

CLEMENT KWANGWARI  
versus  
JULIUS CHEKURE  
and  
AVANTI LOGISTICS (PVT) LTD

HIGH COURT OF ZIMBABWE  
MTSHIYA J  
HARARE, 19 March 2014, 20 March 2014, 27 March 2014 and 11 June 2014

**Civil trial**

Ms *B.M Machanzi*, for the plaintiff  
*A Masango*, for the 1<sup>st</sup> defendant  
*C.T Manyani*, for the 2<sup>nd</sup> defendant

MTSHIYA J: This is an action wherein at the close of the plaintiff's case the defendants applied for absolution from the instance. I allowed the parties to file heads of argument.

In the action, the plaintiff prayed for the following relief:-

- “(a) Payment of the sum of (US20 00-00) twenty thousand United States Dollars for damages for malicious, wrongful arrest and detention of Plaintiff by Police Officers from Braeside Police Station on or about 25<sup>th</sup> February 2011 for 17 hours with an intention to cause suffering and prejudice caused and instigated by 1<sup>st</sup> and 2<sup>nd</sup> Defendants a consequence of which arrest and detention Plaintiff suffered *contumelia* and was deprived of his liberty as applied in his declaration hereto attached;
- (b) Interest calculated at the prescribed rate from 25<sup>th</sup> February 2011 (date of delict) to date payment in full;
- (c) Costs of suit”

The facts of the case were that on 25 February 2011 the first defendant caused the arrest of the plaintiff on the ground that the plaintiff had assaulted him. The plaintiff alleged that the arrest was at the instigation of the second defendant who was the employer of the first defendant. He also alleged that the report of assault was false and malicious. Following the arrest the plaintiff was incarcerated in a cell at Braeside Police Station in an overcrowded cell for 17 hours. The plaintiff said during the incarceration one of his testicles was injured when an inmate fell on him.

It is on the basis of the above facts that the plaintiff made his claim against the defendants.

On 7 December 2012 the parties filed a joint pre-trial conference minute wherein the agreed issues for determination were listed as follows:-

- “1. Whether or not 1<sup>st</sup> Defendant made the police report at the instance of 2<sup>nd</sup> Defendant?
2. Whether or not Plaintiff suffered injuries as a result of his arrest and in police custody?
3. Whether or not Defendants are liable for injuries sustained by Plaintiff?
4. What is the quantum of damages due to Plaintiff by Defendants *viz a viz* injuries sustained?
5. What is the quantum of damages due to Plaintiff by defendants *viz a viz* unlawful arrest and detention.”

In the joint pre-trial minute there was an admission of the fact that the first defendant accepted liability for laying a false charge against the plaintiff. The false charge was, however, not disclosed to the court.

However, in his declaration the plaintiff states:-

“4.

In or about February 2011 and at Harare 1<sup>st</sup> Defendant in the course and scope of his employment with 2<sup>nd</sup> Defendant, made a report to the Zimbabwe Republic Police, Braeside Police Station, alleging that Plaintiff had assaulted him.

5.

Plaintiff avers that such a report was made by the 1<sup>st</sup> Defendant acting on the directions of the 2<sup>nd</sup> Defendant.

6.

The said report was false, and malicious in that both 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant as represented by its directors Anisha whose full particulars are known to Plaintiff and R Kiservan also whose full particulars are not known to Plaintiff were all well aware that 1<sup>st</sup> Defendant had not been assaulted nor threatened in any manner by the Plaintiff.

7.

On 25<sup>th</sup> February and at Harare, 1<sup>st</sup> Defendant as directed by 2<sup>nd</sup> Defendant caused and instigated Police Officers from Braeside Police Station led by one Constable Tarisai to arrest and detain Plaintiff within holding cells at Braeside Police Station. When laying this false charge and giving this false information, 1<sup>st</sup> Defendant had no reasonable or probable cause for doing so nor did the 2<sup>nd</sup> Defendant have any belief in the truth of information given.

8.

The said arrest and detention were in all the circumstances malicious, wrongful and without justification or excuse and all intended to cause suffering and prejudice to Plaintiff as the report upon which they were premised was malicious and false and carefully planned to absent Plaintiff from a disciplinary hearing upon which the 2<sup>nd</sup> Defendant later discharged Plaintiff from its employ.

9.

On 26<sup>th</sup> February 2011 the 1<sup>st</sup> Defendant then proceeded to withdraw his complaint although plaintiff had already been incarcerated for 17 hours without giving Plaintiff an opportunity to be heard before a court of law nor leaving the law to take its course.”

Further more in his amended summary of evidence filed on 25 June 2012 the plaintiff stated that:-

“2<sup>nd</sup> defendant requested that Plaintiff attend a disciplinary hearing and on the date of the said hearing plaintiff was arrested by two police officers who told him that the first defendant had complained that plaintiff had assaulted him and threatened him with death.”

The above pleadings give reasons for the arrest. However, in his evidence the plaintiff said he was never told of the reason for his arrest until released. Be that as it may, at the end of the trial the plaintiff said he no longer had any issue with the first defendant. He saw no need to proceed against the first defendant.

