REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Case No: HC-MD-CIV-ACT-DEL-2021/03620

In the matter between:

SETH MUTILIFA **PLAINTIFF**

and

WINDHOEK RENOVATIONS CC **1st DEFENDANT**

NANGOLO LUGAMBO **2nd DEFENDANT**

Neutral Citation: *Mutilifa v Windhoek Renovations* (HC-MD-CIV-ACT-DEL-2021/03620) [2023] NAHCMD 800 (07 December 2023)

Coram: MASUKU J

Heard: **16 February 2023; 03, 05, 25, 28 April 2023; 1 June 2023; 02, 05 October 2023**

Delivered: **07 December 2023**

Flynote: Civil Procedure – Rules of Court – Rule 32(11) – Rule 100 – application for absolution from the instance – At the close of plaintiff's case – Whether a court acting reasonably is satisfied that plaintiff established a prima facie case requiring an answer from defendant – Legislation – whether an independent contractor – falls within the ambit of s 7 of the Labour

Amendment Act 2 of 2012 – Vicarious liability - Application for absolution from the instance is not interlocutory in nature.

Summary: The plaintiff claims payment of an amount of N$40 477.46. Interest of the aforesaid amount at the rate of 20 per cent, per annum calculated from the date of judgment until date of final payment and costs of suit. In the particulars of claim as well as in evidence, the plaintiff claimed that on or about 20 April 2021, and at about 08h14 at or near the intersection of Hereford Street and Monte Christo Road, Windhoek, a motor vehicle accident occurred between a white Nissan Tiida, bearing a licence plate number: N 212726 W ('the motor vehicle'), being driven by his employee, Mr Negongo ('Mr Negongo') and a white Man truck ('the truck'), bearing a licence plate number: N 88153 W, that was driven by the second defendant.

Held: An employer can only be vicariously liable, when the person upon whom a claim is laid against is under its employment and the cause of action arose during the course and scope of employment.

Held that: 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.

Held further that: In reference to *Car Bargains v Nhlanhla,* Hill and Colma, JJ, stated that the concept of hearsay has no application to an averment in a pleading. It relates to evidence. If from the witness-box or in an affidavit hearsay is adduced, it can properly be objected to. But a litigant in his pleadings does not offer evidence. There, his obligation is to set out material facts which he will prove by means of evidence at a later stage.

Held: That the plaintiff cannot rely on his pleadings solely to prove an allegation of fact. Pleadings are not statements of evidence but rather of fact, as evidence can only be adduced under oath in court in the witness box or on affidavit.

Held that: Yacoob, AJ, in *Marks and Lamb Classic Cars CC v Mbulelo Kona,*[1] is correct in finding that the registration of motor vehicles does not regulate the transfer of ownership of the motor vehicle.

Held further: An application for absolution from the instance does not fall under the ambit of rule 32 and the costs order should not be limited to rule 32(11).

Application for absolution from the instance granted with costs.

ORDER

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1. Absolution from the instance is hereby granted with costs.
2. The matter is considered finalised and is removed from the roll.

JUDGMENT

MASUKU J:

Introduction

[1] The court is to determine an application for absolution from the instance, which was moved by the first defendant at the close of the plaintiff's case.

The parties

[2] The plaintiff, Mr Seth Mutilifa, is a major male, with his place of residence in Windhoek, Republic of Namibia.

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[1] *Marks and Lamb Classic Cars CC v Mbulelo Kona*, Case No. 80288/17 (16 January 2019) Gauteng Division, Pretoria, para 16-17.

[3] The first defendant is Windhoek Renovations CC, a close corporation, duly incorporated and registered as such in terms of the Close Corporations Act[2] of this Republic.

[4] The second defendant, Mr Nangolo Lugambo, is a major male, with his ordinary place of residence in Windhoek, Republic of Namibia.

