

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-ACT-DEL-2022/04690

In the matter between:

BURGER ADRIAAN BOSHOFF

PLAINTIFF

and

RACHEL GWAMAVI MUTEKA

1ST DEFENDANT

BREVS MINING CONTRACTORS (PTY) LTD

2ND DEFENDANT

Neutral citation *Boshoff v Muteka* (HC-MD-CIV-ACT-DEL-2022/04690)
[2023] NAHCMD 666 (19 October 2023)

Coram: Maasdorp AJ

Heard: 21 July 2023

Delivered: 19 October 2023

Flynote: Motor vehicle collision – Negligence – *Res ipsa loquitur* – Collision between Hilux pick-up and Iveco truck – Driver of Hilux died in collision – Objective facts suggest he was negligent in turning right into oncoming traffic without first ensuring that it had been safe to do so – Collision occurred on very dark and very misty morning – Objective facts also suggest that driver of Iveco truck with right of way did not drive at a slow enough speed to ensure that he could avoid a collision if the oncoming vehicle, which he had seen, did not stop as it should have before turning

right – Death of driver of one vehicle does not absolve driver of other vehicle from leading cogent evidence to negate inference of negligence that arises from objective facts.

Motor vehicle collision – Duties of driver with right of way on main road – Driver with right of way on main road entitled to assume a driver from a crossroad will only enter intersection when safe – However, driver with right of way on main road must drive at a reasonable speed that would allow him, when circumstances are such that he ought to be on guard, to avoid colliding with a motorist entering the intersection when unsafe – Driver with right of way on main road must keep a proper lookout for vehicles approaching intersection – When driver with right of way becomes aware of vehicle approaching intersection, it is his duty to keep the other vehicle under observation.

Vicarious liability – Driver of vehicle deceased – Burden of proof – Onus on party seeking to hold employer vicariously liable to satisfy standard test or end test – Deceased employee driving employer's rental vehicle at time of collision – Deceased employee driving from direction of duty station – Deceased employee accompanied by fellow employee who also passed away – Both employees site supervisors - One employee responsible for managing employer's controls of entry and exit from mining site – When objective facts lead to inferences in favour of vicarious liability, employer required to negate inferences with best evidence available to employer – Adverse inference drawn from employer's failure to present documentary evidence or direct evidence from deceased employee's supervisor who was involved with investigators immediately after collision and who supplied information to only employer's sole witness, an alternate director with no operational presence on the ground – Combined inferences sufficient to satisfy plaintiff's onus to prove on balance of probabilities that employer should be held liable.

Summary: A tragic accident at the intersection of the Henties Bay and Uis

roads claimed the lives of two men. One had been the driver and the other his passenger in a Toyota pickup that collided with an Iveco truck. Both deceased were employed by the second defendant, Brevs Mining Contractors, at the time of the accident. The Toyota had been availed to Brevs Mining Contractors under a rental agreement with a third party.

The owner of the Iveco truck instituted a claim for damages. The plaintiff alleged the negligence of the deceased driver had been the sole cause of the collision. The plaintiff sued the executrix of the deceased's estate as the first defendant, and Brevs Mining Contractors as the second defendant based on the principle of vicarious liability.

The first defendant did not defend the action. The plaintiff sought default judgment against her, dependent on the decision about the cause of the collision.

The second defendant denied that the deceased's negligence had caused the collision or contributed to it. In the alternative, the second defendant pleaded that the deceased's negligence had not been the sole cause but that the negligence of the driver of the truck had also contributed to the collision.

The second defendant denied that the deceased had been acting in the course and scope of his employment at the time of the collision, or within the risk created by his employment. The second defendant alleged that the deceased must have been on a frolic of his own because the written rental agreement for the Toyota pickup prohibited use of the vehicle for activities beyond the mining site. The collision occurred approximately 140km from the mining site.

Held, both drivers were negligent, and their negligence contributed to the collision. The plaintiff is entitled to 70 per cent of the agreed quantum of damages.

Held further, the second defendant is vicariously liable for the damages attributable to the driver of the Toyota Hilux.

ORDER

1. The first and second defendants are jointly and severally liable, the one paying the other to be absolved, to the plaintiff, for:

(a) Payment of N\$210 387,80 (70 per cent of the agreed quantum of N\$300 554).

(b) Interest on N\$210 387,80 at the rate of 20 per cent per annum calculated from date of judgment until date of final payment.

(c) Costs of suit.

2. The matter is deemed finalised and removed from the roll.

JUDGMENT

MAASDORP AJ

[1] 21:00, Thursday evening, 22 July 2021. James Kheteng is getting ready to go to sleep. Tomorrow morning at 04:00 he will report for duty to do what he has been doing for the last 20 years – driving a truck. He will be driving to Cape Cross with an Iveco truck, towing two to interlink trailers to load freight on behalf of the truck owner, Burger Adriaan Boshoff.

[2] 06:00, Friday morning, 23 July 2021. It is very misty and very dark, without even a hint of sunlight as Mr Kheteng drives from Henties Bay. Since there is ongoing construction on the main road, Mr Kheteng has to take a detour along a temporary route through the Omaruru river. When he exits the Omaruru river, driving from direction Henties Bay into direction Cape Cross, he faces a slight incline. He gradually increases his driving speed to accommodate the incline.

[3] The exit from the Omaruru river in the direction of Cape Cross, is close to a T-junction where the Henties Bay and Uis main roads intersect. Mr Kheteng will not be turning right, to Uis, but will be travelling straight on. He has the right of way. Any connecting traffic from Uis wishing to join the traffic to Cape Cross must first come to a complete standstill at the stop sign, before turning right, across three lanes. Those wishing to head to Henties Bay must turn left into a slipway and yield before connecting with traffic headed to Henties Bay.

[4] Josephat lileni Nakale was employed by Brevs Mining Contractors (Pty) Ltd ('Brevs'). Brevs conducted mining contracting operations at three sites – one at Navachab mine, one at the Husab mine close to Swakopmund, and another at the Afritin mine in Uis. Mr Nakale's duty station was the Afritin mine in Uis.

[5] Between 06:00 and 07:00 on Friday morning, 23 July 2021, Mr Nakale was travelling on the Uis road in the direction of the intersection with the Henties Bay road. He was driving a Toyota pick-up, rented from a third party by his employer. Mr Nakale was accompanied by one passenger, a fellow Brevs employee also stationed at Uis.

