



**CASE NO.: I 270/08**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**WILLEM NEKWIYA**

**PLAINTIFF**

**AND**

**MR NAFTALI VILHO**

**DEFENDANT**

**CORAM: SHIVUTE, J**

Heard on: 17 - 18 March 2010

Delivered on: 29 September 2010

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**JUDGMENT**

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**SHIVUTE, J:** [1] This matter arose from a motor vehicle collision which took place on 23 September 2006 on a public road between Helao Nafidi and Eenhana towns involving two vehicles belonging to the plaintiff and the defendant. Each party alleges that the other driver was negligent. The plaintiff claims damages from the defendant in the amount of N\$88 384.46 arising from the collision whilst the defendant counterclaims for damages of N\$8 911.20 arising from the same collision.

[2] The particulars of negligence alleged against the defendant are that he:

- (i) failed to keep a proper look out;
- (ii) failed to avoid a collision, while with the exercise of reasonable care he could and should have done so;
- (iii) entered plaintiff's vehicle line of travel when it was unsafe to do so;
- (iv) failed to apply his brakes timeously or at all;
- (v) failed to give the right of way to the other driver.

[3] On the other hand, the defendant's allegations of negligence are that the Plaintiff:

- (i) allowed his motor vehicle to be driven on a public road by Emilia Ndalyatelao Haindongo who was not in possession of a valid driver's licence, or alternatively a valid learner's licence.
- (ii) allowed the driver of his motor vehicle to overtake the defendant's

motor vehicle and to move back to the left lane when it was unsafe to do so, alternatively Emilia Ndalyatelao Haindongo overtook the defendant's motor vehicle and moved back to the left lane when it was not safe to do so.

- (iii) failed to keep a proper look out.
- (iv) allowed his aforesaid motor vehicle to be driven at an excessive speed, alternatively Emilia Ndalyatelao drove the motor vehicle at an excessive speed;
- (v) failed to avoid a collision in circumstances where a reasonable driver would and could have done so;
- (vi) allowed his motor vehicle to be driven recklessly and negligently without giving due regard to the other road users; alternatively Emilia Ndalyatelao Haindongo drove the motor vehicle recklessly and negligently without giving due regard to the other road users.

[4] Either side accuses the other's driver of negligence and relies on contributory negligence of the other in the event of it being found that the other driver was the cause of the collision.

[5] There is no dispute in respect of the quantum as it is reciprocally admitted. This Court is only called upon to determine which one of the two drivers was negligent.

## **The plaintiff's evidence**

[6] The plaintiff's first witness was Emilia Ndalyatelao Nekwiya neé Haindongo who was the driver of the Plaintiff's motor vehicle. She is the plaintiff's wife. Mrs Nekwiya testified that on 23 September 2006 she was driving the plaintiff's motor vehicle enroute to Eenhana. It was midday when she saw the defendant driving about 100 meters behind her. The defendant's motor vehicle overtook her motor vehicle without indicating, after overtaking he went back to the left lane. The distance between the two motor vehicles when the defendant went to the left lane was a normal distance which she estimated to be about ten meters ahead of her motor vehicle.

[7] The defendant's vehicle was reducing the speed at the time. She observed the wheels of the defendant's motor vehicle on the left side of the road as if the defendant was turning to the left. The defendant's vehicle's brake lights did, however, not light.

[8] Mrs Nekwiya tried to pass the defendant's vehicle, but when her vehicle was next to the defendant's motor vehicle he, the defendant, returned to the road. According to Mrs Nekwiya, she attempted to overtake the defendant's motor vehicle by moving in the middle of the line dividing the road but the defendant turned his vehicle onto the road again to get onto the tarmac. By the time the vehicle she was driving was already next to the Defendant's vehicle and the two vehicles collided. The defendant's vehicle did not indicate when it returned to the tarmac. At that stage she was still driving in the middle of the

road and there was nothing she could do to avoid the collision. After the collision, she drove the vehicle off the road and stopped it. She further put on hazard lights. She then disembarked from the motor vehicle and walked over to the defendant where she tried to greet him. The defendant was a bit aggressive and did not want to listen to her. Instead the defendant asked the plaintiff from where she was coming to collide with his vehicle.

