gravel next to the lane for cars travelling from Tsumeb to Tsintsabis.

[6] I turn to the disputed versions of the cause of the collision, starting with the plaintiff who was the sole witness in his case.

Disputed facts: the plaintiff's case

[7] The plaintiff testified that he had been transporting elderly people from a funeral to another funeral. He had been driving straight, he said, at the usual speed limit of 120 km/h when he saw the Nissan turn off to the left side of the road. He slowed down. Suddenly the Nissan made a U-turn right in front of his Toyota. The plaintiff tried to avoid colliding into the Nissan by swerving to his right but could not avoid the collision because the Nissan had been too close. The Nissan was virtually perpendicular to the road, almost facing north, when the vehicles collided. Then the Toyota flipped and landed on the gravel next to the south bound lane. The plaintiff exited his vehicle once he could get out. After checking on his passengers and noticing that one had passed away, he went over to the Nissan. According to the plaintiff, he was shocked by what he saw once he reached the Nissan.

[8] When he reached the Nissan, the plaintiff testified, he saw that the defendant was clearly drunk or under the influence of alcohol. He inferred this from the beer bottles he saw in the Nissan, from the smell of alcohol on the defendant's breath when he spoke to the defendant, and from his later observation of the defendant acting like a drunk person by mumbling incoherently, swearing, and walking barefoot on the tar road. The plaintiff testified that he had asked the police officers who came onto the scene to do a breathalyser test, but the police officers simply did not respond to him. The police officers ultimately did not test anyone for alcohol.

[9] It is common cause that the defendant had been a police officer at the time of the collision. He was taken away from the scene not by the first responding police officers but by other police officers who came to the scene a little after the first responders. He was first taken to the police station in Tsumeb, and later to the station at Oshivelo by members of the Police's Internal Investigation Division. In Oshivelo, he was placed under arrest and charged with culpable homicide and reckless and negligent driving. He was also suspended from his job and eventually resigned. He is still facing those charges. On the other hand, the plaintiff was not arrested at the scene or charged with any criminal offence. At face value, these facts suggest something was amiss with the defendant's contribution to the collision. Why would he have been arrested and charged and suspended from the Police Force, without any probable cause? The most natural inference appears to be that the defendant had appeared visibly under the influence of alcohol, as the plaintiff testified. It is not necessary for the court to take this any further because the plaintiff did not plead that the defendant's alleged intoxication had caused or contributed to the accident. In any event, making a definitive finding on this issue would not make a difference to the outcome of this civil action, for reasons that will be discussed shortly.

Disputed facts: the defendant's case

[10] Moving to the defendant's version on the cause of the collision. His evidence, supported by one witness who claimed to have been a passenger

in the Nissan on that fateful Sunday, is diametrically opposite to the plaintiff's version. It comes down to this. The defendant and three passengers were traveling slowly from Tsintsabis to Tsumeb at about 70 to 80km/h. They travelled slowly because they were low on fuel. They noticed the Toyota approaching at a high speed. Both witnesses claimed in their witness statements that the Toyota had been "over-speeding". However, during oral evidence they accepted that they could not confirm whether the Toyota had in fact been "over-speeding". They both testified in chief that they had seen the Toyota trying to overtake the Nissan. Under cross-examination, they said they did not really see the Toyota overtake the Nissan.

[11] The defendant testified that he saw the Toyota approaching in his rear-view mirror and just held on to his steering wheel. He did not pay too much attention to the Toyota. His passenger had sat in the backseat of the Nissan, diagonally opposite the driver, thus in the rear left seat. The witness said he saw the Toyota approaching from the rear, saw the Toyota put on its indicator to overtake, and then did not pay much attention. Until he heard a loud bang, when the Toyota collided into the Nissan and flipped over in front of the Nissan. Both witnesses denied drinking in the Nissan on that Sunday. The defendant denied that he had been under the influence of alcohol. And both denied that there were beer bottles in the Nissan.

The issue: whose negligence caused the collision?

[12] The court must determine who is responsible for the collision. More specifically, did the plaintiff prove that his version of the cause of the collision as pleaded in his particulars of claim is more plausible than the defendant's version?

The law

[13] The evidence reveals mutually destructive versions. Our courts have often approved and applied the trite test to resolve disputes of this nature, as

set out in the following passage from *SFW Group Ltd And Another v Martell Et Cie And Others*⁴:

‘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. . .’

[14] With respect to demeanour of witnesses and the process of finding facts, I could not improve on the following extract from a paper presented by Justice Mackenna in 1973, as approved by the Supreme Court in *Motor Vehicle Accident Fund v Kulobone*,⁵ and therefore quote it in full:

“I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness’s demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a

⁴*SFW Group Ltd And Another v Martell Et Cie And Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.

