Practice Directive 61

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title:	**Case No:**
	I 2677/2005
Pieter Petrus Visagie Plaintiff and The Government of the Republic of Namibia 1st Defendant Mrs. E.H. Nandago 2nd Defendant Magistrate's Commission 3rd Defendant The Attorney-General of Namibia 4th Defendant	**Division of Court:** High Court Main Division
Heard before: Honourable Lady Justice Rakow, J	**Date of hearing:** 27 January 2022
	Date of order: 1 March 2022
Neutral citation: *Visagie v The Government of the Republic of Namibia* (I2677/2005) [2022] NAHCMD 81 (1 March 2022)	
IT IS HEREBY ORDERED THAT: 1. The application for absolution from the instance is hereby granted and the Plaintiff's claim is dismissed.	
Reasons for orders:	

Introduction

[1] The matter before court stems from an application for absolution from the instance by the second defendant after the plaintiff closed his case.

Background

[2] The Plaintiff was tried and convicted in the Magistrate's Court, Windhoek, by the second respondent on three charges: fraud, corruption - contravening to s 2 of Ordinance 2 of 1928[5] and a contravention of s 56(e) of Act 7 of 1993. At some stage during the proceedings in the Magistrate's Court, the state had closed its case but the magistrate appeared not to accept that, prompting the prosecutor to lead further evidence and eventually convicted the plaintiff on various counts. He was then sentenced to imprisonment for a period of over three years. He appealed against the said conviction and sentence, which appeal was sucessful and his conviction and sentence was set aside and he was released from custody. In his judgement on the appeal matter, Heathcote AJ, with Manyarara J concuring, stated that the manner in which the second respondent conducted the trial was a 'disgrace' and a 'failure of justice' and that the magistrate was determined to secure the conviction of the appellant.

[3] The plaintiff issued summons against the Government of the Republic of Namibia represented by the Minister of Justice in his official capacity; the magistrate, the Magistrates Commission, and the Attorney-General, seeking compensation against them, jointly and severally, the one paying, the others to be absolved. The cause of action is that the magistrate's conduct of the trial of the appellant was wrongful and unlawful and deprived him of his liberty otherwise than in according with procedures established by law, as contemplated by Art 7 of the Namibian Constitution. Initially all the defendants except the second defendant pleaded that they were not liable for the conduct of the judicial branch which is guaranteed independence under the Constitution and that judicial officers are not in the employ of the state.

[4] The parties, except for the matter against the second defendant, then proceeded

by way of a stated case in order for the court to determine if the state was liable for the wrongful and unlawful conduct of the second defendant, if by agreement they concured that in the conducting of the trial of the plaintiff the magistrate acted *mala fide*, maliciously and fraudulently.

[5] The finding of the High Court was subsequently summarized in the Supreme Court in *Visagie v Government of Republic of Namibia and Others* [1] as follows:

'The full bench of the High Court was divided. The majority of two held that the independence of the judiciary and the separation of powers militated against holding the State liable for the conduct of the judicial branch. The majority took the view that as an aggrieved person the appellant had recourse against the second respondent in her personal capacity and that it was not necessary or appropriate to make the State liable for her conduct as the State had no power of control over her performance of the judicial function. The claim was dismissed.

The minority of one held that the existence of a remedy against the individual member of the judiciary was no bar to recognising a remedy in public law against the State. That Art 5 of the Constitution obligates the judiciary to respect and uphold the rights and freedoms guaranteed by the Constitution. That Art 25(3) and (4) of the Constitution empower the court to forge new remedies in public law to give full effect to constitutionally guaranteed rights and freedoms. That recognising State liability for judicial misconduct is necessary to vindicate such rights. The minority therefore resolved the question of State liability in favour of the appellant.The claim was dismissed in the High Court whereafter the plaintiff appealed to the Supreme Court.'

