

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-APP-AMC-2023/00018

In the matter between:

**THABO CLEMENT MONCHO**

**APPELLANT**

and

**SKELETON COAST TRAWLING (PTY) LTD**

**RESPONDENT**

**Neutral citation:** *Moncho v Skeleton Coast Trawling (Pty) Ltd* (HC-MD-CIV-APP-AMC-2023/00018) [2024] NAHCMD 193 (25 April 2024)

**Coram:** UEITELE J et SIBEYA J

**Heard:** 22 March 2024

**Delivered:** 25 April 2024

**Flynote:** Practice – Judgments and orders – Summary judgment – when granted – principles to be applied.

Magistrates court – Civil proceedings – Summary judgment – Rule 14(2) of the Magistrates court rules made under Act 32 of 1944 requires an application for summary

judgment to be delivered at most, within seven days after notice of intention to defend – Application for extension of period under Rule 60(5)(b) must be a substantive application in terms of Rule 2(1)(b) before the magistrate can exercise his or her discretion to condone the delay – The rules must be strictly complied with.

**Summary:** During September 2022, the respondent issued summons commencing action against the appellant where it sought his eviction from the property. The appellant defended the claim. The respondent, thereafter, set down the matter for summary judgment. Respondent obtained summary judgment against the appellant notwithstanding that respondent did not file a notice of motion as contemplated in Rule 2(1) of the Rules of the Magistrates' Court Act 32 of 1944 and also that the set down of the application for summary judgment was brought outside the seven day period from the date of appellant's notice of intention to defend, as required by Rule 14(2).

At the hearing of the application, respondent orally applied for an extension of the period of seven days provided for in Rule 60(5), which was granted by the magistrate.

In the appeal, the appellant contended that there was no application for summary judgment as contemplated in the magistrates' court Rules and also that the magistrate was not entitled to extend the period as there was no substantive application before him as envisaged by Rule 60(5)(b).

*Held:* that before a court will entertain an application for summary judgment, a plaintiff must present a clear case on technically correct papers while complying strictly with Rule 14(2) of the Rules of the Magistrates' Court Act 32 of 1944.

*Held that:* the respondent set the matter down for summary judgment without the consequent application sought to be set down, therefore, respondent's papers are not technically correct.

*Held further that:* where the papers filed in support of an application for summary judgment are not technically correct, the court need not consider whether a bona fide defence is revealed in the opposing papers, but can refuse the application for summary judgment outright, even if no affidavit is filed to oppose the application for summary judgment.

*Held:* that the respondent was bound to have placed a substantive application before the magistrate in accordance with Rule 2(1)(b), before the magistrate could exercise his discretion in favour of the respondent and condone the delay.

*Held that:* what is required from the defendant in an application for summary judgment brought on papers that are technically correct, is to satisfy the court in an affidavit, that he or she has a bona fide defence to the claim.

*Held further that,* accordingly, that the magistrate had erred in granting summary judgment on papers that are not technically correct, and further erred in granting condonation in the absence of a substantive application brought in terms of Rule 2(1)(b), and the appeal should succeed.

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## ORDER

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1. The appeal is upheld.
2. The respondent must pay the appellant's costs of the appeal, subject to s 17 of the Legal Aid Act 29 of 1990, as amended.
3. The order of the magistrate is hereby set aside and is replaced with the following order:

‘Summary judgment is refused, and the defendant is granted leave to defend the action.’

4. The matter is deemed finalised and removed from the roll.

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## JUDGMENT

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SIBEYA J (UEITELE J concurring):

### Introduction

[1] In order to ward-off an application for summary judgment, not a great deal is required from the defendant, but he or she is required to lay down a genuine desire to adduce evidence at the trial which would constitute a valid defence to the action. The court, therefore, inquires into whether or not the defendant raised a bona fide defence or not, that is whether the defendant sufficiently disclosed the nature and grounds of his defence and material facts on which the defence is based.<sup>1</sup>

[2] This is an appeal against the summary judgment and order of the magistrate’s court of Lüderitz.

