CASE NO. SA 20/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DRESSELHAUS TRANSPORT CC **APPELLANT**

and

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **RESPONDENT**

CORAM: Strydom, A.C.J., O'Linn, A.J.A.

HEARD ON: 2004/04/22

DELIVERED ON: 2005/05/11

APPEAL JUDGMENT

O'LINN, A.J.A.: I have divided this judgment into the following sections:

SECTION I: INTRODUCTORY REMARKS

SECTION II: THE MAIN ISSUES AS DEFINED IN THE PLEADINGS.

SECTION III: THE SPECIFIC LEGAL DUTIES AND POWERS OF THE NAMIBIAN POLICE AS PROVIDED FOR IN THE NAMIBIAN CONSTITUTION, THE POLICE ACT AND OTHER RELEVANT STATUTES.

SECTION IV: THE RELEVANT FACTS IN ADDITION TO THOSE IN SECTION I WHICH WILL BE REGARDED AS PROVED FOR THE PURPOSES OF THIS JUDGMENT, BECAUSE SUCH FACTS WERE EITHER COMMON CAUSE, OR NOT SERIOUSLY DISPUTED IN THE VIVA VOCE EVIDENCE IN THE COURT *A QUO* OR ARE JUSTIFIABLE INFERENCES DRAWN FROM SUCH FACTS.

SECTION V: THE QUESTION WHETHER THE NAMIBIAN POLICE FORCE AS AN INSTITUTION HAD A LEGAL DUTY TOWARDS THE PLAINTIFF AND THE DEFENCES AND EXCUSES PUT FORWARD FOR NOT FULFILLING THIS DUTY.

SECTION VI: WAS THE STORMING AND LOOTING AND ENSUING LOSS FORSEEABLE AND PREVENTABLE.

SECTION VII: THE ALLEGATION THAT SOME MEMBERS OF THE NAMIBIAN POLICE FORCE THEMSELVES TOOK SOME CONTAINERS OF BEER FROM THE OVERTURNED VEHICLE OF THE PLAINTIFF.

SECTION VIII: THE LAW OF DELICT APPLICABLE IN THE CASE.

SECTION IX: CONCLUDING REMARKS.

SECTION I: INTRODUCTORY REMARKS.

This is an appeal against a judgment of Levy AJ in the High Court of Namibia wherein that Court dismissed a claim by the appellant against the respondent for damages with costs arising from the looting by members of the public of a

consignment of 3744 cases of beer belonging to South African Breweries and transported by the appellant after appellant's vehicle had overturned on Monday the 21 August at approximately 05:00 at a four-way crossing on a public road at the outskirts of Tsumeb when two tyres burst when the vehicle turned a corner.

Appellant Dresselhaus Transport CC was cited as the plaintiff in the Court *a quo* and the Government of the Republic of Namibia as the defendant.

Mr Corbett appeared for Dresselhaus Transport in the court *a quo* as well as before us and Mr Goba appeared for the Government.

I will hereinafter, for the sake of convenience continue to refer to the parties as in the court a quo. At the time the action was instituted, the plaintiff was registered in Namibia as a close corporation, *inter alia* conducting the business of transporting goods. Plaintiff bore the risk for any loss sustained to the consignment and was insured against such loss by its insurer, Mutual and Federal Insurance Company. The latter Insurance Company in actual fact paid plaintiff for the loss in accordance with an agreement between insurer and insured pertaining thereto. The said insurer was thus entitled on the principle of subrogation to sue the third party, in this case the Government, in the name of the insured. The Court *a quo* found that insofar as plaintiff was liable as the carrier for the loss or damage of goods transported by it, it could claim damages for the loss from the party responsible for such loss.

The question of *locus standi* was not raised in the course of the appeal and nothing more need be said about that issue in this judgment.

SECTION II: THE MAIN ISSUES AS DEFINED IN THE PLEADINGS:

The plaintiff's case was set out in its particulars of claim as amended. No further particulars were requested on behalf of defendant and plaintiffs case thus remained as in its particulars of claim, except for a change in a minor respect during the trial relating to the damages, which was reduced from N$163 725.12 to N$134 254.60.

Plaintiff similarly did not ask for any further particulars to defendant's plea and the pleaded defence consequently remained as in the plea as amended in the course of the trial. The basis of plaintiff's cause of action against defendant was set out in the said particulars as follows:

> "5. Subsequent to this accident, members of the Police arrived and took charge of the accident scene. Members of the public also arrived on the scene and together with some members of the Namibian Police themselves, and in the presence of the Namibian Police wrongfully and unlawfully removed looted and/or stole the entire consignment of beer."

Plaintiff's particulars further proceeded:

"6. Despite being under a legal duty to do so, the members of the Namibia Police present at the scene of the accident failed or neglected to prevent such members of the public and some members of the Namibia Police themselves from removing, looting and/or stealing the entire beer consignment.

7. The conduct of the members of the Namibian Police aforesaid constituted a breach of their legal duty to prevent and/or protect the beer consignment from being removed, looted and/or stolen by members of the public and members of the said police themselves.

8. In and as a result of the said conduct of the members of the Namibian Police, the Plaintiff has suffered damages in the sum of N$163 725.12, being the value of the entire beer consignment. (This amount was reduced in the course of the trial to N$134 254.60 in the light of alleged expert testimony).

9. At all material times hereto, the said members of the Namibian Police were acting within the course and scope of their employment with the defendant…."

According to Mr Corbett, in argument before us, the allegation that some members of the Namibian Police also "unlawfully removed, looted and/or stole the consignment of beer was not pursued in the light of the evidence at the trial." There however was no formal amendment of the pleading in this regard in the course of the trial in the Court *a quo* and it is not clear what Mr Corbett meant by his remark. Be that as it may. What was clearly not nullified by this statement was the evidence before Court that some members of the police did take possession of some cases of beer and placed it in a police vehicle at some stage. The circumstances of this taking will be discussed further including and in conjunction with the evidence that a member or members of the police standing at the back of the stricken vehicle gave the crowd to understand that the consignment was insured and that they could consequently take it.

The defendant pleaded as follows:

> "5. Ad paragraph 5:
>
> The defendant admits that details of the Namibian Police attended the scene. The defendant further admits that members of the public also arrived on the scene. Defendant avers that the police took all necessary and reasonable steps to protect and secure the scene of the accident but were overwhelmed by the large group of persons who engaged in acts of public violence and looting at the scene. Save as

aforesaid, the Defendant denies each and every allegation therein contained as if specifically traversed.

6. Ad paragraph 6 thereof

6.1 The defendant admits that the members of the Namibian police had a duty to preserve the scene of the accident and to protect the motor vehicle and the goods but that such duty ceased and the police were relieved of such a duty when the plaintiff gave to its agent Rubicon Security power and authority to arrange for all security measures at the scene of the accident and when such written authority was furnished to the Namibian police.

6.2 The defendant specifically avers that it was plaintiff itself through Rubicon Security, its agent which prevented the police from guarding and protecting the motor vehicle and the goods and by further informing the police that Rubicon Security had been given sole responsibility to provide security for the motor vehicle and/or the property thereupon.

6.3 In spite of this members of the Namibian police took all necessary and reasonable steps to protect the scene and

> property thereupon but were overwhelmed by the large crowd of members of the public which was present at the scene and which looted the consignment. Save as aforesaid defendant denies each and every allegation contained therein as if specifically traversed."

The various allegations in the plea are in conflict with each other and vague and embarrassing as a whole. A request for further particulars would have been appropriate and an exception to the plea would have had reasonable prospects of success. As plaintiff's legal representatives had failed to take these steps, the Court *a quo* and this Court on appeal was faced with a confusing, inconsistent and vague and embarrassing defence throughout.

SECTION III: THE LEGAL DUTIES AND POWERS OF ALL ORGANS OF GOVERNMENT AND OF THE NAMIBIAN POLICE AS PROVIDED IN THE NAMIBIAN CONSTITUTION, THE POLICE ACT AND OTHER RELEVANT STATUTES.

1. The Constitution:

The following provision of the Namibian Constitution are directly relevant to this issue. Chapter 3 of the Namibian Constitution provides for the recognition of certain fundamental rights and freedoms, its protection and entrenchment.

In Article 16 it is provided:

> "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…."

Article 5 provides for the duty to protect the fundamental rights and freedoms. It reads:

> "The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of 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." (My emphasis added).

It is obvious that the Namibian Police Force as an institution, is an organ of Government and/or an agency of Government and thus has the constitutional duty to respect and uphold these fundamental rights, including the right to movable property, which would include the vehicles of plaintiff and the vehicle of the firm Family Choice and the consignment of 3744 cases of beer transported by the plaintiff.

It is similarly obvious that the members of public who gathered at the scene of the accident, had a similar duty to respect and uphold such fundamental right. The Courts function and duty to respect and uphold includes the specific powers set out in sub-articles (3) and (4) of Article 25 as follows:

> "(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicant the enjoyment of rights and freedoms conferred on them under the provisions of this Constitution, should the Court came to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.
>
> (4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases."

Article 115 provides:

> "There shall be established by Act of Parliament a Namibian Police Force with prescribed powers, duties and procedures in order to secure the internal security of Namibia and to maintain law and order."

2. The Police Act 19 of 1990:

This Act has been enacted in compliance with Article 115 of the Namibian Constitution.

