**REPUBLIC OF NAMIBIA** REPORTABLE

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**(ABSOLUTION FROM THE INSTANCE)**

Case no: I 2909/2006

In the matter between:

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| **DIETMAR DANNECKER** | **APPLICANT** |

And

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| **LEOPARD TOURS CAR & CAMPING HIRE CC** | **1ST RESPONDENT** |
| **BARBARA HAUSNER** | **2ND RESPONDENT** |
| **MANFRED HAUSNER** | **3RD RESPONDENT** |

**Neutral citation:** *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015)

**Coram:** DAMASEB, JP
**Heard:** **26 February 2014, 13 March 2014 and 4 August 2014**
**Delivered:** **20 February 2015**

**Flynote:** Practice and Procedure – Absolution from the instance – Test - Not whether the evidence led by the plaintiff establishes what would finally be required to be

established, but whether there is evidence upon which a court, applying its 'mind reasonably' to such evidence, could or might find for the plaintiff. If plaintiff had made out a case and defendant's defence peculiarly within his/her knowledge, absolution not appropriate remedy - Court must, in adjudicating absolution application, guard against defendant who seek to avoid testifying under oath to explain uncomfortable questions.

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**ORDER**

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1. The application for absolution from the instance is hereby dismissed with costs, such costs to include the costs of one instructing and one instructed counsel;
2. The matter is postponed to **3 March 2015 at 14h15** for status hearing and for the allocation of dates for the continuation of trial.

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**JUDGMENT**

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Damaseb, JP:

Brief Background

[1] The plaintiff sues the defendants, jointly and severally, for the repayment of moneys paid for damage caused to a vehicle he had hired for use while on a safari in Namibia. He had booked the vehicle from his homeland, Switzerland, on-line having taken an interest therein based on a prospectus published on the internet by 'Leopard Tours.'

[2] The prospectus, amongst others, promised to those intending to hire its vehicles a:

'[T]op quality and the best service at a reasonable price' from 'among the leading companies in this line of business , and that we are your first choice when it comes to spending a carefree holiday in southern Africa'.[1]

It added:

[1] In light of what I say later on, this representation is significant.

'Contrary to many other providers, Leopard Tours does not pursue a confusing extra-charge policy with hidden extras.'

It then proceeds to offer in respect of the vehicles offered for hire:

'**SUPER COVER**- all **types of insurance**: 'CDW', 'TLW', 'ACDW' and reduction of excess to a minimum-'ACDW' with approx. 95% cover'. (Emphasis is theirs).

The pleadings

*Plaintiff's claim*

[3] The plaintiff alleged in his particulars of claim, inter alia, that the first defendant, represented by the second and third defendants; alternatively the second and third defendants personally (as a partnership), represented to him through the on-line prospectus that the tariff he had to pay for renting a car from the defendants was a 'super insurance cover' 'providing 95% protection and a reduction of the excess to € 148.90'. He claims that he relied on this representation when he entered into a hire contract with the defendants (in the alternative) for the hire of a 4 x 4 vehicle at a daily rate of € 148, 90. He further alleges that when the defendants made the representation regarding the insurance cover aforementioned, they knew it to be false as they knew that an insurance cover was not in existence to cover the plaintiff in the manner promised; in the alternative he alleges that the representation was negligently made and that the first defendant was at all relevant times not insured as a short-term insurer. He alleges further that the representations were made to induce him to enter into the vehicle rental agreement.

[4] The plaintiff relies on misrepresentation because of the following circumstances:

**(a)** He took delivery of the vehicle and went with it on safari. He was satisfied that the insurance promised covered him fully for the damage the car sustained when it was overturned by a flood which came down on the vehicle when he got stuck in a river;

**(b)** The defendants held him personally liable for the damage to the car and demanded payment from him in the amount of N$ 168 963-41 on the pretext

that he was not covered by the insurance because he drove the vehicle through a river while the rental contract he signed stated he should not;

**(c)** He established after the event that the first defendant was not registered as an insurer under the Short-Term insurance Act, 1998 (Act No. 4 of 1998) (the Act) and, therefore, could not have offered any insurance to the plaintiff as represented but falsely, alternatively negligently, did so.

