

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2019/01427

In the matter between:

PIO MARAPI TEEK

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY

1st DEFENDANT

D/W/O. C.S (04074) HARAES

2nd DEFENDANT

CONSTABLE W. ANGULA

3rd DEFENDANT

THE MINISTER OF JUSTICE

4th DEFENDANT

THE PROSECUTOR- GENERAL, O.M. IMALWA

5th DEFENDANT

DEPUTY PROSECUTOR-GENERAL DANIEL SMALL

6th DEFENDANT

I.M. NYONI, COUNSEL IN THE

OFFICE OF PROSECUTOR-GENERAL

7th DEFENDANT

THE REGISTRAR OF THE HIGH COURT

8th DEFENDANT

Neutral citation: *Teek v The Minister of Safety and Security & 7 Others* (HC-MD-CIV-ACT-DEL-2019/01427) [2021] NAHCMD 348 (30 July 2021)

Coram: USIKU, J

Heard: 04 December 2020 and 12 March 2021

Delivered: 30 July 2021

Flynote: Practice – Absolution from the instance – Court applying trite test – Court holding that plaintiff has not placed before court evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff – Application for absolution upheld.

Summary: The plaintiff, a former judge of the Supreme Court of Namibia, instituted action against the defendants for damages arising from certain alleged intentional and unlawful conduct on the part of the defendants, which conduct has allegedly violated plaintiff's constitutional rights and freedoms. The plaintiff relied, for proof of his case, on the evidence adduced by the State in a separate criminal proceeding. The defendants applied for absolution from the instance, at the end of plaintiff's case. The court held that plaintiff's reliance on the evidence presented in a criminal trial, is inadmissible as proof of the facts in issue in the present proceedings. The court upheld the application for absolution from the instance.

ORDER

1. The application for absolution from the instance is granted.
 2. The plaintiff is ordered to pay the defendants' costs, including costs of one instructing and one instructed counsel.
 3. The matter is removed from the roll and regarded as finalized.
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JUDGMENT

USIKU, J

Introduction

[1] This is an application for absolution from the instance, brought on behalf of the defendants, after the plaintiff closed his case.

[2] The plaintiff instituted action against the defendants claiming payment in the amount of N\$23 160 000, as damages, arising from certain alleged intentional and unlawful conduct on the part of the defendants, which conduct has allegedly violated plaintiff's constitutional rights and freedoms.

[3] According to the particulars of claim (as amended), the amount of N\$23 160 000 is made up as follows:

- (a) claim 1: economic, financial loss (resulting from being deprived of expected income and other perks as sitting judge of the Supreme Court): damages in respect of liquidated amount [vide article 82(4)] of N\$13 660 000,
 - (b) claim 2: constitutional damages, unliquidated amounts in respect of:
 - (i) shock, trauma, pain and suffering: N\$3 000 000.
 - (ii) injury to dignitas (Article 8): N\$3 000 000.
 - (ii) punitive damages: N\$3 000 000.
 - (c) claim 3: costs of suit, legal costs, re-imbursments, disbursements, expenses, copies, transport etc: N\$5 00 000.
- Total: N\$23 160 000.

[4] All nine defendants are sued in their respective official capacities and the total amount is claimed against all defendants, jointly and severally, the one paying the other to be absolved.

Background

[5] In terms of the parties' joint pre-trial report, the following facts are not in dispute and are agreed between the parties, namely:

- (a) the plaintiff is a retired judge of the Supreme Court of Namibia. The plaintiff was charged with eight counts, for various offences, relating to alleged criminal conduct alleged to have occurred between 28 and 29 January 2005;
- (b) the summary of the allegations against the plaintiff were that, he had unlawfully transported two minor girls from Katutura to his residence at Brakwater without the authority of their parents. It was also alleged that the plaintiff had supplied the two girls with alcohol, performed certain sexual acts or indecent assault or immoral acts against them. It was further alleged that the plaintiff forced the girls to watch pornographic videos while at his house;
- (c) the criminal trial commenced on 24 April 2006. After the close of the case of the State, plaintiff was discharged in terms of s 174 of the *Criminal Procedure Act*, on 28 July 2006;

- (d) the State applied for leave to appeal on 9 October 2007, which was refused by the High Court on the same day;
- (e) on 21 July 2008 the Chief Justice granted the State the petition for leave to appeal;
- (f) the appeal was heard by the Supreme Court on 6 April 2009. The Supreme Court delivered judgment on 28 April 2009. It confirmed that there was evidence justifying the prosecution of the plaintiff and overturned the section 174 discharge;
- (g) the case returned to the High Court, to put the plaintiff on his defence on 13 December 2010. The High Court acquitted the plaintiff without plaintiff testifying in his own defence;
- (h) on 30 December 2010, the State applied for leave to appeal to the Supreme Court against the acquittal;
- (i) the application for leave to appeal was heard by the High Court on 6 December 2016; and on 15 February 2017, the court granted leave to appeal to the Supreme Court;
- (j) on 1 October 2018, the Supreme Court heard the appeal and dismissed the appeal on 3 December 2018.