Section 13 of the Police Act provides:

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.

3. One of the specific duties to be performed by traffic officers, who, by definition include a member of the Namibian Police Force, is laid down in Section 14(1)(g) and (h) of the said Road Traffic and Transport Act 22 of 1999 which provides:

(g) "In addition to any other powers, duties and functions as may be conferred or imposed on a traffic officer by or under this Act; a traffic officer may, subject to the provisions of this Act - regulate and control traffic on any public road, and give such directions as, in his or her opinion, may be necessary for the safe and efficient regulation of such traffic and, where he or she is of the opinion that a driver of a motor vehicle is impeding the normal flow of traffic on a public road, direct the driver to remove the vehicle from such road or to follow a different route with the vehicle. (My emphasis added)

(h) require of any person whom such officer reasonably suspects of having committed an offence under this Act or of being able to give evidence in regard to the commission or suspected commission of such an offence, to furnish his or her name and address and give any other particulars which are required for his or her identification or for any process"

The Namibian Police Force not only has the above legal duties, but the law provides adequate powers to enable the police to execute their functions and duties and provisions severely penalizing those who obstruct the police in the execution of

their duties such as those e.g. provided for in Section 15 of the Police Amendment Act and Section 18(1) of the Road Traffic and Transport Act 22 of 1999.

SECTION IV:

THE RELEVANT FACTS IN ADDITION TO THOSE IN SECTION I WHICH WILL BE REGARDED AS PROVED FOR THE PURPOSES OF THIS JUDGMENT, BECAUSE SUCH FACTS WERE EITHER COMMON CAUSE OR NOT SERIOUSLY DISPUTED IN THE *VIVA VOCE* EVIDENCE BEFORE THE COURT *A QUO*, OR JUSTIFIABLE INFERENCES DRAWN FROM SUCH FACTS.

1. Plaintiff's vehicle consisted of a mechanical horse and two trailers.

2. After the vehicle had overturned, it came to rest on its side in the middle island of the road facing in the direction of Ondangwa about 3 kilometres from the town of Tsumeb.

3. The load of 3744 cases of beer was secured on the bed of the vehicle with plastic covers and straps. Although the vehicle fell on its side and lay with the wheels on one side on the ground and the wheels on the other side in the air, the aforesaid load remained secure and none of the containers of beer or its contents appeared to have been damaged by the fall.

4. The driver of plaintiff's vehicle, Mr Griffiths, had sustained some shock but no serious injuries.

4.1 The said driver had no assistant driver or other assistants accompanying him before, during or in the course of he looting.

5. The Namibian police at Tsumeb were informed of the accident by Griffiths and a police officer was stationed at the scene of the accident at about 06:00 to secure the scene.

5.1 Later during the morning more officers were deployed to the scene.

6. Mr Weakly, the managing director and co-owner of plaintiff, requested Mr Oosthuizen, security manager of Rubicon, a security company at Tsumeb, to attend to the scene of accident and report back.

6.1 After Oosthuizen had reported to him and told him inter alia that the Namibian police were on the scene and he had consulted with the insurers, he instructed Oosthuizen to return to the scene to look after the load as well as the vehicle. He also arranged with a company referred to as "Family Choice" to send an interlink truck with two

trailers to the scene to load the consignment on their truck and take it to its destination.

6.2 Oosthuizen, then proceeded to the scene with four (4) security guards from his firm armed with “stoppers”, i.e shotguns which are designed to fire rubber bullets and teargas. The stoppers were loaded with rubber bullets but not teargas. Upon Oosthuizen’s arrival he deployed his guards strategically around the fallen truck while some police stood by. The police at that stage numbered about eight police officers.

7. Meanwhile, a crowd was gathering at the scene with people arriving as from approximately 08:00 on foot, in pick-ups and cars, apparently mostly from the Nombsoub residential area in Tsumeb.

7.1 Initially the crowd was peaceful.

7.2 However, Oosthuizen observed that later in the morning the mood of the crowd became aggressive. By the time Inspector Munalisa of the Field Force arrived at the scene, Oosthuizen informed him that the crowd had indicated that “they had come to take the beer” and that there were certain instigators who were shouting.

(Unfortunately when Oosthuizen was testifying about what was said by and in the crowd, the Court ruled that it could not allow such evidence because it was hearsay. This was clearly a misdirection because Oosthuizen was testifying about the aggressive mood and criminal intention of some members of the crowd and the nature of the incitement).

7.3 Inspector Munalisa talked to the crowd and some of them even told him that they had come to take the load. When he asked them to move back, they refused and even booed him and laughed at him.

7.4 Munalisa then called on his cellphone and/or walkie talkie for reinforcements from the Tsumeb Police Station.

7.5 Chief Inspector Simeon, first testified that when Munalisa talked to him he said that the situation was under control, but later admitted that the crowd was of concern to Munalisa and that it was Munalisa's opinion "that the crowd can storm the overturned truck to get the beer".

7.6 When Munalisa returned to the police station he also told Warrant Officer Jason, the second in command at the police station, that the number of cars and people were increasing at the scene and that the

number of police she had previously sent, was insufficient. She reported what Munalisa had told her to Chief Inspector Simeon and arranged for all available off duty officers to report for duty and to go to the scene. She left for the scene together with Chief Inspector Simeon and about 10 Field Force members.

7.7 Chief Inspector Simeon and his men mostly unarmed, but some may have been armed with pistols.

7.8 There were batons, teargas and the equipment to use it, such as firearms that could fire teargas, live bullets and rubber bullets available at the Tsumeb Police Station, but were not taken to the scene.

8. At all relevant times the police at the scene and personnel at the police station could easily communicate by cellphone or walkie-talkie and police personnel and other persons could move to and from the police station within a very short time.

9. Although the total manpower of the regular blue-uniformed police at Tsumeb did not exceed 30, the strength of the Special Field Force stationed in the Tsumeb area was not disclosed in the evidence.

9.1 It is a notorius fact that if additional manpower of regular police and Field Force was required for an operation at Tsumeb subsequent to the actual looting, those could at short notice have

been drawn from northern towns such as Otjiwarongo, Grootfontein, Outjo, Otavi and Ondangwa. Defence Force units were obviously also available in this northern area if the immediately available manpower at Tsumeb could not control a public violence situation.

9.2 At about 10:00 there were about 25 police persons at the scene but by then the crowd had grown to approximately 800.

10 At 09:58am on the 21st Anton Müller, the transport manager of plaintiff sent a fax to Rubicon Security with the following "security instruction: "You are hereby given instructions to arrange for all security measures at the scene of accident near Tsumeb where a truck of the abovementioned company is involved."

10.1 According to Mr Weakly, the managing director of plaintiff, the fax was sent by his transport manager Müller in accordance with the policy to give written instructions to enable the recipient to later claim payment for its services.

According to Weakly, the intent was to help with the security at the scene.

10.2 After receipt of the faxed instruction by Oosthuizen, he showed the fax to some of the police officers on the scene, notably Chief Inspector Simeon, to explain Rubicon's presence and function on the scene. He also informed Simeon that arrangements have been made for another truck to come and collect the load and to transport it to its correct destination.

10.3 There is a dispute between the parties as to the exact content of that explanation. Some of the police persons alleged that Oosthuizen told them that Rubicon will take charge of all the security and the police must "move over", and leave the securing and protecting of the vehicle and load exclusively to Rubicon security.

The allegations made by police witnesses were vehemently denied throughout by Oosthuizen.

10.4 It is not clear from the pleadings and the viva voce evidence whether the police left the scene of accident at any stage and if they did so, why they left and when they left.

According to defence counsel Goba, the police did withdraw from the immediate scene of accident at some stage and from then on – only controlled traffic.

11. The truck from the firm Family Choice arrived after 10:00, and before 11:00, but the precise time was not established.

This vehicle was also equipped with a mechanical forklift to facilitate the transporting of the load from the overturned truck to the Family Choice truck.

12. The driver of the Family Choice truck slowly moved to a position alongside the stricken truck whilst members of Rubicon moved in front and asked members of the crowd to stand back to enable the truck to accomplish its task of loading the load from the overturned truck onto the Family Choice truck.

The people from the crowd standing in the path of the oncoming truck actually gave way. It could be that this was done because those people were scared of being injured. The truck managed to park alongside plaintiff's overturned truck without bumping against any

pedestrian or injuring any person or damaging any vehicle or other property.

12.1 Once the Family Choice truck was in position and was on the verge of beginning with the operation of loading from the overturned truck onto the Family Choice truck, a person in the crowd jumped onto the Family Choice truck armed with a knife and slashed open the canvas and cut the straps holding the load secure, laying bare the load and ready for grabbing.

Persons in the crowd shouted and some hurled stones at the trucks and the members of the Rubicon Security and those attempting to protect the vehicles and the load. In the course thereof one of the stones hit Mr Lindholm, an employee of Family Choice, who was trying to protect the cab of the Family Choice truck. Lindholm was hit at the back of his head.

It caused an open wound and blood flowing from the wound onto his back. He however did not withdraw. Warrant Officer Jason was also bumped and pushed to the ground by the crowd storming the trucks but was uninjured. No other person from Rubicon Security or the police were injured.

