

LOCADIA NDAIZIVEI MUHWATI SIBANDA
versus
BERVERLY KILPIN PEEL
and
MAHANAM INC (PVT) LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 15, 16, 17, 18, 19, & 22 February 2016 & 18 May 2016

Trial

W. Nyika, for the plaintiff
P.Musina, for the defendants

FOROMA J: The plaintiff the owner of an immovable property known as No. 3 Chinoia Close Ruwa sued the defendants for:

- (a) US\$ 250-00 being the cost of repairing a 6 meter long dura wall damaged by the defendants
- (b) \$300-00 being the costs of a damaged hydrant hand shower pipes and electrical fittings at 3 Chinoia Close Ruwa
- (c) US\$9 231-39 being the value of gum trees which the first defendant unlawfully cut at 3 Chinoia Close and used at her (defendant's) farm.
- (d) US\$ 1 618-75 being the value of bamboo trees which the first defendant unlawfully cut and used at her (defendant's) farm.
- (e) US\$70-00 being the value of a braai stand which the first defendant unlawfully removed from the plaintiff's farm
- (f) Interest at 12% on all the aforementioned amounts from August 2009
- (g) Costs of suit.

The plaintiff's claim arises from a breach of the terms and conditions of a lease agreement entered into between the defendants and the plaintiff represented by her brother Alexio Muhwati in October 2007 at a time the plaintiff was in the United Kingdom.

The defendants defended the plaintiff's claim and filed a claim in reconvention in terms of which the first defendant counter-claimed the following damages:

- (a) US\$300 000-00 being damages for unlawful arrest unwarranted prosecution and emotional stress
- (b) US\$200 000-00 being defamation damages for the claims by the plaintiff that the first defendant was a thief and a dishonest person in the Ruwa area where the first defendant has a high political profile.
- (c) US\$25 000-00 being the value of the defendant's property attached and sold in execution at the plaintiff's instance.
- (d) costs of suit.

The plaintiff was a self-actor from the commencement of this action up to and including the pre-trial conference but was represented at the trial by Mr *Nyika* of Nyika Legal Practitioners. At the pre-trial conference held before Makoni J the parties agreed upon the following issues which formed the basis on which the matter was referred to trial:

- (1) What is the actual quantity and value of gum tree poles and bamboo trees that were allegedly cut
- (2) (a) Whether or not there was an agreement that the defendant could cut trees from any section of the plaintiff's property.
(b) if there was such agreement what size or area was to be cut
(c) what were the trees that were cut used for
- (3) (a) How many times did the brick wall fall down and who was responsible for the repair to the wall each time it fell down
(b) how long was the brick wall that fell down
(c) whether or not the replacement of the brick wall was to its previous standard each time the wall fell down
- (4) Whether the hydrant that was damaged was repaired and relocated or not
- (5) (a) Whether the plaintiff had a legitimate reason to cause the arrest and prosecution of the first defendant or not
(b) Whether the first defendant is entitled to damages for malicious arrest and prosecution or not
- (6) Whether the defendant is entitled to defamation damages or not

(7) Whether the defendants are entitled to the return of goods auctioned or their value or not?

(8) Whether the trees that were cut down by the defendant had a commercial value or not?

Although in the joint pre-trial conference. A minute the parties also considered that there were additional issues 9-12 this court did not consider same to be relevant for the purpose of curtailing trial nor did they really arise from the pleadings. They are however listed for the sale of completeness and they are –

(9) Whether the defendant had a good tenancy record or not

(10) Whether the defendant moved out of the plaintiff's property voluntarily or through ejectment.

(11) Whether the first defendant had a good relationship with the plaintiff's brother and he agent or not

(12) Whether the first defendant was entitled to seek a peace order against the plaintiff's brother or not.

