

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2021/01927

In the matter between:

**JASPER ERASMUS JACOBUS BLAAUW**

**T/A SUIDE DISRTIBUTORS**

**PLAINTIFF**

and

**THE MINISTER OF SAFETY AND SECURITY**

**DEFENDANT**

**Neutral citation:** *Blaauw v The Minister Safety and Security* (HC-MD-CIV-ACT-DEL-2021/01927) [2023] NAHCMD 43 (9 FEBRUARY 2023)

**Coram:** SIBEYA J

**Heard:** 6-9 June, 1-2 August, 13 September, 20 and 28 October  
2022

**Delivered:** 9 February 2023

**Flynote:** Delict – Action for damages – Based on alleged failure of the members of the police to carry out the legal duty – Duty of care – Claim for damages resulting from a consignment that was looted by members of the public in the presence of the police – The approach to mutually destructive versions restated – Court found that the plaintiff’s evidence is, on the balance of probabilities, true and the defendants’

evidence is on the same scale false – Court found that the plaintiff's property was looted by members of the public in the presence of the members of the Namibian Police during the course and scope of their duties and the police failed to protect the property – Plaintiff's claim succeeds.

**Summary:** The plaintiff claims damages allegedly resulting from an omission by members of the police service. It is alleged that a truck carrying goods belonging to the plaintiff overturned where after, in the presence of members of the police who were acting within the course and scope of their employment and who stood idle and watching, the public looted the consignment of the truck. It is alleged that the police have a legal duty to protect the properties of the plaintiff and their failure to protect such properties caused the public to loot the consignment of the truck. The plaintiff, as a result, claims damages for loss of property valued at N\$699 460.63 and interest plus costs.

The defendant denies liability and averred that, by the time the police officers arrived at the scene of the accident, most part of the consignment of the truck was already looted. The defendant further avers that when the police officers arrived at the scene they were outnumbered by the large crowd who loaded the items in their vehicles and left. The defendant further alleges that the police officers took reasonable steps to call for reinforcement and recover some of the items.

At trial both parties led witnesses for their cases.

*Held that* - where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour for the one or the other party. This includes considering the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her or contradiction with an established fact.

*Held that* - It was an established objective fact that based on the two minute video footage which was received into evidence in court, which constitutes real evidence, it is visible that a lot of items were being looted from the truck in the presence of the police officers together with Ms Berry and Mr Blaauw.

*Held that* – The probabilities in the evaluation of mutually destructive evidence between the parties favour the evidence of Ms Berry that considering the volume consisting of a large amount of boxes and the high speed of the loot in the two minute video footage it can be concluded that the consignment was intact at the time that Ms Berry arrived at the scene.

*Held that* – The plaintiff's claim is based on an omission on the part of the police and in such a case the plaintiff is required to prove that the defendant owed him a duty of care, meaning that the police officers at the scene had a legal duty to protect his properties.

*Held that* – A reasonable police officer in the position of the Cst Swartbooi, Cst Dreyer, W/O Haifete and W/O Mwillla could have foreseen that if they assisted Ms Berry, Mr Blaauw and their family in their attempt to protect the consignment they could have prevented the members of the public from the looting the consignment.

*Held that* – The police officers failed to take control of the scene of accident and to prevent the members of the public from looting and that the failure by the police officers to protect the consignment which they are dutifully required to do caused or probably caused the members of the public to loot the consignment of the plaintiff.

*Held that* – Looting has the capacity to undermine the rule of law, democracy and constitutionalism as it sends out a message of being inconsiderate to other people and their properties.

*Held that* – The plaintiff succeeds in his claim and is awarded damages in the amount of N\$692 460.63.

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### **ORDER**

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Judgment is granted in favour of the plaintiff against the defendant for:

1. Payment in the amount of N\$692 460.63.

2. Interest on the aforementioned amount at the rate of 20% per annum from the date of judgment to the date of payment.
  3. Costs of suit including costs of one instructing and one instructed legal practitioner.
  4. The matter is removed from the roll and regarded as finalised.
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## JUDGMENT

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SIBEYA J:

### Introduction

[1] Section 13 of the Police Act 19 of 1990 sets out the functions of the Police Force and includes:

‘13. The functions of the Force shall be –

- (a)
- (b) the maintenance of law and order;
- (c)
- (d) the prevention of crime; and
- (e) the protection of life and property.’

[2] The said functions of the police have dominated the litigations in this court, where the court has been called upon, more often than not, to determine whether or not the police acted within the circumference of their functions. This matter is no exception.

[3] The court is approached to assess the propriety of a claim where the police officers are alleged to have stood idle in the face of a massive loot by the members of the public to the prejudice of the plaintiff.

[4] The plaintiff claims damages from the defendant for the action or inaction of the police officers while acting in the course and scope of their employment when they allegedly failed to protect the property from looting. The damages claimed amounts to N\$699 460.63.

#### The parties and their representation

[5] The plaintiff is Mr Jasper Erasmus Jacobus Blaauw, an adult male person businessman trading as SUIDE DISTRIBUTORS, with the principal place of business situated at Fero Street, Industrial, Keetmanshoop.

[6] The defendant is the Minister of Safety and Security, duly appointed as such in terms of Article 32(3)(i)(dd) of the Constitution as the Minister responsible for the conduct and affairs of the Namibian Police Force, whose address is the care of the Office of the Government Attorney, 2<sup>nd</sup> Floor, Sanlam Centre, Independence Avenue, Windhoek.

[7] The plaintiff is represented by Mr Maasdorp while the defendant is represented by Ms Matsi.

#### Pleadings

[8] The plaintiff alleges, in the particulars of claim, that he conducted business of a public carrier and transported goods by road. On 3 August 2020, while transporting goods on the B1 highway between Mariental and Keetmanshoop, his truck carrying goods overturned. He carried the risk of any loss sustained during transportation. Due to the accident, part of the cargo was scattered at the scene while some remained intact next to the truck trailer.

[9] The plaintiff alleges further that police officers, including Deputy Commissioner Hamakoto, Sergeant Mvoola, Constable Dreyer, Constable Swartbooi, arrived at the scene of accident. The police officers at the scene, who acted in the course and scope of their employment with the defendant or within the purview of their employment, failed to protect the consignment while members of the public

looted the entire truckload. The plaintiff claims that as a result of the loot, he suffered damages in the amount of N\$699 460.63 constituting the value of the consignment.