**(d)** When the defendants exacted payment of the damages for the car, the defendants represented that he had breached the terms of the rental contract when in reality no such insurance cover existed. Had such representation not been made, he would not have made the payment for the damage to the defendants.

[5] In addition to the cause of action based on misrepresentation, the plaintiff alleges that he discovered after paying for the damage to the vehicle that the defendants repaired and renovated the vehicle at a cost substantially lower than the N$ 168 963.44 claimed by the defendants from and so paid by him.

[6] The quintessence of the plaintiff's claim against the defendants is that they were not entitled to the payment he made to them in respect of damages occasioned to the hired vehicle. According to the plaintiff, his understanding of the car rental agreement was that he had full cover and that his having driven through a river, which at the time was running at a depth of 20cm, was not excluded by the contract. However it later transpired that the insurance cover did not, according to the defendants, include the damage caused to the car as a result of the alleged breach of the rental agreement which, according to the defendants, prohibited him from driving it through riverbeds or through water. The plaintiff alleges that he made the payment to the defendants in the bona fide and reasonable belief that he owed the amount demanded.

[7] It was only in their plea to the plaintiff’s particulars that the defendants allege that the alleged contracting party (first defendant) had no insurance cover with a registered insurer but was ‘self-insured’. The plaintiff’s case is that if he had known the full facts, he would not have paid for the damage to the car as he was made to believe that he was

fully indemnified in respect of the damage by the insurance offered in the prospectus and which he accepted. In the alternative the plaintiff relies on unjust enrichment (*condictio indebiti*) of the defendants.

*Defendants' Plea*

[8] The defendant's plea is manifold:

**(a)** That the second and third defendants were misjoined as they did not contract with the plaintiff;

**(b)** That the plaintiff breached the terms of the rental agreement which prohibited him from driving the rented vehicle through riverbeds or in water;

**(c)** That the fact that the first defendant was not a short-term insurer is irrelevant as it did not demand monthly contributions and/or other levies or contributions and excess payments from the plaintiff which could have the effect that the defendants acted contrary to and/or in violation of the Act;

**(d)** That the claim in the alternative, for recovery of the amount on the ground that the defendants were enriched, had prescribed.

Plaintiff's evidence

[9] The plaintiff testified personally and called one witness, Mr Lange (Lange), to testify on his behalf. A great deal of the facts narrated by the plaintiff in evidence relates to facts that are common cause and contained in documentary evidence, i.e. a prospectus published on-line by the defendants seeking customers from overseas intending to go on safari in Namibia and desiring to rent cars for the purpose, the email correspondence between the parties and the car rental agreement which the plaintiff signed in Namibia before he took possession of the car rented from the defendants.

[10] In an on-line advertisement[2] on www.leopardtours.com, the plaintiff came across representations offering 'all-inclusive rates' in respect of vehicles for hire. Regarding insurance, the advertisement made the following representation in so far as it is relevant to what is now before me:

[2] Vide exhibits record, p. 12.

'Unfortunately, there is **no** insurance company in Namibia which offers a "zero-excess". It is thus not possible either to insure a vehicle under a "0-excess" scheme without any excess'. (The emphasis is theirs).

[11] On 2 February 2004, the plaintiff sent an email to 'leopard@leopardtours.com' addressed 'Dear Hausner family' and in reference to the offer of a vehicle for his intended safari in Namibia, stated the following:

'We consider your offer as being very interesting and above all "commented on fairly". I will not hide from you the fact that we hold two offers by competitors, the price of one of whom is slightly below yours. The other one is so much cheaper…that one can only suppose it to be unsound.'

[12] After making reference to the specific price offered by Leopard Tours, the plaintiff states the following in his email message to the defendants as an indication of his minimum requirements:

'Such price includes absolutely everything (the highest possible insurance cover) with the lowest excess admissible in Namibia, no extra charges whatsoever…'

[13] A reply was received to the above email on the same date from 'Leopard Tours (mailto:leopard@iafriac.com.na) penned by second defendant 'Barbara Hausner', writing on behalf of 'Leopard Tours Car and Camp Hire'. The plaintiff apparently having accepted the rate offered by Leopard Tours, the second defendant in that reply advises the plaintiff of payment arrangements as follows:

'In order to make the booking a fixed one, we request payment of a deposit of 10% of the rental fee, for which purpose we have set up an account also in Switzerland'.

