



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-ACT-OTH-2018/02436

In the matter between:

**JERMANO JERALDO EISEB**

**PLAINTIFF**

and

**MINISTER OF DEFENCE: PENDA YA NDAKOLO**

**1<sup>st</sup> DEFENDANT**

**CHIEF OF THE DEFENCE FORCE: JOHN MUUTWA**

**2<sup>nd</sup>**

**DEFENDANT**

**PERMANENT SECRETARY: DEFENCE: PETER VILHO**

**3<sup>rd</sup> DEFENDANT**

**Neutral citation:** *Eiseb v Minister of Defence* (HC-MD-CIV-ACT-OTH-2018/02436) [2020] NAHCMD 333 (6 August 2020)

**Coram:** PARKER AJ

**Heard:** 7, 8, & 23 July 2020

**Delivered:** 6 August 2020

**Flynote:** Practice – Absolution – Close of plaintiff’s case – Court applying trite test – Whether plaintiff has made out a prima facie case upon which a court applying its mind reasonably could or might find for plaintiff – Court held that plaintiff was discharged from the defence force by operation of law in terms of reg 42 (3) (d) of the General Regulations relating to Namibian Defence Force and so the court must give effect to the regulation – Court held further that plaintiff has not made out a prima case, requiring an answer from defendants – Accordingly, court held that the occasion has arisen, in the interest of justice, to make an order granting absolution from the instance – Consequently, court granted absolution.

**Summary:** Practice – Absolution – Close of plaintiff’s case – Court applying trite test – Plaintiff at the rank of private member of the Defence Force, convicted and sentenced to a term of imprisonment by a magistrate court on 31 August 2016 – Interpreting and applying reg 42 (3) (d) of the General Regulations relating to Namibian Defence Force court concluded that plaintiff was discharged from the Defence Force by operation of law – Court finding that a letter indicating that plaintiff was discharged on 29 June 2016 could not amend the law.

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### ORDER

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1. I make an order granting absolution from the instance.
2. There is no order as to costs.
3. The matter is considered finalized and is removed from the roll.

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### JUDGMENT

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[1] The plaintiff was employed as a Namibia Defence Force (‘NDF’) member, and held the rank of Private. While such a member of NDF, plaintiff was convicted, by the Magistrate Court, Gobabis, of assault with intent to do grievous bodily harm, read with the provisions of the Domestic Violence Act 4 of 2003, and sentenced to 36

months' imprisonment, of which a period of 12 months was suspended. Plaintiff appealed unsuccessfully to the court.

[2] Plaintiff was released from the prison on 8 December 2017. Plaintiff reported to his duty station, only to be informed that his name was not on the record as a member of the Namibian Defence Force ('NDF'). A Lt Col Ntinda advised plaintiff to apply to be reinstated in the NDF. The plaintiff did so in a letter dated 8 January 2018, as he was advised to do.

[3] On his own account, plaintiff's 'salary was frozen as from September 2016 after he had submitted documents confirming my incarceration to the Osuna (Osona) Military School Major'. This account in plaintiff's own words is the single most crucial piece of evidence in these proceedings, as will become apparent shortly.

[4] Plaintiff's reinstatement application was unsuccessful in terms of a reply, dated 1 March 2018, to his reinstatement application. I append, hereunder, para 3 of the 1 March 2018 letter:

'In the light of the above, you were then discharged from the Defence Force with effect from 29 June 2016...'

[5] It is on these words that plaintiff relies principally in the particulars of claim in his attempt to prove the allegation of unconstitutional discharge from the Defence Force. Indeed, this forms the talisman of plaintiff's case. It is demonstrated below that like all talismans, this talisman, too, is illusive.

[6] Plaintiff and two other witnesses gave evidence in support of plaintiff's attempt to prove his case. At the close of plaintiff's case, Mr Mutorwa, counsel for defendants, brought an application for absolution from the instance ('absolution application'). On the test of absolution from the instance, I stated as follows in *Konrad V Ndapanda* (HC-MD-CIV-MOT-GEN-2016/00239 [2019] NAHCMD 366 (24 September 2019), where the authorities are gathered:

[6] The test for absolution from the instance has been settled by the authorities. The principles and approaches have been followed in a number of cases. They were approved by the Supreme Court in *Stier and Another v Henke* 2012 (1) NR 370 (SC). 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, nor 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).)”

[My Emphasis.]

“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. . . .”

[7] Thus, in *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015), 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”.

[7] Plaintiff’s case is grounded on these pillars, namely, that (a) he was discharged from the NDF, according to the 1 March 2018 letter, on 29 June 2016. But he had not been sentence on that date, consequently, so says plaintiff, his discharge was unconstitutional and unlawful because NDF ‘failed to follow proper

procedure'; and (b) his discharge from NDF 'is defective because, proper procedures were not followed and no order of discharge from the army'.

[8] The burden of this court in the absolution application is to determine 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. If there is no such evidence, plaintiff cannot survive absolution. (See para 6 above.) In that regard, the court must be satisfied that plaintiff has made out a prima facie case, requiring an answer from defendant (*Stier and Another v Henke* 2012 (1) NR 370 (SC))

[9] The next level of the enquiry is to consider the evidence. And in that regard, the key to the determination of plaintiff's allegations is not only the interpretation, but also the application, of relevant provisions of the Defence Act 1 of 2002 and the General Regulations relating to Namibian Defence Force made under the Defence Act; in particular reg 42 (3) (d) of the General Regulations. They apply to plaintiff as a private member of the Defence Force. The interpretation of the relevant provisions of the enabling Act and the Regulations made thereunder must, therefore, be applied also to the letters that were exchanged between the NDF authorities and plaintiff.

