

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA  
NORTHERN LOCAL DIVISION, OSHAKATI  
PRACTICE DIRECTION 61

<b>Case Title:</b>  Mangulukeni Hamunghete  and  Immanuel Eelu David Tencin Munyama	<b>Case No:</b> HC-NLD-CIV-ACT-DEL-2021/00237  <b>Division of Court:</b> High Court, Northern Local Division  <b>Heard on:</b> 10 July 2023 (On the papers)  <b>Delivered:</b> 02 August 2023  <b>Reasons:</b> 08 August 2023
Plaintiff	First Defendant Second Defendant

**Heard before:** Honourable Mr. Justice Munsu

**Neutral citation:** *Hamunghete v Eelu* (HC-NLD-CIV-ACT-DEL-2021/00237) [2023] NAHNLD 76  
(08 August 2023)

**REASONS:**

MUNSU J:

Introduction

[1] This matter became settled at the conclusion of the trial before judgment. The parties could not agree on the issue of costs. On 2 August 2023, I ordered the first defendant to pay the plaintiff's costs. These are my reasons for the order.

### The parties

[2] The plaintiff is Ms Mangulukeni Hamunghete. She resides at Omuthiya and she is employed as a police officer.

[3] The first defendant is Mr Immanuel Eelu. He is a resident of Onyaanya

[4] The second defendant is Mr David Tencin Munyama. He is self-employed and resides in Windhoek.

### Background

[5] The plaintiff and the second defendant were in a relationship of boyfriend and girlfriend. The plaintiff alleged in the particulars of claim that she is the lawful owner and possessor of a Mazda 2 hatch back bearing registration number N 10136 RU (motor vehicle in question).

[6] It is common cause that on 09 December 2020 a motor vehicle collision occurred between the vehicle in question, at the time being driven by the second defendant and a Toyota Legend 45 bearing registration number N 43 WB, there and then being driven by the first defendant.

[7] The plaintiff and the second defendant went to a wedding, after which the plaintiff returned home and left the motor vehicle in question with the second defendant. According to the plaintiff, the second defendant was supposed to return the vehicle on the same date but did not. She then learnt that the vehicle had been in an accident.

[8] In his counterclaim, the first defendant alleged that the aforesaid collision was caused by the sole negligence of the second defendant. He also alleged that the second defendant, under oath, agreed to repair the first defendant's motor vehicle. The first defendant further claimed that the motor vehicle in question was to remain in his possession until the second defendant repaired his motor vehicle.

[9] The plaintiff instituted action against the defendants, seeking an order directing the first defendant to deliver the motor vehicle in question within seven days, failing which the deputy sheriff would be authorised to take possession of the aforesaid vehicle and restore it to the plaintiff.

[10] The first defendant defended the action and filed a counterclaim wherein he claimed the following relief:

- a) Payment by the second defendant to the first defendant in the amount of N\$ 48 482.55;
- b) First defendant be in possession of the motor vehicle in question until date of final payment.

[11] The second defendant did not defend the matter.

[12] On 13 June 2023, the first defendant applied for default judgment against the second defendant for payment in the amount of N\$ 48 482. 55. The application was granted together with an order for costs of suit.

[13] On the same day, the matter proceeded to trial with the plaintiff and the first defendant leading evidence of witnesses. At the conclusion of the trial, the matter became settled. The parties agreed that the first defendant would restore the possession of the motor vehicle in question to the plaintiff. The parties, however, could not agree on the issue of costs. They agreed to file heads of argument in respect of the issue of costs and the court would decide the matter on the papers.

#### Evaluation

[14] Given that the second defendant did not defend the action, the first defendant could have applied for default judgment against the second defendant as early as April 2022. With such order, the first defendant would have obtained judgment for the damages caused to his motor vehicle, including the costs of suit.

[15] However, the first defendant chose not to apply for default judgment at an opportune time and dragged the matter to trial on a claim that was doomed to fail. The persistence with the second claim to keep the motor vehicle in question without a legitimate basis ultimately cost the first defendant.

[16] The reason the first defendant held on to his defence until trial is because the vehicle in question is registered in someone else's name other than the plaintiff. Additionally, the first defendant alleged that the second defendant made a declaration to the police in which he affirmed that the vehicle in question belonged to him, and that he allowed the first defendant to keep the motor vehicle until he repaired the first defendant's motor vehicle.

[17] Whatever agreement reached between the two defendants would have been their private arrangement not involving the plaintiff. Once the plaintiff instituted the action, each party ought to have carefully considered their unique case. To this end, the second defendant chose not to defend the plaintiff's action.

