

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case number: HC-MD-CIV-ACT-DEL-2023/02155

In the matter between:

JACKSON KUNATELA

PLAINTIFF

and

JOHN NTEMWA

DEFENDANT

Neutral citation: *Kunatela v Ntemwa* (HC-MD-CIV-ACT-DEL-2023/02155)
[2024] NAHCMD 330 (20 June 2024)

Coram: UEITELE J

Heard: 17, 18 & 19 June 2024

Delivered: 20 June 2024

Flynote: Delict – *Action for damages* – Evaluation for quantum to be derived from evidence provided by plaintiff – Evidence required to quantify damages-Principles of proof of damages apply – *Actio legis aquiliae* damages that flow from the loss of property – *Actio iniuriarum* non-patrimonial loss through an injury to a personality right– Action for pain and suffering – Non-patrimonial loss in the form of pain and suffering.

Civil Procedure – Rule 45(9) of the High Court provides for assessment of quantum of damages – The court may grant absolution if not satisfied that plaintiff adduced evidence for assessment of quantum for damages.

Summary: The plaintiff sued the defendant for payment of the amount of N\$100 000 as damages arising from an alleged assault on him by the defendant and damage to his property, a Black Panasonic HC-MDH3 camera.

On 8 September 2022 at Lwanyanda location in the Zambezi region, the plaintiff was recording proceedings of demolition of housing structures by the Katima Mulilo Town Council. During that process a misunderstanding arose between the plaintiff and the defendant. The plaintiff, alleging that the defendant insulted and assaulted him and in the process of the alleged assault plaintiff's camera fell and was damaged, issued summons out of this court claim payment from the defendant.

The defendant defended the action and instituted a counterclaim which he later abandoned. The defendant in essence denied that he assaulted the plaintiff and claimed that the plaintiff threw his camera to the ground to 'fight' him (defendant). The issue which the court was called upon to decide was whether the defendant unlawfully assaulted the plaintiff and damaged the plaintiff's camera. If in the affirmative the quantum of damages suffered by the plaintiff.

Held that, our rules of court, rule 45 (9), (10) & (11) sets out what a plaintiff damages and damages arising from personal injury must allege.

Held further that, a party in an action for damages is required to adduce evidence relating to all the elements of the claim, including the quantum of damages sought. Failure to do so, may result in the court granting an order for absolution from the instance even if this becomes apparent at the end of the entire case.

Held furthermore that, in the procedure prescribed in our rules of court, a plaintiff who seeks damages should state the basis upon which the amount

claimed as damages is based in the witness' statement filed in terms of rule 92. Making a statement in passing in cross examination is not enough.

ORDER

1. The defendant is absolved from the instance.
2. No order as to costs.
3. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] The plaintiff in this matter is Mr Jackson Kunatela (Mr Kunatela). On 9 May 2023 the plaintiff caused summons to be issued out of this court against John Ntemwa (Mr Ntemwa), who is currently the chairperson of the Katima Mulilo Town Council. In his summons, Mr Kunatela seeks payment in the amount of N\$100 000 as damages arising from an alleged unlawful assault on him and damage to his property by the defendant.

The pleadings

The plaintiff's particulars of claim

[2] In his particulars of claim, Mr Kunatela, amongst other allegations, alleges that (I quote verbatim from his particulars of claim):

4 On or about 08 September 2022 and at Zambezi region, the Plaintiff was recording news for One Africa Television on the story of the members of the Namibian Police demolishing the properties (houses) of the residents of the Lwanyanda location at Katima Mulilo.

5 The Plaintiff who was employed as a Freelance at that time and who was contracted by One Africa Television as well as assigned to report and take videos of the said event, whilst the Plaintiff was acting under the course and scope of his duties, the Defendant approached the Plaintiff and demanded him to stop with the recording and threatened to break his camera. The Plaintiff explained to the Defendant that he was authorized to record the event for national news and it was in the scope of his work and duties as a Freelancer for One Africa TV News. Attached hereto is a copy of the contract by One Africa and, marked as "KJ1".

