

STEPHEN T BANDA  
and  
FLINT CHOMBO CHISUKO  
and  
PATRICK WENGAI ZHUWAU  
versus  
MUTUAL FINANCE (PVT) LTD

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 12, 13, 14 and 15 February 2018 & 21 March 2018

**Continuous Roll**

*P Garai*, for the plaintiffs  
*R Mabwe*, for the defendant

DUBE J: The plaintiffs claim damages for malicious prosecution arising from an event that happened at their work place.

The plaintiffs were employed by the defendant as security guards. On 14 October 2016, they were at Sam Levy's Village where they intended to seek audience with their employer over allegations that he had made a colleague carry a stone from Avondale to Sam Levy's Village which incident they alleged was degrading and humiliating. They were arrested for disorderly conduct, and taken to Borrowdale Police Station where they were detained. They were prosecuted and discharged at the close of the state case. The plaintiffs aver that the action brought against them was baseless and amounted to an abuse of the legal process. The plaintiffs bring a claim for malicious prosecution and claim damages under the following categories, loss of reputation, humiliation pain and suffering, discomfort and loss of employment.

The defendant claims that it had a basis to report the conduct of the plaintiffs to the police. They acted in a disorderly and riotous manner and insulted the defendant. The police made their own findings after the report resulting in the arrests and were not influenced by the defendant to arrest the plaintiffs. The defendant denies that the prosecution was malicious and challenges the damages claimed by the defendants.

The court was requested to determine the following issues,

1. Whether or not the defendant intentionally, maliciously and frivolously caused to be instituted criminal legal action against the plaintiffs.
2. Whether or not plaintiffs suffered any damages, if so whether the said damages are a direct result of any conduct of the defendant.
3. Whether or not the defendant is liable for damages for malicious prosecution and if so the quantum thereof.

The plaintiffs opened their case by calling Stephen Tendai Banda who testified as follows. He was a supervisor of security guards under the employ of the defendant. When he went to work on that day, he was advised of an incident where a colleague was made to carry a 30 kg stone from their employer's house in Avondale to Sam Levy's Village on foot and on his head as punishment for being found eating sadza whilst at work. Whilst he was on his rounds, he heard a commotion over the radio. Someone was being ordered to leave the stone. He went to their head office where he found Mr Kapfupi, (Kapfupi) the head of security fighting with Chisuko, in a bid to take a stone from him. Kapfupi wanted to take away the stone. Patrick Zhuwau (Zhuwau) was present and was trying to stop the other security guards and Kapfupi from getting the stone. Zhuwau was on the side of Flint Chisuko (Chisuko) who held onto the stone. The stone is the same their colleague had been made to carry and they wanted to see the employer and express their displeasure at their working conditions.

He watched the struggle for the stone whilst he stood in the crowd. Later he went and stood by the head office door as he feared that members of the public who had gathered might want to get into the offices to see the employer. Mr Dzimbanhete and Mr Chikwenge later came and left with Kapfupi. Members of the public started complaining that they were siding with the police. Chisuko took the stone to the entrance of the head office and sat on it. Reporters from the ZTV arrived. They spoke to Zhuwau and left. The atmosphere was tense. The police arrived after

Kapfupi left. The plaintiffs told them that there was no commotion and they left. They said that they had been called by Kapfupi. Kapfupi came back in the company of his co-workers. He went to where Chisuko was seated on the stone. Chisuko got up whilst holding onto the stone. Kapfupi and Mr Towindi got hold of him, felled him down and dragged him by his feet. Chisuko continued to hold onto the stone. He would fall whilst holding onto the stone when pushed. Zhuwau tried to keep the people with Kapfupi from getting involved. Kapfupi and his colleagues went away.

The second group of police officers came. Chisuko was sitting on the stone and he stood beside him. They said that they had been phoned by people from Mutual Finance. They spoke to them and went towards the head office. Members of the public dispersed, only a few remained. Later another group of police officers came. The plaintiffs were arrested and taken to Borrowdale Police Station together with the stone. They were told that they had conducted themselves in a disorderly fashion. He was not involved in any commotion. He was just a spectator. They wanted a peaceful demonstration.

They were detained in the cells at Borrowdale Police Station for one night. The cell they were detained in was dirty and the blankets smelled. The cell smelt of urine and the toilet had no flushing system. There was urine and faeces all over the floor and they had no shoes on. The next day they were taken to court and remanded out of custody. They were prosecuted and acquitted. They were dismissed from work and paid their terminal benefits. He is unemployed and has tried to look for work and failed. They have bad references because the matter went viral on social media and newspapers. He claims loss of earnings and legal fees incurred in the prosecution case. There was no mutual termination of employment. The witness testified well and gave a clear version of the events of the day.

Patrick Zhuwau was called as the plaintiffs' next witness. He testified as follows. He abides by the evidence of the first witness. He wishes to add the following. He took the stone with Chisuko to the head office in peace. They went and sat by the head office and asked to see the employer regarding the stone. They were not allowed entry into the office. Mr Kapfupi came with other guards in a bid to retrieve the stone from them. He was trying to block them. He shouted out abusive words because he felt pain and was cross. He was arrested because the defendant made a false report to the police. They were arrested in front of the public thereby impairing his dignity.

