

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

PRACTICE DIRECTION 61

Case Title: HAUFIKU KRISTOF // THE MINISTER OF HOME AFFAIRS, IMMIGRATION SAFETY AND SECURITY & 4 OTHERS	Case No: HC-MD-CIV-ACT-OTH-2022/00181
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Heard on: 25 OCTOBER 2023
	Delivered on: 13 DECEMBER 2023
Neutral citation <i>Kristof v The Minister of Home Affairs, Immigration Safety and Security</i> (HC-MD-CIV-ACT-OTH-2022/00181) [2023] NAHCMD 821 (13 December 2023)	
Order:	
<ol style="list-style-type: none">1. Absolution from the instance is granted.2. I make no order as to costs.3. The matter is finalised and removed from the roll.	
Reasons:	
PARKER AJ:	
[1] In the instant action, the plaintiff alleges that while he was an inmate of the Hardap	

Correctional Facility ('HCF') on 13 July 2021, during a 'gang fight' he was injured. He holds the defendants liable in that they failed to keep him safe, and additionally, they denied him medical attention. The defendants have denied the allegations and rejected the plaintiff's claim for damages.

[2] The plaintiff, represented by Mr Tjituri, testified in his cause, and called no witnesses. After the close of the plaintiff's case, the defendants, represented by Ms Meyer, brought an application for absolution from the instance ('absolution application'). By agreement between the parties, the absolution application is determined on the papers, including written heads of argument, without the hearing of oral submissions.

[3] The test for absolution from the instance has been settled by the authorities. The principles and approaches have been followed in several cases. They were approved by the Supreme Court in *Stier and Another v Henke*.¹ There, the Supreme Court stated:

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

“. . . when 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, or ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)”

“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 (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4 ed at 91-2). 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 (*Schmidt* at 93). The test has from time to time been formulated in

¹ *Stier and Another v Henke* 2012 (1) NR 370 (SC).

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" (*Gascoyne* (loc cit)) — a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (*Ruto Flour Mills*). 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...."

[4] It follows that in adjudicating an absolution application at the end of the plaintiff's case, the court takes it that all the evidence of the plaintiff is in. In that regard, the clause 'applying its mind reasonably', used by Harms JA in *Neon Lights (SA) Ltd*,² requires the court not to consider the evidence *in vacuo* but to consider the evidence in relation to the pleadings and the requirements of the law applicable to the case.³

[5] According to the pleadings in the instant proceeding, the plaintiff alleges that on 13 July 2021 on the HCF premises, he was stabbed by a fellow inmate called Romario. He alleges further that the stabbing was witnessed by three inmates and two correctional service officials of the second defendant.

[6] It should be noted that the plaintiff alone bears the burden of proving what he alleged in his pleadings. The defendants bear no such burden. The requirement that he or she who alleges must prove what is alleged is basic to our law.⁴ Accordingly, the next level of the enquiry is to consider the evidence led so far to establish to a *prima facie* degree that Romario stabbed the plaintiff causing a serious bodily injury to the plaintiff's lower back, requiring answer from the defendants.⁵

[7] I now proceed to consider the evidence in relation to the pleadings and the requirements of the law applicable to the case.⁶

[8] The plaintiff alleged in his pleadings that he was stabbed by a Romario. On the facts, the court is unable to decide whether a person called Romario existed on 12 July 2022, and if

² *Neon Lights (SA) Ltd*, see para 2 above.

³ *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 at 453G.

⁴ *Pillay v Krishna and Another* 1946 AD 946.

⁵ *Stier and Another v Henke* (SC) footnote 1.

⁶ *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 footnote 4 *loc cit*.

he existed, if he stabbed the plaintiff. Furthermore, the plaintiff alleged in his pleadings that three inmates and two correctional service officials witnessed the alleged stabbing. These individuals were not called to testify in support of the plaintiff's allegation. I did not hear the plaintiff to testify as to the reasons why these individuals were not called as witnesses to support his version.

[9] Thus, what the plaintiff has alleged has not been proved to a prima facie degree. It remains a mere irrelevance.⁷ What also remains a mere irrelevance is the plaintiff's allegation that he suffered serious injury to his back. The court has not received any probative material tending to prove the allegation of serious injury.⁸ Indeed, in his cross-examination-evidence, the plaintiff conceded that there has not been such medical evidence.

[10] The plaintiff testified further that he underwent an examination, but no X-ray images were placed before the court. The plaintiff's explanation therefore is that he could not afford the fee charged for the examination cannot possibly be true, because he attended a State hospital. In any case, no unpaid invoice to prove the unpaid fee was placed before the court.

[11] Furthermore, no health passport or suchlike document was placed before the court tending to establish the plaintiff's allegation that he sustained the said serious injury to his back.

[12] It cannot be emphasised enough that in seeking to prove bodily injury, it is crucial to place before the court a reliable medical report and medical evidence of the medical practitioner who completed the report to assist the court in assessing the facts placed before it. In the absence of a credible medical report and medical evidence, the court is unable to determine judicially a claim of bodily injury.⁹

[13] Based on the evidence and the application of the authorities, I find that the plaintiff has failed to surmount the bar set by the Supreme Court in *Stier and Another v Henke*¹⁰ which is that for the plaintiff to survive absolute, the plaintiff must make out a *prima facie* case upon which a court could or might find for the plaintiff. In the instant matter, the plaintiff has not made out a prima facie case, requiring the defendants to answer. Accordingly, I find that the occasion has arisen for the court to grant absolute from the instance in the interest of

⁷ *Klein v Caremed Pharmaceuticals (Pty) Ltd* 2015 (4) NR 1016 (HC).

⁸ *Katire v Minister of Safety and Security* [2021] NAHCMD 543 (23 November 2021).

⁹ *ML v S* 2016 (2) SACR 160 (SCA) paras 49-51.

¹⁰ *Stier and Another v Henke* footnote 1.

justice.¹¹

[14] Based on these reasons, I order as follows:

1. Absolution from the instance is granted.
2. I make no order as to costs.
3. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendants
M Tjituri Of Tjituri Law Chambers, Windhoek	M Meyer Of Office of the Government Attorney, Windhoek

¹¹ *Ettiene Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs CC* [2023] NAHCMD 214 (24 July 2013).