

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

Case no: HC-NLD-CIV-ACT-DEL-2020/00267

In the matter between:

**SUSANA MARKUS**

**PLAINTIFF**

and

**MARTIN TANGI ANGULA**

**DEFENDANT**

**Neutral Citation:** *Markus v Angula* (HC-NLD-CIV-ACT-DEL-2020/00267) [2023]  
NAHCNLD 53 (05 June 2023)

**CORAM:** **MUNSU J**

**Heard:** 09 February 2023

**Delivered:** 05 June 2023

**Flynote:** Law of Delict – Motor vehicle collision – Negligence alleged – Onus on plaintiff to prove on a balance of probabilities – Versions of Plaintiff and Defendant mutually destructive – Whether Plaintiff discharged onus.

**Summary:** A collision occurred between the plaintiff and the defendant's motor vehicles. Both the plaintiff and the defendant were driving in the same direction when

the plaintiff decided to overtake the defendant and in the process their vehicles collided. Each party claimed that the other was at fault. There was no counterclaim.

*Held*, that the plaintiff bears the onus of proving that the defendant was negligent. The approach to be adopted by the courts when faced with two different versions restated.

*Held that*, the plaintiff can only succeed if she satisfies the court on a preponderance of probabilities that her version is true and accurate and therefore acceptable, and that the version advanced by the defendant is false or mistaken and falls to be rejected.

*Held further that*, the plaintiff's claim that the defendant intended to turn right but failed to indicate his intention to do so could not be sustained in light of the objective facts, firstly, there was no turn to the right, and secondly, he had no intention to turn to the right. In any event, the plaintiff did not adequately plead her assertion.

*Held*, that the plaintiff's case changed as the matter progressed. It started off with a claim that the defendant veered into the overtaking lane as the plaintiff was overtaking, colliding with the plaintiff's vehicle, and that the collision is what made the plaintiff's vehicle swerve to the right shoulder of the road. The version then changed and it was now claimed that when the defendant veered into the plaintiff's lane, the latter tried to avoid a collision and steered her vehicle to the right.

*Held further*, that despite the plaintiff initially claiming that the defendant's vehicle bumped into her vehicle, she later on changed to say that she could not tell whether it is her vehicle that bumped the defendant's vehicle or the other way round. The testimony of the plaintiff's witness was more of speculation and did not further the plaintiff's case.

*Held further that*, none of the parties presented any expert evidence that could assist the court in determining which of the parties bumped the other.

*Held*, that the defendant, on the other hand, presented a consistent case from the stage of pleadings until the evidence at trial. His case was straightforward in that he

drove on the correct lane when the plaintiff attempted to overtake him, but failed because she veered into his lane, colliding with his vehicle.

*Held further that*, the defendant was steadfast in his version of events and did not contradict himself even under cross-examination. The defendant's witness also corroborated the defendant's version that the plaintiff had not cleared the defendant's vehicle when she steered towards the left lane thereby colliding with the defendant's vehicle.

*Held*, that from the plaintiff's case, it was not clear how the collision occurred.

*Held further*, that under the circumstances, there was no basis on the facts, for the court to reject the defendant's version as false.

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### ORDER

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1. The Plaintiff's claim is dismissed.
2. There is no order as to costs.

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### JUDGMENT

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**MUNSU J:**

Introduction

[1] This is an action for damages arising from a motor vehicle collision, which occurred on 30 June 2020 on D-3603 Okankolo-Onathing road, between a Nissan pick-up NP300 vehicle bearing registration number N38791SH, driven by the plaintiff and a silver Toyota sedan vehicle bearing registration number N105450W, driven by the defendant.

### The parties

[2] The plaintiff is Ms Susana Markus an adult business woman. She resides at Onhuno, Ohangwena Region. The defendant, on the other hand, is Mr Martin Tangi Angula an adult male and resident of Oniimwandi village, Oshana Region. He is employed as a teacher.