⁵ *The Motor Vehicle Accident Fund of Namibia v Lukatezi Lennox Kulobone*, unreported Supreme Court judgment delivered on 5 February 2009, par 51

natural timidity? For my part I rely on these considerations as little as I can help.

This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's".

[15] In the analysis of the evidence, a court may draw inferences and balance probabilities. The proper approach was stated as follows in *Ocean Accident and Guarantee Corporation LTD v Koch*:⁶

'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 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)'

[16] Turning finally to the nature and purpose of real evidence. Justice Hoff neatly summarised the core principles on real evidence in *S v Malumo* ⁷:

⁶ *Ocean Accident and Guarantee Corporation LTD v Koch* 1963 (4) SA 147 (A) at 159B-D; *Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) par 30

⁷ *S v Malumo and Others* 2006 (2) NR 629 (HC) paras 36 to 39

[35] Real evidence was described as the term used to cover the production of material objects for inspection by the court.

[36] 'Real evidence may include any thing, person or place which is observed by the court in order that a conclusion may be drawn as to any fact in issue.

Physical objects normally used as real evidence include, inter alia, the weapon used, the appearance of persons in order to determine their parental origins, tape recordings, fingerprints, photographs, films, video recordings, handwriting, blood tests and things seen at an inspection in loco.

[37] A court is entitled to look at the material produced as real evidence and may rely on its own perceptions and may draw certain inferences. A witness would normally explain or clarify the material produced as real evidence.

[38] ...

[39] Photographs are frequently received as real evidence in those instances where the material objects are difficult to produce in court, like heavy objects, damaged vehicles, or to enable witnesses to identify persons. Courts have in the past received as real evidence photographs of material other than 'articles', eg of places and persons.'

(The authorities cited by the court in support of its conclusions have been omitted.)

[17] And this is stated in the authoritative work of WE Cooper ⁸ regarding the value of real evidence:

“Bearing in mind the difficulty even the honest witness has of estimating speed, distance and relative positions with reasonable accuracy, the courts rightly attach great importance to brake marks, skid marks and other ‘substantially unchallengeable’ real evidence; the absence of such evidence is often a matter of judicial regret.”

[18] Guided by these authorities, I proceed to analyze the evidence and make the necessary findings of fact.

Analysis of evidence and findings of fact

⁸ WE Cooper, *Delictual Liability in Motor Law*, Juta, 1996, 476 – 477

[19] As indicated earlier, the plaintiff was the sole witness in his case. He substantiated his case with documentary evidence. During his evidence in chief, he relied on various photographs showing the damages to the two vehicles, and other documents to establish the quantum of the damage to his vehicle. Quantum had been in dispute until the parties agreed on an amount midway through the trial and the defendant abandoned his counterclaim. The one document that the plaintiff produced during his evidence in chief, which remained potentially relevant to establishing the cause of the collision, was the accident report compiled on the date of the accident.

[20] The defendant had discovered the accident report. The description of the cause of the accident as recorded in the accident report matched the plaintiff's evidence. This correlation is ultimately of limited value because all the information in the accident report was supplied only by the plaintiff, and apparently by some of the passengers in the vehicles, to the investigating officer at the Tsumeb Police Station. The passengers and investigating officer were not called to testify in this action.

[21] The defendant testified that he had been taken to the Tsumeb Police Station to complete the accident report. Instead of completing the accident report, he ended up being taken to the Oshivelo Police Station where he was eventually charged with culpable homicide and reckless and negligent driving. Both parties testified that the defendant had not provided his version to the police officer who compiled the report. This accords with the description of the accident on page 5 of the report that starts with 'According to the driver of [and then lists the plaintiff's vehicle registration] and to both passenger (sic) in all M/V...'

[22] A puzzling feature of the accident report is that it records the details of eight passengers. The oral evidence was that there were only seven passengers. The author of the report was not called to testify. None of the passengers named in the report testified. The only non – driver who did testify in court, testified that he had been a passenger. Yet there is no reference to this witness in the report. He was not confronted in cross

examination with the allegation that he hadn't been a passenger. This was also not argued. In my view, these facts and omissions meant that the report on which the plaintiff relied could not contribute to the resolution of the dispute.

[23] Instead, the only document that contributed to the resolution of the dispute was also produced into evidence by the plaintiff. This document was handed up as Exhibit 23. There are two photographs on Exhibit 23, labelled 'Photo 4' and 'Photo 5'. This document was part of the documents discovered by the defendant. And it was common cause that the photographs were taken by the Crime Scene investigators at the accident scene.

