

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 154/2014

In the matter between:

**MATIAS ANDREAS**

**PLAINTIFF**

and

**MONTANA AUTO MECHANICS & SPARES CC**

**1<sup>ST</sup> DEFENDANT**

**TOBIAS POMBILI ANDIMA**

**2<sup>ND</sup> DEFENDANT**

**Neutral citation:** *Andreas v Montana Auto Mechanics & Spares CC* (I 154/2014)  
[2017] NAHCNLD 38 (08 May 2017).

**Coram:** CHEDA J

**Heard:** 03.03.2017

**Delivered:** 08 May 2017

**Flynote:** A party who when sued enters an appearance and defend, and allows the matter to proceed to the end of plaintiff's case but thereafter decides to abandon his defence mid-stream should pay wasted costs at attorney and client scale.

**Summary:** Plaintiff sued first and second defendants for N\$65000 being damages to his car caused by second defendant's negligence. Second defendant was at the relevant period employed by first defendant and was acting within the scope of his employment. Second defendant did not enter an appearance to defend. First

defendant defended the action. The matter proceeded to trial stage. Plaintiff gave evidence but 1<sup>st</sup> defendant declined to open his case thereby abandoning his defence mid-stream without any explanation. Plaintiff was unnecessarily put into financial expenses. Judgment was granted for plaintiff and first defendant was ordered to pay costs at attorney and client scale.

### ORDER

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1. Judgement is granted against the defendants jointly and severally with one paying the other to be absolved with interest a *tempora morae* at the rate of 20% per annum from the date of judgment to the date of final payment.
  2. First defendant shall pay the costs of suit at attorney and client scale.
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### JUDGMENT

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CHEDA J:

[1] In this matter, plaintiff sued defendants for the sum of N\$65000 plus interest at the rate of 20% per annum together with costs.

[2] Plaintiff is a major and resides in Walvis Bay, in the Republic of Namibia.

[3] First defendant is a close corporation duly registered in terms of the laws of Namibia and carries on business in Ongwediva, in the Republic of Namibia. It was represented by one Ignatius Tonateni Uushini. Second defendant is employed by first defendant at the aforesaid address.

[4] The facts as contained in the particulars of claims are briefly that sometime during December 2011 plaintiff entered into an agreement with first defendant wherein first defendant undertook to carry out some repair work on plaintiff's motor vehicle to wit, a VW Jetta A 4 2004 model registration N18239WB.

[5] On or about the 11 January 2012 first defendant permitted and/or authorised second defendant who was his employee and acting within the scope of his employment to drive plaintiff's motor vehicle which was subsequently involved in an accident. The said motor vehicle sustained damages in the sum of N\$65000.

[6] The accident was solely caused by second defendant's negligence, particulars of which are that he:

- a) drove at an excessive speed in the circumstances;
- b) failed to keep a proper look out;
- c) attempted to enter the main road when it was not safe to do so; and
- d) overtook under circumstances when it was not safe to do so.

[7] Plaintiff therefore sued defendants jointly and severally the one paying the other to be absolved. He claimed the sum of N\$65000, with interest at 20% per annum and costs of suit.

[8] First defendant entered an appearance to defend and in its plea it stated that second defendant was not employed by it, but, was its agent. It later changed and stated that second defendant was renting its premises, but, however, it assisted him with administrative duties including receipting and attending to his customers.

[9] Further, that, at the end of each and every month it reconciled second defendant's books and accordingly deducted what was due to it. It was also its further averment that second defendant was not its employee and needed no authority to drive plaintiff's motor vehicle. In short this was the essence of its denial of liability.

[10] Second defendant did not enter an appearance to defend and is accordingly barred. On that score a default judgment is entered against him. First defendant was initially represented by Mr. J. Greyling who later renounced agency and Mr. Aingura came on board.

[11] Plaintiff gave evidence. It was his evidence that his car developed a mechanical problem and he took it to first defendant's premises. He met the owner,

one Ignatius Tonateni Uushini who took the car into his premises and further undertook to carry out the necessary repairs on the car at his premises.

[12] After the accident, second defendant admitted liability while first defendant denied liability, although he had initially asked plaintiff to furnish him with a quotation, an indication that he was considering paying although it later changed its mind. This infact was an implied admission.

