

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3094/2009

In the matter between:

ALFONS OTTO

1ST PLAINTIFF

THERESE OTTO

2ND PLAINTIFF

and

EKONOLUX CC

1ST DEFENDANT

HAROLD JOHN GEORGE

2ND DEFENDANT

Neutral citation: *Otto v Ekonolux* (I 3094/2012) [2013] NAHCMD 165 (14 June 2013).

Coram: UEITELE, J

Heard: 10, 11, 12, & 13 JUNE 2013

Delivered: 14 June 2013

Flynote: Motor collision — Motorists on national roads- Where a vehicle rams into another vehicle from behind, there is *prima facie* evidence of negligence on the part of the driver of that vehicle.

Summary: On 16 January 2009 Mr Alfons Otto, the first plaintiff, had been driving on a national road (the B2 main road) between Karibib and Okahandja. He alleged that as he approached the intersection on the B2 main road and District Road No. 1988 at around midday, he slowed down the vehicle (a bakkie) and simultaneously switched on his right indicator as the turn-off to the Kanzimba Lodge was to the right of the B2 main road. As he was slowing down he cannot say with certainty how far he was from the Kanzimba turn-off (i.e. the turn off to the right into District Road 1988), he looked in his right side mirror to see if there was any traffic approaching. At that juncture he noticed a bus in the mirror, coming over the crest of an incline on the road. He slowed down further with the aim to turn to the right. When he looked in in his rear mirror again he noticed that the bus was very close behind the bakkie and travelling at a very high speed. At that point he was still in the left lane of the B2 main road. The next moment the bus collided into the rear of the bakkie he was driving.

The second defendant, Mr George Jöhr, on the other hand testified that as they (i.e. the bus and the bakkie) approached the intersection he saw the bakkie slowing down and he also reduced the bus speed a little bit. He saw the bakkie putting on its left indicator he then turned the bus more to the white broken line; to ensure that he overtook the bakkie his right side indicator was on at that point. He then testified that at that moment the bakkie started to move back from the left to right and he suddenly saw the bakkie right in front of him and he pulled the bus to the right side to avoid the accident, but it was late and he hit the bakkie on its right rear side.

Held that the two versions of the plaintiff and the defendant are mutually destructive. The approach then is that 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.

Held further that in a case where a vehicle rams another vehicle from behind, as here, there is *prima facie* evidence of negligence on the part of the driver of that vehicle. This *prima facie* inference of negligence called for an explanation by Jöhr. *Held* further that the Court finds the plaintiff's version of the events more probable

than the version of the defendant and that it is the plaintiff, not the defendants, who has proven his claim on a balance of probabilities.

ORDER

- (a) The Court finds that the collision was caused solely by the negligence of Jöhr.
- (b) The first and second defendants' claim in reconvention is dismissed with costs.
- (c) The first and second defendants must, jointly and severally the one paying the other to be absolved, pay the plaintiffs' (in the consolidated action) costs. The costs include the following:
- (i) The cost of one instructing and one instructed counsel;
 - (ii) Mr Otto's air fare from Germany to Namibia and back to Germany; and
 - (iii) Local (i.e. in Namibia) transportation costs, accommodation costs and the costs of three meals per day (for the period 06 – 14 June 2013).

JUDGMENT

UEITELE J:

[1] On 28 August 2009 Mr Alfons Otto, Mr Hartmut Krohn and Ms. Therese Otto instituted an action against Ekonolux CC and a certain Mr. Harold George Jöhr for damages suffered by them as a result of collision between two motor vehicles (a Nissan 4x4 Double Cab Pick Up vehicle with registration number TRW382GP, driven by Mr. Alfons Otto at the time of the collision and a Mercedes passenger bus with registration number N 47383 W, driven by Mr. Harold George Jöhr at the time of the collision) which occurred on 16 January 2009 on the B2 national road between Karibib and Okahandja. The Nissan 4x4 Double Cab Pick Up was, throughout the trial, referred to as a "bakkie" and I will adhere to this nomenclature.

