

PUNISH MUSHEZHU
and
HARRISON VERA
and
EVARISTO MUCHENJEKA
and
HANNY CHISAMBA
versus
WINDMILL (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 9, 11, 30 March 2015 and 18 January 2017

Civil Trial

W. T. Pasipanodya, with him, *T. Tanyanyiwa*, for the plaintiffs
E. T. Moyo for the defendant

ZHOU J: The plaintiffs issued summons against the defendant claiming payment of a total sum of US\$480 000.00, collection commission and costs of suit on the attorney-client scale. The amount of US\$480 000.00 represents a claim by each of the plaintiff of an amount of US\$120 000 in respect of damages suffered as a result of their arrest by the police. The arrest was at the instigation of the defendant's employees who alleged that the plaintiffs had stolen 25 tonnes of fertilizer. The plaintiff's claim is contested by the defendant.

In the very terse declaration filed on their behalf the plaintiffs allege that the first plaintiff entered into a tripartite agreement with the defendant and the Zimbabwe Farmers Union in terms of which the first plaintiff was granted a credit facility to purchase and receive fertilizer. Upon being provided with the relevant papers the first plaintiff went to the defendant's depot in Harare's Workington area in order to collect the fertilizer. He was given 25 tonnes of fertilizer which were loaded onto a motor vehicle. The driver of the motor vehicle left the defendant's

premises. Some minutes after leaving the defendant's premises the plaintiffs were confronted by an employee of the plaintiff whose name is stated as My Mapayike who was accompanied by a police officer by the name Detective Lapkin. The plaintiffs were thereupon arrested on allegations of stealing 25 tonnes of fertilizer. They were detained for two days at Southerton Police Station. They were released after the two days without any charge being preferred against them. The plaintiffs allege that the report made by the defendant was malicious, hence their claim for damages.

The defendant, in its plea, admitted to making the report to the police which triggered the arrest and detention of the plaintiffs. It denies, however, that the complaint to the police was malicious. The defendant's case as pleaded is that the plaintiffs acted fraudulently in that they used one voucher and one order number to collect fertilizer more than once when they were entitled to use those only once.

Three issues were referred to trial. These are set out in the joint pre-trial conference minute as follows:

1. Whether or not the report filed by the defendant's employees to the police against the plaintiffs was wrongful and malicious.
2. Is the defendant liable to pay the plaintiffs damages for malicious arrest?
3. Quantum of damages, if at all they are due.

At the commencement of the trial the plaintiffs' legal practitioner advised the court that the second plaintiff was now deceased. The matter therefore proceeded in respect of the three remaining plaintiffs, as no request was made to substitute the second plaintiff.

Three witnesses testified on behalf of the plaintiffs. These are Punish Mushezhu (the first plaintiff), Evaristo Muchenjekwa (the third plaintiff), and Hanny Chisamba (the fourth plaintiff). The defendant relied on the evidence of one witness, Rongedzayi Mapaike.

Punish Mushezhu gave evidence that in 2011 he purchased fertilizer from the Zimbabwe Farmers' Union ("ZFU"), an organization of farmers. Part of the money for the fertilizer was deposited into the account of ZFU while the other portion was deposited into the account of the defendant. He managed to collect 50 tonnes of the fertilizer which was due to him. After that he collected a further 5 tonnes from the defendant's St Manuels depot. He was advised that the defendant had run out of fertilizer then. After a week he collected another consignment of 25

