

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
JUDGMENT
(PRACTICE DIRECTION 61)



MAIN DIVISION, WINDHOEK

Case Title: NGHIFILEWANGA FANUEL SHUULIKI PLAINTIFF and MINISTER OF HOME AFFAIRS, IMMIGRATRION, SAFETY & SECURITY HONOURABLE MINISTER ALBERT KAWANA 1 ST DEFENDANT INSPECTOR GENERAL OF THE NAMIBIAN POLICE FORCE LT-GENERAL SEBASTIAN NDEITUNGA 2 ND DEFENDANT WARRANT OFFICER K.M ELIASER 3 RD DEFENDANT	Case No: HC-MD-CIV-ACT-DEL- 2022/02274 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	To be determined on the papers Delivered on: 4 MARCH 2024

Neutral citation: *Shuuliki v Minister of Home Affairs, Immigration, Safety & Security Honourable Minister Albert Kawana* (HC-MD-CIV-ACT-DEL-2022/02274) [2024] NAHCMD 78 (4 March 2024)

IT IS ORDERED THAT:

1. The application for absolution from the instance is dismissed with costs.
2. The matter is postponed to 27 March 2024 for status hearing. (Reason: Court to determine the further conduct of the matter).

Following below are the reasons for the above order:

[1] After the close of the plaintiff's case, the defendants brought an application for absolution from the instance. Ms Pazvakavambwa represents the plaintiff and Mr Ludwig represents the defendants.

[2] 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* where 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 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....”¹

[3] Additionally, in *Dannecker v Leopard Tours Car & Camping Hire CC* Damaseb JP stated as follows on the test of absolution from the instance at the close of plaintiff’s case:

‘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 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 (which I shall call ‘the Damaseb 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, anyone 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.^{1,2}

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

² *Dannecker v Leopard Tours Car & Camping Hire CC* [2015] NAHCMD 30 (20 February 2015).

[4] Another important principle which the court determining an absolution application should consider is this. The clause 'applying its mind reasonably', used by Harms JA in *Neon Lights (SA) Ltd*³ requires the court not to consider the evidence *in vacuo* but to consider the evidence in relation to the pleadings and in relation to the requirements of the law applicable to the case.⁴

[5] The plaintiff alleged in his particulars of claim that he was wrongfully and unlawfully arrested and put in handcuffs and detained by the third defendant. He alleged further that upon his arrest and detention he was assaulted by the third defendant.

[6] The plaintiff has charged the first the first and second defendants with vicarious liability. The allegation that the first and second defendants are vicariously liable for the actions of the third defendant, a Warrant Officer of the Namibian Police at the relevant time, is not disputed. The plaintiff claims N\$300 144 in damages.

[7] The plaintiff testified that on a bright evening on 11 August 2021 near his residence in Oshikango on the Namibia-Angola border, he saw police officials in a police motor vehicle driving after a taxi. The police officials stopped the taxi and proceeded to search it. The plaintiff heard that there were some exchange of words between the driver of the taxi and the police officials. He walked to the scene and talked to the taxi driver.

[8] Apparently, the third defendant, who was one of the police officials at the scene, did not take kindly to the plaintiff having talked to the taxi driver. After the third defendant had exchanged words with the plaintiff, he placed the plaintiff in handcuffs, placed him in the police motor vehicle and drove him to Oshikango Police Station.

Arrest and detention

[9] The plaintiff testified that upon his arrest, the police officials did not inform him that they were arresting him because he was interfering with police duties. It was at the Oshikango Police Station that a male and a female police officials informed Warrant Officer Elao that they had arrested the plaintiff because he had interfered with the police while they were performing police duties.

[10] Doubtless, the grounds for the plaintiff's arrest were communicated to Warrant Officer Elao

³ *Neon Lights (SA) Ltd*, see para 2 above.

⁴ *Bidoli v Ellistron t/a Ellistron Truck & Plaintiff* 2002 NR 451 at 453G.

at the police station in the presence of the plaintiff. Accordingly, it cannot be disputed and it is indisputable that the grounds for the plaintiff's arrest were not communicated to the plaintiff upon his arrest at the border between Namibia and Angola.

[11] To arrest a person is to deprive that person of his or her freedom of movement by some lawful, authorized person.⁵ In the instant matter, I found that placing handcuffs on the plaintiff, placing him in a police motor vehicle, transporting him to the police station and placing him in a police holding cell constituted arrest and detention of the plaintiff. The question that arises for determination is whether the arrest and detention were wrongful and unlawful, as pleaded by the plaintiff.

[12] On the evidence, I find that the arrest was unlawful because the arresting police officials did not inform the arrestee the grounds for his arrest.⁶ Where the arrest was unlawful, as is in the instant matter, the ensuing detention must be arbitrary, within the meaning of article 11(2) of the Namibian Constitution, making the arrest and detention wrongful and unlawful. I now proceed to consider the allegation of assault.

Assault

[13] The plaintiff testified that the third defendant assaulted him by beating him with a baton and kicking him to the ground and beating him while he lay on the ground and while he was in handcuffs. The plaintiff added that some of the other police officials joined the third defendant in his assault of him. The aspect of the evidence that some of the other police officials joined in the assault was not expressively pleaded, and so it is inadmissible.⁷

[14] The plaintiff testified that the following day on 12 August 2021 he experienced pain in his neck, ribs and right leg as a direct result of the assault. For his serious injuries, the plaintiff testified, he sought medical attention at the Engela State hospital.

[15] There is a medical report on Form J88 (an official form headed 'Medical Examination in a Case of Alleged Assault or Other Crime'). The medical officer, Dr Celestinos Munekani Murairwa, who attended to the plaintiff and completed Form J88 gave evidence in support of the plaintiff's

⁵ *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC) para 4.

⁶ *Ibid* para 10.

⁷

Imbili v Haimbodi (HC-MD-CIV-ACT-DEL-2022/02832) [2024] NAHCMD 24 (31 January 2024).

case. Form J88 indicates the following: tenderness of the chest and neck and fracture of the second toe bone of the right of the right leg. Dr Murairwa's evidence was not extirpated under cross-examination.

[16] For completeness, I say the following. Mr Ludwig sought to persuade the court not to admit Dr Murairwa's oral evidence on the ground that he had not filed a witness statement as required by rule 92 of the rules of court. I exercised my discretion under rule 93(5) and permitted Dr Murairwa to give oral evidence for the following reasons. His evidence merely consisted of confirming that he had attended to the plaintiff and completed Form J88 and explaining the contents of Form J88. Additionally, Form J88 had been discovered as long ago as October 2022. Mr Ludwig did not tell the court in what manner the defendants had been prevented from calling rebuttal expert evidence in respect of the Form J88.

Conclusion

[17] I accept as true the plaintiff's evidence on unlawful arrest and detention and assault because at the close of a plaintiff's case when absolution application is brought, the court 'is bound to accept as true the evidence of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory to be rejected out of hand'.⁸

[18] Based on these reasons, I find and hold that the plaintiff has made out a prima facie case, requiring answer from the defendant.⁹ Therefore, the occasion has not arisen for the court to grant absolution from the instance in the interest of justice.¹⁰

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
PLAINTIFF	DEFENDANTS
F Bangamwabo of	J Ludwig of

⁸ See para 3 above.

⁹ *Stier and Another v Henke* footnote 1.

¹⁰ *Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* [2013] NAHCMD 214 (24 July 2013).

FB Law Chambers, Windhoek

Office of the Government Attorney, Windhoek