

IN THE HIGH COURT OF NAMIBIA

In the matter between:

IGNATIUS BEREND

First

Plaintiff

CORNELIA BEREND

Second

Plaintiff

and

COUNCIL OF MUNICIPALITY

OF WINDHOEK

First

Defendant

D M KABENDE

Second

Defendant

CORAM: MTAMBANENGWE, A.J.

Heard on: 2005.06.07;08

Delivered on: 2005.08.15

JUDGMENT

MTAMBANENGWE, A.J.: First and second Plaintiffs in this matter are man and wife married in community of property. The

two, as joint owners of a certain motor vehicle, are suing first and second defendants, the first defendant as vicariously liable for the acts of the second defendant by virtue of the fact that the losses Plaintiffs claim they suffered in connection with the motor vehicle were caused by the negligent acts of second defendant committed in the course and scope of his employment with first defendant.

The particulars of claim allege that on 19th April 2003 second defendant arrested first plaintiff at the single quarters in Katutura and took him away leaving a Volkswagen vehicle he was in possession of at the scene without arranging for its safe keeping as he was lawfully duty-bound to do. As a result of second plaintiff's neglect of his duty the motor vehicle was broken into and the following items were stolen from it:

1. a jacket valued at N\$550 00
2. Ray Ban sunglasses valued at N\$1950.00.
3. a wheel spanner valued at N\$322.40.
4. a motor vehicle jack valued at N\$190.96.
5. motor vehicle floor mats valued at N\$200.00.
6. a spare wheel valued at N\$1 772.95; and
7. radio cassette player and speakers valued at N\$2 823.00.

8. The glove compartment and windscreen of the motor vehicle were damaged and the reasonable repair expense thereof amounts to N\$9 609.49.

In all plaintiffs claim N\$17 418.74 against first and second defendants jointly and severally, interest a *tempore morae* at 20% per annum and costs of suit.

Defendants are resisting the claim. They pleaded as follows:

“6.3 The Defendants deny that the First Plaintiff was forced by the Second Defendant to leave the vehicle behind after the First Plaintiff was arrested and plead that the First Plaintiff in fact locked his vehicle as it was unable to start and that a friend of the First Plaintiff then took control of the vehicle at the request of the First Plaintiff after he was arrested.

AD PARAGRAPH 8 THEREOF

The Defendants deny that the Second Defendant, under the circumstances as pleaded in paragraph 6.3 above, had the duty to ensure that the Plaintiffs' vehicle and its contents are secure and safe as is alleged herein as the

First Plaintiff himself locked the vehicle and left it in the control and under the supervision of his friend after he was arrested.”

As pointed out by Mr Coleman who appeared for the plaintiffs, the duty of care in this case is a statutory duty imposed by Section 14(1)(f) of the Road Traffic and Transport Act No. 22 of 1999 which reads:

“(1) 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 -

(a) - (e) (do not apply)

(b)

(c)

(d)

(e) - (f) if it appears to such officer that the driver or a person apparently in charge of a vehicle is incapable for the time being of driving or being in charge of such vehicle by reason of his or her physical or mental condition, temporarily forbid such person to continue to

drive or be in charge of such vehicle and make such arrangements for the safe disposal or placement of the vehicle as in his or her opinion may be necessary or desirable in the circumstances”.

Second Defendant was at the time a traffic officer in the employ of first defendant.

In his opening summary of the case Mr Coleman advised, and Mr Schickerling for the defendants confirmed, that defendants admit the quantum of the claim provided plaintiffs proved that the items listed were lost and damage was done to the motor vehicle and that the items were in the motor vehicle.

First plaintiff (Berend) and second plaintiff (Ms Berend) testified on their own behalf. Berend said that Easter weekend he, accompanied by Ms Berend’s nephew, i.e his brother-in-law Joseph Hansen, were at Single Quarters, Katutura. They went into a shebeen which he frequents, to have a drink. He parked the vehicle in question “next to the road before going into the shebeen” when they arrived.

Hansen was already under the influence of alcohol, but he himself was sober. While they had been there drinking for 2 to 3 hours a police officer in camouflage uniform came to ask whether the white Jetta standing outside was his. This officer was with a group of young guys who claimed that he had bumped their car. They all went to the cars, where he was shown a dent on the car he was alleged to have caused, but there was no dent on his car. These people were demanding that

he pay N\$500 for the alleged damage to their car. While he was arguing with these people and the police officer, a traffic police officer going past was called back to the scene. This traffic officer was second defendant; Kabende; he came and said to him (Berend).

“But you are drunk, how could you manage to drive this car if you are drunk, I will arrest you now.”

When he protested and told him what according to him had happened, Kabende said to him:

“No but you are under the influence of alcohol so I will take your alcohol blood samples and lock you up now”.

He said he told Kabende the car was his. When Hansen intervened to say how Kabende could arrest him for drunken driving while he was not in the car or behind the steering wheel, Kabende told him (Hansen)

“If you interfere in this case I will take you together with your brother in law and lock you up for interfering”.

Kabende then asked for the car keys from him. Then he was taken in the traffic police officer’s car to the hospital and from there to the Katutura police station where he was detained. His blood sample was taken at the hospital and when they got to the police station he was arrested; his car keys were returned to him at the police station. The car was left where it was standing (at the shebeen at Single Quarters). He had locked the car when he was sober, meaning before he went into the shebeen, and he assumed it was still locked when he was taken away by Kabende. The Single Quarters in Katutura is a dangerous area where people come and go all the time and at night everybody is scared to go there, because you risk

being robbed by the Tsotsies or botsotsies (criminal elements). The car was left standing close to a fence of a house some three and half metres away from the shebeen where he had been drinking. He was taken away by Kabende about past four in the afternoon.

Barend said he next saw the car on Sunday when he was released on bail paid by his wife after he had spent that Saturday night in custody. When he saw it he asked his wife what had happened to his radio tape and the windscreen of the car and she said she had found the car like that. He noted that

someone had cut the screen rubber and that the driver's door window was opened, that the panel and glove compartment were broken and the floor mats, the wheel spanner, the spare wheel were missing; also missing were the speakers, the radio tape, his sunglasses and a jacket. All these items were in the car. The jacket was worth N\$550.00. The glasses N\$1950.00, the wheel spanner N\$322.40, the jack N\$190.90 the mats N\$200.00, the spare wheel N\$1 772.95 (it was a special spare wheel) the radio cassette and speakers N\$2 823.00. He said it cost him N\$9 609.49 to repair the interior of the car the glove compartment and the windscreen.

Finally, Berend said Kabende should have taken the car 'in custody' as well or called "a breakdown to take my car from that particular place to the police office so that my car will be in a safe place". Kabende had not made any arrangements with anyone to look after the car. Hansen had been told to go away with the threat that he might also be locked up and he left the scene before Kabende took him in his car to the hospital.

