



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT- DEL- 2018/05002

In the matter between:

ELIPHAS GOMEB

PLAINTIFF

and

MINISTER OF SAFETY & SECURITY

1ST DEFENDANT

COMMISSIONER-GENERAL –

NAMIBIAN CORRECTIONAL SERVICES:

RAPHAEL AMUNYELA

2ND DEFENDANT

OFFICER IN CHARGE: MANFRED JATAMUINE

3RD DEFENDANT

NURSE: BARNABAS

4TH DEFENDANT

ACTING CORRECTIONAL SUPERVISOR: IIPINGE

5TH DEFENDANT

CORRECTIONAL OFFICER: TOIVO

6TH DEFENDANT

CORRECTIONAL OFFICER: HENDRIK

7TH DEFENDANT

Neutral citation: *Gomeb v Minister of Safety & Security* (HC-MD-CIV-ACT-DEL-2018/05002) [2020] NAHCMD 416 (11 September 2020)

Coram: TOMMASI J

Heard: 13 – 17 July 2020.

Oral Submissions: 17 July 2020
Delivered: 11 September 2020

Flynote: Trial — Absolution from the instance at close of plaintiff's case - 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. (*Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015) - Court must accept truth of plaintiff's evidence unless incurably and inherently improbable and unsatisfactory. (*Helao Nafidi Town Council v Shivolo* 2016 (2) NR 401 (HC))

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. The application for absolution is dismissed with costs;
 2. The matter is postponed to 21 October 2020 to determine dates for status hearing and for the allocation of dates for continuation of trial.
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JUDGMENT

TOMMASI J:

[1] The defendants' applied for absolution from the instance herein. The plaintiff claimed in terms of article 25(2), of the Namibian Constitution, alternatively under

common law for damages suffered in the amount of N\$2 million. (N\$1 million for ill treatment and torture, N\$600 000 for constitutional damages N\$400 000 for Post-Traumatic Stress disorder).

[2] The plaintiff's particulars of claim state that the plaintiff is an inmate of the Windhoek Correctional facility. His claim for damages arose when the defendants' failed to give him medical assistance on 17 August 2018. He complained to the Seventh Defendant that he was having pain and was vomiting and discharging blood. He was not assisted despite his complaint on 17 August 2018. He stayed in this condition for the entire weekend.

[3] On Monday morning, 20 August 2018, the plaintiff reported to the Fifth defendant that he was unwell but no action was taken. At midday he once again complained to the Seventh defendant about his health condition and requested to be taken to the hospital. When the Seventh defendant wanted to know why he did not report it in the morning, he assaulted the Seventh defendant out of frustration and pain. His punishment was to stay in a single cell (isolation) for 30 days. He did not receive any medical attention on 20 August 2018.

[4] On 22 August the officers who unlocked his cell, found his bloody vomit on the floor and they took him to the hospital on the premises of the correctional facility. The Fourth defendant treated him only after an hour when he was injected for pain. He was taken to the Katutura State hospital around 16H00 where he received medical treatment. On 24 August 2018, samples were taken and sent for analysis. He was discharged on the same day. He received the results on 29 August 2018 when he was taken back to Katutura State Hospital. He was diagnosed as having Helicobacter Pylori (Serum). He avers that he was not attended to by any medical doctor during the 30 days he spent in isolation.

[5] The defendants, in their plea, admit that the plaintiff complained of illness on 17 August 2018. They however pleads that the plaintiff received treatment on 17 August

2018 from the Windhoek Correctional Facility clinic and that a nurse (fourth defendant) treated the plaintiff. He was thereafter, on the same day, referred to the Katutura State Hospital where he was seen and treated by doctors. The defendant pleads that the plaintiff was, at all times, attended to medically and more specifically on the 17th, 20th, 22nd, and 29th of August 2018.

[6] The defendants pleaded further that it is standard practice that, before an inmate is placed in isolation, he/she is referred to the Correctional Facility's Clinic for a medical check-up and this was done *in casu*. It is denied that fourth defendant took an hour to give the plaintiff an injection for pain and pleaded that the fourth defendant acted immediately.

[7] According to the defendant's plea, the plaintiff was visited on a daily basis in terms of section 204 of the Regulations to the Correctional Service Act, 2012 (Act 9 of 2012) by an officer in charge and as often as it was practical by the medical service personnel. The defendants admitted that the plaintiff was placed in isolation for 30 days as per the provisions of section 102 of the Correctional Service Act read with section 202 – 207 of the Regulations. The Defendants denied that the plaintiff suffered any damages.

[8] The plaintiff in his replication denied that he was taken to Katutura Hospital, save for the 22nd and the 29th of August 2018. He denied that he received medical attention during the period he was in solitary confinement.

[9] During his testimony the plaintiff did not deviate much from his pleadings. His two witnesses further supported his version that he was not taken to hospital on 17 August 2018. During cross examination of the plaintiff, he was confronted with copies of his health passport, copies of the occurrence book, a copy of a form titled "Confinement or Segregation of Offenders" and a laboratory report which formed part of the documents he disclosed.

[10] The above documents were handed into evidence without any objection. The occurrence book reflects a note made by the Fifth defendant that plaintiff was taken to Katutura Hospital on 17 August 2018. The copy of the passport bears a similar entry reflecting date stamps of inter alia, 17 August 2018 and notes. The medical record reflects further that plaintiff was admitted for treatment on 22 August 2018 and discharged on 24 August 2018. It further reflects that he once again attended Katutura hospital on 29 August 2018 and that on this date his diagnoses was available. The laboratory report reflects that the specimen was collected on 25 June 2018 and not on 24 August 2018 as testified by plaintiff.