[9] Mrs Nekwiya continued to testify that the defendant informed her that he was going to his cuca shop which was on the other side of the road, pointing to the left side of the road. At the place where the impact took place there was no road where one could turn. However, there were shops in the vicinity of the main road which were about fifteen meters away. After Mrs Nekwiya had talked to the defendant, she went back into their vehicle. Thereafter the police arrived and assessed the accident. The defendant, the witness and Mr Nekwiya accompanied the police to the station. At the police station the defendant had a discussion with the plaintiff and the police. The defendant was still aggressive and he demanded that his motor vehicle be fixed. Mrs Nekwiya felt somewhat frightened by the defendant's conduct.

[10] Mrs Nekwiya testified further that when the collision took place she was driving between sixty and fifty kilometres per hour. She was also in possession of a learner's license which was valid from the 18 September 2006. According to Mrs Nekwiya the defendant's conduct caused the collision to take place. It was again her observation that the defendant smelt of alcohol.

[11] Through cross-examination, Mrs Nekwiya stated that there was about ten metres between her vehicle and that of the defendant's after the defendant's vehicle overtook the plaintiff's and she kept that distance consistently at all times. The left wheels of his vehicle got off the road. Part of his vehicle was still on the road. He did not signal that he was turning. Since the defendant was slowing down, she concluded that he was going off the road. When she tried to overtake him she was in the middle of the road. There was no other vehicle coming from the opposite direction at the time she was overtaking. When she was further asked whether she overtook in the middle of the road or on the right side of the road, she stated that she was not "fully overtaking because there was no time to overtake fully."

[12] Mrs Nekwiya was asked whether she had kept a correct following distance. She responded that the following distance was correct; she was driving the same speed she was driving when the defendant overtook her vehicle. When the defendant slowed down, she tried to overtake. She reduced her speed a bit. There was no time for her to stop timeously as he had just got off the road and started slowing down and that was the reason for her to overtake him in order to avoid the collision. She denied that there were speed bumps at the place where the collision took place. She disputed further to have had requested the defendant to get a quotation for the damages to his vehicle so that she could meet the repair costs therefor. She was asked whether it would not be prudent to ensure that it was safe to overtake before she could attempt to do so. She replied that if she had time she would have

ensured that it was safe to do so. But that since the defendant did not indicate, it was not safe for her to move on the right side of the road. Instead, she attempted to overtake from the middle of the road because there was no time for her to stop.

On re-examination Mrs Nekwiya stated that the reason for her to overtake the vehicle in from the middle of the road and not completely on the right side of the road was because there was no time to do so as she was trying to avoid losing control of the vehicle. She estimated the distance between her vehicle and the defendant's vehicle when she overtook to be about a metre and she regarded the space between the two vehicles to be safe to overtake.

[13] The next witness was the plaintiff, Mr Willem Nekwiya and as previously stated the husband to the previous witness. He testified that on 23 September 2006 he had asked his wife to drive the vehicle in issue. They were on their way to Eenhana. They arrived at Ondobe between 11h00 and 12h00. He was a passenger in the vehicle. Whilst they were driving the defendant's vehicle came from behind and overtook their vehicle without indicating. He then returned to the left side of the road without indicating. When he returned to the left side of the road there was a distance of about ten meters between the two vehicles. After he returned to the left side he slowed down, and he, Mr Nekwiya, assumed that the defendant was reducing his speed but he did not apply the brakes. The distance between the two vehicles was narrowing very quickly. There were no braking lights when the vehicle reduced its speed; it

moved to the left. The vehicle's left tyres had left the tarmac and were on the gravel side of the road while the tyres on the right side of the vehicle were still on the tarmac. When the defendant passed, she then moved on the right hand side to overtake the vehicle that was by now on the left hand side of the road.

[14] When Emilia started to overtake on the right hand side of the road in the middle of the road and when she was passing the defendant's car he thought the distance was about one meter to one and half meter between the two vehicles. All of a sudden there was a bump between the two cars. He did not see the defendant's vehicle turning to the right because they were next to it. The next thing he saw was that Emilia was now in the middle of the road driving straight on and he heard a bump. Their car continued still in the same position where it was because it did not move. Emilia was overtaking whilst she was driving on a straight section of the road. She was driving at the speed between sixty and eighty kilometers per hour. He knew the speed which she was driving because he looked at the speedometer a number of times. Mr Nekwiya stated that the duration of time between when their vehicle was right next to the defendant's and when the defendant's vehicle turned to the right would be about five seconds. I must say I have doubts as to how Mr Nekwiya came to the conclusion that the defendant turned to the right within five seconds if he stated earlier that he did not see the defendant turning to the right and that he just heard a bump.

