

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 2380/2015

In the matter between:

**TULIMOSHILI MATHEUS PENDAPALA NAFUKA**

**PLAINTIFF**

and

**ALEXANDER FORBES INSURANCE COMPANY**

**NAMIBIA LIMITED**

**KAARIN NDEAPO NGOLO**

**DEFENDANT**

**THIRD PARTY**

**Neutral citation:** *Nafuka v Alexander Forbes Insurance Company Namibia Limited* (I 2380/2015) [2018] NAHCMD 298 (24 September 2018)

**Coram:** Unengu, AJ

**Heard:** 16 May 2018

**Delivered:** 24 September 2018

**Flynote:** Civil Practice – Insurance company suing third party for compensation – Insurance company paid insured in full – Special plea by third party against claim by Insurance company – Special plea dismissed – defence of *volenti non fit injuria* also rejected by court.

**Summary:** The Insurance company Alexander Forbes paid compensation in an amount of N\$ 180 000.00 to Mr Nafuka for damages to his vehicle sustained in an accident while the third party Ms Ngolo was the driver. When sued by the Insurance company for compensation for the amount paid to the owner of the vehicle, Ms Ngolo raised a special pleas of *locus standi* and *volenti non fit injuria*. Court dismissed both special pleas and *held*: Insurance company has *locus standi* to sue third party on the principle subrogation.

*Held* further that the defence of *volenti non injuria* is not applicable in the matter.

*Held* furthermore that the third party was liable to compensate the Insurance company in the amount of N\$180 000.00 paid to the plaintiff.

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### ORDER

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- (i) The order dismissing the special plea raised by the third party with costs which costs included costs of one instructing and one instructed counsel delivered on 25 June 2018, is confirmed.
- (ii) The judgment is granted for the defendant in the amount of N\$180 000.00.
- (iii) Costs of the suit which costs to include costs of one instructing and one instructed counsel.

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### JUDGMENT

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UNENGU AJ:

## Background

[1] On 21 July 2015, Mr Tulimoshili Matheus Pendapala Nafuka issued a combined summons against Alexander Forbes Insurance Company Namibia Limited (The Insurance Company) for amongst others, a breach of the insurance agreement, indemnification and payment of an amount of N\$290, 000.00 towards the towing of his motor-vehicle, a sedan BMW320i GT with registration number N177-064 W which suffered damages in an accident which occurred on 24 March 2015 near Mariental while Ms Kaarin Ndeapo Ngolo (third party) was the driver.

[2] Initially, the Insurance Company refused to pay the claim but settled later with him, in the amount of N\$180 000.00 during mediation which settlement agreement was made an order of court on 28 September 2016 by Masuku, J.

[3] The order made reads as follow:

‘Having heard Mr Kamanya, counsel for the plaintiff and Ms Beets, counsel for the defendant and Mr Nederlof, counsel for the third party and having read the documents filed of record:

It is ordered:

1. That the settlement agreement between the plaintiff and the defendant is hereby made an order of court.
2. That the matter between the plaintiff and the defendant is removed from the roll and regarded as finalised.
3. That the matter in respect of the defendant and the third party is postponed to 12 November 2016 at 15h15 for status hearing.’

## DEED OF SETTLEMENT BETWEEN THE PLAINTIFF AND DEFENDANT

[4] The Deed of Settlement was date stamped 20 September 2016 and the terms thereof consist of two paragraphs and are brief as they appear hereunder:

'In the mediation between:

**'CASE NO. I 2380/2015**

**TULIMOSHILI MATHEUS PENDAPALA NAFUKA**  
Represented by Mr Amupanda Kamanya

**PLAINTIFF**

and

**ALEXANDER FORBES INSURANCE COMPANY  
NAMIBIA LIMITED**

**DEFENDANT**

Represented by Mrs Elise Yssel

**KAARIN NDEAPO NGOLO**

**THIRD PARTY**

Represented by Mr Nederlof

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**DEED OF SETTLEMENT BETWEEN THE PLAINTIFF AND DEFENDANT**

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At the mediation held in Windhoek on the 12<sup>th</sup> of September 2016, Plaintiff and Defendant were able to reach a settlement, the terms of which are as follows:

1. The Defendant will pay Plaintiff a sum of N\$180 000.00 in full settlement of Plaintiff's claim. This payment will, however, only be effected 7 days after Plaintiff has submitted the invoice making up the costs of the repairs he conducted on his vehicle, which will be sent by fax within at the latest one week.
2. The plaintiff will withdraw his claim against the Defendant, but the claim between the Defendant and the Third Party will continue and proceed to court.'

