

COLLEEN BEATRICE BENATAR  
versus  
ROBERT DANIEL BENATAR

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 7 & 8 July 2015 and 5 August 2015

### **Civil Trial**

*Advocate J Wood*, for the plaintiff  
*F Siyakurima*, for the defendant

DUBE J: It's not all that begins well that ends well. The party's marriage has ended in an acrimonious divorce. Although their divorce was finalised in the year 2010, it is not yet over until it is over for the parties. The parties continue to squabble over property acquired during the subsistence of the marriage. The parties have resorted to laying criminal charges against each other to get back at each other. One such charge has culminated in this claim.

The plaintiff has instituted an action for malicious prosecution. The history of this matter may be recounted as follows. The parties are engaged in litigation under HC 5257/11. The plaintiff is the applicant in that matter. She deposed to an affidavit wherein she made averments to the effect that the defendant resides in South Africa and regards that country as his home and travels up and down to South Africa every month. Further that the defendant visits this country once every month. Sometime in January 2011 the defendant made a report of perjury against the plaintiff. The plaintiff was arrested and prosecuted for the charge of perjury at the Magistrates Court. She was later acquitted of the charge on 5 July 2012.

In this claim, the plaintiff claims that the defendant wrongfully and maliciously set the law in motion by laying a false charge of perjury as defined in s 183 of the criminal Law (Codification and Reform), Act [*Chapter 9:23*]. The Plaintiff avers that the defendant had no reasonable or probable cause for doing so nor did he have any reasonable belief that the plaintiff's statements amounted to perjury. The plaintiff claims damages in the sum of \$17

602- 00 being legal costs reasonably expended by the plaintiff in defending herself against the charge and damages for *contumelia* and discomfort.

The defendant opposes the claim. He denies ever making a false report to the police as alleged. He maintains that the defendant had reasonable belief that the plaintiff had perjured herself. He avers further that the fact that the plaintiff was charged and prosecuted vindicates any malice or falsehoods on the defendant's part and that the plaintiff's claim does not disclose a cause of action.

The following issues were referred to trial.

1. Whether or not defendant, wrongfully and maliciously set the law in motion by laying a false charge of perjury against the plaintiff.
2. Whether or not plaintiff is entitled to damages in the sum of \$17 602-00 or any lesser amount, for legal costs, *contumelia* and discomfort.

The plaintiff testified in her own case. Her testimony is as follows. The statement in issue arises from an affidavit she made on oath in an application for liquidation of one of the companies in which the defendant and herself are shareholders. The plaintiff in that application sought to have the company placed under liquidation. In her affidavit filed in that application, she stated in para 19 as follows, "fourth respondent now resides in South Africa and regard that as his home and travels up here once a month." In para 26 she stated that "the cash takings explain how the fourth respondent is able to finance his lavish lifestyle using funds from the respondents' companies to finance his many flights up and down to South Africa every month." In para 28 she stated that "the fourth respondent is resident in South Africa and visits Zimbabwe about once a month." The defendant made a report of perjury against her. She was arrested and prosecuted.

When prosecution commenced, she was always at court. She cannot remember how many times she was there. She was acquitted in July or August of 2012. During this period, she could not keep a job as she spent a lot of time at court. During that time she was afraid that the police would come and arrest her. She paid \$930-00 to her legal practitioners and \$6 670-00 to Advocate Mehta who represented her at the trial as legal fees. She claims these costs as damages.

The defendant had no reasonable cause for prosecuting her. In 1988 the defendant was granted permanent residence in South Africa. Subsequent to that he obtained a South African ID. He came back into Zimbabwe in 1990 as a returning resident and brought back a BMW vehicle. In the same year he applied for a new ID book in South Africa shortly before

returning to Zimbabwe clearly intending to keep his South African status. He applied for a home loan in South Africa. The application for the loan shows his income as R35 000-00. His bank account with NMB , a South African Bank shows that he has a residence bank account. When the defendant filled in forms for these loans he gave out that he was a South African citizen. The address used for the home loan was an address where he ran a business and when the witness and the defendant went to South Africa they stayed there. His birth certificate shows that his parents were born in Zimbabwe and that is false. He used it to get a Zimbabwean passport. He later rectified this after the trial.