Members of the crowd swarmed onto the vehicles, grabbed the cartons of beer and each carried away as much as he or she could handle. Some loaded their spoils on to vehicles, some onto bicycles and some took as much as they could carry. Some vehicles returned to the scene more than once to reload.

12.2 Initially members of Rubicon Security fired warning shots above the crowd and even rubber bullets at the crowd. It is uncertain whether or not any of the police had any firearms and had fired any warning shots. The two Rubicon dogs and the warning shots did not deter the mob.

12.3 When the stones were hurled and the safety of members of Rubicon and the police were endangered, the members of Rubicon withdrew from their positions around the trucks to positions in the vicinity. It is unclear if the police withdrew and if so, when and why.

13. It took about ¾ of an hour for the mob to complete the looting, the removal from the scene of accident of the whole of the consignment of beer of 3744 cases of beer valued after the accident at N$134 254.60.

14. It follows from the above facts, that the inciters and perpetrators and participants in the action committed the very serious crime of Public Violence, with Robbery, Theft and the disturbance and violation of the public peace and order as elements.

Public Violence is defined by the learned author Milton in South African Criminal Law and Procedure as the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions which are intended violently to disturb the public peace or security or to invade the rights of others". Under the new Namibian Criminal Procedure Act 25 of 2004, the crime of robbery in itself is so serious, that a sentence of life imprisonment without parole or probation or remission of sentence can be imposed on a person convicted of such crime in terms of Section 309 of that Act.

14.1 Members of the mob also contravened the following statutory provisions and thus committed the following further serious criminal offences:

(i) Section 83(1) of Road Traffic and Transport Act 1999:

"No person shall without consent of the owner or operator of a vehicle or any other person lawfully in charge thereof, or without reasonable cause –

(c) in <u>any way tamper with the machinery, accessories, or any part of such vehicle</u>

(d) <u>enter or get onto such vehicle</u>…….”

(ii) Section83(3):

No person shall –

(a) without lawful excuse tamper with any vehicle or any of its equipment or accessories,

(b) wilfully damage any vehicle or any of its equipment or accessories, or

(c) throw any object at any vehicle…….”

Section 106(2) provides that any person convicted of an offence of contravening the above sections, shall be liable to a fine not exceeding N$20.000 or to imprisonment for a period not exceeding five (5) years or to both such fine or imprisonment.

Insofar as the police claim that Chief Inspector Munalisa did order the crowd to stand back and they refused, Section 18(1) of the Road Traffic and Transport Act 22 of 1999 was contravened as well as Section 15 of the Police Amendment Act 3 of 1999 providing for a punishment of a fine not exceeding N$20 000 or for a period of imprisonment of 5 years or to both such fine and imprisonment for –

"Any person who –

(a) resists or wilfully hinders or obstructs a member in the execution of his or her duty or functions, or a person assisting a member in the execution of his or her duty or functions…"

15.1 The police did not perform the specific function as laid down and/or implied by Section 14(1)(g) and (h) the Road Traffic and Transport Act to timeously prevent an unduly large congregation of people and vehicles/at the scene of accident. In particular they did not:

(i) Cordon off the area of the accident with barrier strips.

(ii) Direct the drivers not to stop at the scene and to follow a different route with their vehicles.

15.2. During the period of actual looting at the scene, the crowd became progressively smaller as some of those who had taken or carted away what they can, left the scene.

(i) For those on foot, it would have taken some time to carry their spoils back to Tsumeb.

(ii) The persons who were part of the mob at the scene of accident, were vulnerable to roadblocks on their way back to Tsumeb, no longer being a mob and having the intimidating force of a violent mob. It follows that it was now easier for the police to stop, search or at least take down their names and addresses or arrest them and retrieve the stolen goods or some of it and prosecute the criminals.

(iii) If that was too difficult, the culprits could have been traced and arrested and the stolen goods retrieved during raids later that afternoon or that night or even during the following days and nights.

(iv) When some of the culprits sold cases of beer the next day in the streets of Tsumeb, action could have been taken against them but no action was taken.

16. During the period of 45 minutes that the looting at the scene was in process, Oosthuizen was able and did take down the numbers of vehicles into which the stolen goods were loaded.

16.1 He reported to a police officer on the scene that a police sergeant had taken some cartons of beer from the plaintiff's vehicle and placed it in the police vehicle which he pointed out and the registration number of which, was included in his list of registration numbers.

16.2 The list of registration numbers aforesaid was later in the week handed to officers of the Tsumeb Police for their attention and further investigations.

16.3 Although a police witness testified that a police sergeant was also instructed to take down the number of the motor vehicles on to which the beer was loaded and carted away, no such list was made available to the Court.

17.1 According to police witnesses, although they could hear some people inciting the crowd, they could not identify anyone and consequently could not arrest any of the instigators and ringleaders.

17.2 There was no explanation why the person who jumped on the vehicle with a knife and cut the canvas and straps and was thus an obvious ringleader, was not identified and not acted against in any manner at any stage.

17.3 The police also made no attempt at any stage to obtain the names and addresses of some of the ringleaders or any other participants, although some police witnesses testified that some people in the crowd were known to them.

17.4 Apart from Chief Inspector Munalisa's rebuffed effort to ask the crowd to at one stage to move backwards, after which he returned to the police station, no other identifiable step was taken to deter the mob during the actual looting at the scene. In particular:

(i) The police did not use loud hailers to warn the mob not to persist. They did not use batons, rubber bullets or teargas to deter and/or disperse the crowd and/or to enable them to arrest and charge the culprits.

(ii) The police at the scene were not even appropriately equipped and armed at the scene to use teargas and/or rubber bullets and/or batons to deter intended wrongdoers from committing serious

crimes although such equipment was available at the police station within easy reach and there were sufficient early warning that the crowd was growing and increasingly aggressive and clearly indicated that they intended to take the consignment of beer for themselves.

17.5 No roadblocks were set up to intercept those looters on their way back to Tsumeb.

17.6 No raids were launched in the hours, days and nights following to identify, take the names and addresses and/or arrest and prosecute the culprits and to retrieve any of the stolen goods.

17.7 It was alleged by witnesses for the Government and Mr Goba, counsel for defendant, that a police docket was opened pursuant to a report by Mr Oosthuizen, but no prosecution was ever instituted since the date that the crimes were committed. No reason was given why not.

17.8 No effort was made by the police to retrieve any of the stolen goods from the thieves and none were recovered except the few cases in possession of the police.

18. It is probable that there was no proper command and leadership amongst the police at the scene and that this was one of the causes of the police failure to take appropriate action. The most senior person at the scene of accident was Chief Inspector Simeon of the section of the police known as the Special Field Force (SFF) and who are according to Mr Goba, "mainly responsible for policing borders". Chief Inspector Simeon was reluctant to admit that he was the officer in charge at the time of the looting. He also admitted that he had no training in crowd control and it remained uncertain on his evidence whether he had any experience of controlling mob and mob violence.

19. The Namibian Police had failed -

19.1 to maintain law and order;

19.2 to investigate the serious crime of Public Violence, Robbery and Theft;

19.3 to prevent crime;

19.4 to protect property of the plaintiff;

19.5 to respect and protect the fundamental rights of the plaintiff.

SECTION V: THE QUESTION WHETHER THE NAMIBIAN POLICE AS AN INSTITUTION HAD A LEGAL DUTY TOWARDS THE PLAINTIFF AND THE DEFENCES AND EXCUSES PUT FORWARD FOR NOT FULFILLING THIS DUTY.

1. In the light of the legal duties provided for in the Namibian Constitution and the Police Act set out in SECTION III *supra*, it is obvious that the plaintiff is also a beneficiary of those legal duties, i.e. the plaintiff was also entitled to the benefit of the execution of all those duties and responsibilities placed on the Namibian Police as an institution and organ of Government and the State. The duties and responsibilities were not restricted and/or delegated to those policemen present at a particular scene of accident or scene of crime, but remained the responsibility of the Namibian Police Force as an institution and organ of Government and the State.

2. It follows from the above that the aforesaid duties and responsibilities could not be delegated to private persons and institutions and that the Police Force cannot absolve itself from exercising those functions, duties and responsibilities. It follows further that no private person or institution can legally instruct and/or order the said Police Force or any number of police persons not to exercise the aforesaid functions and not to fulfil the duties and responsibilities provided for by the aforesaid laws. As a matter of fact, any attempt by such private person or institution to do so, will amount to the offence of obstructing the Police Force in the execution of its functions and duties.

3. It follows that the defendant's plea that although the Police Force initially had a legal duty "to preserve the scene and to protect the motor vehicle and goods, but

that such duty ceased and the police were relieved of such a duty when the plaintiff gave to its agent Rubicon Security power and authority to arrange for all security measures at the scene of the accident and when such written authority was furnished to the Namibian Police," such plea was from the outset fatally flawed and could not constitute a proper and legal defence, even if the factual allegations therein were assumed to be correct for the purposes of argument.

The patent absurdity of this plea is obvious when one keeps in mind that property cannot be secured and protected, if the internal security of Namibia is not preserved; if law and order is not maintained; crimes and offences such as those pertaining to the property in the instant case are not prevented and/or investigated and the perpetrators not arrested and prosecuted and the stolen goods not retrieved.

It seems that both the defendant and its counsel, failed throughout to distinguish the case of private and contractual security arrangements for the protection of private property from the case where the police duties are laid down by the Constitution and statute law.

