



**REPUBLIC OF NAMIBIA**

*“SPECIAL INTEREST”*

**CASE NO. I 1682/2008**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**SOPHIA LUBAKI**

**PLAINTIFF**

and

**DG MYBURG T/A MGC TRANSPORT**

**1<sup>ST</sup> DEFENDANT**

**DONALD D VAN NEEL**

**2<sup>ND</sup> DEFENDANT**

***CORAM:*** DAMASEB, JP

Heard: 27 – 28/01/2010; 01/02/2010; 10/02/2010

Delivered: 11/02/2010

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**JUDGMENT**

**DAMASEB, JP:** [1] This is a motor vehicle collision case. A collision occurred on 8 January 2006 at the intersection of Sam Nujoma Drive and Hendrik Witbooi Street, between the two vehicles belonging to the plaintiff and the first defendant respectively. Either party alleges that the other’s driver was negligent. The plaintiff claims damages

from the first and second defendants jointly and severally, while the first defendant counterclaims against the plaintiff for the damage to his vehicle.

[2] The particulars of negligence alleged against either side are identical:

- (i) failing to keep a proper lookout
- (ii) failing to apply the brakes of the vehicle timeously or at all
- (iii) failing to heed traffic lights
- (iv) failing to give right of way to the other driver
- (v) failing to avoid a collision when with exercise of reasonable care it was possible to avoid the collision.

The two versions are therefore mutually destructive.

[3] Crucially, either side accuses the other's driver of driving through a red traffic light and crashing into the other for whom the traffic light was green and thus enjoying the right of way. Either side also relies on contributory negligence of the other in the event of it being found that their driver was the cause of the collision.

[4] As a result of the collision either party suffered patrimonial loss: The damage to the plaintiff's vehicle amounts to N\$ 70 882, 25 and that of the first defendant's vehicle to N\$48 209, 01. The quantum is reciprocally admitted. My only task is to decide who was negligent.

**The plaintiff's evidence**

[5] The first witness for the plaintiff was Mr. Paulo Lubaki (Paulo) the driver of her vehicle at the time of the collision. Paulo is the plaintiff's husband. According to Paulo he, his wife, Simon Sledge Lebang and another male person, were on the fateful day proceeding in his wife's Jetta from east to west on Sam Nujoma Drive. The time was about 16H30. His ultimate destination was Rocky Crest which is located to the east of the intersection where the collision took place. The plaintiff was sitting at the time in the front left seat; while Lebang was seated in the rear left seat and the fourth person in the rear right seat.

[6] Paulo testified that after he had passed the Orban Primary School he drove towards the intersection where the collision occurred. When he was still far from the intersection, he observed that the robot light at the intersection was red for him. About 60 meters before the intersection he noticed that the robot lights turned green in his favour – giving him the right of way to proceed along his path. He saw no traffic in the intersection at the time. As he proceeded, his wife said words to him indicating that a vehicle was coming into the intersection (from South to North). He then looked to the left, noticed the other vehicle and applied the brakes but the two cars were already too close to each other and collided. Paulo and his passengers alighted from the vehicle and Paulo went over to the driver of the other vehicle, Mr. van Neel (“the second defendant”).

[7] Paulo testified that he was very angry after the collision and was asked by his wife to cool down. He then confronted Van Neel and asked him “*Why do you want to kill us?*”,

whereupon Van Neel apologized and said he was driving under pressure and that he was on the cellphone at the time speaking to his employer who wanted him to get back to the workplace to make an unexpected delivery before 17H00 – as a result of which he did not see the red light. Paulo testified that after the collision, Van Neel’s employer came and also apologized over his driver’s causing the collision and promised Paulo that the damage to the Jetta will be covered by his insurance.

[8] Paulo testified that the “City Police” arrived soon after the collision and took possession of the second defendant’s driver’s license which was only returned to van Neel at the request of his employer.