Rule 50 (1) Notice

[5] Subsequent to the settlement of the claim between the Insurance Company and Mr Nafuka, the Insurance Company, who was the defendant in the matter by Mr Nafuka (the plaintiff), filed a notice in terms of Rule 50 (1) of the High Court Rules to the third party (Ms Ngolo) on 11 February 2016 in the following terms:

**'CASE NO. I 2380/2015**

**TULIMOSHILI MATHEUS PENDAPALA NAFUKA**

**PLAINTIFF**

and

**ALEXANDER FORBES INSURANCE COMPANY  
NAMIBIA LIMITED**

**DEFENDANT**

**KAARIN NDEAPO NGOLO**

**THIRD PARTY**

TO THE ABOVE NAMED THIRD PARTY:

TAKE NOTICE that the above named plaintiff has commenced proceedings against the above named defendant for the relief set out in the summons, a copy of which is attached hereto as **"AFL2"**.

TAKE NOTICE FURTHER that the above named defendant claims a contribution or indemnification on the grounds set out in the summons (or such other grounds as may be sufficient to justify a third party notice).

TAKE NOTICE FURTHER that the nature and the grounds of defendant's claim, the question or issue to be determined or the relief or remedy claimed by the defendant against you set out in detailed statement of claim attached hereto as annexure **"AFL1"**.

[6] Rule 50 (1) of the High Court Rules provides as follow:

'Where in any action a party claims –

- (a) as against any other person not a party to the action (in the rule called a "third party") that party is entitled in respect of any relief claimed against him or her to a contribution or indemnification from the third party; or
- (b) that any question or issue in the action is substantially the same as a question or an issue which has arisen between that party and the third party or between any of them,

that party may issue a notice (hereinafter referred party notice) on Form 16 and the notice must be served by the deputy-sheriff.'

[7] In the present matter, the notice was received by the deputy-sheriff on 12 February 2016 with all the attachments. On 16 February 2016, the deputy-sheriff for the district of Oranjemund served the notice on the third party personally at flat number 22, 13<sup>th</sup> Avenue, Oranjemund, and as a consequence, on 29 February 2019, she filed her notice of intention to defend the claim, which triggered case management proceedings.

[8] In addition to the above, the third party, raised a special plea of lack of *locus standi in judicio* against the defendant, alternatively that the defendant's claim is impermissible in law. One of the grounds for lack of *locus standi* to sue is that the defendant did not allege subrogation or take cession of the plaintiff's claim in order to proceed against her and that defendant had not instituted a claim against her.

[9] As pointed out before, the matter was docket allocated to a judge to case manage it. During the course of the case management processes, the matter was referred to mediation where the plaintiff and the defendant settled the claim between them in the terms stated in para 4 above, leaving the defendant proceeding with its claim against the third party.

[10] A draft pre-trial order signed by both the defendant and the third party was made an order of court during a pre-trial conference. In the pre-trial order the defendant and the third party defined issues not in dispute and those in dispute which they resolved to be decided by the court during the trial. In the pre-trial order, it was also agreed between the parties that in the event the third party is hold liable towards the defendant, the quantum of the defendant's claim for indemnification or contribution from the third party will be N\$ 180 000.00.

[11] On 25 June 2018, the trial of the matter commenced before me. Mr Jones appeared for the defendant while Mr Carolus appeared for the third party. Mr Carolus, counsel for the third party moved for the special plea to be resolved first. He

argued that should the special plea succeeds, then it will dispose of the matter. He further said that the parties agreed to argue the special plea on the date of the trial. After hearing from Mr Jones, I allowed the request to first hear the special plea of the third party.

[12] Both Mr Carolus and Mr Jones prepared written heads of argument and were ready to argue the special plea which they did. After oral submissions, I dismissed the special plea and indicated that reasons for doing so will be included in the main judgment.