[10] The defendant denies the claim and pleaded that most of the consignment was looted shortly after the accident and before the arrival of the police officers. The defendant avers that amongst the police officers the first to arrive at the scene of the accident were traffic officers, namely: Warrant Officer Mwiila and Warrant Officer Haifete. Upon arrival, the two police officers are said to have observed a large crowd of people on the road, a high flow of vehicles and many scattered goods on the road. The defendant avers that the aim of the said traffic officers was to secure and take control of the accident scene and regulate traffic on the road in order to avoid the occurrence of another accident.

[11] The defendant avers that the two traffic officers observed members of the public steal goods from the scene and they made efforts to prevent such theft. The defendant further avers that the traffic officers attempted to recover the stolen goods. Their attempts were, however, in vain as they were outnumbered by the large crowd who loaded their vehicles with stolen goods and left.

[12] The defendant further alleges that the traffic officers took reasonable steps to call for reinforcement to come and assist them to maintain law and order, protect the consignment and prevent crime. The defendant states further that Deputy Commissioner Hamakoto arrived later at the scene in his private vehicle and found that most of the items were looted. He attempted to control the scene and tried to intercept members of the public without success. He also called for reinforcement resulting in the arrival of the police officers from Tses Police Station.

[13] The defendant further claims that members of the Special Reserve Force of the police later arrived at the scene and managed to offload some of the plaintiff's looted goods from a red Nissan pick-up and ensured that such goods were loaded in a vehicle of the plaintiff's employee. The defendant alleges that, despite the limited number of the police officers at the scene, they managed to secure the scene and carry out their functions.

[14] The defendant avers further that the duties of the police are not limited to securing the goods at the scene but includes the investigation of theft of goods, possible arrest and prosecution of the looters as well as possible recovery of the stolen goods. This, the defendant continued to do.

[15] The defendant denies the assertion by the plaintiff that the entire consignment was looted. The defendant further denies liability for damages suffered by the plaintiff.

### The pre-trial order

[16] In *Mbaile v Shiindi*,<sup>1</sup> the court emphasised the importance of listing precise issues in dispute between the parties, and said the following at para [10]:

‘The stage of the pre-trial hearing is arguably the most crucial procedural step leading to the trial. It requires of the parties or their legal representatives to analyse the pleadings and documents filed of record with an eagle eye and in order to unambiguously lay the factual issues in dispute before court. Inevitably, at this stage, the pleadings would have been closed and discovery occurred.<sup>2</sup> The parties are therefore duty bound to strip the pleadings and documents filed of record to their bare bones in order to identify the real issues for resolution by the court. Parties should further be mindful that they are bound to the issues which they bring to court for determination. It is not the responsibility of the court to navigate through various issues raised for determination in order to pinpoint what is relevant, but that of the parties to bring forth their disputes and point out the issues for determination from their dispute.’

[17] It should be stated that, just as it is crucial for the parties to list the precise issues in dispute, so is it vital for the parties to clearly set out the issues that are not in dispute and thus common cause between them. This will undoubtedly assist the court to utilise its scarce time and resources to focus on the real issues in dispute. The parties should, therefore, pay closer attention and ensure that they draft a pre-trial report that forms the basis on which the trial starts and rests. Parties who draft an ineffectual pre-trial report may be held to such nugatory pre-trial reports and will not be carrying out their function to assist the court to resolve real disputes.

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<sup>1</sup> *Mbaile v Shiindi* (HC-NLD-CIV-ACT-DEL-2018/00316) [2020] NAHCNLD 152 (22 October 2020).

<sup>2</sup> Rule 26.

[18] The parties, in a joint pre-trial report that was made an order of court on 3 February 2022, by agreement, listed the following issues for determination by the trial court:

- a) Whether or not, the members of the Namibian Police were at the scene on 3 August 2020;
- b) Whether or not, the public, in the presence of the Namibian Police, unlawfully removed and stole the entire consignment of the truck;
- c) Whether or not, the members of the Namibian Police who were present at the scene failed to prevent the public from looting the entire consignment of the truck;
- d) Whether or not, the conduct of the police constituted a breach of their legal duty to take control of the scene and protect the consignment from looting by the public;
- e) Whether or not, as a result of the said conduct of the police, the plaintiff suffered damages in the amount of N\$699 460.63 being the value of the consignment.

[19] The parties listed the following facts which constitutes agreed facts between them:

- (a) That on 3 August 2020, whilst transporting goods, the plaintiff's truck overturned on the B1 Highway between Mariental and Keetmanshoop;
- (b) That annexure "A" to the plaintiff's particulars of claim consists of a list of the stock that formed part of the consignment conveyed by the plaintiff;
- (c) That the value of the consignment conveyed is N\$699 460.63;
- (d) That the members of the Namibian Police acted within the course and scope of their employment with the defendant and as members of the Namibian Police



Service, alternatively, they acted within the ambit of the risk created by such employment.

[20] It is now opportune to consider the evidence led in order to ascertain the propriety of the plaintiff's claim.

#### Plaintiff's evidence

[21] Several witnesses testified for the plaintiff commencing with Ms Annelize Berry.

#### Annelize Berry

[22] Ms Berry testified, *inter alia*, that she is a manager at Suide Distributors operating from Mariental, a business that belongs to her father, the plaintiff who is based in Keetmanshoop. She stated that, on 3 August 2020, a truck from Windhoek arrived in Mariental with consignments destined for Mariental and Keetmanshoop. Ms Berry loaded the Keetmanshoop consignment onto another truck together with the consignment for A Wutow Trading, T&C and Simplex that was destined for Windhoek. She explained that the reason for loading the consignment to be delivered to Windhoek on this truck was that in the event that the truck returned from Keetmanshoop to Mariental during the night such consignment would already be loaded on the truck for delivery in Windhoek.

[23] The consignment loaded onto the truck included frozen food products and general groceries. The truck departed for Keetmanshoop. At about 15h10 she received a phone call from the plaintiff that the truck was involved in an accident about 120 km from Mariental to Keetmanshoop. She departed to the scene of accident and arrived at about 15h40. She found several vehicles and a lot of people next to the consignment which was close to the truck. She saw five police officers in uniform, two of whom appeared to be traffic officers. None of the people present took any items on her arrival and the consignment was intact.

