



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

CASE NO.: I 918/2012

In the matter between:

FOUR WINDS LOGISTICS CC

PLAINTIFF

And

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

DEFENDANT

Neutral citation: *Four Winds Logistics CC v The Government of the Republic of Namibia (1918-2012)* [2015] NAHCMD 115 (3 June 2015)

Coram: UEITELE,J

Heard on: 04, 05 and 06 March 2013

Delivered on: 03 June 2015

Flynote: *Practice - Trial* - Absolution from the instance at close of plaintiff's case - Test to be applied - Test was whether evidence could or might lead a Court, applying its mind reasonably, to find for plaintiff - Evidence to be considered in relation to pleadings and law applicable to particular case.

Negligence - Liability for - Wrongfulness - Omission - Whether negligent omission to be regarded as unlawful - Issue is one of legal policy, to be answered against background of norms and values of particular society in which principle sought to be applied - Legal convictions of Namibia community necessarily informed by norms and values embodied in Namibian Constitution - Norms and values inconsistent with Constitution having no legal validity - Constitution thus a system of objective, normative values for legal purposes.

Negligence - Proof of - Necessity for plaintiff to prove not only that the possibility should have been foreseen but also that there were reasonable steps which should have been taken - Onus on plaintiff to establish the steps defendant could and should have taken to protect plaintiff's property.

Summary: In this matter the plaintiff claims damages from the Government of the Republic of Namibia. It alleges that on 02 July 2011 and at Usakos, Plaintiff's truck overturned whilst conveying 28 020 kg of horse mackerel fish from Walvis Bay to Angola. Subsequent to plaintiff's truck overturning, members of the Namibia Police arrived and took charge of the accident scene.

The plaintiff alleges that members of the public also arrived on the scene and together with some members of the Namibian Police themselves, and in the presence of the Namibia Police, wrongfully and unlawfully removed, looted and/or stole the entire consignment of horse mackerel fish. The essence of the plaintiff's claim is that it suffered damages because the Namibian Police omitted or failed to exercise its constitutional and statutory duties of protecting its property.

The defendant pleaded to the plaintiff's allegations and denied that the members of the Namibian Police neglected their statutory duty and constitutional duty to protect the plaintiff's property. Defendant pleaded that the members of the Namibian Police took all reasonable steps to ensure that the large crowd was dispersed.

At the trial the plaintiff called four witnesses to testify on its behalf. After all the witnesses testified the Counsel for the plaintiff closed the plaintiff's case. Counsel for the defendant thereafter applied for absolution from the instance.

Held that when absolution from the instance is sought at the close of plaintiff's case the test to be applied is not whether the evidence led by 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 (not should, or ought to) find for the plaintiff.

Held further that in order to succeed with a civil claim for the recovery of damages based on delictual negligence, the plaintiff has to show that the defendant owed him a duty of care, which duty of care the defendant had breached by positively committing an act or doing something that caused harm to the plaintiff's interest.

Held furthermore that there was not the slightest evidence that, any member of the Namibian Police who arrived at the accident scene on 02 July 2011, in Usakos looted or stole boxes of fish.

Held furthermore that there is equally no evidence as to what the reasonable steps the members of the Namibian Police who arrived at the scene of the accident ought to have taken to prevent the members of the public from looting and stealing the fish.

Held furthermore that the evidence before the court does not substantiate the allegations by the plaintiff that, the members of the Namibian Police who arrived at the scene of the accident failed or neglected to prevent members of the public and some members of the Namibian Police themselves from removing, looting and stealing the entire consignment of horse mackerel fish. For all these reasons no reasonable Court could or might give judgment in plaintiff's favour.

ORDER

The application for absolution from the instance is granted with costs, the costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE, J

A INTRODUCTION AND BACKGROUND

[1] In this matter the plaintiff claims damages from the Government of the Republic of Namibia which, it alleges it suffered because the Namibia Police failed to perform its duties. In its particulars of claim the plaintiff amongst others makes the following allegations.

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At all times material hereto the plaintiff was the owner of a SCANIA truck with registration number N 16373 S.

