

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING ON ABSOLUTION**

Case No.: HC-MD-CIV-ACT-OTH-2021/01811

In the matter between:

WILHELMINA NDAHAMBELELA KAMATI

PLAINTIFF

and

**SCOUTS OF NAMIBIA
DESMOND MANDJALO**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral citation: *Kamati v Scouts of Namibia* (HC-MD-CIV-ACT-OTH-2021/01811)
[2023] NAHCMD 413 (20 July 2023)

Coram: SIBEYA J
Heard: 6 July 2023
Delivered: 20 July 2023

Flynote: Practice - Absolution from the instance – Plaintiff instituted action in a representative capacity for a claim for damages as a result of a vicious attack by a pitbull canine – Test for absolution from the instance restated – Absolution should be granted where the plaintiff has not established a case and proceeding with a trial constitutes a waste of time.

Summary: This is an application for absolution from the instance where the plaintiff instated action proceedings in a representative capacity as a legal guardian to her minor child. The minor child was attacked by a pitbull dog on 7 February 2020 whilst at the premises of Scouts of Namibia in Tsumeb. The plaintiff claims that as a result of the attack, the minor child sustained severe and permanent injuries requiring continuous and future medical treatment and care. The plaintiff claims damages of N\$2,2 million.

Scouts of Namibia stated that it had no knowledge that Mr Mandjalo, who was not its employee, owned, possessed or kept a pitbull on its premises. It further denied the allegations of its negligent failure to take reasonable preventative measures to secure the pitbull from escaping its restraint or enclosure.

Mr Mandjalo stated that he kept the pitbull, which belonged to a certain Mr Gavin Kolz, on the premises of Scouts of Namibia. He further stated that the children were at all times aware that he kept a fierce dog which could bite and injure persons who entered the property. He pleaded further that the pitbull was not left out in the open yard but was kept in a locked cage and he did not foresee that the pitbull could break free from the cage.

Held: that the evidence before court has to be accepted as true at this stage as there is no other evidence to gainsay it. This, in the court's view, is supported by the *Dannecker* decision, para 26(e) where it is stated that, in an application for absolution brought at end of plaintiff's case, the court must accept as true the evidence led by the plaintiff, unless such evidence is so improbable so as to be rejected outright.

Held that: the court *prima facie* finds that Mr Mandjalo kept the pitbull on the premises under his control and that Scouts of Namibia were aware of the presence of the vicious pitbull on the premises, at least on 7 February 2020. The court accepts at this stage that the pitbull was not enclosed or secured in an enclosure nor was it tied to a leash but was left to move freely.

Held further that: the defence raised by Scouts of Namibia that it was not aware of the presence of the pitbull on the premises constitutes a defence within its knowledge. In the court's view, only Scouts of Namibia can inform the court through evidence of its lack of knowledge of the presence of the pitbull on its premises. This finding is in line with the test laid down at para 26(b) of *Dannecker*. On this basis alone, the application for absolution brought by Scouts of Namibia ought to fail.

Held: that the court found on a prima facie basis that considering that the premises belongs to Scouts of Namibia; that Scouts of Namibia permitted Mr Mandjalo to reside on the premises with dogs in the past; that Mr Mandjalo kept a pitbull on the premises; that it was aware that children attended to scouts training on the premises; that it failed to ensure that the premises was a secure place for the said children to be; that the unsecured pitbull under the control of Mr Mandjalo attacked the minor child on the premises, appears to attract liability on the part of both the defendants for the damages caused to the minor child.

The application for absolution from the instance is refused.

ORDER

1. The defendants' applications for absolution from the instance are refused.
2. The defendants must pay the plaintiff's costs for opposing the applications for absolution from the instance including costs of one instructing and one instructed legal practitioner, jointly and severally, the one paying the other to be absolved.
3. The matter is postponed to 17-18 August 2023 at 10:00 for Continuation of trial hearing.

RULING

SIBEYA J:

Introduction

[1] This is an application for absolution from the instance where the plaintiff instated action proceedings in a representative capacity as a legal guardian to her minor child Jason Kamati. The minor child was attacked by a pitbull dog on 7 February 2020 whilst at the premises of Scouts of Namibia in Tsumeb 'the premises'. The pitbull is claimed to belong to or was under the control of the second defendant who is said have acted in furtherance of the interests of Scouts of Namibia.

[2] The plaintiff claims that as a result of the attack, the minor child sustained severe and permanent injuries requiring continuous and future medical treatment and care. The plaintiff claims damages of N\$2,2 million. The claim is defended.

