

PFUMAYI CHIPOMWE  
versus  
NHLANHLA GUMBO

HIGH COURT OF ZIMBABWE  
MTSHIYA J  
HARARE, 2, 11 March 2015 & 25 March 2015

### **Civil Continuous Roll**

*J. Samukange*, for the plaintiff  
*R Makamure & S. Bhebhe*, for the defendant

MTSHIYA J: On October 2012, the plaintiff issued summons against the defendant praying for the following relief:

- “(a) Payment of USD 350 000 for unlawful malicious prosecution, defamation of character and mental anguish.
- (b) Interest at the rate the rate of 6% per annum from date issue of summons to date of payment in full.
- (c) Costs of sit at attorney and client’s scale”.

The brief background to the case is as follows:-

On 12 April 2012, at Nyamapanda Border Post, the Zimbabwe Revenue Authority (ZIMRA), the employer of both parties herein, impounded 1689 boxes/cartons of Surf and Omo detergents, for having been brought into the country under a wrong certificate of origin.

The plaintiff was employed by ZIMRA as a Senior Revenue Officer, whilst the defendant was employed as a Station Manager at the Border Post. The said detergents could not fit into the official Nyamapanda warehouse and were therefore placed in a shed run by ZIMRA.

On 6 July 2012, when the owner of the detergents came to collect them, as had been agreed to by ZIMRA, it was discovered that 34 boxes/cartons of the detergents valued at US\$1004-19 were missing.

The defendant, as the Station Manager, immediately made a report to the police. The report led to the arrest of the plaintiff who is now suing the defendant for:

“Payment of USD 350 000 being damages for malicious prosecution, defamation of character and mental anguish, which amount despite demand, Defendant has refused, failed and/or neglected to pay”.

The defendant denies the claim and in the main she pleads as follows:-

- “3.1 That, Plaintiff was not arrested at Defendant’s instruction as alleged. The statement that defendant gave to the police upon request by the investigating officers did not implicate the plaintiff in any way or at all.
- 3.2 That, Plaintiff’s arrest by the police followed his implication in the theft by the security guards of a company known as Brising Security (Private) Limited, who were manning the premises whereat the theft occurred. It is the security guards who advised the police that they had seen the plaintiff loading some of the stolen goods. This information was given directly to the investigating police officers by the said guards.
- 3.3 That, the resolution by the police to arrest the Plaintiff was purely their decisions as an arresting authority based on the evidence placed before them by the security guards aforesaid.”

The contents of the second sentence in para 3.1 above and para 3.2, as a whole, are common cause.

Both the plaintiff and defendant submitted bundles of documents which were by consent, admitted as exh(s) 1 and 2 respectively.

The plaintiff and Detective Sergeant Collen Tembo gave evidence and after their evidence, the plaintiff closed his case.

Upon the plaintiff having closed his case, the defendant applied for absolution from the instance.

The plaintiff, in his evidence, confirmed that, on 10 July 2012, he was arrested at his residence in Ruwa in connection with the missing 34 boxes of detergents. He said he was on leave but said the defendant had ordered the police to arrest him at his residence in Ruwa. He said in order to facilitate the arrest the defendant had given the police a ZIMRA vehicle together with a driver. The police, under a search warrant, had searched his Ruwa residence in the presence of his family but had found nothing. He said the police had then taken him to Nyamapanda where they again searched his official residence in the presence of co-workers and neighbours. He said they again found nothing.

The plaintiff said a docket on the case was prepared and taken to Mutoko magistrates court where the prosecutor declined to prosecute for lack of evidence.

The plaintiff said the arrest had traumatised him and he had feared losing his job. He said some of his co-workers started calling him “Mr Soap”.

The plaintiff was convinced that his arrest was instigated by the defendant as evidenced by her surrender of the ZIMRA vehicle to the police in order to facilitate his arrest. The plaintiff said his arrest was not justified since he was not linked to any criminal offence. His reputation had been injured.

Sergeant Collen Tembo, (Tembo), who gave evidence on behalf of the plaintiff, generally confirmed what the plaintiff told the court. Although insisting that he carried out the arrest on the instructions of the defendant, Tembo also said there was enough evidence from the affidavits of the Security guards implicating the plaintiff. He said the evidence of security guards created a reasonable suspicion justifying the arrest of the plaintiff. He, however, maintained that were it not for the instructions from the defendant, he could not have effected the arrest as speedily as he did.