[24] Ms Berry testified further that about five to ten minutes later, her brother, Jacobus Blaauw and the plaintiff arrived at the scene. The bystanders moved closer

to the consignment. Together with her brother and the plaintiff, they tried to form a barrier between the consignment and the bystanders. Three men, including one dressed in a RAM reflector jacket, said that once the stock hit the ground, such stock belongs to the people and further said that Ms Berry, her brother and the plaintiff will be killed if they attempt to stop the people from taking the consignment. The said three persons then began to loot the consignment followed by the general public.

[25] Ms Berry testified further that her husband arrived later with four of their employees, after which they tried to stop the looting without success. Ms Berry, sought assistance from the police officers present at the scene, in vain.

[26] Out of frustration, she asked a police officer in blue uniform whether the police will set up a roadblock in order to apprehend the looters, she was assured that such roadblock was being arranged. It turned out that no roadblock was set up. Ms Berry further testified that she also inquired from the police officer in a reflector jacket as to why they could not fire warning shots, to which the officer responded that a life is worth more than the stock. The officer also said that the stock was insured.

[27] Ms Berry claimed that none of the police officers attempted to stop the looting. The bystanders looted at a scale of a floodgate being opened. They grabbed boxes of items from the consignment, loaded them on various vehicles and left. The police did not cordon the scene of accident and offered the owners of the properties no assistance.

[28] Ms Berry testified further that at about 16h45, a group of armed police officers dressed in camouflage uniform arrived at the scene. These officers ensured that the looted stock that was found in a vehicle at the scene was offloaded. This stock included five boxes of rama margarine and one box of pies. The said stock was thus recovered by plaintiff.

[29] Ms Berry testified further that she found from the tracking system that the engine of the truck stopped running at about 14h35 and that could be the time of the accident. The looting was completed at about 16h30. Although the consignment was insured, the loss reflected on the plaintiff's claim record which could result in higher premiums to be paid in future. The loss suffered was N\$730 000.

[30] Ms Berry recorded a video of the looting. In the video, which was submitted into evidence as an exhibit, the police officers were observed standing amongst the looters. Some of the police officers were observed at the consignment without physically stopping the looters. Other police officers can be observed talking on their phones. In the video Ms Berry is heard speaking in the Afrikaans language at the scene, which was translated to English by a sworn translator, that:

'Our truck fell over and our truck is being looted. Our police is standing and watching because they tell the people our insurance will pay, they do not have to worry. So, yes, so they come with pick-ups to load and we can just do nothing about it.'

[31] During cross-examination, Ms. Matsi disputed the assertion that Ms Berry, the plaintiff and their family formed a barrier to protect the consignment. Ms Berry, however, insisted that they formed the barrier while the police did not assist in such formation as the police stood idle and watched.

[32] Ms Matsi put it to Ms Berry that when the police arrived at the scene, they could not stop looting or arrest anyone as the scene was already chaotic. This was disputed by Ms Berry. Ms Matsi further said that the police tried to stop the looters but they were outnumbered, an assertion that was also disputed by Ms Berry.

[33] Ms Matsi further put to Ms Berry that she informed Constable Swartbooie to shoot the people. Ms Berry disputed and stated that her words were that: "fire warning shots". It was further stated by Ms Matsi that Warrant Haifete, a traffic officer, tried to safeguard the scene of accident as that is his duty as a traffic officer. To this Ms Berry agreed.

[34] It was further put to Ms Berry that the police recovered cigarettes which were loaded at the back of the plaintiff's pick-up vehicle and also that her family members recovered other items. Ms Berry agreed and proceeded to state that the recovered items were loaded at the back of their pick-up vehicle, but such items were further stolen from the back of the pick-up by the looters. When further questioned as to whether anything stopped her from loading the items in a sedan vehicle, Ms Berry agreed that nothing hindered her.

Jasper Erasmus Jacobus Blaauw

[35] Mr Blaauw, the plaintiff, testified that he is the owner of Suide Distributors operating from Keetmanshoop for about eight years. On 3 August 2020 at about 15h05, he received a phone call that one of his trucks was involved in an accident about 120 km south of Mariental. He contacted his daughter Annelize Berry, who is the manager of the Mariental branch of the business. He checked on his tracking system which revealed that the engine of the truck was cut off at 14h35 and this could be the time of the accident.

[36] Mr Blaauw testified that he departed and left for the scene of accident. He arrived at the scene at about 15:50. At the scene he found several motor vehicles and a lot of people close to the consignment which was next to the truck. Ms Berry was trying to stop people from getting closer to the consignment. Mr Blaauw observed four to five police officers in uniform while two of such officers appeared to be traffic officers.

[37] Mr Blaauw testified further that upon his arrival at the scene, he informed the bystanders not to remove any consignment and no one took anything from the consignment. The consignment was intact. He was part of the barrier formed to protect the consignment. People in the barrier did not hold hands but only stood between the people and the consignment. By then one of the police officers was talking on the phone, while other police officers were about ten meters away and two traffic officers were at the road.

[38] Later the bystanders moved closer to the consignment and some people stood on the stock. One person who had a RAM reflector jacket removed items from the consignment. Bystanders began to loot the consignment at a large scale equated to a flood gate that opened and they loaded the items onto several vehicles. None of the police officers attempted to stop the bystanders from looting. The looting concluded at about 16h30. At the scene, Mr Blaauw did not speak to the police officers.

[39] Mr Blaauw testified further that after the incident, he received several photographs which depicted some of the people who looted and vehicles on which the looted items were loaded. It was further his testimony that although the consignment belonged to different suppliers, he was responsible for the consignment until it was offloaded to the clients. He is, therefore, responsible to pay for the loss of the consignment to the suppliers.

[40] Ms Matsi, in cross-examination, put to Mr Blaauw that by the time that Warrant Officer Haifete and Constable Swartbooi arrived at the scene, the consignment was already looted. Mr Blaauw disputed. Ms Matsi further put to him that, at the scene, Cst Swartbooi contacted other police officers for re-enforcement. To this, Mr Blaauw did not dispute.

[41] Mr Blaauw testified further that at about 16h45 a group of police officers dressed in camouflage uniform arrived at the scene. They offloaded some of the stock from the vehicle which consisted of five boxes of rama margarine and two boxes of pies which items were recovered. He also recovered fifteen boxes of yogurt valued at about N\$5 000, and together with other items recovered, they amounted to a total of N\$7 000.

[42] He further testified that his insurer, Santam, paid out the claim less 10% excess fee amounting to N\$70 000 which he paid. He further said that the cigarettes which were recovered by the police and handed to him were later stolen again.

