

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-OTH-2018/01922

In the matter between:

ALI MOUSSA

APPLICANT

and

PRIMUS AMWAAMA

1ST RESPONDENT

MARTTY MBEHA MBUKUSA

2ND RESPONDENT

THE PROSECUTOR-GENERAL

3RD RESPONDENT

Neutral citation: *Moussa v Amwaama* (HC-MD-CIV-ACT-OTH-2018/01922) [2022]
NAHCMD 205 (21 April 2022)

Coram: Miller AJ

Heard: 13 April 2022

Delivered: 21 April 2022

Flynote: Fair trial - Leave to file alternative expert notice and report where report of another expert already filed but due to being medically unfit to testify, court not in a position to disregard the granting of leave for such alternative expert report to be filed without first having considered the evidence of the said alternative expert report – court accordingly granting condonation and leave to file the alternative expert notice and report.

Summary: This is an application for condonation for the late filing of Plaintiff's Expert Notice and Report as well as for leave to call an alternative expert, Dr. Annandale, in the place and stead of Dr. Hamunjela who became medically unfit to testify. Third defendant opposes the application on the ground that the expert evidence will not assist the court in determining the quantum relating to the general damages suffered by the plaintiff because that is in the discretion of the court.

Court finding that it is not, at this interlocutory stage, called upon to adjudicate upon the real issues between the parties and as a result, that determination cannot be made without the court first getting sight of the expert report.

ORDER

1. Condonation for the late filing of the Expert Notice and Report is granted.
2. The plaintiff is granted leave to call Dr. Annandale as an alternative expert in the place and stead of Dr. Hamunjela.
3. The plaintiff must file his alternative Expert Notice and Report before or on 25 April 2022.
4. The matter is postponed to 26 April 2022 at 10h00 for determination of dates for the continuation of trial.

RULING

Miller AJ:

Introduction and Background

[1] For purposes of this judgment, the parties will be referred to as in the main application.

[2] Serving before court is an application by the plaintiff to call an alternative expert witness. The matter currently serves before me on the action floating roll. The plaintiff has testified and he now wishes to lead evidence of an expert regarding his emotional and psychological state in order to prove general damages.

[3] On 25 September 2020, this court, in its judgment, found in favour of the plaintiff and against the third defendant for continued malicious prosecution stemming from the time that the prosecutor became aware of the fact that the complainant in the criminal trial had relocated to Lebanon. It is for this malicious prosecution that the plaintiff claims general damages for: humiliation and degradation; injury to his self-esteem and reputation; *contumelia*; deprivation of freedom of movement; discomfort and inconvenience.

[4] The trial is well nearing finalization with the only issue left for determination being the quantum of the damages claimed by the plaintiff.

The plaintiff's case

[5] Plaintiff prays for amongst other things, leave to call an alternative expert, Dr. Annandale, and condonation for the late filing of the expert notice and report.

[6] According to the plaintiff, he filed his expert notice and report on 15 February 2021 based on the testimony of a certain Dr. Hamunjela who was due to testify on 28

June 2021 as well as on 01 February 2022 but failed to be in attendance due to her being medically unfit.

[7] Subsequent to the aforementioned dates, the matter was again postponed to 03 and 04 March 2022 for her to testify but she still was not in a position, medically, to tender her evidence. It then became apparent to the plaintiff that Dr. Hamunjela would not be in a position to tender any evidence to court. It was upon this realization that his legal practitioner of record wrote to the Directorate of Legal Aid to request for the appointment of an alternative expert.

[8] On 21 February 2022, plaintiff's legal practitioner managed to secure the services of Dr. Annandale to testify in the stead of Dr. Hamunjela. Dr. Annandale consulted with the plaintiff on 25 February 2022 and produced a report which was provided to plaintiff's legal practitioner on 01 March 2022. Upon receipt of this report, the third defendant's legal practitioners were engaged in terms of rule 32 (9). Third defendant indicated that it would oppose the filing of this alternative expert report.

[9] Plaintiff contends that once the court has granted leave to file the expert notice and report of Dr. Annandale in the place and stead of Dr. Hamunjela, the third defendant would be granted an opportunity to object to the report and or qualifications whichever the case may be.

