



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2018/00324

In the matter between:

SIMEON SHISHIVENI

PLAINTIFF

and

**PROSECUTOR GENERAL OF THE REPUBLIC
OF NAMIBIA**

FIRST DEFENDANT

INSPECTOR GENERAL OF THE NAMIBIAN POLICE

SECOND DEFENDANT

Neutral citation: *Shishiveni v Prosecutor General of the Republic of Namibia*
(HC-MD-CIV-ACT-DEL-2018/00324) [2019] NAHCMD 254 (25
July 2019)

Coram: KANGUEEHI AJ

Heard: 19 July 2019

Delivered: 25 July 2019

Flynote: Application for absolution from the instance at the close of the plaintiff's case – The test for absolution – Whether there is evidence on record upon which a court applying its mind reasonably could or might find for the plaintiff – Claim for

malicious prosecution – Principles thereof – No evidence of quantification of the damages claimed – Court not able to assess damages – Court finds plaintiff failed to establish a *prima facie* case therein – Application granted.

Summary: An application for absolution from the instance was brought by the first defendant at the close of the plaintiff's case – The plaintiff's case is one for malicious prosecution against the Prosecutor General (hereafter referred to as the PG) – Although according to the case-plan, the plaintiff intended to call two witnesses of which he was one, he was the only witness who testified in his case – The plaintiff was arrested on the 13th of January 2010 on charges of murder and robbery and remained in custody until his release after he was found not guilty on the 31st of March 2015 – During June 2013 the plaintiff exercised his rights to apply for bail and same was subsequently refused – As a result of his incarceration until when he was found not guilty, the plaintiff is suing the first defendant and her employees in the amount of N\$3 830 000 (Three Million Eight Hundred and Thirty Thousand Namibian Dollars) for *cuntumelia*, deprivation of freedom and discomfort.

ORDER

1. The application for absolution from the instance is granted.
2. The matter is finalised.
3. There is no order as to costs.

RULING: ABSOLUTION FROM THE INSTANCE

KANGUEEHI AJ:

Introduction

[1] At the closure of the case for the plaintiff, on the 17th of July 2019, the PG (hereafter referred to as the first defendant) applied for absolution from the instance. The parties were directed to file their respective heads of argument and the matter was postponed to the 19th of July 2019 for arguments. Heads of argument were filed which the parties orally expanded on.

[2] Claiming malicious prosecution in this action proceeding, the plaintiff sought damages against the first defendant, and her employees in the amount of N\$3 830 000 (Three Million Eight Hundred and Thirty Thousand Namibian Dollars) for *cuntumelia*, deprivation of freedom and discomfort.

[3] At this stage the court is tasked to ask whether the plaintiff has made out a *prima facie* case. What the court considers at this juncture is whether all the elements relating to the claim have been met *prima facie*¹. It follows that the court asks whether the plaintiff, who bore this onus of proof, has done so.

[4] In the claim for malicious prosecution the specific onus which the plaintiff bears is to prove the absence of reasonable and probable cause as well as *animus injuria* on the part of the PG².

Plaintiff's case

[5] The court will not repeat verbatim the evidence presented by the plaintiff. For purposes of this ruling the court will summarise the essential points of his evidence.

[6] The plaintiff was charged on the 13th of January 2010 with murder and robbery and he remained in custody until his release after he was found not guilty on

¹ (*Marine & Trade Insurance Co. Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2).

² *Minister of Safety and Security v Mahupelo Richwell Kulisesa* (SA 7-2017) [2019] NASC (28 February 2019) at para 94.

the 31st of March 2015 (The case in which the plaintiff was found not guilty I shall refer to as the *criminal trial*)³.

[7] During June 2013 the plaintiff exercised his right to apply for bail and same was subsequently refused. The plaintiff is suing for the period of his deprivation of freedom and discomfort as a result of his incarceration until when he was found not guilty.

[8] The basic allegation in the plaintiff's claim is that the defendant (first defendant)⁴ had acted without reasonable and probable cause, without having sufficient information at her disposal which substantiated the charges levelled against him, alternatively that the PG did so without having reasonable belief in the truth of any of the information given to them by the police in respect of the matter he was charged with.

[9] The plaintiff further testified that he suffered physical, emotional and psychological harm. He further testified that he was diagnosed with perianal fistula and suffered from high blood pressure and diabetes⁵.

[10] Integral to the plaintiff's case is the evidence of one Thomas Erastus, who was accused no. 4 in the criminal trial. The plaintiff sought to call the latter to testify that he (Thomas Erastus) allegedly exonerates the plaintiff's involvement in the murder and robbery charges and in particular that the plaintiff was not at the murder scene.

[11] At the end of plaintiff's evidence, however, Mr Enkali, who appeared on the plaintiff's behalf informed the court that there was unwillingness on the part of Mr Thomas Erastus to appear as a witness for the plaintiff and his instructions from the plaintiff were to proceed in the absence of Mr Erastus. The plaintiff thereafter proceeded to close his case.