In cross-examination Berend denied that there had been an accident between his and another vehicle around midday on 19th April, and that when Kabende arrived the vehicles were stationed

"inside the road surface". He also denied what Kabende would say he was told - that he had reversed his motor vehicle from the pavement "into the road surface in front of oncoming traffic and as a result ...an approaching vehicle collided with your vehicle from behind."

He admitted he regularly went to that area he described as "a notoriously dangerous place frequented by criminal elements" and said he always locked his car and nothing had happened

to it before. Though Hansen was already intoxicated he himself was still relaxing having some (more) drinks; he and Hansen had arrived at the shebeen together in his car; he was not so drunk that he could not remember what was going on. The police officer who called Kabende had refused to give his particulars but if he saw him he would be able to point him out.

It was put to Berend that Kabende would testify that when he arrived at the scene “you were smelling heavily of alcohol”. He answered: “That’s correct”. Berend could not remember if Kabende “administered the breathalyser test on him and therefore could not deny that the test showed he exceeded the allowable level and that it was only after that that he was taken

to the police station; he insisted, however, that he was taken to the hospital first and afterwards to the police station. He repeated he had locked his vehicle before going into the shebeen. He disputed that Kabende had asked the other driver to push his (Berend’s) car “outside the road surface to clear the road.” He said it was not true that Kabende asked the driver of the other car to get into his car and they could not open the door whereupon he unlocked the vehicle and opened

the door for that person to get in behind the steering wheel. He disagreed that his car had to be pushed out of the road, but admitted there was another car behind his, it was one metre behind his car. He denied he locked his car before he and Kabende left the scene. He said Kabende gave him the keys to his car at the police station and it was when he was put behind bars that he was asked to remove everything he had in his pocket when he handed the key to the police. Everything that happened at the scene happened while his car was still where he had initially parked it and it was still standing there when he was taken away from the scene; it was not true that it could not start.

Berend said “that is a lie” when Mr Schickerling asked:

“He (Kabende) will also testify that at the time he offered to call a breakdown service for you whereupon you indicated that you’ve made arrangements with your friend to call your wife to fetch the vehicle, not so?”

When the question was repeated and expanded to say Kabende will say he (Berend) “in fact pointed out your friend

who accompanied you in this vehicle to him”, and when asked whether a break-down service could be called, Berend expressed surprise to this suggestion by remarking “I pointed out my friend to him?” And when asked if he denied it he said:

“There was nothing that Mr Kabende was talking to me for a break-down.”

To the question if there had been no accident how on earth people standing around there demanded payment from him, he answered he didn't know “but in that area people make money in everyway they can”.

It was also put to him that Kabende would say “before you left for the police station your car was checked and these items

which you alleged were inside your vehicle at the time were not inside your vehicle”. He insisted that the items were there.

It was his further evidence in cross-examination that he had left the jacket in the car when he and Hansen went into the shebeen; it was hanging over the seat, and when he was called out he found it still there; he had left it there despite the area

being frequented by criminal elements, it was daylight and they did not intend to stay there until it got dark. The following exchange then took place between counsel and Berend.

“Do you agree that upon the arrival of Mr Kabende at this, let’s call it the scene you were already intoxicated? You were intoxicated, not so?

I was, I had a couple of drinks and my smell, when I was talking to him he could have smelled that I was having drinks. So Mr Kabende came there to come and arrest me for drinks and drive not for the accident which was happening there.”

Berend was emphatic that Kabende asked for the key to his vehicle after which they got into Kabende’s vehicle and drove

first to the hospital, thereafter to the police station. Again what Kabende would say about the key and the arrangements he would say Berend made with his friend for the car to be fetched by his wife were put to the witness, and Berend again denied that version, he also again denied that his car was pushed off the road and that it could not start. He again insisted he had locked the car when he and Hansen went into

the shebeen and he had not unlocked it during all that took place before he left the scene under arrest.

Asked what arrangements he himself had made to safeguard the vehicle, he said since he was in the hands of the law he expected the police would arrange for the car to be taken from that place to the police station or to the traffic officer's place.

Berend's further evidence in cross-examination was that he saw the car the next day at 10:00 or 11:00. The first time he spoke to his wife after his arrest on that Saturday night was around 23:30 or 23:20 when she came to the police station. The jacket that went missing was part of his wife's uniform, it was new. He had taken it because it was cold. He had purchased the sunglasses and had had them for three years and had bought the same for N\$1 900.00.

The question about searching the car was repeated, this time it was put to him that Kabende "will testify that specifically before you left your vehicle he personally checked your boot and there was no jack or a wheel spanner in your boot". Berend again denied this by saying "Mr Kabende just not even touched my car". He denied the suggestion by Mr Schickerling that "the idea that there was a burglary into your vehicle and

that these items were stolen was only conceived by you subsequently”.

Lastly Berend said his wife had come to the police on Saturday night after she was sent by a traffic officer to lay a charge against the particular traffic officer who arrested him because she had initially gone to the traffic department to enquire. She had told him she had gone to the traffic department after a neighbour's son had told her that the car was standing at the Single Quarters and that he had been taken away by traffic officers. In answer to a direct question he said the first time he spoke to his wife after his arrest was around 12:30, 12:20 on Saturday night when she came to the police station.

In re-examination Berend said he had never or would never leave his car at the Single Quarters in Katutura, that Saturday he was

there at 14:00 and he did not intend to stay there until night time. He also clarified what happened to his car key, namely that Kabende had the key from the scene until after his blood sample was drawn from him, he gave it back to him on the way to the police station.

Ms Berend's evidence as to the missing items confirmed that they were in the car and also the jacket. Her brother Josef Hansen did not contact her about the car at any stage that Saturday night till Sunday morning. She had found out what had happened when her daughter came back from the market where she had sent her, to say one of the guys she met there had told her that her father had been arrested somewhere around Single Quarters. She had then asked a neighbour to take her to the Katutura police station to find out. This was about 11 o'clock pm. When she got to the station she saw her husband behind the bars after the security bars, and she said:

“And he called on me and I ask him which time do you come here and what happened, and he said he was locked up for drunk drive. - And when I asked the car keys then the police officer told me it's in the safe.”

She said she asked the police officer “why did you leave the car there” and she said the traffic officer, Mr Kabende, is the one who was supposed to remove the car from that place. She said she was given the car keys and then went to the traffic

department where some gentleman advised her to go back to the police station and make a case against the traffic officer.

She was asked what the condition of her husband was when she saw and talked to her husband at the police station: "He was drunk", she answered. This was said when she was asked to clarify the sequence of events and it was then also that she said:

"After I go first to the traffic department and when I come back then she gave me the car keys".