[6] On appeal the Supreme Court held that the 'existence of a remedy against the actual wrongdoer is an important consideration whether or not to recognise state liability for the actions of the members of the judiciary. Held further that recognising a new remedy in public law against the state for such conduct is not necessary and that such liability may undermine the independence of the judiciary and possibly create a greater mischief than not doing so'.[2] The appeal to the Supreme Court was therefore dismissed and the High Court decision upheld.

[7] What remained, was the determination of the claim against the second defendant, Mrs. Nandago, the magistrate, who initialy convicted Mr. Visagie the plaintiff

[1] (SA 34 of 2017) [2018] NASC 411 (03 December 2018).
[2] *Visagie v Government of Republic of Namibia*.

and which conviction was set aside on appeal.

The Claim

[8] The Particulars of Claim sets out the basis of the claim as follows:

'The Plaintiff was arrested during March 1998 and faced the charges as set out above. On 2 August 2000 the State closed its case. The Second Defendant acting in her capacity as magistrate, without just cause and *mala fide.*

Didn't bother to inform anyone, including the Plaintiff of the fact that the State's case was closed

Was determined to get a conviction in this case against the Plaintiff

Six years down the line and eventually convicted the Plaintiff and sentenced the Plaintiff to three (3) years imprisonment on 20 March 2003.

As a result of the Second Defendant's conduct the Plaintiff was convicted and imprisoned for over two(2) years on 20 March 2003 until he was released by order of the High Court of Namibia on 15 June 2005.'

[9] The plaintiff alledged that he suffered damages as a result of the second defendant's conduct in the amount of N$ 2 000 000 being for damages for contumelia, deprivation of freedom and discomfort, as well as N$100 000 for costs because the plaintiff had to approach the High Court of Namibia in order for him to be released from custody.

The evidence presented by the plaintiff

[10] The plaintiff testified himself and handed up by agreement the statement of a witness. The plaintiff made the following allegations under oath regarding the conduct of the second defendant. He testified that she acted *mala fide* and/or fruadulently and/or maliciously and/or was guilty of the grossest carelessness by doing the following:

a) She attempted to intervene to prevent the State from closing its case;
b) She did not inform the plaintiff, his legal represntatives or the prosecutor that the State's case had been closed on a previous occasion;
c) She was determined to get a conviction against the plaintiff;
d) She unduly interfered with the State's case;

e) She denied the plaintiff a fair trial.

[11] The plaintiff attempted to recollect the court proceedings of 2 August 2000 more than 20 years later. He testified that the utterance of the second defendant when she loudly told the state: "Are you closing your case because you cannot trace the witnesses or what?' caused him to conclude that she interfered with the state's case and prevented the state from closing it's case by applying pressure to the state prosecutor. He could however not recall what the state prosecutor said or what else was said by the second defendant.

[12] He further testified that he was convicted despite there being no evidence against him. He further admitted that he had a remedy when the magistrate made a wrong decision in law in that he had the right to appeal. The plaintiff indicated that he relied on the subsequent appeal (against the criminal conviction) judgement where Heathcoat, J pointed out that the magistrate was dead set to get a conviction. It was further his tesimony that he also heard the state stating that they are closing their case but never informed his legal representative Mr. Maritz who was not at court that day, of the fact. The transcript of the original proceedings was however never handed in.

[13] The plaintiff testified regarding the amount of damages he suffered, in that he was working at the time of his arrest as an Immigration Official and subsequently lost his job because he was detained for three months before he received bail. He lost his house because of non-payment of the bond and his wife also divorced him, causing him further injury. He further testified that Mr. Maritz conducted his trial in the Lower Courts as well as the appeal in the High Court and that costed him about N$100 000.00. He could however not provide any proof of the amount he paid towards Mr. Maritz, nor indicate what the costs associated with the appeal were.

[14] The witness statement of Mr. Johannes Visagie which was handed up by consent between the parties deals with the fact that the family had to support the plaintiff's family during his time in custody as well as spent money travelling to visit him and for food and toiletries. Very little, if anything is however added by this evidence.