Statements show that his secretary in Zimbabwe deposited cash from Capital Brake to M and R (Pty) Ltd (M and R Services) a South African Company on several occasions. This money was used to pay bills for Capital Break and for his mortgage bond. Several amounts of money were transferred into the M and R account. His business card shows that he is a director of M and R Services. He signs documents on behalf of the company. There is proof that he receives a salary of R35 000-00 from M and R. A letter produced as part of the bundle of documents shows that he is an employee of the company. He spends money in South Africa so he clearly must have moved money to that country. He bought some furniture in South Africa. He pays for DSTV and other services in that country. In all his dealings in South Africa he has always given out that he is a South African resident.

The plaintiff also had the defendant arrested on two or three charges of perjury arising from numerous lies he made in an affidavit filed in opposition to the application for liquidation. These charges were based on averments made by the defendant that the plaintiff was not a director and shareholder in the company sought to be liquidated. The defendant was prosecuted and acquitted of the charges. Later the defendant laid a charge of theft against her and one of fraud against her and her lawyer in connection with money held in trust. After the arrest, she was not detained. She was tried and acquitted. There was an attempt to settle this charge which failed.

The plaintiff gave a clear and straightforward version of the events surrounding this offence. She was sometimes argumentative but was generally a good witness. It did appear that she was telling the truth as her version was supported by documents. She was not shaken under cross-examination and did not appear to be lying. I believed her.

The defendant testified in his own case. His evidence is as follows. He reported her to the police for perjury. She reported him first for the same offence. He was charged with two or three counts of perjury and was acquitted of the charges. When he read her affidavit he

realised that she had also perjured herself. He reported her because he believed that she had committed an offence. He made a written report as well as a statement which he gave to the police and requested them to investigate. He believed she had lied and contradicted herself. She said in the affidavit that he now resides in South Africa and that he regards South Africa as his home. He does not reside in South Africa. She also said that he is resident in South Africa and that he travels up and down to South Africa. She is insinuating that he lives there. This is not true. She contradicts herself when she says that he travels up and down to South Africa. If he resides in South Africa which is denied, how then could he be going to South Africa every month when he is supposed to be residing there? He lives in Zimbabwe and he did not use cash takings to South Africa to support a lavish life style. He used to live in South Africa and he does not remember telling the bank that that gave him a home loan that he was a South African. The bank made an assumption that he was. His South African ID says he is a non-citizen. He had a right to South African citizenship. He obtained a Zimbabwean passport using a birth certificate that indicated that his parents were born here. When he applied for it he did not realise that that's what it reflected. He proceeded and applied for the Zimbabwean passport. He used a South African ID and addresses to get home and vehicle loans. He was resident in South Africa when he got the loans. He keeps a house in South Africa. It's a home away from home. He spent a lot of time in South Africa after the divorce as he was going through a tough time.

He agreed that he spends more time in South Africa than in Zimbabwe. When he applied for a loan he got payslips from M and R but never received a salary. This was to assist him in getting the loans. The relationship between his company Capital Brake and M and R is purely business. M and R buys goods for Capital Brake in South Africa and these are delivered to it. M and R then sends the goods to Zimbabwe. The witness accepted that he took money from his Zimbabwean company to buy raw materials in South Africa. He paid for his loans from his savings and he got help from family.

There was no malice when he caused the arrest of the plaintiff because she had also committed the same offence. It was his duty to report her as well. He is not aware of any damages the plaintiff may have suffered. He was asked in cross-examination what he meant when he said in his summary of evidence that he took a cue from the plaintiff and proceeded to make a report of perjury. His response was that he was not angry and did not act in retaliation. When it was put to him that he suggested to the police that they should investigate

and prosecute the plaintiff, he responded that he wanted the police to investigate and possibly prosecute her if they find incriminating evidence.

The defendant did not appear to be a very honest person. He got loans from South African banks by giving out that he was resident there and a South African citizen when he says he is not. He used fake salary slips for that purpose. He used a birth certificate that gave out that his parents were Zimbabwean when he knew they were not. It is not clear how he acquired that birth certificate. He wanted the court to believe that the Registrar's Office made up that information. He was able to get a Zimbabwean passport which he otherwise would not have been entitled to at that stage. I found him to be evasive when he was answering questions in cross-examination. Many of his responses consisted of "I do not know" or "I do not remember." He did not seem concerned. I did not find him to be a very reliable witness.

I must express my displeasure at the manner in which the bundle of documents tendered in plaintiff's case was presented. The bundle of documents in this matter was compiled and paginated by the plaintiff herself. The following shortcomings in the bundle of documents were observed. Some pages were unmarked. Most of the pages were highlighted in a very bright yellow marker. It was difficult to follow the pages as the sequence of the pages was confusing. Several pages were numbered as one page.

