REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2019/01570

In the matter between:

ELVIN LAFRED SWARTBOOI **PLAINTIFF**

And

WILLEM CHRISTOPHER PIETERSEN **1ST DEFENDANT**
DARREL LEROY PIETERSEN **2ND DEFENDANT**

Neutral citation: *Swartbooi v Pietersen and Another* (HC-MD-CIV-ACT-DEL-2019/01570) [2021] NAHCMD 155 (13 April 2021)

Coram: PARKER AJ
Heard: **25 March 2021**
Delivered: **13 April 2021**

Flynote: Practice – Absolution – At close of plaintiff's case – Court applying trite test – Whether reasonable court satisfied that plaintiff established prima facie case requiring answer from defendant – Court concluding that plaintiff has not established prima facie case requiring answer from defendants – Consequently, court granting absolution.

Summary: Practice – Absolution – At close of plaintiff's case – Court applying trite test – Whether reasonable court satisfied that plaintiff established prima facie case requiring answer from defendant – Court finding that not one iota of evidence was led to prove negligence which was at the centre of plaintiff's case – Court finding further that plaintiff's evidence was singularly lacking as to the period during which defendants caused the alleged harm – Court finding further that no attempt was made to prove the special damages claimed – Consequently, court finding that plaintiff has not made out a prima facie case upon which a court could or might find for plaintiff – Accordingly, order of absolution granted in the interest of justice.

ORDER

1. Absolution from the instance is hereby granted with costs.
2. The matter is considered finalized and is removed from the roll.

RULING

[1] This is a case of two neighbouring farms to the south of the country, separated by a common fence; and the two farms in turn are bordered by other farms. This is a case where one owner of one of the two farms, the plaintiff, characterized the cattle on his farm as 'tame' and the cattle on the farm of the other farmers, the defendants, as 'wild'. This is a case where an allegation by plaintiff is that the 'wild' head of cattle broke through the common fence to enter his farm – not once, not twice, but for a continual period of three years – and he was forced to feed his 'tame' cattle and the 'wild' intruders.

[2] And for all that, plaintiff says that he, 'plaintiff, as a result of the negligent conduct of the defendants decided to repair the fence where the cattle broke through in the amount of N$26 000'. Plaintiff says again that 'plaintiff furthermore incurred damages due to the negligence of the defendants, due to the fact that the 80 head of cattle grazed on his farm, which can be calculated as follows N$100.00 per head of

cattle for a period of 3 years for 50 head of cattle, which amounts to N$329 000'. Plaintiff says yet again that 'plaintiff furthermore had to pay for supplementary cattle lick which amounts to N$15 000'.

[3] This is a case of plaintiff based on those allegations. It is a fundamental principle of our law that he or she who alleges must prove. (*Pillay v Krishna* 1946 AD 946) So it was that plaintiff embarked on proving his case. In doing so, plaintiff gave evidence and called a witness, Mr Jurgen van Wyk, to testify in support of his case. At the close of plaintiff's case first defendant, through his counsel, Mr Nanhapo and second defendant, through his counsel, Mr Christians, brought separate applications for absolution from the instance ('absolution' for short). Both applications were heard together at the same time.

[4] When a similar application was brought in *Neis v Kasuma* HC-MD-CIV-ACT-CON-2017/000939 [2020] NAHCMD 320 (30 July 2020), I stated thus:

'[1] ….

'[6] The test for absolution from the instance has been settled by the authorities. The principles and approaches have been followed in a number of cases. They were approved by the Supreme Court in *Stier and Another v Henke* 2012 (1) NR 370 (SC). There, the Supreme Court stated:

> "[4] At 92F-G, Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of an appellant's (a plaintiff's) case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H:
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> > ". . . 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 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, or 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).)""
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> "Harms JA went on to explain at 92H - 93A:
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> > "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* 4 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 ''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. . . .”

‘[7] Thus, in *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015), Damaseb JP stated as follows on the test of absolution from the instance at the close of plaintiff’s case:

“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 (which I shall call ‘the Damaseb 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;

(a) 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;

(b) 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;

(c) 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;

(d) 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".'

[5] Another important principle that the court determining an absolution application should consider is this. The clause 'applying its mind reasonably', used by Harms JA in *Neon Lights (SA) Ltd* 'requires the court not to consider the evidence *in vacuo* but to consider the evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.' (*Bidoli v Ellistron t/a Ellistron Truck & Plaint* 2002 NR 451 at 453G)

[6] In the instant matter, plaintiff alleges negligence on the part of defendants, which is at the centre of plaintiff's claim, but not one iota of evidence was led to prove negligence. No evidence, as I say, was led to prove that defendants bore the legal duty not to cause harm negligently or intentionally and to prove the nature of the harm and in what manner plaintiff claimed defendants acted wrongfully and intentionally towards plaintiff. (See *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC).)

[7] Second, plaintiff's evidence was singularly lacking as to the period during which defendants allegedly caused the alleged harm – delictually speaking – to plaintiff. Was it the period 2013-2014-2015 or the period 2016-2017-2018? On this

aspect alone, I should say, the version of plaintiff and that of Van Wyk differed significantly in material respect.

[8] Third, no attempt was made by plaintiff to prove the damages claimed; mind you, plaintiff claims special – as opposed to general – damages. No evidence, as I say, let alone sufficient and satisfactory evidence, was led to prove the damages plaintiff claims.

[9] It follows that in my judgement plaintiff has not made out a prima facie case, requiring answer from the defendants. (*Stier and Another v Henke* 2012 (1) NR 370 (SC)) I am aware of the judicial counsel that a court ought to be cautiously reluctant to grant an order of absolution at the close of plaintiff's case, unless the occasion has arisen, but, if the occasion has arisen, the court should grant absolution in the interest of justice (*Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* [2013] NAHCMD 214 (24 July 2013)).

[11] From the foregoing, I hold that plaintiff has not surmounted the bar set by the Supreme Court in *Stier and Another v Henke* which is that for plaintiff to survive absolution, plaintiff must make out a prima facie case upon which a court could or might find for the plaintiff.

[12] Based on these reasons, I conclude that the occasion has surely arisen, in the interest of justice, for the court to grant absolution; whereupon, I order as follows:

1. Absolution from the instance is hereby granted with costs.
2. The matter is considered finalized and is removed from the roll.

C PARKER

Acting Judge

APPEARANCES:

PLAINTIFF:	F SCHULZ Of Neves Legal Practitioners, Windhoek
FIRST DEFEDANT:	T NANHAPO Of Brockerhoff & Associates Legal Practitioners, Windhoek
SECOND DEFENDANT:	W.T. CHRISTIANS Of Engelbrecht Attorneys, Windhoek