

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**CASE NO. 2800/1997
REPORTABLE**

In the matter between:

JOHN JULIAN DAVIDS

PLAINTIFF

And

**H. MOHAMED & ASSOCIATES
DEFENDANT**

**JUDGMENT IN THE APPLICATION FOR ABSOLUTION DELIVERED
ON 16 NOVEMBER 2006**

DLODLO, J

- (1) This is an application for absolution from the instance brought by the Defendant upon closure of the Plaintiff's case in terms of Rule 39(6) of the Uniform Rules of Court. On behalf of the Defendant it is correctly contended that the Plaintiff's claim against the Defendant is one of professional negligence based upon the Defendant's alleged failure to timeously institute a delictual action on Plaintiff's behalf against the University of the Western Cape. Accordingly, in order to succeed in his claim against the Defendant, the Plaintiff needs to prove that an act or omission on the part of the University of Western Cape is causally connected to the damage allegedly suffered by the Plaintiff. Put differently, the Plaintiff needs to prove (*prima facie* at least at this stage) that his alleged action against the University would have been successful, had the Defendant taken timeous steps to give effect to his (Plaintiff's) instruction in that regard. Mr. Potgieter (SC) assisted by Mr. Verster and Mr. Albertus (SC) assisted by Mr. Paschke, appeared before me for

the Plaintiff and the Defendant respectively. I hasten to mention that Mr. Potgieter (SC) and Mr. Verster handled this matter *amicus curia*. The Court is indebted to them for this assistance.

- (2) The case put forth by the Plaintiff is that there was a fire at his residence in the Cecil Esau Hostel at the University of Western Cape on 4 March 1991, allegedly caused by the throwing of a petrol bomb (possibly by the students) into his main bedroom. The Plaintiff alleges that the fire gave rise to his alleged psychological harm and that the fire could reasonably have been prevented by the University concerned had it (University) timeously taken certain preventative measures. The gist of what the law requires of the Plaintiff is therefore to prove that the fire in question was caused by a petrol bomb. Conversely a fire caused by some other means totally unconnected to any conduct on the part of the University of Western Cape, for an example lightening or an electrical short circuit, would most obviously not give rise to a claim in delict against the University of Western Cape in *casu* and obviously consequently against the Defendant in this matter.
- (3) It is apposite that from the onset I point out that the test for deciding whether or not to grant absolution, is 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. See: ***De Klerk v ABSA Bank Ltd. & Others*** (2003) 1 All SA 651 (SCA) at p656, par 10; ***Claude Neon Lights (SA) Ltd v Daniels*** 1976(4) SA 403 (A) at 409 G-H; ***Gascoyne v Paul and Hunter*** 1917 TPD 170 at 173; ***Ruto Flour Mills (Pty) Ltd v Adelson*** (2) 1958(4) SA 307 (D). The Supreme Court of Appeal has fairly recently authoritatively set out the

test in this regard in the matter of **Gordon Lloyd Page & Associates v Rivera and Another** 2001(1) SA 88(SCA) as follows:

‘The test for absolution to be applied by a trial court at the end of a plaintiff’s case was formulated in **Claude Neon Lights (SA) Ltd v Daniel** 1976(4) SA 403 (A) at 409 G-H in these terms:

“...(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 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).)”

This implies that a plaintiff has to make out *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 – 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.'

- (4) It is trite law that, in deciding whether to grant absolution, questions of credibility should not normally be investigated until the court has heard all the evidence which both sides have to offer. It is also accepted by our courts that this rule is not absolute. A court may grant absolution, based upon considerations of credibility, *inter alia* where 'witnesses have palpably broken down' and where it is clear that they have stated what is not true. (See: **Siko v Zousa** 1908 TS1013). This court in the matter of **Erasmus v Boss** 1939 CPD 204 held that absolution may also be granted where evidence led on behalf of a plaintiff is 'irreconcilable and contradictory.'

- (5) I proceed to have a look into the evidence led in this matter bearing in mind the test in application of this type. It was not the Plaintiff's evidence that he had seen anybody throw a petrol bomb into his residence. He testified that he did not hear any glass breaking or the sound of an explosion before he became aware of the fire. He also did not smell petrol before or after the onset of the fire. Therefore it is correctly contended that there was not *prima facie* proof in the Plaintiff's evidence that the fire was caused by a petrol bomb. In fact, the Plaintiff did not present any direct evidence as to the cause of the fire. This remains the truth of this aspect of the Plaintiff's case despite the

fact that his evidence runs into volumes consequent upon extensive and truth searching cross-examination he was subjected to. Mr. Peter Smuts, an electrician called by the Plaintiff as an expert witness readily conceded when cross-examined that the fire could have been occasioned by a short-circuit of the electrical supply. He most certainly offered no expert opinion to support the Plaintiff's assertion that the fire was caused by a petrol bomb. Mr. Smuts was also, understandably, disadvantaged by the fact that he never visited or had sight of the place where fire burnt.