[6] No-one testified why Mr Nakale and his passenger were 140km from Uis at 06:00 on this fateful morning when, at the intersection of the Henties Bay and Uis roads, on a very misty and very dark Friday morning, the Iveco

truck smashed into the Toyota. Mr Kheteng made it out alive. Tragically, Mr Nakale and his passenger did not.

Structure

[7] This judgment is divided into four chapters. The first chapter identifies the parties and the disputed issues.¹ The second chapter deals with the cause of the collision² and is divided into four sections: the first section contains the plaintiff's summary of the relevant evidence and arguments on the cause of the collision, the second section sets out the second defendant's response on the cause of the collision, and the third section contains the analysis of the respective positions. The final section deals with the assessment of the parties' respective degrees of fault. The third chapter addresses vicarious liability.³ The first section of the third chapter identifies the undisputed facts on vicarious liability. The second and third sections summarise the plaintiff's and second respondent's positions on this topic, while the final section analyses the material evidence and arguments on vicarious liability. The fourth and final chapter contains the conclusion and order.⁴

Parties and issues

[8] This is a civil action for damages. It was launched by Mr Boshoff, the owner of the Iveco truck, as the plaintiff.

[9] The first defendant is the executor of the estate of the late Mr Nakale.

[10] The second defendant is Brevs, late Mr Nakale's employer at the time of the fatal collision.

[11] There are two main disputes: Firstly, who caused the collision? Secondly, if the late Mr Nakale caused or contributed to the collision, should Brevs be vicariously liable for the damages attributable to Mr Nakale? From

¹ Paras [8] – [11]

² Paras [12] – [31]

³ Paras [32] – [41]

⁴ Paras [42] – [44]

here on, this judgment will refer to the late Mr Nakale as 'the deceased'.

Who caused the collision?

[12] The plaintiff pleaded that the deceased's negligence was the sole cause of the collision, as the deceased allegedly:

- (a) Failed to keep a proper lookout for vehicular traffic, and in particular the plaintiff's vehicle;
- (b) Failed to stop at a T-Junction, and as a result collided with the plaintiff's vehicle, which vehicle was travelling straight and enjoyed right of way to do so;
- (c) Failed to apply his brakes timeously or at all;
- (d) drove at an excessive speed in the circumstances;
- (e) Allegedly failed to avoid a collision when by the exercise of reasonable care he could have and should have been able to do.

[13] Brevs pleaded that Mr Kheteng's negligence was the sole cause of the collision, as he allegedly:

- (a) drove at an excessively high speed in the foggy/misty coastal conditions;
- (b) drove without due care and attention when approaching an intersection or T-junction and as a result collided with the vehicle driven by the Deceased;
- (c) failed to apply his brakes timeously;
- (d) failed to keep a proper lookout for other vehicular traffic, and in particular that of the Deceased's vehicle;
- (e) failed to avoid a collision when by the exercise of reasonable care, he could have and should have been able to do so.

[14] The only oral evidence on the cause of the collision was led by Mr Kheteng. This part of the case will be determined with reference to Mr

Kheteng's direct evidence, the documentary evidence in the form of various photographs of the accident scene, the inferences that arise from the evidence, and the rules of the road as set out in various judgments.

[15] The most relevant parts of Mr Kheteng's evidence and the challenges to his evidence, can be classified under four themes: distance, speed, visibility, and action upon awareness of deceased's vehicle.

[16] The parties did not present any expert evidence on the cause of the collision or supply exact measurements on the location and distances between the various objective key points. The parties presented photographs that identified some key points, but no sketch plans, diagrams or other potentially useful material that one would expect in similar matters. The absence of objective evidence made it very difficult to establish the probabilities.

[17] On my understanding of the parties' evidence and arguments, the objective key points are: (1) the exit point from the Omaruru River; (2) the location of the intersection; (3) the starting point of the Iveco's brake marks; and (4) the point of impact. The subjective key points include: (1) the point at which Mr Kheteng saw the intersection; (2) the point at which Mr Kheteng first observed the Toyota; (3) the point at which Mr Kheteng first realised the Toyota might not be stopping at the intersection; and (4) the point where Mr Kheteng applied his brakes.

The plaintiff's evidence and argument on the cause of the collision

[18] This is how the plaintiff summarised the relevant parts of Mr Kheteng's evidence:

“6.1. He has been a truck driver for more than 20-years.

6.2. On 23 July 2021 he was driving the Plaintiff's Iveco truck bearing registration number N 175 OH, whilst towing two interlink trailers. He departed from Henties Bay

at approximately 06h00 enroute to Cape Cross in order to load a freight on behalf of the Plaintiff. At the time when he was driving the Plaintiff's truck it was dark and very misty. This reduced visibility considerably. He therefore ensured that the lights of the Plaintiff's truck tractor were activated.

6.3. As the new bridge over the Omaruru River was still being constructed, he drove along the temporary route through the Omaruru River. After he exited the Omaruru River he proceeded to drive in the direction of Cape Cross. He gradually increased the speed at which he was driving. By the time he reached the T-junction at the intersection of the Henties Bay - Uis road, he was travelling at a speed of approximately 55 - 60 kilometres per hour.

6.4. As he neared the intersection he proceeded to drive straight past the intersection as vehicles approaching from his right (i.e. from the direction of Uis) were required to come to a standstill at the intersection and therefore he enjoyed right of way. When he was a short distance from the intersection, he noticed another vehicle approaching the intersection from his right i.e. from the direction of Uis. He would later learn that this vehicle was at the time being driven by Mr Josephat Ileni Nakale ("the Deceased"). As he enjoyed right of way and the Deceased was required to stop at the stop sign at the T-Junction, Mr. Kheteng proceeded to travel straight with the intention of passing the intersection.

6.5. As he was about to pass the intersection, he realised that the Deceased did not reduce the speed at which he was travelling and failed to come to a standstill at the stop sign, despite being required to do so. Instead, the Deceased travelled straight across the intersection in the direction of the vacant land on the opposite side of the road surface (ie to Mr. Khetheng's left). Immediately after he noticed that the Deceased did not stop at the intersection, he applied the brakes of his truck. Unfortunately, the Deceased's vehicle had already entered his lane and was directly in front of his truck. Therefore, it was impossible for Mr. Kheteng to avoid colliding with the Deceased's vehicle, and the front of his truck collided with the left side of the Deceased's vehicle.