[9] The next day Paulo went to the offices of the traffic police and made a statement about the collision. He there ascertained that the second defendant made a statement which he considered was contrary to the second defendant’s acceptance at the scene of the collision that he was in the wrong. Paulo testified that he thereupon called the second defendant on the cellphone and informed him that his statement was not in accordance with what happened and told him that: *“The truth will set you free.”*

[10] On cross-examination he stated that upon entering the intersection he never looked (as he did not need to) left or right for oncoming traffic.

Mr. Geier for the defendants put to Paulo that no mention was made in the particulars of claim that Van Neel was on a cellphone at the time of the collision; that Paulo did not know the speed limit on the road; that he could not tell how fast he was driving at the

time, and that he did not look left or right before he entered the intersection- all of which Paulo conceded but suggested not to have made any difference as he was right in entering the intersection when he did.

[11] Paulo denied the suggestion by Mr Geier that there was another vehicle in the intersection proceeding from the north to the south which Van Neel had to and gave way to before he (Van Neel) could turn into Sam Nujoma Drive to proceed in the opposite direction from which Paulo came.

[12] The next witness for the plaintiff was Simon Sledge Lebang. He lodges at the home of the plaintiff and her husband Paulo and he did so at the time of the collision. He knows the Lubaki family since 2003 and considers himself part of the family.

[13] At the material time, he was in the Jetta sitting in the left rear seat right behind Mrs Lubaki. He confirms the time to have been around 16H30. According to Sledge, as they approached the intersection, he heard Mrs Lubaki shout something to the effect that the vehicle coming from the south on Hendrik Witbooi Street was not going to stop. This was about 8 meters before they reached the intersection. Sledge testified that he had a good view of the intersection as they approached and did not see any other vehicle inside the intersection, or any vehicle approaching the intersection in either direction. Sledge testified that he saw the other car for the first time when it was already 1½ meters into the intersection, i.e. when its nose only was inside the intersection.

[14] Sledge testified that when Mrs Lubaki sounded the warning about the car coming from the south on Hendrik Witbooi Street, he was able to look at the robots and saw that the lights were green for the traffic moving on Sam Nujoma drive in the direction they were proceeding, i.e. east to west. According to Sledge, when Mrs Lubaki sounded the warning, the Jetta was about 8 meters outside the intersection. He also testified that at the time of the warning of Mrs Lubaki, he looked to the left and got the impression that the driver of the vehicle coming from the south on Hendrik Witbooi was holding a cellphone to his ear.

[15] Sledge confirmed that after the collision, Paulo angrily asked Van Neel if he wanted to kill them and that Van Neel apologized and said he was on the cellphone at the time. He was able to hear the conversation between Paulo and Van Neel as he was about 2 meters from them at the time.

[16] Sledge could not say if Paulo was driving fast or slow at the time they entered the intersection but denied that Paulo had enough time to swerve to the right so as to avoid the collision.

[17] The last witness was the plaintiff, Mrs Sophia Lubaki. She confirmed that their Jetta was about 60 meters from the robot when the lights turned green for them and Paulo proceeded into the intersection towards the west. Mrs Lubaki testified that the robot light facing them was green when her husband approached the intersection. When they were about 6-7 meters from the intersection, she saw the vehicle driven by the second

defendant approach from the left on Hendrik Witbooi Street and sounded the alarm to her husband. Paulo tried to apply the brakes but it was too late to avoid the crash. She testified that when she for the first time saw the vehicle driven by the second defendant, its nose was just entering the intersection. She testified that when she saw that vehicle it was already upon them and it was not possible for Paulo to avoid a crash. The Mini Van driven by the second defendant rammed into the Jetta, causing damage. Mrs Lubaki testified that at the time she saw the Mini Van she shouted to Paulo: *“Is this driver going to stop?”* - Or something to that effect.

[18] Mrs Lubaki confirmed that Paulo was angry after the collision and that she had to calm him down. She remembers that Paulo went to speak to the second defendant but she did not hear their conversation. Mrs Lubaki also testified that when the collision happened, the Jetta was halfway into the intersection. Mrs Lubaki denied the suggestion that she failed to observe the Mini Van earlier than she should have.