The cause of action

[5] In this action, the plaintiff claims payment of an amount of N$40 477.46 with interest of the aforesaid amount at the rate of 20 per cent per annum calculated from the date of judgment until date of final payment and costs of suit. In the particulars of claim as well as in evidence, the plaintiff claimed that on or about 20 April 2021, and at about 08h14 at or near the intersection of Hereford Street and Monte Christo Road, Windhoek, a motor vehicle accident occurred between a white Nissan Tiida, bearing licence plate number N 212726 W ('the motor vehicle'), being driven by his employee, Mr Negongo ('Mr Negongo') and a white Man truck ('the truck') with a licence plate number: N 88153 W, that was driven by the second defendant, Mr Lugambo.

[6] The plaintiff alleged that he is the registered owner of the motor vehicle and alternatively, the *bona fide* possessor of the motor vehicle, in respect of which the risk of profit and loss has passed to him.

[7] The plaintiff, in his particulars of claim, further alleged that the second defendant was in the employ of the first defendant in terms of section 7 of the Labour Amendment Act[3], and further alleged that the second defendant received a monthly salary from the first defendant and was economically dependent on the said monthly salary that he received from the first defendant.

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[2] *Close Corporations Act* 26 of 1988.
[3] *Labour Amendment Act* 2 of 2012.

[8] The first defendant joined issue with the allegations made by the plaintiff in its particulars of claim and pleaded that it has no knowledge of the plaintiff's alleged ownership of the motor vehicle and denied that the plaintiff is the *bona fide* possessor thereof.

[9] The first defendant denied that the second defendant is in its employment and that the second defendant therefor had not acted in the course and scope of employment with the first defendant.

[10] The first defendant alleged that the second defendant is an independent sub-contractor as of 08 April 2021 to 31 May 2021. The second defendant was contracted specifically for work to be done on its two sites, being the Babylon Police Station (Tona) and the Hopsol Omburu (Omaruru). A contract to that effect was pleaded by the first defendant.

[11] The first defendant further alleged that second defendant was not an employee either in common law or in terms of section 7 of the Labour Amendment Act, and referred to section 1(1) of the Labour Act, which defines an independent contractor.

[12] The first defendant denied any form of liability to the plaintiff's claim. It moved for the plaintiff's case to be dismissed with costs.

Legal issues for determination

[13] Legal issues for determination, are the following:

1) Whether or not an independent contractor falls within the ambit of section 7 of the Labour Amendment Act, if not, can a contracting party be held vicariously liable during the term of the contract between itself and the independent contractor?
2) Whether a court acting reasonably is satisfied that the plaintiff established a prima facie case requiring an answer from the defendant?
3) Whether or not the plaintiff is the owner of the motor vehicle and as a consequence suffered damages caused by the collision?

4) Whether or not an application for absolution from the instance is interlocutory in nature in terms of Rule 32(11)?

The chronicle of evidence led

[14] The plaintiff, in his witness statement filed in terms of rule 92, stated that on or about 20 April 2021, he was telephonically informed by Mr Festus Negongo, who had been in his employment as a taxi driver, that the vehicle was bumped by a truck belonging to or owned by the first defendant.

[15] Upon receiving the telephone call, the plaintiff informed Mr Negongo to wait for the traffic police to arrive and for the accident report to be completed. It was his evidence that the first defendant invited him and Mr Negongo to their offices in Windhoek. At this meeting, the management of the first defendant informed him that he should provide them with at least three (3) quotations, from which they could choose, in order to repair the damage to the plaintiff's motor vehicle. He testified that he duly complied with their request and provided them with quotations from Simmy Auto Body Repair CC for N$43 477, 36 and Kamati Body Works and Painting for N$40 085, 98.

[16] After providing them with the quotations, he further testified, the first defendant informed him that they cannot be held liable for the damages to the plaintiff's vehicle, as the driver, Mr Nangolo Lugambo ('Mr Lugambo'), was not in the employment of the first defendant, but was in fact an independent contractor.

[17] The plaintiff called Mr Negongo as a witness and he testified that on or about 20 April 2021, at or near the intersection of Hereford Street and Monte Christo Road, he was involved in a motor vehicle accident. At the time he was driving a Nissan Tiida, bearing registration number N 212726 W, ie the motor vehicle. At the time of the motor vehicle accident, traffic had been moving relatively slowly. It was his evidence that Mr Lugambo, the driver of a white Man truck, bearing registration number N 88153 W, failed to keep a proper look-out and thus bumped the posterior of the plaintiff's vehicle.

