REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2022/03942

In the matter between:

MIKAEL N EKANDJO **PLAINTIFF**

and

FILLIPUS K E PAULUS **FIRST DEFENDANT**

NDILIMIMANI STORES CARVING CC **SECOND DEFENDANT**

Neutral citation: *Ekandjo v Paulus* (HC-MD-CIV-ACT-DEL-2022/03942) [2023] NAHCMD 597 (21 September 2023)

Coram: CLAASEN J

Heard: **21 September 2023**

Delivered: **21 September 2023**

Flynote: Civil Practice – Absolution from instance – Principle in *Dannecker v Leopard Tours Car and Camping Hire CC* where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour, absolution from the instance would be inappropriate. Court upholds plaintiff's argument and declines to grant absolution from the instance.

Summary: The plaintiff sued the first and second defendants jointly and severally for damages arising from a motor vehicle collision between plaintiff's motor vehicle

and a truck owned by the second defendant. The first defendant did not oppose the claim and default judgment was granted against him.

Plaintiff pursued the second defendant on the basis of vicarious liability. At the end of the plaintiff's case the second defendant applied for absolution from the instance, on the basis that the plaintiff has not brought any evidence that at the material time the first defendant, as an employee of the second defendant, acted within the course and scope of his employment.

It was refuted with reference to *Dannecker v Leopard Tours Car and Camping Hire CC,* wherein it was stated that where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour, absolution from the instance would be inappropriate. Court upholds plaintiff's argument and declines to grant absolution from the instances.

ORDER

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

2. The defendant is ordered to pay the plaintiff's costs relating to the application for absolution.

3. The matter is postponed to 22 September 2023 at 09:00 for continuation of trial.

JUDGMENT

CLAASEN J:

[1] The plaintiff sued the first and second defendants, jointly and severally, for damages he sustained as a result of a motor vehicle collision between his motor vehicle and a truck owned by the second defendant.

[2] It is common cause that on 07 March 2022, at around 08h15 and at the road adjacent to the Select Service Station, in Ongwediva, a collision occurred between the plaintiff's motor vehicle, then driven by the plaintiff and the second defendant's truck, then driven by the first defendant.

[3] The plaintiff pleaded that the said collision was caused by the negligence of the first defendant. The plaintiff pleaded that it was common cause that at the time of the collision the first defendant was an employee of the second defendant. The plaintiff in his witness statement explained that after the accident both drivers attended to the Police station wherein the first defendant attended to an accident report wherein it was confirmed that when the first defendant approached the Shell Service Station he turned to his left without indicating his intention to do so and whilst he was moving into the left lane he collided with the right side of the plaintiff's vehicle.

[4] It turns out that the first defendant did not oppose the claim and judgment was given against him on 26 July 2023. The second defendant in its plea admitted the accident but categorically pleaded that at the material time the first defendant was not acting within the course and scope of his employment nor was he furthering the interests of the employer.

[5] The plaintiff's evidence accords with what was pleaded. At the end of the plaintiffs case Counsel for the second defendant, applied for absolution from the instance. She argued that for the plaintiff to succeed against the second defendant, there has to be prima facie evidence as to (a) the employer and employee relationship, (b) that a delict was committed and (c) that the delict was committed whilst the first defendant was acting within the scope of this employment. She argued that there was no single shred of evidence that the first defendant at the time was acting within the course and scope of the employer's business. She supplemented her argument with case law and prayed for an absolution from the instance for her client.

[6] Counsel for the plaintiff opposed the application. He contended that a reasonable court could or might find for the plaintiff, considering the common facts namely that the first defendant works for the second defendant who was the owner of the said truck. As regards to the pertinent issue in contention he invited the court to

make an inference from the proven facts that indeed the first defendant was acting within the course and the scope of his employment.

[7] He submitted that it was a Monday morning when the accident took place and that it would be the most natural inference to make that at the material time, the first defendant was driving the truck in the course and scope of his employment. In support of his contention he referred to the matter of *Dannecker v Leopard Tours Car & Camping Hire CC*[1] wherein it was stated that 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 her cause of action and is destructive of the version of the defence, absolution is an inappropriate remedy. He prayed for dismissal of the application with costs.

[8] The law on absolution from the instance is settled and both counsel referred to the authorities in that regard. In *Stier and Another v Henke*[2] it was stated at para 4 that

'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.'

[9] Counsel for the second defendant cited *Blaauw v Pallais*[3] to highlight the element pertaining to whether the employee acted within the course and scope of the employment. I have no qualm with that, but the matter was not concerned with prima facie evidence nor did counsel for the second defendant have a satisfactory answer to refute the plaintiff's argument about the inference which can be made herein. As

[1] *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006)[*2015] NAHCMD 30 (20 February 2015).*
[2] *Stier and Another v Henke* SA 53/2008 [2012] NASC 2 (03 April 2012).
[3] *Blaauw v Pallais* (SA 10-2021) [2023] NASC (30 August 2023)

far as inferences are concerned in *Nkandih v Kahatjipara* [4]it was said that the inference relied upon by the plaintiff must be reasonable and need not be the only reasonable inference.

[10] Having considered the evidence that is common cause coupled with the principle from the *Dannecker* case, and being mindful that the threshold of evidence required at this phase is rather low, I am of the view that the plaintiff's evidence meets the test.

[11] Therefore I make the following order:

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

2. The defendant is ordered to pay the plaintiff's costs relating to the application for absolution.

3. The matter is postponed to 22 September 2023 at 09h00 for continuation of trial.

C CLAASEN

Judge

[4] *Nkandih v Kahatjipara*(I 3672/2014) [2017] NAHCMD 358 (14 December 2017)

APPEARANCES

PLAINTIFF:	Mr. Pretorius Francois Erasmus & Partners
SECOND DEFENDANT:	Ms Inonge Mainga Inonge Mainga Attorneys