[2] On 13 January 2010 Mr Hartmut Krohn withdrew his action against both Ekonolux CC and Mr. Harold George Jöhr, while Mrs. Therese Otto passed away on 6 February 2012, before the trial commenced. Her husband Mr Alfons Otto filed a notice of substitution, in terms of Rule 15, on 14 February 2012. In terms of that notice Mr. Otto was substituted for his late wife in his capacity as executor of her estate.

[3] On 18 May 2011 Springs Car Wholesalers (Pty) Ltd the owner of the bakkie by means of combined summons instituted action against Ekonolux CC. On 30 May 2012, the action instituted by Mr Alfons Otto, Mr Hartmut Krohn and Ms. Therese Otto and the action instituted by Springs Car Wholesalers (Pty) Ltd were consolidated into one action.

[4] Mr Alfons Otto claims damages for the loss occasioned by destruction of personal effects and personal injuries, while Springs Car Wholesalers (Pty) Ltd claims damages occasioned by the writing off of the bakkie. I will, in this judgment refer to Mr Alfons Otto as the plaintiff and to Ekonolux CC and Mr. Harold George Jöhr as the first and second defendants respectively.

[5] In his particulars of claim the plaintiff alleges that the second defendant was acting within the course and scope of his employment with the first defendant, alternatively within the ambit of risk created by such employment, and that the sole cause of the collision was the negligent driving of the second defendant.

[6] The first and second defendants both pleaded to the plaintiff's claim denying that the second defendant was negligent: The First defendant actually instituted a counterclaim. The plea and the counter claim are similar the defendants amongst others pleaded that:

'...in the event of the above Honourable Court finding that the said Harold John George was negligent and that such negligence contributed to the collision in question then and in such event the Defendants plea that, First Plaintiff was also negligent and that his negligence contributed to the collision and that such contribution be calculated in terms of the Apportionment of Damages Act, in one or more of the following respects

- 4.3.1. he failed to keep a proper lookout;
- 4.3.2 he failed to apply brakes timeously or at all;
- 4.3.3 he failed to exercise proper or reasonable control over the vehicle; and/or
- 4.3.4 he failed to avoid the collision in circumstances when and where he could and should have avoided a collision; and/or
- 4.3.5 he collided with the bus ; and/ or
- 4.3.6 First Plaintiff's negligents (*sic*) contributed more to the collision in question than that of the said Harold John George.'

[7] The parties, at a pre-trial meeting held on 28 November 2012 agreed that the issues of negligence and causation would be determined separately from those relating to the quantum of plaintiffs' damages. That agreement was sanctioned by the Court.

THE EVIDENCE

The evidence on behalf of the plaintiff

[8] At the hearing a rough plan and various photographs were tendered in evidence on behalf of the plaintiff. Two witnesses testified on behalf of the plaintiff in the consolidated action *viz.*, Mr. Nicolaas Jacobus Koch and Mr. Alfons Otto.

[9] The first witness to testify on behalf of the plaintiff was Mr. Koch, he testified that he is a farm manager and professional hunter employed at Farm Levintina Guest and Hunting Lodge. He testified that he was so employed on 16 January 2009, the date of the collision. He further testified that he was a police officer for a period of 40 years, from 1968 to 1990 he served in the South African Police Force doing duty in the then South West Africa. From 1990 to 1994 he continued his service in the South African Police Force in South Africa and returned to Namibia in 1994 after he retired from the South African Police Force.

[10] Mr. Koch further testified that on 16 January 2009, he witnessed a motor vehicle accident at the turn-off to Kanzimba Lodge which is located south off the B2 main road between Karibib and Okahandja. He testified that he was sitting in his motor vehicle near the intersection of District Road 1988 and the B2 main road. At that intersection one turns right (if one travels from Karibeb to Okahandja that is from west to east one turns to the south at that intersection) onto the road leading to Levintina Guest and Hunting Lodge. From the point where he was seated he could observe all cars approaching the crossing on the B2 main road.