### **The defense case**

[19] The only witness on behalf of both defendants was Donald De Wet Van Neel, the driver of the vehicle that collided with the Jetta of the plaintiff and the second defendant in this case. He was employed at the material time by the first defendant as a driver and did deliveries for first defendant's clients. On the day of the collision he was driving a ‘Kia’ bakkie with a prominent ‘Fruit and Veg.’ logo and was doing deliveries for that enterprise. He testified that in the afternoon before 17h00 he was instructed by a superior to return to the place of work to undertake an unscheduled delivery. He was moving

from south to north on Hendrik Witbooi as he approached the intersection of that street with Sam Nujoma Drive. His intention was to turn east into Sam Nujoma Drive. As he approached the intersection, he observed that the robot facing him was green, thus giving him the right of way. He entered the intersection slowly because to the north of the intersection he saw a vehicle approach, followed by another one behind it.

[20] According to Van Neel, he entered the intersection when he had the green light but the light changed to “yellow” while he was already inside the intersection, and the next moment he saw a Jetta crash against the Mini Van he was driving. Van Neel was with a co-worker inside the car who got injured in the collision. Van Neel testified that after the collision he went over to the Jetta and Paulo asked “how could I drive like that?” He did not answer Paulo and went back to the Mini Van.

[21] On cross-examination Van Neel testified that when he was around Hochland Service station he got a call from a superior on his cellphone to return to Fruit & Veg. for an unscheduled delivery. He also stated that he was at no point stationary whilst inside the intersection and that his car was proceeding slowly (at about 15 km ph) until the moment of the crash. He said that when the crash happened, the car coming to the north of the intersection had already passed. He also testified that the lights changed to red for him while he was already inside the intersection.

[22] When asked if the light could have changed to amber before changing to red Van Neel said it could have but that he did not notice it. He also accepted that if the light had

turned green for him, it could not at the same time have turned green for Paulo. Van Neel disputed that the collision took place at the approximate point indicated by the Lubaki's and Sledge, stating on the contrary that the collision occurred seven meters inside the intersection from the southern entry of the intersection, and about 12 meters inside the intersection from the eastern entry point to the intersection, i.e. the direction Paulo was coming from, prompting Mr. Slabber to place on record that on that version the collision must have occurred much closer to the western entry point of the intersection. Van Neel stated that when he saw the Jetta for the first time it was already upon him and that he had not seen it before that.

[23] Van Neel testified that Lubaki was angry after the collision. Van Neel then made an extra-ordinary statement more or less to the following effect:

“I cannot say exactly who was right and who was wrong, but when I negotiated the intersection, the light was green.”

He went on to add:

“I cannot say precisely that Lubaki is wrong.”

[24] Van Neel also said that he cannot think that Paulo could have confronted him in anger if Paulo believed that he [Paulo] was in the wrong. Van Neel conceded, as he had done throughout, that at the time he was on his way to load an unscheduled delivery and that he was under time pressure at the time of the collision. When asked where Paulo could have got *that* information he pleaded ignorance but maintained it was not from him. Van Neel confirmed that two days later, after he had given his account of the

collision to the police, Paulo confronted him on the cellphone about his statement and said to him: *“The truth will set you free.”*

### **Probabilities considered**

[25] What discrepancies and contradictions there are in the evidence of Paulo, Mrs Lubaki and Sledge is not significant and was to be expected 3 years after the collision happened. In fact such discrepancies and contradictions show the likelihood of collusion amongst these witnesses most unlikely. The core essence of the evidence of these 3 witnesses was not shaken in cross-examination. Significantly, when he was cross-examined Van Neel said that he could not tell for sure if Paulo was correct in saying that the light was green for Paulo when he entered the intersection. That is curious. This must be seen against the backdrop that the evidence of the plaintiff and her witnesses that it was when they were about 6-8 meters from the intersection, that the second defendant commenced his entry into the intersection at which time it was not possible for Paulo to take any reasonable steps to avoid a collision. Mrs Lubaki and Paulo both testified in that respect that everything happened so fast. The second defendant himself also testified that he only noticed the Jetta when it was close to him just before the collision.