Susan Blaauw

[43] Ms Blaauw testified that she is married to Mr Blaauw and she co-owns Suide Distributors. She said further that on 3 August 2020, she received a phone call from one of her assistants who informed her that their truck was involved in an accident about 120 km south of Mariental. She arranged with an ambulance to be dispatched to the scene.

[44] Mr Blaauw instructed her to call the police. She telephoned Keetmanshoop Police Station where she was informed to call Tses Police Station. She telephoned Tses Police Station and reported the accident and she was informed that there was

no police vehicle available. She was later informed that the police were already on their way to the scene. She also informed the police officer at Tses Police Station that there was a consignment of food, frozen food and cigarettes and that she feared that the consignment might be looted.

[45] Ms Blaauw did not visit the scene but learnt that the consignment was looted. Upon perusal of the invoices of the consignment she calculated the loss as follows:

(a) A Wutow	-	N\$137 791-70;
(b) Vector Logistics	-	N\$408 450-18;
(c) Simplex	-	N\$2 825-61;
(d) T & C	-	N\$147 380-65;
(e) Plastic Packaging	-	N\$3 012-49.
Total:		N\$699 460-63

Nicolaas Albertus Smith

[46] The plaintiff led the evidence of Mr Smith who testified, *inter alia*, that he is a loss adjustor, estimator and assessor for about 22 years and the managing member of Specialised Investigation Consultant Services CC. His experience include:

- (a) Assessing and inspecting damaged goods and consumables;
- (b) Assessing whether it is economical to use goods and consumables after being involved in an accident;
- (c) Assessing the extent and value of the damage to such goods and consumables, if goods are recovered;
- (d) Assessing the value of damaged goods and consumables (in a damaged and undamaged condition).

[47] Mr Smith testified further that he is able to determine the fair and reasonable value of goods and consumables, determine if the goods involved in an accident are fit for human consumption and reselling, and the value of such goods. On 15 September 2020, on Santam's request, he provided a report to Santam Namibia Ltd regarding his investigation of the accident of the plaintiff's truck that overturned on 3 August 2020 on the B1 road between Mariental and Keetmanshoop.

[48] Mr Smith testified further that as part of his investigation he visited Tses Police Station and interviewed the Station Commander, Warrant Officer Nghinounye. She informed him that they received a report about the accident involving a truck on the afternoon of 3 August 2020. By then, they had no vehicle to attend to the report. She later learnt that two police officers departed to go to the scene in a private vehicle. When the police vehicle arrived, other three officers also left for the scene. Mr Smith further said that no case was registered against any of the looters and no arrests were made.

### Defendant's evidence

#### Constable Bradley Swartbooi

[49] Constable Bradley Swartbooi (Cst. Swartbooi), a police officer in the Namibian police testified, *inter alia*, that he is stationed at Tses Police Station at the Crime Prevention Unit. On 3 August 2020, he was on official duty when he received a report at about 14h25 that a truck overturned between Tses and Mariental and that there were injuries. He received no further information about the accident. At Tses Police Station, the closest police station to the scene, the only available official vehicle was out on a report. He took his private vehicle and departed to the scene, while in police uniform, in the company of Constable Dreyer from the Criminal Investigation Unit who was dressed in civilian clothes. His aim was to assess the condition of the occupants of the vehicle involved in the accident.

[50] Cst Swartbooi further testified that the scene was about 30 km away from Tses. On arrival at the scene at about 14h55 to 15h00, they found an overturned truck, unattended, laying on its side and various items and boxes were scattered all over the roadside within the vicinity of the truck. Most of the boxes were empty and scattered around the nearby bushes and a few items were left inside the loading part of the truck. The scene was chaotic and a lot of people were looting. There were several vehicles parked on either side of the road. About 50 to 80 persons, men, women and children from motor vehicles, bicycles and even a donkey cart came from all directions to grab the items and looted.

[51] Cst Swartbooï testified further that, together with Cst Dreyer, they tried to block the people from looting, but to no avail. The two were the only police officers at the scene. They were unarmed, outnumbered and could not successfully intercept anyone. He telephoned Keetmanshoop Police Station and requested re-enforcement from members of the Special Reserve Force.

[52] At about 15h30 to 15h40 Warrant Officer Haifete and Warrant Officer Mwiila from the traffic division of Keetmanshoop also arrived at the scene. By then the majority of the items were looted, so Cst Swartbooï testified. The traffic officers tried to assist to stop the looters without success and later proceeded to the road to regulate the traffic as some vehicles obstructed the roadway.

[53] Cst Swartbooï testified further that Ms Berry later arrived at the scene and she was yelling at people to stop looting without success and by then the consignment was almost entirely looted. She also spoke to Cst Dreyer but Cst Swartbooï could not hear their conversation as he was a distance away from them. Cst Swartbooï further testified that the owners of the consignment tried to stop the looters but they did not succeed. He, however, did not observe them form a barrier.

[54] Cst Swartbooï further said that when members of the Special Reserve Force who were armed and dressed in camouflage uniform arrived, at about an hour to an hour and fifteen minutes later, some of the items were recovered and handed over to the owners. It was his testimony that he is not aware of any police officer who refused to assist the owners of the consignment, but by the time that the police officers arrived at the scene most of the consignment was looted. He further said that there is ongoing police investigation regarding the looters.

[55] When questioned in cross-examination by Mr Maasdorp on how he would react to a report of a truck that overturned, Cst Swartbooï said that he would ask if there are goods on the truck as looting is possible. He would also ensure that people do not come to the truck. He proceeded to state that Tses Police Station is a small police station with no teargas and no shields. He acknowledged that when the people looted, they committed crimes in the presence of the police officers, but he carried out no arrests as he opted to call for re-enforcement so that arrests could then be effected.



[56] Cst Swartbooi testified that the video taken in court must have been taken at around 15h40. He said earlier that a lot of items were removed from the truck but upon viewing the video footage of about two minutes, he said that he just saw that there were still a lot of boxes available on the truck. On the video he also observed a little boy protecting looted goods in the area where W/O Haifete was. A lot of items were removed in the two minutes of the video footage.

Warrant Officer Nehemia Nghihpavali Haifete

[57] W/O Haifete, a police officer stationed at Keetmanshoop Police Station Traffic Division testified, *inter alia*, that on 3 August 2020 at around 14h25 he received a report from an unknown member of the public about a truck which carried goods that overturned on the B1 road between Tses and Mariental. Together with W/O Mwiila from the same Division, they proceeded to the scene of the accident where they arrived in about 30 to 40 minutes later.