[11] He testified that his reason for seating in his motor is that he was waiting at the crossing for guests who were booked to stay at Levintina Lodge. The guest would have arrived in a white pick-up vehicle from the direction of Karibeb. As a result of this he was vigilant of every car that approached the crossing. He continued his testimony and said that while seated in his vehicle he noticed a white bakkie approaching the turn-off. The bakkie was driving slowly and had its right indicator on indicating that it was turning right. He then testified that the next moment he saw an Ekonolux bus approaching the bakkie at high speed and trying to pass the bakkie at its right side. At that juncture the bakkie was still in the left lane of the B2 main road with its right indicator on. The Ekonolux bus collided with the right rear end of the bakkie, causing the bakkie to overturn several times. In actual fact the bakkie somersaulted through the air, hitting the ground a few times in the process until it finally landed on its wheels facing the direction from which it came. He further testified that the visibility on the day of the accident was good. It was midday and there were no cloud cover or dust to obscure his vision.

[12] Mr Koch testified and indicated some points on the rough plan which he submitted. He testified that he measured the distance himself using a measuring wheel. The points of note which he indicated are that; the point of impact was approximately 41 meters before the intersection of the road turning off to Farm Kanzimba and the B 2 Main road in the left lane; the place where the bakkie ultimately came to a standstill was 81 meters from the point of impact; the place where the bus ultimately came to a standstill was 260 meters from the point of impact.

[13] The second witness to testify for the plaintiff was the plaintiff himself Mr Alfons Otto. His testimony was that during the course of the morning of 16 January 2009 they left Swakopmund. He was driving the bakkie and next to him in the passenger seat was Mr. Krohn. In the back seat were his late wife Therese and Ms. Brigitte Krohn. At around midday, they were approaching the turn-off to Kanzimba Lodge. He further testified that in Germany, it is a rule of the road that all drivers must put on their indicators at least 200 meters before a turn-off from a highway. Around 200 meters from the turn-off to Kanzimba Lodge, he slowed down the bakkie and simultaneously switched on his right indicator as the turn-off to the Lodge was to the right of the B2 main road.

[14] As he was slowing down he cannot say with certainty how far he was from the Kanzimba turn-off, he looked in his right side mirror to see if there was any traffic approaching from behind. At that juncture he noticed a bus in the mirror, coming over the crest of an incline on the road. He slowed down further to turn to the right. When he looked in in his rear mirror again he noticed that the bus was very close behind the bakkie and travelling at a very high speed. At that point he was still in the left lane of the B2 main road. The next moment the bus collided into the rear of the bakkie he was driving. The collision happened extremely quickly. Very little time elapsed between the moment he noticed the bus in his rear mirror the second time and the actual collision. He said that there simply was no opportunity to avoid the bus colliding into the bakkie. After the collision the bakkie was propelled forward on the tarred road and at some point started to somersault several times through the air and hitting the ground a few times in the process before it landed on its wheels. To him it felt never-ending until the bakkie finally came to a standstill on its tyres to the northern side of the B2 main road facing the direction from which they came.

[15] In cross examination it was put to Mr Otto that he overtook the bus on two occasions between Karibeb and the point at which the accident occurred and that on each occasion on which he overtook the bus it appeared that he was not sure as to where to turn off from the B2 main road was. It was also put to him that after he had descended the cliff on the road he indicated that he is turning to the left on a gravel road off the B2 main road and that he moved the vehicle to the left shoulder of the road and as the bus was about to overtake him he suddenly moved the vehicle back on the road getting into the path of the bus. Mr Otto vehemently denied having

indicating to turn left. He testified that it took him six months to plan his trip to Namibia and in that process he already knew that he had to turn right at the turn off to Kanzimba lodge. In support of his evidence he submitted an extract from the itinerary that he had prepared whilst in Germany. The itinerary amongst others read as follows:

“Days 12 & 13 Friday 16 January and Saturday 17 January 2009 from Swakopmund via Erongo mountains to Karibib

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Navigation from Swakopmund along the B2 via Usakos to Karibib until about 22 km behind Karibib; about 182 km. Turn right into district road 1988 and at about 22 to Kansimba Gem lodge.”

The evidence on behalf of the defendants

[16] The defendants called two witnesses namely the second defendant and a certain Mr Bronshua Charles Strauss. The second defendant testified that he was employed by the first defendant since 2001 as a bus driver. That during the year 2009 the routes that he was driving were Windhoek to Walvis Bay and back to Windhoek six days a week.