³ It is in evidence that the plaintiff was in custody on another case when he was so charged with the relevant criminal case.

⁴ Para 2 of the Plaintiffs Particulars of Claim states as follows, 'No relief is sought against the second defendant and cited in so far as it might have an interest in the proceeding'.

⁵ I hasten to add that no evidence of these ailments was led. I further hasten to add that at no point did the plaintiff establish that these ailments came about as a result of his incarceration.

[12] I pause here to mention that the evidence of Mr Thomas Erastus referred to in the plaintiff's evidence in chief constitutes hearsay evidence and shall be disregarded.

[13] Further the court notes that paragraphs 6 – 21 of plaintiff's witness statement refer solely to what was done by an Inspector Amakali, the investigating officer in the criminal case. Bearing in mind that the plaintiff seeks no relief against the second Defendant, under whom Inspector Amakali operates as an investigating officer attached to the Namibian Police Force, the evidence as to his alleged improper conduct takes the case of the plaintiff no further.

[14] It was incumbent on the plaintiff to present evidence on which facts the PG relied on in instituting proceedings against him and particularly dealing with the assessment or alleged lack thereof by the PG in order to prove his case. Regrettably, this was not done. An attempt was made during re-examination. At this point, the damage was already done.

[15] A further glaring omission in the particulars of claim and evidence-in-chief is any form of quantification of the alleged damages suffered. The court thus has nothing at its disposal to assess how the amount of N\$3 830 000 (Three Million Eight Hundred and Thirty Thousand Namibian Dollars) for *cuntumelia*, deprivation of freedom and discomfort was arrived at.

[16] In cross-examination the plaintiff conceded that he did not lead evidence by a medical professional on the medical conditions he alleged to have suffered. He further conceded that he did not provide any proof in respect of the amount of damage he allegedly suffered.

[17] The plaintiff further conceded that he did not provide evidence on whether the PG was malicious in the continued prosecution without probable cause. The plaintiff further agreed that no evidence was provided to show improper conduct or motive on the side of the PG.

[18] On the score of the evidence against the plaintiff at the criminal trial he conceded that the evidence was circumstantial and not direct. The plaintiff further conceded that he was in the vicinity of the murder scene. That an alleged water bottle found around the murder scene bore his finger prints. He further conceded to have been with two of his co-accused prior to the robbery and murder but that he left after they started fighting.

Onus

[19] In a claim for malicious prosecution the plaintiff bears the onus to prove the absence of reasonable and probable cause and *animus injuria* on the part of the PG. If one or other of these elements is lacking, then a defendant will not be held liable. I also accept as good law that if there is reasonable and probable cause to prosecute that it would be improbable that the PG acted maliciously⁶.

The law on malicious prosecution

[20] In *Minister of Safety and Security v Mahupelo Richwell Kulisesa*,⁷ the Supreme Court stated with reliance on *Akuake v Jansen van Rensburg* ⁸ where Damaseb JP set out the requirements on the merits and the quantum which must be alleged and proved in a matter for malicious prosecution. These are as follows:

1. The defendant must have instituted or instigated the proceedings;
2. The defendant must have acted without reasonable and probable cause;
3. The defendant must have been actuated by an improper motive or malice (or *animo injuriandi*);
4. The proceedings must have terminated in the plaintiff's favour, and
5. The plaintiff must have suffered damage (financial loss or personality infringement).

⁶ *Minister of Safety and Security v Mahupelo Richwell Kulisesa* (SA 7/2017) [2019] NASC (28 February 2019), at para 94.

⁷ (SA 7/2017) [2019] NASC (28 February 2019), at para 38

⁸ *Akuake v Jansen van Rensburg* 2009 (1) NR 403 HC.

[21] The Supreme Court further stated that in addition to malice, *animus iniuriandi* must be proved before the defendant can be held liable for malicious prosecution⁹. The Supreme Court referred to *Neethling's, Law of Personality* in showing the distinction between malice and *animus iniuriandi*, as follows:

'*Animus iniuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi* ' ¹⁰ .

Absolution from the instance

[22] Absolution from the instance has been explained in many cases as this court is faced with the test on a frequent bases. In *Aluminium City CC v Scandia Kitchens and Joinery (Pty) Ltd*¹¹, Silungwe AJ stated the tests as follows:

'It is often said that in order to escape absolution from the instance a plaintiff has to make out a *prima facie* case in that it is on *prima facie* evidence – which is sometimes reckoned as evidence requiring an answer (*Alli v de Lira* 1973 (4) SA 635 (7) at 638 B-F) in that a Court or could or might find for the plaintiff. However, the requisite standard is less stringent than that of a *prima facie* case requiring an answer, it is sufficient for such evidence to have at least the potential for a finding in favour of the plaintiff.'