Ms Berend said she had no licence and she could not drive. She went with a neighbour to collect the car on Sunday morning. She did not collect the car that Saturday night because the neighbour who took her to the police station could not help further as he used someone else's car; a different neighbour helped her on Sunday to collect the car. That Sunday morning she contacted her lawyers by phone to find out what she should

do. The lawyer phoned back after some 15 minutes and advised her what the bail deposit was and to go and remove

the car. When they got to the car she found the window open. The glove box was lying on the seat, it was broken and the windscreen was damaged, the jacket and the sun glasses were not there. She paid bail for her husband and when they got home she saw he did not have the jacket and sunglasses with him which item she had thought he had taken with him when he was arrested. She and her husband discussed the matter and after that she phoned the superintendent at the Municipality traffic and told him what had happened. The superintendent said Kabende was on leave and asked her to give him something in writing. She and her husband then wrote a letter to the Municipality. After several phones to the Municipality they were advised to contact a certain Mr Eiseb. The same person at Municipality had initially suggested that they should sit down around the table and discuss the matter. They tried to contact Mr Eiseb but all in vain, so after a month they decided to instruct Ms Duvenhage, the lawyer. The drunken driving case was withdrawn; Duvenhage defended Berend in that matter.

In cross-examination she said she knew her husband had bought the sunglasses for N\$1950.00, she thought he had had

them for almost six months. The radio cassette that was in the car was a Pioneer type. She repeated her evidence that she did not get help to fetch the car Saturday night because the neighbour who took her to the police station borrowed the car he used and was in a hurry to attend to some church business and the other neighbour who helped her on Sunday had been away from home that Saturday night, so it was not a deliberate decision not to fetch the vehicle that night.

She did not know when the burglary occurred. They found the car parked near a shebeen. She repeated that she had spoken to her husband that Saturday night, had asked him what happened when did he come there and where the car keys were. She did not ask the police to help her fetch the car because the sergeant she spoke to said it was the responsibility of the traffic officer. She said the spare wheel is always in the car, it was a small one bought together with the car. The rubber of the windscreen was cut on the driver's side.

Mr Hansen gave evidence in which he corroborated Berend's evidence as to the events that took place that Saturday afternoon up to the point Berend was taken away by Kabende from the

scene at the shebeen in Katutura. He confirmed that Kabende told him not to interfere and threatened to arrest him too. The people who were demanding money from Berend had threatened to beat him. He was scared of being arrested and getting into a fight with those people so he left the scene and went inside the shebeen and when he came out some 5 to 7 minutes later Berend was gone. The arrest was sometime past 16:00. He was drunk and in no condition to walk so he went to a friend's place nearby to sleep till 02:00 when he woke up and went home. He denied that anybody told him to look after the Berends' car. Kabende chased him away from the scene. He said he saw the jacket in the car and the stereo, the sunglasses. He knew the interior of the car because he used to help clean the car. He denied that Kabende had opened the boot of the car while he was there or gone to the car at all or that Berend's car had been involved in an accident. Berend had parked his car in front of a fence next to the shebeen, it was not near the road. Kabende and Berend did not open the car at all or go near it.

In cross-examination he admitted that he often visited the Berends, that when they arrived at the shebeen he was

already intoxicated and said they were in the shebeen 7 to 8 minutes

before they were called out by the police. There was a lot of movement so he could not confirm that a breathalyser test was conducted or that Kabende asked the drivers of the two motor vehicle said to be involved in an accident to identify themselves. This was because he was being mobbed by guys who were trying to prevent him to come between Berend and the traffic officer. Kabende had been annoyed by the questions Hansen was asking him. The Jetta was not on the road at all. He did not see anyone get inside Berend's car, nor the car being pushed off the road. While there he did not hear Kabende offer break-down service to Kabende. He did not discuss the case with Berend, he had no opportunity to because he was in Keetmanshoop and only came only yesterday. In brief Hansen denied everything that was said Kabende would come and say in his evidence, and emphasised that Berend had locked his car before they went into the shebeen. After he was pushed away from Kabende and Berend he had checked the car and made sure all the doors were closed and the windows were rolled up. The only things he could not confirm were the jack, wheel spanner and the spare

wheel as he had no occasion to check the boot, but he knew Berend always drove with the four wheel spanner and the spare wheel. Asked to confirm Kabende's evidence that Berend asked him

(Hansen) to contact second plaintiff to make arrangements for the removal of the vehicle, Hansen replied:

“Mr Berend and I were not allowed contact, I didn't have any conversation with him. After I was told to leave the scene before I was arrested I made a quick exit as far as I could”.

It was not true that Berend left this car in his care, he did not call his sister because he assumed it was the responsibility of Kabende, the arresting officer. Hansen denied he was still at the scene as was said Kabende would say (that after he took Berend to the police station he returned to the vehicle and saw Hansen still at the scene).

Counsel lastly said:

“Mr Hansen I put it to you that before Mr Kabende took the first plaintiff to the police station he confirmed with you personally that you would contact Mr Berend’s wife and make arrangements for the safeguarding of the vehicle!”

Hansen replied:

“And I’m again denying that Sir because he chased me away from that scene”.

Counsel went on:

“In fact Mr Berend and that is my instructions himself requested you to ask his wife the second plaintiff to fetch the keys of the vehicle from him at the police station”.

When Kabende came to testify he did not repeat this specific allegation in the same words; he said:

“...I confirmed with the friend if he could take responsibility of the vehicle? He agreed he said no, he is going to take out the vehicle he’s going to remain there”.

On request counsel repeated the statement:

“Mr Berend himself in the presence of Mr Kabende confirmed with you that you would contact the second plaintiff and request her to fetch the keys for the vehicle at the police station”.

Hansen answered:

“No that’s not true because I cannot remember that incident”.

Hansen said he did not see the car after the incident, he had only been told that the vehicle was broken into. He also denied that there had been a collision between Berend’s vehicle and oncoming traffic shortly before Kabende arrived at the scene, and insisted that Berend’s vehicle had been “in a stationary position in front of the shebeen near the fence”.

The next witness for the plaintiffs was one Engelhardt Haininga who lived in the vicinity of the Single Quarters, who said he was at the scene on the day in question with other members of his soccer team and had seen Berend and Hansen. He said he

and his colleagues arrived at the scene where he found Berend quarrelling with a lot of people; a police officer at the scene had called a traffic officer who “turned around and he came at the accident”. The traffic officer said “this one is drunk” after he talked to the people Berend was quarrelling with the traffic officer drove off in his car with Berend. He did not see if Berend

drove his car and had an accident with another car, his car “was parked nearby on the pavement nearby a fence nearby the shebeen”. He had seen the police officer go into the shebeen to call Berend and Hansen and he saw the two come out of the shebeen. He heard the traffic officer tell Hansen, who was trying to talk to him, that “he must keep quite otherwise he’ll lock him up with Berend and then he kept quiet” and Hansen left. His team stayed around 10 to 15 minutes and during that time he did not see the traffic officer come back. The time they finished playing soccer was around 16:00 to 17:00. He did not see people pushing the white Jetta out of the road or anything like that, nor did he see the traffic officer opening that car to take a look into it. He saw Berend give the traffic officer the keys of his car and talking for a while “after that time they drive off” in the traffic officer’s car. One

of his team mates at the scene who also saw what was happening was Clarence Gawaseb.