- (6) The only evidence on this aspect of importance led in the Plaintiff's case regarding the cause of the fire was evidence of a circumstantial nature from Mr. Chris Juries. The latter is brother to the Plaintiff. Mr. Juries testified about the happenings on the night of 4 March 1991. It is not necessary for purposes of this short judgment on the application to give a comprehensive summary of Mr. Juries' evidence. It suffices, in my view, to point out from the onset that his evidence was riddled with material contradictions and inconsistencies. I proceed to highlight *infra* a few of such contradictions and inconsistencies in this evidence on material aspects of this case. In his evidence under cross-examination on 24 August 2006, Mr. Juries repeatedly stated that when going outside to investigate the sound of breaking glass he had heard and having seen broken glass from a bottle lying on the Plaintiff's patio and having seen a group of people standing nearby, the Plaintiff had accompanied him but he did not point out the pieces of broken bottle to the Plaintiff because the Plaintiff saw them for himself. However, in further cross-examination on 17 October 2006, Mr. Juries testified that he alone went outside and he left the Plaintiff inside. He stated

further that when he came back inside the house he told the Plaintiff about what he had seen outside. When he was confronted about this obvious discrepancy in his testimony, the answer he gave was rather revealing in my view because his answer was to the effect that he would not remember everything that he had said in Court previously. In chief Mr. Juries stated that he had heard “something fall in the lounge” and he immediately smelt petrol. When cross-examined on 24 August 2006, he at first said that he ‘heard a sound’ (‘geluid gehoor’). He later described the sound as an explosion (‘plofgeluid’) and he added that his brother, the Plaintiff, must have also heard. However, under cross-examination on 17 October 2006, Mr. Juries testified that he could not recall anything accompanying the smell of petrol and after repeated invitations he said he could not remember anything else and that there was ‘net die reuk van petrol en die rook.’

(7) In his evidence in chief Mr. Juries said that the Plaintiff pushed open (oopgestamp) the door leading from the lounge to the passage; he referred to ‘spesifiek na die gang se deur’. When cross-examined on this on 24 August 2006, Mr. Juries repeated his earlier evidence that the Plaintiff pushed open the door which according to him was then closed. But when he was further cross-examined on 17 October 2006, Mr. Juries totally changed his evidence on this aspect stating among other things that:

- i) he could not remember whether there was a door between the lounge and the passage;
- ii) from where he was sitting in the lounge he was able to see down the passage where he saw smoke coming from one of the bedrooms;
- iii) he could not remember whether the bedroom was opened,

closed or ajar ('op 'n skrefie');

- iv) he could not remember whether or not his brother, the Plaintiff pushed open the door.

(8) In his evidence in chief, Mr. Juries testified that the Plaintiff was screaming, hysterical and incoherent ('onsamehangend') and that he had to calm the Plaintiff down ('onder bedaring gebring'). It was only thereafter that he looked to see what he could do (about the fire). In cross-examination, on 17 October 2006, Mr. Juries was asked whether he did or said anything when his brother was hysterical. Mr. Juries initially sought to evade the question but when the court repeated the question, Mr. Juries said that he did nothing for his brother and did not pacify ('troos') him. When confronted with what he had said in chief, Mr. Juries claimed that his memory had let him down. Under cross-examination, on 24 August 2006, Mr. Juries said that he could see the curtains in the main bedroom burning. However, in further cross-examination, on 17 October 2006, Mr. Juries said that he could not see what was burning in the bedroom. When it was put to him that he had previously stated that he had seen the curtains burning, he then said that he remembered this and that the mat was also possibly burning.

(9) In his evidence in chief, Mr. Juries said that the passage light and the stoep light were on when he, the Plaintiff and Dominee Knoop were in the lounge. This evidence was repeated in cross-examination on the same day. However, in further cross-examination, on 17 October 2006, Mr. Juries could not remember whether either the passage or outside light were burning. In his evidence in chief, Mr. Juries said that he had switched off the TV and other appliances before leaving the Plaintiff's residence.

However, in cross-examination, on 17 October 2006, Mr. Juries said that the TV was still on when he left after the fire had broken out. He could not remember his earlier evidence that he had switched off the TV.