[14] In a further email of 13 February 2004, the second defendant again writing on behalf of 'Leopard Tours Car and Camp Hire', confirmed plaintiff's booking and gave two alternative account numbers in Germany and Austria into which the plaintiff had to make the deposit of 10%. The account beneficiary is given as 'Hausner' – the surname of second and third defendants.

[15] On 25 February 2004, the plaintiff sent an email to 'Hausner family' advising of a direct deposit into the Germany account given by the second defendant.

[16] The plaintiff took possession of the car on 1 November 2004. He did so after signing the rental agreement which shows that Leopard Tours was a close corporation. On the reverse side of the agreement, which plaintiff testified under oath he did not read, the following representation is made:

'The vehicle is insured in terms of the Motor Vehicle Insurance Act and under an Insurance Policy…'

[17] Having taken possession of the vehicle, the plaintiff took off on the ill-fated safari. At some point on his journey he drove through a riverbed and the vehicle got stuck. A flood then came and overturned the vehicle. The second and third defendants came to recover the vehicle and returned it to Windhoek. They at the time had the plaintiff's passport in their possession, presumably as security for the return of the rented vehicle. The defendants demanded payment of the cost of recovery and anticipated repairs of the vehicle from the plaintiff, failing which, the evidence of the plaintiff shows, it was made clear to him that his departure from Namibia may not be possible. He then made arrangements with his bank in Switzerland to pay the payment demanded.

[18] The defendants justified their demand for payment from the plaintiff on a clause in the rental agreement which, on the front page, stated the following:

'Although renter has got insurance cover with certain amounts of excess as pointed out above in this contract and in paragraph 8 of standard terms and conditions, renter is still liable for full damage to the Leopard Tours vehicle if caused by negligence or road conditions not suitable for the vehicle, or driving in riverbeds and through water, or driving on any terrain or roads which have no road numbers.' (My underlining doe emphasis)

[19] The plaintiff testified that he on reading the prospectus assumed that Leopard Tours was a family business and that he did not gain the impression that it had a separate legal identity from the second and third defendants. He added that the email correspondence between him and the second and third defendants made no mention of

the fact that a separate legal entity was involved. He also relies on the fact that he made payment of the deposit into the account to the second and third defendants and not that of a body corporate. The tax invoice given to him also does not make any reference to a body corporate. Lange who was called by the plaintiff also testified that he was under the impression that Leopard Tours was not a body corporate.

[20] The plaintiff also testified that when he and Lange met with the third defendant they were made to understand that the plaintiff was covered fully for any damage to the vehicle. The plaintiff also lays great store for the allegation in support of the misrepresentation by the fact that the second and third defendant throughout remained silent about the fact, as they now allege, that they were self-insured.

[21] The plaintiff testified that he would not have concluded the car rental agreement had he been informed of the true facts about the kind of insurance the defendants allege he enjoyed and that they were ‘self-insured’, rather than being insured with an insurance company.

[22] At the end of the plaintiff’s case, the defendants brought an application for absolution from the instance in terms of the old rule 40 (6) on the grounds:

(a) By way of special plea, that the second and third defendants are mis-joined because they are being sued in their personal capacities while the plaintiff allegedly knowingly contracted with Leopard Tours CC, a body corporate with a legal identity separate and distinct from the second defendants’;

(b) That the proved facts and the surrounding circumstances demonstrated that the damage to the motor vehicle arose from a cause excluded by the contract between the plaintiff and the first defendant;

(c) That prescription operates against the plaintiff’s alternative claim seeking repayment of the moneys paid in connection with the vehicle as, according to the plaintiff, the defendants repaired the damaged vehicle at a cost

substantially less than the amount they received from the plaintiff for its repair.

Arguments

*Defendant*

[23] If I understand the defendant's defence, which they say remains unraveled by the plaintiff's evidence viewed against the backdrop of the pleadings, is as follows:

**a)** There is no *prima facie* evidence that second and third defendants contracted in their personal capacities with the plaintiff and that the prospectus on the strength of which he initiated the contact for the rental of the car, represented 'Leopard Tours CC' and provided its registration number.