[18] The plaintiff claimed that she is the lawful owner and possessor of the vehicle in question and demanded its restoration. The second defendant who purportedly declared that the motor vehicle in question belonged to him did not contest the plaintiff's claim. One wonders why he chose not to defend the plaintiff's lawsuit if he was the rightful owner of the motor vehicle in question. The first defendant's second claim began to falter at this point. The first defendant still continued with his defence that the motor vehicle in question belonged to the second defendant.

[19] While I agree with the first defendant that the mere filing of witness statements on e-justice does not constitute evidence-in-chief until the witness is called to testify, a perusal of the plaintiff's filed witness statements would have alerted the first defendant of the risk and gamble he was taking by dragging the case to trial.

[20] The original owner of the motor vehicle in question, in whose name it was registered, provided a witness statement. Also, the plaintiff in her witness statement states that she was in the process of registering the motor vehicle in her name. She purchased the vehicle in poor shape because the windshield was damaged and the tyres and steering box were defective. She intended to have the motor vehicle repaired before registering it in her name. It goes without saying that registration certificates alone do not constitute proof of ownership.<sup>1</sup>

[21] According to the first defendant, a party may choose not to call a witness to testify, despite his or her witness statement being filed. Furthermore, a witness should be cross-examined to test the accuracy and reliability of the information provided in the witness statement. It was submitted that the first defendant could not, as matter of fact and law, accept the plaintiff's filed witness statements as evidence. He further could not withdraw his defence just because witness statements were filed on e-justice. In addition, it was pointed out that the plaintiff did not disclose, in her witness statement, how she financed the motor vehicle. For these reasons, it was submitted that the calling of witnesses was crucial.

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<sup>1</sup> *The Acting Deputy Sheriff of Windhoek v Minnesota Trading Enterprises Group CC and Others* (HC-MD-CIV-ACT-CON-2020/01229 / INT-HC-INTERP-2020/0024) [2021] NAHCMD 7 (25 January 2021); *The Acting Deputy Sheriff of Swakopmund v Kadhila* (I 2097/2014) [2021] NAHCMD 484 (21 October 2021).

[22] I have no qualms with the above submissions. It is the position taken by the first defendant. Unfortunately, the first defendant miscalculated and did not properly assess his case. In the event that the plaintiff was to succeed at trial, as she did, she would be entitled to her costs as per her second prayer. There ought to be a good reason why she should be deprived of her costs.

[23] In persisting with his defence, the first defendant relied on the declaration allegedly made by the second defendant. He however, was aware of the following important considerations:

- a) That the second defendant was not contesting the plaintiff's claim that she is the lawful owner of the motor vehicle in question;
- b) That the second defendant was not a witness for the first defendant and was not to be called as a witness to testify on behalf of the first defendant.
- c) That in the absence of the second defendant testifying, the admission into evidence of the declaration purportedly made by the second defendant would not constitute proof of its content.

[24] Based on the above, the first defendant ought reasonably to have known that he had no basis to challenge the plaintiff's title to the vehicle in question. It was an error of judgment on the part of the first defendant to pursue his second claim until conclusion of evidence in the matter.

[25] The first defendant moved his application for default judgment before the matter commenced with trial and the application was granted, including his costs of suit. Yet he continued with his challenge to the plaintiff's claim without evidence. It seems to me that the first defendant chose to argue the matter on the plaintiff's case. However, he did not succeed and as a result of his tenacity, the plaintiff incurred costs.

[26] Whereas the plaintiff wants the first defendant to pay her costs, the latter argued that each party must pay its own costs or that the second defendant be ordered to pay the costs in the matter.

[27] It will be absurd to order the second defendant to pay the costs when he did not defend the action.

[28] While the first defendant did not succeed with the retention of the motor vehicle in question, the plaintiff on the other hand was the successful party as the motor vehicle was restored to her.

[29] The general rule is that costs follow the event. That is, the successful party or the party that enjoys substantial success is entitled to costs from the losing party. Furthermore, where a litigant withdraws an action or defence, there should exist very sound reasons why such party should not pay the costs of the successful party.<sup>2</sup> In this matter, the plaintiff should be indemnified for the expenses to which she was unnecessarily put through by the first defendant's unworthy defence. There are no good reasons why I should deprive the plaintiff of her costs.

[30] It is on that basis that I ordered the first defendant to pay the plaintiff's costs.

<b>Judge(s) signature</b>	<b>Note to the parties:</b>
MUNSU,J	None
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>First Defendant:</b>
D Ogundiran Of Jacobs Amupolo Lawyers, Notaries & Conveyancers, Ongwediva	E Nangolo Of Sisa Namandje & Co, Windhoek

<sup>2</sup> *Standard Bank Namibia Limited v Bergh* (HC-MD-CIV-MOT-GEN-2019/00065) [2019] NAHCMD 102 (8 April 2019).