[3] The first defendant shall be referred to as 'Scouts of Namibia' while the second defendant shall be referred to as 'Mr Mandjalo'. Where reference is made to Scouts of Namibia and Mr Mandjalo jointly, they shall be referred to as 'the defendants'.

[4] Mr Diedericks appears for the plaintiff, while Mr Halweendo appears for Scouts of Namibia. Mr Mandjalo appears in person.

The pleadings

[5] The plaintiff alleges, in the particulars of claim, that Mr Mandjalo was a scouts trainer for Scouts of Namibia situated in Tsumeb. She further claimed that the defendants owed the minor child a duty of care whilst the minor child was on the

premises of Scouts of Namibia. She further claims that the defendants failed to keep the pitbull secured in an enclosure and failed to take reasonable measures to restrain or prevent the pitbull from attacking anyone of the scouts children on the premises.

[6] The plaintiff claims that the pitbull mounted a vicious life threatening attack on the minor child resulting in severe and permanent injuries. This led to the minor child being hospitalised from 7 February 2020 to 22 April 2020. The plaintiff claims further that the minor child requires continuous and future medical treatment and care. As a result, the plaintiff claims that she suffered the following damages: medical and related specialist treatment – N\$500 000; trauma, pain and suffering – N\$1 million; permanent loss of right ear – N\$200 000 and loss of future earning potential – N\$500 000 totaling N\$2,2 million.

[7] Scouts of Namibia, in its plea, stated that it had no knowledge that Mr Mandjalo, who was not its employee, owned, possessed or kept a pitbull on its premises. It further denied the allegations of its negligent failure to take reasonable preventative measures to secure the pitbull from escaping its restraint or enclosure.

[8] Mr Mandjalo, in his plea, stated that he kept the pitbull, which belonged to a certain Mr Gavin Kolz, on the premises of Scouts of Namibia. He further stated that the children were at all times aware that he kept a fierce dog which could bite and injure persons who entered the property. He pleaded further that the pitbull was not left out in the open yard but was kept in a locked cage and he did not foresee that the pitbull could break free from the cage.

Pre-trial order

[9] In an amended joint pre-trial report which was made an order of court on 3 July 2023, the parties listed the following facts not in dispute:

- (a) That the plaintiff's son was attending scouts training at the Scouts of Namibia business premises;
- (b) That the pitbull was on the premises of Scouts of Namibia on 7 February 2020;
- (c) That the plaintiff's son was attacked by the said pitbull on the Scouts of Namibia premises on 7 February 2020;
- (d) That the attack was so vicious that the Namibian Police had to shoot the pitbull down to control the attack;
- (e) That the injuries sustained by the minor child was a direct result of the attack and bite wounds sustained from the pitbull.

[10] The parties further listed, *inter alia*, the following issues to be resolved during the trial:

- (a) Whether or not the minor child was lawfully attending to scouts training on the premises of Scouts of Namibia on 7 February 2020;
- (b) Whether or not the pitbull kept on the premises Scouts Namibia, Tsumeb was unattended to and unsupervised;
- (c) Whether or not the pitbull was on 7 February 2020, kept in an enclosed room that was locked;
- (d) Whether or not Mr Mandjalo was accommodated at Scouts of Namibia in exchange for services on the premises, and whether or not Mr Mandjalo was an employee of Scouts of Namibia, or was furthering the interests of Scouts of Namibia;

(e) Whether or not Mr Mandjalo kept a pitbull at his accommodation premises and whether or not the presence of the pitbull was known to Scouts of Namibia, alternatively whether or not Scouts of Namibia should reasonably have been aware of the pitbull kept by Mr Mandjalo;

(f) Whether or not the children registered for Scouts of Namibia were only allowed on the premises as from 16:30 when Mr Mandjalo returns from his full-time employment;

(g) Whether or not the minor child agitated the pitbull by throwing bricks and stones at it while locked in the room.

(h) Whether or not the claim under action *de pauperize* to recover lies against the defendants;

(i) Whether or not the defendants owed the minor child a duty of care to protect him from the pitbull and whether or not such duty of care was breached during the attack resulting in the defendants' liability.

[11] At the commencement of the trial, the plaintiff and Scouts of Namibia placed on record that the quantum claimed is not in dispute amongst them.

