

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WESSEL MOOLMAN VAN DER VYVER

PLAINTIFF

And

MISS C HENTZEN

DEFENDANT

CORAM: MANYARARA, AJ

Heard on: 2000.08.23 - 24; 2000.12.12 - 13

Delivered on: 2001.06.05

JUDGMENT

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**MANYARARA. A.J.** On 24 October 1997 at approximately 1.10-1.15pm a motor vehicle driven by the defendant collided with a motor vehicle driven by the plaintiff at

the intersection of Robert Mugabe Avenue and Sam Nujoma Drive, Windhoek. In this action, the plaintiff claimed damages in an agreed sum of N\$50 000 for the damage caused to his motor vehicle. The plaintiff was represented by Mr Geier, and the defendant by Mr Schickerling.

It is common cause that plaintiff was driving his motor vehicle, a BMW sedan, from north to south on Robert Mugabe Avenue, while defendant was driving her motor vehicle, a VW Polo, from east to west on Sam Nujoma Drive. It is also common cause that traffic in the area was heavy because it was lunch hour and the plaintiff, like many other parents, had come to pick up his child from Windhoek High School on Robert Mugabe Avenue. Plaintiff said that he could not find his daughter, so he proceeded to the intersection with Sam Nujoma Drive where the collision occurred. It was agreed that at the time of the collision the robot was green in favour of defendant and red against plaintiff.

The plaintiff testified that he intended to drive through the intersection and return to the school to pick up his daughter. Robert Mugabe Avenue has two through lanes and a third or right-turn lane at the intersection with Sam Nujoma Drive. The plaintiff said that he was travelling in the second through lane when the robot at the intersection turned red against his column of traffic and he stopped at the solid white stop line, as did the cars in the first lane on his left side and those in the right turn lane on his right side. He then saw a traffic officer, Mr Gerhard Kakonda, walking from the northwestern pavement of the intersection to about the middle of the intersection and take control of the intersection.

Kakonda signaled all the traffic approaching the intersection to stop and then signaled the traffic on Robert Mugabe Avenue to proceed into the intersection against the red light. Plaintiff said he entered the intersection and, shortly thereafter, he heard the sound of a car braking. This was the Polo, which entered the intersection from the east on Sam Nujoma Drive and collided with plaintiff's BMW. The Polo hit the left front wheel and door of the BMW. The impact pushed the BMW forward for a distance of about one metre, causing it to collide with a bakkie travelling in the opposite direction. The Polo bounced and hit the BMW's left rear side before both vehicles came to a halt, within the intersection.

Mr Kakonda agreed that he entered the intersection as testified to by the plaintiff. He said he walked in a southeastern direction with his right arm raised and left arm outstretched until he reached the middle of the intersection. There is a manhole at about the middle of the intersection and Kakonda said he positioned himself slightly north of the manhole and faced east with his right hand raised and left arm outstretched until he satisfied himself that all the traffic had heeded his signal and stopped. He was wearing blue trousers and a bright, orange coloured jacket with white reflector strips on the front and back, and white gloves. He said that, without changing the setting of the robot, he started "pulling or waving or signaling" the traffic on Robert Mugabe Avenue to proceed, disregarding the fact that such traffic was facing the red light of the robot.

In answer to a question put to him by Mr Geier, Kakonda replied that it was then that he noticed the Polo bearing down on the intersection at "a high speed." He said that he

signaled the Polo to stop by facing the direction from which the vehicle was coming with his right hand raised but his signal seemed to make no impression on the driver. He also stretched out his left arm in an attempt to stop the BMW from proceeding into the intersection but the BMW was already within the intersection and the Polo came and collided with the BMW. The impact pushed the BMW forward to collide with an Isuzu bakkie travelling in the opposite direction.

Kakonda was asked whether the driver of the Polo had applied her brakes to avoid the collision and he replied that there had been no indication of any attempt by the driver to bring the Polo to a halt. "It (the Polo) just came straight and then hit into the BMW which was in the process of crossing the intersection," he said.

On such evidence, plaintiff alleged that the collision was caused solely by the negligence of the defendant in that the defendant -

1. failed to keep a proper lookout for plaintiffs vehicle which had right of way at the intersection;
2. failed to keep a proper lookout for the traffic officer who controlled the intersection at the time, or to adhere to his signals or stop on his instruction to stop;
3. failed to apply her brakes timeously, adequately or at all; and

4. failed to avoid the collision when a reasonable person acting under similar circumstances would and should have been able to do so.