6 The Defendant then unlawfully and intentionally damaged the Plaintiff's movable property, a Black Panasonic HC-MDH3 camera. The Defendant threw the camera on the ground while subjecting him (the Plaintiff) to harsh interrogations and malicious harassment about the purported illegal recording of the house demolitions that were occurring. The Defendant then started publically insulting and assaulted Plaintiff by pulling him and his shirt got torn.

7 The camera was valued at N\$ 49 000.00 and the camera was damaged beyond repair. The Plaintiff used his camera for the purposes of generating income on a daily basis, he had to cover news and stories happening in the Zambezi region and he had to submit 14 stories for the festive season and in addition, he had wedding coverages that he needed to cover to be part of his income.

8 As a result of the Defendant's unlawful actions and harassment, the context and circumstances in which they were made, and the deleterious impact thereof on the Plaintiff's esteem, and the injury to his *dignitas* considered together that, the Plaintiff was publically humiliated, degraded, insulted, and suffered damages in the amount of N\$ 51,000.00 which the Defendant is liable to pay the Plaintiff.

WHEREFORE the Plaintiff claims for:

(1) Payment in the amount of N\$ 100 000.00;

- (2) Interest on the aforesaid amount at the rate of 20% *per annum* calculated from date of judgment to the date of final payment;
- (3) Cost of suit; ...'

The defendant's plea and counterclaim

[3] Mr Ntemwa (the defendant) defended Mr Kunatela's claim and apart from defending the claim against him, he counterclaimed against Mr Kunatela. In his plea, he admitted that he was at the Lwanyanda location at Katima Mulilo where the Katima Mulilo Town Council per, a Court Order was demolishing housing structures. He, however, denied the remainder of the allegations made by Mr Kunatela.

[4] In his counterclaim, Mr Ntemwa alleges that on or about 8 September 2022 and at Zambezi Region, he was approached by Mr Kunatela who requested him for an interview with respect to the demolition process. He further alleges that his refusal to grant Mr Kunatela an interview resulted in Mr Kunatela hurling insults and obscene words at him. It is further alleged that after an hour of insistent demand from Mr Kunatela for an interview, he walked away from Mr Kunatela. As he was walking away from Mr Kunatela, the latter, jumped on him and attempted to 'beat' or assault him (Mr Ntemwa).

[5] Mr Ntemwa furthermore alleges that Mr Musipili Harris Shawn, who was in his company at the time of the incident, intervened by pulling Mr Kunatela away from him and holding him so as to prevent Mr Kunatela from further attacking him (Mr Ntemwa). He continued and alleged that while Mr Kunatela was being held by Mr Musipili Harris Shawn, he (Mr Kunatela) continued to insult and threaten to assault him (Mr Ntemwa).

[6] Mr Ntemwa alleging that he suffered physical, emotional or psychological pain as a result of the verbal and physical attacks from Mr Kunatela counterclaimed an amount of N\$100 000 for damages. I pause here and

observe that during the oral submissions, counsel for Mr Ntemwa indicated that the defendant is not persisting with his counterclaim.

Issues to be determined

[7] From the pleadings the issues falling to be determined by the Court narrowed themselves to:

(a) Whether Mr Ntemwa assaulted Mr Kunatela and in the process damaged Mr Kunatela's property (the camera) and whether the assault was unlawful; and

(b) In the event of a finding being in the affirmative, the *quantum* of damages to which the Mr Kunatela is entitled.

The evidence

The evidence on behalf of the plaintiff

[8] Mr Kunatela's evidence in summary is that on 8 September 2022, he went to Lwanyanda location to record the proceedings of the demolition of houses by the Katima Mulilo Town Council. The 'by-law enforcement officers' present at the scene informed him that he was not allowed to record the proceedings. After being so informed he called his supervisor who asked to speak to Mr Ntemwa. He approached Mr Ntemwa giving him the phone so that Mr Ntemwa could speak to Mr Kunatela's supervisor. Mr Ntemwa refused to speak to Mr Kunatela's supervisor and he (Mr Ntemwa) started insulting Mr Kunatela.