**b)** The particulars of claim alleged that the plaintiff was induced by the defendants representing that they had short-term insurance when, in fact, they did not; whereas the plaintiff's evidence suggests that the reason he contracted with the defendants is that they offered, and he accepted, an all-inclusive insurance (Volkasco). The defendants argue that the contract which the plaintiff signed made no mention of Volkasco or the first defendant being short-term insured and that, consequently, the plaintiff could not have been misrepresented to by something the defendants never said;

**c)** The contract which the plaintiff signed specifically told him that he would be liable for all damages occasioned to the rented vehicle if he drove through riverbeds or in water and that, in that respect, it becomes a moot point whether or not the first defendant had any insurance cover at all in respect of the rented vehicle.

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**d)** The plaintiff's evidence makes clear that he paid the defendants because he feared not being allowed to leave Namibia if he did not pay, yet in his pleadings the assertion is made that had he known the fact that the defendants had no insurance cover for the car, he would not have paid them. In amplification it is said, that the plaintiff made arrangements to pay the defendants at a time that he was fully aware that the defendants had self-insurance.

**e)** The plaintiff's alternative claim for repayment because the defendants repaired and renovated the car at substantially less cost than what they exacted from him, is sought to be debunked on the evidence of Lange that he knew not that the defendants in fact repaired the vehicle at a lower cost. It is said that no evidence has been led that *prima facie* supports the allegation that the cost at which the vehicle was repaired is less than what the plaintiff paid the defendant's for its repair.

*Plaintiff*

[24] Mr Strydom on behalf of the plaintiff argued that the evidence so far adduced on behalf of the plaintiff indicates that the plaintiff had dealings with the second and third defendants in their personal capacities. As for the misrepresentation, he relies on the defendants' failure to disclose the so-called self-insurance for the inference that they intended to mislead potential customers, including the plaintiff, about the nature of insurance they would receive for renting a vehicle from the defendants. Counsel argued that the prospectus and the surrounding circumstances amply demonstrate that the defendants wanted potential customers to believe they would be fully covered for any damage caused to the vehicle and that the plaintiff so believing concluded the rental agreement and would not have done so if he was made aware of the true facts.

<u>The test for absolution at end of plaintiff's case</u>

[25] The relevant test is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.[3] The reasoning at this stage is to be distinguished from the reasoning which the court applies at the end of the trial; which is: 'Is there evidence upon which a Court ought to give judgment in favour of the plaintiff?'[4]

[26] The following considerations are in my view relevant and find application in the case before me:

a) Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law;

b) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;

c) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;[5]

d) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;[6]

e) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's

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[3] Labuschagne v Namib Allied Meat Company (Pty) Ltd (I 1-2009) [2014] NAHCMD 369 (1 December 2014), para [7]; Stier and Another v Hanke 2012 (1) NR 370 (SC).
[4] Ruto Flour Mills (Pty) Ltd v Anderson (2) SA 307 (T) at 309E-F.
[5] Compare, Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) 1971 (4) SA 90 (RA) at 92.
[6] Mazibuko v Santam Insurance Co Ltd & Another 1982 (3) SA 125 (A) at 127C-D.

evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.[7]

The law to the facts

*Misjoinder*

[27] The plaintiff was required to and made payment of the contract amount for the car rental into a bank account belonging to the second and third defendants. It becomes immediately apparent that not only was the payment not made into an account of the entity referred to as Leopard Tours and which purports to be registered in Namibia and would be liable to payment of tax under the laws of Namibia, but it was paid into a foreign account of persons (second and third defendants) who have since stated in the pleadings before court that they are not the contracting parties and, on that basis, seek absolution from the instance at the end of plaintiff's case.

[28] The first defendant, as a Close Corporation, was proven by the plaintiff to be in breach of the law governing close corporations in material respects. The law imposes certain duties on those carrying on business under a close corporation. It must, in transacting business, refer to itself in printed material by the abbreviation 'CC'. The abbreviation 'CC' (in capital letters) must be subjoined to the English name the close corporation uses.[8] If the name of a close corporation is used without the abbreviation 'CC' in capital letters, a member involved in such transaction shall be personally liable to a person who contracts with the close corporation unaware that he or she contracted with the close corporation.[9] All notices, advertisements, letters and invoices of a close corporation must have the name of the close corporation and its registration number mentioned in legible characters.[10] A failure to comply with these provisions renders a member criminally liable.