The plaintiff testified and called her brother Alexio Muhwati as well as one Elton Jonamu. The plaintiff testified under oath and stated that she was the owner of Stand 3 Chinoia Close Ruwa which she acquired through the assistance of her brother Alexio Muhwati. She through Alexio managed to enter into written lease agreement with the first defendant through the agency of Batanai Properties. The written agreement was produced at trial as exh 1. It records the parties to the lease agreement as Alexio Muhwati (erroneously) as the lessor and the second defendant represented by the first defendant as lessee and erroneously refers to the leased premises as No 2 Chinoia Close Ruwa and was signed by the lessor on 15 October 2007 and on behalf of the second defendant (lessee) on 17 October 2007 and erroneously provided the duration of the lease as 12 months from 1 October 2007 terminating on 1 October 2010.

Although the lease agreement contains some errors some of which are highlighted above the parties in their pleadings did not take issue with the said errors. The first defendant however sought to take issue with the errors at the trial for the first time as no such issues were raised or highlighted in the two summaries of evidence filed by the defendants on 5 April 2011 and 4 July 2013. This casts doubt on the defendant's sincerity in raising issues on the said errors at the trial.

The plaintiff's evidence was relatively short as it was in the form of her relating what her brother did on her behalf as lessor while she was in the diaspora. Even her cross examination was largely impeded by the fact that she kept referring to her brother Alexio Muhwati who was directly involved in the negotiations and concluding the lease agreement. She however insisted that the defendants had no right to cut any trees on the plot as this was expressly prohibited in the lease agreement. The plaintiff also denied emphatically that the plot No 3 Chinoia Close could have been used for agricultural purposes as the lease agreement expressly stated that the property use was only residential and not both agro-residential as the defendant sought to suggest. She dealt with the issues that related to events post her return to Zimbabwe and referred to her brother all such matters as her brother dealt with while she was out of the country.

The plaintiff called Mr Alexio Muhwati as the next witness and he also gave evidence under oath. His evidence essentially confirmed that of the plaintiff namely that the leased property was to be used purely for residential and not agro-residential as the defendant sought to suggest. He was adamant that the lease agreement commenced on 1 October, 2007 despite being signed in mid-October 2007. He disputed that the defendants took occupation more than 3 months before October 2007. He denied that he authorised the cutting of any gum trees as the defendants sought to suggest. He was quite emphatic that the gum trees that the defendants cut were about 90 in numbers although the number of trees cut as counted by the Forestry Commission official was 75. He explained that because of the swampy area the other trees cut (as evidenced by the stumps) making up the balance of 15 could not be reached. He described the sizes of the trees and how he obtained quotations or the commercial value of the timber that could be obtained from the size of trees cut. When it was put to him that the correct loss if any due to cut gum trees is as per valuation by the Department of Forestry Commission he strongly disputed this proposition and indicated that the Forestry Commission valuation was not based on Commercial rates. He maintained that the value used at the criminal trial of the first defendant was not a correct reflection of the loss sustained by the plaintiff through unlawful cutting down of both gum and bamboo trees.

Mr Muhwati insisted that he never authorised the cutting down of the gum and bamboo trees. He further testified that when he discovered that the defendants had wrongfully and unlawfully cut gum and bamboo trees he reported the matter to police as a Criminal offence of theft of the said trees as he had learnt from witnesses that the first defendant had

taken the timber from the cut gum trees to her farm where it was used to build a gazebo and servants quarters as well as erecting paddock fences for two paddocks at the defendant's farm. When it was suggested that the report to the Police that the first defendant had unlawfully cut trees and used the poles at her farm was malicious and false he denied this and maintained that the cutting of trees was unlawful and expressly prohibited in the lease agreement thus the report to the police was perfectly justified. He denied that he authorised clearing of a small portion of the plot so that the defendant could use same for horticulture.

He further testified that a 6 metre long wall was damaged and he bought material for repairing same but as he was arranging for a builder to repair it he found the material already used to repair the damaged portion but the work was non challantly done and he had to ensure that it was redone.

Mr Muhwati further testified that the defendants damaged a water hydrant in the yard and that the defendant accepted responsibility and undertook to replace it but the defendant had not done so as at the time they vacated the plaintiff's property. Mr Muhwati also testified that the police could not take the plaintiff's poles used at the defendant's farm as exhibit because that entailed demolition of the structures and police did not have transport to use to transport the exhibit.