[3] The magistrate, following summons commencing action for the eviction of the appellant from the respondent’s property, granted summary judgment and ordered the eviction of the appellant from Erf 202, Raaf Street, Lüderitz (‘the property’).

[4] Disgruntled by the order of the magistrate, the appellant approached this court on appeal. The respondent opposed the appeal.

### The parties and their representation

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<sup>1</sup> *Oos-Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk* 1978 (1) SA 164 (W) at 171 See also: *Maharaj v Barclays National Bank* 1976 (1) 418 (A) at 426.

[5] The appellant is Mr Thabo Clement Moncho, an adult male formerly employed by the respondent as the head of the department of Industrial Relations. He resides on the property.

[6] The respondent is Skeleton Coast Trawling (Pty) Ltd, a company duly incorporated in terms of the company laws of the Republic of Namibia, with its principal place of business situated at Erf 524, Industry Street, Lüderitz.

[7] The appellant is represented by Mr Esau on the instructions of the Directorate of Legal Aid, while the respondent is represented by Ms Brinkman. The court appreciates the duty carried out by both counsel including their written and oral arguments.

### Background

[8] The appellant was, in 2016, employed by the respondent as the head of department of Industrial Relations. In the employment contract, the parties agreed that the respondent will provide the appellant with accommodation during such employment.

[9] During April 2021, and subsequent to a disciplinary hearing, the appellant's employment was terminated. The appellant lodged an internal appeal against the dismissal. The appeal was dismissed on 22 June 2021. On 8 October 2021, the appellant referred a dispute of unfair dismissal to the Office of the Labour Commissioner. The proceedings are still pending before the arbitrator appointed by the Labour Commissioner.

[10] During September 2022, the respondent issued summons commencing action against the appellant where it sought his eviction from the property.

[11] On 2 December 2022, the appellant entered appearance to defend the action.

[12] On 20 December 2022, the respondent set down the application for summary judgment for hearing on 26 January 2023.

[13] On 26 January 2023, the appellant filed an affidavit opposing the application for summary judgment, relying mainly on the provisions of s 28(5) of the Labour Act<sup>2</sup> for his defence against the eviction order sought.

[14] On 8 September 2023, and after hearing the parties, the magistrate granted summary judgment and ordered the appellant to vacate the property on or before 22 September 2023. It is this order that forms the subject of the appeal.

#### Grounds of appeal

[15] The appellant set out the following grounds of appeal:

1. The learned magistrate erred in fact and in law when he held that the respondent's application for summary judgment was filed in terms of the rules, whereas the application for summary judgment was filed out of time.

2. The learned magistrate erred in fact when he found that the appellant did not file an affidavit in terms of rule 14(3) of the Magistrates' Court Rules and failed to disclose his defence, whereas the appellant filed an opposing affidavit on 26 January 2023.

3. The learned magistrate erred in law when narrowly interpreting and applying section 28(5) of the Labour Act, 2007 and also whereas the interpretation and application thereof should have been done by the trial court.

4. The learned magistrate erred in law when he accepted the evidentiary submissions made from counsel for the respondent from the bar in respect of alleged prejudice suffered by the respondent, whereas no such evidence was led on the founding affidavit.'

#### The parties' case and arguments

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<sup>2</sup> Labour Act No. 11 of 2007.

[16] The appellant contended that, considering that he entered an appearance to defend the action on 2 December 2022, the respondent's application for summary judgment should have been filed by 13 December 2022. He states that the application for summary judgment was filed out of time on 20 December 2022, and sought no condonation for the default. On this basis, the appellant submits that the application for summary judgment ought to have been refused.

[17] The appellant contends further that, at the hearing, the respondent applied for an extension of the seven day period within which the application for summary judgment should have been delivered, and it was granted. He contends that the extension should not have been granted in the absence of a substantive application.

