**LEOPOLD MUDISI**

**Versus**

**COMMISSIONER-GENERAL ZIMBABWE REPUBLIC POLICE**

**And**

**MINISTER OF HOME AFFAIRS & CULTURAL HERITAGE**

**And**

**MAKUSHA MAKUSHA**

**And**

**TADIOUS KAMBARAMI**

**And**

**DETECTIVE SEARGENT MUTOPA**

**And**

**DETECTIVE CONTABLE CHISHUWO**

**And**

**DETECTIVE CONSTABLE MOYO**

**And**

**CONSTABLE CHIGAYO**

**And**

**CONSTABLE SIBANDA**

**And**

**CONSTABLE CHIMUTI**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 22 JUNE 2021 & JULY 2021

**Application for absolution from the instance**

*Ms. T. Chidyamakono*, for the plaintiff
*D. Janicha*, for the defendants

**DUBE-BANDA J**: This is an application by the defendants for absolution from the instance at the close of the plaintiff's case. In this case, plaintiff sued out a summons against the defendants, praying for judgment in the following terms:-

1. Damages in the sum of $20 000.00; arising out of the arbitrary violation of the plaintiff's right to privacy and dignity; and failure of the Police Service to diligently perform their constitutional obligations.
2. For the payment of the claim, the defendants are jointly and severally liable for the claim one paying the others to be absolved.
3. Payment of 5% interests from day of summons to the date of full and final settlement.
4. Costs of suit at a higher scale.

The action is defended. At the pre-trial conference the issues for trial were identified and set out to be the following:

1. Whether or not the defendants had any lawful excuse to the search of plaintiff's property without a search warrant or the plaintiff's consent.
2. Whether or not the 1st and 2nd defendants' are liable for the actions of the 3rd to 10th defendants in this instance.
3. Whether or not the defendants are liable for the payment of damages in the sum of $20 000.00 for the arbitrary conduct of the 3rd to 10th defendants that contravened on the plaintiff's right to privacy and right to dignity.

As per the pre-trial conference minute, the *onus* on the 1st issue is on the defendants. The *onus* on the 2nd and 3rd issues is on the plaintiff.

The plaintiff testified and led evidence from two other witnesses. The witnesses who testified for the plaintiff are; Thomas Maphosa and John Guvamombe. At the conclusion of

the testimony of John Guvamombe, plaintiff closed his case. It is at this stage that Mr*Janicha,* counsel for the defendants rose and made an application for absolution from the instance.

Briefly, the evidence at this stage is this: - the plaintiff is the registered legal practitioner. He is the senior partner at Mutendi, Mudisi & Shumba Legal Practitioners, a firm of legal practitioners with offices in Zvishavane. He has been a legal practitioner for eighteen years. He owns a butchery, restaurant and several houses which he lets out. He testified that on the 16 January 2019, while in his office he received a telephone call from one of his employees, i.e. John Guvamombe. He was informed that there were police officers at his homestead. He was told that the police were investigating a case of stock theft, and they had conducted a search at his homestead. He drove to his homestead and saw the police officers; amongst them were Stg. Kambarami and Assistant Inspector Makusha. The plaintiff was informed that the police were looking for stolen stock. He noted that the police did not have a search warrant. In fact, the police told him that it was not necessary to for them to have a search warrant. He noted that one of his employees, Thomas Maphosa was in handcuffs. On inquiry he was told that Thomas Maphosa was a suspect. He then drove back to his office.

The next to testify was Thomas Maphosa. He works at plaintiff's butchery. He was approached by the police. They asked him to get into the lorry they were using. He was driven to plaintiff's homestead. The police told him that plaintiff and he (witness) were thieves. The police said he was a thief and he wanted to run away, he was then handcuffed. He was talking to Stg. Kambarami. The police later told him that they were looking for stolen cattle and goats. He did not see the search being conducted because he was 30 metres from the animal pens, inside a motor vehicle.

