

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case No: I 282/2016

In the matter between:

GIDEON NDESHITILA KARLUSH

PLAINTIFF

and

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA
MINISTER OF HOME AFFAIRS AND IMMIGRATION**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral citation: *Karlush v The Government of the Republic of Namibia* (I 282/2016)
[2019] NAHCNLD 30 (25 March 2019)

Coram: CHEDA J

Heard: 22 March 2019

Delivered: 25 March 2019

Flynote: In a test for absolution from the instance - the test is that - is there evidence upon which a court applying its mind reasonably to such evidence could or might find for the plaintiff - If the answer is in the affirmative, then defendant must be placed on its

defence - If the answer is in the negative then plaintiff's claim should be dismissed at the close of plaintiff's case without more.

Summary: Plaintiff went to apply for a passport and handed over his documents for the consideration of the said application to second defendant's officials. However, the particulars in his documents were not matching and the officials confiscated them as they alleged that he was an Angolan. After investigations, it turned out that he was in fact a Namibian. Some of his documents were misplaced, but, the birth certificate was replaced by second defendant. Plaintiff averred that as a result of the wrongful and unlawful confiscation of his documents, he lost a contract with Mr Pedro and his company in Angola as he could not travel without a passport. It was further his argument that he suffered loss in the sum of N\$6 million. He called three witnesses to testify. None of the witnesses gave evidence about their personal knowledge of the contract. Plaintiff conceded that there were irregularities in his national identity card and the birth certificate. He further conceded that in light of this, second defendant had a duty to investigate. Second defendant applied for an absolution from the instance at the close of plaintiff's case and it was granted.

ORDER

1. The application for absolution from the instance succeeds with costs.

JUDGMENT

CHEDA, J:

[1] This is an application for absolution from the instance.

[2] The background of this matter is that on the 14 November 2016, plaintiff issued summons out of this court.

[3] Plaintiff was a self-actor, and is a male adult who is a welder by trade and is based in Outapi. First defendant is the Government of the Republic of Namibia while second defendant is the Minister of Home Affairs and Immigration. Both respondents were represented by Mr Kadhila.

Plaintiff Evidence

[4] Plaintiff opened his case by giving evidence and elected to have his statement read into the record in terms of rule 93. It was his testimony that he operates a welding business in Oshikango. During the course of his operations, a certain man, one Pedro who is an Angolan National saw his work and was impressed by his craftsmanship. He then decided to engage him for some work in Angola.

[5] He entered into two agreements with Pedro for a job in the sums of N\$461 000 and N\$4 326 000 on the 28th of July 2014 and the said agreements were verbal and written respectively. He further stated that he was paid part of the contract cost by Pedro which he used to pay for the application for a passport and purchase of tools and equipment for the said work in Lubango, Angola amongst other expenses. This was the gist of his evidence.

[6] It was for that reason that, he claimed the amount of N\$6 million with 25 per cent interest per annum and cost of suit. He then called three other witnesses.

Plaintiff's Evidence

[7] Plaintiff gave evidence and averred that second defendant through its officials confiscated the following documents from him namely:

- a) National Identity Card;
- b) Electronic Voters Card;

- c) Full Birth Certificate;
- d) Passport Application Form;
- e) Border Pass;
- f) Police Declaration; and
- g) Welding & Fabrication Certificate.

[8] He stated that second defendant's office confiscated these documents after they had accused him of being an Angolan who had presented a birth certificate with certain particulars which differed from those in his National Identification card. It was further his averment that as a result of the confiscation of the said documents and pending investigations, he was not issued with a passport in time for him to attend to a contract which he had been offered and accepted in Angola. It was his further argument that it was as a result of second defendant's officials who at the relevant period were acting within its scope and authority, that they conducted themselves wrongfully and unlawfully to his prejudice. Plaintiff further averred that as a result of this wrongdoing he failed to vote in November 2014 as second defendant's officials were still holding on to his documents amongst which was his electronic voters card.

[9] Plaintiff also averred that he lost a lucrative contract with Pedro as a result of second defendant's officials' negligence as they misplaced his documents which were necessary for the application for his passport.

Victoria Kalompolo

[10] The first witness was Ms Victoria Kalompolo. She testified that plaintiff is her cousin. On the 27 August 2014, she accompanied plaintiff to Ongwediva Trade Fair as he wanted to apply for a passport. Plaintiff was given a passport application form which he completed and left behind for processing. He was later called back by Immigration officials who are employed by second respondent. Upon arrival, plaintiff was confronted by Immigration officials who accused him of being an Angolan and was using fraudulent documents to apply for a Namibian passport. He tried to explain himself out of this quagmire, but, they were not prepared to listen. The bone of contention was that his national identity document stated that he was born in "Onaitembo" while his abridged birth certificate stated that he was born in "Onaitembu". His attempt to explain this

anomaly fell into deaf ears and this resulted in his documents being confiscated by second defendant's officials. This witness, however, had no personal knowledge of the alleged contracts entered into between plaintiff and Pedro. This was the gist of her evidence.