[15] After the collision the both the plaintiff and Mrs Nekwiya grabbed the

car's steering wheel. Mrs Nekwiya drove on for metres and she stopped the vehicle in the middle of the road. She disembarked from the car and the plaintiff then drove the vehicle from where it had stopped and parked it safely on the side of the road.

The plaintiff got off the vehicle and found the defendant complaining about the accident. The plaintiff did not talk to the defendant; the defendant was just complaining about the accident saying *inter alia* that it was not his fault. The defendant also spoke to Emilia after the collision but the plaintiff advised her to keep quiet. The defendant was a bit aggressive and he was walking around stumbling all over the place. After the police arrived they requested both parties to go to the police station. According to the plaintiff the defendant was still talking at the police station and the plaintiff "suspected that there was some smell of alcohol and so on from the way he was talking." The plaintiff then asked the police if they were going to test both drivers for the possible content of alcohol. The police indicated that they had no instrument to conduct such a test.

[16] The plaintiff further testified that they only spoke to the defendant at the police station after the defendant spoke to them.

### **The Defendant's case.**

[17] Mr Naftali Vilho, the defendant, testified that on 23 September 2006 he was driving an Isuzu bakkie. He was going to his shop at Ondobe. Whilst he was driving there was a BMW vehicle in front of him. He overtook the BMW

vehicle and drove for about two to three kilometers. He then indicated that he wanted to turn to go to his shop, but he did not use the place where he was supposed to get off the road to go to his shop. The BMW vehicle came from behind and collided with his vehicle. It struck the mirror on the right side, the driver's side, and the front tyre on the driver's side up to the front bumper. The mirror was struck first.

[18] After the defendant's vehicle was bumped it veered to the left side of the road. The collision took place at Ondobe. At the place where the collision took place the speed limit is sixty kilometers per hour. There were also speed bumps, the existence of which was as already noted, denied by the other party. According to Mr Vilho the BMW was driving at a high speed. His opinion was based on the fact that after the collision the driver of the BMW vehicle stopped about 40 meters away from the point of impact. The defendant denied that at the time of the collision the left tyres of his vehicle were off the road and that he went back to the road when the driver of the BMW vehicle was overtaking. According to the defendant, where the collision took place one could not get off the road. It was furthermore his opinion that the person who was driving the plaintiff's vehicle caused the accident. She lacked driving skills because when she was overtaking she went back to the left lane before she completely overtook his vehicle.

[19] The defendant denied that he smelt of alcohol and disputed that he drinks. Even people from his village were aware that he does not take alcohol.

The defendant testified that he was not angry although he felt bad about the collision. After the collision he called Ondobe police officers and informed them about the collision. He said his vehicle was bumped and requested the police to go to the scene to investigate.

[20] When the police arrived they requested both parties to go to the police station. At the police station the plaintiff informed the defendant to get three quotations so that his insurance could pay for the damage caused to the defendant's vehicle. This piece of evidence, as mentioned before, was disputed by the plaintiff. Mr Vilho further testified that when the plaintiff told him to get the quotations, Mr George Nelulu, the headman of that area was present as well as a police Commander known as Mbeha.

[21] On cross-examination the defendant stated that when he overtook the plaintiff's vehicle he was driving between eighty to a hundred kilometres per hour. The speed limit where he overtook was a hundred kilometers per hour. He disputed that the collision took place shortly after he overtook or a minute after he overtook as stated by Mr Nekwiya. He further stated that after he overtook their vehicle he was driving in front of their vehicle before they reached the Ondobe town. After he started to indicate but before he reached the place where he was supposed to turn off, the accident occurred.

[22] As to the question why it was not put to the plaintiff and his wife that the defendant's vehicle did indicate, he responded that he did not know the reason why his legal representative did not put that assertion to the witnesses. He

insisted that the BMW vehicle was speeding at the time of the collision and that his vehicle was not partially off the road even though the latter assertion was not put to plaintiff and his witness by his legal representative. Mr Vilho was further asked whether it made sense for a vehicle to turn to the left hand side of the road while another vehicle was right next to it. He responded that if a person lacked driving skills she could do it. I consider the above question to contradict the plaintiff's version because if it does not make sense for someone who is on the right side next to another vehicle to turn to the left side then it would also not make sense for someone who is on the left side to turn on the right side when the vehicles are next to each other.

