

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
JUDGMENT



MAIN DIVISION, WINDHOEK

CASE NO: HC-MD-CIV-ACT-

DEL-2021/04007

In the matter between:

FRANSINA BEREDY

PLAINTIFF

and

REBEUS SHILIMELA

FIRST DEFENDANT

MINISTER OF HEALTH AND SOCIAL SERVICES

SECOND DEFENDANT

Neutral Citation: *Beredy v Shilimela* (HC-MD-CIV-ACT-DEL-2021/04007) [2023]
NAHCMD 336 (16 June 2023)

CORAM: OOSTHUIZEN J

Heard: 3 March 2023

Delivered: 16 June 2023

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

Summary: On 27 July 2021 at around 17h20 driving from Ongwediva to Oshakati, on the Oshakati-Ongwediva main road, two motor vehicles collided. This involved the plaintiff's motor vehicle and the second defendant's motor vehicle, both vehicles sustained damages. The plaintiff's motor vehicle was driven by herself, Ms. Fransina

Beredy, while Mr. Rebeus Shilimela, the first defendant, an employee of the second defendant, drove the motor vehicle belonging to the second defendant.

In the particulars of claim, the plaintiff pleaded that the collision occurred solely out of the negligent driving of the first defendant, however, the second defendant countered and alleged that the collision was caused by Ms. Beredy. The first 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 oncoming traffic, clearly signal his intention to so turn, constantly observe the oncoming traffic and refrain from turning until it is opportune and safe to do so. 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 – 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.

ORDER

1. The plaintiff's claim against the first and second defendants succeeds.
2. The second defendant's counterclaim is dismissed.
3. The second defendant shall pay the amount of N\$141,830 to the plaintiff.
4. Second defendant shall pay interest on the aforesaid amount at the rate of 20% per annum from the date of judgment until the date of final payment.
5. Second defendant shall pay costs of suit

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

JUDGMENT

OOSTHUIZEN J:

Introduction

[1] Driving a motor vehicle requires a driver to exercise a high degree of care, skill and consideration towards 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, a Toyota Corolla motor vehicle with the registration number N 2849 OP and Toyota Hilux motor vehicle with registration number GRN 7799 collided with each other.

[2] The plaintiff instituted action and claimed an amount of N\$141,830 plus interest at the rate of 20 percent per annum jointly and severally from the defendants and costs allegedly arising from damages caused to her motor vehicle. The plaintiff claims that a collision occurred between her motor vehicle and the vehicle driven by the first defendant and which collision was solely caused by the first defendant. The second defendant disputed the claim and filed a counterclaim for damages in the amount of N\$15,499,000.70 plus interest at the rate of 20 percent per annum allegedly caused to it's vehicle by the plaintiff.

[3] The trial commenced on 7 February 2023.

The parties and their representation

[4] The plaintiff is Ms. Fransina Beredy, a Namibian adult female.

[5] The first defendant is Mr. Rebeus Shilimela, a Namibian adult male employed by the Ministry of Health and Social Services. Where reference is made to the plaintiff and the first defendant jointly, they shall be referred to as “the parties”.

[6] The second defendant is the Minister of Health and Social Services.

[7] The plaintiff is represented by Mr. F. Pretorius while the defendant is represented by Mr. W. Amukoto.

Background

[8] On 27 July 2021 at around 17h20 driving from Ongwediva to Oshakati, on the Oshakati-Ongwediva main road, two motor vehicles collided. This involved the plaintiff’s motor vehicle with registration number N 2849 OP and the first defendant’s motor vehicle with registration number GRN 7799. Both vehicles sustained damages. The plaintiff’s motor vehicle was driven by herself while the second defendant’s vehicle was driven by its employee, Rebeus Shilimela, (hereinafter referred to as ‘Mr. Shilimela’).

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

(a) He allegedly failed to keep a proper look-out for other vehicles, particularly the vehicle of the plaintiff, which was traveling straight on the Oshakati-Ongwediva main road about to cross the Yetu traffic lights;

(b) He allegedly failed to take cognisance of the fact that the robot controlled intersection was indicating green for traffic traveling in the direction in which the plaintiff’s vehicle was traveling and that the plaintiff’s vehicle was traveling straight across the intersection, therefore enjoyed right of way;

(c) He allegedly attempted to turn to his right at the intersection across the plaintiff’s vehicle’s path of travel at a time when it was unlawful, dangerous and

inopportune to do so thereby entering the plaintiff vehicle's right of way and colliding with the vehicle of the plaintiff whilst it was crossing the intersection;

- (d) He drove at a speed in excess of the speed limit;
- (e) He allegedly failed to apply his breaks timeously or at all;
- (f) He failed to avoid a collision when he could have and should have done so by the exercise of reasonable care.