[18] It was his further evidence that after the motor vehicle collision took place, he informed the plaintiff, the owner of the vehicle, that the vehicle had been involved in a motor vehicle collision. The plaintiff advised him to wait for the police so that they could prepare an accident report. The police arrived at the accident scene and performed their duties accordingly.

[19] The plaintiff and Mr Negongo then proceeded to the Katutura Police Station. He and the plaintiff were informed by Mr Lugambo that his superiors had requested that they meet at the offices of the first defendant. Once they had finalised their statement at the Police station, they proceeded to the first defendant where the plaintiff proceeded to talk to its management.

[20] The plaintiff called another witness, Mr. Hiski Kamati ('Mr Kamati'), who was in the employ of Kamati Body Works and Painting, in Okaryangava 79, Omakata Street, Katutura, Windhoek, as a motor vehicle assessor.

[21] It was Mr Kamati's evidence that as a motor vehicle assessor, the scope of his duties include: a) assessing the conditions of motor vehicles that have been involved in accidents to establish the extent of the damage; b) preparing quotations for the repair of damaged vehicles; c) effecting repairs as quoted; d) determining amounts that constitute reasonable value of repairs; e) making recommendations as to the reasonableness of quotations received from third parties; f) determining and making recommendations about the commercial viability of repairing damaged motor vehicles, versus writing the said vehicle off in circumstances where the reasonable costs of repair would be greater than the pre-accident value of the motor vehicle.

[22] Mr Kamati further testified that on or about 20 April 2021, he inspected and attended to the repairs of a white Nissan Tiida motor vehicle bearing registration number N 212726 W, at his place of employment. He determined that the vehicle had been damaged due to a motor vehicle collision. It was his evidence that the motor vehicle had suffered considerable damage to the boot, back bumper, rear lights, the back windscreen, and the nose panel.

[23] In order to restore the vehicle to its condition prior to the motor vehicle accident, Mr Kamati testified that he had to order new parts and spray paint them. It was his evidence that he ascertained that the damage was caused due to a truck colliding with the posterior of the motor vehicle, he repaired. The costs of repair of the motor vehicle amounted to N$40 085, 98, as stated in a damages affidavit deposed to by him.

Application for absolution from the instance – the arguments

[24] At the close of the plaintiff's case, Mr Barnard, for the first defendant indicated that he wished to move an application for absolution from the instance.

[25] The first defendant's application for absolution from the instance rests on the premise that there is no evidence placed before court upon which a court acting reasonably, can be satisfied that the plaintiff established a prima facie case, requiring an answer from the defendant.

[26] Mr Barnard argued that on 28 April 2023, a judgment was delivered by the court, as presently constituted and in which the plaintiff's application to file the complete witness' statement of Mr Lugambo, was refused with costs. This was so because the plaintiff had filed an incomplete witness statement of Mr Lugambo. As a result, Mr Lugambo was not called as a witness.

[27] Mr Barnard submitted that there is no evidence adduced by the plaintiff upon which the court could make a finding that Mr Lugambo was an employee of the first defendant. In that connection, no evidence was adduced before court to support the plaintiff's allegations that Mr Lugambo was employed by the first defendant and was thus acting within the scope of duty and in the course of his employment, when the accident in question occurred. Mr Lugambo was an essential as a witness and because he was not called to testify as a witness, anything said about him became hearsay.

[28] Mr Barnard further argued that the plaintiff testified that he is the registered owner of the motor vehicle and alternatively, the *bona fide* possessor of the motor vehicle, in respect of which the risk of profit and loss has passed to him. He further went on to state that he had an agreement with the person who is the registered owner. This begs the question whether the plaintiff suffered any damages, as he did not prove ownership of the motor vehicle.

[29] Mr Barnard further argued the order as to costs. He submitted that an application for absolution from the instance is not interlocutory in nature and is therefor not subject to rule 32(11).