Ileni Indongo

[11] The next witness was Ms Ileni Indongo, who is employed in the Office of the Ombudsman as a chief complainants Investigator at Ongwediva Regional Office. Her evidence was that on the 28 October 2014 she received a complaint from plaintiff regarding his documents which had been unlawfully confiscated by second defendant's officials. She carried out investigations and found, that, indeed second respondent's officials had taken the said documents ostensibly to investigate the possibility of fraud relating to plaintiff's Namibian citizenship. It, however, turned out that he was indeed a Namibian citizen. However, it also appeared that second defendant's officials had misplaced plaintiff's birth certificate among other documents. They subsequently re-issued them and were given to plaintiff except for the birth certificate which was issued in her presence as per her instructions and was handed over to her, which she later gave to plaintiff.

Abraham Kamifumunu Eliaser

[12] The last witness was Abraham Kamifumunu Eliaser, a police officer. He is Ms Kalompo's boyfriend. His evidence was that on the 27 August 2014 he dropped his girlfriend at Ongwediva Trade Fair where she joined her cousin, the plaintiff. He later received a call from second defendant's officials that he should advise plaintiff to return to their stand as there were some irregularities in his passport application form. He indeed transmitted the message, after he had finished his business he contacted his girlfriend to find out whether she was ready to go home, only to be advised that plaintiff was surrounded by second defendant's officials who were accusing him of fraud. He drove to second defendant's stall and indeed found plaintiff being mobbed by the said officials. It was further his evidence that he was in police uniform and he advised the officials that plaintiff was personally known to him and was indeed a Namibian citizen, but, they would not listen to him. Having failed to convince them, he walked away. He

did not testify about the alleged contract between plaintiff and Pedro as he had no first-hand knowledge about it except for what was related to him by plaintiff. That was his evidence. Plaintiff then closed his case.

Defendant's Case

[13] At the close of plaintiff's case, second defendant through its representative Mr Kadhila applied for absolution from the instance. His application can be summed up as follows:

a) plaintiff failed to prove that second defendant's officials acted negligently by confiscating his documents as the birth certificate and identity documents had different places of birth;

b) that plaintiff conceded that the issuance of a passport to him was not automatic, but, a discretionary exercise by second defendant;

c) plaintiff's allegation that he suffered loss of income as a result of his failure to travel to Angola is futile as he did not produce proof with regards to the said contract; and

d) he failed to vote in 2018 as second defendant was in possession of his electronic voters card, but, failed to produce proof thereof;

[14] It is for that reason that he is of the strong view that he fell short of making a good case for himself in the circumstances.

[15] Mr Kadhila therefore argued that absolution from the instance must be granted.

[16] Plaintiff opposed this application. In light of the fact that he is a self-actor the court gave him enough time to peruse respondent's heads of argument so that he can prepare his as well, if he so wished. He indeed filed his heads of argument, wherein, he argued that he has placed sufficient evidence, before the court to rebuff plaintiff's attempt to be granted the application for absolution from the instance. He referred me to the matter of *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015). In that case, Damaseb JP crystallised the requirements which can be summed up as that, absolution ought to be granted in a very

clear case where the plaintiff has not made any case at all. Further, that plaintiff should not easily be shut out by a defendant who is trying to avoid being placed in the witness box. I fully associate myself with the leaned Judge President's approach. I should add, though, that indeed these courts being courts of justice should not easily grant such an application whenever the word "absolution" is mentioned by defendant. As this application is a procedure which has a tendency of effectively blocking plaintiff's prosecution of his or her claim to finality, the court should not grant it at the whim and caprice of defendant. Therefore, in my considered view, courts should be slow in granting such applications. What can be gleaned from *Dannecker's* case is that the courts should grant such applications where there is an iota of evidence, unless the plaintiff's evidence is incurable and inherently so improbable and unsatisfactory so as to be rejected. This means that plaintiff's case should not only be bad, but, incurably bad at law that it should not see the light of day.

[17] It is noteworthy that plaintiff did not produce the contract signed between himself and Pedro, neither did he produce corroborative evidence in relation to the oral evidence between himself and Pedro. What plaintiff only produced was a confirmation or certificate of translation of a contract from Portuguese to the English language. The certificate only referred to a contract, but, the said contract was not produced by plaintiff.

[18] Plaintiff also argued in his heads of argument that he was assaulted by second respondent's officials, but, he did not call any evidence to support his claim. He also did not call Pedro because of the alleged death threats he had received from Pedro. Further, he did not prove the monetary loss he referred to.

Legal Issue

[19] Plaintiff's suit is a delictual claim. A delictual claim has the following essential elements which must be fulfilled in order for a claim to be sustained:

- a) the actor or doer must have caused damage or harm to another person either by action or omission;
- b) the conduct must have been wrongful and unlawful; and

c) the defendant must have been at fault.

[20] The test for absolution from the instance is now well settled and is applied with vigour in this jurisdiction as well. It was crisply stated in the celebrated case of *Claude Neon Lights (SA) Ltd v Daniel 1976(4) SA 403 (A) at 409G-H* where Miller AJA stated:

‘ . . . 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 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. (*Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p.173; Ruto Flour Mills (Pty.) Ltd. v. Adelson (2), 1958 (4) S.A. 307 (T).*)’

[21] This therefore laid thread bare the legal position for all to see and grasp. This case put paid all other approaches, courts might have had.