[9] Mr Kunatela further testified that Mr Ntemwa then called all the media houses and informed them that the media was allowed to record the proceedings. Despite being informed that the media was allowed to record the proceedings Mr Kunatela started filming and recording the demolition process which he finished recording after an hour. After he finished recording the demolition of the housing structures, Mr Kunatela approached Mr Ntemwa to

convey his disappointment but he was met with insults from Mr Ntemwa, who also attempted to assault him (Mr Kunatela).

[10] Mr Kunatela continued and testified that Mr Ntemwa pushed him and in the process caused Mr Kunatela's camera to fall and crack. Mr Ntemwa further grabbed him on the upper part of his body and in the process tore Mr Kunatela's T- shirt.

[11] In cross examination, it was suggested to Mr Kunatela that he has a political vendetta against Mr Ntemwa who defeated him at the 2020 local authorities' elections for the election of members of the Katima Mulilo Town Council. Mr Kunatela admitted losing the elections against Mr Ntemwa, but denied harbouring an ill feelings about his defeat in the election. He simply stated that he felt bad about the alleged insult hurled at him by Mr Ntemwa and the attempts by Mr Ntemwa to assault him. Mr Kunatela further admitted that he continuously insulted Mr Ntemwa but justified his actions as retaliation to Mr Ntemwa's insults.

[12] Mr Kunatela, in re-examination, sought leave to introduce a video footage, which leave was granted and the video footage was admitted into evidence as 'Exhibit A' and two pictures depicting Mr Kunatela standing with a torn T-shirt. The two photos were admitted into evidence as 'Exhibits B and C'.

[13] Mr Kunatela called a certain Mr Lazarus Likando in support of his claim. Mr Likando's testimony in summary was that on 8 September 2022, he witnessed the demolition of the housing structures at Lwanyanda location, in Katima Mulilo. He saw Mr Kunatela taking videos of the demolition process.

[14] He testified that Mr Ntemwa started to insult Mr Kunatela and later on pushed and punched Mr Kunatela without his (Kunatela's) consent. It was in that process that Mr Kunatela's camera fell down and got damaged. Mr Ntemwa kept fighting Mr Kunatela who later decided to defend himself against Mr Ntemwa. The Chief Executive Officer of the Katima Mulilo Town Council and

other people intervened and stopped the fight between Mr Ntemwa and Mr Kunatela.

The evidence on behalf of the defendant.

[15] Mr Ntemwa testified on his own behalf and called two other persons, a certain Mr Raphael Liswaniso, the Chief Executive Officer of the Katima Mulilo Town Council and a certain Mr. Shawn Musipili to testify in his defence. Mr Ntemwa testified that it is correct that on 8 September 2022 the Katima Mulilo Town Council in accordance with a Court Order issued by this court was demolishing housing structures in Lwanyanda location, Katima Mulilo.

[16] He furthermore, testified that he was at the Lwanyanda location during the demolition process as a delegate of the Katima Mulilo's Town Council to observe the demolition process. He testified that whilst at the scene where the demolition of the housing structures was taking place, he was approached by Mr Kunatela, who requested to conduct an interview with him. Mr Ntemwa refused to grant the interview because his mandate did not include the authority to grant interviews. Mr Kunatela persisted (for approximately one hour) with the request for an interview but Mr Ntemwa consistently refused. The refusal incensed Mr Kunatela, who started hurling insults at Mr Ntemwa and challenged him to a fight.