[30] Ms Jacobie, for the plaintiff, argued that even though the plaintiff is not the registered owner, he is still the bona fide possessor of the vehicle. It was further argued that, there was an agreement between the registered owner and the plaintiff that regulated their relationship. Ms Jacobie argued strenuously that all considered, the application for absolution should be dismissed with costs. In the event the court held that the application was to succeed, then costs should be limited to the provisions of rule 32(11), because the application for absolution from the instance is interlocutory in nature.

Analysis of the evidence

[31] The issue relating to absolution from the instance is now well documented in judgments of our courts. It is further trite that he or she, who alleges, must prove the allegations on a balance of probabilities in order for his or her claim to be successful. Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC*[4] stated the following:

'[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

[4] *Dannecker v Leopard Tours Car and Camping Hire CC* (I 2909/2006) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

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.

[45] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A-C, Corbett JA discusses the distinction between the burden of proof and the evidential burden as follows:

> "As was pointed out by DAVIS, A.J.A., in *Pillay v Krishna and Another*, 1946 AD 946 at pp. 952 - 3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In *Brand v Minister of Justice and Another*, 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., called it "the overall onus". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea and Another v Godart and Another*, 1939 AD 16 at p. 28; *Marine and Trade Insurance Co. Ltd. v Van C der Schyff*, 1972 (1) SA 26 (AD) at pp. 37 - 9.)'"

[32] Additional to the onus of proof, Damaseb JP further pronounced himself on the test for absolution from the instance in *Dannecker v Leopard Tours Car & Camping Hire CC*[5] as follows:

'[25] The relevant test is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. The reasoning at this stage is to be distinguished from the reasoning which the court applies at the end of the trial; which is: 'Is there evidence upon which a Court ought to give judgment in favour of the plaintiff?

[26] The following considerations are in my view relevant and find application in the case before me:

a) Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law;

b) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;

c) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;

d) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;

e) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is

[5] *Ibit* para 25-26.

incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.'

[33] This formulation of the relevant legal principles, was accepted and cited with approval in *Omaka Mining and Engineering CC v Omusati Regional Council*.[6] In *Factcrown Ltd v Namibia Broadcasting Corporation,*[7] the Supreme Court, in dealing with an application for absolution from the instance reasoned as follows:

'This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff.'

[34] Mr Barnard argued that any evidence that needs to be verified by Mr Lugambo is hearsay as he was not called as a witness. He referred the court to *Car Bargains v Nhlanhla*,[8] which stated the following:

'The concept of hearsay has no application to an averment in a pleading. It relates to evidence. If from the witness-box or in an affidavit hearsay is offered, it can properly be objected to. But a litigant in his pleadings does not offer evidence. There his obligation is to set out material facts which he will prove by means of evidence at a later stage. He need not (indeed he should not), in a pleading, specify the evidence whereby he proposes to prove the facts upon which he relies. In that regard the plaintiff's attorney erred. He did not content himself with alleging the disposal of the motor car to a stranger, but went on, unnecessarily, to specify the source of his information in that regard. That might have justified an application to strike out. But it was in no sense an indication that at a subsequent trial the evidence to be tendered in support of the plaintiff's cause of action would be inadmissible. He might at the trial have called the employee from whom his information emanated or he might have produced some other witness who of his own knowledge could testify to the disposal of the motor car.'

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[6] *Omaka Mining and Engineering CC v Omusati Regional Council* (HC-NLD-CIV-ACT-CON-2017/00180) [2021] NAHCNLD 17 (22 February 2021).

[7] *Factcrown Ltd v Namibia Broadcasting Corporations* 2014 (2) NR (SC) para 72.

[8] *Car Bargains v Nhlanhla* 1971 (1) SA 214 (TPD) 216 B-D.

[35] Ms Jacobie for the plaintiff argued that an application for absolution from the instance is interlocutory in nature. Mr Barnard rebutted her argument by submitting that it is not interlocutory in nature. In *Leopard Tours Car and Camping Hire CC v* Dannecker,[9] Van Wyk AJ, made a finding that such an application is interlocutory in nature. The court was faced with two questions and the learned Judge stated the following:

> 'The question before this court in this regard is two-fold. Firstly, whether absolution of the instance is an interlocutory proceeding or not and then secondly – whether it is contemplated to be resorting under the type of interlocutory proceedings contemplated in *rule* 32(11).'