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

[11] This resulted in the second defendant instituting a counterclaim against the plaintiff, the second defendant pleaded that the collision occurred solely as a result of the negligent driving of the plaintiff, in that:

- (a) She allegedly failed to keep a proper lookout;
- (b) She allegedly failed to heed to a road traffic signal by bringing her vehicle to a stop, alternatively, entered a traffic-controlled intersection when it was unlawful and/or inopportune to do so;
- (c) Failed to give way to vehicles that had right of way;
- (d) She drove at an excessive speed in the circumstances;
- (e) Failed to apply her brakes timeously or at all;

(f) Failed to avoid the motor vehicle collision when she could have and should have done so by the exercise of reasonable care.

Issues for determination

[12] In terms of the pre-trial order of 15 August 2022, 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\$141,830.00;
- (e) Whether the second defendant suffered damages in the amount of N\$15,499 000.70;
- (f) Analysis of duty of care, breach and causation.

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

Plaintiff's case

[14] In striving to prove her case, the plaintiff commenced with leading the evidence of Ms. Beredy.

[15] Ms. Beredy testified, *inter alia*, that: on 27 July 2021 she was travelling on the Oshakati-Ongwediwa main road, Oshakati, she drove a Toyota Corolla motor vehicle with the registration number N 2849 OP. As she was approaching the intersection,

the light turned green for traffic travelling in her direction. As a result, she enjoyed right of way to enter and cross the intersection. While she was in the process of crossing the intersection, and travelling at a speed of approximately 60km per hour, she suddenly noticed the second defendant's vehicle attempting to turn right, across her path of travel. Her testimony was further that the moment she noticed the second defendant's vehicle in front of her vehicle, she applied the brakes of her vehicle in an attempt to avoid a collision with the second defendant's vehicle. Her attempt to avoid the collision was futile as the second defendant's vehicle was too close to her. The second defendant's vehicle bumped the front part of her vehicle at an angle.

[16] She also testified that the direction in which she was travelling only had two lanes, and a slipway turning to her left some distance before the intersection. There were no vehicles travelling in the lane to her left, or in close proximity to her vehicle. The light was green as she was approaching the intersection. At no time was the light any other colour, she slightly slowed down when she entered the intersection.

[17] Ms. Beredy 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 proceeding through the green intersection. The second defendant's vehicle jumped in front of her vehicle. She could see him driving fast and trying to turn. She reconfirmed under cross-examination that the second defendant's vehicle was driving fast into the turn. She observed a vehicle coming from the front, and was expecting it to stand for the green light, the car was however approaching fast and crossing into her. She further testified that the first 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. The negligent driving of the first defendant caused the plaintiff the damages in the amount of N\$141,830.

The first defendant's case

[18] The first defendant testified that on 27 July 2021 at about 17h20, he was driving from Oshakati to Ongwediva, in the opposite direction of plaintiff's travel. He intended to make a right turn at the Yetu traffic lights, as he approached the Yetu traffic lights, he noticed that the light was green, which meant that he had to give right

of way to traffic travelling straight through the intersection as he intended to make a right turn across the path of traffic travelling straight through the intersection. He brought his vehicle to a stop at the intersection to give those vehicles right of way. When the light turned from green to orange, he readied himself to execute his right turn.

[19] The first defendant testified further that the collision was caused by the negligent driving of Ms. Beredy who failed to take cognisance of the first defendant's oncoming turning vehicle. He noted that there were other vehicles travelling in the same direction as the plaintiff, in the lane to the left of the plaintiff's lane, he noted that the vehicles in the lane to the left of the plaintiff's lane were no longer driving through the intersection and had come to a stop at the intersection, thus indicating to him that it was safe to execute his right turn.

[20] Mr. Shilimela further testified that he proceeded to execute his right turn, and succeeded in doing so, however, as he was exiting the intersection, he saw the plaintiff's vehicle speeding into the intersection from the 'back corner of his eye'. In an attempt to 'beat the red light. The front of the plaintiff's vehicle did not stop at the intersection, and collided with the left rear end of the defendants' vehicle at a 90-degree angle with the plaintiff's vehicle which failed to stop and give the defendant the right of way. In so doing failing to keep a proper lookout and failed to stop her vehicle or apply breaks. Ms. Beredy had failed to heed to an orange light by bringing her vehicle to a stop at the intersection when she was required to do so. She also failed to give right of way to the first defendant.

[21] In cross-examination, the first defendant testified that his view of the road in front of him was unobstructed and he could clearly see in the direction from which the plaintiff was driving from. During evidence in chief, Mr. Shilimela testified that he only saw the plaintiff's vehicle for the first time in the 'back left-hand corner of this eye' moments before the impact.

[22] In further cross-examination the first defendant testified that when the accident occurred a part of his vehicle was already outside the intersection. In contrast to his evidence in chief:

'When I saw the vehicles that were on the plaintiff left came to a standstill, a stop and when I looked, I saw a car rushing coming (intervention). I saw this car driving fast, approaching fast, the right word is approaching fast and I then realise that this was going to, it was going to be difficult for this car to stop so let me rush out or let me drive faster. And that is the reason why it just hit me at the back when I was about to exit the intersection.'¹

[23] Mr. Frans Johannes testified as a witness of the first defendant, Mr. Amukoto submitted that his testimony was in all material respects identical to that of the first defendant in respect of what he and the first defendant witnessed and that, Mr. Johannes corroborates the testimony of the first defendant in the following respects; he was driving from Oshakati to Ongwediva in another vehicle, immediately behind the second defendants' vehicle; he equally intended to make a right turn at the Yetu traffic lights; he approached the Yetu traffic lights and noted that the light was green, indicating that the vehicles travelling straight through the intersection had right of way; he observed the first defendant give right of way to the vehicles driving straight through the intersection, until the light turned from green to orange; when the light turned from green to orange, he noted the vehicles in the lane to the left of the plaintiff's lane were no longer driving through the intersection and had come to a stop at the intersection, thus indicating to him that it was safe to execute his right turn.

[24] Mr. Johannes testified further in evidence in chief that the defendants' vehicle was executing a right turn. The first defendant succeeded in executing his right turn; as the second defendants' vehicle was exiting the intersection, he saw the plaintiff's vehicle speeding into the intersection in an attempt to "beat the red light"; the plaintiff's vehicle did not stop at the intersection, and collided with the defendants vehicle before the first defendant could make a clear exit out of the intersection.

[25] Durring cross examination Mr. Johannes in contrast to evidence in chief, testified that he did not move into the intersection. In fact, he stated that he never moved his vehicle once the orange light came on. He could see the plaintiff's vehicle approaching the intersection from very far away, and conceded that the first defendant should have also been able to see her from very far away. The first defendant turned into the intersection against a red light. He also conceded that the orange light does not stay lit for as long as the red and green lights do. He did not move into the intersection further testifying that he never moved his vehicle once the

¹ Page 91 line 27 of the record.

orange light came on. He could see the plaintiff's vehicle approaching the intersection from far, and conceded that the first defendant should have equally been able to see her from far. The first defendant turned into the intersection against a red light.²

Analysis of evidence

[26] 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*³ 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 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.'

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

² Page 118 line 31 of the record, Page 121 line 31 of the record and Page 123 line 25 of the record.

³ *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at paras 44-45.

[28] In *Ndabeni v Nandu*⁴ and *Life Office of Namibia v Amakali*,⁵ the court quoted with approval the following passage from *SFW Group Ltd And Another v Martell Et Cie And Others*,⁶ 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. . .’

[29] 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.

[30] The following facts are common cause between the parties:

(a) That the collision between the plaintiff’s vehicle driven by Ms. Beredy and the second defendant’s vehicle driven by the first defendant bearing registration number N 2849 OP, and the second defendant’s motor vehicle bearing registration number GRN 7799 occurred on 27 July 2021 at around 17h20 at a traffic controlled intersection more commonly known as the ‘Yetu robots’, on the road between Oshakati town and Ongwediva town, Oshana Region, Namibia;

(b) The colour indicated by the robot-controlled intersection at any relevant time was exactly the same for the plaintiff and the first defendant, as they were travelling in opposite directions;

⁴ *Ndabeni v Nandu* (I 343/2013) [2015] NAHCMD 110 (11 May 2015).

⁵ *Life Office of Namibia v Amakali* (LCA78/2013) [2014] NALCMD 17 (17 April 2014).

⁶ *SFW Group Ltd And Another v Martell Et Cie And Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.

(c) That the first defendant is employed by the second defendant, and that at all times relevant hereto, the first defendant drove the second defendant's vehicle within the course and scope of the former's employment relationship with the latter – the vehicle driven by the first defendant will be referred to herein as the defendants' vehicle;

(d) That the defendants received a written Letter of Demand dated in terms of section 39(1) of the Police Act, 1990;

(e) The parties have agreed to each other's quantum.

(f) That the first defendant intended to make a right turn at the Yetu Robots, across the path of oncoming traffic, whilst the plaintiff had the intention to drive straight through the Yetu Robots.

[31] 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.

[32] Mr. Pretorius submitted that it is improbable that the first defendant would not see the plaintiff's vehicle approaching the intersection if he kept a proper lookout before entering the intersection and crossing plaintiff's lane of travel. This is made more so probable by the evidence of Mr. Johannes that he could clearly see ahead of him and could see the plaintiff approaching the intersection. The first defendant provided no explanation for this.

[33] Mr. Amukoto's submissions on the first defendant's version were that the first defendant testified that he surveyed the intersection prior to executing his right turn. He observed that all the other vehicles coming from the plaintiff's direction and that were in the lane to the left of plaintiff's lane had come to a stop at the intersection as a result of the light turning from green to orange. The first defendant further testified that at the time he noticed that the other vehicles coming from the plaintiff's direction had stopped driving through the intersection, the plaintiff's vehicle was still relatively far.

[34] The court in *Josea v Ahrens*⁷ held that:

“The duty of a driver who has a green light in his favour when he approaches an intersection, and the light turns yellow before he crosses the intersection, is to stop behind the stop line and remain stationary: Provided that if he is so close to a stop line when a yellow signal is displayed that he or she cannot stop safely, he may proceed with caution against such yellow light signal.”

[35] The above principle in my view finds adequate application to the facts before this court. The first defendant pleaded and recorded in the pre-trial report that the plaintiff caused the collision when she, inter alia, failed to heed to a red traffic light. This would entail that the first defendant entered the intersection against a red light. However, the defendants, in contradiction to the affidavits filed on their behalf, tendered evidence that the light was actually orange when the collision occurred. The defendants’ version in agreement with Mr. Pretorius of the accident is therefore in conflict with the defendants pleaded case.

[36] Having decided that the aforesaid principle applies 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 she did not drive negligently but that it was the first defendant who was negligent. In the analysis 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*:⁸

‘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)’

⁷ *Josea v Ahrens* (I 3821-2013) [2015] NAHCMD 157 (2 July 2015)

⁸ *Ocean Accident and Guarantee Corporation LTD v Koch* 1963 (4) SA 147 (A) at 159B-D.

[37] 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*⁹ 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.'

[38] It is expected that a driver who intends to turn right or change lanes should ascertain whether there is oncoming traffic, clearly signal his intention to so turn, constantly observe the oncoming traffic and refrain from turning until it is opportune and safe to do so. 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 oncoming traffic has seen and is reacting to his signal that is why he must continuously observe the oncoming vehicles.¹⁰

[39] From the proven facts, I find that Mr. Shilimela did not continuously observe the oncoming vehicles. To his credit, he could probably have looked once to see oncoming traffic but he surely did not continuously observe the oncoming vehicles, hence he could not see the plaintiff's vehicle prior to the collision. He failed to avoid a collision when he could have and should have done so by the exercise of reasonable care. This cannot be equated to a driver who makes a turn to the right when it is opportune and safe to do so.

Conclusion

[40] 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. Shilimela, 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 plaintiff's

⁹ *Boots Co (Pty) Ltd v Somerset West Municipality* 1990 (3) SA 216 (C).

¹⁰ 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

oncoming vehicle. By his own version, I find that Mr. Shilimela did not keep a proper lookout and therefore drove negligently. Therefore the second defendant's counterclaim is therewith under these findings dismissed.

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

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

1. The plaintiff's claim against the first and second defendants succeeds.
2. The second defendant's counterclaim is dismissed.
3. The second defendant shall pay the amount of N\$141,830 to the plaintiff.
4. Second defendant shall pay interest on the aforesaid amount at the rate of 20% per annum from the date of judgment until the date of final payment.
5. Second defendant shall pay costs of suit
6. The matter is regarded finalised and removed from the roll.

G H OOSTHUIZEN
JUDGE

APPEARANCES:

PLAINTIFF: F Pretorius
Francois Erasmus and Partners
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DEFENDANT: W Amukoto
The Office of the Government Attorney
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