The cells were smelling and the blankets dirty. They lost their employment and time with their families during the time they were detained.

Under cross-examination he testified that he was emotionally charged and said a lot of bad things. When he signed the paper for mutual termination of employment he thought it said mutual finance. They were confused. He confirmed under cross-examination that he was shouting and jumping about. I found the witness to be contrite and he regretted the events of the day. He testified well.

Chisuko testified as follows. He abides by the evidence of the Banda and Zhuwau. They went to see their employer not with the intention of disturbing the business but so that they could speak to him about the stone incident. They had a scuffle with Kapfupi because he wanted to take the stone away from him. He wanted the stone as an exhibit. If it was not for Kapfupi who wanted to take the stone he would have remained seated. They dragged him so that they could take the stone. He would kick out because they were trying to grab his legs. He sustained bruises on his hand and hit against a tree. He shouted “fuck beaches”. “racist racist” because he was cross and felt pain when they tried to take the stone away from him. He apologized about the words used in the video. His dignity was impaired when he was arrested and detained and when the videos circulated on social media. The witness corroborated the evidence of the two first witnesses. I find that he gave an honest version of the events of the day. There were no contradictions with the earlier versions.

Mr Kapfupi testified on behalf of the defendant. He was in his office when he heard someone shout over the radio that “if anyone comes here, I am going to kill them”. He went to head office and found Chisuko holding a concrete block. Zhuwau was holding two button sticks and he threatened to beat him up. He tried to knock some sense into Chisuko to stop what he was doing so that they could discuss the problem. People started gathering. He went to Borrowdale Police Station for assistance and was given 2 officers in a bid to have them persuade the plaintiffs to have a discussion with them. They could not conduct their business whilst the plaintiffs were at the entrance. Staff could not enter the offices. He asked the police to send more officers and they came around 11 am. They tried to remove the plaintiffs but were told that the guy who had been made to carry the stone was battling for his life at Parirenyatwa Hospital. It was not true. They had to go and pick him up and brought him to head office. The plaintiffs were shouting saying they

don't care if they lose their jobs. The defendant never instigated the arrest. The demonstration was not peaceful. The plaintiffs were shouting and moving all over the place. Banda did not threaten anyone. He was offering moral support by inciting the other plaintiffs and telling them not to stop the protest. He had a scuffle with Chisuko. Mr. Tandi was assaulted. Two ladies who wanted to get into the office were chased away. A third group of officers came around 3 pm. The plaintiffs were arrested and taken to the police station. The guy who had been made to carry the stone disowned them. They were arrested and taken to Borrowdale police station where they were detained in cells overnight. They were taken to court prosecuted and were acquitted at the close of the state case. All the plaintiffs refused to go for disciplinary hearings. They were rude and disrespectful. All they wanted was their money and to go away and the request was put down in writing. Their employment was terminated by mutual consent. It is not true that Stephen Banda was forced to sign termination papers. The witness testified well and maintained his version under cross examination. I found him to be an honest witness.

It is common cause that the plaintiffs demonstrated over the issue of the stone at the defendant's head office. People gathered. The protest took place at a public place. The defendant made a report to the police resulting in the plaintiffs being arrested and detained at Borrowdale Police Station. The plaintiffs were prosecuted for disorderly conduct and later acquitted of the charge. The central issue is whether the prosecution of the plaintiffs was malicious. This question is easily resolved by looking at the conduct of the plaintiffs to determine if it constitutes the offence charged.

The plaintiffs contend that their conduct did not warrant an arrest. The defendant maintains that their conduct constitutes disorderly conduct and that they were justified in reporting them to the police. The conduct of the plaintiffs is shown in the three videos that were produced and oral evidence led in court. Banda testified that when he got to the scene he found Kapfupi fighting with Chisuko in a bid to take the stone. Patrick Zhuwau was trying to stop Kapfupi from getting the stone while Chisuko held onto the stone. He was moving around and at some stage stood by the door to prevent people from entering the offices. He says that the atmosphere was tense. Chisuko held onto the stone the entire day. At some stage Kapfupi felled Chisuko and dragged him by the feet but he held onto the stone. He would be pushed, fall, but would still hold onto the stone. Zhuwau kept on trying to keep Kapfupi and others from getting the stone.

Chisuko's version is similar to that of Banda save to add that at some stage he was dragged in a bid to take the stone but he resisted. He kicked all over the place as they tried to grab his legs. He sustained bruises in the process and was hit against a tree. He called out 'fuck beaches' at two ladies who had brought a vehicle to ferry the stone away out of emotion. He apologized for what he said. He was saying "Hapana anopinda nhasi," "ngaripere basa." He also shouted 'racist racist,' directed at two white secretaries.