The last to testify for the plaintiff was John Guvamombe. He is employed by plaintiff as a supervisor at the plot. On the 16 January 2019, while at the cattle pens he saw a vehicle at the main gate. He saw men disembarking from the vehicle and entering the homestead. The police requested that the cattle be returned to the pens. The police said they were looking for missing beasts. They did not show him their police identity cards. He tried to phone the plaintiff, the police confiscated his mobile phone. The police searched for the beasts they were looking for, could not find them. They proceeded to the goat pen. After a while the person who had lost his beasts arrived with his head boy. They looked around and informed the police that they did not see their lost cattle. This witness testified that he did not grant the

police permission to enter the homestead. He said the police instilled fear in him and he allowed them to do what they wanted to do.

At the conclusion of the testimony of the John Guvamombe, plaintiff closed his case, and defendants' counsel made an application for absolution. The defendants contend that the plaintiff has failed to establish a *prima facie* case. The evidence is replete with inconsistencies, and does not show or demonstrate a case of arbitral invasion of privacy and loss of dignity. It is argued that the evidence shows a diligent execution of duty by the members of the police. It is contended that the last witness of the plaintiff, i.e. John Guvamombe testified that the police requested to see the cattle. On the other side of the pendulum, plaintiff contends that this is not a case for absolution from the instance. It is argued that there are no discrepancies in the evidence in support of plaintiff's case, and that the application for absolution must be dismissed.

**The law**

The law relating to absolution from the instance is settled in this jurisdiction. See: *Afrasia Bank Limited v Drummond Ranching (Private) Limited and others* HH 237/17; *Gascoyne* v *Paul & Hunter* 1971 TPD 170; *Supreme Service Station (Pvt) Ltd (1969)* v *Ford Gooldridge (Pvt) Ltd* 1971 (1) RLR 1 (A); *Edmond Totri and George Patrinos v Phathisani Nkomo* HB 222/20. 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. See: *Klein v Kaura* (I 4315 / 2013) [2017] NAHCMD 1; *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA); *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307 (T). 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. See: *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A. *Clause Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (A); *Sithole* v *P G Industires (Pvt) Ltd* HB-47-05; *Marine & Trade Insurance Co Ltd* v *Van der Schyff* 1972(1) SA 26(A); *Moyo* v *Knight Frank & Anor* HB-87-05 and *Ikeogu* v *Guard Alert (Pvt) Ltd* HB-13-08.

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. The court 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 questions having a bearing on both credibility and the weight of probabilities in the case. 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 her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy. See: *Osman Tyres and Spares CC & another v ADT Security(Pty) Ltd* [2020] ZASCA 33 [3 April 2020]. Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the court 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. *See: Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30. An 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 theapplication. See: *The Board of Incorporators of The African Episcopal Church v Kooper* (I 3244/2014) [2018] NAHCMD 5 (24 January 2018); *Ernest Tekere **v** Precious Sihle Sibanda and Sherperd Chipadza* HB 90/18.

**Application of the facts to the law**

What is apparent from the evidence at this stage of the proceedings is that the police entered the homestead of the plaintiff and conducted a search. There is an admission in the pleadings that 3rd, 4th and 5th defendants entered the plaintiff's homestead. Again, it is admitted that whatever 3rd, 4th and 5th defendants did at the plaintiff's homestead, was done during the scope and course of their employment with 1st and 2nd defendants. In respect of admissions, section 36(1) and (3) of the Civil Evidence Act [8:01] says an admission as to any fact in issue in civil proceedings shall be admissible in evidence as proof of that fact, and it shall not be necessary for any party to prove any fact admitted on the record of the proceedings. Therefore, the 3rd, 4th and 5th defendants having admitted in pleadings that they entered the homestead of the plaintiff, it is not necessary for plaintiff to lead evidence placing them at his homestead. In fact, outside the admission there is evidence that 3rd and

4thdefendants entered plaintiff's homestead and conducted a search. Again, it shall not be necessary for plaintiff to lead evidence that the other 3rd, 4th and 5th defendants were acting in the scope and course of their employment with 1st and 2nd defendants, as this fact is admitted in pleading.