### The pleadings

[3] The plaintiff alleges that the collision referred to para 1 above was caused solely as a result of the defendant's negligent driving in one or more of the following respects:

- 3.1 He failed to keep a proper lookout for other vehicles on the road, especially the plaintiff's vehicle;
- 3.2 He failed to indicate his intention (sic);
- 3.3 He failed to observe traffic that was overtaking him from behind;
- 3.4 He failed to avoid a collision which in the exercise of reasonable care he could have or should have done so;
- 3.5 The defendant veered onto the opposite lane whilst the plaintiff was already on that lane overtaking the defendant resulting in the collision.

[4] In respect of claim 1, the plaintiff seeks payment of an amount of N\$ 60 034.89 (consisting of N\$ 1 900 for towing fees; N\$ 59 034.89 for damages occasioned to the vehicle).

[5] In claim 2, the plaintiff seeks payment of an amount of N\$ 18 500 for the mahangu crusher that was allegedly being conveyed in her vehicle and was allegedly damaged beyond economical repair as a result of the collision.

[6] In his plea, the defendant denied liability for the collision and maintained that he was driving on the correct side of the road and kept a proper lookout for other vehicles

on the road. It is the defendant's plea that he did not indicate because he did not have the intention of doing anything that required indicating, such as changing lanes, pulling over, overtaking or stopping. In addition, the defendant pled that he was driving straight until the plaintiff lost control of her vehicle and collided into the defendant's vehicle. Furthermore, it is the defendant's plea that he never veered into the opposite lane.

#### The issues for determination

[7] In terms of the pre-trial order, this court has to determine which of the parties was negligent and therefor responsible for the collision. The parties agreed that there was no need to prove the damages sustained by the plaintiff. The defendant did not file a counterclaim. The effect of the parties' agreement on damages was that the court would grant damages as claimed if the court finds that the defendant was at fault. If, on the other hand, the court determines that the plaintiff was at fault for the collision, then it will be the end of the matter. Similarly, the court was asked to determine if both the plaintiff and the defendant were contributory negligent, and if so, what percentage of their negligence contributed to the collision.

#### Common cause facts

[8] It is common cause that on 30 June 2020, on a public road namely D-3603 (Okankolo-Onathinghe), a motor vehicle collision took place between the vehicles described in paragraph 1 above. The plaintiff and the defendant were the drivers of their respective vehicles.

#### The plaintiff's case

[9] Ms Susana Markus, the plaintiff, testified under oath, and her testimony about the motor vehicle accident can be summarized as follows: She was driving on the Okankolo-Onathinghe road at midday on June 30, 2021. She had four passengers in the vehicle, one of whom sat in the front passenger seat and the other three on the

loading box. On the loading box, there was also a mahangu crusher. It was a cloudless day.

[10] She encountered the defendant's vehicle, which was also travelling in the same direction. She testified that the defendant was driving slowly, below 60 km/h. She decided to overtake the defendant's vehicle and signalled her intent to do so. While overtaking, she heard a loud noise and realised her vehicle had been hit on the left front side by the defendant's vehicle. As a result of the collision, her vehicle drifted to the right and half of it ended up on gravel, causing her to lose control of the vehicle, which led to the vehicle overturning.

[11] She testified that when her vehicle came to a halt, she exited through the window and discovered that two of her passengers had been thrown out and were bleeding. She witnessed the defendant getting into a taxi without helping the injured passengers.

[12] It was her testimony that she noticed that the mahangu crusher which was on her vehicle was damaged. She testified that they were taken to the hospital by an ambulance.

[13] According to the plaintiff, the defendant was the sole cause of the accident because he failed to keep a proper lookout for other vehicles on the road; he failed to observe overtaking traffic; he failed to avoid the collision, which he could have avoided with reasonable care; and he veered onto the opposite lane while the plaintiff was overtaking, resulting in the collision.

[14] In addition, the plaintiff testified that she hired the services of a company called Kenny Auto Repair to tow her vehicle to Oshakati and in the process she was charged N\$ 1 900. Her vehicle was assessed and it was determined that the fair and reasonable amount for the damages is N\$ 59 034.89. She testified that the mahangu crusher was damaged beyond repair hence her claim for payment of the purchase price in the amount of N\$ 18 500.