[26] The case of the defendants in the pleadings is that the light was green for Van Neel when he approached and entered the intersection. The robot light could not have been green for both. One of the two drivers' stories is false.

[27] The concession by Van Neel that he cannot tell for sure that Paulo is right to say he had the green light makes his evidence untrustworthy. It buttresses, in my view, Paulo's version that he had the green light to proceed while Van Neel did not. I find corroboration for the plaintiff's case in the following facts and circumstances: immediately after the collision, Paulo in anger accused Van Neel of driving negligently. He, in his own words and as admitted by Van Neel, asked him. "*Do you want to kill us?*" Van Neel never answered? What is more, he never remonstrated with Paulo about this accusation as one would have expected him to do if he were not the party in the wrong. Even when Paulo called him two days later to accuse him that he had changed his story in the collision report to the police, Van Neel never sought to point out to Paulo that he was accusing him falsely for being the negligent driver. Paulo testified that immediately after the collision, Van Neel apologized and said that he was inattentive at the time because he was driving under pressure as he had been ordered by his employer to return to the workplace before five as there was another delivery to be made before 17H00. He added that the employer of the second defendant came and equally apologized to Paulo and assured him that the damage to the Jetta would be taken care of by *his* insurance. If true, this is a clear admission of negligence by Van Neel.

[28] The evidence is unambiguous that the collision took place at about 16H30, giving Van Neel only about 30 minutes to get to his place of work, load whatever cargo was to be loaded, and to make the unscheduled delivery before 17H00. That indeed Van Neel was called by his employer on the cellphone and so instructed was admitted by Van Neel to be correct. Van Neel denies that he gave that information to Paulo. Where else would

Paulo have got the information from? Mr. Geier's suggestion in re-examination of Van Neel that it could have been either the driver in Van Neel's car or Van Neel's employer that Paulo could have got the information from is, at best, speculative. Significantly, the suggestion was not put to Paulo in cross-examination to comment on<sup>1</sup> and the employer was not called to come and say that he was the source of the information. As regards the passenger in the Mini Van, Mr. Geier stated that his testimony, if called, would not take the case any further- a position accepted by Mr. Slabber. I therefore make no inference either way from the fact that the passenger in the Mini Van was not called.

[29] In my view, Paulo evidence of what van Neel said to him –evidence peculiarly in the knowledge of Van Neel- corroborates Paulo's story that Van Neel admitted to have been inattentive at the time and that he drove into the intersection when the robot light was red against him and green for Paulo.

[30] The second defendant's version that there was another car coming from the north inside the intersection to which he had to give way was vehemently denied by all of the witnesses of the plaintiff and I accept that their version that the intersection was clear at the time the robot light turned green in their favour.

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<sup>1</sup> *President of the Republic of the RSA v SARFU* 2000 (1) 1 Paras 58-64, in particular Para61, where the following is 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."

[31] In my view the critical question in this case is which driver had the right of way (green light) at the time both entered the intersection?

[32] The testimony of Mrs Lubaki and Sledge that at the time of the collision the Jetta was only half-way into the intersection, supports the location pointed out by the Lubakis and Sledge as the spot where the collision occurred. I prefer their version of where the collision occurred to that given by the second defendant: Van Neel testified that the collision occurred about 7 meters into the intersection from his direction and about 12 meters into the intersection from the eastern entry point. On that version the collision took place very close to the western point of entry to the intersection. That could not be as, on the common cause facts, Van Neel had turned to the right (towards the east) immediately after he entered the intersection at its southern entry point which is about 7.4 meters from the eastern entry point of the intersection. He later sought to back-track this statement when he realised *that* did not accord with even his own version of where the collision occurred. This about turn raises doubts about the trustworthiness of Van Neel's recollection of events.