[24] Exhibit 23 was only produced on behalf of the plaintiff during the cross-examination of the defendant. The plaintiff only relied on Photo 5. Photo 5 shows the road where the collision occurred, skid marks on the road, and a vehicle standing next to the road. The plaintiff's intention with the production of Photo 5 was to demonstrate that the real evidence represented by Photo 5, being the skid marks on the road and the location of the Toyota next to the road after the collision, supported the plaintiff's claim. Only the plaintiff had testified that he had applied his brakes, or at least had tried to.

[25] The defendant admitted the location of the Toyota on Photo 5. At first, he also admitted that the brake marks must have been from the Toyota, but later tried to backtrack by claiming that he had not been present when the photograph was taken so could not admit that the brake marks were made by the plaintiff's vehicle. In response to the court's question for clarity, the defendant accepted the photographs were taken at the accident scene by Police Crime Scene investigators. Considering that one could almost draw a straight line from the direction of the brake marks to the position of the Toyota, and considering that the photograph was indisputably taken at the accident scene, I have little doubt that the brake marks were made by the plaintiff's vehicle.

[26] At the end of the presentation of the oral evidence, my assessment and comparison of the demeanour of the witnesses and cogency of their evidence

while observing them in real time, favoured the plaintiff. He appeared forthright, answered all questions clearly and convincingly, and explained apparent anomalies when confronted in cross-examination. He kept to his version as set out in his pleadings and witness statement, and this version was largely undisturbed by the cross-examination. He was asked repeatedly to explain material parts of his testimony on exactly how the accident happened and his answers remained consistent. His evidence also lined up with the documentary evidence in the form of the accident report.

[27] In contrast, the defendant and his witness changed material parts of their very short written witness statements when they testified. Additionally, their evidence about the defendant's alleged intoxication or at least appearance of intoxication did not align with the inferences from the undisputed facts. If the case had to be decided only based on my estimation of the witnesses in real time, the decision would likely have been that the plaintiff's version is more probable than the defendant's. However, this likely outcome could not follow after a careful consideration of the parties' conflicting versions about the cause of the collision against the inferences arising from the real evidence, in others words the location of the Toyota and the skid marks on the road as represented by Photo 5.

[28] In summary, these are the two conflicting versions of the cause of the collision, as taken from the pleadings. According to the plaintiff, the defendant executed a U-turn across the path of traffic having the right of way, at an inopportune moment, without first ensuring that it was clear and safe to execute a U-turn. However, according to the defendant, the plaintiff caused the collision by overtaking the defendant while driving too fast and failing to maintain a reasonable and safe distance before returning to the left lane.

[29] On my assessment, the plaintiff failed to prove, as he was required, that his version is more probable and thus true and that of the defendant is false.

[30] The first reason for this finding is the location of the Toyota after the collision. It is common cause that the point of impact was on the Nissan's right front headlight, and the Toyota's left front headlight. Following the impact, the Toyota flipped over to its left, and ended up on the gravel next to left lane in which both cars had been travelling before the collision. On the plaintiff's version, he had swerved to his right to avoid colliding into the defendant, but he could not avoid it because the Nissan was already "too close". Thus, according to the plaintiff, the Toyota had been moving *right* at the time of impact. My rudimentary knowledge of the laws of physics suggests that the Toyota would then most likely have flipped to the right, in the direction of its momentum, and ended up on the right side of the road. If the plaintiff's version is to be accepted, the location of the Toyota after the collision could not have been on the left side of the road. But it is an objective fact that this is where the Toyota ended up – on the left.

[31] The second reason for the finding that the defendant's version is more probable than the plaintiff's version, is the inference that follows from the skid marks depicted on Photo 5. The skid marks start in the right lane. At the start of the marks, the vehicle that made those marks was approximately halfway on the tar road and halfway on the gravel next to the road. The direction of the marks show that the vehicle was trying to move back onto the tar road. The marks then show that the vehicle managed to return to the tar road, into the right lane. Then the marks come to a stop virtually on the broken white line in the centre of the road. And then, across the road from where the marks end, almost in a straight line from the direction of the brake marks, one finds the Toyota.

[32] This is what I infer from Photo 5 and the other relevant objective facts:

- a) A vehicle, traveling from north to south - from Tsintsabis to Tsumeb - crossed over from the left lane into the right lane. This vehicle must have been the plaintiff's Toyota.
- b) Somewhere in the right lane, the Toyota braked hard, went off the shoulder of the road onto the gravel while still braking and then

returned into the right lane, all the time still braking hard. The Toyota was moving *left*.

- c) Something happened close to the broken white line in the centre of the road, where the skid marks stopped. This 'something' must have been the Toyota colliding into the Nissan.
- d) In line with its momentum – having travelled *left* immediately before the collision, the Toyota flipped over to its left, and ended up on the left side of the road.