[6] On 2 April 2019, the plaintiff instituted the present action.

The plaintiff's action

[7] In his particulars of claim, the plaintiff, in summary, alleges that:

- (a) the 2nd defendant intentionally, unlawfully and maliciously:
 - (i) tore up, destroyed, re-wrote/edited, tampered with and manipulated, during the interrogation and process of writing, the statement of witness/complainant T;
 - (ii) fabricated a "witness statement" by fraudulently drafting and signing it as purported to have been done by one Syliva Kaunozondunge;
 - (ii) amended a District Surgeon's report.

- (b) the police maliciously failed to:

- (i) take scrapings of the plaintiff's finger-nails for DNA analysis, in light of T's allegations that plaintiff inserted his finger into her private parts;
- (ii) secure blood samples from complainants T and Q, for alcohol testing;
- (ii) seize empty and/or alcohol bottles for finger prints in light of allegations that alcohol was consumed by the complainants;
- (iv) disclose vital evidence from their docket or investigation diary;
- (v) secure the alleged crime scene on 29 January 2005;

(c) the 3rd defendant maliciously and falsely testified and alleged that he observed a pornographic cassette on the coffee table in the plaintiff's lounge;

(d) the 4th – 8th defendants persisted with the prosecution of the criminal matter/appeals after the State adduced weak and unreliable evidence, particularly after the closure of plaintiff's case;

(e) the 5th, 6th and 7th defendants, misrepresented the State's evidence and made misleading submissions in their heads of argument and during argument before the High Court and the Supreme Court; and failed to disclose a video recording which contained exculpatory evidence in favour of the plaintiff;

(f) the 8th defendant maliciously delayed the prosecution of the criminal case and the appeals in that he/she failed to comply with her duties, functions and responsibilities pursuant to applicable statutory provisions and the Rules of the High Court;

(g) the 1st and 4th defendants failed to take action or steps to lodge investigation into the unlawful conduct of their respective officers and officials implicated in criminality, pursuant to the evidence adduced by the 5th defendant;

(h) the 4th defendant failed to initiate, put or cause to be put in place, legislation and/or statutory instruments/provisions/procedures and/or process for facilitation of effective and expedient action/redress remedies available to the plaintiff after the termination of the appointment of the peregrine justices;

[8] According to the particulars of claim, by their actions or omissions described above, the defendants violated the plaintiff's constitutional rights, in that:

- (a) the 4th defendant failed to comply with the peremptory provisions of *Articles 38, 40 and 41* read with *Schedule 2* of the *Namibian Constitution*;
- (b) the 5th , 6th and 7th defendants contravened their oaths of office, constitutional, statutory duties, functions and obligations and responsibilities towards the plaintiff pursuant to Article 88 and s 30 of the *High Court Act*, No 16 of 1990 read with *Rules 115 and 120* of the *High Court Rules*;
- (c) by delaying the prosecution and appeal process, the 4th to the 8th defendants violated plaintiff's constitutional rights under *Article 12(a) and (b)*, 8 (respect for human dignity); 18 (administrative justice) and 25(1) (enforcement of fundamental rights and freedoms) read with the first and second paragraphs of the *Preamble*.

[9] The particulars of claim further state that, as a result of the unlawful conduct on the part of the defendants, the plaintiff was denied:

- (a) fair due process of law, natural justice and due care;
- (b) fair and just criminal investigation and fair, just, competent and speedy trial hearing, appeal prosecution process, pursuant to the demands and tenets of the provisions of the Constitution (*Article 12*), Statute and the Common Law, under Rule of Law, and,
- (c) pursuit of economic/financial advancement, happiness and dignity, in violation of his constitutional right, resulting in:
 - (i) mental anguish/torture, trauma, shock, emotional distress;
 - (ii) injury and humiliation to his reputation, and
 - (ii) gross economical/financial loss and constitutional damages, in violation of his legitimate expectations.