The defence was that the defendant was entitled to proceed into the intersection because the robot was green in her favour and if Kakonda was present as alleged he was obscured from defendant's view by a Land Cruiser vehicle which was stationary on her left hand side. In the alternative, defendant denied, in the event of the Court finding that she had been negligent, that such negligence contributed to the accident. In the further alternative, she averred that the plaintiff and/or the traffic officer had also been negligent and prayed that the damages be apportioned in accordance with the Apportionment of Damages Act No 34 of 1956.

Defendant's testimony was that she was returning from the international airport. She completed the rise in Sam Nujoma Drive and came to the sharp left turn bend in the road at about 150 yards from the intersection and the road descended to the intersection. From this point, her view of the area was obscured by "lots of cars on (her) right hand side." There were also some stationary cars on the slip way on her left. She observed that the traffic light was green in her favour and a car which was about 4 car lengths in front of her drove through the intersection. She slowed down a little "in case the light turned red" and accelerated because the light remained green.

It was put to defendant that there was a traffic officer controlling the intersection, who had signaled to her to stop. She replied: "I didn't see him at any stage at all."

The court conducted an inspection *in loco*. The middle of the intersection where Kakonda indicated he stood is directly opposite the island on the eastern side of Sam Nujoma Drive. Therefore, the Land Cruiser in defendant's right hand lane would have been slightly to Kakonda's right. The court asked Kakonda to stand where he had stood on the occasion. Only his head, shoulders and upper part of the chest were visible from the sharp right hand turn at a distance of about 120 paces from the intersection. The Court took the view that it was difficult, to say the least, for the defendant to notice his presence from that distance, especially because her attention was focussed on the colour of the robot ahead of her.

However, Kakonda indicated that, at the time, he took a couple of steps forward to face the defendant's line of travel directly when it appeared that she was ignoring his signal. According to him, the defendant should, at this stage noticed his presence and obeyed his signal to stop. The defendant insisted that she did not see him until after the collision. She also said that she only became aware of the presence of the BMW in front of her car "at the moment of collision." She got out of her car and saw Kakonda walking away from the intersection.

A second traffic officer, a Mr Pietersen, arrived on the scene and took statements from the parties. The defendant said she heard Kakonda tell Pietersen that defendant was "too fast and should remember to proceed at an intersection with caution." But neither he nor Pietersen mentioned that she had disobeyed the traffic officer's signal. Neither was defendant charged with reckless driving.

The issue to be decided is whether defendant was negligent in the circumstances. It is trite that negligence in this case is constituted by failure to exercise the degree of care and skill of a reasonable person in the circumstances and the slightest departure from this standard is adjudged "culpa." However, once culpa is established, a claim for damages may be reduced to such an extent as the court may deem just in the circumstances.

Mr Geier submitted that plaintiff had established the requisite departure by defendant from the degree of care to be expected of a reasonable driver in the circumstances of this case; that no degree of fault attaches to plaintiff which could lead to a finding that his conduct should reduce his claim or, alternatively, that if plaintiff is to blame at all, his degree of fault cannot be higher than 25%. Mr Geier also submitted that defendant had failed to comply with Traffic Officer Kakonda's signal to stop and the court should find that such non-compliance indicated conclusively that defendant was negligent.

In support of his argument, Mr Geier cited certain provisions of the Road Traffic Ordinance No 30 of 1967 (which has since been repealed by the Road Traffic and Transport Act, No. 22 of 1999). The first of the provisions cited was section 101(1) of the Ordinance, which provides as follows:

"Subject to the provisions of subsection (3), any person who unless otherwise directed by a police officer (or traffic officer) fails to comply with any direction conveyed by a road traffic sign...shall be guilty of an offence." Subsection (3) relates to emergency vehicles.

It is recalled that the defendant was not charged with negligent driving or any other driving offence.

The second provision cited was section 118, which states -

"The driver of a vehicle on a public road shall stop such vehicle -

(a) in compliance with any direction conveyed by a road traffic sign or given by a police officer (or traffic officer) in uniform."

Mr Geier also referred to section 151(2), which states that the driver of any vehicle which a traffic officer has signaled to stop "...shall not proceed until such officer signals him to do so."

The section goes on to provide that a traffic officer "...may, in addition, regulate and control traffic upon any public road and give such directions as may in his opinion be necessary for the safe and efficient regulation of such traffic..."