The evidence

[12] The plaintiff was the first witness for her case. She testified, *inter alia*, that she is the biological mother to the minor child who was born on 5 September 2009 and that she instituted these proceedings on behalf of the minor child. The minor child joined Scouts of Namibia in January 2018 to be trained as scouts and become responsible human beings. She stated that on 7 February 2020, the minor child together with four other children walked to the premises of Scouts of Namibia at Tsumeb for their usual Friday' scouts training. Upon arrival, there was no Scouts trainer or any adult present at

the premises and they remained on the premises waiting for the trainer to arrive as usual.

[13] The plaintiff testified further that whilst at the premises, the minor child was brutally attacked by a pitbull. The police officers were later called to the premises and they shot and killed the pitbull which was still attacking the minor child. The Pitbull was owned, kept possessed, supervised and controlled by Mr Mandjalo at the premises of Scouts of Namibia.

[14] The plaintiff testified further that the minor child was taken to the hospital in an ambulance. The minor child had his left ear ripped off together with the skin around his head leaving only the scalp of the skull. The minor child was referred to a specialist at Ongwediva MediPark where he was placed under the care of Dr Lopez San Luis. The minor child was taken into theatre where a skin graft was performed on him by grafting a skin from his thigh to replace it on the scalp as they could not reuse the skin that was ripped off by the pitbull. The minor child was released from the hospital on 22 April 2020 but still attends to medical check-ups, resulting in continuous medical treatment and care.

[15] The plaintiff testified further that the defendants were negligent and breached their duty of care towards the minor child and other children resulting in the vicious pitbull attack.

[16] The plaintiff testified further that she knows Mr Jim Kastelic, an employee of Scouts of Namibia, as a Chief Scouts trainer. Mr Mandjalo and Ms Akela were always at the premises. She knew Mr Mandjalo as a scouts trainer and normally trains the children, and when there were meetings, Mr Mandjalo and Ms Akela would address them. In cross-examination, Mr Halweendo put to the plaintiff that on 7 February 2020, Mr Mandjalo was employed by Dundee Metals and not by Scouts of Namibia, and the plaintiff said that she had no knowledge about Dundee Metals but knew that he worked for Scouts of Namibia and when she handed over the application forms for the

enrolment of the minor child, she was informed that Mr Mandjalo will be the trainer and his contact details were on the application forms. When questioned further regarding the employment of Mr Mandjalo and Ms Akela, the plaintiff testified that she was not aware if they were not employed by Scouts of Namibia, but they would address them at meetings and they trained the children. Mr Mandjalo addressed the parents on what the children are expected to do at scouts, the amount to be paid for the scouts uniform, the scouts levels and the badges to be put on after completion of a certain level of scouts.

[17] The plaintiff was further questioned by Mr Halweendo that the Scouts of Namibia and Mr Kastelic were aware that Mr Mandjalo stayed at the premises but they were not aware of the presence of the pitbull at the premises, neither did they know that Mr Mandjalo kept the dog nor did they authorise that a dog be kept on the premises. The plaintiff testified that the pitbull was at the premises under the care of Mr Mandjalo and Mr Mandjalo kept a dog at the premises before. She further said that the pitbull was a vicious dog, likely escape its hidden enclosure and this Scouts of Namibia ought to have known.

[18] Mr Mandjalo put to the plaintiff that he informed her that he is not employed by Scouts of Namibia but was carrying out volunteer work, staying and renting at the premises. To that, she said that she could not recall but later said that Mr Mandjalo stayed at the premises but she had no knowledge that he was renting.

[19] The plaintiff testified that scouts time commenced at 16h30 while the attack was just before 16h00. Mr Mandjalo put to the plaintiff that the minor child was not allowed at the premises when there was no elder person present but the plaintiff said that the children would normally enter the premises whether there were elders or not. Mr Mandjalo further put to the plaintiff that he does not train the group of the minor child but trains the elder children and the plaintiff stated that she is not aware of that.

[20] The minor child took to the stand and testified, *inter alia*, on the Friday, 7 February 2020, he arrived at the premises and met Ms Akela and the Wolf who are

trainers. He testified that the said trainers arrived at the premises after the children had arrived.

[21] The minor child testified further that on 7 February 2020, and together with four other children walked to the premises of Scouts of Namibia at Tsumeb where they attended to every Friday. Upon their arrival, there was no scout trainers or any adults present. He testified further that they remained on the premises as usual waiting for the scouts trainers to arrive at the premises. He saw that the cage of the dog at the premises was open. He observed a brown pitbull walking towards them and some of the children climbed the fence while some stood on tables. One of the children walked passed the pitbull freely. He also thereafter attempted to walk past the pitbull but it attacked him.