<u>The basis for absolution from the instance</u>

[15] The process for the application for absolution from the instance is set out in rule 100 of the High Court rules, it however does not set out what needs to be considered. The test for granting absolution from the instance at the end of a plaintiff's case is set out in *Claude Neon Lights (SA) Ltd v Daniel*[3] where Miller AJA said:

'(W)hen 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.'

[16] In *Ramirez v Frans and Others,*[4] this court dealt with the application and the principles applicable. Concerning case law, the following principles were extracted:

'(a) (T)his application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials i.e. in terms of s 174 of the Criminal Procedure Act — *General Francois Olenga v Spranger*[5];

(b) the standard to be applied is whether the plaintiff, in the mind of the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — *Stier and Another v Henke*[6] "

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim because in the absence of such evidence, no court could find for the plaintiff — *Factcrown Limited v Namibian Broadcasting Corporation*;[7].

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating or of so romancing a character, the court may, in those circumstances, grant the application — *General Francois Olenga v Erwin Spranger;*[8]

(e) the application for absolution from the instance should be granted sparingly. The court must generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this

[3] 1976 (4) SA 403 (A) at 409G – H

[4] [2016] NAHCMD 376 (I 933/2013; 25 November 2016) para 28. See also *Uvanga v Steenkamp and Others* [2017] NAHCMD 341 (I 1968/2014; 29 November 2017) para 41.

[5] (I 3826/2011) [2019] NAHCMD 192 (17 June 2019), infra at 13 para 35.

[6] 2012 (1) NR 370 (SC) at 373.

[7] 2014 (2) NR 447 (SC).

[8] (I 3826/2011) [2019] NAHCMD 192 (17 June 2019) and the authorities cited therein;

application — *Stier and General Francois Olenga v Spranger (supra).'*

[17] In the case of *Hurwitz vs Neofytou* [9] the principles were explained as follows:

'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) 37G-38A; Schmidt Bewysreg 4th ed 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 (Schmidt 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 interests of justice.'

Other legal considerations

[18] In *Visagie v Government of Republic of Namibia and Others*[10] the Supreme Court recorded the position of the law in regard to civil liability of judicial officers, and stated that:

'At common law, a judicial officer is not personally liable if damages are occasioned to another arising from decisions made in good faith and without malice in the performance of judicial functions. A judicial officer is however personally liable for his or her wrongful conduct whilst performing the judicial function if such conduct is proven to be mala fide, malicious or fraudulent.'

[19] The above reiterates the position that was taken in *Gurirab v Government of the Republic of Namibia and Others*[11] :

[9] Unreported judgement of the South Gauteng High Court case no. 23542/2015 delivered on 2 June 2017.
[10] (SA 34 of 2017) [2018] NASC 411 (03 December 2018).
[11] 2006 (2) NR 485 (SC)

'It must be remembered that the magistrate, like a judge, is in our law an administrator of justice, not a mere figure head. Judicial officers are not above criticism but litigants cannot expect perfect justice. A delictual action will only lie against a judicial officer where such officer is shown to have acted mala fide and with bias. Where a decision is wrong, a litigant has the right of appeal or review.'

[20] The matter of *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[12] Harms, JA sets out the reasoning behind the requirement that for delictual action to be successful, the requirement of *mala fides* and bias must be shown.

'The decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to adjudicate fearlessly. Litigants (like those depending on an administrative process) are not "entitled to a perfect process, free from innocent (i.e. non mala fide) errors": The threat of an action for damages would "unduly hamper the expeditious consideration and disposal" of litigation. In each and every case there is at least one disgruntled litigant. Although damages and the plaintiff are foreseeable, and although damages are not indeterminate in any particular case, the "floodgate" argument (with all its holes) does find application.'