[15] The second witness called by the plaintiff was Mr Matheus Shangeelao Namumonika. Mr Namumonika testified that he was travelling with the plaintiff from Okankolo to Onayena. He occupied the front passenger seat. He testified that the plaintiff was driving behind the defendant's vehicle which was moving very slow. As a result, the plaintiff decided to overtake the defendant's vehicle. The plaintiff indicated her intent to overtake and moved on the lane for oncoming vehicles and began overtaking. Before the plaintiff could clear the defendant's vehicle, the witness heard a loud bang on his side and realised that the defendant's vehicle bumped into the plaintiff's vehicle. It led the plaintiff's vehicle to veer off the road to the right, resulting in the plaintiff losing control of the vehicle and it overturning.

[16] Mr Namumonika further testified that, as a result of the defendant's conduct, the plaintiff's vehicle went off the road, causing it to overturn. It was his evidence that the mahangu crusher that was being conveyed in the plaintiff's vehicle got damaged as a result of the accident.

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#### Defendant's case

[17] The defendant, Mr Martin Tangi Angula, testified that the plaintiff was the sole cause of the collision because she failed, at the time of overtaking, to keep a proper lookout and neglected to check her rear view mirror before promptly returning to the left lane and colliding with the defendant's vehicle. According to his testimony, the plaintiff lost control of her vehicle while overtaking and veered back into the defendant's lane. The defendant testified that the impact caused his front right tyre to burst, the engine to be entirely damaged, and the car to come to a complete halt. His colleague then drove him to the hospital.

[18] Mr Efraim Amutenya was the defendant's second witness. He testified that he was driving behind the defendant when the plaintiff got between the defendant's vehicle and his vehicle. He testified that the plaintiff was driving fast and attempted to overtake the defendant's vehicle. The plaintiff steered to the right to overtake, then abruptly steered back to the left, colliding with the defendant's vehicle near the defendant's front tyre, sending the plaintiff's vehicle into a roll several times while the

defendant's vehicle came to a stop. According to the witness, the plaintiff was at fault for the accident because she failed to ensure that she cleared the defendant's vehicle before returning to the left lane, resulting in the collision.

[19] Mr Sisuwo Cornelius Nyango was the police officer who attended to the accident scene and compiled a sketch plan. He was not an eye witness as he only attended to the scene after the collision. He did not find the plaintiff and the defendant as they were already taken to the hospital. He testified that the accident scene was pointed to him by one Beata Shipanga who was allegedly one of the passengers in one of the vehicles. According to the sketch plan, the point of impact is in the middle of the road. The crucial point on his sketch plan, being the point of impact, is indicated on the dividing line in the middle of the road. Both the plaintiff and the defendant dispute the point of impact as indicated on the sketch plan. Beata Shipanga, the witness who allegedly pointed the scene was not called as a witness.

#### Onus of proof

[20] The plaintiff bears the onus of proving that the defendant was negligent, that is, a reasonable person in the position of the defendant could have reasonably foreseen the ensuing harm and the reasonable person would have taken reasonable steps to prevent harm from occurring. In *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone*<sup>1</sup> the Supreme Court found that even where there is no counterclaim but each party alleges negligence on the part of the other, each party must prove what it alleges.

#### Disparate versions

[21] It is common cause that there are different and mutually destructive versions before the court. In *Von Wielligh v Shaumbwako*,<sup>2</sup> Ueitele J outlined the approach to be adopted by the courts, when faced with two different versions, as follows:

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<sup>1</sup> *Motor Vehicle Accident Fund of Namibia v Lukatezi* Case No SA 13/2008 (at para16 - 17) delivered on 09 February 2009.

<sup>2</sup> *Von Wielligh v Shaumbwako* ( I 2499/2014) [2015] NAHCMD 168 (22 July 2015) at 16; *Awases v Smith* (I 1272/2016) [2017] NAHCMD 277 (4 October 2017).



'The plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities favour the plaintiff then the Court will accept his version as being probably true.'

[22] Thus, the plaintiff can only succeed if she satisfies the court that her version is probable, accurate and hence acceptable, and that the defendant's version is therefore false and falls to be rejected.