It is also obvious that the function and duty to protect property, includes the function and duty to recover and retrieve stolen property, particularly those

stolen and robbed in the police presence in circumstances amounting to rioting, mob violence and public violence.

It is shocking that once the thieves had removed their loot from the scene of accident, the Namibian Police washed their hands of the crime and allowed the thieves and robbers to enjoy their spoils undeterred, unpunished and in peace.

4. The defendant's further initial plea that it was plaintiff itself, through Rubicon Security its agent, which attempted to prevent the police from guarding and protecting the motor vehicle and the goods any further by informing the police that Rubicon Security had been given sole responsibility to provide security for the motor vehicle and/or the property thereupon, was similarly fatally flawed, even if the factual allegations of such attempt were regarded as correct for the purpose of the argument.

5. When defendant amended its plea during the trial to allege that plaintiff through Rubicon not merely attempted to prevent the police from carrying out its aforesaid functions/and duties, but actually prevented the police from doing so, it made the bad original plea even worse and even less credible.

5.1 The further allegation in paragraph 6.3 of the plea adds further ambiguity to the already inconsistent and ambiguous plea by stating:

"In spite of this, members of Namibian police took all necessary and reasonable steps to protect the scene and property and to assist Rubicon Security but were overwhelmed by the large crowd of people which was present at the scene and which looted the consignment…"

The allegation that Plaintiff, through Rubicon Security prevented the police from guarding and protecting the motor vehicle and its load is in conflict with the allegation that the police nevertheless took all necessary and reasonable steps to assist Rubicon Security but were overwhelmed by the large crowd. The questions arise –

(i) if the police were prevented by plaintiff and its agent, how could they still take all the necessary and reasonable steps to protect the scene and property.

(ii) If plaintiff prevented the police and was thus the cause, how could it be alleged in the same breath that the police were overwhelmed by the large crowd, and that was then the cause of the police being unable to fulfil their functions and duties to protect the scene and property.

5.2 The only mitigating factor in this absurd pleading and the attempt to justify it at the trial, was that Mr Goba conceded in his argument on

appeal that "the duty was however revived when the crowd stormed the truck and engaged in stealing from it in the presence of the police." This concession was in line with the Court a quo's finding on this point.

The question then arises: What steps were taken by the police after their duty revived?

Mr Goba in his cross-examination of Oosthuizen put the "withdrawal" as follows:

"At the stage when you showed the police officers the fax and they made this decision to withdraw their officers to control traffic only and leave you and your company to secure the truck and its load, the crowd at that stage had not stormed the truck."

The evidence of Warrant Officer Jason was that when she was bowled over by the rushing crowd, she was instructed by Chief Inspector Simeon to go to the approaches to the scene with some other traffic officers and control traffic.

As Mr Corbett pointed out, Warrant Officer Jason and her colleagues were now positioned with their backs towards the vehicles where the looting was in progress and the adage of “hear no evil”, “see no evil” and “speak no evil” was now applicable.

The Court *a quo* held that the duty of the Police to protect the overturned vehicle and the consignment was revived when the actual looting began.

If it is correct as alleged by Police witnesses that the Police withdrew when Rubicon allegedly took over the protection of the vehicle and consignment, then the Police duty to protect such vehicle and consignment revived as found by the Court *a quo*, when the looting began. The defence that the Police took all reasonable and necessary steps must also fail, if it is assumed, as alleged by them, that they withdrew even before the actual looting began.

6. The defendant, its witnesses and its counsel were unable throughout the evidence and in argument to specify the so-called necessary and reasonable steps they had taken. I have set out in SECTION (IV) the steps they should have taken and had failed to take and there is no need to repeat it.

7. It is clear from defendant's plea that defendant and its counsel, as well as the

Court *a quo* in its judgment, failed to appreciate the fact that the duty and function of the police did not begin and end with the phase when the crowd rushed towards the vehicles and allegedly overwhelmed the police, but extended over the following related but distinct phases:

Phase I: The period beginning with the taking of control of the scene of accident until the beginning of the looting.

Phase II: The period of about 45 minutes from the beginning of the looting at the scene until the looting at the scene was complete.

Phase III: The period during which the stolen goods were actually removed from the scene and taken to the Tsumeb town and residential area and in some cases, to other Namibian destinations.

Phase IV: The period following upon such actual removals from the scene of accident which continued for an indefinite period, within which the crime of theft continued by virtue of the legal principle that "theft is a continuing crime" – and a period within which the criminals who had committed the grave crimes of Public Violence, Robbery and Theft, had to be traced and prosecuted and efforts made to recover all, or at least some of the stolen property of the plaintiff. Although an effort was made to excuse the failure to take any effective steps at the time of the actual storming and

alleged overwhelming by the mob, no real effort was made to explain and excuse the failure to take reasonable steps during the preceding period or phase to prevent such a situation developing and for not taking any reasonable steps in the ensuing period or phases.

8. The case for the defence was one of absurd and pathetic excuses and an attempt to place the blame on Rubicon Security, alternatively on unforeseen mob action which overwhelmed them.

How and why the police allowed 80-100 cars to come and go at the scene of accident and to stop and park within meters from the overturned vehicles, and how and why they allowed up to a 800 people to also congregate in the immediate vicinity, was not and could not be explained.

8.1 Mr Goba's argument that the people of Namibia have the fundamental right of freedom of movement after Namibian independence and that this had to be respected by the police, adds insult to injury and is an absurdity not expected to be put forward in the highest Court in Namibia by a representative of a noble and respected profession and of the Government of Namibia.

This is obvious because the fundamental freedom to "move freely throughout Namibia" provided for in Article 21(1)(9) of the Namibian Constitution, is

subject to subarticle 21(2) and further obviously subject to the fundamental rights of others and the functions and duties of the police contained in the Police Act and specific provisions of the law herein referred to ensure safety at a scene of accident.

Mr Goba even suggested that the police was faced with the dilemma of choosing between protecting beer and property and protecting the freedom of the people and their right not to be killed or injured. Again the obvious answer is that when the "people" disturb the public order and commit heinous crimes such as theft on a massive scale, robbery, and public violence, strong action becomes necessary to protect the innocent against their deeds and to prevent the State and society from sinking into a state of disorder, insecurity and criminality where the criminal reigns.

8.2 It remained unclear on the police evidence whether or not any of them were at least armed with side arms (revolvers and pistols) at the scene of accident. But at any event, on the assumption that they had, it was said by Warrant Officer Jason that those in charge could not order or allow these police colleagues who had side - arms to fire even warning shots <u>above the heads of the mob</u>, because "we were afraid that our colleagues <u>may not be able to use live bullets properly and they may have injured people at the scene</u>…".

If the police used force to deter the mob and prevent the serious crimes, they would have been protected from liability for damages for injuries to persons by well-known legal principles as set out in the decision in *Chetty v Minister of Police*[1]. In that decision it was held that:

1. There must have been reasonable grounds for thinking that because of the crowd's behaviour there was such a danger, (commenced or imminent) of injury to persons or damage to or destruction or loss of property as to require police action.

   Whether or not such a situation existed must be considered objectively, the question being whether a reasonable man in the position of the police would have believed that there was such a danger.

2. The means used in an endeavour to restore order and avert such danger, and resulting in one or more members of the crowd being injured, were not excessive having regard to all the circumstances, such as the nature and extent of the danger, the likelihood of serious injury to persons, the value of the property threatened, etc.

[1] 1976 (2) 450 (N.P.D)

8.3 Police witnesses stated that they wished to arrest the agitators in the crowd, but they could not identify them. But when an obvious ringleader jumped on the Family Choice vehicle and the overturned vehicle of plaintiff and slashed open the canvas and cut the straps securing the load with a knife, the police on the scene must have been able – if they were around and not asleep – to identify at least this criminal – to attempt to deter him, and/or attempt to arrest him at the time. But the dereliction of duty becomes even more pronounced when one considers that in the days and years that followed, the police failed to take any steps to bring this particular criminal to justice for the heinous crimes committed by him. This failure supports the inference that some members of the police present at the scene tacitly approved of the looting.

8.4 Oosthuizen gave the police a list of the numbers of vehicles that transported stolen goods from the scene. They raised no excuse for not immediately acting on this information. But then Chief Inspector Simeon testified that he had given a police sergeant instruction at the scene itself to take down the numbers of vehicles carrying the loot. Mr Goba explained that the purpose of this instruction was that “some of the thieves were from the Tsumeb community and could be followed up later during further investigations.” Mr Goba also stated that the police “observed and noted the features of the perpetrators for a future investigation”. Now if this is so, the police was in a position to act immediately after the crowd had dispersed, against the owners

of the said vehicles and to attempt to recover the loot. But no action was ever taken and there was no explanation for it.

8.5 When a police officer was asked why no arrest was made at the scene of accident, he replied that he did not want to risk injury to the police.

This notwithstanding that the Police Force as a professional force has certain very onerous duties of protecting members of the society and inherent in such a profession is that certain risks must be taken when duty calls. In this case the police did not even attempt to make one arrest. If they did and individuals in the mob obstructed them and assaulted them, the police may have had a little more credibility for their excuses put forward for not taking elementary, reasonable and available steps.