[10] It is further alleged in the particulars of claim¹ that all defendants' respective intentional and unlawful conduct, was the basis upon which plaintiff's:

- (a) removal from office (early retirement) as a permanent judge of the Supreme Court; and,
 - (b) prosecution (trial and appeals);
- were premised and predicated.

The evidence

¹ Para 8.1.

[11] The plaintiff is the only witness who testified in this matter.

[12] In summary, the plaintiff testified that the material grounds upon which his case against the defendants is based, are as a result of the 2nd, 3rd, 5th, 6th and 7th defendants' corrupt, intentional, unlawful and malicious delay in the prosecution of the criminal case against him and the misrepresentation and misleading submissions made during argument, to ensure conviction, which resulted in gross violation of his constitutional and statutory/common law rights and/or freedoms, as confirmed by the *Supreme Court judgment in case No SA 12/2017*.

[13] According to the plaintiff, the Supreme Court's ratio to dismiss the State's appeal was premised on the basis that his constitutional rights to a fair, impartial, objective trial, police investigation and prosecution process of the case were grossly violated.

[14] The plaintiff testified that the evidence forming the basis of his cause of action against the defendants comes solely from the State's own evidence adduced in the High Court, in the criminal case of *S v Teek, Case No. CC 3/2005*, and the submissions presented during the *Supreme Court appeal, Case No SA 12/2017*.

[15] The plaintiff further testified that the criminal process was delayed for 13 years from January 2005 to 3 December 2018, without any explanation from the prosecution authorities. The plaintiff endured unimaginable, excruciating mental, emotional pain and suffering during that period.

[16] According to the plaintiff, the violation of his constitutional rights resulted in loss of income, benefits and/or favourable retirement pension and benefits up to the legitimate expectation of the prescribed constitutional retirement age (65/70 years), the amount of which he now claims, and entitles him to constitutional damages.

[17] The plaintiff further asserted that, if the police investigations and prosecution process had been performed objectively, diligently, competently and impartially, the plaintiff would have been in a stronger position to have had amicably negotiated a

more favourable and beneficial retirement pension and benefits package than the one imposed upon him by the Judicial Service Commission.

[18] The plaintiff therefore prayed for the relief as set out in the particulars of claim.

[19] During cross-examination the plaintiff conceded the following:

(a) in 2005, he took early retirement. Before he took early retirement he was suspended from office by the President on the recommendation of the Judicial Service Commission. He faced disciplinary charges. He did not appear before a disciplinary committee because he retired from office;

(b) he has no personal knowledge of the police having destroyed, tampered with and fabricated witness statements or amending the district surgeon's report, but relies for his allegations on the testimonies of complainant 'T' and witness Sylvia Kaunozondunge, during the criminal trial;

(c) for the allegations of the defendants' corrupt, intentional and unlawful conduct, he relies on the evidence led during the criminal trial and the factual findings made by the High Court and the Supreme Court;

(d) the judgment of the Supreme Court does not mention that the 5th, 6th and 7th defendants misrepresented the State's evidence or made misleading submissions in their heads of argument during argument before the High Court and the Supreme Court;

(e) the prosecution authority, was justified in pursuing the second appeal, on the basis of the first Supreme Court judgment, which found that there was sufficient evidence to convict the plaintiff;

(f) the complaint about the 4th defendant having failed to put in place legislation to enable the plaintiff to sue the South African Appeal Judges, was previously raised by the plaintiff in a different matter and same was dismissed by Oosthuizen, J and the dismissal is a subject of an appeal before the Supreme Court.

Application for absolution from the instance

[20] At the close of the plaintiff's case, counsel for the defendants, Mr Marcus, applied for absolution from the instance. The plaintiff opposes the application.

[21] Mr Marcus submitted that the plaintiff bears onus to present evidence of what happened and that what happened was done with a fraudulent and malicious design. The plaintiff testified that he has no personal knowledge of the facts which constitute the basis of his cause of action against the defendants. The plaintiff relied, for the support of his claim, on the State's evidence in the High Court, during the criminal trial and on the submission presented during the Supreme Court appeal. Counsel argued that the evidence relied on and the cause of action based on the judgments of the High Court and the Supreme Court is inadmissible, because it is opinion evidence by another court. Counsel cites the case of *Hollington v Hewthorn 1943 2 All ER 35*, as authority for the foregoing proposition.