tonnes of fertilizer. He hired a truck to collect that fertilizer. On that day that he collected the 25 tonnes he received a telephone call from the owner of the truck he had hired to transport the fertilizer advising that he wanted some money from him, presumably for the transport services. When he went to where the caller was he found police officers who immediately informed him that he was under arrest for stealing fertilizer from the defendant. He was arrested together with his nephews who had accompanied him. The fourth defendant who was the driver of the motor vehicle which transported the fertilizer was also arrested. The arrest took place around 8 o'clock in the evening. They were taken to the police station where they were subjected to assaults by some police officers. The assaults took place in the presence of the defendant's security officer who also accused the plaintiffs of being thieves who had stolen fertilizer. The plaintiffs were detained in police cells up to 6 o'clock in the evening of the following day. The first plaintiff denied that he used one voucher to collect fertilizer twice. He stated that the voucher in question was in respect of 30 tonnes of fertilizer. However, when he went to collect the thirty tonnes he managed to get only 5 tonnes as the defendant advised that it had run out of fertilizer as described above. There was therefore a balance owing to him of 25 tonnes of fertilizer in respect of that voucher. He stated that the police released him after he had produced to them proof that he was entitled to the 25 tonnes of fertilizer. The truck with the 25 tonnes of fertilizer which had been impounded upon his arrest was also released to him by the police.

During cross-examination the first plaintiff stated that the procedure for accessing the fertilizer in terms of the facility was that he would first be given a voucher by the ZFU which he would take to the defendant and have a reference number allocated. After that he would then be entitled to access fertilizer from any of the defendant's depots. In the instant case he was given a voucher bearing a reference number 0056. The order number given to him by the defendant was F780189. He admitted in cross-examination that the documents produced showed that he had collected 30 tonnes of fertilizer from the defendant's depot known as Feya-Feya on 17 January 2011. They showed that the fertilizer had been transported by Murwira Transport. Other documents bearing the same voucher number and reference numbers showed that the first plaintiff had collected 25 tonnes and 5 tonnes of fertilizer separately from the defendant's depot known as St Emmanuels. The 5 tonnes were collected on 18 January 2011 according to the documents produced. 25 tonnes were collected on 21 January 2011, according to the documents.

All the three deliveries referred to above – of 30 tonnes, 5 tonnes, and 25 tonnes were collected under the same voucher number 0056. He accepted, when it was suggested to him, that a person seized with the documents produced would reasonably believe that the first plaintiff had used the same voucher number to collect 60 tonnes of fertilizer. During cross-examination the first plaintiff stated that he had purchased 60 tonnes of fertilizer from the defendant. He admitted that voucher number 0056 entitled him to collect only 30 tonnes. He conceded that the overall picture created by the documents at pages 33, 34, 37, 39 was that he had used the same documents to collect more than what he was entitled to collect. It was suggested to him that employees of the defendant had acted upon the same documents when they formed the view that he had made a double collection of fertilizer using the same voucher. To that, his response was, “I do not dispute that”.

As for the number of days that he had been detained by the police, he stated that the reference to three days in his summary of evidence included a day on which he had gone to the police station to collect the truck with the 25 tonnes of fertilizer. He also admitted that he did not mention the alleged assault by the police in his summary of evidence. In fact, the assault is also not mentioned in the declaration.

Evaristo Muchenjekwa stated that he and the other plaintiffs were arrested by the police around 7 o'clock in the evening and released from police custody the following day around 4 o'clock in the afternoon. He stated that the police assaulted them alleging that they had stolen fertilizer. He testified that at the time of the arrest and assault a representative of the defendant was present, accusing the plaintiffs of being thieves who had stolen fertilizer. He stated that the police released them because the documents furnished by the first plaintiff who is his uncle showed that they had not committed an offence. His evidence was that he knew nothing about the fertilizer prior to his arrest. He was only arrested because he accompanied the first plaintiff when the first plaintiff went to the offices of the transporter of the fertilizer.