[18] The appellant further contends that the magistrate remarked in his ruling that up to the date of judgment, 8 September 2023, the court did not receive the affidavit opposing the application for summary judgment, thus the court reasoned, there is no basis on which the court could determine whether the appellant raised a bona defence or not. This could not be correct, submitted the appellant, as the appellant had already filed the affidavit resisting summary judgment on 26 January 2023.

[19] The appellant further contended that although he did not refer the complaint of unfair dismissal to the Office of the Labour Commissioner within a period of 30 days, there is, nevertheless, a dispute pending with the Labour Commissioner. Mr Esau argued that the referral of the dispute outside the 30 day period provided for in s 28(5) of the Labour Act, does not deny the appellant of the benefits of the said provision.

[20] The respondent was not to be outsmarted. The respondent disputed the assertion that the appellant entered appearance to defend the action on 2 December 2022. This, the respondent argued, is on account of the appellant's notice of intention to defend not bearing a date stamp of service on the Clerk of Court. The respondent stated that the notice of intention to defend was served on it on 5 December 2022. The

respondent clears the air in the written heads of argument, that: ‘... the final day to have filed an application for summary judgment would have been on 14 December 2022.’

[21] The respondent proceeded to state the following in the written heads of argument:

‘27. The respondent filed its application for summary judgment on Monday, 20 December 2022. Therefore the respondent’s application was filed 4 days out of time as opposed to 12 days as contemplated by the appellant.

[28] The appellant then filed his opposing affidavit on 26 January 2023, which was the same day of the hearing of the summary judgment application. The appellant’s affidavit was similarly filed 1 day out of time in terms of the Rules of the Magistrates’ Court.’

[22] The respondent contends that, considering that the magistrate continued to hear the application for summary judgment, it means that he was inclined to condone the parties’ defaults. During oral argument, Ms Brinkman submitted that the magistrate tacitly condoned the respondent’s defaults for failure to comply with the rules.

[23] On the merits, the respondent contends that the appellant failed to raise a bona fide defence to the claim, and called for the dismissal of the appeal. The respondent further stated that the appellant could not find shelter in s 28(5) of the Labour Act as the complaint of unfair dismissal was not referred to the Office of the Labour Commissioner within the prescribed period of 30 days.

### The law

[24] The Supreme Court in *Swakop Uranium (Pty) Ltd v Calitz*,<sup>3</sup> reiterated the approach to be adopted by a court of appeal and remarked as follows at paragraph 37:

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<sup>3</sup> *Swakop Uranium (Pty) Ltd v Calitz* (SA-103/2021) [2023] (22 November 2023) para 37.



'It is a well-established principle of our law that a court of appeal cannot decide the matter afresh and substitute its decision for that of the court of first instance; it would do so only where the court of first instance (in the present matter the arbitration forum) did not exercise its discretion judicially. This could be done by showing that the court of first instance exercised the power conferred upon it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question, or did not act for substantial reasons, or materially misdirected itself in fact or in law.'<sup>4</sup>

[25] The law on summary judgment applications is well-established and invites no repetition. A reminder would suffice that Rule 14 of the Magistrates' Courts Rules ('the Rules') regulates applications for summary judgment in the court *a quo*.

'(1) When a defendant has entered an appearance to defend, the plaintiff in convention may apply to the court for summary judgment on one or more of such claims in the summons as are only –

- (a) on a liquid document;
  - (b) for a liquidated amount in money;
  - (c) for the delivery of specified movable property; or
  - (d) for ejection,
- in addition to costs.'

[27] Rule 14(2) on other hand reads as follows:

'Such application shall be made on not less than 7 days' notice delivered not more than 7 days after the date of the defendant's appearance to defend and the plaintiff shall deliver with such notice –

- (a) if the claim is a claim referred to in sub rule (1) (b), (c), or (d), a copy of an affidavit, made by himself or any other person who can swear positively to the facts, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is not a bona fide

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<sup>4</sup> Compare, *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) and *Engelbrecht v Transnamib Holdings Ltd* 2003 NR 40 (LC).

defence to the claim and that appearance has been entered solely for the purpose of delaying the action.