6.6. ...

7. During the cross-examination of Mr. Kheteng, the following evidence was

solicited from him and tendered by him:

7.1. Other than this accident, he has never been involved in an accident while driving a truck;

7.2. He was not negligent in causing the accident;

7.3. He started driving from Swakopmund at 4h00 and went to bed at 21h00 the previous night. He was therefore not tired when the accident occurred;

7.4. It was very dark and misty when the accident occurred;

7.5. He could not confirm in meters what the extent of his visibility was, but confirmed that it was not far;

7.6. He could see further than the width of the court room, which has a width of approximately 11 paces;

7.7. The headlights and marker lights of his truck were on. The 'brights' of his truck were not switched on because that would reduce visibility even more due to the mist;

7.8. When he exited the river, he was driving between 45 km/h and 55 km/h. His speed picked up as the road becomes straight and flat. The distance between the river and the intersection is also not far. He estimated it to be approximately the same as between the court room and Independence Avenue;

7.9. He always looks at the road in front of him when he drives. The speedometer is in his view [in his line of sight] if he looks at the road and he therefore knew that the speed at which he was driving was between 55 km/h and 60 km/h when the accident happened;

7.10. He was however decreasing his speed at the time of the accident because he was approaching the end of the tar road on which he was travelling. The tar road ends not far from the intersection;

7.11. The salt road is darker than a normal gravel road, and becomes darker as more vehicles travel on it. It is not the same colour as a tar road though. He could identify the salt road on Exhibit C6. It started after the road sign on the left;

7.12. He described the vehicle dynamics of the truck to be that because of the size of the truck, he decreases the speed of the truck before he is required to stop;

7.13. He could see the intersection as he was approaching it, and it was close to him at that stage. He estimated it to be further than the width of the court room;

7.14. He could not tell exactly how far the Second Defendant's vehicle was away from the intersection when he saw it for the first time;

7.15. When he saw the Second Defendant's vehicle its lights were switched on. At that stage he was still on his way to the intersection;

7.16. At that stage he already decreased his speed because he was approaching the end of the tar road;

7.17. He looked at the Second Defendant's vehicle once before the accident and once after the accident. He saw the vehicle as they collided;

7.18. He saw the Second Defendant's vehicle did not stop at the intersection. He motivated this by saying that if one has regard to the brake marks on Exhibit C5 & C6 it shows that the brakes were applied before he reached the intersection, i.e. before the impact, and he therefore saw the Second Defendant's vehicle approaching otherwise he would not have braked;

7.19. At the intersection, the road is divided into three lanes, two in the direction in which Kheteng was travelling and one in the opposite direction;

7.20. The accident happened so fast;

7.21. The accident happened in the lane in which Mr. Kheteng was travelling;

7.22. It was not possible to swerve out for the Second Defendant's vehicle;

7.23. ...

7.27. He said he has a wide angle of the road when he drives. This includes his view of the speedometer of the truck he was driving. He was also cautious when he approached the intersection although he had the right of way to drive past it. For him, the speed at which he was travelling was "correct" for him.

7.28. He was expecting the Second Defendant's vehicle to stop at the intersection;

7.29. ...

[19] The plaintiff's main argument on the cause of the collision proceeded as follows:

"14. Due to the fact that the Second Defendant's driver passed away in the accident, there is no real mutually destructive version of how the accident happened. Instead, due to the fact that the accident happened at an intersection where the Plaintiff's driver enjoyed right of way, the fact that the Second Defendant's driver failed to stop at the intersection and that accident happened in the lane in which the Plaintiff's driver was travelling, the Honourable Court may apply the *res ipsa loquitur* principle and draw an inference of negligence against the Second Defendant's driver.

15. The applicability of the principle of *res ipsa loquitur* in our law was recently set out the Supreme Court in the reportable matter of *Dausab v Hedimund and Two Others*, case number SA 24/2018 (delivered on 7 May 2020):

"The principle of *res ipsa loquitur* is fairly well settled. In our context, it applies where a motor vehicle collides with a stationary vehicle in circumstances which point to *prima facie* proof of negligence; and therefore a presumption of negligence arises. When *res ipsa loquitur* applies - 'the facts speak for themselves' - in that an inference of negligence is inescapable. It must follow that a driver of a vehicle which collides with a stationary vehicle is required to furnish a satisfactory explanation to negate the inference or presumption of negligence on his or her part. Should he or she fail to rebut the presumption, he or she will be held to have been negligent under the circumstances...."

16. In *Caroline Lydia Engelbrecht v The Motor Vehicle Accident Fund* Parker J clarified the application of the *res ipsa loquitur* principle. He said, with reference to various authorities:

“(t)his leads me, in my view, to only one enquiry, namely, has the plaintiff, having regard to the evidence, discharged the onus of proving, on a balance of probabilities, the negligence she has put forward against the defendant? Granted, as Mr. Erasmus appears to argue, looking at the nature of the accident, the mere happening of the accident may justify an inference of negligence. Such inference underlies the maxim “*res ipsa loquitur*”, which both counsel debated in their submissions (See *Jensen v Williams, Hunt & Clymer Ltd* 1959 (4) SA 583 (O); *Naude, NO v Transvaal Boot and Shoe Manufacturing* 1938 AD 379; *Stacey v Kent* 1995 (3) SA 344 (E); Cooper, *Delictual Liability in Motor Law*, (Vol.2), pp. 100-103; Klopper, Isaacs and Leveson: *The Law of Collisions in South Africa*, 7th ed., p. 78.) Whether the Court ought to draw such inference depends on the nature of the explanation given by the defendant. (Naude, N.O., supra, at 392) But that is not to say that an onus rests upon the defendant to establish the correctness of his explanation on a preponderance of probability. (*Arthur v Bezuidenhout and Miemy* 1962 (2) SA 566 (A) at 576C-D) However, “[T]hrough the inference suggested by the nature of the accident does not shift the burden of disproving negligence on the defendant, still it does call for some degree of proof in rebuttal of that inference.” (Naude, NO, supra, loc. cit).”

17. Furthermore, it is important to bear in mind that in a civil case it is not necessary for a Plaintiff to prove that the inference that he asks the court to draw is the only reasonable inference, it suffices for him to convince the court that the inference that he advocates is the most readily apparent and acceptable inference from a number of possible inferences.