[17] That on 16 January 2009 he drove a bus from Walvis Bay to Windhoek and approximately 40 km outside Karibeb on his way to Okahandja a collision occurred. He testified that as he was driving from Karibeb to Okahandja there were no vehicles in front of him. After he drove approximately 15 – 20 km out of Karibeb a Nissan bakkie overtook him. It had a canopy. He said he cannot remember the vehicles registration number, but what he could remember are the last letters of the registration number, which were GP. He testified that the bakkie was driving in front of him and at approximately 300 – 400 m ahead of him the bakkie slowed down; he approached it, indicated with his right indicator and passed it. He continued for a substantial distance and the bakkie followed him, at some point the bakkie accelerated and overtook him.

[18] He testified that he drove behind the bakkie and it drove away from him but it was still in his sight, he said he could see the bakkie up to the intersection. He said the sight was clear there were no clouds or dust nor were there any vehicles

approaching from the front. He testified that as they (i.e. the bus and the bakkie) approached the intersection he saw the bakkie slowing down for the second time. He reduced the bus speed a little bit. He saw the bakkie putting on its left indicator he then turned the bus more to the white broken line; to ensure that he overtook the bakkie, his right side indicator was on at that point. He then testified that at that moment the bakkie started to move back from the left to right and he suddenly saw the bakkie right in front of him and he pulled the bus to the right side to avoid the accident, but it was late and he hit the bakkie on its right rear side.

[19] He continued and testified that he kept to his right side of the road. The bus started to swing and he could not apply brakes at that stage, because the bus would have overturned. After he stabilized the bus he drove off the main road onto the gravel road next to the main road, applied his breaks and stopped. After he brought the bus to a standstill, he and one of the passengers immediately jumped off the bus (he cannot recall the passenger). He ran over to the opposite side of the road to where the bakkie was but did not see any injured persons. He testified that the first person he recognized there was the person who was working at the lodge (who he identified in court as Mr Koch).

[20] The second witness to testify for the defendant was Mr Bronshua Charles Strauss, he testified that he was a mathematics and science teacher for about 23 years (that is between 1989 and 2012) whereafter he resigned and started working in 2012 as fleet manager for Ekonolux CC (the first defendant).

[21] He further testified that on the day of the collision (i.e. 16 January 2009) he came from Usakos on his way to Windhoek. He was a passenger in the Ekonolux bus driven at the time by Mr George Jöhr (the second defendant). He testified that he was seated directly behind the driver (Mr Jöhr) and next to the bus hostess at the time the collision occurred and that during the journey from Karibib he at intervals looked at the speed the bus was driving and saw it was travelling between 80 to 90 km/hour. He further testified that the bakkie that was involved in the collision with the bus was also travelling on the B2 main road between Karibeb and Okahandja, that the bus was following the bakkie and it closed the following distance between the bus and the bakkie, to such an extent that the bus was approximately 20 to 40 meters behind the bakkie before the collision occurred.

[22] His testimony was further that when the bus got nearer to the bakkie he saw its left indicator going on whereafter the bakkie moved to the left side of the road. The driver of the bus as a result thereof moved the bus over to the direction of the broken line in the middle of the road in order to overtake it. The next moment the bakkie came back into the left lane turning in front of the bus. The driver pulled the bus sharp to the right in order to avoid colliding with the bakkie. Thereafter he heard a big noise and the bus started swinging. The driver of the bus stabilized it and started to decrease the speed. The bus was ultimately brought to a standstill at the right side of the road.

[23] In cross examination Mr Strauss testified that he cannot recall the bus overtaking the bakkie, he testified that if the bus overtook the bakkie he would not have forgotten that fact, he also testified that the only left turn off, off the B2 main road, that he saw that day immediately before the collision was the turn off at the intersection of the Kanzimba, turn off to the right (south) one turns to Kanzimba Lodge and to the left (north) one turns off to farm Vogelsang. He also testified that the bakkie never went off the tar road on to the gravel road. He further conceded that he could have been mistaken when he said he saw the left indicator of the bakkie. He confirmed and maintained that the distance between the bakkie and the bus was 20-40 meters. He further confirmed that the first time he saw the bakkie, the bakkie was approximately 100 meters to 150 meters before the B2 main road and the Kanzimba intersection.