[29] The second and third defendants' application is undermined by the following undisputed or common cause facts:

[7] Antlatic Continental Assurance Co of SA v Vermaak 1973 (2) SA 335 (A) at 527.
[8] Section 22(1) of the Close Corporations Act, No. 26 of 1988.
[9] Ibid, section 63(a).
[10] Ibid, section 23(1) (b).

(a) the deposit for the car rental was made into their personal account held in Germany on 25 February 2004;[11]

(b) the tax invoice received by the plaintiff does not state that the first defendant was a separate legal entity.

(c) the advertisement of the first defendant on the on-line prospectus did not use the abbreviation ‘CC’ in capital letters and the registration number was not stated.

(d) In all the email correspondence leading up to the rental agreement the second and third defendant make no reference to the fact they were acting on behalf of a body corporate and always did so in their personal names.

[30] There is therefore evidence, quite apart from the plaintiff's own evidence, that during conversations with them he formed the impression that he was dealing with them in their personal capacities.

[31] There is prima facie evidence therefore for drawing the inference that the plaintiff thought he was contracting with the second and third defendants as a family business. Besides, all these factors provide a disincentive for the first and second defendants to enter the witness box. But that is no good reason for seeking absolution.

*Misrepresentation on insurance*

[32] Plaintiff’s case is two-fold at this stage of proceedings. First, he maintains that the defendants had offered him, and he accepted, full risk cover in respect of the rented car and that the kind of risk that occurred was not excluded under such cover. He bases that on the way in which the prospectus stated the insurance and the discussion he and Lange, his only witness, say they had with the third defendant when they picked up the

[11] This requires some explanation because income earned in Namibia is taxable under Namibian law: Income Tax Act, 1982 (as amended).

vehicle. Their evidence is that during that discussion, third defendant assured them that all risks were covered.

[33] In the view I take of the matter on the question of 'self-insurance' and the potential for misrepresentation, I do not find it necessary to deal specifically with the conflicting evidence on whether or not the plaintiff was made to understand that he was receiving full risk cover.

[34] The car rental agreement between the parties was predicated on the understanding that the plaintiff enjoyed insurance cover for his use of the car. It is not in dispute that the defendants represented to him that he indeed enjoyed insurance. That much is clear from the references from the prospectus[12]. It emerged during the course of plaintiff's case that the defendants had no insurance policy with a short term insurer in respect of the rented vehicle and that, as suggested by their counsel, in the plea and during course of the trial, they were self-insured. Not only is such a concept alien to me and requires explanation from them as part of their case, but, it is common cause, that was (a) not conveyed to the plaintiff when the agreement was being consummated, (b) its scope and extent is not fully pleaded, and (c) is prima facie a breach of the Act which prohibits the offering of any short term insurance by any person who is not registered.

[35] Section 2(1) of the Act states that:

'No person shall…carry on short-term insurance business in Namibia unless such person is registered to carry on such business.'

[36] The Act defines a short-term insurance business as:

'any transaction in connection with the business of assuming the obligations of any insurer…under any class of short-term insurance business specified in Schedule 1 ...'[13]

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[12]See paras 2 and 10 of this judgment.

[13] Item 7 of Schedule 1 includes under short-term insurance: 'Effecting and carrying out short-term insurance contact primarily designed to cover the interest of any natural person against –
(a)…
(b) loss or damage to any motor vehicle used on land , including liability risks arising from the use of such vehicle…and the risk pf pecuniary loss to the person insured attributable to the incurring of legal costs'.

[37] The definitions section excludes from a short-term insurance business the activities of an association of persons established for the purpose of rendering aid to its members or their families and registered under the Friendly Societies Act of 1956 including any transaction connected with, and subsidiary to, any business other than insurance or reinsurance which is so exempted by the Registrar of Short-Term insurance. It appears to me that the first defendant, if it offered insurance and wished to place itself beyond the reach of the prohibition to conduct an insurance business on the basis of being 'self-insurance', needed the registrar's determination that it was excluded. There is no evidence before me that it is so excluded. The defendants on-line (a public forum) represent themselves as among the best the best in the business and publicly solicit custom for the rental of camping vehicles and as part of that offer insurance which includes an excess. The plaintiff was not their or the last client.[14] Therefore, even on the basis that it offered self-insurance (whatever that means), there is prima facie evidence that it conducted an unregistered short-term insurance business.