Contrary to his claim for US\$375-00 in respect of medical expenses and as contained in his amended declaration, the plaintiff conceded that he had paid only US\$180-00. He further went on to say instead of claiming US\$19 500-00 as damages for future specialist medical treatment the correct amount was US\$27 00-00. The plaintiff produced a medical report and an affidavit dated 01 October 2012 and 9 October 2012 respectively. Those reports, coming after over a year following the injuries in police cells, required further expert evidence to link them to the injuries. (i.e. injuries sustained on 25 February 2011).

The plaintiff also went on to produce an unauthenticated document purporting to be a police report dated 11 March 2011. The report, in full, read:-

“Reference of report made to Police on 25 February 2011 on CR 175/02/11, a result of investigations carried out: Case was withdrawn by complainant.”

The report did not bear an official stamp of Braeside Police Station and did not spell out what the case was and the persons involved.

It was on the basis of the above discrepancies in the plaintiff’s evidence that the defendants found it necessary to apply for absolution from the instance. They were, in my view, justified to do so because the plaintiff has indeed failed to present a *prima facie* case before the court.

The plaintiff has clearly disowned his own pleadings and also proceeded to exonerate the first defendant. In view of the vicarious nature of the claim against the second defendant, I hold the view that, without a case against the first defendant, no case can attach to the second defendant. The second defendant agreed that it provided transport to the arresting details as they took the plaintiff to the police station. The plaintiff also agreed that there was nothing wrong with the second defendant co-operating with the police.

The plaintiff's evidence was far from establishing that the first defendant, whatever report he made to the police had been instigated by the second defendant. Even assuming that the exonerated first defendant had made a false report, the said report was not before the court. Furthermore according to his own evidence, the plaintiff was never told the reasons for his arrest. The plaintiff can therefore proceed against those who arrested him for no reason. (i.e. the police whom he did not cite). The issue now is whether or not the second defendant should be absolved from the instance.

In *Limited Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) it was stated:-

**“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if at the case, there is evidence upon which a court directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See Supreme Services Station 1969 (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 RLR (a) at 5 D-E; Laurenco v Raja Laundry (Pvt) Ltd 1984 (2) ZLR (S) at 158 B-E.”**

The above is the law governing an application of this nature and indeed, as submitted by both defendants, I find nothing “on which a court might make a reasonable mistake and give judgement for the plaintiff.” The plaintiff has dismally failed to present a *prima facie* case before the court.

Although reluctantly, the plaintiff's counsel conceded to the above finding. I say reluctantly because of the contradictory nature of the submission made at the end of her Heads of Argument. In para 5 of her Heads of Argument Ms *Machanzi*, for the plaintiff, submits, in part, as follows:-

5.

“It is humbly submitted that the essential elements of the Plaintiff's claim have been proved on a balance of probabilities. Absolution from the instance will not be competent in the circumstances. Proceeding to find that the Plaintiff have failed to establish essential element to his claim with respect will be undue to Plaintiff as Defendant's admission was by law conclusive of the issue of who made false report and what was contained in the report. See Mining Industry Pension Fund v DAB Marketing (Pvt) Ltd SC10/11. Plaintiff submits that, he did not bear any onus to prove his arrest and reasons thereof in light of 1<sup>st</sup> defendant's admission.

In Supreme Services Station 1969 (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971(1) RLR A, the court held that there are silent features a court should bear in mind and exercise caution over as regards applications of this nature. Beadle CJ had this to say;

“The court should bear in mind that the defendant has not yet given evidence and cross examined on it. If the plaintiff has made same case for the defendant to answer and the defence is something peculiarly within knowledge of defendant, justice demands that he should be heard.....”

Ms *Machanzi* then goes on to say:-

The issue that remains is whether the Plaintiff was detained by the Police and whether he sustained injuries from police holding cells. The evidence of the Plaintiff is far from satisfactory. It is with heavy heart that the same is submitted for plaintiff as the Plaintiff's action cannot be supported.” (My own underlining)

All in all, given the foregoing, the application for absolution from the instance has merit. That disposes of the main matter before the court

On the issue of costs I am not persuaded to grant costs on higher scale as prayed for by defendants. Notwithstanding failure to establish a case against the second defendant, there is an admission by the first defendant that he caused the arrest of the plaintiff. What we do not have is the report and the reasons behind the arrest. As I have indicated, it appears the plaintiff suffered from making a proper determination on who to proceed against. In the circumstances costs on ordinary scale would, in my view, be fair.

I therefore order as follows:-

1. The application for absolution from the instance by both defendants be and is hereby granted.
2. The plaintiff's claim be and is hereby dismissed, and
3. The plaintiff shall pay costs of suit.

*Messrs C Mpame and Associates*, plaintiff's legal practitioners  
*Messrs Musunga and Associates*, 1<sup>st</sup> defendant's legal practitioners  
*Messrs TH Chitapi and Associates*, 2<sup>nd</sup> defendant's legal practitioners.