The plaintiff's last witness was one Elton Jonamu who also testified under oath. He testified that he was a thatcher. He had been engaged by the first defendant to cut some gum trees and bamboo trees. The gum trees he cut were further cut into poles which were taken the defendant's farm where he used some of it for erecting paddock fences for 2 paddocks. He was paid for the services he rendered by the first defendant. His recollection was that he cut 40 gum trees using a chain saw and he removed the bark from the poles. He was adamant that the poles he used at the defendant's farm to erect paddock fences were brought from the plaintiff's farm. He was not making any mistake that the poles were from the gum trees he had cut at the plaintiff's farm. He also had been engaged by the first defendant to repair a fence at the plaintiff's plot but did not eventually do so as he had been called away to thatch some structures before he was able to repair the fence at the plaintiff's plot. Despite rigorous cross examination Elton Jonamu was unshaken and maintained his evidence i.e. that he cut gum trees at the plaintiff's plot and used poles from those trees at the defendant's farm and cut 100 bamboo trees which he heaped at the homestead at the plaintiff's plot.

He was clearly a truthful witness. He conceded fairly that although he cut bamboo trees he did not know whether they were removed from the plaintiff's farm or what they were used for. He was asked to thatch the gazebo and staff quarters at the defendant's farm but he did not roof same. The plaintiff closed her case after Elton Jonamu's testimony had been taken.

The defendants opened their case by leading the evidence of the first defendant. She testified that she had been looking for a place where she could conduct her horticultural and piggery activities and also use as a residence as her farm at Pamusoro Pedombo was not yet ready for occupation as there was no infrastructure and they had to convert a goat pen into some shelter. She noticed an advertisement of a plot which had potential for agricultural activities i.e. horticulture and piggery and she arranged to view the plot. She found the plot suitable and expressed an interest. This was in July 2007. She described the plot as divided into the homestead and fields. Mrs Kilpin Peel testified that although the plaintiff's plot was small in terms of residential accommodation it appealed to her as it had an area she needed to pursue a horticultural and piggery project. She also testified that during negotiations she pointed out to the plaintiff's representative Mr Muhwati that since the arable area was not big enough she would need to extend it by cutting and stumping a portion to create space for maize production to which Mr Muhwati agreed. She said there was a written agreement for clearing a piece of the plot for raising the maize crop but Mr Muhwati insisted that she find someone to come and cut trees and cut poles to be used for the repair of the boundary fence. She further testified that the cost of clearing the identified area was to be borne by herself as it was they who wanted to do farming. She confirmed that gum trees and bamboo trees were cut and used to repair the fence although she could not remember the number of trees cut. She confirmed that she moved onto the plaintiff's plot on 1 September 2007. By then no written lease agreement had been signed with the plaintiff but the estate agent Batanai Properties had given them i.e Miss Kilpin Peel and Muhwati a draft agreement to consider before signing a proper lease agreement. The draft lease agreement was produced to support the defendant's contention that the plaintiff's plot was leased by the defendant for agro-residential purposes which Mr Muhwati disputed very strongly insisting that only the written lease agreement signed by both the defendant and himself was the exclusive memorandum of a lease agreement between the plaintiff and the defendant. Whilst accepting having cut some gum trees and bamboo trees at the plaintiff's farm the first defendant denied having used any poles

from the trees at her own farm. She maintained that she used the poles to repair the plaintiff's boundary fence and constructed a cattle pen and used bamboo trees as fence droppers to strengthen the fence at the plaintiff's plot. She described Mr Muhwati the (plaintiff's) brother's denial that he authorised the cutting of trees as a case of selective memory. She further testified that some of the trees cut were used for installation of electric cable to the borehole at the field which was done by Dominic Muhwati who worked at ZESA Marondera. She further testified that Mr Muhwati saw the defendants cutting trees on the several occasions he made inspection visits to the plot and raised no objection. This of course Mr Muhwati denied.