8.6. The excuse by the defendant relied on to prove that the police have been prevented from doing their duty – is a socalled written authority by officials of plaintiff to Rubicon Security contained in a faxed message and also furnished to the Namibian Police, which read as follows,

"You are hereby given instructions to arrange for all security measures at the scene of accident near Tsumeb where a truck of the abovementioned company is involved".

(i) In my view the words – “to arrange for all security measures at the scene of accident”, is a far cry from the allegation in paragraph 6.2 of the plea that: “It was plaintiff through Rubicon Security its agent which prevented the police from guarding and protecting the motor vehicle and the goods any further by ‘informing the police that Rubicon Security had been given sole responsibility to provide security for the motor vehicle and or property thereupon”.

The words “to arrange for all security measures” could mean and include: to report the accident to the police; to inform them of any issue and circumstance that they should know; to request the police to assist; to inform the police that they will be on the scene to represent the plaintiff; help the police to protect and secure the vehicles and load; arrange for the load to be reloaded from the stricken truck onto a truck from the firm “Family Choice” to be then taken by the “Family Choice” truck to its intended destination.

(ii) To supplement the shortcoming in the fax, for its defence, the defendant and its counsel attempted in the evidence to take the allegation much further by alleging that when Oosthuizen of Rubicon explained the fax and their presence to Chief Inspector Simeon and Warrant Officer Jason, he said that “Rubicon had been given sole responsibility for the truck and its consignment by the plaintiff; that

he had arranged another truck to come and collect the goods and cart them away and that the "police should move over'", i.e remove themselves to make place for the Rubicon personnel.

The defence witness Warrant Officer Jason even testified that Oosthuizen said: "There is no need for your police presence. Could you please take your people back because the responsibility is on my shoulders".

(iii) When Simeon was cross-examined and asked whether Oosthuizen had said anything about the role of the police at the scene, Simeon answered in the negative but later again changed his evidence.

(iv) Oosthuizen, an experienced former policeman, vehemently denied the allegations that he had told the police that he had sole responsibility and that they must please leave. He said that he had explained to the police that Rubicon Security was there to represent Dresselhaus Transport to make the necessary security arrangements and to assist the police, to arrange for the arrival of the "Family Choice" truck and ensure that the consignment of beer is transferred from the overturned truck to the Family Choice truck.

He said that his security firm Rubicon Security had on previous occasions cooperated with the police and that he and the firm had a good relationship with the police. He referred to a previous incident in 1995 when he and his firm cooperated with the police at a riot when a crowd was successfully dispersed by *inter alia* using teargas at the premises of the Tsumeb Corporation Mine at Tsumeb.

The police allegation and that of Mr Goba appear to be grossly exaggerated and improbable. Why would Oosthuizen with a few men and a great responsibility have the audacity and stupidity to tell the police with all its available manpower, facilities and resources and functions and duties provided for by the Constitution, Police Act and other statutes, to "move over", "remove themselves from the scene" "leave all the security to his firm" etc, when he had told Chief Inspector Munalisa when Munalisa arrived on the scene, that the crowd was "aggressive" and has indicated that "they intend to take the beer."

(v) The Court *a quo* did not make a credibility finding on this or any other issue except for its commentary that:

> "In the witness box he gave the impression that he was resentful of the police and not objective."

No reference was made in the judgment to incidents and parts of the evidence to support this observation. However, if Oosthuizen was resentful, that would only have been the natural reaction of any reasonable person in the circumstances and should not affect his credibility. In my respectful view, the Court a quo also misdirected itself in this regard.

8.6 The excuse that the family choice truck drove straight at the crowd and this angered the crowd and caused the eruption.

This defence which was not raised by defendant in its plea but raised by Mr Goba in his cross-examination and argument, appears to be an act of desperation. The "Family Choice" truck successfully moved into position alongside the overturned truck to transfer the load from the overturned truck to the said Family Choice truck. This manoevre was carried out without injuring any member of the crowd.

The driver of the truck was merely executing his contractual duty and did not interfere with any right of members of the crowd. The alleged driving "straight at the crowd" was an exaggeration by Mr Goba and no excuse for the mob's behaviour.

Yes, members of the crowd may have been angry but why? Is it not obvious that in view of their criminal intention to loot the consignment of beer, they now realised if they don't go over to drastic action to do so, the opportunity would be lost because of the imminent removal of the potential loot from the scene of accident to a safer haven. They then used the opportunity given by the scoundrel who cut the canvas and straps securing the load.

8.7 <u>The excuses for not using teargas</u>

(i) The facts and circumstances set out in this judgment of the progressive development of a congregation of many motor vehicles and a large crowd at a scene of accident on a public road and this crowd becoming gradually unruly, aggressive and clearly indicating an intention to loot property valued at N$160 000.00 which was secured on an overturned truck, notwithstanding the presence of the police and personnel of a security firm, justified in my respectful view the use of teargas. It was unreasonable not to have prepared for the use of teargas and not to use it.

In this regard evidence was given by an expert witness such as Mr Oosthuizen, a former policeman with long experience and Inspector Jason, who had previously been part of the police and security company personnel

who together had used teargas successfully to disperse an illegal crowd at TCL Mining Corporation at Tsumeb.

Mr Oosthuizen testified that in his opinion the use of teargas was justified. The point was also made that the use of teargas could not result in serious injury", that the scene of accident was in an open space where a dispersing crowd would have the open veld to move into. There was also no possibility of a stampede wherein people could be injured.

Even if there could be argument about the stage when teargas should have been used, it cannot be doubted that once the aggressive mood and criminal intent of the crowd became clear, the use of teargas was justified. This justification was strengthened where the gathering developed into a violent mob committing Public Violence, Robbery and Theft on a very serious scale. Failure to use teargas at this and subsequent stages was in itself negligence. Obviously, there were several other reasonable steps that could have been taken at the various stages as indicated in this judgment and nothing said in this section about the use of teargas, is meant to excuse the failure to have taken the various steps discussed at the various stages or phases.

(ii) The learned judge *a quo* held that "it was too late to leave the scene to fetch teargas or rubber bullets and Mr Oosthuizen had clearly demonstrated that rubber bullets and dogs would not deter the crowd."

I cannot agree with this argument, *inter alia* for the following reasons:

One could not expect two dogs to deter the crowd if the police force itself have brought no dogs, were mostly unarmed, had no rubber bullets and no gas, remained passive throughout and at no stage showed the crowd that they are determined to take appropriate and drastic action if the crowd attempted to take the consignment of beer. The learned judge should have appreciated that the police, who are by the Constitution and the Police Act mandated to maintain law and order, preserve internal security, prevent crime, protect life and property and investigate crime, would be in a better position to act effectively and make an impression on the crowd.

The <u>argument that it was too late</u> to fetch teargas:

The question then arises:

Why did they not fetch it earlier e.g. when Chief Inspector Munalisa returned. Considering that they could instantly communicate with the police station and move to and from within minutes, why would they have had any difficulty to equip some of their personnel at short notice with teargas.

(iii) The learned judge said that:

> "the crowd consisted of men women and children and many of these people were probably innocent! There is no justification for contending that there was a common purpose amongst the members of the crowd to steal beer."

The judge on the next page of his judgment said that the police was overwhelmed by irresistible force. The question then is if many in the crowd were innocent, what and who in the crowd constituted "the irresistible force"? There must have been a large number of the crowd who actively participated if one considers that 3744 cartons of beer were carried off and removed in about ¾ of an hour.

Surely at least those who stormed towards the vehicles and had a criminal intent, made up a large part of the crowd and all those who in any way associated with those that stormed, robbed and stole the beer and committed public violence, by their association with the others, were a proper target for rubber bullets and teargas. If some of the crowd were innocent, they had no reason to stay at the scene for hours and to associate by their continued presence and even after warning shots were fired, with those who were the agitators and the activists. If in such a situation the police use rubber bullets and teargas, any so called "innocent" civilians who suffers some discomfort, must blame him or herself. If such a possibility should prevent the Namibian police from using rubber bullets and teargas, there will be no deterrent for mob violence, public disorder and crimes such as robbery, theft and public violence.

I regret with respect that I have to reject the argument put forward by the learned presiding judge in the Court *a quo* also in this respect.

(iv) Mr Goba's written submission before us that the Court *a quo* found that "the use of teargas under such circumstances would have amounted to an excessive use of force" is incorrect. The Court never made such a finding as appears from my above quotation from the judgment.

SECTION VI: WAS THE STORMING AND LOOTING AND ENSUING LOSS FORSEEABLE AND PREVENTABLE

1. The point of departure for this discussion is that the Namibian Police Force had in fact failed to execute its functions as laid down in the Namibian Constitution and the Police Act as stated in paragraph 19 of SECTION (IV) supra.

2. The Court *a quo* found:

> "On the evidence placed before me, I find that the Namibian Police had no reasonable grounds for anticipating a riot and theft of beer."

The Court *a quo* stated further that it was neither foreseeable by Oosthuizen nor the police.

In my respectful view the Court *a quo* misdirected itself in this regard.

2.1 In dealing with the argument that the police should have foreseen the eventuality of the crowd storming and looting, the learned presiding judge however said at one stage:

> "If Mr Oosthuizen with his credentials did not foresee this eventuality and dispensed with police assistance, there is no reason why the police should have foreseen the sudden change in the mood of the crowd. It ill-behoves Mr Oosthuizen, who categorically rejected and scorned police help, to cry 'foul'".