[22] It is therefore, now part of our law as the following authorities bear witness, see *Gordon Lloyd Page and Associates v Rivera & another 2001(1) SA 88 (SCA) at 92E-93A*; where Harms JA ably stated:

‘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 4th ed at 91-92*). 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....’

[23] This is the principle which of late our courts have invariably applied, see *Faida Trading and Cleaning Enterprises CC and Nedbank Namibia CC (1 143/2014) [2017] NAHCNLD 103 (30 October 2017)* and *Amadhila v Amwaandangi (I 16/2014) [2017] NAHCNLD 36 (08 May 2017)*. In *Aluminium M City cc v Scoudia Kitchens and Jerry (Pty) Ltd 2007 (2) NR 494*, the court went further and made it clear that, the issue of *prima facie* evidence was evidence which requires an answer. It is that evidence, which if reasonably viewed has the potential of finding a favour for the plaintiff as the presenter

of facts. The same principle was applied with equal force and effect in *Herbert v Britz No.* (I 2188/2006) [2013] NAHCMD 39 (14 February 2013). I find comfort in this approach as it is well grounded and I can do no better than to accept and apply it as the immutable legal position.

[24] It is now trite that the remedy of absolution from the instance is available to a defendant who at the close of plaintiff's case is of the view that plaintiff has failed to establish a *prima facie* case against it. Better put, the question is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff. If the answer is in the affirmative then defendant must be put on its defence. However, if the answer is in the negative, plaintiff's claim should be dismissed without more.

Plaintiff's Conduct

[25] In order for plaintiff to escape the wrath of absolution from the instance, he must show that second defendant's employees' conduct towards him was wrongful and unlawful. He averred that it was wrongful for them to have confiscated his documents. However, it was their argument that the confiscation of his documents was as a result of the particulars in his national identification card and birth certificate which were different. In fact, plaintiff admitted under cross examination that there was a difference in the said documents and conceded that in view of that, second defendant's officials had a right to carry out further investigations in order to authenticate the documents. With that approach by second defendant and plaintiff's admission, I find that the element of wrongfulness is eliminated. However, one of the documents got lost in the process, which indeed is negligence on their part. Negligence is, however, not the only determining factor in this regard as is shown in the above requirements for a delictual claim.

Failure to issue a Passport

[26] Plaintiff argued that second defendant failed to issue a passport to him timeously which resulted in him losing out on a contract with Pedro and his company. I find that

two issues arise out of this argument. Firstly, the issuance of a passport in as much as it is an entitlement to a Namibian citizen, it is not automatic as everything depends entirely on the applicant fulfilling all requirements as set out by second defendant. In *casu*, defendant admits that his two necessary and essential documents were materially dissimilar which made it necessary for a further inquiry and hence a further delay. I did not hear him arguing that the delay was unreasonable in the circumstances. Plaintiff did not prove that his failure to secure his contract was causally linked to second defendant, who if it is so, had acted negligently to plaintiff's prejudice at that point and up to the verification of his citizenship. In my view, reasonable measures were taken by second defendant in the circumstances and as such it cannot be faulted as these officials were merely carrying out their lawful duties.

Loss of Income

[27] Plaintiff testified that he suffered financial loss in the sum stipulated above. What is surprising and indeed a concern to me, is that despite his fervent claim, he did not produce proof of the written contract between himself and Pedro, but, all he did was to produce a certificate of translation of a contract from Portuguese to English. In the absence of the said written agreement being discovered and produced in court, plaintiff's case is limping. Even if he did not have the agreement of contract, it would have been prudent for him to call witnesses to corroborate his evidence. The best evidence rule is a must in this case. In addition to that, the figures he referred to are not backed by either corroborated and/or independent evidence as to the authenticity or reasonableness of the quantum. Failure to produce this evidence has deprived the court of an opportunity to determine for itself what plaintiff's claim is based on.

[28] Throughout these proceedings plaintiff bore the onus of proof of his claim, see *Pillay v Krishna* 1946 AD 946. He who alleges has a duty to prove. Plaintiff should have placed his facts before the court in order for it to determine whether the application for absolution from the instance should succeed or not. Where plaintiff has failed to do so, it means that the court cannot find for it, but, for defendant. In this regard Plaintiff has failed to pass this hurdle.

[29] Further, to the above, in order for plaintiff to prove a delictual claim, he must prove an intention to injure him. As it is absent in this case, I cannot find sufficient evidence to prove a *prima facie* case against the defendant and it will, therefore, be unfair to place second defendant on its defence where plaintiff has dismally failed to prove a *prima facie* case against it.

[30] In the result the following is the order of the court:

1. The application for absolution from the instance succeeds with costs.

M Cheda
Judge

APPEARANCES

APPLICANT:

Mr Karlush in Person
Onaitembu Village, Outapi

RESPONDENTS:

Mr Kadhila
Of Government Attorneys, Oshakati