#### Reasons for dismissal of special plea

[13] The essence or crux of the special plea, in my view, is the question of whether or not the defendant has a right to sue the third party who drove the motor vehicle of the plaintiff with consent to recover from her the amount of money it has paid to the plaintiff. Mr Carolus argued that the defendant did not plead cession or subrogation, therefore, cannot rely on these two legal remedies to sue his client for compensation. On his side Mr Jones argued that it was not necessary for the defendant to plead cession or subrogation because, subrogation, he said, takes place by operation of law. According to Mr Jones, the defendant has legal standing to recover the amount of money paid to the plaintiff through subrogation after the defendant and the plaintiff settled the matter between them. He also relied on the pre-trial order which was drafted and signed by both parties.

[14] Further, Mr Jones in his written heads of argument submitted that, in his opinion, the third party's special plea is in fact an exception because she is complaining about the defendant not having a cause of action founded on subrogation.

[15] In the settlement agreement, the terms of which the court made an order of court, it is clear that the defendant after paying the insured, the matter between it and the insured was finally settled with only the matter between the defendant and the third party to proceed.

### Cession and Subrogation

[16] After the defendant and the insured (plaintiff) had settled, cession has fallen away automatically, while subrogation still applicable. What is also clear from the settlement agreement is the fact that the third party was not released from liability by the defendant. By paying the insured the settlement amount of N\$ 180 000.00, for the loss suffered due to damages to his motor vehicle, the defendant met all the requirements for subrogation<sup>1</sup>.

[17] In *Marco Fishing (Pty) v Government of the Republic of Namibia and Others*<sup>2</sup>, Angula AJ (as he then was) when dealing with subrogation and quoting from the judgment of *Ackerman v Loubser* 1918 OPD, said the following:

'Where the court dealt with the principle of subrogation, the court stated at 154 D (All SA at 240 E):

It is trite law that an insurer under a contract of indemnity, insurance who has satisfied the claim of the insured is entitled to be placed in the insured's position in respect of all rights and remedies against other parties which are vested in the insured in relation to the subject - matter of the insurance. This is by virtue of subrogation, which is part of our common law'. The same sentiments were expressed by the Supreme Court earlier in *Dresselhaus Transport CC v Government of the Republic of Namibia*<sup>3</sup>.

[18] It is, therefore, that, after having regard to the written and oral submissions by counsel and considering the authorities cited in the written heads of argument, I came to the conclusion that the point of special plea raised by the third party attempting to evade a trial of the claim, is hollow and without substance. I rejected it and ordered the trial to proceed with evidence of defendant.

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<sup>1</sup> Insurance Law of South Africa Vol 12 Butter-worths para 228.

<sup>2</sup> 2008(2) NR 742 at para 17.

<sup>3</sup> 2005 NR 214 (SC).



## Evidence

[19] During the trial following the dismissal of the special plea, the defendant called four witnesses to testify on its behalf with Mr Hendricks Nyenyemba, the Police Officer who investigated the matter as the first witness.

[20] The evidence of Mr Nyenyemba was brief and mainly about what he observed on the scene of the accident on the road. Accident form (exhibit "C") and the Police Report (Pol 17), (exhibit "E") a warning statement of the driver signed by Ms Ngolo were handed in.

[21] After cross-examination, Mr Jones called Mr Jacobus Johannes de Klerk to testify. Briefly, his testimony is that he was a branch manager of the defendant responsible for the Swakopmund Branch. He said that Mr Nafuka Pendapala Matheus Tulimoshili was insured by the defendant under 5-star VIP Insurance Policy with policy number 14107526-1, therefore, was entitled to indemnification from the defendant for damages to his vehicle, subject to the terms, conditions and exclusions of the policy and if all the insurance premiums due under the policy were paid in full.

[22] Mr de Klerk further testified that Mr Nafuka submitted a claim to the defendant for damages to his vehicle sustained in an accident which occurred near Mariental on 22 March 2015. That as a result of the information in the documents attached to the claim, he instructed Mr Van Schalkwyk to conduct an investigation on the scene of the accident. He said, initially, the defendant was unwilling to indemnify Mr Nafuka but later during mediation proceedings, a settlement agreement with Mr Nafuka was reached in terms of which the defendant paid him (Mr Nafuka) an amount of N\$180 000.00 in full and final settlement of his insurance claim.

