

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: ELLIOT ELLIS PHILANDER v GOVERNMENT OF THE REPUBLIC OF NAMIBIA & OTHERS	Case No: HC-MD-CIV-ACT-DEL-2022/00984
	Division of Court: High Court, Main Division
Coram: Miller AJ	Heard on: 6 March 2023 Delivered on: 7 March 2023 Released: 22 March 2023
Neutral citation: <i>Philander v Government of the Republic of Namibia</i> (HC-MD-CIV-ACT-DEL-2022/00984) [2023] NAHCMD 138 (7 March 2023)	
ORDER: 1. The application for absolution from the instance is refused. 2. The respondents are ordered, jointly and severally, to pay the plaintiff's costs relating to the application for absolution. 3. The matter is postponed to 3 April 2023 at 10h00 for continuation of trial.	

REASONS FOR ORDERS:

MILLER AJ:

[1] This judgment concerns an application for absolution from the instance brought by the counsel for the defendants following the close of the plaintiff's case. The plaintiff instituted action against the defendants for damages arising from what he alleges to be an assault upon him by members of the Namibian Police Force and members of the National Defence Force. The assault is alleged to have happened on the 19th of March 2021.

[2] Three witnesses testified on behalf of the plaintiff. In sum, what the evidence established is that the plaintiff and another person, the second witness, were sitting outside a bar when two vehicles arrived. One was said to be a vehicle with a Namibian Police registration number and what the witnesses referred to as a Jeep occupied by members of the Namibian Defence force. Several persons alighted from the police vehicle and searched the plaintiff. Upon the search on the plaintiff, a pistol was found in his possession for which the plaintiff says he had a valid licence. The evidence is that the plaintiff was thereafter assaulted by various members of the defendants who were present and conducted the search upon him.

[3] The plaintiff testifies that he was injured and subsequently received treatment for the injuries he had.

[4] In arguing that the plaintiff has failed to make out a case to answer, counsel for the defendants relied on various what he termed, contradictions in the evidence of the plaintiff and his witnesses, as well as the fact that the plaintiff and the second witness were drinking and were drunk at the time of the incident.

[5] Generally speaking, our law is that an application for absolution at the close of the plaintiff's case, is not readily granted. In this regard I refer to the judgment in *Stier and*

Another v Henke SA 53/2008 [2012] NASC 2 (03 April 2012) para 4, where his Lordship Mr Justice Mtambanengwe stated the following and I quote from paragraph 4 at 92F:

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

“(W)hen 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, nor ought to) find for the plaintiff. ...”

Harms JA went on to explain at 92H- 93A:

“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 ... 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. 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’ – a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury. 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.”

[6] Issues of credibility play a limited role in an application for absolution at the close of the State's case. Generally speaking, the court will not concern itself with issues of credibility except in cases where the evidence tendered by the plaintiff is so lacking in

credibility or so improbable to the extent that no court would place any reliance upon it.

[7] In the instant case there is direct evidence that the plaintiff was assaulted at the time. There is no evidence to contradict the allegation that he was so assaulted. The evidence is further that the persons who assaulted him alighted from a vehicle bearing a registration number peculiar to the Namibian Police. The evidence also establishes as far as the third witness is concerned, that one of the officers who was talking to the plaintiff was dressed in reflective clothing bearing a distinctive Namibian Police sign.

[8] To my mind if I were to apply the correct test as formulated in the judgments which I have referred to and which have generally been accepted by our courts, the application for absolution from the instance must, at this stage be refused. I accordingly make the following orders:

1. The application for absolution from the instance is refused.
2. The defendants are ordered, jointly and severally, to pay the plaintiff's costs relating to the application for absolution.
3. The matter is postponed to 3 April 2023 at 10h00 for continuation of trial.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendants
L Cloete of FB Law Chambers, Windhoek	W Amukoto of Office of the Government Attorney, Windhoek