[23] The defendant called Sergeant Osmundo Sirunga Mbeha who is a police officer. He testified that on 23 September 2006 he was stationed at Ondobe substation when he attended a collision that took place between two vehicles bearing registration numbers N117W and N28858W. His observation upon arriving at the scene was that the BMW vehicle was standing about forty metres away in front of the defendant's vehicle. One of its front tyres was missing. According to his observation, the impact took place on the left side of the road. He took both drivers as well as Mr Nekwiya to the police station. At the police station Mr Vilho was accusing the other driver that she did not know how to drive and that she was the one who caused the accident. The driver of the BMW was saying that the defendant was trying to turn to the right.

[24] During cross-examination Sergeant Mbeha was shown an accident report

and a rough sketch plan of the accident which he drew up at the scene of the accident. He was asked how far the defendant's vehicle was from the road. However, he could not give estimation thereof. He was again asked the distance where the defendant's motor vehicle came to a standstill from the point of impact to the place where he found the plaintiff's vehicle. He said it was about forty metres. One wonders why he was able to remember the distance where he found the plaintiff's vehicle from the point of impact but he could not remember the distance in relation to the defendant's vehicle. Although there was a sketch plan produced by the plaintiff in respect of the accident, it was not of much assistance to the court, because there were no measurements indicated between the distances given.

[25] It was submitted on behalf of the plaintiff that the defendant failed to dispute the following version of the plaintiff and his witness through cross-examination:

That the defendant's vehicle overtook the plaintiff's vehicle without indicating; that he returned to the left lane without indicating; that the plaintiff's vehicle drove behind the defendant for approximately one minute only and reduced its speed. Although the aforementioned version was not challenged, I did not find it to be material because the collision did not take place at the time the defendant's vehicle overtook the plaintiff's vehicle. Regarding the assertion that the plaintiff's driver drove behind the defendant's vehicle for about a minute and reduced the speed, again I found this to be immaterial. Even if it is

true that he drove for about a minute this does not indicate the distance which was between the two vehicles in terms of metres or kilometers. It was further submitted on behalf of the plaintiff that the defendant then reduced his speed “very quickly” and that there was no braking light indicating that he was reducing his speed. Although it was submitted that the defendant reduced the speed “very quickly” none of the witnesses testified that the speed was reduced very quickly. Both witnesses, however, testified that the defendant reduced the speed without braking lights and without indicating and it was correctly submitted that this piece of evidence was not challenged by the defendant through cross-examination.

It was again submitted on behalf of the plaintiff that the defendant then veered off the road to such an extent that the left front and rear tyres went off the tar road on the left lane. When the two vehicles were directly next to each other, the plaintiff attempted to overtake the defendant’s vehicle the distance was only one and half metre between the two vehicles. Then suddenly and without warning the Defendant turned to the right in an attempt to return to the tarmac. Although I agree that the above piece of evidence was not challenged through cross-examination by the defendant, I do not agree that the defendant turned sharply because none of the witnesses testified to that effect. It was further submitted on behalf of the plaintiff that the testimony of Mrs Nekwiya that she had no opportunity or time to avoid the said collision was not challenged. This is not correct because Mrs Nekwiya was asked whether it was not safe for her to overtake from the right lane of the road instead of overtaking

from the middle of the road. It was also put to Mrs Nekwiya that the distance between her vehicle and the defendant's vehicle was not correct. The plaintiff's counsel further rightly argued that the evidence that after the collision the plaintiff's vehicle came to a standstill a few meters away from the point of impact was not challenged under cross-examination. Therefore the evidence which was given by the witnesses and was not challenged should be accepted as the correct version.

[26] It was furthermore submitted on behalf of the plaintiff that there was no logic in the defendant's evidence suggesting that the plaintiff was driving at an excessive speed, that she turned too quickly to get back into the left lane whilst she was overtaking the defendant's vehicle. Why would she turn suddenly and collide with a vehicle which she could see all the time, whilst her fiancé of the time, the plaintiff, sat in the passenger's seat? Counsel for the Plaintiff so asked.

[27] With regard to Mr Mbeha, the defendant's witness, it was argued that his evidence with regard to the plaintiff's vehicle that it came to a standstill approximately 40 meters away from the point of impact should be disregarded because he has been in court at the time the defendant was testifying and he listened to the defendant's version. It was further a point of criticism that Mr Mbeha was not an eye witness and that he was not an expert on collisions he was not in a position to analyze the speed of the motor vehicle before the collision took place. Therefore he could not tell exactly what happened at the

time of the collision.