In cross-examination he said he arrived at the scene before the traffic officer arrived. He denied that the traffic officer asked Berend if he could call a break-down service for him. He did not see anybody in Berend's car or unlock the car. The police officer who was at the scene left after Kabende had arrived.

Haininga said Berend and Hansen were drunk when in chief he referred to an accident he meant people were quarrelling about an accident but "there wasn't an accident". He could not testify whether there had been an accident or whether Berend had been in his car. He could not remember if anyone attempted to start Berend's car. He saw Berend hand his car keys to the traffic officer after which "they just drive off in the traffic officer's car". He confirmed that Kabende had asked who the drivers were of the two cars and Berend had identified himself as driver of his vehicle and Hansen as his passenger.

He had known Berend since that day. Counsel put to the witness what Kabende would say and the ensuing exchange between the two was as follows:

“Mr Kabende will testify that before they left the scene they specifically check the vehicle for any loose items and that there were nothing in the vehicle. --- No Sir, the time when the traffic officer arrive on the scene they just start talking and they just left to the traffic officer’s car and they drive off.

Mr Kabende will also testify that the boot was specifically checked for items in the boot there was no jack

or wheel spanner in the boot of the vehicle. --- I don’t see if they open the car really.

He will testify that before they left for the police station Mr Berend himself locked his vehicle and Mr Berend himself took his keys to the police station. --- No he gave the keys to the traffic officer at the (indistinct) (scene)”.

The letter second plaintiff wrote to the Municipality was produced as Exhibit A1 and an agreed English translation of it as Exhibit A2. They read as follows:

Exhibit A1

“DIE HOOF VAN MUNISIPALITEIT VERKEERS AFDELING:

AANDAG MNR OWOS-OAB

Op die 19de April 2003 is my man Mnr I F Berend gearresteer deur Mnr Kapende 'n Verkeersbeampte van die Windhoek se Munisipaliteit.

Die man is gaan toegesluit, en die voertuig is by die Single Kwartiere gelos, sonder om na die polisie stasie te neem vir veiligebewaring.

Die aand omstreeks 22h30 het my buurman se seun my meegedeel dat my man se voertuig by Single Kwartiere geparkeer staan, en dat daar niemand by die kar is nie. Ek het onmiddelik met sy pa gery na die plek waar die voertuig staan toe gegaan waar ek my man daar gaan gekry het.

Ek het na ek met my prokureur gepraat het die voertuig met my buurman die Sondagoggend gaan gehaal met sy opdrag.

In die voertuig was waardevolle goed wat ons verloor het my werk se jacket, spaarwiel, wielspanner, sonbrille, vloermaatjies, cloverbox was afgebreuk.

Dankie

Ek sal hoogwaardeur om iets te hoor van u.

C.BEREND (MEV)

TEL: 2013092

Exhibit A2

INFORMAL TRANSLATION

"THE HEAD OF THE MUNICIPALITY TRAFFIC DEPARTMENT

ATTENTION MR OWOS-OAB

On the 19th April 2003 my husband Mr I F Berend was arrested by Mr Kapende a traffic officer of the Windhoek Municipality.

The man was locked up and the vehicle was left at the single quarters without being taken to the police station for safekeeping.

That night at approximately 22h30 my neighbour's son informed me that my husband's vehicle was standing parked at the single quarters and that there was no one at the car. I with his father immediately drove to the place where the vehicle stood then went to where I then found my husband.

I, after I spoke to my attorney, with my neighbour fetched the vehicle the Sunday morning on his instruction.

In the vehicle there were valuable things which we lost; the jacket of my work, spare wheel, wheel spanner, sunglasses, floor mats, "clover" box was broken off.

Thanks

I will highly appreciate it to hear something from you.

C Berend (Mrs)
Tel 2013092

Signature"

Kabende was the only witness called on behalf of defendants although Mr Schickerling had indicated he was trying to procure the policeman who was at the scene, the one who called Kabende. Regrettably nothing more was said about this witness before closure of the defence case.

Kabende's evidence was the following:

On 19th April 2003 he was employed as a traffic officer at the City of Windhoek Traffic Department, he was on duty patrolling the City. The man in the control room called him to attend an accident in Mungunda Street which is a street “crossing over the Single Quarters. He drove into the street from the police station and at the intersection of Shangai and Mungunda, a few metres behind the robots on the eastern side he saw there was an accident on the road where the Single Quarters are situated. There are shebeens in the area and other businesses which he described. The Single Quarters is a big area. The accident occurred in Mungunda Street opposite the flea market and “the

shebeen. The vehicles involved were facing the western direction - west to east. He found two vehicles, “a Toyota motor taxi and a VW motor car which were stationed on the road stuck to each other”. The rear wheels of the VW Jetta were on the road while the front wheel were “on the side of the pavement”. The Toyota was straight in the road facing the eastern side”. The two had collided. “The police officer that I found there identified Mr Berend and the driver of the taxi as the two owners or drivers who was involved in the accident”. The two confirmed this. He took the two aside and the driver

of the Toyota told him that Berend had reversed his vehicle into the main road and collided into his car which was driving in the main road. He said he spoke to Berend "and he agreed that he was the driver at that specific time when the accident happened." He went on to say:

"There were bystanders around and the person who was identified as being in the vehicle was his friend who is sitting there, that he was with Mr Berend at the time of the accident".

His evidence continued:

"So what happened then? What did you notice particularly as far as Mr Berend and his friend is concerned? --- What happened then I realised that the two (2) or Mr Berend was smelling of alcohol. He was looking tired and his eyes were red. So before I could write a statement into my pocket book I asked him that he must give me that because I was unable to open the door the driver seat the door that I must remove the vehicle from the road. So I asked him to open it for me.

So he opened, he gave me, he opened it he gave the keys to me. I tried to, I entered into the vehicle, I try to start the car that I must drive out of the road into the sidewalk but it couldn't start.

So the vehicle couldn't start? --- It couldn't start yes.

Yes. What happened then? --- What happened then I went out of the car realising that Mr Berend was tired. I asked the driver of the Toyota motorcar taxi to assist me that he should drive the vehicle. To go into the vehicle so that we must push him out because his could move. So he entered the vehicle we pushed him out of the road and then he drove his out off the road.