As already stated, the Ordinance has been repealed and re-enacted by the Road Traffic and Transportation Act, No 22 of 1999 (the "new Act"), section 14(1) of which specifies, *inter alia*, that a traffic officer may -



"...regulate and control traffic on any public road, and give such directions as, in his opinion, may be necessary for the safe and efficient regulation of such traffic..."

The defendant was not charged with failing to comply with KakonoVs signal but if I understood Mr Geier correctly, his submission was that the statutory provisions illustrated the conduct to be expected of the parties at the scene of the collision and not that the court should find that the defendant's negligence was constituted by breach of the statute.

The rule which governs motorists at intersections has been stated as follows:

"Where a motorist enters a robot-controlled intersection when the robot is in his favour and the intersection is clear, there is no duty on him to regulate his driving on the assumption that the driver of another vehicle approaching the intersection with the robot against him might not stop. To expect more of the motorist who has entered the intersection with the robot in his favour would be to make driving impossible." *Izaaks v Schneider* 1991 (3) SA 675 (NmHc).

The rule has been qualified as "not an inflexible rule that the driver (with a right of way) is never required to look to the right or left as he proceeds through the intersection." Cooper's *Motor Law, Principles of Liability*, page 86. Further, in spite of the assumptions a driver may legitimately have made, "so soon as it would be evident to a reasonable man

that there is danger of an accident, arising from inability, refusal or neglect of the wrongdoer to give way, then the rightful user of the road is bound to take all reasonable steps to avoid an accident." *Solomon and Another v Mussett and Bright Ltd* 1926 AD 427 at 433-444.

In *Hamilton v Mackinnon* 1935 AD 114 the trial court found that Hamilton had failed to give an exculpatory explanation why his car left the road and crashed killing his passenger. From such a finding, the court drew the inference that Hamilton was not keeping a proper lookout and entered judgment for the plaintiff. The judgment was reversed on appeal by a majority of 3 to 1 (Curlewis JA dissenting). However, the courts have since adopted the views of Curlewis JA which the learned author, Cooper, explains at page 122 of his text as follows:

"The case against Hamilton was not based on 'the single fact of a car leaving the road.' The evidence established that Hamilton drove straight off the road without applying his brakes. As Curlewis JA rightly held, the tracks of the motor car thus clearly excluded any possibility of Hamilton having been forced off the road through some extraneous factor. The court could, therefore, not legitimately infer that Hamilton may have driven off the road for a reason which was inconsistent with his negligence."

Mr Geier submitted that defendant's conduct at the intersection is consistent with negligence in that she was approaching the intersection from an elevated position and she

easily should have "picked up" the vehicles moving into the intersection even if they were doing so against a red light. Further, defendant's attention should have been drawn to the possibility that there could be traffic approaching from the north on Robert Mugabe Avenue because defendant noticed that, beside the traffic on her right, which was stationary and intending to turn north, the traffic in the slip way on her left hand side intending to turn south had also stopped. Mr Geier also argued strenuously that the defendant should have "anticipated" that the intersection "could be controlled by a traffic officer in order to improve the flow of traffic at such a congested point." She should have realised that the occasion was "a busy time of day when businesses were closing for lunch, traffic from Parliament could be expected (and) one of the biggest schools in Windhoek was also pouring traffic into the streets."

Now, the plaintiff indicated on the plans handed up to the court that he stopped at the solid stop line of the lane in which he was travelling (the second or outer lane) when the light at the intersection turned red. The column of traffic in the lanes to his left and right also stopped. Then Kakonda signaled the plaintiff's column of traffic to proceed against the red light. Plaintiff said he looked to his left and right "for his own safety" as he entered the intersection. However, it was impossible for him or anyone else in his position to have observed defendant's vehicle approaching the intersection on the intersecting road.

Kakonda said he observed the Polo approaching "at a high speed" when it was at a distance of about 100 to 200 metres and he signaled the driver to stop before he beckoned

the plaintiff to proceed into the intersection. Defendant's version was that she did not see Kakonda at all when she approached the intersection with the green light in her favour. She said she slowed down in case the light turned red but, as the light remained green, she accelerated, "satisfied that the intersection was clear."