The fourth plaintiff, Hanny Chisamba, testified that he was the one who drove the motor vehicle which collected 5 tonnes of fertilizer from the St Emmanuels depot at the request of the plaintiff. On a subsequent day he was assigned to collect 25 tonnes of fertilizer, which he duly collected from the defendant's premises. He was followed by two motor vehicles, one of which belonged to the defendant. The occupants of the two motor vehicles assaulted him and seized his

motor vehicle, accusing him of stealing fertilizer. He was detained at Southerton Police Station. Later on that day he was taken from the police station and taken to the first plaintiff's office where the latter was also arrested together with another person who was in his company. He was released on the following day together with the other plaintiffs. He stated that he was assaulted by a police officer at Southerton Police Station. After the release of the motor vehicle he delivered the fertilizer in question at the first plaintiff's premises.

The defendant relied on the evidence of Rongedzai Mapaike who was employed by it as its Risk and Loss Control Officer. His evidence was that he was aware of the facility between the defendant and the Zimbabwe Commercial Farmers' Union in terms of which the members of the Union would access fertilizer which was being sold by the defendant. His description of the procedure that was involved was essentially the same as that of the first plaintiff. He testified that once a farmer had furnished the relevant documents to the satisfaction of the defendant the farmer could collect fertilizer from any of the defendant's depots or stockists. He stated that the first plaintiff was a member of the Zimbabwe Commercial Farmers' Union. According to the documents referred to by the witness as contained in the defendant's bundle of documents, exh. 1, the first plaintiff was issued with a voucher bearing the number 0056 by the farmers' union. The voucher showed that it was issued on 10 January 2011. The voucher was for 30 tonnes of ammonium nitrate fertilizer. On 11 January 2011 the plaintiff was issued with an order number by the defendant. The order number was 780189. The first plaintiff then hired a transporter and collected his 30 tonnes of ammonium nitrate from Feya-Feya depot. He stated that on 18 January 2011 the first plaintiff used the same documents already used, to collect 5 tonnes of fertilizer. He stated that when the 5 tonnes were collected he and the others at the defendant's premises noticed that this was a second collection using the same documents which had already been used to collect 30 tonnes from Feya-Feya. He then went to Southerton Police Station and made a police report that the plaintiff had committed a fraud. The report was made on 18 January 2011. They then decided to wait for the plaintiff's driver to return to collect the 25 tonnes which had been recorded as a balance outstanding. Arrangements were made for the defendant's staff to alert the witness once the first plaintiff's agent came to collect the 25 tonnes. Police Officers from the Criminal Investigations Department were at the defendant's premises when the fourth plaintiff came to collect the fertilizer. The loading was being filmed and the

police officers were able to watch it from the defendant's office. After the fertilizer had been loaded the witness and the police officers followed the truck which was being driven by the fourth plaintiff in two motor vehicles. When the truck got to Lochnivar near Southerton the police officers arrested the driver. After the arrest he and the police officers proceeded to Southerton Police Station. The wife of the owner of the truck was also taken to the police station. At the police station he was excused by the police since it was now at night and on a Friday, and was advised to return to the police station on the following Monday. He made several visits to the police station but there appeared to be no progress in the matter. At some point he was told that the police needed to carry out further investigations. He was subsequently made to write an affidavit by the police. The document which the witness produced as exh. 2 and referred to as an affidavit is actually not a sworn statement although at the top it is written "Affidavit Statement". He stated that he demonstrated to the police the basis of his complaint but the police had done nothing to investigate the matter. He stated that in February of the same year he discovered that the truck with the fertilizer had been released to the first plaintiff. He stated that the defendant instituted a claim to recover the value of the fertilizer under Case No. HC 7813/13. The claim was for a sum of US\$42 000.00.

During cross-examination it was brought to the attention of the witness that the claim instituted by the defendant was for a sum of US\$53000, and that in the declaration in that case the defendant had stated that the first plaintiff purchased 80 tonnes of fertilizer. The witness stated that the claim for the value of 80 tonnes included the 30 tonnes which he alleged to have been stolen by the plaintiffs. The cause of action in that claim is sale, not theft. The claim is against the first plaintiff.