Mrs Kilpin Peel testified that the plaintiff's brother maliciously reported to police that she had unlawfully cut gum trees and used poles to erect paddock fences and build a gazebo and staff quarters at her farm resulting in her being arrested and prosecuted for theft despite police having cleared her. She further claimed that as a result of the malicious prosecution her name and political standing in the area was soiled and thus she claimed \$300 000.00 for wrongful arrest and a malicious prosecution and US\$200 000.00 for damages for defamation. She regarded the prosecution as malicious because police cleared her of any wrong-doing but Mr Muhwati persisted that she be prosecuted.

She also testified that the plaintiff sued her for damages in the sum of US\$25 000.00 being the value of the gum trees which she claimed she (Mrs Kilpin Peel) had allegedly cut without the lessor's consent and obtained default judgement which on execution caused her to lose a lot of her assets which she wanted returned otherwise have their value restored. She testified that Alexio Muhwati was fully aware of the agricultural activities she was pursuing and he could thus not deny that the piece of land that was cleared to create an area for cropping was done with his consent.

Mrs Kilpin Peel further testified that gum poles that were found used at the second defendants farm were obtained from neighbouring farms where she barter traded them with the farm owners. She therefore disputed that the fencing gum poles or roofing poles used on the gazebo were taken from the plaintiff's plot.

The defendants called 2 witnesses namely Shadreck Majojo the farm manager of Mr Nyamazana who testified that his employer barter traded 256 gum poles with Mrs Kilpin who ploughed Nyamazana's fields and repaired a tractor.

The next and last defendant's witness one Revai Vhiza testified that he was the defendant's tractor driver and stayed at plaintiff's plot at the time the defendants were leasing it. He testified that he ploughed at Maruta Chambara and Nyamazana's farms where the defendant was paid for in kind i.e. given gum poles which he ferried to the defendant's farm.

Analysis of evidence

The plaintiff's claim was based on the written lease agreement which was exhibited in as Exh1. She demonstrated in her evidence that the defendants wrongfully and unlawfully cut gum trees and bamboo trees in breach of the provision of lease signed by the parties. Exhibit 1 has the following clauses which corroborate the plaintiff's testimony –

- (i) Clause 5- Use of the premises. The clause provides as follows:

“The premises shall be used by the lessee for residential purposes and for no other purpose unless the lessor or his agent has given his prior consent”

- (ii) 10 - Alterations and improvements- this clause provides as follows

“The Lessor may not make any alterations to the premises whether permanent or temporary. Nor may he cut down any tree or shrub except with the prior written consent of the Lessor which consent shall not be unreasonably withheld. Such alterations shall not be compensated even where they were done with the consent of the Lessor.”

- (iii) 16- Whole Agreement- this clause provides as follows

“This agreement is the whole agreement between Batanai Properties and the Lessee and there have been no warranties guarantees representations or conditions precedent save as are specifically recorded. No alterations or variations of this lease shall be of any effect unless in writing and signed by both parties.”

The plaintiff's contention that the defendant wrongfully and unlawfully cut trees at the leased premises is borne out by the clause 10 above. That gum trees and bamboo trees were cut at the defendant's instance is not in dispute. The plaintiff's brother Alexio Muhwati's dismissal of the defendant's suggestion that they were allowed to cut the gum and bamboo trees is supported by the specific prohibition and the failure by the defendants to produce written consent of Alexio Muhwati authorising the cutting of such trees. The use to which the cut trees were put is not relevant to the plaintiff's damages claim arising from a breach of the agreement. However Elton Jonamu's testimony was that the poles from the gum trees were used to fence paddocks at defendants' farm. Elton Jonamu's testimony was clear and convincing and the court has no hesitation in accepting it as truthful. His evidence is also partly corroborated by Alexio Muhwati's evidence in regard to having found the gum poles

from the plaintiff's farm at the defendant's farm already used to fence paddock fences and construction of gazebo and roofing staff quarters.

The court does not accept as truthful the defendant's evidence that none of the gum poles cut at the plaintiff's plot were taken to the defendant's farm for the reason detailed below.

The defendant in its plea to the plaintiff's declaration pleaded as follows.