[23] In *Redoli v Elliston t/a Elliston Truck and Plaint*¹², Levy AJ stated the following at 553 (F):

'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

⁹ *Minister of Safety and Security v Mahupelo Richwell Kulisesa* (SA 7/2017) [2019] NASC (28 February 2019).

¹⁰ *Neethling's Law of Personality* (Second Edition) p 181.

¹¹ *Aluminium City CC v Scandia Kitchens and Joinery (Pty) Ltd* 2007 (2) NR 494 at 496 E-G

¹² *Redoli v Elliston t/a Elliston Truck and Plaint* 2002 NR 451

relation to the requirement of the law applicable to the particular case. Mr Dicks argued that the plaintiff had to make out a prima facie case. I doubt whether a plaintiff has to go that far to escape absolution. 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.’

[24] The Supreme Court in *Stier and Another v Henke*,¹³ the Court At 92F-G stated the following:

‘Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88 referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of a appellant’s case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A) at 409G-H:

“... (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 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 (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307 (T).”

Harms JA went on to explain at 92H- 93A:

“This implies that a plaintiff has to make out a *prima 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 could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’ (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another

¹³ *Stier and Another v Henke* 2012 (1) NR 370 (SC)

“reasonable” person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.” ’

Applying the law to the facts

[25] In analysing the evidence presented what stands out like a sore thumb is the absence of evidence upon which the court can assess the damages suffered and how the amount was arrived at. This omission is unfortunately fatal as damage is clearly an element of the plaintiff’s case.

[26] The court’s view on this is that the best evidence available to the plaintiff was not presented to the court. The court should be placed in a position to assess such evidence but cannot do so when mere lip service is paid to such a requirement.

[27] I accept as good law the position in *Abner v K L Construction and Another*¹⁴ where the Court referred to *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd*¹⁵ at 51 where De Villiers J quoted with approval the following passage from *Hersman v Shapiro & Co*¹⁶ at 379:

‘Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but, even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance.’ (Emphasis added)

[28] One can certainly not say that the mere averment of an amount of of N\$3 830 000 is the best evidence the plaintiff had in his possession as it begs the question where the plaintiff derived this amount from. Surely the plaintiff derived the amount from some sort of quantification and same was simply not produced in court. I

¹⁴ *Abner v K L Construction and Another* (I 1676-2011) [2013] NAHCMD 139 (27 May 2013)

¹⁵ *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T)

¹⁶ *Hersman v Shapiro & Co* 1926 TPD 367

therefore find that in those circumstances, a court would be justified in giving absolution from the instance.

[29] The plaintiff evidence dealt almost entirely with the conduct of the investigating officers in the criminal trial. This not only detracted from the elements of improper motive or malice and *animo injuriandi* on the part of the PG but resulted in insufficient evidence being placed before the court regarding same. The result thereof was also fatal to the plaintiff's case.

[30] What further aggravates the problem for the plaintiff is that the evidence presented, or lack thereof is uncorroborated as a result of his closing his case without calling further witnesses. Glaringly absent was the evidence of Thomas Erastus who would exonerate the plaintiff of any involvement in the criminal matter.

[31] The plaintiff further failed to present to court any documentary evidence in support of his testimony on the ailments suffered whilst incarcerated. So to his failure to create a nexus between the said ailments and his incarceration. These further taints the probative weight of the evidence on that score.

[32] Through the evidence it became apparent that there are disputes on whether there is evidence upon which the plaintiff was arrested and prosecuted. This being, the water bottle which bore his finger prints, the plaintiff being in the vicinity of the murder scene, the stolen properties allegedly recovered from his residence and that the plaintiff was seen with his co-accused prior to the murder and robbery.

[33] The court was, however, provided with the judgment of the proceedings in the criminal matter which took place in the regional court and can deduce therefrom that the regional court was of the view that on such evidence the plaintiff had a case to answer to when she, Divisional Magistrate Usiku, as she then was, then placed him and his co-accused on their respective defence¹⁷. What the court can draw from the judgment is that the court found that there was a *prima facie* case against the plaintiff.

¹⁷ Para 83 of the regional vourt judgment, *S v Amon Fillemon Siyamba and 6 others*.

[34] I have taken into account all the foregoing and in applying my mind reasonably to the evidence, the court is of the view that the evidence presented does not arouse the court's mind is so far as it 'could' or 'might' find for the plaintiff. It follows that the evidence does not meet requirement 2, 3 and 5 of the elements of the claim. I therefore conclude that the plaintiff has not succeeded in the test provided for in the Supreme Court in the *Stier* matter and as a result absolution from the instance is granted.

[39] In consequence whereof, I make the following order:

1. The application for absolution from the instance is granted.
2. The matter is finalized.
3. There is no order as to costs.

K N G Kanguuehi
Acting Judge

APPEARANCES:

PLAINTIFF:

S N ENKALI

Of Kadhila Amoomo Legal Practitioners, Windhoek

DEFENDANTS:

J VAN DER BYL (with her S KAHENGOMBE)

Of Government Attorney, Windhoek