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On 02 July 2011 and at Usakos, Plaintiff’s aforesaid truck overturned whilst conveying 28 020 kg horse mackerel fish from Walvis Bay to Angola. Plaintiff bore the risk of all damage or loss to the said fish whilst in transit.

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Subsequent to plaintiff's truck overturning as aforesaid members of the Namibia Police arrived and took charge of the accident scene. Members of the public also arrived on the scene and together with some members of the Namibian Police themselves, and in the presence of the Namibia Police, wrongfully and unlawfully removed, looted and/or stole the entire consignment of horse mackerel fish.

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Despite being under a legal duty to do so, the members of the Namibian police present at the scene of the accident failed or neglected to prevent such members of the public and some members of the Namibian police themselves from removing, looting and/or stealing the entire consignment of horse mackerel fish.

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The conduct of the members of the Namibian Police aforesaid constituted a breach of their legal duty to prevent or protect the fish consignment from being removed, looted and or stolen by members of the Public and members of the Namibia Police themselves.

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In and as a result of the said conduct of the members of the Namibian Police, the plaintiff suffered damages in the sum of N\$257 240.00 being the value of the entire fish consignment.

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At all material times hereto the said members of the Namibia Police were acting within the course and scope of their employment with the defendant.

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On the premises the defendant is liable to the plaintiff for the payment in the amount of N\$ 257 240.80, which amount despite due demand, defendant failed and/or refuses to pay.'

[2] The defendant pleaded to the plaintiff's allegations. In its plea the defendant admitted that the plaintiff was the owner of the SCANIA truck with registration number and letters N 16373 S, and that on 02 July 2011, the truck overturned at Usakos, whilst conveying a consignment of 28 020 kg Horse Mackerel fish. The defendant did not deny that the consignment of the Horse Mackerel fish (I will in this judgment for the sake of convenience and where relevant refer to the consignment of the Horse Mackerel fish as the property) was being transported from Walvisbay to Angola. It furthermore pleaded that.

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...members of the Namibian Police arrived at the scene to attend the accident, the remainders of the content herein are denied and the plaintiff is put to the strictest proof thereof:

5.1 In amplification of the above denial, the defendant avers that the police did not derelict from their statutory duty and constitutional duty of protection as they took all reasonable steps in ensuring that large crowd dispersed viz;

5.1.1 Firing warning shots several times to disperse the crowd.

5.1.2 By addressing the crowd to disperse and advising that those who would loot the fish would be arrested. Arrests were made as a result.

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6.1 ...

6.2 In spite of the police effort they were clearly outnumbered by the crowd, the defendant made all necessary efforts to disperse the large crowd from taking the law in their own hands.'

[3] In support of its allegations (i.e. that members of the Public and members Namibian Police Force who arrived at the accident scene on 02 July 2011, in Usakos looted and stole the plaintiff's property and that members of the Namibian Police failed

or neglected to perform their constitutional and statutory duties of protecting the plaintiff's property), the plaintiff called four witnesses to testify on its behalf. After the four witnesses testified Mr. Slabber closed the plaintiff's case. Mr. Hinda, who appeared for the defendant asked for absolution from the instance, argued his case and Mr. Slabber replied thereto.

[4] In support of its application for absolution from the instance, Mr. Hinda argued that the plaintiff failed to place evidence before the court which indicates that:

- (a) Members of the Namibian Police who arrived at the scene of the accident removed, looted or stole some of the boxes of the fish;
- (b) Members of the Namibian Police who were present at the scene of the accident failed to or did not act to prevent the members of the public to loot and steal the boxes of fishes; and
- (c) That Mr. Klynsmith had the authority to institute these proceedings on behalf of the plaintiff

Mr. Slabber who appeared for the plaintiff however argued that this matter falls squarely within facts of the *Dresselhaus*¹ matter and urged me to dismiss the application for absolution.