It is common ground that the plaintiffs were arrested by the police, and that the arrest was procured by the defendant acting through its employees. It is common cause, too, that the plaintiffs were detained at Southerton Police Station and were only released on the following day. The plaintiffs gave evidence that they were released after 4 o'clock in the afternoon of the day following their arrest. The court is not dealing with the reasonableness of the grounds of arrest by the police as the plaintiffs have not cited the police in their claim.

Before adverting to the cause of action, to the extent that it can be distilled from the plaintiff's declaration, this court must express its disappointment at the bad drafting of the

declaration filed in this case. The declaration does not plead the essentials of the cause of action concisely and distinctly as is required by law. Instead, it narrates a story, as if it is a summary of evidence. It even describes how the plaintiffs were “shocked when 10 minutes after they had left the defendant’s premises” they were confronted by an employee of the defendant and police officers. Paragraph 7 of the declaration tells the story of what happened following the arrest of the plaintiffs. The declaration defies even the basic principle that each distinct fact must be pleaded in a separate paragraph. It contains irrelevant and argumentative descriptions of the arrest as ‘frivolous’, an adjective that seems to be commonly abused now even where it is not a requirement to constitute the cause of action being pleaded. Paragraph 8 of the declaration is phrased in the simple present tense. It states: “Plaintiffs **feel** harassed, demeaned, embarrassed and defamed by the defendant’s actions.” The date when the arrest took place is not stated in both the summons and the declaration. The quantum of damages claimed appears for the first time in the prayer. The issue of the quantum and the relief sought will be dealt with later in this judgment. It is hoped that these remarks will constitute a serious invitation to the profession to go back to the basics of legal drafting even for those legal practitioners who have been in practice for many years.

What has to be determined is whether the defendant maliciously caused the arrest and detention of the plaintiffs. It is an actionable wrong at law to procure the arrest and/or imprisonment of another person by setting the law in motion against that other person maliciously and without reasonable and probable cause. For such a cause to be sustained it is essential for the plaintiff to allege and prove that:

- (a) the defendant instigated the prosecution of the plaintiff;
- (b) The invocation of the prosecution was without reasonable and probable cause;
- (c) The defendant was actuated by an improper motive; and
- (d) The prosecution failed.

See *Munyai v Chikurira & Anor* 1992 (1) ZLR 145(H) at 148E-150A; *Thompson & Anor v Minister of Police & Anor* 1971 (1) SA 371 at 373; Burchell, *Principles of Delict* (1993) pp 205-6. Malice in the context of this delict connotes an improper motive; in other words a motive other than a genuine desire to bring a suspected offender to justice. See *Bande v Muchinguri* 1999 (1) ZLR 476 (H) at 487E-H.

Whether the defendant had reasonable and probable cause to set in motion the law against the plaintiffs is a matter that must be objectively determined by reference to the facts as disclosed by the evidence led. The defendant's witness stated that the defendant had reasonable grounds for believing that the plaintiffs had committed a fraud by using the same voucher bearing the same number to collect twice the amount of fertilizer that the first plaintiff was entitled to. First plaintiff in his evidence accepted that that suspicion might be justified. But that is not the end of the matter. All the circumstances leading to the arrest must be considered. In this case the opportunity to verify from the plaintiffs why they were using the voucher in question to collect the fertilizer was available. The defendant had more than 24 hours to do that. When the first plaintiff sent the fourth plaintiff to collect the 5 tonnes of fertilizer the defendant did not query that. Instead, it decided to lay an ambush by inviting the driver to return the following day to collect the remaining 25 tonnes. The defendant's witness did not suggest that there had been cases of abuse of the facility before which they wanted to investigate. A telephone call to the first plaintiff would have cleared the air as to what was going on in the mind of the plaintiff who had, according to his evidence, purchased 60 tonnes of fertilizer which he believed he was entitled to collect.