[23] Furthermore, Mr de Klerk testified that as short term insurer, the defendant was entitled to claim compensation for N\$180 000.00, the amount which it had indemnified Mr Nafuka from Ms Ngolo, who was the driver of the vehicle when the accident occurred.

[24] Mr de Klerk was extensively cross-examined by Mr Carolus, counsel for the third party, Ms Ngolo. With most time of cross-examination spent on whether or not cession or subrogation did take place for the defendant to claim compensation from Ms Ngolo and the question of whether or not Ms Ngolo, in view of the fact that she drove the vehicle with the permission of the insured (Mr Nafuka), was also covered by Mr Nafuka's insurance policy.

[25] The issue of whether or not Ms Ngolo was liable to compensate the defendant in the amount of N\$180 000.00 paid to Mr Nafuka was dealt with herein before when I discussed the reasons for the dismissal of the special plea. I will not repeat it.

[26] The case law cited by counsel in their heads of argument for the special plea, overwhelmingly supports the fact that subrogation will take place by operation of law once the insurer has paid the insured in full the amount claimed. In *Dresselhouse Transport CC v The Government of the Republic of Namibia* above, the Supreme Court when dealing with the principle of subrogation said that once the insurance company has paid the insured in accordance with an agreement between them, the insurer was entitled on the principle of subrogation to sue the third party in the name of the insured.

[27] That being the case, it is incorrect for Mr Carolus to argue that Mr de Klerk could not assist the court in coming to a finding that the third party was liable to pay compensation to the defendant or that the defendant lacks legal standing to sue his client. The fact that Mr de Klerk testified that the third party would have been entitled to indemnification under the insurance contract, does not mean she was indemnified. The defendant never intended to release Ms Ngolo from paying compensation to it. This was made clear in the settlement agreement between Mr Nafuka and the defendant.

[28] After Mr de Klerk, Mr Nafuka was called to testify. He testified that he works for Namdeb at Oranjemund together with Ms Ngolo (the third party), that he requested Ms Ngolo to assist him to drive to Oranjemund a day before the accident which Ms Ngolo had accepted. The following day, he picked up Ms Ngolo and Ms Shifa and drove from Windhoek to Oranjemund with Ms Ngolo driving.

[29] He testified further that they had agreed that Ms Ngolo would drive from Windhoek until Mariental from where he would take over till Oranjemund. He said that he took a sit at the back while the two ladies occupied the front seats.

[30] Mr Nafuka further testified that outside Windhoek the vehicle veered from the tarred road to avoid a collision with an oncoming car which encroached in their lane. That they stopped and after checking the computer system of the vehicle and found that nothing was wrong with the car, they proceeded with their journey. However, because he slept a bit late the previous night, he fell asleep in the back seat and only woke up at Mariental because of the accident.

[31] Mr Nafuka furthermore confirmed that even though the defendant initially refused to indemnify him, he and the defendant reached a settlement during mediation proceedings and was paid N\$180 000.00 in full and final settlement of his claim. He stated further that he was aware that Ms Ngolo had a driver's licence because he has seen her driving in Oranjemund.

[32] Mr Nafuka was also cross-examined by Mr Carolus extensively in an attempt for Mr Nafuka to cave in and concede that he instructed Ms Ngolo to drive at an excessive speed because he wanted to watch a soccer match in Oranjemund. Mr Carolus wanted Mr Nafuka also to agree that he had accepted all the risks which might happen to his vehicle while Ms Ngolo was driving for the principle of *volenti non fit injuria* or vicarious liability to apply. However, Mr Nafuka resisted the vigorous cross-examination by counsel and was not shaken.

[33] Next to be called by Mr Jones to testify was Mr Petrus Willem Van Schalkwyk, the owner of Lynx Investigations and Observation Services doing business at Sam Nujoma Avenue in Swakopmund. Even though Mr Van Schalkwyk did not testify as an expert, in my view, his evidence is admissible and credible for he testified about what he observed on the scene of the accident. He testified about facts.