I queried the state of the bundle of documents and why it was prepared by client. The explanation that I was given was that Advocate *Wood* was too busy and asked her client to prepare the bundle of documents. It is not the function of a litigant to prepare and paginate documents sought to be produced in court. First, the litigant does not know and cannot preempt the legal issues that may arise at the trial. The litigant may not know what is and what is not relevant. Even if the litigant prepares the bundle of documents, it is incumbent upon the legal practitioner concerned to check whether or not sufficient and relevant information has been put together. It did not appear that Advocate *Wood* had inspected the bundle as she appeared unaware of these shortcomings. The function of putting together bundle of documents sought to be relied on at a trial should never be left to client. Legal practitioners are discouraged from producing documents that are highlighted or marked to emphasize a paragraph or point. In every matter where a bundle of documents is going to be produced, legal practitioners should ensure that the documents are properly paginated in the sense that the pages are correctly and logically numbered. The practice of highlighting pages for the court should be avoided. The courts do not require the assistance of litigants in identifying relevant issues.

The delict of malicious prosecution is committed in circumstances where a defendant causes the arrest and prosecution of another person without reasonable and probable cause. The proceedings so instituted must terminate in favour of the complainant. The mischief behind the delict of malicious prosecution is to check and penalise abuse of process by litigants who wrongly and falsely set the law in motion in criminal charges. In dealing with this delict, the court is required to balance the right and freedom that an individual has to report offensive behaviour and restraining frivolous and false allegations against innocent persons.

Five requirements emerge from the definition of the delict. The requirements to be proved are firstly, that the defendant must set the law in motion. The plaintiff must show that the defendant acted without reasonable and probable cause in setting the law in motion. It must be shown that the defendant acted with malice and that the proceedings terminated in the plaintiff's favour. The plaintiff must prove that he suffered damages resulting from the prosecution. See *Bande v Muchinguri* 1999 (1) ZLR 467 for the requirements of the delict.

The onus is on the plaintiff to prove on a balance of probabilities that these requirements have been met. Setting the law in motion entails instigating or instituting the prosecution. In *Bande v Muchingwi* (*supra*) Malaba J (as he then was) relied on the test laid down in *Bucket v Christine* 1920 WLD 14 to determine whether a defendant had set the law in motion. In that case the court held that the test is "whether the defendant did more than tell the defective the facts and leave him to act on his own judgment." The court also relied on J.G Flemming, *The Law of Torts* 7 ed at 582 where it is stated that,

"The defendant must have been actively instrumental in setting the law in motion. Simply giving candid, account however incriminating, to the police, ---- is not the equivalent of launching a prosecution. The critical decision to prosecute not being his, "the stone set rolling [is] a stone of suspicion only."

But 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"

What requires to be shown is not merely that the defendant made a report to the police. It must be shown that he instigated the arrest and the subsequent prosecution and went beyond just making a report. The defendant made a written report of perjury to the police. In his report the offending parts of the affidavit are outlined and he gives his views over why he thinks the statements are offensive. He then goes on to outline the offending parts of the affidavit, in particular paras 19, 26 and 28. He states that the plaintiff stated under oath that

he now “resides in South Africa and regards that as his home and travels up here once a month.” He states that it is untrue that he resides in South Africa. The complaint related to para 26 is that she states in that paragraph that he uses cash takings from his business in Zimbabwe to support a lavish life and finance his many flights “up and down to South Africa every month.” He says she contradicts herself in this paragraph because if he is resident in South Africa, how can he be said to be going to South Africa every month as he will be residing there. In the paragraph the plaintiff stated that the “defendant is resident in South Africa and visits Zimbabwe once a month.” The defendant avers that these statements are false and contradictory to para 26. He reiterates in conclusion that the plaintiff committed perjury and should be investigated and prosecuted. He says, “It is apparent from the foregoing conflicting statements that Colleen committed perjury for which she should be investigated and prosecuted. He suggests that the plaintiff committed the offence of perjury in terms of s 183 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

I find it interesting that the defendant made his report in writing. All the defendant was required to do was to make his report and leave the affidavit with the police for them to carry out their investigations. What they were going to do with the report was entirely in their discretion. It appears to me that the defendant was over zealous. He not only suggested the charge to be preferred, thus perjury. He gave the police the relevant section of the law offended. He had already checked out the section and deemed it necessary to give the section to the police. He effectively directs the police over what charge to prefer. He also suggests that she should be investigated and prosecuted. The defendant instructed the police on what to do and was actively instrumental in setting the law in motion. It was not the business of a complainant to suggest what charges to prefer or for that matter to tell them to investigate and prosecute. All that was required of the defendant was to tell the police the facts and leave them to make a decision firstly whether to investigate the matter and prosecute the plaintiff. He went beyond just making a report. His conduct amounts to active instigation of proceedings.