The defendant believed that the first plaintiff had purchased 80 tonnes of fertilizer. That is the reason why in its claim in case number HC7813/13 the defendant alleged that fact. In fact, a perusal of the record in that case revealed that the defendant which is the first plaintiff in that case claimed against the plaintiff payment of a sum of US\$43 200.00 in respect 80 tonnes of fertilizer delivered to the plaintiff. An order by consent was granted in that case for the first plaintiff to pay US\$10 800. The case shows that the claim was based on a contract between the parties. The summons in that case was issued on 23 September 2013, some two and half years after the summons in the present case was issued. There is no allegation of theft or fraud in that case although the claim was instituted many months after the 25 tonnes of fertilizer which formed the bases of the complaint of fraud or theft had been released to the first plaintiff. These facts show malice on the part of the defendant.

The defendant's witness said nothing about why the fourth defendant, a mere driver, was arrested and detained after his employer had confirmed that his truck had been hired by the first plaintiff. There is also no reason given as to why the third plaintiff was arrested. He was only

found it the company of the first plaintiff at the time that the latter went where the defendant's representative and the police officers were. There was nothing that linked him to the alleged offence.

The defendant's witness, Rongdzai Mapaike, actively participated in the arrest of the plaintiffs. The evidence of the plaintiffs that he was present and described them as thieves was not challenged. He was involved in ensuring that the police officers were in attendance at the defendant's premises at the time that the 25 tonnes of fertilizer were loaded onto the truck. He followed the truck together with the police. He even went to the police station in the company of the police after the arrest of the plaintiffs. He therefore went beyond merely making a statement to the police. The fact that the police had a discretion as to whether or not to arrest or detain the plaintiffs does not therefore excuse the defendant from liability in the present case.

In the result, the court finds that the defendant committed the delict of wrongfully causing the arrest of the plaintiffs without reasonable and probable cause. The setting in motion of the process of arrest was actuated by malice. See *Bande v Muchinguri (supra)* p. 487E-H.

As regards the quantum of damages, regard must be had to the awards made in this jurisdiction in related cases. In the case of *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 100E GUBBAY CJ emphasized the seriousness with which the law views deprivation of liberty as follows:

“The deprivation of personal liberty is an odious interference and has always been regarded as a serious injury.”

See also *Minister of Home Affairs & Anor v Bangajena* 2000 (1) ZLR 306 (S) at 309G-H; *Muambo v Ngomaikarira & Ors* 2011 (2) ZLR 51 (H) at 55F-H; *Botha v Zvada & Anor* 1997 (1) ZLR 415(S) at 422F; *Masawi v Chabata & Anor* 1991 (1) ZLR 148 (H) at 159.

The factors which are relevant in the assessment of the appropriate quantum should be the same as in those cases where the defendant is the one who effected the arrest and detention. These are set out in Visser and Potgieter *Law of Damages* 2nd ed at 472-4, and include the circumstances under which the deprivation of liberty took place; the presence or absence of malice on the part of the defendant; the harsh conduct of the defendants; the duration and nature of the deprivation of liberty, the status, standing, age, and health of the plaintiffs, the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant, awards in previous comparable cases; the

fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed, the high value of the right to physical liberty, the effects of inflation, and the fact that the *actio injuriarum* also has a punitive function. See *Mavhiza & Anor v Muwambwe & Ors* 2014 (1) ZLR 605 (H) at 613B-D.

In this case the deprivation took place in the context of a business relationship between the first plaintiff and the defendant. Instead of resolving the issue in terms of the contract the defendant abused the criminal procedures by making a report of fraud. The court has already found that the complaint was actuated by malice. The plaintiffs spent two days in police custody. In determining the duration of the deprivation of liberty the court is less concerned with the hours than with the fact that the plaintiffs were detained on a Friday and released on a Saturday, and therefore spent a whole night and some hours during the day in the unpleasant conditions of police cells. They therefore spent two days in the cells. The plaintiffs allege that they were assaulted by the police. However, they did not provide evidence of such assaults. They also made no mention of such assaults in their declaration and summary of evidence. The first plaintiff stated that he is a businessman whose reputation was affected by the arrest and the allegations involved. The fourth defendant is a driver. Nothing is said about the occupation or status of the third plaintiff. What is clear, however, is that the plaintiffs were embarrassed in that they spent a night and some hours without their families and in confinement. The above factors warrant the award of a reasonable amount as damages.