DISCUSSION

[24] The evidence of the two drivers is, in relation to the crucial facts that have a direct bearing on the question of negligence, mutually destructive. The following legal principles are now well settled in our law namely that:

- (a) where a party alleges negligence on the part of the other, each party must prove what it alleges¹;

¹Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone Case No SA 13/2008 (unreported) at 16 - 17 para 24).

- (b) where the evidence of the parties' presented to the court is mutually destructive the court must decide as to which version to belief on probabilities²;
- (c) the approach that a court must adopt to determine which version is more probable is to start from the undisputed facts which both sides accept, and add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses.³

[25] It is with those principles in mind that I now have to decide whether the accident more likely happened in the way asserted by plaintiff or in the way described by the defendant. Mr Denk who represented the plaintiff urged the court to accept the evidence of Mr Koch and Otto on the basis that the probabilities in the case favour the plaintiff. On the other hand, Mr Horn, who appeared for the defendants, submitted that the plaintiff had the opportunity to avoid the accident and he did nothing to avoid the accident, he argued as follows:

"It is respectfully submitted that the first Plaintiff was in a position to avoid the accident if one has regard to the following.

6.1 In the witnesses statements of the First Plaintiff more specifically paragraph 3.9 and 3.10 the First Plaintiff testified that he saw the bus **twice** driving at an **excessive speed** coming down from the incline on the road. At that stage the First Plaintiff was driving very slowly and was in a very good position to maneuver he's vehicle out of harm's way to avoid the collision. However in his (First Plaintiff) oral testimony Mr Otto clearly deviated from his witness statement when he said that from point G of the rough plan of Mr Koch he saw the bus as driven by the Second Defendant **3(three)** times before the collision occurred. During all **3(three)** times he was sure that the bus was driving at an excessive speed and was directly in the same lane as he was approaching him from behind.

²National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at H 440E – G: Also see Harold Schmidt t/a Prestige Home Innovations v Heita 2006 (2) NR at 556

³ MVA v Lukatezi Kulubone (supra) at footnote 1

6.2 It is respectfully submitted that the First Plaintiff, on his own version, watched the bus carefully for an approximate distance of 740 meters.

Whilst observing the bus he had sufficient time to react by driving off the road. It cannot be accepted that if a reasonable driver is foreseeing a collision it is acceptable if he does nothing to avoid it.”

[26] I decline to accept Mr Horn’s submission. I do so for the following reasons. There was no evidence before court that when Mr Otto first saw the bus in his mirror the bus was 740 meters behind the bakkie. Both Mr Jöhr and Mr Otto testified that they could not estimate the distance between the bakkie and the bus when each one of them for the first time saw the other vehicle. Even Mr Koch who was an independent witness could not estimate the distance between the bakkie and the bus when he saw the bus coming down the incline. The only witness who estimated the distance between the bakkie and the bus is Mr Strauss who testified that the first time when he saw the bakkie in front of the bus was just before the collision and he guesstimated the distance between the two vehicles to be any distance of between 20-40 meters.

[27] I am of the view that had Mr Jöhr been keeping a proper look-out he would have observed the bakkie well in advance and safely pass the bakkie or wait for the bakkie to turn right and pass it on the left side. He did not keep a proper look out. He trundled along at 70 km/h until the very moment of impact, and hit the bakkie - from behind. The bakkie, was on the road ahead of Mr Jöhr, in full view, in broad daylight. There had, according to Mr Jöhr’s testimony, been warning signs from bakkie’s brake lights, the indicator light (whether left or right is immaterial at the moment) that the bakkie may well execute one or other maneuver. The fact is that Jöhr, was, when the bakkie slowed down, travelling at 70 km/h and was at most 40 meters away from the bakkie. Cooper⁴ opines that ‘vehicle speed is commonly indicated by the speedometer in terms of kilometers per hour as these units are appropriate to the distances and times which are involved in the usual car journey. However, where events take place over much shorter distances and in much shorter terms as in traffic accidents it is more appropriate and more convenient for calculation, to express vehicle speed in units of meters per second in terms of the following

⁴ W E Cooper Motor Law Vol 2 at 434.

conversion: speed in meters per second is equal to speed in kilometers per hour divided by 3.6.’