#### Analysis of the evidence and findings of fact

[23] The plaintiff claimed that the defendant failed to indicate his intention to turn to the right (as it turned out in her evidence), but such claim could not be sustained in light of the objective facts because, first, there was no turn to the right, and second, he had no intention to turn to the right. In any event, the plaintiff did not adequately address this point. She was unclear about the claim she wished to make. In the particulars of claim, she simply stated that "he failed to indicate his intention." That was also her evidence in chief. However, she could not take it any further as the matter progressed during trial.

[24] The following exchange took place between the court and the plaintiff:

COURT: At some point I heard you saying as if the Defendant was turning or driving off the road, was it mere encroaching or driving off the road or are you able to say or not say anything in that regard?

PLAINTIFF: I would not know exactly his intention Defendant's intention was My Lord but according to my observation is that he was getting off the road. His intention was to get off the road.<sup>3</sup>

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<sup>3</sup> Page 26 para 10 of the record of proceedings.

[25] The plaintiff's witness Mr Namumonika was clear on the issue. This is how he testified:

'PLAINTIFF'S COUNSEL: Okay, when you were overtaking did you perhaps observe any exit on the lane where Defendant was swerved on, did you see an exit for him to maybe leave the road or any stop to leave the road or something?

MR NAMUMONIKA: There was nothing My Lord.<sup>4</sup>

[26] The plaintiff's version changed as the matter progressed. In her evidence in chief, she testified as follows:

'Whilst I was on the opposite lane about to execute my conduct herein overtake the Defendant's vehicle suddenly I heard a loud sound to wit I realise I was hit here in my vehicle on the left front side by the Defendant's vehicle. At the same time half of my vehicle and the mahangu trailer crusher veered on the gravel road as a result of the Defendant bumping my vehicle which conduct caused me to lose control of my vehicle and causing it to overturn.'<sup>5</sup>

[27] The above evidence was corroborated by the plaintiff's witness Mr Namumonika who testified that:

'The Plaintiff's vehicle was bumped on my side the left front part which caused the right part of the Plaintiff's motor vehicle to veered off the main road to the gravel road while the left part was still on the main road. It was the result of the Defendant's conduct Plaintiff's vehicle veered off the main road causing the Plaintiff to lose control and resulting in the vehicle to overturn.'<sup>6</sup>

[28] According to the account presented above, the defendant veered into the overtaking lane as the plaintiff was overtaking, colliding with the plaintiff's vehicle. Additionally, the bumping is what made the plaintiff's vehicle swerve to the right shoulder of the road.

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<sup>4</sup> See page 71 para 20 of the record of proceedings.

<sup>5</sup> Page 6 – 7 para 20-30 of the record of proceedings.

<sup>6</sup> Page 65-66 of the record of proceedings.

[29] However, during further examination by counsel, the plaintiff's version changed and she claimed that when the defendant veered into her lane, she tried to avoid a collision and steered the vehicle. She testified as follows:

'And while I was just approaching this vehicle it veered in front of me My Lord. I tried then to avoid collision. Then one of the wheel or the tyre went on the gravel road and the other tyre was on the road. I suddenly just heard a sound My Lord and could not tell what exactly happened I only saw the vehicle overturning because the car had overturned My Lord.'<sup>7</sup>

[30] Further:

'Your Worship because the Defendant's vehicle went across the lane where I was overtaking then for me to avoid bumping in straight on the doors of the vehicle I then swerved that is when then his vehicle collided with the wheel from the passenger's side that is when he collided with the wheel of the car that is when I got off the road because should I have not swerved to avoid this collision I would have bumped him straight in the middle of his vehicle across the lane My Lord.'<sup>8</sup>

[31] In cross-examination, the following exchanges took place between the defendant's counsel and the plaintiff:<sup>9</sup>

'Is it your evidence that you saw the Defendant's vehicle as it swerved towards the right lane where you were overtaking, you saw it? --- That is correct I saw him when he got in front of me. And then just again to clarify, you said you took action and the action you took was to try to avoid him and you heard one of your tyres actually going off the road on the opposite? --- Correct. But at this point he still in front of you is it not, you are not parallel he is still in front of you? --- That is correct he was still in front of me My Lord.' And then what happened you tried to go off the road and then what happened? --- By then I did not go off the road My Lord, his vehicle then came in front of me. When the vehicle, the Defendant vehicle came then in front of me there was no other way I could do I then tried to get off and then I heard of a sound and then that is when the (indistinct). It is your testimony that he was, he was in front of you as this is happening he is still in front of you, the Defendant is still in front of you? --- Correct.