B THE LEGAL PRINCIPLES

Absolution from the instance

[5] In the matter of *Nampost Limited v Hiwilepo*² Ndauendapo, J said the following:

¹*Dresselhaus Transport CC v Government of the Republic of Namibia 2005 NR 214 (SC).*
²*An unreported judgment of this Court Case No (T) I (3253/2007) [2013] NAHCMD 18 delivered on 29 January 2013.*

'The test for absolution from the instance to be applied by a trial court at the end of plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H as follows:

"...(W)hen absolution from the instance is sought at the close of plaintiff's case the test to be applied is not whether the evidence led by 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 (not should, or ought to) find for the plaintiff (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173, *Ruto Flour Mills (Pty) Ltd v Adelson* 1958 (4) 307 (T)."

This implies that a plaintiff has to make out a *prime facie* case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court would find for the plaintiff. See *Marine Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 at 37G-38 (A).

[6] In the matter of ***Bidoli v Ellistron t/a Ellistron Truck and Plant***³ Levy, AJ said:

'The phrase 'applying its mind reasonably' requires the Court not to consider the evidence in *vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case. He further held that 'if a reasonable Court keeping in mind the pleadings and the law applicable, considers that a Court 'might' find for the plaintiff, then absolution from the instance must be refused.'

Negligence

[7] In order to succeed with a civil claim for the recovery of damages based on delictual negligence, the plaintiff has to show that the defendant owed him a duty of care, which duty of care the defendant had breached by positively committing an act or doing something that caused harm to the plaintiff's interest⁴. The general rule of delict is

³ 2002 NR 451 at 453E-F.

⁴*Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A) at 585A per Schreiner, JA.

that no one is held liable for doing nothing. This is trite law. But this general rule has developed another dimension. In the case of *Minister van Polisie v Ewels*⁵ the Court held that a negligent omission (i.e. the doing nothing) will be regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only evokes moral indignation but the '*legal convictions of the community*' require that it should be regarded as unlawful.

[8] In the case of *Knop v Johannesburg City Council*⁶ Botha, JA said:

'The general nature of the enquiry [that is whether the defendant owed the plaintiff a duty of care or not] is stated in the well-known passage in Fleming *The Law of Torts* 4th ed at 136:

"In short, recognition of a duty of care is the outcome of a value judgment that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes."

C THE EVIDENCE

[9] Against this background I turn to the evidence. The first witness to testify was a certain Klynsmith the sole member of the plaintiff. Klynsmith testified that, he is the sole member of the plaintiff and the plaintiff is the owner of the Truck and trailer which was attached to the Truck. He testified that the Truck was engaged to carry the consignment

⁵1975 (3) SA 590 (A); This case was approved by the Supreme Court in the matter of *Dresselhaus Transport CC v Government of the Republic of Namibia* 2005 NR 214 (SC).

⁶ 1995 (2) SA 1 (A).

of fish from Walvis Bay to Angola and bore the risk for any loss sustained thereto. Consequently the corporation was insured against such loss.

[10] Mr. Klynsmith further testified that, he received a report on the morning of 02 July 2011 of the Truck overturning with the consignment thereon. He at the same time also received a phone call from a certain Ms. Pearson of Impala Security in Usakos and he requested her to deploy guards in order to safeguard the property. He immediately drove to Usakos and on his way to Usakos he also received a call from a police officer who informed him of the accident and that the trailer broke open. He furthermore testified that he asked the police officer to guard the property. When he arrived in Usakos at the scene of the accident he found the entire container empty. He was then taken to a butchery where 38 boxes of the fish were placed in a refrigerated room and he was informed (by the Manager of Impala Security) that, those were the only boxes of fish that they could rescue. He also testified as to the value of the property that was looted, he placed the value at N\$ 264 213-60.