[38] Self-insurance is not a common practice or a term of art; and since its scope and effect is not clear from the defendant's plea, the defendants have an obligation, as argued by counsel for the plaintiff, to disclose all material facts incidental to the type of insurance they offered to the plaintiff. For if such thing does not exist, how could the plaintiff breach its terms? One can't breach a non-existent obligation. The evidential burden rests on the defendants to show there was an insurance of the nature alleged; its terms and their acceptance by the plaintiff and resultant breach by him.

[39] In addition, the plaintiff's evidence, which on the authorities I must accept as true, is that the defendants represented to him that he was covered by insurance according to the applicable laws of Namibia. A reasonable inference in his favour is that he assumed that such insurance was compliant with the only applicable legislation, the Short-Term Insurance Act, which in any event prohibits the offering of insurance by an unregistered person. If that result is reached, the representation was, as alleged, fraudulent or negligent. A conclusion made all the more plausible because no self-

[14] See footnote 1 and para 10 of this judgment.

insurance was mentioned in the prospectus or in the discussions the plaintiff had with the defendants before he took possession of the rented vehicle.

[40] I do not find any merit in the suggestion that the plaintiff could not have been misled by the offer of insurance in the terms he alleges because, on his own version, he did not look on the reverse side of the rental agreement where that representation is made. The state of mind of the person making a representation is just as relevant as the state of mind of the representee.

[41] Lord Herschell said in *Derry v Peek*[15] that to establish fraudulent misrepresentation, the plaintiff only need establish absence of an honest belief in what the representor states. A representor who pretends to have knowledge when in truth she knows that she is ignorant can't be said to have an honest belief in a statement putting forth what she pretends to know.[16]

[42] It is apparent from the on-line prospectus and the correspondence between the parties that the second and third defendants wanted the plaintiff to believe that they were offering him 'the best possible insurance cover' for the vehicle he was going to hire and that the insurance they offer is the best in the business. They knew he wanted the best possible insurance cover because he told them so. On their version now, the best possible insurance cover which they could offer was 'self-insurance'. Yet nowhere in the prospectus or the correspondence with the plaintiff do they make any reference to it – a concept which only they seem to know and which, at best, remains nebulous. They also knew that the plaintiff was considering alternatives to their offer. Would a person seeking the best possible insurance and who was not prepared to take the cheapest because it seemed unsound[17] accept a form of insurance that is out of the ordinary and not disclosed to him by the defendants. I think not!

[43] The defendants clearly represented to the plaintiff that they were offering him insurance in the conventional sense. The fact that he did not look at the reverse side of

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[15] (1889) 14 A.C. 337 (HL) at 374, adopted in R v Meyers 1948 (1) SA 375(A) at 382. See also Hamman v Moolman 1968 (4) SA 340 (A) at 347(A).

[16] Kerr, AJ.2002.*The Principles of the Law of Contract* (5th edt) Duban: Butterworths, p 259.

[17] See para 11 of this judgment.

the rental contract is neither here nor there. The fact that such a statement appears in the rental agreement is proof of the intent they acted with, which was to make the plaintiff believe that they were offering him insurance under the laws applicable in Namibia. As we know now, that was false.

[44] The plaintiff has therefore made out a *prima facie* case for the allegation that the defendants made a false representation about the insurance they were offering him.

[45] It does not assist the defendants to say, as suggested by their counsel in argument that the Act was not applicable to the self-insurance they offered because they were not in the business of taking premiums. It is a contradiction in terms to refer to an insurance contract which does not involve a premium. It has been said[18] that a premium:

> '[I]s the consideration required of the assured in return for which the insurer undertakes his obligations under the contract of insurance.'[19]

In fact, the Act defines 'premium' to mean 'the consideration given or to be given in return for an undertaking to provide policy benefits and includes a deposit premium'. A policy is in turn defined to as 'a valid written short-term insurance contract, irrespective of the form in which the rights and obligations of the parties thereto are expressed or created, and includes a guarantee policy'. A policy benefit is then defined as 'one or more sums of money, services, or other benefits'.