[28] It was again submitted that the defendant created a sudden emergency, because, before turning onto the road if he had first looked in his rear view mirrors, he would have seen the plaintiff's vehicle. It was further submitted that the defendant was negligent in returning to the road when he knew there was traffic behind him specifically when he knew that the plaintiff's BMW was behind him and he failed to indicate that he was returning to the road. Finally the plaintiff's counsel argued that the plaintiff proved his case on the balance of probability that the defendant was negligent and he solely caused the collision by failing to keep a proper look out of the vehicle which was behind him; that he failed to avoid the collision while with the exercise of reasonable care he could have done so; that he entered the plaintiff's vehicle lane of travel when it was not safe to do so and by failing to apply his brakes timeously in order to avoid the collision.

[29] On the other hand it was argued on behalf of the defendant that the plaintiff failed to prove his case in the following respects:

Even if it was to be accepted that the defendant's version that the defendant first overtook the plaintiff's vehicle without indicating was not put to witnesses, this did not establish negligence as alleged by the plaintiff. When the defendant overtook the plaintiff's vehicle about a minute later he reduced the speed, the driver of the plaintiff's vehicle noticed that the defendant was reducing the speed. When she was asked what action she took she said that there was no

time to avoid the accident. This could only lead to two conclusions, that she drove a distance too close to the defendant's vehicle and did not allow herself sufficient distance within which she could apply the brakes timeously or she was travelling too fast under the circumstances. According to the version of plaintiff and his witness, they testified that only half of the defendant's vehicle was off the road; he did not indicate that he was going off the road, the plaintiff's driver is the one who assumed that the defendant was getting off the road; plaintiff and his witness stated that the defendant was heading to his cuca shop which was on the left side of the road. If he was going to his cuca shop why would the defendant then turn to the right lane? So counsel asked. It was argued that the driver of the Plaintiff's vehicle overtook when it was not safe to do so. The driver who overtakes road traffic must satisfy himself that it is safe to do so. Concerning the sudden emergency the defendant argued that there was no sudden emergency because the plaintiff or his driver created the situation themselves therefore they cannot rely on the defense of sudden emergency.

[30] Counsel for the defendant correctly conceded that she failed to challenge the plaintiff's version through cross-examination that the defendant did not indicate and that the defendant's vehicle was not entirely on the road.

The following was stated in the matter of *President of the RSA v SARFU* 2000 (1) SA 1 Paragraphs [58]-[64], in particular paragraph [61] where it was stated:

“The institution of cross-examination not only constitutes a right, it also

imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness the opportunity, while still in the witness-box of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct."

In the light of the relevant evidence which was not challenged by the defendant, I wish to adopt the above dictum. The plaintiff is entitled to assume that the unchallenged testimony is accepted as correct.

[31] It was finally argued on behalf of the defendant that plaintiff's driver was the one who was negligent in that she failed to keep a proper lookout and that the plaintiff's vehicle was driven at an excessive speed as they drove between 60 and 80 km per hour in the 60 km zone.

[32] This Court is called upon to determine which one of the two drivers drove in a negligent manner and caused the collision.

[33] Before I conclusively answer this question, I propose to briefly deal with the legal principles applicable to the facts of the case. As the learned author HB Klopper points out in his book The Law of Collisions in South Africa, 7<sup>th</sup> Ed. on page 11, paragraph (f):

“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.”

[34] It is trite that the driving of a motor vehicle under modern traffic conditions demands a high degree of skill and experience.

In *Johannes v South West Transport (Pty) Ltd* 1992 NR 358 at 361(i) this Court observed:

*“Each case in which it is said that a motorist is negligent must be decided on its own facts. Negligence can only be attributed by examining the facts of each case. Moreover, one does not make inferences on a piecemeal approach. One must consider the totality of the facts and then decide whether the driver has exercised the standard of conduct which the law requires. The standard of care so required is that of which a reasonable man would exercise in the circumstances. In all cases the question is whether the driver should reasonably in all circumstances have foreseen the possibility of a collision”*

[35] Having dealt with the applicable legal principles, I proceed next to relate the facts of this case to those principles. It will be recalled that according to Ms Nekwiya she observed the wheels of the defendant’s motor vehicle on the left side of the road as if the defendant was turning to the left. The defendant did

not indicate when he executed this manouvre. Ms Nekwiya tried to overtake the defendant's vehicle but when the vehicle she was driving was next to the defendant's vehicle, the defendant did not indicate when he returned to the tarmac. Although this piece of evidence was disputed by the defendant when he gave his testimony it was not disputed through cross-examination and it should be accepted as correct.