[22] According to counsel, in order to survive an application for absolution, the plaintiff must make out a *prima facie* case, in the sense that there must be evidence relating to all the elements of the claim. In the present case, the plaintiff did not prove that the defendants acted fraudulently, maliciously or unlawfully.

[23] Mr Marcus further argued that the plaintiff has not shown that he suffered any damages through the conduct of the police or of the prosecution, and there was no trial-related prejudice to the plaintiff as a result of the alleged improper investigation by the police. Similarly, argued Mr Marcus, the alleged misrepresentation or misleading submissions did not sway the Supreme Court. The Supreme Court upheld the acquittal.

[24] As regards the alleged delay, Mr Marcus contended that there is no evidence that there was unreasonable delay or if there was delay, there is no evidence that the defendants were responsible therefor.

[25] Counsel argued further that constitutional damages are available only when existing remedies are not sufficient to vindicate plaintiff's rights to a fair trial. The

plaintiff has not shown that constitutional damages are necessary and appropriate in the circumstances.

[26] Counsel highlighted that the plaintiff does not assert that the prosecution was unlawful. The prosecution was lawful and any mental stress, pain, trauma and so forth, which is attendant to him defending the prosecution is something that the law requires a party to bear and is not something that gives rise to constitutional damages.

[27] In regard to the claim for damages arising from the plaintiff's decision to take early retirement, counsel contended that the plaintiff chose to take early retirement and that decision is the basis for the early retirement.

Opposition to the application for absolution from the instance

[28] The plaintiff argued that the ratio *decidendi* of the High Court and the Supreme Court in respect of the criminal case, confirmed that plaintiff's constitutional right to a fair hearing and investigation had been violated. He submitted that his case is *sui generis*, with its own peculiar facts and circumstances and should be dealt with in that light.

[29] The plaintiff further argued that he was the accused in the criminal case and personally witnessed the State witnesses give evidence and counsel making arguments and submissions. His evidence is neither contradicted nor disputed by the defendants. If the defendants deny what he has testified to, they must get into the witness box and testify.

[30] According to the plaintiff, he has discharged his *onus* of proving that his constitutional rights to a fair police investigation and State's prosecution of the trial and appeal were violated. He submitted that he has made out a *prima facie* case and that the application for absolution be dismissed with costs.

Legal principles

[31] In action proceedings, a plaintiff is required to:

- (a) allege in the pleadings certain wrongful or unlawful actionable acts attributable to the defendant, which have caused plaintiff to suffer some damages, and
- (b) prove, at trial, that which the plaintiff has alleged in the pleadings.²

[32] If a plaintiff merely makes allegations in the pleadings and does not, at trial, furnish proof of what he has alleged, a court may not find for the plaintiff. Parker, J observes that, authorities and precedents do not serve as substitute for the required evidence.³

[33] The test to be applied in an application for absolution is whether, at the end of the plaintiff's case, there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff.⁴ This implies that a plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all elements of the claim, to survive absolution, because without such evidence, no court could find for the plaintiff.⁵ The underlying reason is that, it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances.⁶ At the end of the plaintiff's case, it is inferred that the court has heard all the evidence available against the defendant.⁷

[34] *Hattingh, J* noted that the test to be applied in determining the question whether the application for absolution should be granted is not whether the evidence adduced required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable court can find in favour of the plaintiff.⁸

[35] A judgment, verdict or award of another court or tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issues in other proceedings between different parties.⁹

² *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018) para 4.

³ *Ibid* para 5.

⁴ *Ibid* para 5.

⁵ *Marine and Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 at 379-38A.

⁶ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 970A.

⁷ *Chombo v Minister of Safety and Security* (supra) para 5.

⁸ *Build-A-Brick on 'n Ander v Eskom* 1996 (1) SA 115 at 123A-E.

⁹ *Land Securities v Westminster City Council* [1993] 4 All ER 124 at 126C; *Hellington v Hewthorn* [1943] 2 All ER 35 at 40A; *Van Wyk v Ambata* Case No. I 1769/2004 [2010] NAHCMD (29 June 2010)

Analysis

[36] According to the particulars of claim, the plaintiff wishes to hold the nine defendants liable, jointly and severally, the one paying the other to be absolved, in respect of three claims. The basis of the claims are the alleged wrongful, unlawful or malicious acts and/or omissions they committed, when they were acting in the course and scope of their employment with the State.

[37] Claim 1 is for economic and financial loss, resulting from plaintiff being deprived of expected income and other perks as sitting judge of the Supreme Court. In respect of this claim, the plaintiff claims liquidated damages.