[58] At the scene W/O Haifete observed a truck lying on the side next to the road with goods scattered around. The driver of the truck and his companion were already taken from the scene by an ambulance. There were public members and vehicles present. Some of the vehicles were stationed in the road obstructing traffic. The scene was chaotic and people were busy looting the consignment from the truck. Together with W/O Mwiila they informed the members of the public to leave the items, without success. Thereafter they proceeded to regulate the traffic.

[59] He conceded after viewing the video clip he could observe many people removing boxes which appeared to be full of items from the truck during the time that the video was recorded. When asked why he did not fire warning shots to stop the loot, W/O Haifete said that he did not carry a firearm with him.

[60] W/O Haifete testified further that he found Cst Swartbooi and Cst Dreyer from Tses Police Station at the scene. Cst Swartbooi and Cst Dreyer attempted to stop the public members from looting but were overpowered by people who continued to loot and remove other items from the nearby bushes. W/O Haifete further said that

the owners of the truck who arrived at the scene at about ten minutes after his arrival also attempted to stop the looters but by then most of the items were already stolen.

[61] He said further that some of the boxes of cigarettes were recovered and handed to the owners who loaded them on a pick-up vehicle. He also observed Ms Berry yell at the police officers to shoot the people. Commissioner Hamakoto also later arrived at the scene from Windhoek while driving his private vehicle and assisted the police in their activities but by then many of the looters had vanished.

[62] W/O Haifete said that he also contacted Tses Police Station to set up a roadblock in order to intercept the looters but he was informed that they had no vehicle nor sufficient manpower to do so. The direction that the looters took from the scene was not clear as some of the looters were suspected to come from the surrounding farms.

[63] The members of the Special Reserve Force later arrived at the scene and recovered some of the items although most items were already taken. The limited recovered items were handed over to the owners. The owners also recovered a few other items. W/O Haifete emphasised that most of the items in the consignment were looted before the arrival of the police. He is further aware that there is ongoing investigation in the looting.

[64] In cross-examination, W/O Haifete agreed to a question from Mr Maasdorp that when he attends to a strike he carries a firearm but when he went to the scene of the accident he had no firearm with him.

Warrant officer Isai Hamwaanyena

[65] W/O Hamwaanyena, a police officer stationed at Keetmanshoop attached to the Crime Analysis Unit testified, *inter alia*, that at around 14h55 he received a report of an accident involving a truck and possible injuries on the B1 between Tses and Mariental. At around 15h10, together with Sergeant Paul he departed from Keetmanshoop and headed to the scene in a rescue vehicle. He went with a rescue vehicle because he was informed that someone may have been injured in the accident. The scene was about 110 km away from Keetmanshoop. Upon arrival at

about 16h45 he observed about 50 to 100 people, consisting of men, women and children busy removing goods from a truck that overturned and the nearby bushes. The two police officers from Tses Police Station were regulating the traffic.

[66] W/O Hamwaanyena testified that upon his arrival at the scene the majority of the content of the truck was already looted by persons who had left the scene. He observed that the efforts of the owners of the truck to block the public from looting were futile. He did not observe the owners of the consignment form a barrier to prevent the public from looting. There was insufficient police manpower at the scene to stop the remainder of the loot which occurred when the police officers arrived at the scene. He further said that when the police Special Reserve Force arrived they managed to recover some of the stolen items. He concluded his testimony that there is a pending criminal investigation against the looters.

#### Brief submissions by counsel

[67] Mr Maasdorp argued that there are conflicting versions between the versions of the plaintiff and the defendant and the defendant did not state why the plaintiff's version should not be preferred over that of the defendant. He argued further that the phone call made by Ms Blaauw to report the accident to the police was clear that there was a consignment on the truck and therefore the police should have left for the scene prepared. The police ought to have known that there were goods on the truck and that members of the public could loot such goods. The police further had a duty to ask for more information about the truck which they failed to do, Mr Maasdorp argued.

[68] Mr Maasdorp further argued that the police failed to carry out their function to protect the properties of the plaintiff and their negligence caused the damages suffered by the plaintiff for which the defendant is liable. He argued that this matter is on all fours with the *Dresselhaus*<sup>3</sup> matter and the defendant should be held liable herein as was the case in *Dresselhaus*.

[69] Ms Matsi argued contrariwise. She argued that the report made by Ms Blaauw about the accident was not accurate and therefore the defendant cannot be held

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<sup>3</sup> *Dresselhaus Transport CC v The Government of the Republic of Namibia* 2005 NR 214 (SC).

responsible after being misinformed about such accident. She further argued that by the time that the police officers arrived at the scene most of the consignment of the truck was already looted and the defendant cannot be held responsible for what transpired before the arrival of the police officers as they had no control over what occurred then. Ms Matsi invited the court to dismiss the plaintiff's claim.

### Burden of proof

[70] The parties are *ad idem*, correctly so in my view, that the plaintiff bears the burden of proof of his claim on a balance of probabilities.

[71] Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC*<sup>4</sup> discussed the burden of proof and remarked as follows:

[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.'

### The legal duty

[72] Article 16 of the Namibian Constitution provides that:

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<sup>4</sup> *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

'All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens...'

[73] Article 5 provides for the protection of fundamental rights and freedoms, in that:

'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'

[74] Section 13 of the Police Act 19 of 1990 sets out the functions of the Police Force as follows:

- '13. The functions of the Force shall be –
- (a) the preservation of the internal security of Namibia;
  - (b) the maintenance of law and order;
  - (c) the investigation of any offence or alleged offence;
  - (d) the prevention of crime; and
  - (e) the protection of life and property.'

[75] It is common cause between the parties that the above provision creates a legal duty on the police to carry out the aforesaid functions and protect persons and property, commonly known as the duty of care in delict.

[76] In despising looting and emphasising the duty of the police to protect persons and property, O'Linn AJA in the Supreme Court decision of *Dresselhaus matter (supra)*<sup>5</sup> remarked as follows:

'One would have thought that when a civilised person arrives at a scene of accident, such person would be inclined to establish whether he/she could be of any assistance, rather than engage in robbing and stealing and even joining a mob to rob and steal, disrupt public order and commit public violence.'

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<sup>5</sup> *Dresselhaus (supra)* at 251.