[36] Mr Vaatz who appeared for the respondent advanced an interesting argument that the legal figure of absolution of the instance does not fit into the category of interlocutory proceedings addressed by rule 32 in general. These proceedings in rule 32, are mainly providing for the seamless flow of the joint case management process by a managing judge.

[37] Mr Mouton who appeared for the applicants submitted that an interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. It may be purely interlocutory or an interlocutory order having final or definite effect. The distinction between a purely interlocutory order and an interlocutory order having final effect is of great importance in relation to appeals. It has been held that a refusal to grant absolution from the instance at the close of the plaintiff's case is interlocutory in form, not appealable and therefore interlocutory also in nature.

[38] I now turn to deal with the provisions of s 7 of the Labour Amendment Act,[10] regarding the question whether Mr Lugambo was the first defendant's employee. Section 7 of the Labour Amendment Act states as follows:

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[9] *Leopard Tours Car and Camping Hire CC v Dannecker* (I 2909-2006) [2016] NAHCMD 260 (9 September 2016) para 5,7 and 8.

[10] Labour Amendment Act *supra.*

‘Presumption as to who is employee

128A. For the purposes of this Act or any other employment law, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors is present:

(a) the manner in which the individual works is subject to the control or direction of that other person; the individual's hours of work are subject to the control or direction of that other person;

(b) in the case of an individual who works for an organisation, the individual's work forms an integral part of the organisation;

(c) the individual has worked for that other person for an average of at least 20 hours per month over the past three months;

(d) the individual is economically dependent on that person for whom he or she works or renders services;

(e) the individual is provided with tools of trade or work equipment by that other person;

(f) the individual only works for or renders services to that other person: or

(g) any other prescribed factor.’

[39] Section 1 of the Labour Act, defined an independent contractor as follows:

‘Independent contractor” means a self-employed individual who works for or renders services to a user enterprise or customer as part of that individual’s business, undertaking or professional practice.’

[40] Ms Jacobie argued that the plaintiff is the owner of the motor or alternatively the *bona fide* possessor. In *Marks and Lamb classic cars cc v Mbulelo Kona,* (*op cit*), Yacoob AJ stated the following:

> '16 The possession of the registration papers is *prima facie* proof of ownership. However, the possession of the papers is not conclusive proof of ownership. A motor vehicle is not immovable property, the sale and transfer of which is governed by statute. There is no requirement that the change of ownership of a motor vehicle be registered for transfer to take place.
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> 17 The only statutory requirement regarding motor vehicles is that they be registered and licenced, in terms of the National Road Traffic Act, 93 of 1996. This does not regulate the transfer of ownership of motor vehicle.'

[41] The question for determination before this court at this juncture, is to determine by reference to the principles articulated above, whether on the evidence adduced by the plaintiff, it can be said that a court, properly directed, will find for the plaintiff.

Application of the law to the facts

Whether or not an independent contractor falls within the ambit of section 7 of the Labour Amendment Act, if not, can a contracting party be held vicariously liable during the term of the contract between itself and the independent contractor?

[42] The question whether Mr Lugambo, as argued by Mr Barnard is not an employee as defined by section 7 of the Labour Amendment Act, or section 1 of the Labour Act, is not necessary to deal with or to decide, in my considered view.

[43] What is abundantly clear and I should, in this connection, agree with Mr Barnard, is that there was no evidence placed before court by the plaintiff, upon whom the onus lies, to prove that Mr Lugambo was indeed an employee

of the first defendant. This is quite apart from the muttering in the form hearsay statements that Mr Lugambo was an employee of the first defendant.

[44] It must be considered, in this regard, that Mr Lugambo, was not called as a witness to come and clarify the allegation that he was employed by the first defendant. It must be recalled that this allegation was blatantly denied by the first defendant in its plea and had Mr Lugambo testified, it would in all probability have been put to him in cross-examination that he was not an employee of the first defendant. The court cannot surmise what his answer would have been nor how well, if at all, he would have stood up to cross-examination on that very issue.