[17] Annoyed by the insults, Mr Ntemwa decided to walk away from Mr Kunatela, who did not stop his insults and followed Mr Ntemwa, still hurling the insults. It is at that point that Mr Ntemwa decided to return and walk towards Mr Kunatela to order him (Kunatela) to desist from insulting him. He testified that as he was approaching him (Mr Kunatela), he jumped onto him (Mr Ntemwa) and started to assault him (Mr Ntemwa). In that process Mr Kunatela's camera fell. In cross examination, Mr Ntemwa denied that he insulted or assaulted Mr Kunatela.

[18] Mr Raphael Liswaniso testified that on the day in question (that is 8 September 2022), Mr Kunatela approached him at Lwanyanda location, Katima Mulilo, and requested to interview him with respect to the process of

demolishing the housing structures. Mr Liswaniso referred Mr Kunatela to Mr Ntemwa, who at the time was the Chairperson of the Management Committee of the Katima Mulilo Town Council. He further testified Mr Ntemwa refused to grant the interview and the refusal attracted insults from Mr Kunatela.

[19] As the insults were persistent, he decided to draw Mr Ntemwa away from Mr Kunatela and they walked and went to stand a distance of approximately 50m away from Mr Kunatela, who would not stop the insults. He, at a point had given his back to Mr Ntemwa and at that point Mr Ntemwa went back to Mr Kunatela. Mr Liswaniso then testified that as Mr Kunatela was being approached by Mr Ntemwa he saw Mr Kunatela throw his camera to ground and taking up a defensive stance. He further testified that he then saw an employee of the Katima Mulilo Town Council, a certain Mr Shawn Musipili who intervened and pushed Mr Kunatela away.

[20] In cross examination, it was suggested to Mr Liswaniso that he only came to testify to protect a friend (Mr Ntemwa) of his and guard his employer's interest. Mr Liswaniso denied that he was a friend of Mr Ntemwa and stated that he came to testify to what he saw and experienced on the day in question. He further denied that none of the media persons were prohibited to record the demolition process and refuted the allegation that a meeting took place between Mr Ntemwa and the media practitioners who attended the demolition process.

[21] The last witness to testify on behalf of the defendant was Mr Shawn Musipili who testified that on the day of the demolition of the housing structures, he was operating a front end loader that was used in the demolition process. He testified that at some point he had to exchange operating the front end loader with another employee. As he got off the front end loader, he got to the place where Mr Ntemwa, Mr Kunatela and the Chief Executive Officer of the Katima Mulilo Town Council were standing. It is there where he heard Mr Kunatela insulting Mr Ntemwa.

[22] He also testified that Mr Liswaniso then dragged Mr Ntemwa away, but Mr Kunatela followed them still insulting Mr Ntemwa. He stopped Mr Kunatela

from following Mr Ntemwa and the Chief Executive Officer. Mr Musipili further testified that at some point Mr Ntemwa turned and charged towards Mr Kunatela and as Mr Ntemwa was charging towards Mr Kunatela, the latter threw his camera to the ground taking up a combative posture, but he, Mr Musipili, and other people who were present went in between Mr Kunatela and Mr Ntemwa to avoid physical confrontation.

[23] It is against the above evidence that I am required to consider the plaintiff's claim. But before I consider the dispute between the parties, I will make some remarks as regards to the legal principles governing claims of the nature that now serves before me.

The legal principles

[24] There are three actions or categories of actions that form the pillars of delictual remedies in our law, namely the *actio legis aquiliae*, the *actio iniuriarum*, and the action for pain and suffering.¹

[25] *Actio legis aquiliae* is an action taken when harm is in the form of patrimonial loss (*damnum iniuria datum*)². The *actio legis aquiliae* is a legal action available to recover damages for the loss or destruction of property caused by someone else's fault. The action is based on the principle of 'culpa', which means fault or negligence.³ To succeed in an *actio legis aquiliae*, the plaintiff must prove that the defendant was at fault, and that their fault caused the damage to the plaintiff's property⁴. The damages that can be recovered in an *actio legis aquiliae* are the value of the property at the time of its destruction, plus any consequential damages that flow from the loss of the property.⁵

[26] *Actio iniuriarum* is an action taken when harm is in the form of non-patrimonial loss through an injury to a personality right⁶. The *actio iniuriarum* is a

¹ Neethling, Potgieter & Visser: *The Law of Delict* 5th ed, LexisNexis Butterworths, 2006 at 8-13.