Re: ad paragraph 3 & 4 – These are admitted. Paragraph 3 of the declaration which is relevant for the purpose of illustrating that the defendant's evidence cannot be or should not be believed reads as follows – 3 in October 2007 the defendants leased the plaintiff's premises known as Plot 3 Chinoia Close Ruwa which lease was effective the first day of that month. The terms and conditions were drawn up in a lease agreement for which the plaintiff was represented by his brother Alexio Muhwati. This factual averment was admitted without qualification but at the trial the defendant sought to disown the lease agreement suggesting that it was not binding on the defendants because it contained the following errors:

- (a) the leased property was erroneously referred to as No. 2 Chinoia Close instead of No. 3 Chinoia Close.
- (b) The duration of the lease agreement was indicated to be 12 months commencing on the 1 October 2007 terminating on 1 October 2010.
- (c) The defendant sought to suggest that the use to which the premises was to be put was agro – residential contrary to clause 5 which categorically indicated use as residential purposes. The defendants in the closing submissions sought to submit that the admitted agreement was vitiated by mistake and is therefore void and not binding on the defendants. The first defendant in the closing submissions submits that she first noticed the error at her Criminal trial i.e. that the plaintiff's leased plot had erroneously in the lease agreement been leased for residential purposes only whereas the agreement in reality was that it was rented for agro – residential purposed. It is incomprehensible that despite the alleged discovery of an error on such a vital term of the lease agreement no effort was made to amend the defendant's plea. Besides in their summary of evidence the defendant did not suggest that the agreement of lease was void and not binding on them and yet by this time the summary of evidence was filed the defendants had already discovered the alleged

omission/error. A perusal of the pleadings will show that the defendants filed two summaries of evidence on 5 April 2011 and 4 July 2013 respectively. The two summaries are not entirely reconcilable in that (a) the one filed on 5 April 2011 in para 1 reads “The lease agreement classified the property as an agric – residential which meant that the defendant would carry out agricultural activities at the leased premises”. As can be observed clause 1 quoted above does not reconcile with clause 5 of exh 1 (the lease agreement) which clearly indicates that the premises shall be used by the lessee for residential purposes only. The defendants did not dispute that they signed the agreement of lease exh 1. When asked why she did not raise the objections to the agreement now raised the defendant explained that she signed the agreement in a hurry while on her way to Zambia and assumed that the actual lease agreement contained all the clauses she claimed she had seen in the draft agreement.

This court does not accept the defendants’ attempt to wriggle out of very clear terms of a written agreement which they freely and voluntarily signed. They are unfortunately not saved the consequences of their signature in terms of the *caveat subscripto* rule – see Christie – *Business Law in Zimbabwe* p 67 where the learned author says “The general rule, sometimes known as the *caveat subscripto* rule is therefore that a party to a contract is bound by his signature whether or not he has read or understood the contract.” The defendants have sought to rely on mistake as one of the exceptions to the *caveat subscripto* rule. This cannot avail the defendants given that the defendants did not challenged the validity of the lease agreement in their plea as observed herein above. It is therefore this court’s view that the defendants attempt to discredit the lease agreement is an exercise in futility. Therefore the court prefers the plaintiff and her witnesses’ testimony whenever and wherever it conflicts with that of the defendants and their witnesses. It did not avail the first defendant that she could not tell the truth even in regard to the issue of the hydrant. In one breath she claimed it had been repaired and relocated and in another she claimed it was placed in the store-room. The plaintiff adduced evidence in support of her damages claim in the form of quotations obtained from dealers in timber and poles at the time the plaintiff obtained a default judgement against the defendant. During this trial Mr Muhwati was challenged on the applicable quantum of damages as between the value of gum trees given by Forestry Commission and the amount that the plaintiff pleaded. The defendant considered that the

value of gum trees used at the Criminal Trial of the first defendant was the Forestry Commission one and that was the correct value to which Mr Muhwati's response was that the correct value for the assessment of damages was the commercial value of the gum trees cut and in this regard he had obtained quotations from Woodrow in Eastlea Gold Rank Enterprises and Lomangundi Poles P/C.