It is in the public interest of Namibia and all its citizens that steps are urgently taken to prevent and discourage the development of a culture where people believe that it is right to plunder and loot the persons and property involved in an accident, and that such plunder and looting carry the approval of the Namibian police, will not be prevented and/or discouraged by the police and will go unpunished.'

[77] The question for determination in this matter is whether or not the police failed to take reasonable steps in order to carry out their legal duty to protect the properties of the plaintiff. The reasonable steps referred to are "those to be taken by members of a professional police force trained and equipped, mentally and materially, for their tasks. The Government cannot escape liability if it has failed to take reasonable steps to render such training and equipment."<sup>6</sup>

[78] It is against the backdrop of the above authorities that I proceed to analyse the evidence with the aim to determine whether the plaintiff proved his claim or not.

#### Mutually destructive versions

[79] It is apparent from the evidence of the plaintiff that when Ms Berry arrived, after the police officers had already arrived at the scene, the consignment was still intact and no looting had occurred. Mr Blaauw who reached the scene after Ms Berry had already arrived said that on his arrival he found that only a few items were removed. Ms Berry further said that together with her family they formed a barrier in an attempt to prevent the public from looting. Mr Blaauw testified that although they did not hold hands they stood in between the people and the consignment in order to protect such consignment. Ms Berry and Mr Blaauw further said that the police did not assist to protect the consignment.

[80] The police officers deny that there was ever a barrier formed by the owners of the consignment. They further testified that by the time that Ms Berry and her family arrived, the majority of the consignment was already looted. The further version of the police officers is that they attempted to protect the plaintiff's goods but they were outnumbered and overpowered.

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<sup>6</sup> *Dresselhaus (supra)* at p 251.

[81] The aforesaid versions, *inter alia*, constitute mutually destructive evidence. They are crucial versions in the determination of this matter that cannot co-exist just like night and day.

[82] The assessment of mutually destructive versions was laid down in the Supreme Court of Appeal of South Africa in *SFW Group Ltd and Another v Martell Et Cie and Others*, where the court remarked that:<sup>7</sup>

‘The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his with his own extra-curial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .’

[83] It is apparent from the above passage that where the matter cannot be resolved on probabilities, the court can consider the credibility of witnesses in order to determine as to which of the two destructive versions should carry the day. This process includes considering the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to testify about the same event or where the evidence contradict an established fact.

[84] In *National Employers’ General Insurance v Jagers*,<sup>8</sup> Eksteen AJP while discussing the approach to mutually destructive evidence remarked that:

‘In a civil case ... where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probability that his version is true and accurate and therefore

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<sup>7</sup> *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.

<sup>8</sup> *National Employers’ General Insurance v Jagers* 1984 (4) SA 437 (E) at 440E-F.

acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.'

#### Analysis of evidence and submissions

[85] Considering that the parties agreed that the plaintiff's truck overturned on 3 August 2020 on the B1 highway between Mariental and Keetmanshoop while carrying stock listed by the plaintiff and that the members of the Namibian police attended to the scene of the accident, the question to be answered is mainly whether or not the police officers failed to protect the properties of the plaintiff. If not, whether the defendant, as a result, should be held liable for damages suffered by the plaintiff.

[86] It is undisputed that the engine of the truck was, according to the tracking system, cut off at 14h35 suggesting that it may be the time of the accident. Cst Swartbooi, on the other hand, testified that he received the report of the accident at about 14h25. Cst Swartbooi further said that he arrived at the scene together with Cst Dreyer at about 14h55 to 15h00 and at around 15h30 to 15h40, W/O Haifete and W/O Mwiila from Keetmanshoop Police Station also arrived at the scene. Ms Berry stated that she arrived at the scene at around 1h:40 and by then she found several vehicles next to the road and a lot of people who were close to the consignment that was next to the plaintiff's truck.

[87] It was established in evidence that when Ms Berry arrived at the scene, she found Cst Swartbooi, Cst Dreyer, W/O Haifete and W/O Mwiila present. Ms Berry said that on her arrival none of the people removed any items and the consignment was intact. About five to ten minutes later Mr Blaauw also arrived at the scene. The defendant's witnesses dispute the assertion that none of the items were looted by the time when Ms Berry arrived and also dispute the further assertion that the consignment was intact. The defendant's witnesses emphasised that most of the items were looted by the time that Ms Berry arrived at the scene.

[88] In support of her version that the consignment was intact on her arrival at the scene of the accident, Ms Berry testified that together with her family members they formed a barrier between the truck and the people in an attempt to protect the consignment. The witnesses for the defendant further disagreed with this version



and insisted that they did not observe Ms Berry and her family form a barrier at the scene. Mr Blaauw, said that they did not hold hands when they formed a barrier but they stood in a line between the people and the goods in order to protect the goods. I find that Mr Blaauw corroborated the version of Ms Berry that they formed a barrier in order to protect the consignment.

[89] I further find that it is an established objective fact that based on the two minute video footage which was received into evidence and which constitute real evidence, it is visible that a lot of items were being looted from the truck in the presence of the police officers together with Ms Berry and Mr Blaauw. When Cst Swartbooi was shown the video footage, he changed his testimony and agreed that a lot of boxes of items were still available in the truck.

[90] I must add that the video footage reveals a lot of items being looted by members of the public in the presence of the police officers, Ms Berry and Mr Blaauw, amongst others. The assertion by the police officers who testified for the defendant that a lot items were looted before Ms Berry arrived, in my view, does not hold water and contradicts real evidence led in the form of a video footage. The probabilities in the evaluation of mutually destructive evidence between the parties favour the evidence of Ms Berry that considering the large amount of boxes and the high speed of the loot in the two minute video footage it can be concluded that the consignment was intact at the time that Ms Berry arrived at the scene.

[91] To put my aforesaid finding to rest, in the video footage, it can be observed that some of the police officers were standing around without stopping the looters. Ms Berry can be heard in the video footage shouting in Afrikaans language, which was translated to English by a sworn translator that "Our truck fell over and is being looted. Our police is standing (sic) and watching because they tell people our insurance will pay, they do not have to worry. So, yes, so they come with pick-ups to load and we can just do nothing about it." The fact that Ms Berry remarked as stated above in the midst of the looting adds credence to her version.