[38] Claim 2 is for constitutional damages in respect of:

- (a) shock, trauma, pain and suffering;
- (b) injury to 'dignitas'; and
- (c) punitive damages.

[39] In regard to claim 2, the plaintiff sues for unliquidated damages.

[40] Claim 3 is for costs of suit and disbursements.

[41] The particulars of claim, allege, among other things, that the defendants (or some of them):

- (a) tore-up, destroyed or tampered with, a witness statement;
- (b) fabricated a witness statement;
- (c) amended a District Surgeon's Report;
- (d) maliciously failed to conduct certain investigations;
- (e) persisted with the prosecution of the criminal case and appeal, when the State has adduced weak evidence;
- (f) misrepresented the State's evidence and made misleading submissions; and
- (g) maliciously delayed the prosecution of the criminal case and appeals.

[42] It appears that the plaintiff relies on the same allegations and 'facts' for both claims under claim 1 and claim 2. I say so, because the plaintiff has not pleaded separately the material facts in respect of each cause of action.

[43] According to the plaintiff, by acting as set out in para 41 above, the defendants violated the plaintiff's constitutional rights as more fully set out in para 8 hereof. And as a result thereof the plaintiff suffered damages as set out in claim 1 and 2.

[44] In his testimony the plaintiff, asserted that the evidence forming the basis of his cause of action against the defendants, comes solely from the State's evidence as adduced in the criminal case in the High Court and the submissions presented during the Supreme Court appeals.

[45] It is trite law that a judgment of another court is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings.¹⁰

[46] Insofar as the plaintiff seeks to rely on the State's evidence as adduced in the criminal case, as proof for his allegations in the present case, I am of the opinion that such evidence is inadmissible. This court knows nothing of the evidence that was presented before the criminal court nor does it know what arguments were addressed to it.

[47] Indeed, under cross-examination, the plaintiff conceded that he has no personal knowledge of the defendants:

- (a) tearing-up or destroying a witness statement,
- (b) amending a District, Surgeon's Report, or
- (c) of the conduct of the Police during investigations¹¹, or
- (d) acting with malice¹²,

but relies on the testimony of the State witnesses during the criminal trial. Plaintiff's reliance on what other witnesses said during the criminal trial, to prove facts in issue or facts relevant to the issue, is inadmissible in the present proceedings.

¹⁰ *Hellington v Hewthorn Co Ltd* [1943] 2 All ER 53; *Limbo v President of the Republic of Namibia* (supra); *Van Wyk v Ambata* (supra)

¹¹ Page 15 of record of proceedings.

¹² Page 23 of record of proceedings.

[48] In his testimony, the plaintiff stated that the criminal trial and the appeals, took 13 years, however the plaintiff did not furnish evidence that the defendants were responsible for the delay. Nor did the plaintiff furnish evidence that the alleged delay resulted in an *unlawful* infringement of his right to a fair trial and appeal process. Similarly, the plaintiff stated that the defendants misrepresented the State's evidence and made misleading submissions, however he did not furnish evidence on what the correct facts were.

[49] In addition, it is common cause that the plaintiff left office, pursuant to his decision to take early retirement. In his evidence, the plaintiff stated that he had no option, in the circumstances, but to take early retirement. However, there is no evidence furnished by the plaintiff, establishing a causal link between the alleged wrongful acts of the defendants and his decision to take an early retirement. In any event, as far as the plaintiff's claim for economic and financial loss is concerned, the plaintiff did not present evidence that would support his claim that the damages he suffered in this respect was N\$13 660 000.

[50] In this matter, the plaintiff has made a series of allegations against the defendants, but has not placed evidence before court to support those allegations. At the present, there is no evidence before court that the defendants unlawfully performed the acts/omissions attributed to them. Nor are there facts from which the alleged malfeasance may be inferred. Furthermore, there is no evidence that the defendants unlawfully infringed the plaintiff's constitutional/statutory rights.

[51] Accordingly, I find that there is no evidence before court, upon which a court applying its mind reasonably to such evidence, could or might find for the plaintiff.

[52] Insofar as the issue of costs is concerned, I am of the view that the general rule that costs follow the result must find application.

[53] In the result, I make the following order:

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

2. The plaintiff is ordered to pay the defendants' costs, including costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and regarded as finalized.

B USIKU

Judge

APPEARANCES:

PLAINTIFF:

P M Teek

In person

Windhoek

DEFENDANTS:

N Marcus

Instructed by Office of the Government Attorney

Windhoek