[33] Given that the two versions are mutually destructive, the plaintiff can only succeed if I am satisfied that her version is true and that of the defendants false.<sup>2</sup> The material point of dispute in this case is which of the two drivers drove through the red light when the other had the green light to proceed. One of the two versions is true and the other false. The Lukakis and Sledge asserted vehemently that when the Jetta reached the robot-

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<sup>2</sup> *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199; *Barring Eindomme Bpk v Roux* 2001 1 ALL SA 399 (SCA); *Afrikaner v Frederick* Case NO. 12043/2004 (HcNm), unreported at pp10-11.

controlled intersection the light was green in their favour and that there was no other vehicle in the intersection at that point and that by the time they noticed the Mini Van driven by the second defendant enter the intersection Paulo did not have enough reaction time to avoid a collision.

[34] Given that only one of the two drivers could have driven through the red light, Van Neel's concession that he cannot say with certainty that Paulo did not heed the red light – in the absence of even as much as a hint in the evidence that the robot was not functioning properly- is damning as it casts serious doubt on Van Neel's version that he, not Paulo, had the green light to proceed.

[35] Mr Geier has urged me that it is common cause that when Paulo approached the intersection, the Mini Van (with colourful and very prominent signage) driven by the second defendant was already inside the intersection and that Paulo should have seen it and taken avoiding action by swerving to the right. Paulo was with his wife and two others in the vehicle, and the notion that the Mini Van was so positioned inside the intersection at the time that he should have seen it suggests that he chose deliberately to bring harm unto himself, his wife and others. That is improbable.

[36] Both Mrs Lubaki and Lebang testified that the very first moment they noticed the Mini Van it was only its nose which was inside the intersection. By that time they were only about 6-8 meters from entering the intersection with the green light in their favour. Against this factual backdrop Mr Slabber correctly submitted:

“On second defendant’s version of the point of impact the front of plaintiff’s vehicle was not more than some 4.5 meters into the intersection. At worst for plaintiff her driver had travelled 12, 5 meters from the moment plaintiff exclaimed about second defendant not stopping. At 60 kph 0, 75 seconds would have followed until impact. At 80 kph only 0, 5 seconds would have followed. No motorist, not even Michael Schumacher, is equipped with instantaneous reaction to danger.”

This accords with the testimony of all the protagonists, that everything happened so fast and that when they noticed the presence of each other’s vehicles, the crash was inevitable.

[37] I agree with the dictum of Muller J, relying on similar dicta from South Africa, that where a motorist enters a robot-controlled intersection with the robot light in his favour and while the intersection is clear, there is no duty on that driver 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.<sup>3</sup>

### **Conclusion**

[38] I am satisfied that the plaintiff has established on a preponderance of probabilities that the second defendant drove into the intersection when the robot was red for him and when it was green in favour of Paulo, and *that* failure of Van Neel to heed a traffic light was the sole cause of the collision that occurred on 8 January 2006 between the vehicle belonging to the plaintiff and the one belonging to the first defendant. The plaintiff has established on a balance of probabilities that her version of how the collision occurred is true and that of the second defendant false.

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<sup>3</sup> *Izaaks v Schneider* 1990 NLR 171 at 174D-J/175A-C

[39] It is common cause that the second defendant was at the time of the collision in the employ of the first defendant who is vicariously liable for the negligence of the second defendant.

[40] The quantum of the damage to the plaintiff's vehicle having been admitted, the plaintiff is entitled to judgment in that amount.

***The order***

[41] I therefore make the following order:

- i) The plaintiff's claim against the first and second defendants succeeds and judgement is entered for the plaintiff in the amount of N\$70,882.25, with costs.
- ii) The amount of N\$70,882.25 will attract interest at the rate of 20% per annum calculated from the date of judgment.
- iii) The first and second defendants are liable to the plaintiff for the judgment debt of N\$70,882.25 plus interest and costs, jointly and severally, the one paying the other to be absolved.
- iv) The first defendant's counterclaim against the plaintiff is dismissed, with costs.

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**DAMASEB, JP**

ON BEHALF OF THE PLAINTIFF:

Mr. A. Slabber

**Of:**

**DR WEDER, KAUTA & HOVEKA INC.**

ON BEHALF OF THE DEFENDANT:

Mr. H Geier

**Instructed By:**

**BEHRENS & PFEIFFER**