² *Guardian National Insurance Co Lt v Van Gool NO* 1992 (1) SA 191 (W) at 63.

³ Neethling, Potgieter & Visser: *The Law of Delict* 5th ed, LexisNexis Butterworths, 2006 at 8-13.

⁴ *LAWSA* second edition Part 8 para 7.

⁵ *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N).

⁶ *LAWSA* second edition Part 8 para 9.

legal action available to recover damages for personal injuries caused by someone else's wrongful conduct.⁷ The action is based on the principle of 'iniuria,' which means injury or harm. To succeed in an *actio iniuriarum*, the plaintiff must prove that the defendant committed a wrongful act that caused the plaintiff harm.⁸

[27] Action for pain and suffering - an action taken against non-patrimonial loss in the form of pain and suffering (e.g. bodily injury). To prevail in the action, the claim must be grounded on bodily injury resulting in physical pain, mental anguish, shock, loss of life amenities or expectancy, disability or disfigurement, and the humiliation and sorrow that ensues.⁹ The critical aspect in all these scenarios is that the injury must be connected to some physical harm experienced by the plaintiff. Such harm is non-monetary or non-patrimonial, meaning it is intangible and does not adversely affect the plaintiff's economic or financial standing.¹⁰

[28] The rules of this Court in Rule 45 (9), (10) & (11) provide that:

(9) A plaintiff suing for damages must set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof.

(10) A plaintiff suing for damages for personal injury must specify the nature and extent of the injuries and the nature, effects and duration of the disability alleged to give rise to such damages.

(11) In a claim for damages for personal injuries the plaintiff must, as far as practicable, state separately what amount, if any, is claimed for –

- (a) medical costs and hospital and other similar expenses;
- (b) pain and suffering;
- (c) disability in respect of –

⁷ *Neethling's Law of Personality* 2nd edition, LexisNexis Butterworths, 2004 at 55-60.

⁸ *Ibid.*

⁹ Corbett, Buchanan & Gauntlett *The Quantum of Damages in Bodily and Fatal Injury cases*, 3 ed.

¹⁰ Visser PJ, Potgieter JM, Steinberg L & Floyd TB: *Visser and Potgieter's Law of Damages* 2nd edition, Juta at 100.

- (i) the earning of income stating the earnings lost to date and the estimated future loss;
- (ii) the enjoyment of amenities of life and giving particulars.’

[29] In *Kuyonisa v Kangueehi*¹¹, this court held that at the trial a plaintiff is required to place some evidence before court, which can eventually assist the court in determining the quantum of damages. In *Mouton v Mouton*¹² this court quoting with approval the authors Corbett, Buchanan & Gauntlett¹³ stated that:

‘In the case of damages which are capable of exact mathematical computation, such as for example medical and hospital expenses, proper evidence establishing the loss and substantiating the precise amount of the claim must be tendered. Where, on the other hand, mathematical proof of the damages suffered is in the nature of things impossible, then, provided that there is evidence that pecuniary damage in this regard has been suffered, the court must estimate the amount of the damages as best as it can on the evidence available and the plaintiff cannot be non-suited because the damages cannot be exactly computed. However, the application of this principle is dependent upon the plaintiff having adduced the best evidence available to him. Where he has not done so and the difficulties in assessing the quantum of damages are due to the manner in which he has conducted his case, then the court is justified in ordering, and does order, absolution from the instance.’

Has the plaintiff discharged the *onus* resting on him?