[45] An employer can only be vicariously liable, when the person against whom a claim is laid against, is in its employment and in circumstances where the evidence points to the cause of action arising in the course of duty and within the scope of the said person's employment.

[46] In the instant case, there is no evidence showing or suggesting that Mr Lugambo, was an employee of the first defendant at the material time. As stated earlier, it is also a fact that Mr Lugambo, was not called as a witness for reasons stated earlier. That being the case, there is accordingly no evidence upon which a court, acting reasonably, can find that the plaintiff has adduced evidence that suggests prima facie that Mr Lugambo was employed by the first defendant and more importantly, that when the accident took place, he was acting in scope of employment and in the course of his duties with the first defendant. For this reason alone, the application for absolution from the instance should, in my considered opinion, succeed.

Whether or not the plaintiff is the owner of the motor vehicle and as a consequence, suffered damages caused by the collision?

[47] It must be stated that when the plaintiff was cross-examined by Mr Barnard, he was asked if he was the owner of the vehicle and he answered in the affirmative. When asked to produce the proof of ownership of the vehicle,

he stated that he had proof of payment which enabled him to obtain a taxi licence.

[48] Pressed further by Mr Barnard, the plaintiff testified that the person who is the registered owner of the vehicle is one Mr Joseph. The plaintiff admitted that he was not the registered owner of the motor vehicle in question. Asked why he says he is the registered owner of the vehicle, the plaintiff testified that he is not the registered owner of the vehicle for the purpose of conducting the taxi business.

[49] Mr Barnard put the following question to the plaintiff in cross-examination, as recorded in my notes: 'You are unable to produce a document showing that you are the registered owner of the vehicle in question?' He answered in the affirmative. Asked as to why he did not reproduce this version in his witness' statement and whether he was intent on misleading the court, the plaintiff testified that he had informed his lawyers of this issue. He could not explain why he did not raise this issue when asked by the court if his statement was correct in terms of rule 93.

[50] What transpired from further cross-examination, was that the plaintiff had an oral agreement with the said Mr Joseph, who rents out taxi licences for about N$600 monthly. This results in the vehicle being registered in the name of the said Joseph.

[51] With the above in mind, I am of the considered opinion that the plaintiff failed to prove to the court that he is the owner of the vehicle. No documentation proving prima facie that he is the owner of the vehicle was tendered in evidence by the plaintiff and as such, he failed to prove to the court that he had the right to institute the action and that he suffered any damages as a result of the damage to the vehicle. From his evidence, it is clear that he delivered the vehicle to the said Mr Joseph and who, in terms of the plaintiff's own evidence, is the registered owner of the vehicle in question and would thus be the one who suffered the damages claimed.

[52] I am of the considered view that the plaintiff failed to meet the standard of the authority referred to by Ms Jacobie, namely the *Marks and Lamb* case, (*op cit*). In that case, quoted above, the court held that possession of registration papers is *prima facie* proof of ownership. If the plaintiff's evidence is believed, then what it shows is that the said Mr Joseph is prima facie the owner of the vehicle in question. The evidence of the plaintiff does not disturb this prima facie finding.

[53] I should, however, mention that when regard is had to the plaintiff's evidence, extracted from him in cross-examination by Mr Barnard, it would appear that the arrangement between the plaintiff and the said Joseph in relation to the vehicle, is *in fraudem legis*.

[54] I accordingly find that the plaintiff has failed to show that he is the owner, even on a *prima facie* basis, of the vehicle in question. That being the case, he also failed to demonstrate by admissible evidence that he suffered any damages as a result of the motor accident in question. For this reason, I also find that this is a proper case in which to grant the application for absolution from the instance.

[55] In sum, the plaintiff failed to show by admissible evidence that he is the owner or *bona fide* possessor of the vehicle in question. The existence of Mr Joseph and the alleged relationship with him only surfaced in cross-examination and does not serve to bolster his case. He simply failed to cross the threshold, resulting in the application for absolution, having to succeed, in my considered view.

Whether or not an application for absolution from the instance is interlocutory in nature in terms of Rule 32(11)

[56] From my reading of the rules, the following matters , it would seem, fall within the category of interlocutory proceedings:[11]

[11] *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2018] NAHCMD 265 (31 August 2018) para 18.