[22] The minor child testified further that the attack lasted for about half an hour to an hour, until when the police came and shot the pitbull. Both his ears were torn off during the attack. He did not lose consciousness and was taken to the hospital in an ambulance. He was hospitalised for about four months. As a result of the attack, he cannot hear properly. At school, he is very uncomfortable and some teachers and pupils pull his hat off. He said further that he suffered extreme injuries and he is since scared of pitbulls and bulldogs.

[23] During cross-examination, Mr Halweendo asked the minor child if Mr Mandjalo gave him scouts training, and he responded that Mr Mandjalo did not train him. Mr Mandjalo asked the minor child if anyone offended or touched the pitbull. He responded that no one touched or threw any object at the pitbull.

[24] The plaintiff then called Dr. Caridad Lopes San Luis who testified, *inter alia*, that she is a qualified medical practitioner having obtained degrees of MBCHB, M. Sc and FCP (SA), and enrolled as a medical practitioner as per the certificate of registration from the Namibian Medical Council. She is employed at MediPark Ongewdiva hospital

as a plastic and reconstructive surgeon for 10 years and has 32 years' experience as a medical practitioner.

[25] Dr Luis testified further that she assessed and treated the minor child upon his referral and he was in intensive care unit for about 30 days undergoing surgeries and procedures in order to save his life. The minor child suffered post traumatic degloving wound of the full head and lost his whole scalp, damaged skull, lost the left side of his face including total loss of left ear, absence of the left temporal muscle, fracture of the jaw and the head.

[26] Dr Luis further testified that the minor child required to undergo dynamic surgical treatment for debridement, drilling, skin graft, negative pressure and dressing under anaesthesia as the left side of his head was left to pure bone with the loss of his left ear. The assessment and evaluation required periodic surgery which commenced from 7 February to 7 April 2020. She testified further that on 7 February 2020, the minor child was unconscious and in shock and he had to be intubated and resuscitated in order to save his life.

[27] Dr Luis further testified that the assessment and treatment of the minor child were limited to:

- (a) Dynamical surgical procedures to avoid further complications to his life;
- (b) Major debridement;
- (c) Evaluation by the maxillofacial specialist;
- (d) Ear specialist;
- (e) Eye specialist;
- (f) Neurosurgeons;
- (g) Reconstruction of the head and face and face including drilling of the scalp.

[29] Dr Luis further testified that the head of the minor child had to be totally reconstructed with serious sequelae including:

- (a) Special procedure which had to be prepared to avoid the contracture of the foreman (hole) of the left side where the ear was;
- (b) Permanent draining of the saliva, as the parotid gland developed a fistula which cause an infection inside the brain;
- (c) Follow-ups on the left eye to avoid secondary complication due to the absence of the temporal muscle on the left side of the head;
- (d) Permanent assessment with the psychologist as the minor child suffered social panic and had to adjust his mental preparation to continue with school.

[30] Dr Luis further testified that the minor child will display severe social breakdown owing to his lack of hair, lack of ears and long-lasting fear of the manifestations of life-deteriorating infections. He is subjected to permanent draining of saliva from the remaining parotid gland to avoid brain infection which may lead to brain death, slight palsy of the facial nerve on the left side and severe headaches from pressure on the head. Dr Luis is of the opinion that special provision must be made for the minor child as there are many gaps which were not possible to solve earlier, such as the vulnerable entrance through his left ear, the posterior area of his head and the disfiguration of the appearance of his head and face. She opined that he will have to continue with radiotherapy at the Oncology Service in Windhoek which has formed part of his treatment due to the developed fistulae. He will further require follow-ups with the specialist of senses including hearing (the ENT specialist) and the plastic surgeon.

[31] Dr Luis further produced photographs of the minor child which she personally took in the theatre from the time that he was referred to Ongwediva MediPark.

[32] In cross-examination, Mr Halweendo questioned the doctor on her expert opinion on psychology when she is not a psychologist, and she said that she had internship on psychology. The doctor further said that she cannot work on a severe matter as this one without considering the psychological effect and treatment.

Arguments

[33] Mr Halweendo argued that the plaintiff failed to present evidence which could sustain a cause of action against Scouts of Namibia. Mr Halweendo reminded the court that damages caused by animals are based on either *actio de pastu*, *actio de pauperize* or *actio aquiliae*. The plaintiff's claim is based on the *legis aquiliae*, the negligence of the defendants.

[34] Mr Halweendo argued that the evidence established that the Scouts of Namibia owns the premises but does not prove that Mr Mandjalo was employed by Scouts of Namibia. He argued further that the fact that Mr Mandjalo was on its premises and that a delict occurred, does not impute liability on Scouts of Namibia.