[11] The plaintiff largely agreed with the contents of the medical record but denied that he was at the hospital on 17 August 2018. He could not explain how the date stamp and notes reflects his attendance at the hospital on this day. He indicated that the officers kept his medical passport at all times. He furthermore denied that he received medical attention on 20 August 2019 before he was taken to a single cell. He responded to cross-examination on the notes in the occurrence book that he was unable to comment as he does not have any knowledge of these entries and neither was he privy to this document. He insisted that the samples were taken on 24 August 2018 and not on 25 June 2018.

[12] In the matter of *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015) the court held that the test 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 find for the plaintiff. If the plaintiff had made out a case and the defendant's defence peculiarly within his/her knowledge, absolute not appropriate remedy. The Court must, in adjudicating the absolute application, guard against a defendant who seeks to avoid testifying under oath to explain uncomfortable questions. The court referring to *Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 335 (A) at 527* stated the following:

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

[13] The plaintiff's case is that he was not taken to the hospital on 17 August 2018 when he first complained nor did he receive medical treatment when he was placed in solitary confinement. The defendants make the positive statement that the plaintiff was taken on 17 August 2018 and that he was examined before he was placed in solitary confinement. These allegations the defendants must prove.

[14] The defendants' counsel submitted that the mere fact that the documents were handed into evidence, constitutes proof of the contents thereof and failure to object thereto must be construed as a waiver by the plaintiff to challenge the authenticity and admissibility of the documents. Plaintiff's counsel, Mr Muchali, submitted that despite the fact that the documents were handed in without objections, that same is not admissible and referred this court to *Ipinge v Lukas (I 1833/2011) [2018] NAHCMD 106 (23 April 2018)* where the court deals extensively with the admission of documentary evidence in terms of section 18, 20 and 34 of the Civil proceedings evidence Act.

[15] The content of the documents insofar as they differed from the plaintiff's version, was however not admitted by the plaintiff despite the fact that there was no objection to the documents being handed into evidence. The plaintiff's visit to Katutura Hospital on 17 August 2019 and treatment before he was placed in solitary confinement therefore remains disputed.

[16] Counsel for the defendant's took issue with some unsatisfactory aspects of the plaintiff's testimony and urged the court to conclude that the plaintiff's evidence was poor and not credible in material aspects. Counsel highlighted the plaintiff's failure to follow the prescribed grievance procedures and his failure to adduce evidence which supports his quantum. It is trite that the Court must accept the truth of plaintiff's

evidence unless incurably and inherently improbable and unsatisfactory. (*Helao Nafidi Town Council v Shivolo 2016 (2) NR 401 (HC)*).

[17] There is undisputed evidence that the plaintiff was ill on 17 August 2018 and on 22 August 2018, to the extent that he was unable to walk unassisted. It is not disputed that he was hospitalised until 24 August 2018. The case which the defendants presented is that there was nothing wrong with the plaintiff on 20 August 2018. An inference in favour of plaintiff may very well be that his medical condition deteriorated for lack of medical treatment and there is a need for the defendants to answer or rebut the case presented by the plaintiff. I am further of the view that the evidence adduced by the plaintiff and his witnesses, although not entirely satisfactory, cannot be described as incurably and inherently improbable and unsatisfactory.

[18] Counsel for the defendants argued that the plaintiff did not adduce any report of a Social Worker or Psychologist to corroborate his claim for emotional stress nor did he produce medical records. She referred this court to *Minister of Urban and Rural Development v Witbooi* (HC-MD-CIV-MOT-GEN-2019/00225 [2020] NAHCMD 279 (9 July 2020) submitting that it was vital for the plaintiff to have submitted medical records. This matter however deals with the importance of filing the record of review proceedings when applying for condonation. In the matter of *Fish Orange Mining Consortium (Pty) Ltd v Goaseb and Others 2018 (3) NR 632 (HC)* the court held that:

'It would be the high-water mark of injustice for the court, where the plaintiff had otherwise made a prima facie case that it was entitled to some damages, to then grant an application for absolution for the reason that the damages have not been calculated. The court should assess the damages as far as it could, and even where an expert was required to assist the court, ultimately, the decision of the amount of damages to be awarded was a matter for the court and not that of the expert witness.' [my emphasis]

[19] Defendants are tasked with the safe custody of the plaintiff and are required by law to provide every inmate as far as is practicable and when so required, with inter alia essential health care services (Section 23 of the Correctional Services Act, 2012 (Act 9

of 2012. Failure to perform its functions in terms hereof would be unlawful and may render the defendants liable for damages.

[20] I therefore conclude that the plaintiff has made out a *prima facie* case that he did not receive the necessary medical treatment which first defendant and the concerned officers was duty bound to provide in terms of the governing statute. In light of this conclusion the application for absolution of the instance must fail.

[21] In the result, the following order is made:

1. The application for absolution is dismissed with costs;
2. The matter is postponed to 21 October to determine dates for status hearing and for the allocation of dates for continuation of trial.

M A TOMMASI
Judge

APPEARANCES:

PLAINTIFF:

J MUCHALI

Jermaine Muchali Attorneys

Windhoek

DEFENDANT: MS.

J Gawises

Office of the Government Attorney

Windhoek