Where a person making a report to the police goes on to suggest the charge to be laid against the suspect and further gives directives that the matter be investigated and prosecuted, he is deemed to have been actively instrumental in setting the law in motion and liable for malicious prosecution.

The next enquiry is whether there was reasonable and probable cause for setting the law in motion. A person is said to have reasonable and probable cause to commence or

continue the prosecution if he knows the elements of the offence preferred and has a reasonable belief in the report he makes. The requirement for a reasonable and probable cause was defined in *Heck v Faulker* (1881) S and BD 167 at 171 as follows,

“... an honest belief in the guilt of the accused based upon a false conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

In *Prisloo and Anor v Newman* 1975 (1) SA 481 the court held that reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings against the plaintiff is justified. This requirement has both an objective and subjective element to it. In order to escape liability, a defendant placed in this situation should show that he had an honest belief which was based on reasonable grounds that the plaintiff had committed the offence in issue and that the institution of proceedings was justified. He must obviously be aware of the nature and elements of the offence. It must be shown that any reasonable man placed in the position of the defendant would be of the same view that an offence had been committed.

The defendant testified that he knew the elements of the offence because the plaintiff had also laid 2 or 3 charges of perjury against him. The police had explained the elements to him. When he read the plaintiff's affidavit and realised that it contained untruths, he decided to take a cue from her and report her for perjury. I am not satisfied that the defendant had a reasonable belief in the guilt of plaintiff when he made the report of perjury. He knew of his status both in South Africa and Zimbabwe. He was aware of his movements between the two countries. A schedule produced by the plaintiff shows that he was spending more time in South Africa than in Zimbabwe. He has a home in South Africa. He was always said to be in South Africa. The trial magistrate found on his own evidence that the defendant lived in South Africa and that it could be assumed that he did. That is exactly the point. Anybody looking at his activities and circumstances in South Africa would assume, if he did not ask the defendant, that he resided in South Africa. One also has to have regard to the fact that the defendant has South African residence and has an ID for that country. The nature and extend of the business he carries out there suggests that he resides there. I find no sound basis for lodging a complaint that somebody has lied that you reside in South Africa when it has been shown that you spend half your time there. Evidence is clear that the defendant travels in and out of the two countries. I find no conflict in the statements of the plaintiff. Even if the defendant does not legally reside in South Africa, his movements, activities and time spend in



South Africa suggests that he resides there. The defendant had no reasonable and probable cause for complaining that the defendant was lying when she said he resides in South Africa.

As regards the taking of cash to South Africa, the defendant did not deny that monies were being transferred to a company in South Africa but that it was for purchase of goods for Capital Brake. The defendant was making monthly loan repayments in South Africa. He admitted in the magistrate's court that those loan repayments were coming from his company in Zimbabwe. Later he changed and said that he got help from his relatives. He maintained this story in this court. He did not tell the magistrates court about his savings of more than \$50 000-00. It is clear from the evidence that he would take cash to South Africa and use some of it to pay for his expenses. He knew this and had no justification in complaining about the complainant's statement regarding this aspect. One wonders why he would require assistance from his family if he had such savings. I find it difficult to believe that the defendant would go to South Africa and live on handouts when he had a thriving company in this country. It is safe to conclude that the money he used in South Africa was coming from his Zimbabwean company and the plaintiff's version is more probable on this aspect.

The plaintiff was required to show that the defendant had an improper motive or actual malice when he instigated these proceedings and that he was actuated by malice. Malice in the context of malicious prosecution involves a sinister motive other than the motive to exercise one's legal rights. It may also mean subjectively a dishonest state of mind. Malice may be inferred. Malice involves a motive other than that to bring the offender to justice. Where it is shown that an arrest and subsequent prosecution were actuated by the desire to exact anger and revenge channelled into the justice system, this may constitute an improper motive. If a person makes a false report to the police with the intention that a person be prosecuted, then that person has an improper motive. The defendant accepted under cross-examination that the perjury charges against him were petty. By his own admission, he took a cue from the plaintiff and decided to lay a charge against her. He laid a charge just because she had done the same against him. He was reckless as to the consequences of his report. What emerges is that he made a report of perjury in a bid to revenge because she had done the same against him.