[35] Mr Diedericks argued contrariwise. He argued that the defendants owed the minor child and other children a duty of care and that by not securing the pitbull, they breached such duty. He argued further that both defendants knew that there was a pitbull on the premises; that the pitbull roamed unrestrained and knew that children attended to the premises. In respect of Mr Mandjalo, Mr Diedericks argued that he kept and was in control of the pitbull. He invited the court to dismiss the application for absolution.

The law on absolution

[36] Damaseb JP in *Dannecker v Leopard Tours Car & Camping Hire CC*¹ said the following regarding the legal principles applicable to absolution from the instance:

'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

¹ *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

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, any one 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 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'

[37] The plaintiff is still required to make out a prima facie case in respect of the elements of the claim, failing which, it may be a waste of time to find in favour of the plaintiff and proceed with the trial.²

Analysis

[38] At the outset, it should be laid bare that the parties agreed that the minor child attended Scouts at the premises and that on 7 February 2020, there was a pitbull on the premises. The pitbull viciously attacked the minor child.

² *Factcrown Ltd v Namibia Broadcasting Corporation* 2014 (2) NR 447 (SC) para 72.

[39] The evidence established that the pitbull was kept at the premises under the custody and control of Mr Mandjalo. Evidence was further led that the first defendant knew that there was a pitbull on the premises at least on 7 February 2020.

[40] It was the testimony of the minor child that 7 February 2020 was the second Friday that, together with other children, he attended to the premises by arriving earlier than the scouts time of 16h30. Upon arrival, on both occasions he found no scouts trainer or an adult person at the premises to receive them. On 7 February 2020, the minor child testified that he observed that the cage of the dog was open with no chain on it and the pitbull walked towards them.

[41] The above evidence has to be accepted as true at this stage as there is no other evidence to gainsay it. This, in my view, is supported by the *Dannecker* decision (*supra*), para 26(e) that in an application for absolution from the instance brought at end of plaintiff's case, the court must accept as true the evidence led by the plaintiff, unless such evidence is so improbable so as to be rejected outright.

[42] In view of the above, I prima facie find that Mr Mandjalo kept the pitbull on the premises under his control. I further prima facie find that Scouts of Namibia were aware of the presence of the vicious pitbull on the premises, at least on 7 February 2020. I accept at this stage that, the pitbull was not enclosed or secured in an enclosure nor was it tied to a leash but was left to move freely.

[43] I find that, in consideration of the above-stated evidence, the defence raised by Scouts of Namibia that it was not aware of the presence of the pitbull on the premises constitutes a defence within its knowledge. In my view, only Scouts of Namibia can inform the court through evidence of its lack of knowledge of the presence of the pitbull on its premises. This finding is in line with the test laid down in para 26(b) of *Dannecker* (*supra*). On this basis alone, the application for absolution brought by Scouts of Namibia ought to fail.

[44] I further find on a prima facie basis that considering that the premises belongs to Scouts of Namibia; that Scouts of Namibia permitted Mr Mandjalo to reside on the premises with dogs in the past; that Mr Mandjalo kept a pitbull on the premises; that it was aware that children attended to scouts training on the premises; that it failed to ensure that the premises was a secure place for the said children to be; that the unsecured pitbull under the control of Mr Mandjalo attacked the minor child on the premises; appears to attract liability on the part of both the defendants for the damages caused to the minor child.

Conclusion

[45] In view of the above findings and conclusions, I hold the view that the defendants' applications for absolution from the instance cannot be sustained. The applications for absolution, therefore, fall to be dismissed.

[46] Costs follow the result. No arguments were made as to why this principle should not be followed. As a result, the plaintiff will be awarded costs.

Order

[47] In the result, it is ordered that:

1. The defendants' applications for absolution from the instance are refused.
2. The defendants must pay the plaintiff's costs for opposing the applications for absolution from the instance including costs of one instructing and one instructed legal practitioner, jointly and severally, the one paying the other to be absolved.

3. The matter is postponed to 17-18 August 2023 at 10:00 for Continuation of trial hearing.

O S SIBEYA
JUDGE

APPEARANCES

PLAINTIFF:

J Diedericks
Instructed by
Isaacks & Associates Inc, Windhoek

FIRST DEFENDANT:

N Halweendo
Of Nafimane Halweendo Legal Practitioners,
Windhoek

SECOND DEFENDANT:

D Mandjalo
In Person