18. This justifies an inference of negligence by the Second Defendant’s driver.

19. The Defendants are required to tender admissible evidence to the contrary, which they completely failed to do.

20. In any event, should the Honourable Court find that the aforesaid principle does

not find application in this matter, the Second Defendant's driver was still the sole cause of the collision as the direct and credible evidence provided by Mr. Kheteng support the Plaintiff's pleaded case.

21. The Second Defendant's defence to the direct and credible evidence tendered on behalf of the Plaintiff is essentially premised on the allegations that the Plaintiff's driver was:

21.1. driving at an excessive speed;

21.2. without due care and attention when approaching the intersection;

21.3. failed to apply the brakes of the truck timeously or at all;

21.4. failed to keep a proper lookout for other traffic; and

21.5. failed to exercise reasonable care.

22. The Second Defendant's defence (in respect of the negligence of its driver) is flawed for the following reasons:

22.1. The Plaintiff's driver was driving well within the speed limit at the intersection where he enjoyed right of way. No objective evidence was provided to indicate otherwise;

22.2. He provided extensive detailed evidence of his observations of the intersection and what was happening around him prior to and at the time of the accident. He also confirmed that it was dark and the mist/fog was thick, which impaired his range of vision. He however knew that he was approaching an intersection (where he enjoyed right of way) and his knowledge of the road entailed that he knew that the tar road would end soon after the intersection;

22.3. His evidence that the brake marks of his truck show that he applied the brakes prior to colliding with the Second Defendant's vehicle is supported by objective evidence on Exhibit C5 & C6;

22.4. It was reasonable under the circumstances to accept that the approaching vehicle of the Second Defendant would not enter the lane in which he was travelling. That was the cause of the accident.

23. Mr. Kheteng was forthcoming and frank in his evidence, he had a good demeanour in the witness box, showed no bias, there were no internal and or external contradictions, and the caliber and cogency of his performance in the witness box cannot be faulted on any valid ground.

24. It is therefore submitted on behalf of the Plaintiff that the Plaintiff has discharged the onus, on a balance of probabilities, and thereby proved negligence on the part of the Second Defendant's driver, and the Second Defendant has failed to provide evidence to the contrary.'

The second defendant's answer to the plaintiff's summary of evidence and argument on the cause of the collision

[20] The essence of Brevs' disagreements with the plaintiff's summary of the evidence and the application of the law, is captured in paras 45 to 69 of the defendant's heads of argument.

'45. The facts and evidence placed before this Honourable Court coupled with the testimony of the witness, similarly challenged under cross-examination, will assist the Honourable Court in determining what the actual cause of the accident was on that fateful day. Therefore, the test for negligence, against the Plaintiff's driver, is not excluded by the unfortunate death of the Second Defendant's driver and he thus still has the responsibility to prove that the late driver was entirely negligent on a balance of probabilities whilst in turn being tested against the possibility that he himself was wholly and if not, in the alternative contributory negligent for the causation of the accident/collision.

46. The test for negligence is imperative in this instance and the matter of *Roads Authority v Government of the Republic of Namibia* sets out the test for negligence under paragraph 49 and it reads: "HB Klopper in his book *The Law of Collisions in South Africa*, 7th Ed. p 11, paragraph (f) formulates the test for negligence as follows:

“The test for negligence is whether a person’s conduct complies with the standard of the reasonable person. In order for a person to be liable the damage resulting from the negligence must be foreseeable and preventable. If these principles are applied to a motor vehicle accident, the driver must act like a reasonable person under the prevailing circumstances, be capable of reasonably foreseeing the damage flowing from his negligent act and must also take reasonable steps to prevent damage from occurring. Failure to do so will constitute negligence.”

47. This test for negligence, applied by the courts, is tested on and against the conduct of both motor vehicle drivers involved in a motor vehicle accident/collision. The determination of negligence is tested objectively and against the reasonableness of the driver in their motor vehicle as each driver has the duty to act like a reasonable person under prevailing circumstances in any given circumstance when operating a motor vehicle. Thus, the conduct of the Plaintiff’s driver, in casu, must be strictly tested against the arm of reasonableness while using and observing the evidence before court and with emphasis of his testimony, under oath, before the Honourable Court.

48. The Plaintiff, in raising the *res ipsa loquitur* principle in his Written Submissions, does not provide the Court with an opportunity to test the negligent conduct of the Plaintiff’s driver and therefore would bypass the process of evaluating the conduct of the Plaintiff’s driver prior and during the accident based on the evidence which has been presented to this Honourable Court.

49. The Plaintiff’s reference to the case of *Dausab v Hedimund and Two Others* is fundamentally arbitrary, as it states that: “when *res ipsa loquitur* applies- ‘the facts speak for themselves’ – in that an inference of negligence is inescapable. It must follow that a driver of a vehicle which collides with a stationary vehicle is required to furnish a satisfactory explanation to negate the inference or presumption of negligence on his or her part. Should he or she fail to rebut the presumption, he or she will be held to have been negligent under the circumstances...”.

50. An inference cannot be drawn in these circumstances merely because the other driver in casu is not alive to present a mutually destructive version to the court in

rebuttal to the Plaintiff's claim as that is not the basis for which negligence is to be determined. The Plaintiff further states that 'it is not necessary for a Plaintiff to prove that the inference that he asks the court to draw is the only reasonable inference but that it suffices for him to convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences.' The Second Defendant hereby submits that the above submitted and discussed principle does not find application and/or relevance in this case and therefore bears no weight in the determination of negligence.

51. The reason upon which the Court should similarly not make an inference in circumstances such as the one being advanced by the Plaintiff in this matter, can be found in the Supreme Court judgment of in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz* 2008 (2) NR 775 (SC) at 790B-E cited with approval the following passage from *Govan v Skidmore* 1952 (1) SA732 (N) at 734A – D in which it states:

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt ... for, in finding facts or making inferences in a civil case, it seems to me that one may ... 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.'