The plaintiff testified that the reason why the defendant laid this charge against her is because he wanted her to earn a conviction so that she could be removed as a director of their company together. This evidence was not challenged. The report was made not because it was untrue and offensive, but for sinister motives. What further supports the assertion of

malice is the plaintiff's evidence that the defendant was constantly making reports to the police (of theft) which resulted in the police harassing her. She was also reportedly being harassed by the CIO who accused her of being an awful wife and racist. Although the defendant denied that he was responsible for any reports to the CIO, in the consent order for the divorce, he agreed to withdraw the allegation of racism. Of interest to note is that whilst it was contained in the affidavit complained against that the CIO were harassing her, the defendant did not complain against this part of statement. He did not think the statement was false and seemed happy with that statement. There is evidence that there were previously strained relations between the parties. The parties have prosecuted each other left, right and centre. This supports the assertion of malice. The plaintiff has managed to show that the defendant was actuated by malice when he made this report.

The requirement that the prosecution must have terminated in the plaintiff's favour has been satisfied. It is common cause that the proceedings terminated in the plaintiff's favour. She was acquitted. The plaintiff is required to show that in addition to all the other requirements of the delict, she suffered damages.

The plaintiff claims damages in the form of legal costs she incurred in defending the criminal charges, *contumelia* and discomfort. It is common cause that she engaged the services of counsel at the trial. The plaintiff told the court that she paid the legal costs outlined to her legal practitioner and advocate. She submitted proof of those costs. She did not produce receipts to prove such payment. She was not cross-examined on this point. The quantum of legal costs was not challenged. I believed her when she said that she paid the costs.

The defendant argued that in order for costs in a claim for malicious prosecution to constitute damages, they ought to be taxed. The defendant relied on the case of *Law and Others v Kin* and Another 1966 (3) SA 480 for the proposition that victims of malicious prosecution are entitled to taxed costs incurred in defending themselves. The costs were incurred in criminal proceedings. I am not aware of any rule in this country that requires a bill of costs in criminal matters to be taxed.

It was also argued that the legal costs were not necessarily incurred because the parties had agreed to withdraw the charges. That had the plaintiff agreed to withdraw the charges, these charges would not have been incurred. The plaintiff's explanation was that counsel who represented her on the day the settlement was discussed was very junior. She did not give any instructions on the settlement. When she eventually spoke to her regular lawyer,

the settlement or withdrawal did not succeed because there was another case that had not been taken to court involving fraud against her and her lawyer. They wanted to ensure that that the complaint of fraud would also not be prosecuted. The plaintiff wrote to the defendant and gave conditions for the withdrawal. The defendant did not respond to the letter and the conditions were not met. The defendant proceeded with the prosecution of the plaintiff. When agreement over these cases was not reached, settlement failed and defendant proceeded with prosecution. The plaintiff's attitude to the proposal for settlement was reasonable in the circumstances. I view that the legal costs were reasonably incurred.

Under the category of *contumelia* and discomfort, she claims that she was severely inconvenienced because she was unable to work when she was required at court. She testified that she went to court on a number of occasions and sometimes the matter was not able to take off. She does not know the number of times she went to court. She was clear that she went there also in connection with other cases. It is not known how the discomfort is apportioned between the various cases. It appears to me that a sum of \$10 000-00 is too exorbitant in the circumstances of this case. I have not been able to find any cases where damages were awarded for malicious prosecution under the USD currency in this jurisdiction. Most awards in South Africa involving cases of this nature range between R15 000-00 and R3 000-00. This translates to about US1 500-00 to US3 000-00. I have considered that the plaintiff was not detained after the arrest. The arrest and subsequent prosecution must have caused her some discomfort and humiliation. I view that a fair amount would be \$3000-00. The plaintiff is entitled to the claim. The plaintiff asked for costs on an attorney client scale but did not justify them.

In the result it is ordered as follows,

The defendant shall pay to the plaintiff damages as follows,

- 1) Payment of \$7 602-00 as legal costs
- 2) Payment of \$3000-00 as damages for *contumelia* and discomfort.
- 3) Costs follow the event.

*Matizanadzo & Warhurst*, for the plaintiff  
*Sawyer & Mkushi*, for the defendant