[28] It was conceded, in argument by Mr. Horn that this conversion entails a simple mathematical calculation and that the evidence of a reconstruction expert is not necessary. In terms of this conversion a motor vehicle which travels at 70 km/h covers a distance of 19.4 meters in just one second. Two seconds worth of time means 39 meters of distance). At 70 km/h, and 40 meters away from bakkie it was surely impossible for the bakkie to move out of the way of the oncoming bus. I therefore do not believe that Jöhr noticed the brake lights and the indicator light of the bakkie. It has been held that in a case where a vehicle rams another vehicle from behind, as here, there is *prima facie* evidence of negligence on the part of the driver of that vehicle⁵. This *prima facie* inference of negligence called for an explanation by Jöhr. He did give an explanation which, for reasons I will advance below, I am not willing to accept. If I accept the estimation of Mr Strauss (which I do) then the only inference I can draw is that the second defendant was too close behind the bakkie, he did not keep a safe following distance⁶. Jöhr was simply not paying attention to his driving, and did not see the situation developing ahead of him until it was too late to do anything to avoid the collision.

[29] I have indicated above that I rejected Jöhr’s explanation of how the accident occurred. My reasons for rejecting Jöhr’s version of the accident are the following. In a judgment that I recently delivered⁷ I quoted with approval the following comments by Justice Mtambanengwe “I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points”. In the present matter Jöhr’s evidence is not only inconsistent with indisputable facts but it is contradicted in many respects by the evidence of Strauss who testified on his behalf. As a witness Mr Jöhr was singularly unimpressive. He consistently failed to answer simple questions in a straightforward manner. In fact he seemed bent on attempting to avoid coming to

⁵ Fig Brothers (Pty) Ltd v South African Railways and Harbours 1975 (2) SA 207 (C) at 211 H-I.
⁶W E Cooper Motor Law Vol 1 at 422 and also Fig Brothers (Pty) Ltd v South African Railways and Harbours 1975 (2) SA 207 (C)

⁷Smith v Mediva Fisheries (Pty) Ltd and Another (I 429/2012) [2013] NAHCMD 152 delivered on 06 June 2013.

grips with the truth by changing his version every time he was faced with difficult questions in cross examination to the extent that I had to caution him that he was dangerously moving towards the path of exposing himself to perjury. In fact, his evidence as a whole was entirely unconvincing and, save to the extent that it is corroborated by acceptable evidence, and save for admissions he might have made, no reliance can be placed upon any of Jöhr's evidence. The plaintiff's evidence on the other hand is corroborated by an independent witness Mr Koch. Mr Koch's evidence is consistent with the versions recorded in contemporary documents. The plaintiff was not discredited in any manner during cross-examination and answered questions with ease and in a manner consistent with what one would expect of an honest witness.

[30] I have considered their evidence as a whole and, bearing in mind inconsistencies, contradictions, corroboration as well as the aspects casting suspicion on the reliability and credibility of Mr Jöhr's evidence I am of the view that it is the plaintiff, not the defendants, who has proven its claim on a balance of probabilities.

[31] In the result, I make the following order:

- (a) The Court finds that the collision was caused solely by the negligence of Jöhr.
- (b) The first and second defendants' claim in reconvention is dismissed with costs.
- (c) The first and second defendants must, jointly and severally the one paying the other to be absolved, pay the plaintiffs' (in the consolidated action) costs. The costs include the following:
 - (i) The cost of one instructing and one instructed counsel;
 - (ii) Mr Otto's air fare from Germany to Namibia and back to Germany; and
 - (iii) Local (i.e. in Namibia) transportation costs, accommodation costs and the costs of three meals per day (for the period 06 – 14 June 2013).

SFI Ueitele

Judge

APPEARANCES

FIRST PLAINTIFF:

A Denk

On Instructions of Theunissen, Louw &
Partners, Windhoek

DEFENDANT:

S Horn

Of M B De Klerk & Associates, Windhoek