[34] He testified amongst others that he visited the scene of the accident pointed out to him by Mr Nyenyemba, the investigating officer on 8 May 2015, in the absence

of Mr Nafuka and Ms Ngolo. He further testified that there are traffic signs to warn motorists about the T-junction to the left side of the main road. The T-junction sign, according to him, is approximately 400 meters from the T-junction.

[35] Further, Mr Van Schalkwyk testified that he saw other traffic signs like 100km per hour and 60 km per hour signs on the left side of the road warning motorists to reduce their speed for they were approaching an area where the speed per hour is limited to 60 km/h. According to him the visibility is good as there are no obstructions along the road to the scene of the accident.

[36] It is further Mr Van Schalkwyk's testimony that there is only one T-junction to the left turning into Mariental town. He saw also two short poles to which the iron barrier was fixed, pulled out of the ground by the impact when the vehicle collided against the barrier and prepared a photo plan showing the traffic signs, the iron barrier hit by the vehicle and the T-junction to the left of the main road. The photo plan was handed in as an exhibit.

[38] In her testimony, Ms Ngolo told the court that it was arranged between her and Mr Nafuka that she would drive from Windhoek until Mariental from where Mr Nafuka will then take over to drive until Oranjemund.

[39] She testified further that at the intersection of the Spar shop, she intended to turn to the left side of the road to go to the shop for refreshment when it happened so fast that she lost control of the motor vehicle while in the turn and bumped into the side barrier.

[40] In addition, Ms Ngolo testified that she was not familiar with the road between Windhoek and Mariental as it was her first time to drive the road. Because it was her first time to drive on this road, she was confused. However, Ms Ngolo did not explain why she bumped the road barrier on the far right of the road in the lane of oncoming vehicles from Mariental.

[41] Ms Ngolo further testified that she reduced her speed to between 50 and 60 kilometer per hour when she approached the T-junction but due to her unfamiliarity

with the terrain and the fact she had estimated the turning angle inaccurately, she collided with the opposing barrier on the far right. According to her, this happened because it appeared to her as if there were two left turns to the left side of the main road.

[42] This explanation is in stark contradiction with the explanation she gave to Detective Sergeant Nyenyemba on the scene of the accident. In that statement Ms Ngolo told Detective Sergeant Nyenyemba that while turning to the left side of the road on her way to Spar, it happened so fast that she lost control of the motor vehicle and bumped into the road side barriers. She never mentioned in her warning statement taken down by Detective Sergeant Nyenyemba about the two turns to the left side of the main road.

[43] I am also not sure what this so-called second left turn to Mariental has to do with the collision because her testimony is that she was already in the turn when she collided against the barrier on the far right side of the road. She also did not explain what she meant by miscalculation of the terrain she said. In the same testimony, she told the court that she lost control of the motor vehicle due to her unfamiliarity with the terrain, and that it happened fast while turning, therefore, lost control of the motor vehicle and collided against the barrier.

[44] The only reasonable inference I can draw from these inconsistent explanations given as the reason for the collision is that they are afterthoughts hatched by Ms Ngolo attempting to justify her wrongful conduct. A reasonable driver in her position who was not familiar with the terrain of the area or the road, would have been more careful for any unexpected situation – which Ms Ngolo failed to do.

[45] There is again another contradiction in her testimony. She said that she reduced her speed between 50 and 60 kilometers per hour while keeping a proper look out and signalling her intention to turn to the left into the intersection. If this is correct, why did she only at a later stage realise and foresee that the angle of the turn could cause harm to her by way of a collision?

[46] The angle of the turn and the terrain of the road are just some of the many factors Ms Ngolo supposed to take care of. Had she obeyed the traffic road signs on the left side of the main road when she approached the T-junction, which she failed to do, she would have avoided the collision against the barrier.

[47] In her evidence-in-chief and in cross-examination, Ms Ngolo tried by all means very hard to give a plausible and reasonable explanation why she lost control of the vehicle and bumped the barrier, but did not succeed to manufacture one such explanation. She also failed to persuade the court why the principle of *res ipsa loquitur* should not be of application in the matter. The only reasonable inference the court could draw from the facts of the matter is that she was negligent in one or all aspects alleged in the particulars of claim by the defendant as the cause of the accident.