The application for absolution from the instance is based on the reasoning that at the close of his case, upon him and Tembo having testified, the plaintiff failed to place a *prima facie* case against the defendant before the court. That being the case, it is argued, it would not be necessary to hear the defendant’s case i.e a situation similar to the discharge of an accused person after the completion of evidence by the prosecution.

The agreed issues for determination are listed as follows:

- “1. Whether or not the Defendant caused the Plaintiff’s arrest.
2. Whether or not the police report made against the Plaintiff was motivated by malice, prejudice and without legal basis.
3. Whether or not Defendant defamed the character of the Plaintiff.
4. Whether or not Plaintiff suffered any damages? If so the quantum thereof”.

I believe the 3<sup>rd</sup> to 4<sup>th</sup> issues listed above are dependant on findings on the first two issues.

Purely on the basis that it is common cause that in her report to the police, the defendant never implicated the plaintiff, and that the police arrested the plaintiff on the basis of a reasonable suspicion, I find merit in the application for absolution from the instance.

The defendant’s official report to the police dated 8 July 2012 reads, in full, as follows:-

- “1. I am the above named female adult and aged 49 years. I reside at Nyamapanda ZIMRA. Mess and work as the station manager.

2. On 12 April the office processed a manifest for a consignment of detergents from Malawi to Zimbabwe.
3. The agent voluntarily disclosed that the detergents were made in Kenya, but however the attached certificate of origin is for Malawi. Officers checked and confirmed so.
4. The exporter submitted a letter asking if the goods could be returned to Malawi, and The importer submitted letter a letter rejecting the consignment as they had ordered the goods on the understanding that duty was not to be paid.
5. The goods were moved into our warehouse on 25 April 2012 to press for clearance. Handover was done to the warehouse keeper Mr Brian Magore, while the officer in charge was Mr Benson Lembacharu.
6. On handover Zimra recorded 1755 boxes of detergents.
7. On 24 June Zimra Head Office advise the office to allow the exporter to export the detergents back to Malawi.
8. The exporter came to collect the goods on 6 July, 2012. The importer disclosed that the consignment had 1655 Boxes. It took 2 days to handover from 6 to 7 July. On discovering that they were missing boxes the matter was reported to CID, D/S Tembo.
9. On collection of the goods the following was discovered:

| Description   | Taken over | Handed over | Missing | Price per box | Total cost |
|---------------|------------|-------------|---------|---------------|------------|
| 1 kg omo      | 250        | 248         | 2       | \$30.35       | \$60.70    |
| 500g          | 950        | 933         | 17      | \$ 32.37      | \$550.29   |
| 200g omo      | 229        | 222         | 7       | 26.98         | \$188.86   |
| 1kg sunlight  | 50         | 48          | 2       | \$26.30       | \$52.60    |
| 500g sunlight | 50         | 48          | 2       | \$26.30       | \$52.60    |
| 200g sunlight | 10         | 10          | Nil     | Nil           |            |
| Total         | 1689       | 1655        | 34      |               | \$1,004.19 |

As can be seen, the above report does not implicate or mention the plaintiff at all.

However, Tembo's report, of 1 August 2012, makes reference to the plaintiff. The Plaintiff, in Tembo's report, is referred to as "THE ACCUSED". The report, narrating what transpired after receipt by the police of the defendant's report, reads as follows:

"During the month of April 2012 some cartons of washing powder (Omo and Sunlight were impounded by ZIMRA Nyamapanda after the importer failed to meet the required standard and it were kept inside the ZIMRA Yard awaiting the supply of the missing requirements.

ZIMRA later opted to give back the Importer his goods so that he can take them back and during the handover/takeover of the goods it was discovered that some boxes of washing

powder were missing. The case was then reported to the Police and investigations were carried out.

On the 9<sup>th</sup> of July 2012, 3 Security guards who were guarding the ZIMRA premises were arrested for the offence and during interrogations, the 3 admitted the case and they later implicated THE ACCUSED person saying that on a certain day they saw the accused loading 2 boxes of the washing powder into his private vehicle and went away with them.

