

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2019/02299

In the matter between:

TALENI PETRUS MANJA

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

1ST DEFENDANT

CHIEF OF THE DEFENCE FORCE

2ND DEFENDANT

MINISTRY OF DEFENCE

3RD DEFENDANT

Neutral citation: *Manja v Government of the Republic of Namibia* (HC-MD-CIV-ACT-CON-2019/02299) [2020] NAHCMD 420 (18 September 2020)

Coram: SIBEYA AJ

Heard: 10 -14 August 2020

Delivered: 18 September 2020

Flynote: Practice – Absolution application at closure of plaintiff’s case – test applied – Whether the plaintiff has made out a case upon which a court acting reasonably could or might find for the plaintiff – On the issue of the assault

perpetrated by NDF members on the plaintiff, causing injuries, pain and suffering, *prima facie* case made out – application for absolution refused.

Summary: The action emanates from an assault perpetrated on the plaintiff during the night of 31 December 2018 by alleged members of the NDF. According to the plaintiff, the NDF members failed to protect him and assaulted him while they were in uniform and acting in the course and scope of their employment. Subsequent to the assault, the NDF members jumped in NDF motor vehicles and left the scene. The plaintiff sustained injuries, suffered pain and suffering and was bedridden for several days.

Held that, the test applied to absolution from the instance is whether there is evidence on which a court acting reasonably, may or might find for the plaintiff.

Held further that, absolution will be granted sparingly, but where an opportunity presents itself, in the interest of justice, absolution should be granted.

Held further that, Evidence led established on a *prima facie* basis that the court, acting reasonably, might find in favour of the plaintiff and there is no evidence led to gainsay that.

Held further that, the application for absolution from the instance is refused with costs.

ORDER

1. The application for absolution from the instance is refused.
2. The defendants are to pay the costs of the application jointly and severally, the one paying the other to be absolved.
3. The matter is postponed to 19-21 October 2020 for continuation of trial.

JUDGMENT

SIBEYA AJ:

[1] Serving before court is an application for absolution from the instance ('absolution application') brought by the defendants subsequent to the closure of the plaintiff's case. The absolution application is opposed by the plaintiff.

[2] The plaintiff is Taleni Petrus Manja, an adult Namibian male businessman residing in Khomasdal in the district of Windhoek.

[3] The 1st defendant is the Government of the Republic of Namibia, a legal person duly constituted in terms of the Namibian Constitution. The 2nd defendant is the Chief of the Defence Force, the principal officer responsible for the supervision, administration and control of the Namibian Defence Force duly appointed in terms of Article 32(4)(c)(aa) of the Namibian constitution. The 3rd defendant is the Minister of Defence duly appointed in terms of Article 32(3) (i)(dd) of the Namibian Constitution.

[4] According to the particulars of claim, on 31st December 2018 at around 23:22 the members of the Namibian Defence Force (NDF) acting in the course and scope of their employment with the Ministry of Defence, wrongfully and unlawfully failed to protect the plaintiff and assaulted the plaintiff all over his body. Resultantly, the plaintiff sustained injuries, suffered from pain and suffering, emotional and psychological trauma. As a consequence, the plaintiff suffered damages for pain and suffering in the amount of N\$600,000; and loss of amenities of life in the amount of N\$400,000.

[5] The defendants in their plea denies that officers of the NDF or Ministry of Defence were at the scene; that the NDF members failed to protect the plaintiff and further denies the NDF members assaulted the plaintiff to the extent of causing him harm.

[6] The test applied in matters of absolution from the instance is trite. It is whether there is evidence led by the plaintiff, at the close of his case on which the court, applying its mind reasonably, to such evidence, might find for the plaintiff?¹

[7] *Damaseb JP in Dannecker v Leopard Tours Car & Camping Hire CC*² discussed the legal principles applicable to absolution from the instance and said the following:

'The test for absolution at the end of plaintiff's case

[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. 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?'

"[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 had 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;
- (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 cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;
- (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

¹ *Stier v Henke* 2012 (1) NR 370 (SC); *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) 409; *Okorusu Fluorspar (Pty) Ltd v Tanaka Trading CC and Another* 2016 (2) NR 486 (HC).

² (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

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.”

[8] *Ms. Zenda* appeared for the plaintiff while *Mr. Kadhila* appeared for the defendants.

Evidence led

[9] The plaintiff testified as the first witness in support of his claim. He testified, *inter alia*, that during the night of 31 December 2018, he was in a taxi with others when they met members of the NDF wearing camouflage uniform and carrying firearms. He was pulled out of a taxi by one of the NDF members armed with a firearm and he cocked it. About six to seven members of the NDF, while acting in the course and scope of the employment, began to question him and accused him of not answering their questions, where after they assaulted him by beating him all over his body. He fell to the ground and they proceeded to kick him on his body. He sustained injuries as a result and suffered from severe pain.

[10] He testified further that as the NDF members left him, he managed to write down the number plates of their motor vehicles. These numbers were NDF 3690 for a white pick-up and NDF 5652 for a camouflaged vehicle. He then proceeded to Wanaheda Police Station where he reported the assault and registered a criminal case against members of the NDF.

[11] The plaintiff testified further that he thereafter went to the hospital where he was examined by a medical doctor, *Dr. Christian Ndambi*.

[12] He further said that he was bedridden for several days due to the assault.

[13] A few days after the assault, the plaintiff posted a complaint on social media (NDF facebook page) where he narrated his ordeal about the assault perpetrated on him by members of the NDF and provided his contact details. A certain *Shilumbu* from the NDF called him to their offices where plaintiff explained the details of the assault at the hands of the NDF members.