- (10) In his evidence in chief, Mr. Juries testified that he told a fire-fighter that he had smelt petrol. However, under cross-examination, on 17 October 2006, Mr. Juries could only remember telling the fire-fighter who he was and that his brother stayed at the place in which the fire had occurred. When confronted with his earlier evidence that he had told the fire-fighter of all his observations including that he had smelt petrol, Mr. Juries said that he could not remember what evidence he had given previously. In his evidence in chief, Mr. Juries said that four (4) University security officers had found pieces of broken bottle or of broken bottles in the lounge and had placed the pieces in a plastic bag to take to the police. In cross-examination, on 17 October 2006, Mr. Juries confirmed and stood by his evidence that bottle pieces were found in the lounge. However, when confronted with the fact that bottle pieces found in the lounge could not have formed part of a petrol bomb thrown into the main bedroom, Mr. Juries then tried to adapt his evidence by saying that the bottle pieces were found in the bedroom.
- (11) What follows are instances where Mr. Juries' evidence is inconsistent with and contradictory to other evidence led by the Plaintiff, including the Plaintiff's own testimony. Mr. Juries said that he had heard the sound of breaking glass caused by beer bottles being thrown onto the patio next to lounge. The Plaintiff, however, said that he did not hear the sound of breaking glass

before the fire. Mr. Juries testified that the Plaintiff went outside to investigate the sound of breaking glass. The Plaintiff made no mention of this in his evidence. Mr. Juries said that when he came back inside he told the Plaintiff that he had found broken bottles and that students were standing outside his residence. The Plaintiff, while laying heavy emphasis on previous alleged bottle throwing incidents, did not mention that his brother had reported that the bottles had been thrown onto his patio minutes before the fire. Regard being had to the Plaintiff's evidence that on previous occasions broken glass was found outside his residence, one would have expected him, if Mr. Juries' evidence was true, to have mentioned what Mr. Juries had told him. The fact that he did not, in the words of Mr. Albertus, belies Mr. Juries' evidence. I agree with Mr. Albertus.

- (12) Mr. Juries repeatedly mentioned that he smelt petrol and also told the Plaintiff that he had smelt petrol. The Plaintiff, however, said that he did not smell petrol before the fire and made no mention of the fact that his brother had smelt petrol or told him that there was a smell of petrol. Regard being had to the importance the smell of petrol has to Plaintiff's claim that a petrol bomb caused the fire, one would have expected him, if Mr. Juries' evidence was true, to have mentioned what Mr. Juries had told him. The fact that he did not, once more, belies Mr. Juries' evidence. Mr. Juries testified that there was a sound of an explosion which his brother 'must' have heard. The Plaintiff, however, was unaware of the sound of any explosion before the fire. The Plaintiff also did not say that his brother had told him that he had heard an explosion before the fire. This too, presents problems for the Plaintiff's case. Mr. Juries testified that the fire-fighters put out the fire using hoses from their fire

engines which were attached to one of the University's fire hydrants. The Plaintiff, however, testified that by the time the fire brigade had arrived on the scene, the students had already put out the fire, using 'first-aid' hose reels from the hostel. This is also born out by the Plaintiff's acceptance of the immediate fire report prepared by Fire Officer Theron.

- (13) Mr. Juries maintained that when he had visited the Plaintiff at the hostel a number of times after the fire, the Plaintiff and his then wife were living together at the hostel as husband and wife. This is inconsistent with the evidence of both the Plaintiff and his then wife and with the Plaintiff's Particulars of Claim in his divorce action and his own oral testimony in the divorce proceedings before the High Court. The evidence shows that the Plaintiff induced his present wife to lie for him. She admitted that she lied to the court about when they were married and when their children were born because the Plaintiff had asked her to do so. Importantly Plaintiff called a witness, Dominee Behaardien who told lies about everything he testified to in chief. He subsequently asked to be forgiven for telling so much lies. He was a shameless dangerous liar.
- (14) In the light of all the evidence that has been led on behalf of the Plaintiff in this matter, an inescapable conclusion is that the Plaintiff put Mr. Juries up to lie for him. Mr. Juries had demonstrably lied about the extent of contact between himself and the Plaintiff. Under cross-examination, on 24 August 2006, Mr. Juries claimed that he had not spoken to his brother at all between June 2006 and 23 August 2006. Under further cross-examination, on 17 October 2006, Mr. Juries initially confirmed that he had not spoken to the Plaintiff between June 2006 and

23 August 2006, including on the phone. Under further cross-examination, Mr. Juries said that he may have spoken to the Plaintiff on the phone between June 2006 and 23 August 2006. He said that he had spoken to the Plaintiff two (2) or three (3) times between August and 17 October 2006. His wife had about one (1) or two (2) telephone conversations per month with the Plaintiff's wife. Subpoenaed telephone records show forty five (45) telephone conversations being held between the Davids' and Juries' household in the last year totaling almost eight (8) hours. Of these thirty three (33) calls, conversations occurred since August 2006. Mr. Juries lied about whether the Plaintiff had discussed the case with him prior to him giving evidence. This, notably, was a lie on an unimportant aspect of his testimony.