[10] It is his further contention that the circumstances surrounding the medical fitness or otherwise of Dr. Hamunjela is something beyond his control and his intention was to always call an expert to assist him in his testimony as relates to the general damages he suffered. According to the plaintiff, the court is not called upon to adjudicate upon the real issues between the parties.

[11] The plaintiff submits that his application is brought bona fide without any blame being attributable to him in that when the circumstance arose, he and his legal practitioner took the necessary steps under the circumstances and timeously so, to

ensure the application is brought timeously. The plaintiff also argues that he in no way intends on amending his pleadings with the filing of this new expert report.

Third defendant's case

[12] The application is opposed by the third defendant because it is of the view that the plaintiff's expert will not assist the court in quantifying the general damages which the plaintiff seeks, i.e. for deprivation of freedom and personality infringement. According to third defendant, the expert evidence will not assist the court in determining the quantum of the general damages sought for loss of income and business as this remains in the discretion of the court.

[13] The respondent argues that the purpose of the expert is to testify regarding the mental and psychological state of the plaintiff in order to prove general damages. According to the respondent, the report of Dr. Annandale essentially deals with future medical expenses for psychological diagnosis and treatment to provide evidence on the psychological ailments and treatment therefor, as well as costs for treatment.

[14] It is the further argument of the third defendant that whether the plaintiff suffered psychological harm has not been pleaded and third defendant has not been afforded an opportunity to plea thereto. The general damages sought are merely for deprivation of freedom and infringement of the personality right to the plaintiff's good name.

Analysis

[15] The right to a fair trial is trite for any person in any litigation proceedings. In order to ensure that a litigant enjoys this right, such litigant has the right to call witnesses to help them in proving their claim. Similarly, the plaintiff in this case sought to call an expert witness in order to facilitate him in proving his claim.

[16] The plaintiff seeks leave from this court to file an expert notice and report of a certain Dr. Annandale owing to the unavailability of his initial expert witness, Dr. Hamunjela, who, before she could give her testimony, became medically unfit to testify.

[17] From the submissions made in argument by the parties, it is apparent that both legal practitioners are well versed with the content of the said report by Dr. Annandale and it is also evident that the only objection thereto is the fact that, the third defendant is of the view that it will not aid the court in making a determination as to the quantum of the general damages.

[18] This court is placed in a difficult position as it has not had sight of this expert report by Dr. Annandale, it does not know what evidence it introduces and to what extent it will either assist, or not assist, the plaintiff in proving his claim. How does the court then make a determination such as the one it is presently faced with, without having regard to the said report?

[19] Another bone of contention by the third respondent regarding the filing of an alternate expert's report is that the report tends to introduce a claim for special damages when same have not been pleaded by the plaintiff and, that as a result of this, leave to file the notice and report should not be granted. In considering this argument, the question remains the same as that raised in the aforementioned paragraph, i.e. that the court will not be in a position to make a determination without first having considered the report. In fact, even in instances where the court may be of the view that certain evidence is not helpful to it, such evidence would still have to be heard at trial in order to allow it to make a proper determination as opposed to shutting the door to a litigant who enjoys the right to a fair trial.

[20] The court is of the view that the expert notice and report must be filed in order to allow it to properly ventilate the issues before it and any issues that may arise from the testimony of Dr. Annandale can be addressed at the trial as that would be the appropriate forum. Once the court is given the opportunity to hear and consider the

evidence of Dr. Annandale, only then will it be in a position to make an informed decision as to how that evidence must be dealt with.

Costs

[21] Plaintiff is legally aided and his legal counsel prayed that no cost order be made and as a result, although he is successful in this matter, the court will make no order as to costs.

[22] For the foregoing reasons, I make the following order:

1. Condonation for the late filing of the Expert Notice and Report is granted.
2. The plaintiff is granted leave to call Dr. Annandale as an alternative expert in the place and stead of Dr. Hamunjela.
3. The plaintiff must file his alternative Expert Notice and Report before or on 25 April 2022.
4. The matter is postponed to 26 April 2022 at 10h00 for determination of dates for the continuation of trial.

K Miller
Judge

APPEARANCES:

PLAINTIFF: H Garbers-Kirsten
Instructed by: Dr. Weder, Kauta & Hoveka Inc Windhoek

THIRD DEFENDANT: E Shifotoka
Instructed by: Office of the Government Attorney