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### The application for summary judgment

[28] It is apparent from the above cited rule 14(2) that the plaintiff may apply for summary judgment when the requirements of rule 14(1) are met. Summary judgment can, therefore, only be sought and obtained upon application by the plaintiff.

[29] Rule 2 of the magistrate court rules, which contains definitions, provides, *inter alia*, that:

'(1) In these rules and in the forms annexed hereto, unless the context otherwise dictates –

(a) a word to which a meaning has been assigned in the Act shall bear that meaning; and

(b) “apply” means apply on motion and “application” has a corresponding meaning;'

[30] Form number 7 of the rules sets out the nature of the notice of application for summary judgment.

[31] The respondent, instead of filing a notice of application for summary judgment, filed a notice of set down for summary judgment to which it annexed the affidavit in support of the summary judgment sought. There is strictly-speaking, no application on motion filed by the respondent, as all there is, is a notice of set down. When this was brought to the attention of Ms Brinkman, she was at pains to explain the reasons why the notice of set down should nevertheless be regarded as notice of application for summary judgment. She argued that the said notice is substantially compliant with the rules, its reading mentions an application for summary judgment. Can the argument raised of substantial compliance save the day?

[32] In *Bill Troskie Motors v Motor Spares (EDMS) BPK*,<sup>5</sup> the court had occasion to consider an application for summary judgment, and in a judgment written in the Afrikaans language loosely translated, remarked as follows at page 962:

‘Summary judgment is a request for extraordinary legal remedy. The rules on which it is founded must be strictly complied with and the courts are less accommodating to allow non-compliance therewith. The rules which moreover allow a court a discretion to condone a failure to comply with them must be just as strictly applied.’

[33] Rakow J in *Bank Windhoek Limited v Kock Investments*,<sup>6</sup> at para 14 cited with approval the following acknowledged remarks by Van Niekerk, Geyer and Mundell in *Summary Judgement – A practical guide*:<sup>7</sup>

‘Departing from the premise that the remedy is drastic, our courts have laid down three rules for summary judgement applications. Firstly, that there is a *numerous clausus* of instances in which a plaintiff may apply for summary judgement in the sense that no application is possible which falls outside the strict ambit of rule...; secondly, that, before a court will entertain an application for summary judgement, a plaintiff must present a clear case on technically correct papers while complying strictly with the rule and thirdly, that, in cases which are doubtful, summary judgement must be refused. (See *Art Printing Works Ltd v Citizen (Pty) Ltd* 1957 (2) SA 95 (SR) 97H; *Davis v Terry* 1957 (4) SA 98 (SR) 100 in fin 101A).’

[34] Technically, the respondent moved an application for summary judgment based on the notice of set down and not on a notice of application for summary judgment as required by the rules. Undeviatingly, the respondent filed a notice of set down instead of a notice of application for summary judgment. Attaching meaning to the notice of set down, one cannot help but find that, the respondent unnecessarily filed a notice to set down the matter without the consequent application sought to be set down. On this premise, the papers of the respondent cannot be said to be technically correct.

<sup>5</sup> *Bill Troskie Motors v Motor Spares (EDMS) BPK* 1980 (2) SA 961 (O) 962.

<sup>6</sup> *Bank Windhoek Limited v Kock Investments* (HC-MD-CIV-ACT-CON-2020/03329) [2020] NAHCMD 574 (7 December 2020) para 14.

<sup>7</sup> Van Niekerk, Geyer and Mundell. *Summary Judgement – A practical guide*. LexisNexis, Durban 1998, at page 5-4.

[35] This court in *Marenga and Another v Tjikari*,<sup>8</sup> remarked as follows regarding technically incorrect papers in an application for summary judgment:

[10] (iv) In determining a summary judgment application the court is restricted to the manner in which the Plaintiff has presented its case. It is trite that a court must insist on strict compliance with the Rule by a Plaintiff. To this extent a Plaintiff is bound by the manner in which it has presented its case and a court will not entertain an application for summary judgment moved on technically incorrect papers. (*Western Bank Beperk v De Beer*, 1975 (3) SA 772 (T); *Credcor Bank v Thompson*, 1975 (3) SA 916; *Visser v De La Ray*, 1980 (3) SA 147 (T).’