[30] Ordinarily after having set out the evidence of the parties, the court would embark on evaluating the evidence led and arrive at a conclusion as to whether or not Mr Kunatela has established that Mr Ntemwa unlawfully assaulted him as alleged and further whether or not Mr Ntemwa is liable for the damages claimed. In this regard, the court ordinarily has to arrive at a conclusion regarding the question whether Mr Kunatela, on whom the *onus* lies, has made out a case for the relief he claims.

¹¹ *Kuyonisa v Kangueehi* [(HC-MD-CIV-ACT-OTH-2021/03226) [2024] NAHCMD 109 (13 March 2024).

¹² *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021) at para 40.

¹³ Corbett, Buchanan & Gauntlett. *The Quantum of Damages in Bodily and Fatal Injury cases*, 3 ed. Quoted with approval by this court in *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021) at para 40.

[31] From the narration of the evidence led, as I have set out that narration earlier in this judgment, it is plain that the parties' versions are mutually destructive. For that reason, the proper approach to dealing with the irreconcilable versions of the parties, would be to resort to the following legal principles which are now well settled in our law namely that:

(a) where the evidence of the parties' presented to the court is mutually destructive, the court must decide as to which version to believe on probabilities;¹⁴ and;

(b) the approach that a court must adopt to determine which version is more probable, is to start from the undisputed facts which both sides accept, and add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses.¹⁵

[32] I have, after a careful analysis of the facts of the instant matter and much reflection, decided that it is unnecessary, at this juncture, to embark on an analysis of the evidence led by the parties, in order to determine the probabilities in the case. I say so because of the manner in which the parties have pleaded their cases and presented their evidence in court. First Mr Kunatela's particulars of claim do not comply with the requirements of rule 45 (9) – (11) and they are therefore, undoubtedly excipiable. Despite the non-compliance with the identified sub-rules, Mr Ntemwa has not raised any legal objection to the defects in the particulars of claim. Second is the question of whether Mr Kunatela has made out a case at all regarding the quantum of damages, to which he may be entitled to, if the court were to conclude that he was in deed unlawfully assaulted.

[33] During the oral submissions made on behalf of the parties, I put the issue squarely to counsel appearing on behalf of Mr Kunatela who correctly conceded that as regards the claim for damages in respect of the alleged damages to the

¹⁴ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G: Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.

¹⁵ *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 39 - 17 para 51.

camera no evidence as to how Mr Ntemwa allegedly damaged the camera and the quantum of the damages was placed before court. As regards the claim for damages resulting from the alleged assault, counsel submitted that, although Mr Kunatela's witness statement and the oral evidence submitted at the trial do not set out the nature of his pain and suffering, Mr Kunatela, in cross examination, stated that he felt bad and felt humiliated by the attempted assault on him.

[34] Counsel for Mr Kunatela furthermore, argued that the issue of quantum is a matter that the court is able to decide on the evidence presented, considering the awards by the courts in related matters. That is in my view, unfortunately a half-hearted response to a significant issue. I say the response is half-hearted because the evidence relating to the nature of the injuries that Mr Kunatela allegedly suffered, the extent and duration of Mr Kunatela's pain and suffering were not placed before court either in the evidence in chief or in cross examination so as to assist the court to make an assessment of his damages.

[35] In *Kuyonisa*¹⁶ this Court stated as follows:

[48] It must be mentioned in this regard, that the witness' statement in terms of rule 93, ordinarily takes place of the evidence in chief that the witness would have adduced. As such, it is in this statement that the issue of the quantum of damages, must be established in evidence. That would be the juncture where evidence regarding the quantum of damages would be elicited in jurisdictions where there is no provision in the rules for written witness' statements standing as evidence-in-chief.

[49] When proper regard is had to the subrule quoted above [that is, rule 92(1)], it becomes plain that witness' statements deal with the evidence in relation to issues of fact that a party intends to adduce at the trial. One of the issues for the court to resolve at trial, as recorded in the pre-trial order, is the issue whether the plaintiff is entitled to damages in the amount claimed. I say this noting though that this was recorded as a legal rather than a factual issue.