There is no evidence that the6th, 7th, 8th, 9th and 10th defendants were seen at the homestead of the plaintiff. Their names were not mentioned during the plaintiff's case. In general, this would mean that plaintiff has not established a *prima facie* against these defendants, and they would be entitled to an order of absolution from the instance. However on the facts of this case, an order of absolution cannot be returned in their favour. It is so because in terms of the pre-trial conference minute, the first issue for trial is this: "whether or not the defendants had any lawful excuse to the search of plaintiff's property without a search warrant or the plaintiff's consent." The pre-trial conference minute records that the *onus* on this issue is on the defendants. It is for the defendants to show that they had a lawful excuse to search plaintiff's property without a search warrant nor his consent. It seems to me that the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. For the defendants to discharge the *onus* which rest upon them on a balance of probabilities the court must be satisfied that they have told the truth and that their version was therefore acceptable. See: *Pillay v Krishna* 1946 AD 946. This means that the defendants must testify in the trial, and they can only testify in the defence case. I therefore take the view that no matter the absence of evidence at the close of plaintiff's case in respect of the 6th, 7th, 8th, 9th and 10th defendants, this court cannot order an absolution from the instance when defendants bear the *onus* on an issue in the trial. In a case such as this, it would be unwise for the defendants to make an application for absolution at the close of plaintiff's case, when they know that they bear an *onus*, which can only be discharged by way of evidence. There is no other way they could discharge the *onus* on them, except that they have to testify in their defence.

Plaintiff claims payment of damages in the sum of $20 000.00 for the alleged arbitrary conduct of the 3rd to 10th defendants that infringed his right to privacy and right to dignity. The privacy of the individual is important. Section 57 of the Constitution entrenches everyone's right to privacy, including the right not to have one's person, home, or property searched, possessions seized or the privacy of his or her communications infringed. These

rights flow from the value placed on human dignity by the Constitution. There is evidence that the police entered plaintiff's homestead and conducted a search. Whether the conduct of the police was lawful, cannot be decided at this stage of the proceedings. Again, counsel for the defendants embarked on a forensic evaluation of the plaintiff evidence, pointing out its alleged shortcomings. I take the view that this court cannot at this stage of the proceedings, embark on such an analysis, such can be done at the conclusion of the trial. At this stage of the proceedings, I will not evaluate the plaintiff's evidence but will accept it as true. Nor will I weigh up different possible inferences that can be drawn from the plaintiff's evidence. See: *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C-E; *Gandy v Makhanya* 1974 (4) SA 853 (N) at 856B-C; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39.

In the premises, I hold the view that the application for absolution from the instance cannot succeed in the present circumstances. In *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) at 321A, the court reasoned as follows on an application for absolution:' the question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not.' See: *Fish Orange Mining Consortium (Pty) Ltd V! Goaseb (*I 582/2010) [2018] NAHCMD 154 (8 June 2018). Generally, this court is a very chary of granting absolution at the close of a plaintiff's case.In the light of the legal principles enunciated above, and the evidence on record, I take the view that the necessary threshold has been crossed by the plaintiff in this matter and in the result, defendants should be called to their defence.

Costs are always at the discretion of the court. On the facts of this case, I take the view that costs should be costs in the cause.

**Disposition**

In the result, I order as follows:

1. The application for absolution from the instance is hereby dismissed.
2. The costs shall be in the cause.
3. The Registrar shall provide a set-down date for continuation of the trial.

*Mutendi, Mudisi & Shumba*, plaintiff's legal practitioners
*Civil Division of the Attorney-General's Office,* 1st defendant's legal practitioners