[36] As stated, despite the spirited submissions made by Ms Brinkman to salvage the respondent’s papers filed in support of the relief sought for summary judgment, I find without hesitation that the respondent’s papers are not technically correct. The starting blocks in the consideration of the application for summary judgment application must be the technical correctness of the applicant’s papers. If the papers are found to be technically incorrect, that should spell the end of the application, which must be refused.

[37] In *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd*,<sup>9</sup> the Orange Free State High Court remarked that:

‘... before even considering whether the defendant has established a *bona fide* defence, the court must be satisfied that the plaintiff’s claim has been clearly established and that his pleadings are technically in order.’

[38] Having found as set out above that the respondent’s papers are not technically correct, I hold that the respondent failed to get out of the starting blocks in the quest to establish entitlement to summary judgment. I find that where the papers filed in support of an application for summary judgment are not technically correct, the court need not

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<sup>8</sup> *Marenga and Another v Tjikari* (1 1841 of 2011) [2011] NAHC 317 (21 October 2011) para 10.

<sup>9</sup> *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd* 1988 (1) SA 679 (O) at 683I-684A.

consider whether a bona fide defence is revealed in the opposing papers, but can refuse the application for summary judgment outright. I further find that even in an instance where no affidavit is filed to oppose the application for summary judgment, but the papers filed in support of such application are technically incorrect, the court will be entitled to refuse summary judgment.

[39] On the basis of the above findings, I hold that the respondent's application for summary judgment ought to have been refused by the magistrate. The magistrate, therefore, misdirected himself when he granted the summary judgment on papers that are technically incorrect. On this finding alone, the appeal ought to succeed.

#### The late filing of the application for summary judgment

[40] For completeness sake, I find that even if it could be said that the respondent's application for summary judgment was brought on technically correct papers, it would still suffer the same fate. This is due to the fact that the application was filed out of the prescribed time, in contravention of rule 14(2).

[41] It is insignificant whether the application was filed 12 days late, as contended by the appellant, or four days late, as contended by the respondent. The duck test finds application here, in that: 'if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck'. The respondent is in a worse off position in that it is clear as day that its application for summary was filed outside the prescribed time period of seven days from the date that the appellant entered appearance to defend.

[42] At the hearing of the application for summary judgement, the respondent orally sought an extension of the seven day period within which to have filed its application, and the magistrate granted it.

[43] Rule 60(5) of the Magistrates' Court Act 32 of 1944 provides for condonation and states that:

'(5) Subject to the provisions of rule 17 (1) (b), any time limit prescribed by these rules, except the period prescribed in rule 51 (3) ad (6), may at any time, whether before or after the expiry of the of the period limited, be extended –

(a) by the written consent of the opposite party; and

(b) if such consent is refused, then by the court on application and on such terms as to costs and otherwise as may be just.'

[44] No written consent was granted by the appellant for the respondent's non-compliance with rule 14(2). To the contrary, the respondent orally sought, from the magistrate, an extension of seven day period, which was granted.

[45] Rule 60(5)(b) requires an application for extension to be brought. As stated earlier, Rule 2(1)(b) provides that an application must be on motion. The court in *Bill Troskie (supra)*,<sup>10</sup> was faced with an application for summary judgment that was filed out of time, and like *in casu*, the applicant was granted an extension following an oral request. The court at page 962, in loose translation, remarked that:

'... the magistrate has a discretion to condone. No one disputes this, but the appellant's objection is still unanswered, namely: that the oral request on which the magistrate based his discretion exercised is not an application as intended by rule 60(5)(b). "Apply" is defined in rule (2)(1)(b) as apply by way of motion and "application" has a corresponding meaning.