¹⁶ *Supra* footnote 8.

[50] Having this in mind, it occurs to me that what the plaintiff was accordingly required to do in the witness' statement, was, in addition to adducing evidence about the nature of the defamatory material, deal specifically with the effect of the statements on his reputation and good name; the extent of the publication; how the statements affected him or how they influenced the reaction or relation of other people to him thereafter. This was not done by the plaintiff, nor was oral evidence led in this regard adduced during the trial.'

[36] The above comments in *Kuyonisa*¹⁷ find application to the present matter. What Mr Kunatela was required to do in his witness' statement, was, in addition to adducing evidence about the nature of the alleged assault, deal specifically with the effect of the assault on him and his reputation and good name; the extent of the injuries he suffered as a result of the assault and how the assault has affected him and the duration and intensity of the pain he has suffered. Mr Kunatela did not do this, nor did he present oral evidence in that regard during the trial. To say, in cross examination, that he 'felt bad' about the assault is not enough.

[37] In this matter, Mr Kunatela claims N\$51 000 for damages as a result of the alleged assault, but says not a mumbling word regarding the computation of the amount in evidence and from which the court, after considering the cross examination, could form an opinion on a fitting quantum. I, in the circumstances conclude that there is no need to deal with the issue of whether or not Mr Ntemwa assaulted Mr Kunatela because there was no application for the separation of issues, that is, for the court to determine liability and to deal with quantum in the event the court found that Mr Kunatela was assaulted.

[38] I furthermore, find that Mr Kunatela has failed to prove an essential part of the claim, namely, the damages that he suffered as a result of the alleged assault. The plaintiff is ordinarily required to prove all the essential elements of a claim and where he or she fails to do so, the court is entitled, to enter an order absolving the defendant from the instance.

¹⁷ Ibid.

[39] In view of my finding in the preceding paragraphs, I associate myself with the comments by Justice Masuku in *Kuyonisa* where with approval, quoted the following from Cilliers *et al.*¹⁸

‘Although there is no express provision in rule 39 for an order for absolution from the instance at the conclusion of the whole case, the practice to grant absolution from the instance when a plaintiff has not established the facts in support of his case to the satisfaction of the court, has been extended to cases in which evidence for the defendant has also been given.’

[40] As Justice Masuku noted, this is also an appropriate case in which the court must grant an order for absolution from the instance. It would be unfair and probably harsh, in the circumstances, to issue a dismissal of the claim when considering the nature of the deficiencies in Mr Kunatela’s case. Absolution from the instance would, afford Mr Kunatela’s an opportunity, should he be so advised, to place all the requisite evidence, including on damages, before court.

Costs

[41] The ordinary rule applicable is that costs follow the event. This does not, however, take away the court’s discretion, in appropriate cases, to issue an order for costs as the justice of the case, including the behaviour of the parties, warrant. The court has in this matter found it fit to issue an order for absolution from the instance, which spells success for Mr Ntemwa and ordinarily he would have been entitled to an award of costs of suit.

[42] In this matter, I, however, found that Mr Kunatela’s particulars of claim do not comply with rule 45 (9), (10) & (11) and that the particulars of claim were excipiable. Had Mr Ntemwa excepted to the particulars of claim at an early stage this matter would in all likelihood not have progressed to this stage and for that reason I exercise my discretion against ordering the plaintiff to pay the defendant’s costs. I will therefore make no order as to costs.

¹⁸ Cilliers *et al*, *Herbstein & Van Winsen*, The Civil Practice of the High Courts of South Africa, 5th ed, Juta & Co, Vol 1, 2009, at 924.

[43] For the reasons and findings that are set out in this judgment, I make the following order:

1. The defendant is absolved from the instance.
2. No order as to costs.
3. The matter is regarded as finalised and is removed from the roll.

UEITELE SFI
Judge