For this finding, the learned judge *a quo* did not refer to and consider Oosthuizen's vehement rejection of the allegations made by some police officers that he had told them that his firm had sole responsibility and that the police must move over or even remove themselves from the scene. The learned judge also did not analyse the probabilities mentioned above. A reading of Oosthuizen's evidence gives the impression that he was experienced, knowledgeable, and clear and did not contradict himself on any issue. I cannot say this from a reading of the evidence of

State witnesses such as Chief Inspector Simeon and Warrant Officer Jason who was a Warrant Officer at the time of the incident but since then promoted to the rank of "inspector".

It seems that another witness on the plaintiff's side was also ignored. So e.g. there is no mention of the evidence of Griffiths, the driver of the Dresselhaus vehicle, who said that when Rubicon arrived on the scene they explained to him that they are there to assist the police in securing the truck and its load.

In my respectful view the Court misdirected itself in this regard.

2.2 The Court ignored the uncontradicted evidence by Oosthuizen that the crowd was aggressive and clearly indicated beforehand that they had come to take the beer; that he told Chief Inspector Munalisa so when he arrived on the scene; that Chief Inspector Munalisa then called for reinforcements. This evidence was not contradicted by any defence witness and was indeed common cause.

2.3 Chief Inspector Simeon contradicted himself on many occasions. At one stage he said that "the situation was under control". Under cross-examination Simeon conceded that the crowd was of concern to Munalisa. On the question – "why would it be a matter of concern if there were many people at the scene? What could the possible consequences be? Simeon

replied: "The people can storm the overturned truck to get the beer. It was his opinion." "So he expressed an opinion at that stage before you left the police station that he had a concern that the people could storm the truck and take the beer is that correct? That's correct My Lord."

2.4 Inspector Jason said in regard to her testimony that the public were insulting and harassing the police:

Question: "You said they were insulting and harassing you. What precisely were they doing or saying?

"Answer: "Just to say – 'you fucking police' – 'daai bier is nie jou ma se bier nie, is nie jou wat nie" that the type of words…-

Questions: "Were they indicating why they were angry or aggressive?"

Answer: "No according to them they are mentioning that that is not our mothers beer, we must not control them and such type of words."

Questions: "Can I assume that they were angry because you were protecting the beer and they wanted to take the beer – is that right".

Answer: "I think so."

2.5 Chief Inspector Munalisa was not called by the defendant as a witness. No explanation was placed on record why not. In the absence of an explanation the inference must be drawn that he could not support the defence case.

3. The Court *a quo* nevertheless further argued:

(i) "For four hours, except for one or two persons, the crowd had not been hostile or threatening…." This alleged fact was not a fact and not supported by the evidence.

(ii) "Was there reason to believe that a crowd of approximately 2000 average Namibians, men women and children would suddenly be thieves?"

This was another misdirection by the Court *a quo*.

3.1 There was no credible evidence that the crowd was 2000 at any stage. The Court itself found that at the critical time there was about 800 people.

It must be obvious that many in the crowd that congregated, were not standing there for hours out of curiosity to see the overturned vehicle. And obviously they did not all stand there for four hours. Nevertheless, the fact that the crowd was gradually growing on a working day and a day when most children will be at school, indicated

that most of those who arrived, were not there out of curiosity and certainly were not women and children.

Mr Goba was however nearer to the mark when he at one stage ventured the following explanation:

> "The crowd suddenly increases we don't know why – presumably somebody went spreading in the township – we don't know. --- presumably words spreading in the township, there's probably – we're going to have a feast today, there's a truck fallen – there's a lot of beer and people start streaming, you know…"

Mr Goba's presumption of the aforesaid probability, makes sense. But if this was the probable cause of people moving to the scene of the accident, it means that they had the intent to loot the fallen truck and its load of beer to have a feast. It also follows that those who went to the scene did not go out of curiosity, but because they wanted to steal and thus they were not innocent people exercising their freedom to move freely around in Namibia, but intent on committing a serious crime or crimes because of their thirst for free beer.

3.2 Mr Goba further contended:

> "With the passage of time the crowd which was mainly made up of women and children and some males increased…"

Mr Goba here distorted the evidence. The pages of the record referred to does not contain such evidence. No witness testified to that effect that the crowd consisted mainly of women and children. It seems that this distorted statement about "mainly women and children" was put forward to justify the argument that teargas or other violent means could not be used because the crowd was mainly made up of women and children.

Later on, Mr Goba further embroidered on his submission when he emphasized that there were "pregnant woman and babies" in the crowd. Mr Goba however admitted at one stage: "Among the crowd certain murmurs were heard demanding to be allowed to take the beer…" This supports the fact that the demands were clear at an early stage – long before the actual storming. But then Mr Goba continued: "…on the basis that it was damaged, hence not of much value to the owners and insured." This excuse again does not appear on the pages of the record and is clearly an excuse offered by Mr Goba in mitigation of the mob's scandalous behaviour.

Mr Goba continued:

> "The murmurs turned to shouts and insults by some instigators among the crowd such that at a later stage Chief Inspector Munalisa was booed when he addressed the crowd at about 10:00."

There was not a crowd of about 2000 peaceful Namibians who were peaceful for four hours and then suddenly erupted into a violent and criminal mob, robbing, stealing and committing the grave crime of public violence. There was rather a gradual build-up to that stage which was clearly observable by the police and Rubicon Security and was in fact observed.

3.4 The storming and looting was foreseeable if not from the very beginning – then at least from an earlier stage when much more effective steps could have been taken to prevent it. But even if it could not have been prevented *in toto*, the progressive build-up of a crowd and vehicles at the scene could have and should have been prevented; effective steps could have been taken to disperse the crowd at an earlier stage or at least act against the perpetrators by arresting and later prosecuting them and recovering all or most of the stolen goods at a later stage – once the mob had dispersed. As previously indicated, the Court *a quo* directed all its attention to the stage when the crowd stormed the vehicles and the looting began, and the question whether the storming and looting was foreseeable, instead of focussing and evaluating

the events during the various phases or periods discussed in SECTION V, paragraph 7 supra.

Even if the storming and initial looting was not foreseeable, then it was at any event foreseeable that in the phases that followed, the culprits would go free and the loot, the property obtained by the culprits by means of theft, robbery and public violence, would be irretrievably lost to its owners or those that legally acquired their rights, unless effective and reasonable steps were taken by the police in terms of the Constitution and the Police Act to prevent the loss.

4. Was the loss preventable.

The Court also found that the police could not prevent the loss because they were faced by "*vis major*" or "irresistible force". I with respect, cannot agree with this finding in the light of the facts, circumstances and reasons set out in the various sections of this judgment. Simply put, in my respectful view, there was no irresistible force confronting the Namibian Police at any stage.

Alternatively, the Police Force cannot shield behind such an excuse when it failed to take effective and reasonable steps beforehand to prevent such a situation to develop when there were ominous signs of such an eventuality.

Furthermore, even if there developed an “irresistible force” which applied at a particular moment or stage, that is no excuse for not taking reasonable steps to arrest and prosecute the criminals and to recover the property or part of it in the stages immediately following when there was ample opportunity to do so. At no stage did the police explain why they were unable to retrieve any of the property during those stages or phases.

4.1 If the Namibian police was hampered by lack of training or education or scarcity of vehicles and equipment, or lack of leadership qualities, or uncertainty about who was in charge at the scene of accident – which became a scene of crime, such problems must be urgently addressed, but does not afford a lawful excuse for the Namibian Police as an institution, not to have properly executed their legal functions and duties towards the plaintiff at the scene of accident before, during and after the heinous crimes were committed.

SECTION VII: THE ALLEGATION THAT SOME MEMBERS OF THE NAMIBIAN POLICE FORCE THEMSELVES INCITED THE CROWD AND TOOK SOME OF THE CONTAINERS OF BEER FROM THE OVERTURNED VEHICLE OF THE PLAINTIFF.

This grave allegation that beer was taken by the police from the vehicle itself was first made by Griffiths, the driver of the overturned vehicle and later also by Oosthuizen of Rubicon Security.

The allegation that policemen who were standing at the back said that the stock was already insured and the people could take it was made only by Oosthuizen in his evidence.

Griffiths specifically testified that he saw police as well as people with company cars like that from Telecom off loading beers from the overturned truck after the canvas was cut and the straps severed, and he saw the police take the boxes of beer off, loaded by then and load it into a police vehicle with which he was at some stage given a lift into town to get a tele-card.

Griffiths furthermore testified that he subsequently saw and heard a traffic officer warning a regular police officer “that you will be in trouble loading these beers on the police van.”

Notwithstanding the clear allegation made by plaintiff in its particulars of claim that the police took containers of beer from the overturned vehicle and placed it on a police vehicle, Mr Goba now commenced a confusing line of cross-examination. He asked:

Question: "So if I put it that the beer that was found on the police van was placed there by one of the gentlemen who had been with you when the police first came…" Answer: "I don't believe it Your Worship."

On further questions Griffiths explained that the only persons with him after the accident were his nephews who came to visit him at the scene of the accident and they were school children – they don't drink beer and they did not put cases of beer onto a police vehicle.

Goba further put it to the witness that those cases of beer were removed from the police van on the instructions of a police officer. That was not contested.