Yes. --- Yes.

COURT: He did go in? --- He did, he went in into Mr Berend's car with my permission.

MR SCHICKERLING: The driver of the other vehicle?

--- The driver of the other vehicle.

And the vehicle couldn't start and did you assist him pushing the vehicle? --- We pushed the vehicle out of the road with the other bystanders.

What happened then? --- What happened then is that we, I tested them both for alcohol with the alcohol meter.

The breathalyser. --- The breathalyser. Where I discovered that the driver of the motorcar taxi was not having alcohol in his breath. The reading was 0.00. I tested Mr Berend where it went to .382. So after that I explained to them, to Mr Berend that I will have to arrest him for drink and driving.

COURT: Sorry? It was 0.? Berend's? --- It was, Mr Berend's reading was .382.

MR SCHICKERLING: If I can pause you at that juncture? --- Yes. What was your observation of Mr Berend at the time? Your impression that you got about his, the state in which he was? What was your impression? --- My impression that I realised that Mr Berend was drunk. I realised that he was tired and he could no more be capable of driving the vehicle. It's why I asked the other driver that

he has to help me to remove the vehicle out of the road.

Did you have any further discussions with Mr Berend? --- From there I checked in the vehicle for

whatever material or property that could be removed because I was supposed to take him to the police station. I checked the boot, we find that there was nothing. I asked him if there's anything that he could removed from the vehicle. He said there was nothing.

And once his car is locked no one can open it. And as I felt I believed him. At that point in time I asked him if I could get assistance for the breakdown to come and tow his vehicle. He said no, he didn't want a breakdown because he was not having money to pay. He requested his friend who was a passenger in that vehicle at the time of the accident to take responsibility of the vehicle and to make sure he contacts Mr Berend's wife and inform 'him' about the incident of being arrested and (intervention)

COURT: Can you repeat that slowly please? You said let's start with you know after you checked the boot of the vehicle. --- Yes.

And there was nothing? --- Yes.

And? --- And after ensuring that Mr Berend inside there was nothing that he could remove from the vehicle I requested him if I could organise the breakdown or a

service for him. He refused that he didn't have money to pay for that. And then he authorised his friend to take responsibility of the vehicle so that he could inform the wife in order for them to or either the wife or the two (2) of them to remove the vehicle from the scene.

MR SCHICKERLING: At that moment in time where exactly was the vehicle parked? --- The vehicle was outside the road towards the shebeen.

Was it close to the shebeen? --- There was a distance.

How far from the shebeen, approximately?

--- Approximately less than two (2) metres.

COURT: Less than? --- Two (2) metres from the shebeen.

Yes? --- Okay. From there I confirmed with the friend if he could take responsibility of the vehicle? He agreed he said no, he's going to take out the vehicle he's going to remain there. I took Mr Berend to Katutura Police Station whereby I took the CR I think it was CR 331/04/2003 which I was given for drink and driving. And from there we proceeded to our office the Traffic Department Office to withdraw the blood sample."

He was asked where did he withdraw the blood sample, and he said "at our office the Traffic Department Office. Asked why he first went to the police station he said to get the CR number which must be kept or "written on the receipt of the blood sample". Before they moved from the scene he asked Berend to lock his vehicle "after locking the vehicle himself" he was given the key to his car. Asked who gave the keys of his car to him he replied:

Yes I gave the keys to Mr Berend.

Counsel asked, apparently in surprise at this paradoxical answer:

"You gave the keys to him?".

And he answered, still paradoxically:

Yes. After locking the vehicle himself".

Asked what happened with those keys Kabende answered:

--- Okay. What happened with those keys is that after taking the blood sample from our office, withdrawing blood from his body at the hospital I took him to the police station where he was

detained. At the detention centre or at the police station he give the keys to the police officer the Charge Office Sergeant who was in charge of the shift that specific day. And I explained to the Charge Office Sergeant that the keys that were given the vehicle remained on the scene of the accident. The vehicle could not start. But the owner made arrangements with the friend to ensure that the vehicle is removed or taken care of by the friend and the wife if he happens to inform the wife later."

He then said that he left Berend at the police station and drove past the scene of accident where he found Hansen still at the scene, and then he continued with his patrol duties.

Kabende said some Tuesday after the incident he had met Berend in Academia and Berend had not mentioned that his car had been broken into. He denied that he had the duty to ensure that Berend's car was put in safe custody. He said the duty was given to Berend himself or to the friend that took responsibility, accepted responsibility with the permission of the owner "that he should look after the vehicle and contact the wife to come and remove the vehicle", he continued:

“When Mr Berend refused my assistance to call a breakdown and for him to pay for the cost there’s nothing that I could do after that because he therefore decided he’s going to make his private arrangement. It’s why I gave the keys to him. That I’m no more (reliable) for your vehicle you can take the keys. Whoever is going to come to the police station to come and visit you give him the keys to go and take you vehicle from there. Secondly that the vehicle is not roadworthy. The vehicle could not start. If at that stage the vehicle could start I could maybe call, because we use to be two - two patrolling the whole Windhoek. And the other problem the Traffic Officers are not there for, to guard vehicles or properties. We make sure that the free traffic, free flow traffic is there. If the accident happens and there are no injuries we remove the vehicles out of the road. If you give assistance to a person who agrees to be assisted that you can call the breakdown, you do so. If he makes his own arrangement then it’s his ‘reliability’ (responsibility)”.

He was asked if Berend was in a state to make his own arrangements, he said “yes” and added:

“The fact that he was looking tired that could not make him unreasonable or incapacitated to give a reasonable decision.”

Asked: “Were you satisfied that the arrangements that you made between Mr Berend and his friend which you pointed out that that, you were satisfied with those arrangements were sufficient?”,

he answered: “I was truly satisfied. And I truly believe that the friend he could be of assistance to Mr Berend or to look after Mr Berend’s vehicle and remove it from the scene.”

In answer to a question he repeated that after Berend locked the car the keys were given to Berend implying that Berend had the key, Berend locked the car and gave the key to him (Kabende) and Kabende gave the keys to Berend. Asked exactly where the blood alcohol test was done he now said it was done at Katutura. He did not accept responsibility for the break in into Berend’s car. He could not remember who the police officer at the scene was nor who the driver of the other car at the scene was “unless we check in the Pol 66” but, he said he failed to get the ER Book.

He tried to establish the particulars of the police officer at the scene to no avail.