Discussion

[21] The question that needs answering is: Did the second defendant exercise her judicial function pertaining to the plaintiff in a *mala fide* and/or fraudulent manner. The Court is the best judge of what would constitute *mala fide* and/or fraudulent conduct and as such, the court will only interfere if the conduct complained about is so utterly unreasonable and capricious that no reasonable man would have made it. To evaluate the conduct of the second defendant, the court needs to look at the proceedings as a whole and unfortunately the recollection of the Plaintiff, in the absence of the actual court record, is not sufficient to allow the court to rely on it to form an understanding of the unreasonableness and or capriciousness of the conduct of the second defendant.

[22] It is further true that the plaintiff admitted relying on the subsequent appeal judgement (in the criminal matter) to form his opinion regarding the conduct of the second

[12]SA 2006 (1) SA 461 (SCA) ([2006].

defendant. This however does not help his case as it was findings, although by another set of judges, that was based on their interpretation of the Lower Court proceedings and specifically as to whether there occurred an irregularity or not when the state closed its case and subsequently proceeded with calling further witnesses. This court cannot base any finding on the findings of the appeal court. The second defendant further placed it in issue that the state's case was indeed closed. The fact that the court was not placed in possession of a copy of the Lower Court proceedings, and therefore not in possession of the best evidence is in fact detrimental to the case of the plaintiff. There is further no evidence placed before this court that supports malice on the part of the second defendant when she convicted the plaintiff.

[23] The attempt to rely on Constitutional damages also stands to fail. The plaintiff had a remedy for his complaint of wrongful conviction, he could appeal the said conviction and in fact did so. This is a statutory remedy to which he availed himself. The requirements for a Constitutional Damages Claim to be successful are discussed by the South African Constitutional Court and this court is in full agreement therewith. In *Residents of Industry House, 5 Davies Street and Others v Minister of Police and Others*[13] the court said the following:

'[152] A careful reading of the various decisions reveals that our courts do not grant constitutional damages in every case where there has been a violation of the rights in the Bill of Rights. In some cases, those damages were awarded where they were the only effective relief. In others they were granted on the basis that there were special circumstances which rendered such damages the most appropriate relief. And in respect of each instance, the computation of those damages was based on a clear and objective formula.

….

….

[155] But even if we were not to follow the principle that constitutional damages should be allowed where there are no alternative effective remedies, we would still not grant such damages for a number of reasons. For a claim of that nature to succeed, it is not enough for the claimants to show that there was a breach of a guaranteed right. In addition to this, they should establish the nature of the harm or loss suffered and the causal link between the loss and the wrongful conduct that resulted in a breach.

Moreover, there were a number of alternative remedies available to the applicants against

[13] (CCT 136 of 2020) [2021] ZACC 37 (22 October 2021).

members of the South African Police Service. The first judgment accepts that the presence of alternative remedies is a weighty consideration in determining whether to award constitutional damages. As was observed in *Fose*,[14] those remedies may be in the form of common law or statutory remedies. The common law and statutory remedies may constitute "appropriate relief" envisaged in section 38 of the Constitution.'

[24] Allegations of *mala fides* and/or fraudulent conduct must be proven with strong and clear evidence. The plaintiff's case failed at this hurdle as it had to show what happened on 2 August 2000 in the court and also how the second defendant acted *mala fide* and/or fraudulent when she convicted him. This was not shown by the evidence presented by the plaintiff and on his behalf and for that reason the court must find that he did not make out an answerable case and the second defendant's application must succeed. It was indicated that the second defendant will not seek an order for costs as the plaintiff was assisted by the Directorate of Legal Aid.

[25] I therefore make the following order:

The application for absolution from the instance is hereby granted and the Plaintiff's claim is dismissed.

Judge's signature	**Note to the parties:**
	Not applicable.
Counsel:	
Applicants	**Respondent**
M Siyomunji Of Siyomunji Law Chambers, Windhoek	S Namandje Of Sisa Namandje & Co. Inc, Windhoek

[14] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC)