

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

PRACTICE DIRECTION 61

<b>Case Title:</b>		<b>Case No:</b>
Cornelius Plaintiff	Ganuseb	HC-MD-CIV-ACT-OTH- 2020/00165
and		<b>Division of Court</b> HIGH COURT (MAIN DIVISION)
Minister of Justice : Frans Kapofi Defendant	First	
Minister of Safety and Security: Charles Namoloh Defendant	Second	
Chief Justice: Peter Shivute Defendant	Third	
Judge President : Petrus Damaseb Defendant	Fourth	
Registrar Of The High Court Of Namibia: Rita Ikuambi Defendant	Fifth	
Chief Inspector: Jantjies Defendant	Sixth	
Warrant Officer : Jantjies Defendant	Seventh	
Constable: Platt Defendant	Eighth	
Sergeant: Kuahee Defendant	Ninth	
Inspector : T Gariseb	Tenth	

Defendant	
<b>Heard before:</b> CLAASEN, J	<b>Heard on:</b> 25 September 2023 and 28 September 2023
	<b>Delivered on:</b> 13 February 2024
<b>Neutral citation</b> <i>Ganuseb v The Minister of Justice</i> (HC-MD-CIV-ACT-OTH-2020/00165) [2024] NAHCMD 50 (13 February 2024)	
<b>Order:</b>	
<ol style="list-style-type: none"> <li>1. The application for absolution from the instance is granted.</li> <li>2. There is no order as to costs.</li> <li>3. The matter is removed from the roll and regarded as finalised.</li> </ol>	
<b>Reasons for the order:</b>	
<u>Introduction</u>	
<p>[1] This is an application for absolution from the instance, at the close of the plaintiff's case.</p>	
<p>[2] The plaintiff instituted action against the defendants claiming damages of N\$2 800 000. Mr Ganuseb asserts that he is entitled to that in terms of Article 25(2), (3) and (4) of the Namibian Constitution.</p>	
<p>[3] After the defendants opposed the matter, the plaintiff withdrew the suit against the majority of the defendants. The trial proceeded against the first and fifth defendant only, claiming payment jointly and severally, the one paying the other to be absolved.</p>	
<u>The plaintiff's action</u>	
<p>[4] The plaintiff alleges that on or about 31 May 2013, he filed a notice of appeal against his conviction and sentence with the fifth respondent who was acting within the scope of her</p>	

employment. The fifth respondent never provided a notice of set down to the plaintiff for that. As a result of the conduct of the fifth defendant, his appeal was never set down and he had had to apply for leave to appeal during 2018, when the appeal was set down.

[5] The plaintiff asserts that the fifth defendant failed to discharge her duties. That, in turn, violated his right to a fair trial under Article 12(1)(a) of the Constitution which provides that in the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair public hearing by an independent, impartial and competent court or Tribunal established by law.

[6] The defendants, in their plea, deny the allegations and put the plaintiff to the proof thereof.

[7] In terms of the joint pre-trial report, the parties agreed that it was not in dispute that the plaintiff is currently serving a 20-year prison sentence for murder and that a notice of set down was issued on 1 July 2020 which appeal was postponed to 01 September 2020 for the plaintiff to secure legal representation.

#### The evidence

[8] The plaintiff testified in support of his claim and called no other witnesses. I will summarise the salient parts of his evidence. He testified that on 17 May 2013, he was sentenced to 20 years imprisonment on a murder conviction by a Judge of the High Court. He deposed that he filed a notice to appeal against the conviction and sentence on 31 May 2013 at the High Court of Namibia.

[9] He testified that the fifth defendant was acting within the scope of her employment and that since he filed the notice he was not provided with a notice of set down. That was despite him following up on it, physically and in a written format, which letters he wrote during January 2014. He wrote again in 2017, but received no response.

[10] He requested the office of the Ombudsman to follow up on his behalf. According to him they informed him that they could not trace his papers on the court file. He maintains that on the advice of the Ombudsman he had to apply for leave to appeal during 2018. He was never

advised of the status of his application until it was eventually set down during March 2021.

[11] The plaintiff further testified that the fifth defendant failed to set down his appeal which resulted in an undue and unreasonable delay in him pursuing his right to appeal. That conduct violated his right to a fair trial under Article 12 of the Namibian Constitution. On that premises he suffered damages and is entitled to an award in the amount as prayed for.

[12] Cross-examination ventured into court process relating to proper filing of court documents. Counsel postulated that when a criminal appeal is filed, a date stamp will be affixed by the court official who receive it and that the purported document by the plaintiff has no such stamp. The plaintiff conceded that his first appeal document has no stamp and that he did not take the document to the High Court on the said date. It was pointed out to him that he has not tendered evidence by the persons who ostensibly brought the document to court to substantiate his claim that he filed an appeal. He reasoned that he could not bring the Officers to his case.

[13] Cross-examination also revealed another purported notice of appeal, authored by him, which bears a date stamp of 28 February 2018. The plaintiff conceded that the stamp on it shows it to be that of the Windhoek Correctional Facility. He was also confronted that the heading was formulated as a Leave to Appeal in terms of s 309(1) of the Criminal Procedure Act 51 of 1922, which counsel postulated deals with appeals against proceedings in the Lower Court. The plaintiff accepted that he now understand that it was improper to want to use that provision for an appeal against a case finalised in the High Court.

[14] It was put to him that in view of that, the fifth respondent did nothing wrong between the period of 2013 until 2018 as alleged in his particulars of claim. He answered that if the fifth respondent has responded on his papers she would not have violated his rights.

#### Application for absolution from the instance

[15] The essence of the application for absolution rested on the premise that there was no evidence that the plaintiff indeed filed an appeal on 31 May 2013, or that the fifth defendant infringed any rights of the plaintiff which would entitle him to damages. Thus plaintiff has not discharged the onus on him, so Counsel for the defendants argued.

[16] The application was opposed. It was contended that the plaintiff has presented enough evidence for a court to find in his favour. The argument proffered was not denied, that the plaintiff filed a notice of appeal in 2013 as it was merely put to the plaintiff that he has no proof (in the form of a stamped copy) that he filed the said notice. Thus, the plaintiff must have filed an appeal prior to 2014 as he was following up on it. Furthermore, that the defense that emanated from cross-examination that the '2018 Notice Of Appeal' was defective and would have been struck from the roll, was not pleaded, and thus such argument is not available to the parties.

#### Legal principles

[17] The legal principles for applications of this nature are well established. The test is whether, at the end of the plaintiff's case, there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff.<sup>1</sup> This implies that a plaintiff has to make out a *prima facie* case, in the sense that there is evidence relating to all elements of the claim, to survive absolution, because without such evidence, no court could find for the plaintiff.<sup>2</sup> The underlying reason is that, it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances.<sup>3</sup> 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.<sup>4</sup>

[18] *In Teek v The Minister of Safety and Security & 7 Others*<sup>5</sup>, Usiku J reiterated basic requirements as follows at para 31:

' In action proceedings, a plaintiff is required to:

- (a) allege in the pleadings certain wrongful or unlawful actionable acts attributable to the defendant, which have caused plaintiff to suffer some damages, and
- (b) prove, at trial, that which the plaintiff has alleged in the pleadings.<sup>6</sup>

<sup>1</sup> *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H.

<sup>2</sup> *Marine and Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 at 379-38A.

<sup>3</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 970A.

<sup>4</sup> *General Francois Olengav Erwin Spranger* (I3826/2011)[2016] NAHCMD 330 (28 October 2016).

<sup>5</sup> *Teek v The Minister of Safety and Security & 7 Others* (HC-MD-CIV-ACT-DEL-2019/01427) [2021] NAHCMD 348 (30 July 2021).

<sup>6</sup> *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018)

[19] Furthermore, it appears that an award of damages is not automatic where there was a violation of a constitutional right and that a party must first have recourse to other available legal remedies in common law before embarking on a constitutional motion. In *Visagie v State*,<sup>7</sup> Rakow J referred to the requirements for a constitutional damages claim as elucidated in *Residents of Industry House, 5 Davies Street and Others v Minister of Police and Others*<sup>8</sup> where 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.'

### Analysis

[20] I proceed to the question as to whether the plaintiff has presented *prima facie* evidence of the allegations in his particulars of claim. The starting point of his claim is that he filed an appeal on 31 May 2013 which was not set down for hearing. In this regard, counsel for the plaintiff argued that it was not denied in cross-examination that the plaintiff filed it and it can be deduced that he filed it. There is no merit in that, because that allegation was tested on multiple fronts. The plaintiff was confronted about not having any proof that he indeed 'filed' it in the form of a Notice of Appeal that bears a date stamp of the Registrar's Office at all. The plaintiff conceded that there is none.

---

para 4.

<sup>7</sup> *Visagie v The Government of the Republic of Namibia* (I2677/2005) [2022] NAHCMD 1 (1 March 2022).

<sup>8</sup> (CCT 136 of 2020) [2021] ZACC 37 (22 October 2021).

[21] That point was followed up by exploring how the purported Notice of Appeal was filed. The plaintiff's unequivocal response was that he did not bring or tender the document to the Registrar's Office. He gave the document to prison officials to bring to the High Court. That was the high water mark of the evidence regarding the 'filing' of the document.

[22] According to the plaintiff he was convicted and sentenced for a criminal case in the High Court and appealed against that. In *Pienaar v S*<sup>9</sup> it was reiterated that a person who intends to appeal to the Supreme Court against a judgment of the High Court cannot appeal as of right and is first required to apply for leave to appeal. Section 316(1) and (2) of the Criminal Procedure Act 51 of 1977 regulates that procedure and it provides that:

'316(1) An accused convicted of an offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply to the judge who presided at the trial or, if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of any offence before any such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon.

(2) Every application for leave to appeal shall set forth clearly and specifically the grounds upon which the accused desires to appeal: Provided that if the accused applies verbally for such leave immediately after the passing of the sentence, he shall state such grounds and they shall be taken down in writing and form part of the record.'

[23] Presumably, the plaintiff did not apply immediately after he was sentenced as he gave his document to prison officials. It goes without saying that, to give a document to an official employed at the Correctional Facilities does not constitute proper 'filing' of an application for leave to appeal. There is no qualm that the simplest and most certain way herein to prove that he indeed filed an appeal was to produce the relevant document, bearing a date stamp of the Registrar's Office, wherein the document was received. That has not surfaced in the plaintiff's evidence. At the bare minimum, he could have tendered evidence by any of the officials to whom he delivered his application to substantiate that it was indeed delivered to the fifth

---

<sup>9</sup> *Pienaar v S* (HC-MD-CRI-APP-CAL-2019/00065) [2020] NAHCMD 527 (18 November 2020) para 3

defendant at the Registrar's Office. Again that was not done. Incidentally, his case is also silent as to service on the other side.

[24] The plaintiff bears the burden to prove his allegations, in particular that he duly filed an appeal. In this matter, he has not discharged the onus to prove that first material allegation, not even on a *prima facie* level. It will serve no purpose for this court to delve into the rest of his claim. It amounts to the situation referred to by Parker J in *Chombo v Minister of Safety and Security*<sup>10</sup> that when a plaintiff merely makes allegations and does not prove that in trial ...'no court will find for the plaintiff; for, what is alleged and not proven remains a mere irrelevance. (*Klein v Caramed Pharmaceuticals (Pty) Ltd* 2015 (4) NR 1016 (HC))'.

[25] I deviate for a moment to comment on clarity in pleadings. In scrutinizing the particulars of claim it is unambiguously clear that the plaintiff's claim is predicated on his purported 'Notice of Appeal', purportedly filed on 31 May 2013, which was not set down for hearing by the fifth respondent.<sup>11</sup> It was not in respect of an appeal filed in '2018 to 2020', which period was also slipped into written argument by counsel for the plaintiff. That much is clear from the particulars wherein the plaintiff pleads that he had to apply for 'leave to appeal during the year 2018 which application has now been set down.'(sic). That speaks to an application that he brought in 2018, which was indeed set down. The plaintiff cannot plead one thing and then loosely amplify his case in argument, seemingly, in an effort to extend the claim to something that the defendant was not called upon to answer.

[26] For these reasons I have come to the conclusion that there is no evidence on which a court, applying its mind reasonably to such evidence, could or might find for this plaintiff.

1. The application for absolution from the instance is granted.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalised.

**Judge's signature**

**Note to the parties:**

<sup>10</sup> *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018) para 5.

<sup>11</sup> Paragraph 11 of particulars of Claim.



	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>First Respondent</b>
H Ntelamo-Matswetu Instructed by Directorate for Legal Aid, Windhoek	L K Tibinyane Government Attorney Windhoek