52. Thus the Honourable Court must be granted the opportunity to decide whether an inference can be drawn following the close of the Plaintiff's case which is based on the evidence presented by the Plaintiff which evidence is summarily tested under cross-examination. For the Honourable Court to decide upon the truthfulness of probabilities, the credibility of the witnesses presented will have an intrinsic effect on the conclusion made by the Presiding Judge and this is similarly set out in the case of *Van der Westhuizen v Januarie and Another* in which the court made reference to the dictum of Eksteen AJP (as he then was) in *National Employers General Insurance Co. Ltd v Jagers*, which stated: [W]here the onus rests on the plaintiff . . . and where there are mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is

therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

53. The Plaintiff, through the testimony of the witness and evidence presented, has failed to show how such an inference can be drawn particularly when taking into account the number of discrepancies, irregularities and inconsistencies of their single witness's testimony. The test for negligence must be exercised and scrutinized against the evidence and the cross-examination of the Plaintiff's witness and the test of reasonableness in the circumstances.

54. The Second Defendant, as previously mentioned, contests the basis of the Plaintiff's claim on the basis and pursuance that the Plaintiff's driver was solely negligent in that he was:

54.1 driving at an excessive speed;

54.2 driving without due care and attention when approaching the intersection; 54.3 failed to apply the brakes of the truck timeously or at all;

54.4 failed to keep a proper look out for other traffic; and

54.5 failed to exercise reasonable care.

55. The Plaintiff's driver in his testimony, testified that due to the very dark and very misty conditions which he was experiencing, that he could not see far ahead of him on the road and could only see about 12-13 metres ahead of him even with the use of his headlights and similarly emphasized the extent of the impairment with regards to his vision on the road, with no natural light present.

56. The Plaintiff's driver further testified that once he had exited the Omaruru River, he had gradually increased the speed at which he was driving and thereafter consistently drove at a speed of 55 to 60 km/h because he looked at the speedometer at that time, which was in front of him but under cross-examination he was unable to confirm whether he had looked at the speedometer on approaching the intersection and it was put to him that he didn't as he could not verify exactly what speed he had been driving then.

57. He testified that he was 16.5 meters from the intersection when he first noticed the other vehicle approaching the intersection from his right-hand side, this caused some confusion as how he was able to see the other vehicle. Firstly, if the Plaintiff's driver was only able to see 12-13 meters ahead of him, how was he able to notice that he was 16.5 meters away from the intersection whilst travelling at a speed of 55 to 60 km/h? Additionally, he testified that when he was this exact distance from the intersection, he first took note of the other vehicle approaching and thereafter paid no attention to that vehicle.

58. The credibility and truthfulness of the driver's evidence was tested here as it was put to him that if he had been travelling at 55-60km/h at that distance from the intersection, that it would only take 1 second to reach and pass the intersection, which he was unable to give any reason or proof to dispute that. Making use of the arithmetic equation of calculating how much time it would take to travel 20 meters (which is more than the distance he was from the intersection) whilst travelling at a speed of 55 to 60 km/h into account and the testimony that the other vehicle was still approaching the intersection, the Plaintiff's driver must have reached the intersection within 1 second of all of these alleged observations which he is claiming thus drawing us to a conclusion that he should have reached the intersection before the other driver which cannot be said to be true. The Plaintiff's version does not make any logic sense if all these measurements and distances are taken in account.

59. The Plaintiff's driver, in his testimony, stated that he had decreased the speed at which he was travelling as he was approaching the salt-road which was not far after the intersection and testified that is situated at the far left-hand sign behind the police vehicle on Exhibit C6 and that the colour of the salt-road is different from the

colour of a tar road. However, when the Plaintiff's driver was presented with a colour copy of Exhibit C6 and asked to point out exactly where he sees a difference in colour on the road, he was unable to and it was put to him that his testimony of where the salt-road starts cannot be proved.

60. Furthermore, the Plaintiff's driver never made mention that the reason as to why he decreased his speed was because he was approaching the intersection or that it was due TO the intersection. He only added this averment (which was not evidenced before in his evidence nor witness statement) after it was put to him under cross-examination. That he acted with reasonable care and caution, specifically, when and BECAUSE he was approaching the intersection is not true and cannot be relied on by the Plaintiff.

61. The Plaintiff's driver decreased his speed for an alternative purpose and thus proves that he had not been acting with reasonable care and, subsequently, failed in keeping a proper look out for the other vehicle which had been approaching the intersection as he testified to, which means the Plaintiff's driver did not prepare himself for the possible actions or conduct of the other driver even though he had enjoyed right of way.

62. Additionally, a specific number of words constantly remained in attendance during the trial proceedings and evidence of the Plaintiff's driver and those words are "enjoyed right of way." It became more and more evident to the Second Defendant, that the Plaintiff's driver made use of these words in an attempt to avoid and/or escape liability for his part in sole and/or alternatively, contributory negligent conduct in the causation of motor vehicle accident upon which the Plaintiff's claim is based. The fact that the Plaintiff's driver was driving in a direction or lane which at such time allowed for him to have right of way did not exempt the Plaintiff's driver for acting with or exercising reasonable care and attention as a driver.

63. In the case of *Van der Westhuizen v Januarie and Another*, as above-mentioned, it had been submitted that a driver who has right of way is not excused from exercising the necessary care and diligence expected of a reasonable person and it made reference to *Gerber v Minister of Defence and Another* in which Ueitele J referred to the following explanation of the applicable law in *Robinson Bros v Henderson* where Solomon CJ said:

“Now assuming that, as the defendant himself admitted, the plaintiff in the circumstances had the right of way, the whole question would appear to be whether he acted reasonably in entirely ignoring the approaching car on the assumption that the driver would respect his right of way and would avoid coming into collision with him. In my opinion that was not the conduct of a reasonable man. It is the duty of every director of a motor car when approaching a crossing, no matter whether he believes he has the right of way or not, to have regard to the traffic coming from a side street. There is necessarily a certain amount of danger in approaching a crossing, and it is the duty of every driver to exercise reasonable care to avoid coming into collision with another car entering the crossing from a side street. Having seen such a car, he is not justified in taking no further notice of it, on the assumption that the driver is a careful man and may be relied upon to respect his right of way. If every driver of a motor car were a reasonable man, there would be few accidents; it is against the careless and reckless driver that one has to be on one's guard. The duty of the plaintiff in this case was to keep the car coming down Alice Street under observation, and not to have entirely lost sight of it merely because he had the right of way.”