In regard to the other claims the plaintiff produced the following quotations – Hanky S P/L exh 3

- Fabsoc P/L exh 4
- Fanzan Electrial exh 5
- Electricaare Wholesalers & Hardware exh 6
- Ghoeph Investments exh 7
- Taluwik Enterprises P/L t/a Inov Graft Div exh 8.

The court has compared the damages awarded to the plaintiff in the default judgment granted by Makoni J with the evidence produced at the trial as supported by the exhibits referred to above and found no fault with Makoni J's judgment.

The first defendant counter claimed damages for wrongful arrest and malicious prosecution as well as return of assets attached and sold in execution of the default judgement. It is common cause that pursuant to execution of the default judgment the plaintiff had attached some of the defendant's assets and sold same in execution. The issue is whether such sale in execution was wrongful. The result of this case will provide the answer to the issue. If the court finds in the plaintiff's favour then the defendant's claim would fail and the converse would be true.

As for damages for malicious assault and prosecution and defamation it is common cause that Alexio Muhwati acting on the plaintiff's behalf made a report to ZRP that the defendants had unlawfully cut gum trees and bamboo trees and used same at the defendant's farm. As a result of such report the defendant was arrested and detained for about 24 hours as the first defendant indicated in her evidence which the plaintiff did not dispute.

The first defendant was prosecuted at Goromonzi Circuit Magistrate's Court and she spent some money towards legal fees and she considered that all this was unnecessary and caused her a whole year of stress and inconvenience and attendant cost of travelling to and from court only to be acquitted at the end of it all.

An acquittal is not necessarily evidence that a prosecution was malicious. In *casu* the defendants admitted to cutting gum trees and bamboo trees at the plaintiff's plot in breach of the provisions of the lease agreement. Contrary to her contention this court found that some of the gum poles from the cut gum trees were used at the defendant's farm to erect paddock fences. These findings establish *prima facie* that the plaintiff had a lawful basis for filing a complaint with the police. The decision to have the first defendant prosecuted was made by the police based on their assessment of the evidence established by their investigations. That does not make the prosecution malicious. It may well be that the first defendant was improperly acquitted. It is not clear why for instance the evidence of Elton Jonamu was not adduced at the criminal trial. It is quite probable that had such evidence been led the result of the criminal trial could have been different.

The court cannot in the circumstances find that the report made to the police by the plaintiff or on her behalf was wrongful or unlawful.

As for the claim for defamation the defendant testified that she is a well-known person in the ZANU PF party in the area and her prosecution for theft tarnished/her image. The first defendant did not lead evidence of publication of the alleged sting i.e that she had stolen the plaintiff's property. It is trite that in the absence of publication a claim for damages for defamation cannot be sustained. See *Lysbe v Robinsky* 1923 CPB 110 at 111. The publication through communication of a complaint of a criminal nature in the absence of proof of malice would be protected under the defence of privilege – *Argus Printing and Publishing C/o Ltd v Anastassiades* 1954 (1) SA 72W 75.

In the result it is ordered that:

- (1) Defendants pay the plaintiff US\$250-00 being the cost of repairing the 6 metres long brick wall
- (2) The defendants pay the plaintiff US\$299-31 being the cost of damaged hydrant hard shower pipes and element fittings.
- (3) The defendants pay the plaintiff the sum of US\$12 195-71 for gum trees and bamboo trees that the defendant unlawfully cut from the plaintiffs plot and used at her farm.
- (4) The defendants pay the plaintiff the sum of \$70-00 for the braai stand unlawfully removed from the plaintiff's plot.
- (5) The defendants pay interest at the legally prescribed rate from the date of

service of summons to date of payment.

- (6) That the total amounts as ordered above be reduced by the amount realised from a sale in execution of the defendants assets by the plaintiff's in the sum of US\$4118-46.
- (7) That defendants pay the costs of suit.
- (8) The defendants' claim in reconvention be and is hereby dismissed with costs.

Nyika Legal Practitioners, plaintiff's legal practitioners
Mushonga Mutsvairo & Associates, defendant's legal practitioners