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<sup>7</sup> Page 9-10 para 20-30 of the record of proceedings.

<sup>8</sup> Page 26 of the record of proceedings.

<sup>9</sup> Page 27-28 of the record of proceedings.

[32] At some point, the plaintiff gave the impression that she was confused which vehicle bumped the other. She testified that:

'According to myself My Lord while I was trying to avoid the collision My Lord I cannot then tell whether it is my vehicle that collided with his or his vehicle collided with me but I believe his vehicle collided with mine because my vehicle got damaged on the front passenger wheel on the chassis. That is when I lost control and then overturned.'<sup>10</sup>

[33] The plaintiff presented the accident report into evidence. There the plaintiff states that:

'While I was busy overtaking on the right lane, the front car Toyota sedan just turn to the right side without indicating then my car hit into a sedan front side.'

[34] None of the parties presented any expert evidence that could have assisted the court in determining which of the parties bumped the other. Neither was a photo plan presented.

[35] In re-examination, the following exchanges took place between the plaintiff and her counsel:

'Madam for the last time, can you clarify when you, clarify your testimony, when you were attempting to overtake what did you do? --- Before I started overtaking My Lord there was no oncoming vehicle in front and I checked 20 on my rear mirror. There was also no any traffic coming from the rear according to my mirror and then I indicated. When I then check that the road from both side was clear I then indicated and then started executing to overtake My Lord. While I was just getting close to the vehicle that I was overtaking then this vehicle just came in front of my vehicle. That is when then I tried to avoid colliding with him putting part of the tyres on the gravel and part on the road. And then suddenly I heard a sound and then from there I then lost control of the vehicle and then it overturned.'<sup>11</sup>

[36] In his evidence in chief, the plaintiff's witness Mr Namumonika had the following exchanges with the plaintiff's counsel:

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<sup>10</sup> Page 28 para 20 of the record of proceedings.

<sup>11</sup> Page 57 of the record of proceedings.

'How did this come about one side being on the gravel road and the other being (indistinct) how did that happen? --- This happened My Lord because the Defendant's vehicle came to our lane and then that is when the Plaintiff's vehicle then veered off one side of it being on the gravel the other side being on the road because we could no longer fit on one lane My Lord because of the Defendant's vehicle which came towards our lane. Did perhaps Plaintiff ever swerved onto Defendant's lane at any point while overtaking? --- No My Lord that I cannot remember.<sup>12</sup>

[37] Further:

'When the Defendant swerved onto the lane where you were overtaking did Plaintiff attempt to avoid the incident? --- That is correct My Lord she attempted to avoid the collision, should she not have attempted the part of the vehicle should not have gone to the gravel road My Lord because when the Defendant swerved to this lane by then the Plaintiff's vehicle has already, was closed already. Would it be correct then to say that the Plaintiff lost control of the car after the car half of the car one part of the car was on the gravel, would it be correct to say that? --- That is correct My Lord.<sup>13</sup>

[38] In cross-examination, Mr Namumonika was questioned by counsel for the defendant if he had seen the defendant's vehicle swerve from the left lane, to which he replied:

'No, I did not see it, I only came to see Defendant's vehicle when he came to bump or collide with us My Lord.<sup>14</sup>

[39] Mr Namumonika then changed his version captured earlier above.

'So Sir in your testimony yesterday as I have it in my notes you stated that it was the collision it was after the collision that the vehicle the Plaintiff's vehicle now one side of it left the road, was that not your testimony? --- That is not correct My Lord it is not what I said. Let me go back to the collision again so you are testifying that you heard the sound as the vehicles collided that is what you heard first and then that is when you became aware that the

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<sup>12</sup> Page 69 of the record of proceedings.