52. In light of the above, it is evident that the notion of “enjoys right of way” does not exempt nor does it provide a safety net for driver to deviate from exercising reasonable care and diligence on the road. It states: “It is the duty of every director of a motor car when approaching a crossing, no matter whether he believes he has right of way or not, to have regard to the traffic coming from a side street,” which the Plaintiff's driver failed to do especially giving regard to the supervening circumstances of the conditions. The expectation, which the Plaintiff's driver has testified to, that the other driver was ‘supposed to’ or he “expected the other driver’ stop at the intersection does not, in law, exempt him from exercising reasonable care. The Plaintiff's driver tried to fabricate his version in order to indicate that he had decreased his speed due to the impending intersection AND the other vehicle that had been approaching the intersection, this was a blatant lie in order to sugar coat the version before court. He blatantly did not have due regard for that vehicle, and this can only be evidenced through his testimony in which he testified that he had only seen the Second Defendant's vehicle twice during this occurrence, specifically, when the Second Defendant's vehicle had been approaching the intersection and after the accident had occurred when he had been removed from

the truck.

64. Flowing off of this testimony of the Plaintiff's driver, the additional parts in which he states that he had seen the Deceased vehicle NOT stop at the intersection, driving towards the vacant land in the opposite direction and crossing the three lanes should be rendered false and not true. It appears to form a mere excuse from the Plaintiff's driver to create a false narrative in which to paint the Deceased, who was unfortunately unable to testify, as the solely negligent party.

65. It is further submitted that the version that the Plaintiff's driver had applied his brakes immediately after he noticed that the Deceased did not stop at the intersection through his witness statement and that he had applied his brakes prior to the intersection is completely a different version to his testimony and is similarly contrary to the images depicted in Exhibits C5 & C6 as it clearly indicates that the brake marks were applied AT the intersection and at the exact moment of collision and not prior thereto. This clearly indicates that the Plaintiff's driver did not keep a proper look out for the vehicle as it was approaching the intersection, he did not act with reasonable care when he, the Plaintiff's driver, had been approaching the intersection, that due to his failure in doing the previously mentioned, he failed to apply his brakes timeously because he kept proper look out and exercised reasonable care, the Plaintiff's driver would have been able to apply his brakes timeously and therewith, avoid the accident. The brake marks are very short and can possibly not have been applied before the intersection.

66. In emphasis hereof, Parker AJ in the matter of *Marx v Hunze* held that:

“it is “the duty of every driver of a motor car when approaching a crossing, no matter whether he believes he has the right of way or not, to have regard to the traffic coming from a side street.” If the plaintiff had the defendant's vehicle under observation, and really reduced his speed, he could have seen in ample time that the whole length of the defendant's vehicle was already in the left lane, along which his vehicle was travelling, and tried to avoid the collision. The plaintiff's duty was, therefore, to avoid the consequences of the defendant's negligence, as he could have done by reducing his speed and swerving his vehicle to his left.”

67. Similarly, in casu, had the Plaintiff's driver kept a proper look out for the Second Defendant's vehicle and under observation as he was able to notice the lights of the other vehicle approaching the intersection and had the Plaintiff's driver actually exercised the reasonable care and diligence when actually approaching the intersection (instead of relying on having right of way) instead of decreasing his speed due to the gravel/salt-road which was approaching, the Plaintiff's driver would have been in a position to apply his breaks timeously and avoid the motor vehicle accident by swerving to either side which he failed to do prior to the collision. A driver has the duty to keep a proper look out and drive at a speed which will enable him to apply brakes if necessary and the Plaintiff's driver, although driving within the required speed limit, did not fulfil this duty as a reasonable driver in this regard.

68. What is a more reasonable and probable version for the Honourable Court to accept under the circumstances, is that the Second Defendant's driver had entered the Plaintiff's driver's lane with the intention of heading in the direction of Cape Cross because the Plaintiff's driver was in fact even a further distance from the intersection and thus the Second Defendant's driver had the opportunity to do so in comparison to what he purported and the Plaintiff's driver failing to keep a proper look out and exercising reasonable care, did not see the other vehicle until it was too late, collided with the Deceased vehicle and only applied his brakes at the moment of collision, rendering him solely responsible for the cause of the accident because had he exercised reasonable care and diligence with respect to the impending intersection, the motor vehicle collision could have been avoided.

69. Therefore, it is submitted on behalf of the Second Defendant that the Plaintiff's driver was solely negligent for the motor vehicle collision due to his serious deviation from what is expected of a reasonable driver and supplemented by his improbable version and inconsistent testimony as to the account of events and thus should be held solely liable for the causation of the motor vehicle accident. If the court is not so satisfied that the Plaintiff's driver is to be held solely liable for the occurrence of the collision, the Second Defendant submits, in the alternative, that the Plaintiff's driver be held contributory negligent in the majority ratio for the causation of the collision.'

Analysis – the cause of the collision

[21] Having considered the evidence, the parties' written arguments and

what they added during oral argument, and the authorities, it appears to me that the application of the principle of *res ipsa loquitur* is indeed decisive in this case. On the application of this principle, I find that both drivers were required to explain why they should not be held to have been negligent. The deceased could not explain for obvious reasons. Mr Kheteng's explanation fell short, on his own facts.

[22] With respect to the deceased, the principle operates because the Toyota collided with the truck in the second of three lanes in the direction where the plaintiff's truck had the right of way, and the deceased had been required to stop at a stop sign before he could turn right, meaning that he ought to have come to a complete standstill before turning right into oncoming traffic. The photographs suggest that the impact was on the left front door of the Toyota, meaning the Toyota did not complete a right turn into the direction of Cape Cross. It was not a rear-end collision, where other inferences could have arisen. These objective facts required an explanation from the deceased to negate the inference that he did not stop at the intersection as he was supposed to before proceeding into the opposite lane, and that the deceased had failed to keep a proper lookout for vehicles from his left before proceeding into the opposite lane.

[23] However, I agree with Brevs' argument that the deceased's negligence does not automatically mean that Mr Kheteng was not also negligent in the circumstances.

[24] I accept Mr Kheteng's evidence of his driving experience, of the dark and misty conditions on the day, that his truck's lights were on, that he travelled at approximately 55 – 60 km/h when approaching the intersection, that he had seen the deceased's vehicle once while it had been approaching the intersection and before it entered the intersection, and that he braked and tried everything in his power to avoid a collision when he realised that the deceased had entered the intersection without stopping as the deceased should have. Accepting his evidence on the facts does not mean that I accept the conclusion that his negligence had not contributed to the collision.

The evidence on the objective and subjective key points show that Mr Kheteng ought to have driven at a much lower speed than he testified. On his own version, he could only see around 12 to 13 metres ahead of him, due to the very dark and misty conditions. At his speed, it would have taken him only between one and two seconds to reach the intersection once he exited the river.

[25] Mr Kheteng testified that he had driven this road before and knew that the salt road that started shortly after the intersection required him to slow down. Mr Kheteng testified that it took some time to bring the truck to a standstill, one cannot just brake and expect the same results as one would in a passenger vehicle. Considering the impaired visibility, the short distance between the exit from the Omaruru River to the intersection, the time it would necessarily have taken for Mr Kheteng to bring his truck to a standstill⁵ or manoeuvre to avoid a collision with someone like the deceased who may not have seen the oncoming truck before crossing the intersection, Mr Kheteng ought to have taken more care to ensure he could react to a warning that someone might travel into his lane without ensuring that it was safe.

⁵ In *Mkhabo and another v Road Accident Fund*, unreported judgment in case number 37685/2014, delivered on 6 December 2019, paras 56 – 58, the Gauteng Local Division of the South African High Court dealt with an action for damages from a collision involving a bus and two other vehicles. The bus crossed into an intersection on red traffic light. The bus driver claimed the traffic light had turned red very shortly before he entered the intersection but that he crossed anyway because he would have disrupted the traffic flow if he tried to stop. He would've stopped in the middle of the intersection. The court discussed expert and other evidence about speed and distances. Amongst others, it discussed the simple calculation that showed a vehicle traveling at a constant speed of 40km/h would cover 11.1 metres per second and one traveling at 50 km/h would cover 13.9 metres per second. For the bus in question, calculations were presented that the bus 'would have needed 27 metres to stop at a speed of 40 km/h and 36 metres at 50 km/h (although an emergency stop could be carried out over as little as 9 metres). Although the court ultimately did not rely on the evidence about the braking distance because of the uncertainty of numerous variables that were considered or ought to have been considered in calculating the braking distance, the point is that large vehicles need some distance to come to a stop even when traveling at relatively slow speeds. And calculating the actual distance that is needed for a specific vehicle, whether a bus or a truck, to come to a stop is a complicated exercise.

[26] In argument, the plaintiff's representative emphasised that Mr Kheteng was uncertain about his estimates of the distances between the key points. He only supplied the estimates when pressed under cross examination. The plaintiff argued that the estimates are unreliable and cannot carry the day.

[27] The plaintiff's argument is factually accurate. The argument also enjoys support in the authorities, for example in the following observation in the South African High Court judgment of *Mkhabo and another v Road Accident Fund*⁶.

'[40] One must have significant distrust in the ability of motorists to accurately judge distances while driving. The only safe manner to approach evidence about when the light turned red for the bus driver, is by adding an "about" to his evidence. Even an "about" is difficult, as one covers so much distance per second, even at moderate speeds, and in the normal course one would not be making mental notes about distances travelled when normal events occurred. I have difficulty in accepting evidence that the bus driver was 10 meters away from the intersection when the light turned amber in the absence of any specially developed skill to make such an assessment with a degree of accuracy. It is notoriously difficult to do. The 10 meters was pointed out in a court room, years after the event.'

[28] Despite the factual accuracy of the argument and the support in the authorities, the facts of this case do not allow the court to completely disregard Mr Kheteng's evidence on the distances. Unlike in *Mkhabo*, the parties in this case did not present any relevant objective evidence or independent witness evidence that I could use as a check, or which could cast Mr Kheteng's estimates in a different light. None of the photographs tendered into evidence show the distance between the river and the intersection. I accept Mr Kheteng's estimates as estimates only. However, even if one adds several metres to Mr Kheteng's estimates, or even doubles

⁶ *Mkhabo and another v Road Accident Fund*, unreported judgment in case number 37685/2014, delivered on 6 December 2019, para 41.

or triples his estimates, the plaintiff's problems do not disappear.

[29] It follows that Mr Kheteng was also negligent and that his negligence contributed to the collision.

Degree of fault

[30] The parties did not present evidence or argument on the degree of fault attributable to each party. In the assessment of the degree of fault, I took guidance from the Supreme Court's judgment in *Sheehama v Nehunga*⁷ and two High Court judgments in *Marx v Hunze*⁸ and *The President of the Republic of Namibia v January*.⁹

[31] On my assessment of the facts, the deceased appears to have driven straight over the stop sign at the intersection, as Mr Kheteng testified. The deceased ought to have come to a complete stop at the sign, whether or not he had seen the Iveco. If he had stopped, the collision would probably not have occurred. As such, the deceased's negligence is the main cause of the collision. However, if Mr Kheteng had displayed more care to drive slower, and had paid more attention to oncoming traffic, knowing that he was exiting a river on a temporary road approaching an intersection in darkness and mist, and that he was driving a vehicle that couldn't stop on the proverbial dime, it is probable that he could have avoided the collision. I assess the deceased's negligence at 70 per cent, and Mr Kheteng's at 30 per cent.

Vicarious liability

Undisputed facts on vicarious liability

[32] These are the undisputed relevant facts on vicarious liability:

⁷ *Sheehama v Nehunga* (SA 13 of 2019) [2021] NASC 1 (7 April 2021) paras 31 - 36

⁸ *Marx v Hunze* 2007 (1) NR 228 (HC) paras 12 - 14

⁹ *The President of the Republic of Namibia v January* (HC-MD-CIV-ACT-DEL-2019/03450) [2021] NAHCMD 278 (04 June 2021) paras 118 - 129

- (a) Mr Nakale was a Brevs employee at the time of the collision.
- (b) At the time of the collision, he drove a Toyota pickup rented by Brevs from a third party.
- (c) The written rental contract between Brevs and the third party contained, amongst others, the following provision at clause 5: “the car is authorized for the purpose of mining supervision work at the m (*sic*), thus leisure driving is prohibited. Driving the Van Zyl Pass is also prohibited.”
- (d) Mr Nakale’s duty station at the time was Uis.
- (e) Mr Nakale was travelling from direction Uis when he collided with Mr Kheteng.
- (f) Mr Nakale’s passenger was also a site supervisor at the Uis mining site. The passenger was responsible for approving applications for Brevs employees seeking to travel to and from the mining site for work related travel or leave.

Plaintiff's case on vicarious liability

[33] The plaintiff did not lead any evidence on vicarious liability. His case is constructed on the inferences that arise from the common cause facts. The plaintiff relies heavily on the negative inference that the court must draw, so the plaintiff argues,¹⁰ against Brevs for failing to produce any documentation relevant for the two employees’ duties generally or their specific duties on the day, and from Brevs’ failure to call as a witness anyone with direct knowledge of the employees’ schedules and activities. Brevs’ sole witness is an alternative director whose full-time job is CEO of Epangelo Mining based in Windhoek. This witness was not involved in Brevs’ operations at the relevant time. The witness gained his knowledge of what happened and might have happened at the relevant time from Mr Bedja, Brevs’ project manager at the Uis mining site. The critical question is why did Brevs not call Mr Bedja as a witness? The plaintiff also relies on the rule of evidence ‘that, if the facts were peculiarly within the knowledge of a

¹⁰ Relying, amongst others, on *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A) at 715F – 716F and *Raliphaswa v Mugivhi and Others* 2008 (4) SA 154 (SCA) para 15.

defendant, the plaintiff needed less evidence to establish a prima facie case'.¹¹

Second defendant's answer to plaintiff's case on vicarious liability

[34] Brevs' case is that the plaintiff has the onus to prove that Mr Nakale had acted within the course and scope of his employment with Brevs at the time of the collision (to satisfy the standard test)¹² or that there is/are a sufficient connection between the employer's action or enhancement of a risk and the harm that accrues therefrom, even if is unrelated to the employer's claims.¹³ Brevs argues that the plaintiff did not present a shred of evidence to satisfy either test. It also argues that clause five of the rental agreement made out a *prima facie* case that the employees were not authorised to use the Toyota on their trip outside Uis. When this evidence is combined with Mr Hawala's evidence that (1) Brevs' had no business in Cape Cross on Henties Bay and (2) Brevs does not allow its operational vehicles or staff to leave the site for errands, it follows that the plaintiff failed to satisfy his onus.

[35] Brevs did not say anything about Mr Bedja's absence.

Analysis – vicarious liability

[36] Brevs is correct in asserting that the plaintiff has the onus to prove his case on vicarious liability. Brevs is also correct that the plaintiff has not led any evidence in support of its case. However, Brevs is wrong in asserting that there is no evidence at all that supports the plaintiff's case.

[37] To the contrary, the probabilities are in the plaintiff's favour when several of the common cause facts are combined with Brevs' unexplained

¹¹ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 27.

¹² *Fv Minister of Safety and Security* 2012 (3) BCLR 244 at 254 paras 40 and 41 and *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA), at 378 – 379.

¹³ *Crown Security CC v Gabrielsen* 2015 (4) NR 907 (SC) para 19.

failure to present documents that would have shed light on the issue and its failure to present evidence by the one person who would have direct knowledge of the circumstances under which Mr Nakale and his fellow employee were traveling in a company rental, vehicle.

[38] Clause 5 of the rental agreement is not sufficient to oust the most likely inferences that follow from the following facts.

(a) The rental agreement did not amount to an absolute ban on driving from the mining site, other than for leisure activities. The agreement expressly prohibited driving via the Van Zyl Pass. It did not expressly ban employees from running errands for the company.

(b) Two supervisory level employees travelled together in the company car. This makes it less likely that they were traveling on a frolic of their own.

(c) One of the employees in the vehicle was responsible for the company's system for managed employees leaving the mining site for official or personal reasons. This makes it less likely that the very same employee will be cheating the system by going on a frolic of his own or accompanying a fellow employee on a that employee's frolic.

[39] The two employees could not testify in this action. The employer did have a system for managing its employees' access and exit from the mining site for work related and personal reasons. The employer ought to have records that would have shown what exactly the relevant employees were doing or ought to have been doing. There were other employees that had been working with the two deceased employees, who could be reasonably expected to shed light on the reason for the deceased employees traveling with a company vehicle on the relevant date.

[40] Brevs did not explain why no records were produced or why Mr Bedja in particular was not called as a witness, I find that Brevs' failure to present direct evidence of the relevant facts, which are, or which must reasonably be assumed to be within Brevs peculiar knowledge, suggests that such

evidence would have contradicted Brevs' case and was for this reason not presented. Thus, when this negative inference is considered with all the inferences from the common cause facts that support the plaintiff's case, it is more probable than not that the late Mr Nakale had been driving in the course and scope of his employment on the relevant day.

[41] Even if I am wrong in this assumption, and if it is more probable that he was not working but perhaps had been on his way home, it still appears probable that Mr Nakale would not have been driving the vehicle on a frolic of his own. It is probable that he would have driven with his employers' permission. In this case, even if the purpose of the journey would not have been in direct furtherance of his employer's interests, the employer's consent for the deceased to use the vehicle would constitute a sufficient connection between the creation of the risk and the wrong that accrued for the employer to be liable.¹⁴

Conclusion

[42] The plaintiff is entitled to 70 per cent of the agreed quantum of damages caused by the collision between the vehicles driven by Mr Kheteng and the late Mr Nakale. The agreed quantum is N\$300 554. The total amount due to the plaintiff is N\$210 387,80.

[43] The second defendant, the employer of the late Mr Nakale at the relevant time, is held vicariously liable for the damages caused by the negligence of the late Mr Nakale while he was driving the vehicle rented by the second defendant from a third party.

[44] With respect to the application for default judgment against the first defendant, the plaintiff delivered a damages affidavit by Marthinus Venter, an expert insurance assessor, to prove the quantum of damages. This was necessary since the first defendant had not agreed to the quantum of damages as Brevs had done at the start of the trial. I am satisfied that the

¹⁴ *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134F-135C

plaintiff has proven the quantum of its claim against the first defendant but limit the amount to that agreed to between the plaintiff and second. The first and second defendants are liable, jointly and severally, to the plaintiff for 70 per cent of the total damages quantified at N\$300 554.

[45] In the premises, the following orders are issued.

1. The first and second defendants are jointly and severally liable, the one paying the other to be absolved, to the plaintiff, for:

(a) Payment of N\$210 387,80

(b) Interest on N\$210 387,80 at the rate of 20 percent per annum calculated from date of judgment until date of final payment.

(c) Costs of suit.

2. The matter is deemed finalised and removed from the roll.

R MAASDORP
Acting Judge

APPEARANCES

PLAINTIFF: F Pretorius
Of Francois Erasmus and Partners

2ND DEFENDANT: L Goraseb
Of Ileni Velikhoshi Inc.