It seems to me that Kakonda's recollection of the events cannot be relied on. For instance, he did not remember that defendant applied her brakes before the collision. This evidence was confirmed by the plaintiff but denied by Kakonda who was better placed than the parties to observe what happened. Kakonda's evidence (as well as that of plaintiff) is also suspect in that neither of them could explain how the vehicle which was in the first or left-hand side of the BMW (the "first vehicle") stopped and avoided the collision. The only reasonable explanation must be that plaintiff left the solid line ahead of the "first vehicle" and that he did so at a higher speed than he would have the court believe. I draw this inference from plaintiff's testimony that, having missed his daughter, he intended to drive for a considerable distance on Robert Mugabe Avenue before he could find a safe place to turn around and retrace his steps to the school. Only three-quarters of the lunch hour remained for him to pick up his daughter, drop her off at home and return to work. Therefore, it is fair to assume that he was in some hurry to find her. However, I do not make any positive finding on the point.

Bearing in mind that the onus rests on plaintiff to prove his case, I am of the view that the defendant's explanation of the collision is insufficient to negative the probability of negligence on her part. *Hamilton v Mackinnon, supra*. I take this view because, having

observed that the intersection was congested, it was not enough for her to merely slow down and then accelerate, even though the robot was green in her favour. Compare *Izaaks v Schneider, supra*. It is evident that the defendant did not leave herself enough reaction time to brake or otherwise avoid a collision if it turned out that there was a traffic officer controlling the intersection as in fact there was.

Be that as it may, there is no evidence to disprove the indications made by the defendant during the inspection *in loco* that Kakonda positioned himself where she or any other person in her position would not easily have seen him unless he had stood on a pedestal or other raised structure. Therefore, I cannot legitimately infer from the facts that the defendant was wholly to blame for the collision. At the same time, the plaintiff cannot be faulted for obeying Kakonda's signal to proceed into the intersection against the red light. There is no evidence to contradict his version that he did so cautiously, looking to his left, but he did not see the Polo. This is in a way confirmed by the defendant's testimony that she had not seen the BMW up to "the moment of collision." This leaves the defendant and Kakonda as the only parties to blame for the collision.

Defendant's blame arises from her departure from the degree of care expected of a driver entering a busy intersection even with the green light in her favour, while Kakonda's blame arises from his embarking on the critical task of controlling traffic at a busy and robot-controlled intersection in an extremely careless manner. I say so because Kakonda did not have any explanation for his failure to change the settings of the robot before he took control of the intersection. The robot control box indicated to the Court was only a

few paces to the south east of the intersection. I also consider it to be unacceptable that, having overridden the robot, Kakonda should have assumed that he was visible to all the traffic approaching the intersection when he was not standing on any pedestal or other raised structure. In my view, Kakonda compounded his mistake by proceeding to signal the traffic receiving the red light to enter the intersection. His explanation that he first satisfied himself that it was safe for such traffic to enter the intersection is belied but the sudden appearance of the defendant on the scene in the circumstances to which she testified. This view is supported by the evidence that Pietersen invited Kakonda to demonstrate how he took control of the intersection and directed the traffic thereat but decided not to charge the defendant with reckless driving. The inescapable inference is that Pietersen did not consider that defendant was to blame or wholly to blame for the collision.

In the result, I consider it only fair and just to hold the defendant no more than 75% liable for the collision and attribute 25% of the liability to Kakonda. It may well be that plaintiff should have joined him as a defendant but I make no ruling on the point.

Counsel for the parties requested this court to lay down "guidelines for traffic officers controlling traffic at robot-controlled intersections." I do not consider this to be the Court's responsibility but that of the relevant authorities. All that one may legitimately say is that it would be advisable for traffic officers always to alter the settings of the lights before taking control of a robot-control intersection and to stand on some raised platform in order to be clearly visible to all the traffic approaching the intersection.

The parties have agreed the quantum of damages to be a sum of N\$50 000. Accordingly, the following order is made:

1. Judgment is entered for the plaintiff against the defendant in the sum of N\$37 500, with interest on the said sum at the rate of 20% per annum from the date of judgment to date of payment.
2. Defendant shall pay three-quarters of plaintiffs costs of suit on the normal scale as between party and party.



MANYARARA, AJ

**ON BEHALF OF THE PLAINTIFF**

**Instructed by:**

**ADV GEIER**

**P F Koep & Co**

**ON BEHALF OF THE DEFENDANT**

**Instructed by:**

**MR SCHICKERLING**

**Behrens & Pfeiffer**