In my view, the respondent was bound to make a substantive application in terms of rule 2(1)(b) before the magistrate exercised his discretion in favour of the respondent and condone his failure. This was not done, and consequently, the magistrate erred in granting condonation.'

[46] I find that the failure by the respondent to file a substantive application for the extension sought meant that rule 60(5)(b) was not complied with. The said rule grants

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<sup>10</sup> *Bill Troskie (supra)* at 962. See also: *Evander Caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T) at 316.

the magistrate the discretion to extend the time periods that are not met. It follows, therefore, that, for the magistrate to have the authority to extend the time periods, he or she must, in the absence of the written consent of the opposite party, be seized with a substantive application for such extension or condonation. It is the said substantive application that clothes the magistrate with the power to grant the extension. Absent a substantive application, in the absence of the written consent by the opposite party, the magistrate enjoys no authority or discretion to extend the time period or condone the non-compliance with the prescribed time periods. The reason for the substantive application is for the court to be well-informed of the grounds for the application and to determine whether such grounds have merit, and also to inform the other party of the said grounds to consider and respond accordingly for the court's determination.

[47] The magistrate, thus, misdirected himself when he extended the seven day prescribed period within which to file an application for summary judgment based on an oral request, and without a substantive application. On this finding alone, the application for summary judgment ought to have been refused.

[48] As I draw this judgment to the finishing line, I note that what is required from the defendant in an application for summary judgment brought on papers that are technically correct is to satisfy the court in an affidavit, that he or she has a bona fide defence to the claim. The defendant is required to set out facts which, if proven at the trial, will constitute an answer to the plaintiff's claim. The defence will be sufficient if it demonstrates a reasonable prospect of success at the trial.

[49] Where the defence is based on material facts or new facts are alleged disputing the claim, the court does not decide these issues, or determine as in whose favour the probabilities lie. This is left for the trial court, after hearing evidence.<sup>11</sup>

## Conclusion

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<sup>11</sup> *Maharaj v Barclays National Bank Ltd (supra)* at 426. See also: *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 276A.

[50] In view of the foregoing findings and conclusions made, I hold that it is inevitable that the respondent's application for summary judgment, if it at all it can be labelled as such, was brought on papers that are technically incorrect. As a result, the application for summary judgment ought to have been refused. The magistrate, as found earlier, misdirected himself when, based on an oral request, condoned the respondent's failure to file the application for summary judgment within the prescribed period of seven days after the appearance to defend was noted. The appeal, therefore, ought to succeed.

### Costs

[51] The appellant seeks an order to uphold the appeal with costs, while the respondent, in converse, seeks a dismissal of the appeal with costs. It appears, therefore, that whatever the result of the appeal, parties were content that such order must be complemented by a costs order. Similarly, no reasons were advanced before court why costs should not follow the result, neither was it even suggested.

[52] The court finds no compelling reasons to deviate from the established principle on costs, namely, that costs follow the result. The appellant is represented by Mr Esau on the instructions of the directorate of Legal Aid. Section 17 of the Legal Aid Act,<sup>12</sup> provides, *inter alia*, that costs awarded to a legally aided person shall be payable to the Director. Considering that the appellant succeeded in the appeal, he shall be awarded costs.

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

1. The appeal is upheld.
2. The respondent must pay the appellant's costs of the appeal, subject to s 17 of the Legal Aid Act 29 of 1990, as amended.

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<sup>12</sup> Legal Aid Act No. 29 of 1990.



3. The order of the magistrate is hereby set aside and is replaced with the following order:

‘Summary judgment is refused, and the defendant is granted leave to defend the action.’

4. The matter is deemed finalised and removed from the roll.

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O S SIBEYA  
JUDGE

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S UEITELE  
JUDGE

APPEARANCES:

APPELLANT: D Esau  
Of Anne Shilengudwa Incorporated, Windhoek  
Instructed by the Directorate of Legal Aid.

RESPONDENT: C Brinkman  
Of LorentzAngula Inc (T/A ensafrica), Windhoek.