[92] It was the testimony of Cst Swartbooi that the scene was chaotic and together with Cst Dreyer they tried to stop the looting without success. Ms Berry, supported by Mr Blaauw, testified to the contrary and said that when they arrived the people

were calm and the consignment was still intact. Again with reference to the video footage and the above-mentioned remarks made by Ms Berry at the scene the probabilities do not support the testimony of Cst Swartbooi and supports the version that the consignment was intact at the concerned time.

[93] The witnesses for the defendant further testified that most of the boxes were scattered around and members of the public who were in vehicles, on bicycles and even donkey cart picked up the items and left. This version is contrary to what was observed from the video footage. The video footage revealed that most boxes were packaged and not already damaged and scattered around as alleged by the police officers.

[94] The video footage further revealed that most of the items were in areas that were in a protected space. I find that it is highly improbable, based on the proven facts, that by the time Ms Berry and Mr Blaauw arrived, the container was almost empty or that looting had commenced. I find that looting commenced after the arrival of Ms Berry and Mr Blaauw and I reject as false the version of the police officers that looting occurred before the arrival of Ms Berry and Mr Blaauw.

[95] It is undisputed evidence on record that despite the members of the public stealing and looting from the consignment in the truck in the presence of the police officers, none of the looters were arrested by the police. It is common-cause between the parties that amongst the looters were men, women and children. In the video footage it could be observed that even a small boy appear to have looted as he can be seen standing next to certain items which he appear to be protecting. To their credit, the police officers testified in the year 2022 that police investigation of the loot is still ongoing. No preliminary results or results of any kind from the investigation were shared with the court.

[96] It is not disputed between the parties that the members of the Special Reserve Force recovered some of the items to the value of N\$7 000 and handed same to the plaintiff.

Did the police act reasonably or breach their legal duty? -

[97] The plaintiff is required to prove wrongfulness, causation, fault and harm in order to succeed in a claim based on delict.<sup>9</sup>

[98] The conduct on which the plaintiff lays blame on the defendant is that the police officers failed to protect his properties which were looted by members of the public. The claim is, by and large, based on an omission on the part of the police. In the case of a claim based on an omission, the plaintiff is required to prove that the defendant owed him a duty of care, meaning that the police officers at the scene had a legal duty to protect his properties.

[99] It was Ms Blaauw's testimony that when she reported the accident to the police, she informed them that the truck that was involved in an accident had a consignment of goods including frozen food and cigarettes. Still, despite having such report, the police went to the scene unprepared to deal with a possible looting of the consignment.

[100] There is no dispute between the parties that the police officers who were at the scene had a legal duty to protect the properties or consignment of the plaintiff. To the contrary, the dispute raised by the defendant's witnesses is that by the time that the police officers arrived at the scene most of the consignment was already looted. Another version from the police officers was that by the time they arrived at the scene, the members of the public were looting the consignment at a high scale to the extent that the police officers were outnumbered and overpowered and could not stop them.

[101] I have rejected as false the versions of the police officers that by the time that they arrived at the scene most of the consignment was looted. I further rejected as false the defendant's version that on arrival of the members of the police, the public were looting at such scale that they could not stop them. By the time that Ms Berry and Mr Blaauw arrived at the scene the consignment was still intact.

[102] One would be liable for negligence where a *diligens paterfamilias* in a position of the defendant would have foreseen a reasonable possibility that his conduct may injure another in his person or property and cause him or her patrimonial loss and

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<sup>9</sup> *H L & H Timber Products (Pty) Ltd v Sappi manufacturing (Pty) Ltd* [2000]4 All SA 545 (A) para 13.

would take reasonable steps to avoid the occurrence of such foreseeability and the defendant failed to take such steps.<sup>10</sup>

[103] It was the testimony of Ms Berry and Mr Blaauw that the four to five police officers whom they found at the scene did nothing to prevent the members of the public from looting the consignment. They are said to have stood idle and watched while Ms Berry, Mr Blaauw and their family members attempted to prevent the public from looting the consignment. When Ms Berry, Mr Blaauw and their family members formed a barrier to prevent the public from looting, the police officers present stood by and watched. In my view, a reasonable police officer in the position of the Cst Swartbooi, Cst Dreyer, W/O Haifete and W/O Mwillla could have foreseen that if they assisted Ms Berry, Mr Blaauw and their family in their attempt to protect the consignment they could have prevented the members of the public from the looting the consignment. As a matter of fact, the video footage shows some of the police officers standing idle and doing nothing in the face of heavy looting of the consignment.

[104] The said four police officers who attended to the scene, went to the scene of accident after receiving a report of a truck having overturned while carrying goods. The police officers conceded that when a truck carrying goods overturn it is likely that members of the public might loot its consignment. Notwithstanding such possibility, the said police officers arrived at the scene without firearms as a result no warning shots were fired. The said police officers did not cordon the scene of accident nor did they arrest anybody despite the offences of theft being committed right in front of their eyes.

[105] The above-mentioned police officers further said that they had no teargas, no shields, no rubber bullets, and were not trained to handle the situation that they faced on 3 August 2020. As was found in the *Dresselhaus*<sup>11</sup> matter, the police cannot hide behind lack of training and insufficient material to protect the people and their properties. If indeed the said deficiencies exist in the Namibian Police, urgent attention must be afforded to remedy such grave deficiencies, but such cannot constitute a lawful excuse and thus does not result in a valid defence to the claim.

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<sup>10</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.

<sup>11</sup> *Dresselhaus (supra)* at p 242.

[106] Ms Berry and Mr Blaauw testified in a forthright manner and their evidence was supported by objective and established facts. The evidence of Cst Swartbooi and W/O Haifete in particular was full of self-contradictions and contradictions with established facts. As stated above, the two witnesses testified that when they arrived at the scene most of the items were already looted, which is inconsistent with the established facts as alluded before. Cst Swartbooi kept changing his version after being shown the video footage and it was only after viewing the video footage that he said people looted at high scale after Ms Berry arrived at the scene.

[107] W/O Haifete, on the other hand, was no different. He testified, *inter alia*, that he did not carry a firearm to the scene as he only carries a firearm when he attends to events like strikes as they constitute public disturbances. When pressed in cross-examination, that an accident scene where a truck carrying goods overturned poses a similar situation, he said that he just never carried firearms. W/O Haifete also said that by the time Ms Berry arrived most of the goods were looted. I find, in the premises and in view of what I stated hereinabove that Ms Berry and Mr Blaauw were credible witnesses while Cst Swartbooi and W/O Haifete were far from being credible. I find that where the versions of Ms Berry and Mr Blaauw compared to that of Cst Swartbooi and W/O Haifete stand in contrast, I accept the version of Ms Berry and Mr Blaauw as reasonably possibly true.