The presiding judge then started putting a new possible defence to the witness as follows:

> "Now you testified that a policeman put cases of beer into a police car. Sometimes the police take charge, look after damaged property and put it into their vehicles to protect it. Is it possible that this policeman who put it in his van in the car was putting it there in order to protect it? Answer: "That I couldn't say Your Lordship."

It should be observed that up to that stage Mr Goba had not raised that defence at all.

Oosthuizen's clear and unambiguous evidence in this regard was as follows:

> "You've testified the crowd was stealing the beer, did you see any police person on the scene trying to prevent this happening?" Answer: "Your Lordship, after we withdrew, I have seen that nobody was rejected from taking the stock. As we moved to the back of the car, (meant overturned vehicle) I saw a police officer jumped on the truck and took, a sergeant jumped on the truck and make use of the opportunity and take himself some beer. From the police that were standing at the back said that the stock was already insured and the people can take it. The beer that was taken by a police officer was then put into what we call a Venture with number POL 4468. I went to Chief Inspector Ashipala who stood with Chief Inspector Simeon. Chief Inspector Ashipala was dressed in civilian clothes. I told him that the beer were loaded on a police van. We then together went with him to the police van. I showed him where the beer was hidden under a police uniform – a blue police uniform. At that moment there were two police sergeants with one female police. We moved back where Chief Inspector Simeon and Inspector Ashipala was standing and discussing. Chief Inspector Simeon informed Inspector Ashipala that he cannot send his officials into the crowd with the fact that he's afraid they will get injured or hurt…."

On further questions Oosthuizen said that beer was not removed from the police vehicle in his presence. On questions as to why the beer was placed in the police vehicle in the first place Oosthuizen said:

> "What I can say is that people took things as I have said from the truck for their own benefit. So the police even went on top of the truck, get themselves the beer for themselves…."

> "After I finished the discussion with Chief Inspector Simeon and Inspector Ashipala, I personally took the task and go about writing down all numbers and number plates of the private cars which were loaded with this beer."

In cross-examination Mr Goba put it to Oosthuizen that:

> "I am instructed that the driver of the motor vehicle which overturned, Mr Griffiths had been with another gentlemen on the truck and towards the end of all the looting procedures this man approached a police sergeant who was standing at this particular police vehicle with his bags and this case of beer and requested the police to give him a lift into town since he didn't have transport and he told the police, he

> was asked about the beer that he had with him and he said that the beer had been damaged and was written off so there was no problem with him taking the beer with him. Do you know anything about that?"

Oosthuizen wanted clarification and asked: "Is it the person with Mr Griffiths or Mr Griffiths himself?" Answer by Goba: "The person with Mr Griffiths." Answer by Oosthuizen: "I don't know such a person – My Lord."

Goba now put to Oosthuizen a new and confusing version quite different from that put to Griffiths. Question:

> "Now Mr Oosthuizen – my instruction are and evidence will be led in this regard if necessary, that <u>in fact as the crowd was taking the beer from the truck and placed on the ground and the police would in the process attempt to take the beer and keep it themselves but then other people in the crowd would came and take the beer from the police as well. What do you say about that?"</u>

Oosthuizen appears to have misunderstood what was now put to him and answered: "……it is <u>possible</u> that the beer was put down there by the police and it is possible that the people grabbed it and walked away with it…"

What Oosthuizen answered was consistent with his former testimony that a police person offloaded the beer from the truck and was not an admission that the police may have taken beer off loaded by members of the crowd and put by these members on the ground, then taken by the police and then retaken by members of the crowd.

What Goba here put to Oosthuizen is fundamentally different from what was put to Griffiths. One wonders why, if "other people in the crowd would come and take the beer from the police" the said police could not at least have attempted to arrest such people or resist such retaking.

And now at last, Mr Goba moved over to the line previously suggested by the learned judge as a defence. Goba asked:

> "Furthermore Mr Oosthuizen is it not possible that this beer might have been placed in that police van in order to secure it?" Answer: "My Lord if I do take things and I put it in a police vehicle for security purposes then I would not cover it with police jackets etc."

It is noteworthy that Mr Goba continued with this vague form of cross-examination asking about whether this or that is possible, without once putting a firm proposition such as e.g.

> "Chief Inspector Mr X will testify that he would deny that the beer was taken from the overturned vehicle! That it was taken from the ground whereon members of the crowd had placed it. That they put it in a police vehicle to secure it!"

The possibility suggested by Goba that the boxes of beer was put in the police vehicle to protect it from the looters is obviously also in direct conflict with his first effort where he tried to place the blame on an alleged colleague of the driver Griffiths who according to Goba, actually placed the beer in the police vehicle.

In conclusion Mr Goba put another "possibility" to Oosthuizen as follows:

> "I just want to find out from you Mr Oosthuizen is it not possible that, in fact what you are telling the Court about this beers is something that you heard from the driver of the motor vehicle and not what you yourself, personally saw?" Answer: "My Lord I have seen it personally with my own two eyes."

Mr Goba later in his cross-examination stated that Ashipala actually spoke to a sergeant about the beer in response to the report made by Oosthuizen to him. It is

necessary for me to observe that the cross-examination by Mr Goba on this crucial issue was a fishing expedition and did not constitute proper cross-examination. There was also no proper rebuttal by the witnesses later called by the defence.

It is also important to note that Mr Goba did not take issue with Oosthuizen on his other grave allegation to the effect that some policemen standing at the back of the truck even justified a taking by the public on the ground "that the stock was already insured and the people can take it." Not only was no member of the public prosecuted but no police person was prosecuted, notwithstanding the complaint.

In the circumstances the evidence by Griffiths and Oosthuizen were not properly contested and should have been considered and accepted by the Court *a quo*.

According to the Court *a quo*, Inspector Jason testified that she saw members of the police remove cases of beer from members of the crowd. "While there is no evidence to link these cases to the cases of beer Mr Oosthuizen saw the police put

into a police vehicle, he in any event demanded that the beer be removed from the police vehicle. If these cases of beer had been taken into police custody, where were these cases to be put if they were not to be put into a police vehicle? Members of the crowd swarmed over the trailers and it appears as if a police vehicle would have been a good place to put such cases."

The learned judge *a quo* here failed to make any finding as he should have done on the uncontested evidence of Oosthuizen and Griffiths, about cases of beer removed from the overturned vehicle by certain police persons and placed in a police vehicle. The Court also failed to make a finding on whether or not the cases of beer allegedly taken by the police from members of the crowd, were in fact so taken. According to Mr Goba in his cross-examination, cases of beer taken by the police from members of the crowd, were retaken by the crowd from the police. If that is so the beer so taken from the crowd and retaken by members of the crowd could not be an explanation of the containers of beer seen in the police vehicle.

A finding by the Court whether or not such cases were taken by the police from members of the public and placed by the police in the police vehicle, would have been relevant and even necessary in view of the serious implications of the issue. But instead the Court again goes no further than again speculating on the issue as the Court had done when it first speculated in the course of cross-examination by Mr Goba on such a possible defence. The Court now says: "If these cases of beer had been taken into custody, where were these cases to be put in a police vehicle?" In so speculating, the Court failed to consider and make a finding or at least comment on the other conflicting versions put forward by Mr Goba in his cross-examination.

The Court *a quo* also wrongly failed to consider and make a finding as it should have done on Oosthuizen's uncontested and uncontradicted evidence about police

persons standing at the back of the truck who justified the looting by saying that "the stock was already insured and the people can take it". It is also clear from the above that the Court wrongly failed to consider the impact of these acts of commission on the outcome of the case.

The aforesaid evidence is important, because if accepted, it would have helped to explain the inaction of the police, except for the effort of Chief Inspector Munalisa, before he also left the scene.

It stands to reason that such conduct by some policemen would have given those in the crowd with criminal intent the impression that the police was with them and that they had nothing to fear from the police if they loot the property.

The said evidence would also mean that there were not only acts of omission by the police, but acts of commission, which are presumed to be unlawful.

SECTION VIII: THE LAW OF DELICT APPLICABLE IN THIS CASE.

In view of the fact that there does not seem to be any serious disagreement between counsel for the parties, I need not and do not intend to extend this already long judgment unduly.

In Minister of Police v Ewels[2] it was held that a negligent omission will be regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission evokes not only moral indignation, but that the 'legal convictions of the community' require that it should be regarded as unlawful. The Court in Ewels had no hesitation in pronouncing that a legal duty existed and rested on police members who refrained from protecting Ewels when assaulted at the police station. In arriving at its conclusion the Court took into account –

(i) the statutory duties of the police;

(ii) the fact that the assault took place on the premises of the police station;

(iii) the particular relationship of protection between a member of the police force and an ordinary person; and the fact that the on-duty police could have intervened on behalf of the assaulted plaintiff without any difficulty.

In the more recent case of *Minister of Safety and Security v van Duivensboden*,[3] The South African Supreme Court of Appeal dealt with the legal issues relevant to the instant case.

The facts of this case were briefly:

> One B owned two licensed firearms. He habitually consumed alcohol to excess and while under the influence of liquor, was inclined to become aggressive and abuse his family. On 25 October 1995 a domestic squabble

[2] 1975 (3) SA 590 (A)
[3] 2002 (6) SA 431 (SCA)

between B and his wife developed in the course of which B shot and killed his wife and young daughter. He also shot the respondent in the ankle and shoulder.