In cross-examination Kabende confirmed his powers were defined in the Road Traffic & Transport Act of 1999. He had been a traffic officer from 1997 in Nampol, he came to the Municipality in 1999 where he worked until September 2003, when he got an offer at Social Security Commission, he could not remember whether Berend's car was white or brown. Of the bystanders he said were at the scene some might have come after the accident had happened some might have seen the accident. Though he could dispute the version of one who would say he saw what happened after the police officer arrived he could not dispute the fact that that person saw what happened (earlier). At the scene he did not ask Hansen to identify himself. He agreed that Berend was under the influence of liquor. Yes, he said, he there and then made the assessment that he must have probably committed a crime and secondly that he was incapable of driving his car. Yes, as a traffic officer he had the duty to prevent someone from driving who was clearly under the influence of liquor. Asked what his

duties were in respect of the car if he arrested someone and his car could not be driven away, he answered:

“Okay, there are two scenarios. A person that I physically stop and I limit the right of that person to freedom of movement I’m ‘reliable’ for his property. The vehicle that is involved in an accident which does not cause any danger to other road users I can only if I asked the owner of the vehicle to make arrangements for the breakdown and he refuses to do so because the cost has to be paid by the owner of the vehicle not the Municipality. If that person refuses I only have to remove the vehicle from the scene to make sure that it’s properly safely parked far from where it cannot cause any danger to other road users.

Sir, are you saying that, would that be under circumstances where you arrest the person or under all circumstances? --- At circumstances where I arrest the person. If the vehicle is not starting but the person is not arrested there’s no need to make arrangement. He has to by all means make sure that he calls someone or a friend to come and assist that person.

The question and answer continued:

“Okay. So we’re clear on that. You would have a responsibility around the vehicle if you arrest the person, you agree with that? --- If I arrest the person that I have stopped. If we are having a campaign drink and driving campaign I stopped someone or patrolling I stop someone, I realise that the person is under the influence or there’s a crime that is committed I have to arrest him because I’m the one now who is limiting his freedom to movement.

Yes. --- I’m therefore reliable. If his car cannot be moved I will make arrangements and make sure that the vehicle is removed. But the vehicle that is involved in an accident because 99% of all accidents in the city or anywhere, Traffic Officers do not witness those accidents they are only being called. So the, my responsibility is to ensure that I ask the driver if he’s prepared which breakdown does he want. Because we do not decide for the people because at the end of the day say they use to say you are connected with the other breakdown to make money for them. So he decides which breakdown must

you call? You call that breakdown, they towed the vehicle from the scene either to his place either to the place where, at the tow-in service or at the police station. If he refuses

therefore I do not bear the liability that that person should make arrangement to ensure that his property or vehicle is in good hands or someone else has to assist that person.

So let me see if I understand you correctly? What you are saying is that if you arrest a person because in your opinion that person should not be in charge of his motor vehicle and the motor vehicle cannot be driven from the scene (intervention) --- Yes.

For some reason. --- Yes.

You asked part of your obligation to safeguard the motor vehicle (intervention) --- Yes.

You asked the person whether you could call a breakdown for him? --- Yes.

And if he says no thank you that is the end of your obligation towards the car - It ends..."

The question and answer exchange between counsel and Kabende relating to a traffic officer's responsibility in respect of a car whose owner is arrested and is adjudged incapable of driving went on for a considerable time. A lot of the answers were a repetition of what Kabende had already stated as to what he considered the limit of his liability or responsibility in the

circumstances. A lot of the questions sought a clarification of Kabende's answers because, as the passages of his evidence already quoted verbatim show, he had a tendency of not answering questions straight, and to be long winded in his answers. The circumstances I refer to consists of his version of events relating to what he said were the arrangements made to safeguard the motor vehicle in question. Note the variations in his answers or statements (indicated by my underlining of the same as shown supra and infra).

Suffice it to say that what is reflected in the passages I have quoted above represents the tenor of his evidence right through the rest of the cross-examination on this issue.

Kabende's evidence as to his claim that he handled and how he handled plaintiff's motor vehicle at the scene leaves a big question mark as to the veracity thereof.

First when defence counsel cross-examined Berend the questions and answers went as follows:

"Mr Kabende will testify that when he arrived at the scene of the accident after he had administered the

breathalyser test he requested the other driver to help him to push your vehicle outside the road surface to clear the road, do you dispute that? --- No, there was nothing like that.

He will also testify that at the time he requested another person to get in the vehicle behind the steering and that they could not get the door open whereupon you in fact opened the door unlock the vehicle and opened the door for this person to get into the vehicle. --- No, it's not true My Lord.

Do you agree that your vehicle had to be pushed out of the road surface? --- No, I don't agree with that.

In his evidence Kabende said:

--- What happened then I realised that the two (2) or Mr Berend was smelling of alcohol. He was looking tired and his eyes were red. So before I could write a statement into my pocket book I asked him that he must give me that because I was unable to open the door the driver seat the door that I must remove the vehicle from the road. So I asked him to open it for me. So he opened, he gave me, he opened it he gave the keys to me. I tried to, I entered into

the vehicle, I try to start the car that I must drive out of the road into the sidewalk but it couldn't start.

So the vehicle couldn't start? --- It couldn't start yes.

Yes. What happened then? --- What happened then I went out of the car realising that Mr Berend was tired. I asked the driver of the Toyota motorcar taxi to assist me that he should drive the vehicle. To go into the vehicle so that we must push him out because his could move. So he entered the vehicle we pushed him out of the road and then he drove his out off the road.

Yes. --- Yes.

COURT: He did go in? --- He did, he went in into Mr Berend's car with my permission.

MR SCHICKERLING: The driver of the other vehicle?

--- The driver of the other vehicle.

And the vehicle couldn't start and did you assist him pushing the vehicle? --- We pushed the vehicle out of the road with the other bystanders.

What happened then? --- What happened then is that we, I tested them both for alcohol with the alcohol meter.

It is also very significant that the evidence that Berend had admitted to Kabende that he was the driver of his motor vehicle "when the accident happened" was not put to Berend in cross-examination. One asks why, since if indeed Berend had made that important admission it would be conclusive as to whether indeed there had been such an accident!

Next Kabende said he arrested Berend some time past 16:00 not at midday as was put to the plaintiffs' witnesses. Then he said yes the accident that he was called to attend had to be

reported and it was reported. Asked to give the reference number of the report, he said:

“--- I could not at the police station the OB for April 2003 it's not there. At the Municipality we could not secure the AR number because what we do when you take the accident report you register this on the POL 66 with our office it has to be recorded by the Police Station of that jurisdiction.”

“So you could not find any record of the report?”, he was asked and he answered: --- “I could not find because at the Police Station the person in charge of the storeroom he is not there.”

Mr Kabende repeated his evidence that there was an accident, that the vehicles were stuck to each other; but admitted there was no damage mark on the plaintiffs' car. He denied that he had threatened Hansen with arrest for interfering or chased him away. He said although he didn't see Berend drive he arrested him on the word of the police officer who was at the scene, the allegation of the other driver and his own admission that he was the driver of the Jetta. Asked the condition in which Hansen was he answered:

"I realized that he was busy drinking".