The plaintiffs are claiming US\$120 000 each. That claim is clearly excessive when regard is had to the above factors. In fact, it is reckless for parties to make excessive claims for damages which bear no relation to awards made in comparable cases. This court has warned both legal practitioners and litigants against deliberately inflating their claims, and has issued the warning that in future they may be penalized for that. I will consider this issue in relation to costs. In the case of *Mavhiza & Anor v Muwambwe & Ors (supra)* this court awarded a sum of US\$6 000 to each of the plaintiffs for unlawful deprivation of liberty and *contumelia*. In that case the plaintiffs had been detained from 9 o'clock in the morning and released at about 4:30 in the afternoon of the same day. They were not put in the police cells, but were made to sit on a bench behind a counter in the charge office. In *Muyambo v Ngomaikarira & Ors (supra)* at 57C the plaintiff was awarded damages in the sum of US\$3 000 following his unlawful arrest and

detention some 300 kilometres away from his residence. In the case of *Musindire v OK Zimbabwe Ltd* 2012 (1) ZLR 292 (H) the plaintiff was arrested and detained for four days at the instance of the defendant. He was moved from one police station to another and was subjected to squalid conditions in handcuffs and barefoot. An award of US\$8 500 was made. The awards vary depending on the circumstances of each case and, as held by the Supreme Court in *Muzonda v Minister of Home Affairs & Anor supra* at 101 E-F, “awards of damages made in recent decisions provide only general guidance”, such that “each case is in a sense without parallel, having individual subjective aspects to it”. See also *Botha v Zvada & Anor* 1997 (1) ZLR 415(S) at 422G-H; *Mavhiza & Anor v Muwambwe & Ors supra* at 613F-G. The cases cited above would suggest that an award of damages in the sum of US\$8 000 for deprivation of liberty and US\$2 000 for *contumelia* to each plaintiff would be reasonable. A total amount of US\$30 000 must therefore be paid to the three plaintiffs.

The plaintiffs’ counsel conceded that there was no basis for claiming collection commission in the instant case. That concession was properly made.

As regards costs, although the plaintiffs have succeeded, this is a case where their success in relation to quantum clearly shows that they have overstated their claim. The court must dissuade litigants from making outrageous claims which forestall any chances of a settlement and do not reflect consideration of the relevant factors considered in such claims. The time has now come for the court to show its displeasure at such an attitude, primarily because such claims have become common. The defendant has succeeded in knocking off US\$110 000 from the amount claimed by each plaintiff. That is significant victory. But for the fact that liability was also contested, the court would have had no difficulty in making an order that the plaintiffs only recover about 8% of their costs which reflects what they succeeded in proving in relation to quantum. In this case, the court, in the hope that the litigants and their legal practitioners will be more careful and apply their minds when they make claims for damages, considers reducing the plaintiffs’ costs by fifty percent. In future the court may consider ordering legal practitioners not to recover their full costs in circumstances where they do not properly advise their clients on quantum.

There is no basis for costs to be awarded on the attorney-client scale as claimed by the plaintiffs in the summons. There are no special reasons justifying punitive costs in the case.

In the result, IT IS ORDERED AS FOLLOWS:

1. The defendant shall pay a sum of US\$10 000.00 to each of the three plaintiffs, namely, the first, third and fourth plaintiffs.
2. The defendant shall pay fifty percent of the plaintiffs' taxed costs.

Manase & Manase, plaintiffs' legal practitioners
Scanlen & Holderness, defendant's legal practitioners