[48] In her testimony, Ms Shifa, called by Ms Ngolo, testified amongst others that Ms Ngolo took the turn into the junction too late passing the left lane of the junction and was at the right side of the junction making it difficult for her to bring the vehicle back to the left lane without bumping the barrier on the right side of the junction.

[49] Ms Shifa, who was sitting in the passenger seat next to Ms Ngolo further testified that Ms Ngolo was confused by a second turn to the left side of the main road. As pointed out before, neither Ms Shifa nor Ms Ngolo was able to point out the so-called second T-junction to the left of the main road on photo plans produced before court by Ms Ngolo and Mr Van Schalkwyk.

[50] As said before, had Ms Ngolo kept a proper lookout on the road in front of her and on both sides of the road, she would have seen the T-junction sooner and acted like a reasonably competent and skilful driver in the circumstances would have done. See *De Ridder v Rondalia Versekerings-Korporasie van Suid Africa* (Bpk)<sup>4</sup>.

[51] The Transport Regulations<sup>5</sup> published in terms of the provisions of the Road Traffic and Transportation Act 22 of 1999 provide that “before reaching the point at

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<sup>4</sup> 1967 (2) PH 050.

<sup>5</sup> Regulation 334 (1).

which he or she intends to turn, indicate in the manner prescribed in these Regulations, his or her intention to turn and must steer his or her vehicle as near to the left side of the roadway in which he or she is travelling as circumstances may permit and must turn with due care and merge into such traffic stream as may at the time be travelling along, towards or into the public road which he or she desires to turn". (Emphasis added)

[52] In the matter, Ms Ngolo failed to steer her vehicle to the left side of the roadway she was travelling and did not turn with due care to merge into the traffic stream or the public road she desired to turn into. Instead, drifted to the right side of the roadway carelessly and collided against the road barrier.

[53] Similarly, in the matter of *De Ridder v Rondalia Versekeringskorporasie van Suid Africa (Bpk) Supra*, where the court was dealing with the defence of sudden emergency raised by the defendant, the court held that:

'The defendant is faced with that dilemma. If he saw the rock at a stage when he was only eight paces from it, he was not keeping a proper lookout. In that event the "sudden emergency" with which he was faced was one of his own making, and, therefore, does not provide him with a lawful excuse for the collision. On the other hand, if he saw the rock sooner, he did not, in taking avoiding action, act as a reasonable competent and skilful driver would have acted and misjudging of the situation was therefore culpable.'

[54] The defendant in the abovementioned matter was held liable for the damages suffered by the plaintiff as a result of the injuries sustained in the accident as the accident was attributed to the defendant's negligent driving. Therefore, I agree with the sentiments expressed in the *De Ridder v Rondalia Versekeringskorporasie van Suid Africa (Bpk) supra*, and I will apply the principles applied therein in the present matter.

#### *Volente non fit*

[55] On the evidence presented by the witnesses who testified in the matter, I am not persuaded that Mr Nafuka, knew that the accident was inevitable, realised it and

that he undertook it voluntarily. [*Government of the Republic of Namibia v LM and Others* 2015 (1) NR 175 (SC) para 98)]. On the contrary, Mr Nafuka testified that he consented to Ms Ngolo driving his vehicle because he knew her driving in Oranjemund. Therefore, the defence of *Volente non fit injuria* is not applicable in the matter and is rejected.

### Conclusion

[56] I have taken note and seriously considered the evidence and both sets of written heads of argument filed by both counsel and the oral submissions presented to bolster up their cases which I found well researched and useful. That said and with reasons stated hereinbefore in mind, I am persuaded on the balance of probabilities that the defendant has discharged the *onus* resting on it in its case against the third party (Ms Ngolo) and as a result therefore, I make the following order:

- (i) The order dismissing the special plea raised by the third party with costs which costs included costs of one instructing and one instructed counsel delivered on 25 June 2018, is confirmed.
- (ii) The judgment is granted for the defendant in the amount of N\$180 000.00.
- (iii) Costs of the suit which costs include costs of one instructing and one instructed counsel.

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E P UNENGU  
Acting Judge



## APPEARANCES

APPLICANT: Jones  
instructed by Engling, Stritter and Partners, Windhoek

RESPONDANT: Carolus  
of Neves Legal Practitioners, Windhoek