[13] Plaintiff was cross-examined by Mr. Aingura, but, maintained his position that both first and second defendants were liable for the damage to his motor vehicle. He was indeed a good and credible witness. Plaintiff's vehicle is valued at N\$65000, which valuation was given by an Insurance Company which deals with VW Jetta vehicles at Swakopmund. Plaintiff then closed its case.

[14] First defendant declined to lead evidence and therefore that was the end of the trial.

[15] What plaintiff managed to establish is that:

- a) he took his motor vehicle for repairs to first defendant's premises.
- b) throughout the negotiations, first defendant was represented by Ignatius Tonateni Uushini.
- c) the vehicle was involved in an accident while in the custody and control of first defendant.
- d) at the time of the accident it was being driven by second defendant who was an employee of first defendant and was driving it while he was under the authority and within the scope of his employment.
- e) plaintiff was not aware of any internal arrangement between first and second defendants regarding the operations at first defendant's premises.
- f) that he suffered damages in the sum of N\$65000 as valued by an Insurance Company.

[16] First defendant declined to give evidence in this matter and thereby depriving the court from hearing its side of the story. It is clear to me, therefore, that it must

have realised that, it does not have any defence at all. It, therefore, threw in the towel as it were at the 11<sup>th</sup> hour.

[17] What remains for determination is whether or not plaintiff has made a case for himself. He who asserts must prove and in my view, he resoundingly did and deserves his prayer.

[18] I am however, concerned with the attitude of first defendant who without explanation abandoned his defence mid-stream after misleading plaintiff that he had a defence against his claim. This type of attitude does not find favour in the eyes of the courts as it is a waste of time and unnecessary costs to the plaintiff. I am mindful of the time honoured principle that costs follow the event. Put in the other way costs are awarded to a successful party in order to indemnify it for the expenses to which he would have been unnecessarily put through by defendant's unworthy defence.

[19] Plaintiff asked for costs on the ordinary scale. It should, however, be borne in mind that all costs are in the discretion of the court. This was clearly stated in *Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69* where Innes CJ stated:

“The rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission.”

[20] The award for costs is at the discretion of the court which must be exercised judicially and it largely depends on the circumstances of each case. In essence it is a case of fairness to both parties and should not be arbitrary. Defendant's conduct has been reprehensible and inexcusable. These courts, are courts for justice and cannot be used as a game of chance or a Russian Roulette. Defendant's conduct deserves censure in terms of costs outside the ordinary scale.

[21] Generally the court is not in the habit of ordering one party to pay the costs of another on the basis of attorney and client scale unless there exists some special grounds, see *Van Dyk v Conradie 1963 (2) SA 413 (c) at 418*.

[22] Further, these courts are averse to making an order for costs at attorney client in the absence of a special prayer for it or notice of an application for it, see *Marsh v Odendaal SRUS Cold Storages Ltd 1963 (2) SA 263 (W) at 269* and *Msiza v Director-General, Department of Land Affairs 2002 (3) SA 839 (LCC) at 845 F-H*. However, the absence of such prayer is not a preclusion to the court's discretion in showing its displeasure at how a party has conducted itself in the circumstances.

[23] In *casu* first defendant's conduct points to one conclusion and one conclusion only being that it was dishonest right from the beginning when it entered an appearance to defend. It went through all the necessary legal proceedings only to abandon its defence at the last minute without any explanation whatsoever. It is clear to me that its defence lacked *bona fides* and was therefore dilatory. This type of conduct was intended to buy time and put plaintiff in both financial expenses and emotional stress.

[24] First defendant's conduct unfortunately has brought the wrath of the court upon itself and the court's fangs have to dig deep into its financial muscle in order to restore plaintiff's financial loss in prosecuting its claim. This is a matter where first defendant cannot avoid paying costs at a higher scale, even if plaintiff has not prayed for them. First defendant however has to pay, as a punitive measure in order to show it that legal proceedings have to be taken seriously.

[25] In the result I make the following order:

1. Judgement is granted against the defendants jointly and severally with one paying the other to be absolved with interest a *tempora morae* at the rate of 20% per annum from the date of judgment to the date of final payment.
2. First defendant shall pay the costs of suit at attorney and client scale.

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M Cheda  
Judge

## APPEARANCES

PLAINTIFF: C. Tjihero  
Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva

1<sup>ST</sup> DEFENDANT: S. Aingura  
Of Aingura Attorneys, Oshakati