[36] The facts that the defendant drove partially on the tarmac whilst the left wheels of his motor vehicle were on the gravel side of the road and returned to the road without indicating his intention to do so, are manifestations of negligence on his part to a certain extent. He clearly failed to exercise the standard of care towards other road users.

[37] Ms Nekwiya testified further that she attempted to overtake the defendant's motor vehicle by moving in the middle of the line dividing the road but her motor vehicle was already parallel to the defendant's motor vehicle.

[38] Upon cross-examination, Ms Nekwiya stated that because the defendant was slowing down, she concluded that he was going off the road. When she tried to overtake him she was in the middle of the road and there was no oncoming traffic. When she was asked whether she kept enough space between her vehicle and the defendant's vehicle, she responded that there was sufficient space between the two vehicles as she was driving the same speed she drove when the defendant overtook the motor vehicle she was driving. When the defendant slowed down she tried to pass. She reduced her speed "a

bit.” There was no time for her to stop timeously as the defendant just got off the road and started slowing down and that was the reason for her to overtake his vehicle to in order to avoid the collision. As regards the question whether it was not prudent for her to ensure that it was safe to overtake, she replied that there was no time. On re-examination she estimated the distance between her vehicle and defendant’s vehicle when she overtook to be about a metre.

[39] At the pain of being repetitive, the plaintiff’s driver stated that when she was overtaking the defendant’s vehicle she reduced her speed “a bit.” When overtaking a motor vehicle it is prudent to do so at some speed and not linger alongside the vehicle that is being overtaken but to complete the overtaking manouvre as soon as it can be possibly be done safely under prevailing circumstances.

[40] The evidence on record establishes that the plaintiff’s driver was negligence and such negligence contributed to the damages he has suffered. My reasons for this conclusion are that, the plaintiff’s driver did not allow sufficient distance between her motor vehicle and the defendant’s motor vehicle. She overtook when the distance between the two vehicles was about a meter. When she was overtaking she was more in the middle of the road instead of being on the right side of the lane. Although there was no oncoming traffic the plaintiff’s driver did not avoid the collision by moving to the right side of the road. Plaintiff’s driver said there was no time to do so. This admission to my mind amounts to negligence on her part, because if she had

kept sufficient space between the two cars and had she also overtaken more on the right side instead of the middle of the road, she was going to avoid the collision. The Plaintiff's driver did not exercise the standard of care which a reasonable person would have exercised in the circumstance. In this regard, it is clear that the Plaintiff's driver was a novice at driving motor vehicles on public roads. The evidence establishes that she had acquired her learner's licence on 18 September 2006. Five days later on 23 September 2006, she was involved in the collision the subject matter of the litigation. The defence of sudden emergency does not apply to her. In so far as what she was confronted with may be called a sudden emergency, I agree that it was self-created: she failed to observe a safe following distance and/or to leave sufficient space between the two vehicles before she could attempt to overtake the vehicle in front of the vehicle she was driving.

[41] In the result I find that the Plaintiff has proved negligence on the part of the defendant to a certain extent but that the Plaintiff's driver was also contributorily negligent. It now remains to be decided on the apportionment of the negligence of parties. In the circumstance of the case, the evidence and the facts proved, it is my opinion that plaintiff's driver was grossly negligent and she contributed 70% liable for the collision between the two vehicles and the defendant is 30% liable for the collision of the damage.

[43] I would accordingly make the following order:

1. The Defendant is 30% liable for the collision between his motor

vehicle and the vehicle of the Plaintiff while the Plaintiff is contributorily liable to the extent of 70%.

2. The Defendant's counter claim succeeds to the extent that the Plaintiff is liable for 70% of the collision.
3. The Defendant shall be liable for 30% of the plaintiff's costs.
4. The Plaintiff shall pay 70% of the Defendant's costs. Such costs to include the costs of one instructing and one instructed counsel.

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**SHIVUTE, J**

**ON BEHALF OF THE PLAINTIFF** Adv. Van Zyl

**Instructed by:** Fisher, Quarmby & Pfeifer

**ON BEHALF OF DEFENDANT**

Ms Mainga

**Instructed by:**

Kishi Legal Practitioners