(a) discovery - Rule 28;
(b) seeking directions in terms of Rule 31 (1), (2) and (4);
(c) joinder of parties – Rule 41;
(d) applications for intervention of parties – Rule 41;
(e) consolidation of proceedings – Rule 41;
(f) applications for transfer of proceedings from one division to another – P.D. 47;
(g) third party proceedings – Rule 50;
(h) applications for amendment of proceedings – Rule 52;
(i) applications for condonation; upliftment of bar, extension and relaxation of time – Rule 55;
(j) applications for relief from sanctions – Rule 56;
(k) applications for security for costs – Rule 57;
(l) exceptions – Rule 57;
(m) application to strike out – Rule 58;
(n) applications for summary judgment – Rule 61 (although subject to some controversy, but now accepted that rule 32 applies);
(o) irregular proceedings – Rule 61;
(p) application for amplification of witness' statements – Rule 93(3); and
(q) variation and rescission of orders or judgments – Rule 103.

[57] Ms Jacobie relied for the proposition that an application for absolution from the instance, is interlocutory, on the findings of Van Wyk AJ, in *Leopard Tours and Car Hire CC v Dannecker* (*op cit*), that an application for absolution from the instance is interlocutory in nature. I do not agree with that proposition. It is probably for that reason that absolution from the instance, is not mentioned among the matters identified in the immediately preceding paragraph.

[58] I find that an application for absolution from the instance does not fall within the ambit of rule 32. As such, the costs order should not be limited to rule 32(11). It must not be lost to Ms Jacobie that an application for absolution from the instance, is moved in trial proceedings. That being the case, it is

clear that evidence has to be led in order for the court to make a decision ultimately, whether the said application should or should not be granted.

[59] There may be cases where the plaintiff leads seven or even ten witnesses before closing his case. It would not, in my considered view be fair, just or reasonable, to expect a plaintiff who has successfully parried an application for absolution, to be content to be compensated therefor with the paltry amount of N$20 000 for costs, when he or she may have spent a lot more in prosecuting the case. By the same token, it would be unfair for a defendant, who succeeds in this application, to be confined to costs in the amount of N$20 000, when the granting of the application may arguably bring the proceedings to a final end, as far as this court is concerned.

[60] With the foregoing in mind, I am of the considered view that the costs of this particular application should not be confined to the provisions of rule 32(11). The defendant spent considerable costs to defend and conduct the trial in its defence. It would not be just, having spent a number of days in trial, to confine a successful defendant in an application for absolution from the instance, to the costs stated in rule 32(11). This is more so the case as this ruling on absolution from the instance has the potential to bring the proceedings to an end.

[61] Having said this, I do not, however agree with Mr Barnard's insistence on punitive costs in this matter. There is nothing objectionable in the plaintiff's conduct of this matter that should attract the special scale of costs applied for. Furthermore, I do not regard it as proper to order the plaintiff to pay costs for the days the matter did not proceed as a result of the court entertaining this application. The plaintiff cannot be expected to have prepared for an application for absolution from the instance which had not been moved at the previous adjournment of the matter.

[62] In any event, the course the court adopted, ie of ordering the parties to file written argument was not only sensible and fair but it conduced to all the parties preparing and thoroughly considering all the angles of the matter. This

resulted in the court receiving the full benefit of counsel's argument, which has alleviated the court's burden considerably.

Conclusion

[63] In view of the discussion above and the conclusions to which I have arrived, I am of the considered opinion that the application for absolution from the instance, should succeed with costs, uncapped in terms of rule 32(11). Such costs are to be levied on the ordinary scale.

Order

[64] In the premises, I issue the following order:

1. Absolution from the instance is hereby granted with costs.
2. The matter is considered finalised and is removed from the roll.

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T S MASUKU

Judge

APPEARANCES

PLAINTIFF:	T Jacobie Of Henry Shimutwikeni Inc., Windhoek
FIRST DEFENDANT:	T. A Barnard
Instructed by:	Dr Weder, Kauta & Hoveka Inc., Windhoek