- (15) Initially Mr. Juries mentioned in his evidence under cross-examination, on 24 August 2006, that since the incident in March 1991 until then (24 August 2006) he and the Plaintiff had not at all ('geensins nie') spoken about the incident. He also said that the Plaintiff's legal representatives had not told him what the case was about. He denied contacting his brother even to ascertain why he had been subpoenaed, claiming that he knew from the subpoena what the matter was about. When it was put to him that the subpoenas did not indicate that the case involved the University of Western Cape or had anything to do with the fire, Mr. Juries said that he could not remember how he knew what the matter was about. However, in further cross-examination, on 17 October 2006, Mr. Juries admitted that before the hearing on 24 August 2006 he could have spoken to his brother about the case. He certainly must have spoken to the Plaintiff about the case. Why would a man be dishonest on this aspect? There is nothing wrong in speaking about the case

with the Plaintiff, his own brother.

- (16) In chief, the Plaintiff's counsel asked a simple question, 'Can you tell his Lordship what you know about this incident?' Mr. Juries' reply lasted six (6) pages of the record during which the Plaintiff's counsel did not have to prompt him once. The answer was a narration complete with minute details of the incident. Mr. Juries was evasive, his memory was selective and he sought to embellish and adapt his evidence as he went along. He created an extremely poor impression. The only reasonable assessment that this court can make of Mr. Juries' evidence regarding the cause of the fire, is that he was told what to come and say. He clearly was nowhere near the place where the fire burnt.
- (17) The difficulty the Plaintiff's case faces is that there is no evidence other than that of Mr. Juries about what caused the fire. In the light of the irreconcilable and contradictory nature of Mr. Juries' evidence, I hold the view that no court applying its mind reasonably to such evidence can or may find for the Plaintiff. See: (**Gascoyne v Paul and Hunter** 1917 TPD at 173; **Ruto Flour Mills (Pty) Ltd v Adelson** (2) 1958(4) SA 307 (T).) Quite apart from Mr. Juries, it is strange to say the least, that almost every witness in this matter has either 'palpably broken down' or made material concessions which have largely contributed in making the Plaintiff's case unsustainable.
- (18) I have had regard to Mr. Verster's opposition to this application. It is trite law though that a Plaintiff has to make out a *prima facie* case at this stage. The approach set out *supra* was confirmed as the correct approach in adjudicating on applications such as the present by Schutz JA in **De Klerk v**

ABSA Bank Ltd 2003(4) SA 315 (SCA) at 323. An application for absolution from the instance at the end of the Plaintiff's case can be compared in some way with an application for discharge at the close of the case for the prosecution in a criminal case. The case should not summarily be terminated merely because there are contradictions in the evidence led on behalf of the plaintiff (see **Herbstein the Civil Practice of the Supreme Court of South Africa** 681-683). Accordingly a trial court should not readily grant absolution at the end of the plaintiff's case. It must assume that in the absence of very special considerations, such as the "inherent unacceptability of the evidence adduced" that the evidence is true (see **Herbstein** 683). (Underlining is my own). The instances, in which an application for absolution can succeed where it is based on the unreliability of the evidence adduced by the plaintiff, are therefore very limited. This case is a classical example of a case in which indeed very special considerations are present. The Plaintiff's case as it presently stands is certainly inherently unacceptable. Unlike in a matter involving more than one Defendant, the instant matter, (as far as the determination of this application is concerned) is rather simple. There is only one Defendant. Accordingly it can fairly be inferred at the stage when the Plaintiff has closed his case, that the Court has heard all (my emphasis) the evidence which is available against the Defendant. Any further evidence that would be forthcoming if the case continued would be likely to operate only to the detriment of the Plaintiff. Therefore, it is considered unnecessary in the interest of justice to allow the case to continue any longer if, there is no *prima facie* case made against the Defendant.

(19) I have briefly set out above the material shortcomings and deficiencies in the Plaintiff's case. I cannot turn a blind eye to these difficulties in the Plaintiff's case because if I do grave injustice would be done not only to the Defendant but also to the Plaintiff himself. What would be the reason to spend more days (possibly months and years) prosecuting a matter that has shown itself to be dead at this very stage. Continuity will serve to expose the parties to further generation of legal costs. It is certainly not in the interest of justice that litigants should be allowed endlessly to expose themselves to what may be economic ruin. It is also of importance that this valuable time to be further spent on this matter be rather applied fruitfully and gainfully in deserving matters by not only the litigants but also their legal representatives. This, in my view, is one exceptional occasion which has arisen where although absolution should be granted sparingly; the dictates of justice make it obligatory for a court applying its mind properly and reasonably to the evidence adduced upto now to grant absolution from the instance.

(20) In the result I make the following ruling:

- a) Absolution from the instance is granted.
- b) Plaintiff is ordered to pay the Defendant's cost upto this stage of the proceedings.

DŁODŁO, J