<sup>13</sup> Page 72 of the record of proceedings.

<sup>14</sup> Page 79 para 10.

Defendant's vehicle had collided with the Plaintiff's vehicle. --- Correct. It is the Plaintiff's testimony here yesterday or it was the Plaintiff's testimony yesterday that as she attempted to overtake the Defendant's vehicle she saw the Defendant's vehicle veer off from the left lane onto her lane, what do you have to say about that? --- I have no comment to that My Lord nothing to say to that.<sup>15</sup>

[40] Mr Namumonika's responses prompted the following exchange with the defendant's counsel:

'Sir I will give you another chance again to answer my question, my question is it is the Plaintiff's version in her testimony yesterday that as she attempted to overtake the Defendants vehicle she saw the Defendant's vehicle she saw the Defendant's vehicle swift or veer off from the left lane onto her lane, what do you have to say about that? --- I have nothing to comment to that My Lord because I do not know what was in her mind and also that I was not the driver I would not know what she or her intension was what she was trying to do My Lord.'<sup>16</sup>

[41] In further cross-examination, it became clear that Mr Namumonika's testimony about the plaintiff trying to avoid the collision was a speculation. The following were his exchanges with the defendant's counsel.

'Sir I just want clarity, you indicated that just before the collision you did not see as the Plaintiff's evidence that you did not see the Defendant's vehicle swift onto the right lane? --- That I did not see My Lord. Now you then went on to testify that the Plaintiff was avoiding the Defendant's vehicle and that is how a part of her vehicle veered of the road onto the ground? --- I just said according to what I think or according to my understanding maybe Plaintiff was trying to avoid collision My Lord because there is no one or no driver would drive part of the car on the gravel road and part of the car on the road. That is what I was thinking that is my understanding that could be what the Plaintiff was trying to avoid the collision. So this is in fact an opinion and not a fact. This is just your opinion it is not what you saw because a fact is what you saw? --- That is correct My Lord because even in my Statement I did not state it that I saw her avoiding the collision.'<sup>17</sup>

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<sup>15</sup> Page 81 – 82 of the record of proceedings.

<sup>16</sup> At page 82 of the record of proceedings.

<sup>17</sup> Page 102-104 of the record of proceedings.

[42] It follows that Mr Namumonika's evidence was more of speculation and did not further the plaintiff's case.

[43] On the other hand, the defendant presented a consistent case from the stage of pleadings until the evidence at trial. His case was straightforward: he was driving straight on the correct lane when the plaintiff attempted to overtake him, but failed because she veered into his lane, colliding with his vehicle.

[43] The defendant was steadfast in his version of events and did not contradict himself even under cross-examination. The defendant's witness also corroborated the defendant's version that the plaintiff had not cleared the defendant's vehicle when she steered towards the left lane thereby colliding with the defendant's vehicle.

### Conclusion

[44] The question that now needs to be answered is whether the plaintiff proved her case on a balance of probabilities. From the plaintiff's case, it was not clear how the collision took place. The plaintiff's case first appeared to be a simple one in which the defendant veered into her vehicle as she was overtaking, but as the trial went on, the plaintiff's case grew murkier. Under the circumstances, there is no basis on the facts, for the court to reject the defendant's version as false.

### Costs

[45] At all material times relevant to the claim, the defendant was not a holder of a driver's licence. According to him, it is the reason he did not file a counter claim. He had passengers in the vehicle as he drove down the highway. For starters, the defendant should not have been on the road. He acknowledged breaking the law on that fateful day. Although he was successful in defending the plaintiff's claim, the court is not inclined to grant him his costs.

### The order

[46] In the result, it is ordered as follows:

1. The Plaintiff's claim is dismissed.
2. There is no order as to costs.

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D. C. MUNSU  
JUDGE



## APPEARANCES:

PLAINTIFF

G JAPHET

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DEFENDANT

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Of Jacobs Amupolo, Lawyers, Notaries & Conveyancers,  
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