[33] The parties did not present expert evidence. When the plaintiff testified, he did not address these inferences. As such I presented these possible inferences from Photo 5 to the plaintiff's counsel to address in oral argument. I also requested the parties to deliver supplementary heads of argument to address these issue. Plaintiff's counsel could not present a meaningful response. Her argument that the brake marks were consistent with the plaintiff's overall evidence is not supported by the evidence. The defendant's counsel supported the inferences.

[34] In her supplementary heads of argument, the plaintiff's counsel maintained that the balance of probabilities favoured the plaintiff's version. Amongst others, counsel relied on inconsistencies in the defendant's oral testimony and that of his witness, compared to their witness statements. I agree that the witnesses were not always consistent and that their oral evidence differed from the witness statements. However, I cannot place too much emphasis on the differences between the witness statements and the oral evidence in respect of these witnesses. Their witness statements, each consisting of barely two pages of proposed evidence, were clearly hastily prepared. The statements contained obvious mistakes, such as the point of impact on the defendant's vehicle, which is obvious from the photographs discovered by both parties. The defendant also testified that he had in fact informed his representative of mistakes in his statement. The lawyer's answer was that the mistakes could be corrected in court.

[35] Importantly, plaintiff's counsel emphasised the inconsistencies between the defendant's evidence in chief and during cross-examination, and that of

his witness, about having seen the Toyota overtaking the Nissan. In my view this does not assist the plaintiff. Ultimately, both witnesses agreed in cross-examination that they did not see the Toyota overtake the Nissan. Both confirmed having seen the vehicle behind them and that it had been travelling at a fast speed (they abandoned their reliance on “over – speeding”). They confirmed that they did not pay much attention to the Toyota after seeing it approach. The next thing they heard was a loud bang, the sound when the Toyota collided into the Nissan. Then they saw the Toyota flipping over several times in front of their car. This evidence accords with the inferences I drew from the location of the Toyota after the collision, the brake marks depicted on Photo 5, and the points of impact on the vehicles.

[36] The plaintiff was the only person who could have explained why the inferences from the real evidence should not follow. He carried the onus to prove his version of the cause of the accident. He did not meet the onus.

[37] I considered the possibility that the defendant had indeed made a U-turn while the plaintiff was about to drive past him. Perhaps the plaintiff had seen, from some distance, the defendant pulling off to the side of the road. Perhaps the plaintiff immediately started drifting slightly to the centre of the road, or even into the right lane, to ensure he would not collide with the defendant. This would have been one natural reaction, considering the absence of oncoming traffic and the excellent visibility. Perhaps, when the defendant made his sudden U-turn, it had caught the defendant off guard. To avoid colliding into the defendant, the plaintiff veered sharply to his right, momentarily left the road, fortunately made his way back onto the road and then, while moving left, collided with the Nissan around the centre of the road. This would have accorded with the inferences from the real evidence. Although possible, I do not find this scenario the most natural inference from facts. If this is what really happened, why would the plaintiff not just say so? On the face of this explanation, it would have been a reasonable reaction by the plaintiff to an unreasonable and probably reckless manoeuvre by the defendant.

[38] With reference to paragraph 12 of *Motor Vehicle Accident Fund v Kulobone*,⁹ the plaintiff argued that the defendant also had to prove his case to succeed in his defence, whether he proceeded with his counterclaim or not, and that he had failed to prove his case. It appears to me that the plaintiff's reliance on the Supreme Court's judgment is misplaced. There, the Supreme Court indeed held that a defendant who pleads that a collision was caused by the negligence of a plaintiff must prove that the plaintiff was the sole cause of the collision to escape some liability, even if the defendant did not counterclaim. The Supreme Court found, on the pleadings and the evidence, that both parties had been negligent and apportioned liability equally. Here, the parties did not argue, in oral argument, in the main heads of argument or in their supplementary heads of argument, that there ought to be any apportionment. It was always "all or nothing" for both parties. In any event, the facts and inherent probabilities lead me to find that the plaintiff's negligence was the sole cause of the collision.

[39] In the result, I make the following orders:

1. The plaintiff's claim is dismissed.
2. The plaintiff shall pay the defendant's costs of suit, which do not include costs of the defendant's counterclaim that was abandoned on Wednesday, 19 April 2023.
3. The matter is regarded as finalised and removed from the roll.

R MAASDORP
Acting Judge

⁹ *The Motor Vehicle Accident Fund of Namibia v Lukatezi Lennox Kulobone*, unreported Supreme Court judgment delivered on 5 February 2009

APPEARANCES

PLAINTIFF: Ms Ludwig
Delpport legal Practitioners

DEFENDANT: Mr Goraseb
Ileni velikoshi Incorporated