The police had prior to this been in possession of information which reflected on B's fitness to possess firearms long before the respondent had been shot. While some of the information had emanated from B wife, members of the police had had direct information as a result of two occasions on which they had been summoned to defuse B's threats to shoot his wife and family. The second of these occasions when the police entered the house after a siege lasting many hours, they found that B had lined up at least 20 boxes of spare ammunition and had reduced the house to a shambles.

The respondent sought to recover from the Minister of Safety and Security the damages he had sustained as a result of his injuries on the grounds that although the police officers had known, from the events of 27 September 1994, that B was unfit to possess firearms, they negligently had failed to take steps available to them in terms of Section 11 of the Act to deprive B of firearms. As a result of that failure, B had still been in possession of firearms on 25th October 1995 when respondent was shot.

The respondent's claim was dismissed by a single judge but allowed on appeal to the full bench. The Minister then appealed to the Supreme Court of appeal but the appeal was rejected. Although reliance was placed by the Court of appeal on provisions of the South African Constitution which are not contained in the Namibian Constitution, the fundamental right to life and property is fundamentally the same. In any case the legal duties which rest on the Namibian police and

through them on the Government and the State, are clearly set out in the

various articles of the Constitution and in the Police Act as set out in

SECTION III of this judgment.

In the aforesaid decision the Court held *inter alia*:

"(i) Negligence is not inherently unlawful. It is unlawful, and thus actionable, only if it occurs in circumstances that the law recognizes as making it unlawful. Unlike the case of a <u>positive act causing physical harm, which is presumed to be unlawful</u>, a negligent

omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.

(ii) "There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, the constitutional norm of accountability requires that a legal duty be recognized. The negligent conduct of the police officers in those circumstances is thus actionable and the State is vicariously liable for the consequences of any such negligence."[4]

In the case of *Carmichele v Minister of Safety and Security*, the South African Constitutional Court upheld an appeal against a decision of the High Court and the Supreme Court of Appeal dismissing an action for damages by Carmichele, a woman, who had been brutally assaulted by one C at the house of a Mrs G.

The action was based on alleged omissions by the police and the Public Prosecutor which resulted in the release of C on bail on previous charges of Rape, when there was information available to the police and through them to the prosecutor, of C's previous conviction and crimes which may have resulted in bail being refused if the magistrate was given the correct information.

C's brutal assault on Carmichael was perpetrated when he was on bail.

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[4]See also: Van Edden v Minister of Safety and Security, 2003 (1) 389 SCA.
Kruger v Coetzee, 1966 (2) SA 428 (A) Mukheiber v Raath, 1999 (3) SA 1065 (SCA)
Carmichele v Minister of Safety and Security, 2001(4) SA 938 CC.
Van Eeden v Minister of Safety and Security, 2003 (1) SA 389 (SCA)

The High Court had granted absolution from the instance. The Constitutional Court now remitted the case for a proper hearing to the High Court. The argument before the Constitutional Court centred on the implicit duty of the Courts to develop the common law in accordance with the letter and spirit of the common law, wherever the existing common law does not meet the requirements of justice in accordance with the South African Constitution.

The Court held *inter alia* that there was a duty on the State and its organs not to perform any act that infringed the fundamental rights entrenched in the South African Constitution and further held that in some circumstances there would also be a positive component obliging the State and its organs to provide adequate protection to everyone through laws and structures designed to afford such protection – the Constitution did not draw a distinction between acts of commission and omission in this regard.

It must be noted that the South African Constitutional Court did not finally decide the matter because the facts still had to be decided by the High Court and findings made applying the law to the facts. However the Constitutional Court held that a prosecutor's negligence not to place relevant information before the magistrate relating to an application for bail, could result in awarding damages to a plaintiff who had been injured by a criminal wrongly released on bail, because the prosecutor had failed to supply available relevant information to the Court.

In the decision of *Van Eden v Minister of Safety and Security*, the South African Supreme Court of Appeal awarded damages to the plaintiff where the plaintiff, a 19 year old woman, was sexually assaulted, raped and robbed by M, a known dangerous criminal and serial rapist who had escaped from police custody.

The plaintiff claimed that the police owed her a duty to take reasonable steps to prevent M from escaping and causing harm. The Court *a quo* dismissed plaintiff's claim but the Supreme Court allowed the appeal and made the following order:

> "1. It is declared that the conduct of the defendant's servants was wrongful and that the defendant is liable to the plaintiff for such damages as she is able to prove…"

As motivation for the Court's order the Court held that the police owed the appellant a legal duty to act positively to prevent Mohamed's escape. The learned judge who wrote the judgment said that:

> "the existence of such a duty accords with what I would perceive to be the legal convictions of the community and there are no considerations of public policy militating against the imposition of such a duty. To sum up, I have reached this conclusion mainly in view of the State's Constitutional imperatives to which I have referred; the fact that the police had control over Mohamed who was known to be a dangerous criminal and who was likely to commit further sexual offences against women should he escape; and the fact that measures to prevent his escape could reasonably and practically have been taken by the police…."

Although the Namibian Constitution does not contain an explicit provision that the Courts must adapt the common law where it does not accord with the letter and spirit of the common law, the NAMIBIAN Constitution and Police Act, not only

amplifies the common law in relation to the Law of Delict, but overrides it where the common law is inconsistent or inadequate.

Although the Namibian Constitution and statute law are the main sources of law on which the Namibian Courts must rely in deciding the legal issues arising in this case, the South African decisions discussed herein, afford useful guidelines also for the Namibian Courts.

SECTION IX: CONCLUDING REMARKS

1. The events at Tsumeb on 21st August 2000 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 e.g. 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.

2. There was much speculation in this case about the reasons for the crowd’s behaviour. Unfortunately, the events at Tsumeb, were not the first and only such occurrence in Namibia.

I may mention that in evidence under oath given at public hearings of the “Judicial Commission of Enquiry into Legislation for the more effective combating of crime in Namibia”, chaired by myself, it became clear that several incidents of the same nature had taken place in Namibia.

The phenomenon was regarded as so serious and so objectionable, that the Commission in its written report to the President dated 12 August 1997 recommended that provision is made in the envisaged new Criminal Procedure Act for a minimum sentence of two (2) year imprisonment and a maximum sentence of eighteen (18) years, for the crime of Theft, committed at or from a place of accident or scene of crime. The crime is obviously much more serious when committed by a violent mob, amounting to Robbery and Public Violence.

At page 625 of the report the Commission motivated this recommendation as follows:

> "Various forms of theft which have become particularly damaging or prejudicial to the individual and/or the State and/or where the society's disapproval should be marked, have been selected for the regime of maximum and minimum sentences."

One would have thought that when a civilized 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.

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 carries the approval of the Namibian Police, will not be prevented and/or discouraged by the police and will go unpunished.

3. I have no doubt in this case that:

3.1. The Namibian Police had a legal duty provided for in the Namibian Constitution and Police Act towards the plaintiff, to protect the plaintiff and

its property. The aforesaid legal duty also amounted to a “duty of care” as known in the Law of Delict.

3.2. The police had failed to fulfill their aforesaid legal duties and in particular had failed to take reasonable steps to do so. The reasonable steps here contemplated are steps to be taken by the reasonable police persons in the execution of the onerous legal duties imposed by the Namibian Constitution and the Police Act, on the Namibian Police Force.

The reasonable steps 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 had failed to take reasonable steps for such training and equipment.

3.3. The negligent omission by the Namibian Police Force to perform their aforesaid legal duties was a direct cause of the theft of the property of the plaintiff and the failure to retrieve it.

3.4. As a direct consequence of the acts and omissions of the defendant, the plaintiff suffered damages in the amount of N$134 254.60.

3.5. The aforesaid findings in my respectful view also accord with the legal convictions of the law-abiding citizens of Namibia.

4. The judgment in this case is long overdue. The reason for this is that judge Pio Teek, JA, to whom the duty was allocated in April 2004 by the then acting Chief Justice Strydom to prepare the judgment of the Court, had failed to do so by the time that he was suspended by His Excellency, the President of Namibia on the recommendation of the Judicial Commission, pending the outcome of criminal charges against him and a final consideration and recommendation by the Judicial Commission in the light of such outcome.

In my respectful view, the remaining two members of the Supreme Court, namely Strydom A.C.J and myself, may hand down a valid and binding judgment in this appeal, provided we agree on the result.

In this regard I associate myself with the opinion of Strydom, A.C.J., in his judgment in *Wirtz v Orford*, handed down at the same time as my judgment in this appeal, concurred in by Strydom A.C.J.

In the result the following order is made:

1. The appeal succeeds.
2. The respondent is ordered to pay to the appellant:
   (i) the sum of N$134 254;

(ii) interest thereon at the rate of 20% a *tempore morae* from date of judgment; and

(iii) Costs of suit in the Court *a quo* and in this appeal.

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O'LINN, A.J.A

I agree

_____
STRYDOM, A.C.J.

ON BEHALF OF THE APPELLANT:	MR. A.W. CORBETT
INSTRUCTED BY:	LORENTZ & BONE
ON BEHALF OF RESPONDENT:	MR. R.H. GOBA
INSTRUCTED BY:	GOVERNMENT ATTORNEY