### Causation

[108] I harbour no doubt that the conduct of the police officers not to carry out their legal duty to protect the consignment of the plaintiff, contributed to the looting of the consignment by the members of the public. Had the police officers assisted Ms Berry, Mr Blaauw and their family members in their quest to prevent the public from looting the consignment and thus to protect such consignment, I find that a reasonable possibility exist that the consignment would not have been looted.

[109] The Supreme Court in *Minister of Health and Social Services v Kasingo*,<sup>12</sup> stated while discussing causation cited with approval the following remarks by Nugent JA in *Minister of Safety and Security v Van Duivenboden*:<sup>13</sup>

‘There are conceptual hurdles to be crossed when reasoning along those lines for, once the conduct that actually occurred is mentally eliminated and replaced by hypothetical conduct, questions will immediately arise as to the extent to which consequential events would have been influenced by the changed circumstances. Inherent in that form of reasoning is thus considerable scope for speculation which can only broaden as the distance between the wrongful conduct and its alleged effect increases. No doubt a stage will be reached at which the distance between cause and effect is so great that the connection will become altogether too tenuous, but, in my view, that should not be permitted to be exaggerated unduly. A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.’

[110] The police officers failed to take control of the scene of accident and to prevent the members of the public from looting. I find, based on the conclusions and findings made above, that the failure by the police officers to protect the consignment which they are dutifully required to do caused or probably caused the members of the public to loot the consignment of the plaintiff. I am convinced that had the police reasonably acted to protect the items, the consignment would not have been looted.

[111] As I draw curtain to a close in this judgment I cannot help but comment of the defendant’s reliance on the fact that the police officers who arrived at the scene called for reinforcement and that should be viewed as a defence to the claim. I, find without fear of contradiction, that the fact that reinforcement was called does not exonerate the defendant from liability as besides calling for reinforcement, the police at the scene did nothing to protect the consignment. In any event, by the time that the Special Reserve Force (reinforcement) arrived the consignment was already looted.

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<sup>12</sup> *Supra* at para 72.

<sup>13</sup> *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 449D-F.

[112] Another argument by Ms Matsi was that the defendant should be exonerated from liability because the plaintiff's claim was paid by insurance. This argument was not pleaded by the defendant. It is, therefore, not worthy of being addressed but for completeness' sake, I have opted to comment thereto. Ms Blaauw testified that although his claim was paid by insurance he paid 10% of the claim which amount to N\$70 000. Besides, the fact that the claim was paid by insurance does not exonerate the defendant from liability for the full amount of the damages suffered. Amler's Precedents of Pleadings, Seventh Edition by LTC Harms commented as follows at p 234 while discussing subrogation:

'Subrogation: An insurer who has indemnified an insured in full has the right to step into the insured's shoes without cession and to bring an action against a third party (the wrongdoer) in the name of the insured without the latter's knowledge or consent. The insurer may instead sue in its own name. The insured may also claim from the wrongdoer for the benefit of the insurer because the fact that the insured has been indemnified by the insurer does not release the wrongdoer.'

[113] It follows from the above that there is nothing untoward with the plaintiff suing for the total damages suffered despite having some of the loss paid his insurance. Our law allows that as stated above. The defendant cannot benefit from own wrongdoing on the basis that the claim was paid up by insurance and I find the argument by Ms Matsi to lack merit.

### Conclusion

[114] After considering the evidence led, I find that the plaintiff proved on a balance of probabilities that the police officers employed by the defendant failed to carry out their legal duty to protect the properties of the plaintiff. As a result, the plaintiff suffered damages for which the defendant cannot escape liability.

[115] How looting is still practiced in this day and age in our country where we pride ourselves that the rule of law reigns supreme is unimaginable. Looting has the capacity to undermine the rule of law, democracy and constitutionalism as it sends out a message of being inconsiderate to other people and their properties. Looting in the face of the entrenched provisions of Article 16 of our Constitution which

guarantees the right to property is an insult to our forefathers who drafted the Constitution. When such happens, the police are the first line of defence and must protect the right to property by reasonable means necessary.

[116] Fifteen years down the line, the remarks made by O'Linn AJA in the Dresselhaus matter resonates to this day and finds equal application to this matter. They are:

'The events ... can only be described as shocking and scandalous. It is a blemish on Namibia and Namibians, its rule of law, its administration of justice, and the Namibian police, its level of competence and its ability and commitment to perform its functions and duties laid down by the Namibian Constitution, the Police Act and other statutes.

It is also particularly disturbing that such a large section of a Namibian community could willingly participate in such serious and heinous crimes. No wonder that serious crimes have escalated in recent years in Namibia.

Grave crimes were committed in the presence of the police and they pleaded, *inter alia*, that they were overrun by a mob and were unable to prevent it. The position is, however, aggravated by the fact that the police failed to take any action against the perpetrators after being 'overrun'. So eg no steps were taken to recover the property, but also no prosecutions were ever instituted, notwithstanding the commission of grave and heinous crimes in broad daylight in their presence.'

[117] The police, in my view, requires no reminder of their duty to ensure the safety and security of the people and their properties. This is because it is one of the primary functions for the existence of the police and surely the police requires no reminder of the purpose of their existence. Their inaction in this matter is strongly condemned and attract an award for damages.

[118] Considering that some of the items valued at N\$7 000 were recovered it is only befitting that the claim amount, which was earlier agreed to by the parties, be reduced with an amount of N\$7 000.

#### Costs



[119] It is an established principle of law that costs follow the result. I have not been drawn to any compelling reasons why I should depart from the said principle and no evidence from the record suggests such departure. Consequently, the plaintiff is awarded costs.

Order

[120] In the result, I order that:

Judgment is granted in favour of the plaintiff against the defendant for:

1. Payment in the amount of N\$692 460.63.
2. Interest on the aforementioned amount at the rate of 20% per annum from the date of judgment to the date of payment.
3. Costs of suit including costs of one instructing and one instructed legal practitioner.
4. The matter is removed from the roll and regarded as finalised.

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O S Sibeya  
Judge

APPEARANCES:

PLAINTIFF:

R Maasdorp

Instructed by Vijoen & Associates,

Windhoek.

DEFENDANT:

F Matsi

Of the Office of the Government Attorney,

Windhoek