Affidavit statements were recorded from them and that led to the arrest of the accused person.

### **OUTCOME OF THE CASE**

Further investigations were carried out and the docket was sent to Mutoko Magistrate court for Prosecution views and the Senior Prosecutor at Mutoko magistrate court DECLINED PROSECUTION FOR LACK OF EVIDENCE (Mutoko Prosecutor ref M12m61).

NYAMAPANDA CR 35/07/12 and CID Nyamapanda Dr 10/07/12 refers". (my own underlining).

The above report does not say the arrest was on the instructions or orders of the defendant.

The arrest was because security guards had, through affidavits, implicated the plaintiff.

Tembo confirmed in court that it was the police who told the defendant that the plaintiff had been implicated in the matter by the Security guards. The relevant part of the report from Brisning Security Firm (i.e the firm employed to guard the ZIMRA offices) dated 10 July 2012, reads as follows:

"Sometime in June our Night Guards who were on duty phoned me at around 20 00hrs whilst I was at home, telling me that, guard Tabuda Masaze Had seen a ZIMRA official namely Chipomwe putting two boxes of surf in his car which was parked at the search bay.

Upon asking the guard the following day, he refused to tell the truth and said he was not sure of the incident, then I had to abandon the investigations for I had no tangeable evidence, but at the CID he told them that it was true, that the ZIMRA official took the two boxes, but only that he was afraid to tell the truth as the ZIMRA official is our client". (my underlining)

The foregoing clearly confirms that the plaintiff was roped into the case following police investigations. The defendant was only a recipient of the results of police investigations. She only learnt from the police that the plaintiff was implicated. As matters stand, the defendant is now being sued for her official reaction to the police report, which report implicated one of her subordinates i.e. the plaintiff.

Having established that the defendant did not mention or implicate the plaintiff in her report to the police, we now need to examine her reaction/conduct upon being informed by the police that the plaintiff was implicated in the theft of the detergents.

It cannot be denied that as the Station Manager, the defendant had an important official role to play in the matter on behalf of ZIMRA, her employer. She made an honest

report, which did not even name any possible suspects. Upon being briefed by the police on the results of their investigations, she correctly and responsibly called for swift action against the plaintiff who had been implicated. She also caused the plaintiff's immediate supervisor to obtain a report from him (plaintiff). Anything else would, in my view, have been construed as protection or cover up for a colleague. She did not do that and proceeded to assist the police in getting to the bottom of the matter. That, in my view was commendable conduct for which there is no reason or ground for her to be subjected to this law suit.

In urging the police to speed up their action because her superiors wanted finality, the defendant did not in any way place the investigating police officers under her command. This was confirmed by Tembo when he said the decision to arrest was based on reasonable suspicion because there was affidavit evidence from three security guards implicating the plaintiff. The security guard's reports arose from the fact that the plaintiff had indeed, on 7 June 2012, been spotted loading items onto his vehicle. Upon investigations, he explained that the items were "two boxes of cooking oil – one for myself and the other one for Mr Magumise". That alone proves the guards' reports were not baseless. The security guards were only mistaken on what the plaintiff was loading into his vehicle.

In her memorandum to the Head of Litigation in ZIMRA, the defendant wrote, in part:

"On 19 August 2012 at 1300hrs I received a letter (3 copies) from Chipomwe's lawyer – Venturas & Samukange (attached) claiming damages for unlawful malicious prosecution. May I please bring your attention to the fact that the statement sworn before police did not implicate anybody (refer to attached). It was a formal report on missing goods, seeking CID intervention.

Mr Chipomwe was implicated in the case of stolen detergents by the security company guarding ZIMRA premises at Nyamapanda known as Brising Security Company and his implication prompted CID Nyamapanda to investigate. Affidavit statements were recorded from the guards and led to his arrest. If he has to claim damages he can claim from Police. When police conduct their investigations I have no authority to interfere as it is an offence to defeat the course of natural justice. There was no way I could defend him as it was a criminal offence and out of my control. I only assisted the police with transport on their request to enable them to carry out their investigation, on behalf of ZIMRA and not in my personal capacity.