[10] It is crucial to note that the provisions of the Military Disciplinary Code (Schedule 1 to the Defence Act) do not apply to the facts of this case. The tell-tale is the title of Chapter VII which reads: 'DISCIPLINE, LEGAL PROCEDURE AND OFFENCES (ss 39-63)'. The Military Code concerns cases that are dealt with internally by the NDF in respect of conduct considered to be offences in terms of the Act, read with the Military Code; but they do not concern civil courts and offences tried by civil courts, and sentences imposed by civil courts in terms of the Criminal Procedure Act 51 of 1977. The Military Code related to military court, as defined by the Defence Act, and suchlike internal disciplinary bodies; and not the kind of civil court where plaintiff was convicted and sentenced in terms of the Criminal Procedure Act, read with the Domestic Violence Act 4 of 2003. Therefore, the prescriptions contained in item 94 of the Military Code are not directed to civil courts.

[11] I am afraid, these pieces of legal reality are lost on plaintiff, hence his averment that the civil court did not sentence him to be dismissed from the NDF. The

pivotal provision that are apposite on the facts of the instant case is contained in reg 42 (3) (d) of the General Regulations relating to Namibian Defence Force; and it reads:

'An other rank who has been sentenced by a civil court to imprisonment and is serving such sentence is discharged with effect from the date of that sentence.'

[12] It need hardly saying that plaintiff was, in terms of this regulation, discharged from the Defence Force with effect from the date of the aforementioned sentence, which is 31 August 2016, by operation of law. The critical date in the instant proceedings is, therefore, 31 August 2016.

[13] The term 'other rank' is defined in s 1 of the Defence Act, and it is in contradistinction to 'officer'. It is a rank that is not 'officer' rank. And it is not in dispute that plaintiff was not an officer within the meaning of s 1 of the Defence Act. Furthermore, s 23 (2) of the Act on termination of service does not apply to plaintiff, as Mr Mutorwa submitted, because s 23 is subjected to s 9 of the Act.

[14] It is not disputed that plaintiff belonged to 'an other rank'; and so, on the basis of the indisputable evidence that plaintiff was sentenced to imprisonment on 31 August 2016 by a civil court, plaintiff was discharged from the NDF by operation of law 'with effect from the date of that sentence', that is, the critical date. It matters tuppence that in the reply to his reinstatement application, the Chief of the Defence Force wrote that plaintiff was discharged from the NDF with effect from 29 June 2016. The Chief of Defence Force has not a grain of authority to amend the law. The law is impervious to what the Chief of the Defence Force wrote. The court must give effect to the law that plaintiff was discharged from NDF on the date he was sentenced by the civil court (the magistrates court), that is, the critical date.

[15] In any case, on his own account, as I have mentioned previously, plaintiff was aware that he was not discharged on 29 June 2016, because, according to him, his 'salary was frozen as from September 2016', not from July 2016, as I have mentioned previously. Moreover, the fact that plaintiff, according to him, has not received a certificate of service in terms of reg 43 (1) of the Regulations cannot

assist him, for the simple reason that reg 42 (3) (d) is not subjected to reg 43 (1). I find, with respect, that plaintiff's reliance on para 3 of the 1 March 2018 letter is, therefore, fallacious and self-serving.

[16] Applying the foregoing interpretation of the relevant statutory provisions to plaintiff's evidence, I come to the conclusion that plaintiff has not placed evidence before the court upon which the court applying its mind reasonably to the evidence, could or might find for plaintiff (see para 6 above). I hold, therefore, that plaintiff has not made out a prima facie case, requiring the defendants to answer. (*Stiers and Another v Hanke*)

[17] Based on these reasons, I find that the occasion has arisen, in the interest of justice, to make an order granting absolution from the instance at the close of plaintiff's case. (*Erasmus v Wiechmann* (I 1084/2011) [2013] NAHCMD 214 (24 July 2013), para 20)

[18] The foregoing considerations and conclusions are unaffected by plaintiff's complaint that the second defendant's name has been spelt wrongly on the absolution application, and the case number is wrong. On a question from the court, plaintiff stated that these have not prevented him from resisting the application. I also do not see any prejudice occasioned to plaintiff as a result of these errors. In any case, plaintiff's papers are not free from similar errors. They show second defendant as 'John Mutorwa' and 'Jhon Muutwa' in some of plaintiff's papers filed of record, starting with the summons, where yet again, we find second defendant as 'Chief of Defence' instead of 'Chief of the Defence Force'. What is good for the goose, must be good for the gander, I should say. Be that as it may, on an application from the Bar by Mr Mutorwa, I allowed the amendment of the names and the case number.

[19] It remains to consider the issue of costs. I see from the papers that plaintiff considered himself as indigent, hence his application to the Legal Aid Directorate (Ministry of Justice) for legal representation. The application was unsuccessful only because in the Directorate's estimation, plaintiff's case has no merit. It is, therefore, just and reasonable to make no order as to costs.

[20] Based on all these reasons, the absolution application succeeds; whereupon,

I order as follows:

1. I make an order granting absolution from the instance
2. There is no order as to costs.
3. The matter is considered finalized and is removed from the roll.

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C PARKER  
Acting Judge

## APPEARANCES:

PLAINTIFF:

J Eiseb  
In person  
Windhoek

DEFENDANT:

N Mutorwa  
Of Government Attorney, Windhoek  
Windhoek