[46] It has been held that:

> 'A contract of insurance, then, must be a contract for the payment of a sum of money, or for some corresponding benefit such as the rebuilding of a house or the repairing of a ship, to become due on the happening of an [uncertain] event'.[20]

[47] If I find that the defendants did not have in place a valid insurance cover for the benefit of the plaintiff in respect of the car rental agreement, they would have

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[18] Lewis v Norwich Union Fire Insurance Co. [1916] A.C. 509.
[19] Ibid at 519.
[20] Prudential Insurance Company v Inland Revenue Commissioners [1904] 2 K.B. 658 at 665.

misrepresented to the plaintiff. If there was no insurance contract in place, on what basis could the plaintiff be held liable for the damage occasioned to the vehicle? All these are issues that can only be determined at the end of the whole case and after the defendants had given their versions. I do not wish to elaborate further on the many concerns I have about the defendants' case given they have not yet testified.

[48] If the fact of the defendants being self-insured was disclosed to the plaintiff, it may well have been decisive of the question whether he would have assumed the risk of renting the defendants' vehicle and his preparedness to pay the rental amount and the so-called excess.[21] In fact, in his evidence, which I must accept as true, he said he would not have contracted with the defendants if he knew that what was offered was not insurance in the conventional sense but 'self-insurance'. This, the most important defence of the defendants, is peculiarly within their knowledge. The defendants must answer to it.

[49] Fraud if established unravels everything. If it is proved that the defendants made a fraudulent misrepresentation that unravels everything. The parties in such a circumstance must, as far as possible, be placed in the position they would have been in but for the misrepresentation.[22] It is trite that where the representee was not to blame for his or her inability to restore wholly or at all, justice may require that he not be made to restore.[23]

[50] Lange's failure to support the allegation that the defendants fixed the car at a cost lower than what they received from the plaintiff in that case becomes irrelevant because they will in any event have to establish just how much they spent on the repair of the vehicle to justify any excess above which the plaintiff would not be entitled. The inquiry always is, as the authors of Lawsa suggest: 'How much worse off is the representee financially as a result of the misrepresentation?'[24]

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[21] Compare Mutual & Federal Insurance Co Ltd v Oudshoom Municipality [1985] ALL SA 324(A), 1985 (1) SA 419 (A) 435.
[22] Trotman v Edwick 1951 (1) SA 443(A); De Jager v Grunder 1964(1) SA 446(A); Ranger v Wykerd 1977(2) SA 976(A).
[23] LAWSA, Vol. 5, para 134 at p.63 and authorities cited at footnote 7.
[24] Lawsa supra and also see Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd 1958 (1) SA 479(A) and Scheepers v Handley 1960 (3) SA 54 (A).

[51] I have come to the conclusion that the application for absolution must fail on either ground advanced by the defendants. One should not lose sight of the test to be applied at this stage ie not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its 'mind reasonably' to such evidence, could or might find for the plaintiff.[25]

[52] I may well come to a different conclusion at the end of the whole case, but at this stage certain explanations are required from the defendants.

[53] The prescription point was not pursued in argument by the defendants and for that reason I do not deal with it.

Order

[54] In the premise, I make the following order:

1. The application for absolution from the instance is hereby dismissed with costs, such costs to include the costs of one instructing and one instructed counsel;
2. The matter is postponed to **3 March 2015 at 14h15** for status hearing and for the allocation of dates for continuation of trial.

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PT Damaseb

Judge-President

[25] Claude Neon Lights (SA) Ltd v Daniel 1979 (4) SA 403 at 409G-H; Bidoli v Ellistron t/a Ellistron Truck & Plan 2002 NR 451 (HC) at 453D-F.

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APPEARANCES:

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| APPLICANT | J A N STRYDOM |
| ON INSTRUCTIONS OF | ANDREAS VAATZ & PARTNERS, WINDHOEK |
| RESPONDENT | C J MOUTON |
| ON INSTRUCTIONS OF | MUELLER LEGAL PRACTITIONERS, WINDHOEK |