Three (3) copies of the letter were received from his lawyers. One copy was surrendered to CID Nyamapanda as they were interested in the case when I asked for their report on the case. They returned the copy and availed the ZRP report on condition that I surrender the lawyer's letter. Their comment on the latter was that the officer had misdirected his claim. They highlighted that they are ready to handle the case should the need arise".

The import of the last paragraph above is that the police were in a position to justify

their arrest of the plaintiff. I therefore refuse to accept that the police arrested the plaintiff on the instructions or orders of the defendant. Their investigations dictated to them what action to take against the plaintiff. There was reasonable suspicion justifying the arrest of the plaintiff and so the police acted.

Tembo professionally agreed that they acted on reasonable suspicion. Accordingly, other than only reading the truth from his evidence, I did not read any self-incrimination. In the face of the existence of reasonable suspicion, I did not think the timing of the arrest merited any debate. Through the defendant, ZIMRA wanted swift action.

Having established that the defendant did not cause the plaintiff's arrest, we should also establish whether or not her assistance to the police was premised on malice.

In her submissions the defendant has, in my view, correctly stated the law. The following submission was made on her behalf:

- “(a) The Defendant should have acted without reasonable or probable cause; and
- (b) The Defendant actively set law in motion; and
- (c) The arrest was unlawful; and
- (d) There was malice on the part of the defendant making the police report”.

In *Banda v Muchinguri* 199(1) ZLR the court quoted from JG Flemming the Law of Tort as follows:

“The defendant must have been actively instrumental in setting the law in motion. Simply giving a candid, account however incriminating, to the police ... is not the equivalent of launching a prosecution: the critical decisions to prosecute not being his “the stone set rolling (is) a stone of suspicion only”. But if besides giving information he proceeds to lay a charge, this amounts to an active instigation of proceedings which he cannot shrug off by saying that they were in the last resort initiated at the discretion of the public authority”.

The charges were laid against the plaintiff by the police and not the defendant.

The evidence, so far led in court, fails to prove factors (a)-(d) enumerated above.

That, in my view, justifies an application for absolution from the instance.

As already stated, once it is proved that the defendant did not maliciously or falsely cause the arrest of the plaintiff, the matter ends there. This should be so, because, in *Lourenco v Raja Dry Cleaners and Steam Laundry (Private) Limited* 1984 (2) ZLR 151 it was stated:

“The approach by the court to an application for absolution from the instance was laid down in that case of *Gascoyne v Paul and Hunter* 1917 TPD 170 by De Villiers JP as follows:

‘The question therefore is, at the close of the case ... Was there a prima facie case against the defendant Hunter; in other words was there such evidence before the

Court upon which a reasonable man might, not should give judgment against Hunter?’

It must be remembered too that an application for absolution stands on the same footing as a submission of on case to answer in a criminal case, except for the difference in the standard of proof pointed out above...In *Supreme Service Station (1069) (Private) Limited vs Fox and Goodridge (Private) Limited 1971 (1) RLR 1 at 4 C-F* Beadle CJ considered the approach in *Gascoyne vs Paul and Hunter, supra* and commented as follows:

In that case, it was pointed out that an application for absolution from instance stands on much the same footing as an application for the discharge of an accused at the close of the evidence for the prosecution, but it is stressed (see P173 of the judgment) that it would, indeed, be curious if, in civil cases, (the court) were to apply a more stringent rule of practice than in criminal cases. It would seem to me that, as in a criminal case the onus of proof is always higher than in a civil case be sufficient to justify refusing an application for absolution from the instance....”

The above clearly sets out the principles of law in relation to the application before me. In the foregoing pages I have demonstrated that the plaintiff has failed to prove that the defendant maliciously or unlawfully caused his arrest. That being the case no purpose will be served by asking the defendant to testify when no *prima facie* case has been established. The plaintiff’s own evidence distances the defendant from the plaintiff’s claim.

Accordingly the application for absolution from the instance ought to succeed.

1. The application for absolution from the instance be and is hereby upheld.
2. The plaintiff’s claim be and is hereby dismissed; and
3. The plaintiff be and is hereby ordered to pay costs of suit.

*Venturas & Samukange*, plaintiff’s legal practitioners  
*Kantor & Immerman*, defendant’s legal practitioners