[11] The second witness to testify on behalf of the plaintiff was a certain Mr. Festus Ngeno, a security officer employed by Rubicon Security in Usakos and he resides at the Transnamib premises in Usakos. He testified that on Saturday morning (the 02nd of July 2011) at between 08H00 and 09H00 a truck collided into the cooler room next to his house. He went out and he found a certain Mr. Rohan Pearson of Impala Security (and four other members of that company), two other members from Rubicon Security company, a police officer by the name of Simon (he was not in uniform) and about twenty members of the public at the truck. He further testified that, he saw that the truck had a load of boxes of fish on it. The Truck had capsized and its trailer had broken open and a large number of boxes of fish had fallen out of the trailer. He further testified that what they (i.e. he, Mr. Pearson, and the other security officers present) did when he got to the truck that had capsized was to assist the driver who was injured and trapped in the Truck. They succeeded to get the driver out and to summon an ambulance which came and took the driver of the Truck to hospital. Shortly after the driver of the Truck

was taken to a hospital, a member of the Namibian Police traffic department, a certain Mr. Iitope arrived at the accident scene and so did members of the public also start to arrive at the accident scene and gathered around the truck.

[12] Mr. Ngeno further testified that as the people (i.e. members of the public) arrived a female police officer and another police officer (he identified this Police Officer in uniform as sergeant Senyando, the station commander of the Usakos Police Station) in uniform also arrived at the scene, he then made the proposal (to Simon the Police Officer whom he found at the scene) that they must move all the boxes of the fish and pack them at one place so that they could have better control of the boxes of fish. Simon's reply was that the boxes of fish must not be touched or moved. He further testified that at the time when he made the suggestion no box of fish was looted or taken. He testified that people were arriving fast (in his words he said '*hundreds and hundreds of people were coming near the truck*') and they lost control of keeping the members of public away from the Truck and the boxes of the fish which were strewn on the ground around the Truck. He further testified that one member of the public (whom he identified as a teacher at a local primary school (i.e. in Usakos) then made the following statement '*let us take the fish, the Insurance will pay, the police officers or the security officers can do whatever they want to...*'

[13] Mr. Ngeno testified that after this utterance by the member of the public that member grabbed the first box of fish and the crowd followed suit. At that point there were five police officers and about nine security officers. He testified that at that point the police officers could do nothing because they were overwhelmed by the number of persons who were taking the boxes. He testified that all of them (i.e. the police officer and the security officers from both Impala and Rubicon) who were present tried to stop the people from looting the boxes of fish. He testified that the woman police officer was using a plank to hit the people, so that they do not take the boxes, another police officer was beating the people with his belt and sergeant Senyando was having a pistol. He further testified that there were two pistols and a rifle that was used to attempt to stop

the crowd from looting and stealing the boxes of fish, he testified that pepper spray was also used in an attempt to stop the people from looting the boxes of fish. They were shooting in the air and the ammunition got finished and they started to use fire extinguishers to attempt to stop the people. All these attempts were in vain. He testified that when they realized that they were 'losing the battle' to stop the looting, they the security officers resorted to taking the boxes of fish to a nearby butchery but they only managed to rescue thirty eight boxes.

[14] The sole proprietor and manager of Impala Security was plaintiff's next witness. He was one Pearson. He testified that he was standing with an off duty police officer one constable Johannes Simon at the OK Mini Mark when he saw the truck approaching the T junction from the Swakopmund direction and colliding into the cool room just after the T junction. He testified that they rushed to the accident (which was a few meters away from the OK Mini Mark where they were standing) and the first thing they did was to assist the driver who was injured and they managed to get him taken to a hospital by an ambulance. He testified that within a space of five minutes members of the public started to converge on the scene of the accident. As soon as the members of the public started to converge on the scene, he telephonically called his mother and asked her to bring more security guards and equipment (from Impala Security) to the accident scene. He testified that his mother brought him four security officers, a rifle, buttons and lots of pepper sprays. He thereafter sent her to the police station to request some more assistance. Shortly after he had send his mother to summon assistance from the police station, three (two in uniform and one in plain clothes) police officers arrived at the accident scene.