Asked whether he was drinking or was under the influence of alcohol he answered, again cryptically:

--- Not really under the influence. There's a possibility that he was drinking that specific moment. Like he was not, he was not having beer in his hands.

It was put to him that three (3) witnesses had testified that he had not, before he left the scene, gone through the car "to see if there was anything in the car, Kabende answered:

"--- Ja. You see my, I will say the operation of Traffic Officer they are not familiar with what we are doing. So there is no way, I'm more observant towards accidents because that's my profession. I see defects I can identify something within the car within a minute, which they cannot. So when I entered the vehicle it was sufficient time for me to realise or to check whether these things are there. When I checked the boot if they didn't check or if they were not having interest in what I was doing

there's no way they could have seen or realise what I was doing."

His evidence in chief and what was put to the witnesses was that Berend had himself unlocked the boot car and the boot and the check was done with him.

Mr Coleman read to him the provisions of Act 22 of 1999 and asked if Kabende agreed those were his duties, in a long rambling answer Kabende talked of the duties being discretionary not mandatory. When Mr Coleman sought clarification and asked him:

"--- I thought you said it gives you a discretion?"

Kabende answered:

"I said its discretionary. If the vehicle was removed from where it obstruct the road users that was sufficient exercised insure that is safe where it was. He could not be bumped anyone or nobody come and has an obstruction or cause an accident because of the specific vehicle."

Further asked:

“So you see your discretion around making sure that the motor vehicle is safe in the sense that its not in the way of other traffic?”

He answered:

“Exactly”.

“And not in any other way”.

Counsel asked, and he replied:

“As I explained earlier to a person that you physically stopped you make by all means to comply with that. The vehicle that is in an accident and its not roadworthy and the owner refuses to accept the services of a breakdown there’s nothing you can do.”

Prodded further Kabenda said:

“It ends there if the owner makes arrangements with someone else”.

In re-examination he repeated his evidence that Berend had made arrangements with Hansen and said that he was very satisfied that the arrangements were reasonable.

That was the end of the case for the defence.

As can readily be appreciated from the evidence, there are two stories which are diametrically opposed to each other or mutually destructive. The plaintiffs’ story told by three witnesses starts with a denial that on the afternoon in question there was an accident at the Single Quarters Katutura in which

plaintiffs’ motor vehicle collided with another motor vehicle. Secondly the story denies that first plaintiff who was in charge of plaintiffs’ motor vehicle was offered break-down services and declined the same when he was arrested and removed from the scene by defendant’s sole witness Kabende a traffic officer in the employ of defendant, that plaintiffs motor vehicle was pushed off the road surface to the pavement, was

searched by Kabende and none of the items of property was on the vehicle, that first plaintiff arranged with Hansen his brother-in-law, with whom first plaintiff had gone to the Single Quarters for a drink in a shebeen that afternoon, that Hansen would contact second plaintiff, first plaintiff's wife, to remove the vehicle from the scene.

The defendant's story as told by Kabende is that a collision took place between plaintiffs' motor vehicle when first plaintiff reversed onto the main road and into the path of oncoming traffic. It goes on to say the two motor vehicles were stuck into each other when Kabende who had been called to the scene by a police officer at the scene arrived at the scene, that before he took Berend, first plaintiff, away he, Kabende, offered to call a breakdown service to remove the plaintiff's vehicle from the scene, Berend declined the offer and said he had made

arrangements with Hansen to contact his wife to come and remove the vehicle from the scene, that Kabende confirmed this arrangement with Hansen, that Kabende in the presence of and with the assistance of Berend searched the car including its boot and none of the property alleged to have gone missing

was in the car; Berend himself said there was nothing he wanted removed from the car.

The story goes on to say plaintiffs' vehicle could not start and when it was pushed onto the pavement the driver of the other vehicle involved in the collision sat behind the steering wheel while Kabende and some bystanders did the pushing, Berend could not drive because he was intoxicated.

It is common cause that Berend was arrested for drunken driving, that the plaintiffs' motor vehicle was left at the scene. It is not disputed that the said motor vehicle was removed by second plaintiff the following day. It is common cause that Berend was detained overnight at Katutura police station and was released on bail paid by his wife the following day a Sunday following April 19th, the Saturday when the events in question took place. There is no dispute that the duty the failure to

perform which or the negligent performance of which by Kabende forms the basis of the claim by plaintiffs, is a statutory duty in terms of section 14(1)(f) of the Road Traffic

and Transport Act 22 of 1999; I have already quoted paragraph (f) of subsection 1 of section 14.

In the circumstances of this matter I think paragraph (f) of section 14 (1) must be read with paragraph (h) thereof; that paragraph provides:

“(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 for his or her identification or any process.”

In this case two traffic offences were involved, namely the drunken driving and the negligent driving by Berend; it is claimed at least two eye witnesses to the latter were present at the scene, when Kabende arrived namely, the police officer who

called Kabende to attend and the driver of the alleged other vehicle, yet none of their particulars were recorded. The question is why if indeed there had been an accident?

Wessels, JA set out the approach in a situation where two versions in a civil case are mutually destructive, as follows in *National Employers Mutual General Insurance Association v Gary*, 1931 AD 187 at p 199:

“Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version.....”

In *National Employers General Insurance v Jagers* 1984 (4) SA 437 (ECD) Eksteen AJ, at 440 C, said:

“I fully agree with the judgment of Coetzee J in the last mentioned case at 237 to the effect that the approach to

the problems of proof as laid down in the above quoted passage from the judgment in Gany's case

'only applies in cases where there are not probabilities one way or the other. Where there are probabilities, inherent or otherwise there is no room for this approach.'

(The last mentioned case is *African Life Insurance Co Ltd v Cainer* 1980 (2) SA 234 (W).

I note in passing that the further statement by Wessels, JA that "absolute reliance" must be placed upon the story as told by the litigant upon whom the onus rests was considered inappropriate when dealing with the onus of proof in the setting of a civil case (per Davis J in *Maitland & Kensington Bus Co (Pty) Ltd v Jennings* 1940 CPD 489 and per Clayden J in *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd* 1955 (2) SA 1 (WLD).

In *S v De Lange*, 1983 (4) SA 621 (ZSC)

Georges JA said at 624 H.

“The assessment of the probabilities inherent in the story given by a witness is an essential part of the evaluation of the truth of that story. If on appraisal it can be concluded that a story is inherently probable and there is in addition corroboration of it, then very good reasons indeed must exist for not accepting it”.

In Jagers case, supra, Eksteen AJP went on to say (at 440 E) that in a civil case the onus is not as heavy as in a criminal case,

“...but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.”

He further stated, at 440 I-441 A, that it did not seem desirable “for a Court first to consider the question of the credibility of the witnesses

...and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiryit is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities”.