[14] The defendants on the hand persisted in cross examination that the members of the NDF did not assault the plaintiff.

[15] The plaintiff then led the evidence of *Dr. Christian Ndambi*. *Dr Ndambi* testified that on 01 January 2019 at Katutura State Hospital, he examined the plaintiff. During medical examination, *Dr Ndambi* found that the plaintiff had a soft tissue injury. He found that plaintiff had sub-conjunctive hemorrhage of the white part of the right eye. This he explained to be as a result of a vein in the right eye of the plaintiff that was damaged causing blood to appear on the white part of his eye.³ The doctor stated further that the injuries which he observed could not have been caused by bacteria but by blunt force trauma. These injuries could last for about 7 days. Plaintiff complained of general body pain. The doctor did not observe any open wound, swollen eye, fracture, or dislocation on the plaintiff.

[16] The basis of the application for absolution from the instance was that:

16.1 The plaintiff failed to call *Mr. Baisako* to testify about the audio recording which as a result amount to hearsay evidence;

16.2 The plaintiff failed to identify the NDF vehicles which he observed at the scene;

16.3 The plaintiff failed to describe one of his assailants to the police as a 'a young slim man', when he reported the assault, while being knowledgeable of such description at the time.

16.4 The plaintiff failed to identify the NDF members who allegedly assaulted him.

16.5 The plaintiff did not allege and prove amenities of life lost.

[17] From the evidence led, it is established that:

17.1 The plaintiff was assaulted on 31 December 2018;

17.2 After the assault, he reported the matter to the Namibian Police for investigation and prosecution;

17.3 During the assault he sustained injuries and was examined by the medical doctor;

³ Exhibit "F" and "G".

17.4 During medical examination, it was found that a vein was damaged in his right eye, causing the eye to be red and such injury could not have been caused by bacteria but by blunt force trauma;

17.5 The plaintiff complained of body pain.

[18] It follows from the above that the plaintiff was assaulted on 31 December 2018 as a result of which he sustained injuries to his eye and suffered body pains.

[19] The determinant question is therefore this: who assaulted the plaintiff?

[20] *Mr. Kadhila* lodged a spirited attack on the evidence of the plaintiff in so far as he testified that he was assaulted by members of the NDF. To say that the defendants simply disputed the evidence that members of the NDF assaulted the plaintiff is an understatement. *Mr. Kadhila* went all out to dispute every fact suggesting that the NDF members assaulted the plaintiff.

[21] The record in its present form hosts evidence from the plaintiff providing that, he was assaulted by members of the NDF. The plaintiff testified further that the NDF member who pulled him out of the taxi wore a camouflage uniform and carried a firearm. When the NDF members left, (so the testimony went), they jumped in two NDF vehicles with registration numbers NDF 3690 and NDF 5652. Without making credibility findings, there is no evidence on record, strictly speaking, to the contrary. On the opposite side, save for the questions disputing the said evidence of the plaintiff, this court has not heard evidence which contradicts that of the plaintiff. I record my observation that, it might be sufficient, in the absence of evidence to the contrary, for the plaintiff to prove his case, if it is ultimately found that he was assaulted and not protected by the NDF members. This might be so, even if the plaintiff fails to pinpoint the exact members of the NDF who are alleged to have assaulted him.

[22] Absolution from the instance should be granted sparingly. But where justice dictates that the plaintiff had not established a case on which a court may or might find in his or her favour, then absolution should be granted.

[23] The evidence of the plaintiff so far demonstrates on a *prima facie* basis, that in absence of the evidence to the contrary, that he was assaulted by members of the NDF. I cannot conclude that the evidence of the plaintiff is so incurably and inherently improbable and unsatisfactory in order to be rejected out of hand as suggested by *Damaseb JP* is the matter of *Dannecker v Leopard Tours Car & Camping Hire CC*, para 26 (e) (*supra*).

[24] It should be remembered that the reasoning at this stage of the proceedings, is distinguishable from the reasoning applied by the court at the conclusion of the trial. At the conclusion of the trial, the test is whether there is evidence upon which a court ought to give judgment in favour of the plaintiff.

[25] In emphasizing the test at this stage of the proceedings, at the closure of the plaintiff's case, and similar to the *Dennecker (supra)* matter, *Gubbay CJ* in *United Air Charters (Pvt) v Jarman*⁴ stated as follows:

‘A plaintiff will successfully withstand such an application if, at the close of his case there is evidence upon which a court, directing its mind reasonably to such evidence, could, or might (not should or ought) to find for him’

[26] I am of the considered view, in the foregoing, that the plaintiff has made out a *prima facie* case against the defendants. I find that the plaintiff has adduced evidence of such a nature that a court acting reasonably, might find for him. In the premises, it will therefore offend the interest of justice, to make an order of granting absolution from the instance in this matter.⁵

Conclusion

[27] In the premises, for the foregoing reasons, I am of the considered view that the defendants' application for absolution from the instance falls to be dismissed.

[28] In the result, I order as follows:

1. The application for absolution from the instance is refused.

⁴ 1994 (2) ZLR 341 (SC).

⁵ *Erasmus v Wiechmann* (I 1084/2011) [2013] NAHCMD 214 24 July 2013 para 18.

2. The defendants are to pay the costs of the application jointly and severally, the one paying the other to be absolved.
3. The matter is postponed to 19-21 October 2020 for continuation of trial.

O S SIBEYA
ACTING JUDGE

APPEARANCES:

PLAINTIFF:

S Zenda
Of Legal Assistance Centre,
Windhoek.

DEFENDANT:

F Kadhila
Of the Office of the Government Attorney,
Windhoek