[15] Mr. Pearson testified that by the time that the three police officers arrived at the scene, the members of public had already started taking the boxes of fish. He then testified that, he went to a police officer (constable litope, the traffic officer) who gave him permission to fire in the air in an attempt to stop people from looting. The firing in the air did not deter the public from looting. Constable litope accordingly gave

permission to the security officers to use minimum and maximum force to stop the members of the public from looting the fish. Pearson further testified that, they then sprayed the people with pepper sprays in the attempt to stop them from looting the boxes of fish. He testified that the police officers at the scene also attempted to stop the people from looting the boxes of fish, he testified that the lady police officers used a plank to hit the people on their hands to stop them from taking the boxes of fish, another police officer was using his belt to hit the people in the attempt to prevent them from taking the boxes of fish and he gave pepper sprays to two police officers who also sprayed the people with it but all these efforts did not succeed in preventing the people from looting the boxes of fish. He further testified that constable Johannes was taking pictures of the people as they were looting the boxes of fish.

[16] The plaintiff's next witness was a certain Nicolas Albertus Smith, who is a loss adjustor and conducting business under the name and style of Specialized Investigation Consultant Services. His testimony was more with respect to the quantum of damages suffered by the plaintiff. After the testimony of Smith the plaintiff closed its case. The defendant did not testify but opted to apply for absolution from the instance.

D APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS

The alleged negligence of the Namibian Police

[17] The essence of the plaintiff's claim is that it suffered damages because the Namibian Police omitted or failed to exercise its constitutional and statutory duties of protecting its property. The starting point is therefore whether the alleged omissions of the members of the Namibian Police recognize a legal duty owed by the Namibian Police to the plaintiff. In applying the test that was formulated in ***Minister van Polisie v Ewels*** the 'convictions of the community' must necessarily now be informed by the

norms and values of our society as they have been embodied in the Namibian Constitution.

[18] In the matter of ***Dresselhaus Transport CC v Government of the Republic of Namibia***⁷ the Supreme Court found that the constitutional directives for the State to protect the rights and property of persons require that a legal duty be recognized. I fully endorse and associate myself with the view that the constitutional and statutory directives enjoining the Namibian Police to protect the rights and property of persons in Namibia require that a *legal duty* be recognized. The negligent conduct (either by commission or omission) of police officers where a legal duty is recognized is thus actionable and the State is vicariously liable for the consequences of any such negligence. The next question, then, is whether the police officers who arrived at the scene of the accident on 02 July 2011 were negligent.

[19] The classic test for negligence was set out in the matter of ***Kruger v Coetzee***⁸ as follows:

'For the purposes of liability *culpa* arises if –

- (a) a *diligens paterfamilias* in the position of the defendant –
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.

...Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of

⁷ *Supra* footnote 2.

⁸ 1966 (2) SA 428 (A).

each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases. {Italicized and underlined for emphasis}

[20] These requirements summarize the law, and failure to prove any one of these requisites vitiates a claim of damages, the onus being on the plaintiff. In the present matter the plaintiff must, at the least, place evidence before the court indicating that members of the Namibian Police who arrived at the scene of the accident foresaw the reasonable possibility of their conduct (either by commission or omission) injuring the plaintiff in his property and causing him patrimonial loss; and that they failed to take reasonable steps to guard against that occurrence. In this matter there is not the slightest evidence that any member of the Namibian Police who arrived at the accident scene on 02 July 2011, in Usakos looted or stole boxes of fish. There is equally no evidence as to what the reasonable steps the members of the Namibian Police who arrived at the scene of the accident ought to have taken to prevent the members of the public from looting and stealing the fish. The evidence before me does not substantiate the allegations by the plaintiff that the members of the Namibian Police who arrived at the scene of the accident failed or neglected to prevent members of the public and some members of the Namibian police themselves from removing, looting and stealing the entire consignment of horse mackerel fish. For all these reasons no reasonable Court could or might give judgment in plaintiff's favour. The application for absolution from the instance is therefore granted. As regards the costs I see no reason why the general rule that costs must follow the course should not apply.

[21] In the result, I make the following order: The application for absolution from the instance is granted with costs, the costs to include the costs of one instructing and one instructed counsel.

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Ueitele SFI, Judge

APPEARANCES

PLAINTIFF:

Mr A Slabber
Of Dr Weder, Kauta & Hoveka Inc.

DEFENDANT

Mr G S Hinda
Instructed by Government Attorney