I adopt the approaches mentioned in the cases just quoted above and proceed to consider the probabilities in this case. I do so in light of the fact that the story told by first plaintiff is in major respects corroborated by two eye witnesses, Hansen and Haininga, and as to the items that went missing, by second plaintiff and that Kabende was the sole witness for the defence, the police officer who called Kabende to attend the alleged accident was not called nor was the driver of the other vehicle which allegedly was in collision with plaintiffs' motor vehicle; in the drunken driving charge on which Kabende arrested Berend, these two would have been vital witnesses as to the proof that Berend drove his car under the influence of drink, and also as to the allegation that an accident had occurred.

As a traffic officer Kabende would have been or ought to have been aware of the need for eye witnesses to prove the fact that

Berend drove his motor vehicle in the circumstances alleged, since Kabende himself did not see the collision occur, more so considering the alleged fact that although he said the two motor vehicles were stuck together, that he asked the other driver to sit behind the steering wheel of Plaintiffs' motor vehicle while it was being pushed on to the pavement because it could not start. If his story is true Kabende's performance of his duties imported by section 14(1)(h), was very negligent. I find it improbable that Kabende as a traffic officer would fail to appreciate the need for witnesses if he indeed attended an accident where the allegations made by the defence, through Kabende, would have to be proved in a charge of drunken driving, and that he would have failed to record the particulars of both drivers when, as alleged, the other driver was clamouring for payment for the damages sustained by his vehicle as a result; the other driver would no doubt have claimed damages in a civil suit, but no such suit was brought against Berend.

Kabende's disclaimer of liability to see that Berend's motor vehicle was safeguarded rests solely on his claim:-

- (i) that he offered to call a breakdown service for Berend,
- (ii) that Berend declined the offer,
- (iii) that Berend made arrangements with his brother-in-law to call his wife to come and remove the motor vehicle,
- (iv) that he confirmed such arrangements with Hansen.

In his evidence Kabende said that after he had dealt with Berend at the Hospital and had him detained, he passed by the Single Quarters and found Hansen still at the vehicle. If he did one would be justified to assume he was checking to see if everything was alright with the car. Having satisfied himself that Berend himself had made arrangements for the safe placement or removal of the motor vehicle one would have expected him to enquire from Hansen if he had called or contacted Berend's wife; he did not. It is highly improbable that the arrangements he alleged were made by Berend with Hansen for "the safe disposal or placement of the motor vehicle were made as Kabende claimed; Kabende would have been concerned or at least curious to see if Hansen had

followed up or was following up on such arrangements seeing, as he alleged, the vehicle would not start.

I find it also highly improbable that Kabende searched the motor vehicle and its boot and found that none of the articles alleged to have gone missing were in the vehicle. If the search had been made he would have found at least the jack, the wheel spanner

and the spare wheel in the boot. These are items commonly carried by every driver in his motor vehicle all the time.

It was not denied that Berend and Hansen were under the influence of liquor, they had been drinking and Berend's evidence was that Hansen was already under the influence of alcohol when they arrived at the shebeen that afternoon. On his own showing Kabende regarded Berend was incapable of "driving or being in charge of his vehicle, hence the arrest. This would import a duty on him to make sure the alleged arrangements Berend made with Hansen in respect of the removal of the motor vehicle to a safe place would be effected. Kabende said that the duty imposed on a traffic officer by section 14 of the Road Traffic and Transport Act 22 of 1999 was discretionary. According to his evidence he exercised that

discretion. If he did so in terms of what he said in his evidence I would still find that he exercised his discretion in a negligent manner, or improperly.

Lastly I must say it is highly improbable that the other driver involved in the alleged collision would have left the matter there if indeed there had been a collision in which his motor vehicle sustained damages in circumstances where first plaintiff's negligence would have been the sole cause of the accident.

I am quite aware of the criticism made by Mr Schickerling of the evidence on behalf of the Plaintiffs. The first is that there is no evidence as to when the burglary took place. Mr Schickerling said it was on this score that he submitted the plaintiffs had much to gain by coming to this Court with a distorted version; immediately thereafter he reminded the court of what he regarded as two vital issues on which plaintiffs contradicted each other. The first was that Berend testified that when his wife arrived at the police station at 23:06 that Saturday evening, he did not speak to his wife and this was to create the impression that he had not informed her where the vehicle was stationed at that particular time so that it would open the door to "argue that the vehicle was locked

when left at the place, and that when they found it the next morning it was burgled; Ms Berend said she spoke to him.

Indeed in answering questions put to him by the Court Berend appeared to deny that he spoke to Ms Berend when she got to the police that Saturday night. But Mr Schickerling seems to have forgotten that he had asked Berend in cross-examination as follows:

“When was the first time after your arrest that you spoke to your wife? --- When was the?

First time after your arrest that you spoke to your wife?

--- It was the night when they came there.

In the night when they came there? --- Ja its about 23:30, 23:20 round that time”.

When Berend appeared to contradict himself at the end Mr Schickerling did not follow it up to ask him to explain. In any event I do not see how that links up with coming up with a distorted version.

The letter Exhibit A & B written by Ms Berend to the Municipality shows that after she received a report of the arrest of her husband Ms Berend went “to the place where the vehicle stood” before she went to the police station. It is also true that in her evidence she said she did not go to the car because she was afraid she had heard there had been a quarrel between her husband and some other guys. Again even after the letter was revealed no clarification of this statement was sought.

Ms Berend’s explanation as to why she did not remove the motor vehicle that night after she obtained the key at the police station

was a reasonable explanation. I do not see anything blameworthy in the fact that she did not remove the vehicle that night and that she removed the vehicle the following morning after she had contacted her lawyer who instructed her to do so. Nor do I agree that she deliberately withheld the evidence that she had gone to where the vehicle was that night before she went to the police. The conclusion by defence counsel that “if anything the (plaintiffs) caused their own damage is not, in my opinion, warranted by any criticism that is made of Ms Berend’s actions.

The last criticism made of their evidence is that Mr Berend said he had had the Rayban glasses for approximately three years while according to Ms Berend he had had them for about six months. In my view nothing turns on these two approximations.

In the result I find that plaintiffs have proved their case on a balance of probabilities.

The following order is made:

1. Defendants are ordered jointly and severally to pay the plaintiffs N\$17 418.74 plus interest at the rate of 20% per annum *a tempore morae*.
2. Defendants are ordered jointly and severally to pay plaintiffs' costs of suit.

MTAMBANENGWE, A.J.

ON BEHALF OF THE PLAINTIFFS

Adv

Coleman

Instructed by:

A Vaatz &

Partners

ON BEHALF OF DEFENDANTS

Adv

Schickerling

Instructed by:

Fisher Quarmby &

Pheiffer