Zhuwau admitted that he was wielding two baton sticks on the day. He was trying to restrain Kapfupi and others from taking the stone. He admits pushing Mr. Kapfupi at some stage. He was talking most of the time and shouting obscenities. He admitted jumping about and shouting. He admitted that someone was shouting that he should not do so. The defendant's witness confirmed that he and his colleagues were shouted at, insulted assaulted and pushed around.

The court's observations of the videos are as follows. The first plaintiff is not seen in the three videos. Chisuko is seen kicking all over whilst holding onto the stone. Zhuwau is very energetic, shouts and is seen addressing people. Mr Chibhoi is seen being pushed by Zhuwau. Someone is heard in the background trying to discourage Zhuwau from doing what he was doing and urging him to understand. Chisuko is very active and addresses the crowd. He is seen trying to stop the taking of the stone by holding onto the stone and pushes Mr Kapfupi. He is talking most of the time. He is also seen running away with the stone. Zhuwau is seen standing guarding Chisuko and the stone and stopping Kapfupi from getting the stone by pushing him. Chisuko is heard saying "Get away you fucking beaches."

The demonstration or protest was held in a public place and was not peaceful. There was a commotion and members of the public gathered. The defendant's workers were barred from accessing their offices. There was a struggle for the stone. There was use of by violence, shouting of obscenities and use of force by Chisuko and Zhuwao. Abusive, threatening and insulting words were used. The first plaintiff urged them on .The protest took almost an entire day.

The legal issues that arise from these facts is whether the arrest was made for an improper purpose, without good ground and any probable cause and whether the police were entitled to arrest and cause the prosecution of the plaintiffs. The court is being called upon to decide whether these facts support the offence charged thereby determining the lawfulness of the arrest.

The delict of malicious prosecution is a common law remedy that is available when a defendant initiates a lawsuit for an improper purpose, without good ground and any probable cause. In *Wireless (Pvt) v Sanangwa* 2013 (1) ZLR 401 (S) at 407 F - 408A, the court laid out the law on malicious prosecution as follows:

“The law on the delict of malicious prosecution is clear. In *Davies v Premier Finance Group Ltd* HH 235-10 Patel J (as he then was), said at pp 10-11 ‘According to Feltoe, *A Guide to the Zimbabwean Law of delict* (2006) the delict of malicious prosecution is committed:

‘When D maliciously and without reasonable and probable cause brings legal proceedings against another. Every citizen has a right to use legal proceedings legitimately for the purpose of upholding and protecting his rights. He or she does not, however, have the right to abuse the legal process for the purpose, of upholding and furthering his or her rights, but instead solely for the purpose of causing harm to plaintiff. As regards malicious prosecution, the case of *Bande v Muchinguri* (1999) points out that the term ‘malice’ did not here mention spite or ill will or a spirit of negligence, it had a wider connotation. It included any malice different that which is proper for the institution of criminal proceedings, which is to bring an offender to justice and thereby did in the enforcement of the law.’ See also *Nherera v Shah* 2015 (2) ZLR 455 (H).

In the *Econet Wireless* case, the court said that the phrase,

“reasonable and probable cause of a prosecution” refers to “an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming then to be true, would reasonably lead any ordinary 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.”

Whether the arresting detail had reasonable suspicion of commission of an offence by a suspect is a question of fact. See *Moyo v Sgt Chacha & Ors* CCZ 19-17. The test for determining the existence of reasonable suspicion is an objective one. See *R v Van Heerden* 1958 (3) SA 150 (T) at 152 E. Once a defendant has established reasonable cause for the arrest, there ceases to be malice on the part of the defendant. The lack of reasonable and probable cause can be interpreted to mean that the plaintiff was not at fault.

The plaintiff in a malicious prosecution claim has to show that,

- a) The prosecution was instigated by the defendant.
- b) That the matter was finalized in the plaintiff’s favoured.
- c) That there was no reason or probable cause for the prosecution or continued prosecution.
- d) The prosecution or its continuance was actuated by malice on the part of the defendant.

A defendant who relies on a wrongful arrest has to show the following,

- a) That the arrest was affected by a police officer.
- b) That the officer formulated a reasonable suspicion of commission of an offence.
- c) The suspicion must be that the suspect committed an offence.
- d) The suspicion must be based on reasonable grounds.

See *Econet Wireless (supra)* p 408 A-B.

The plaintiff must show that the defendant instigated the proceedings or set the law in motion against the plaintiff. It must be shown that a defendant's direct or indirect conduct led to the wrongful arrest of the person whose liberty was infringed see *Abu –Basutu v Moyo* HB 173/13. The plaintiff must show that the defendant did more than just report the matter. He must be shown to have been actively instrumental in setting the law in motion. In a case where it has been shown that there was no reasonable or probable cause on the part of the arresting detail, to cause an arrest, this ought to be interpreted to mean that the plaintiff was not at fault. In *Bande v Muchinguri* at p 484 the court remarked that,

“Simply giving a 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 if besides giving information, he proceeds to lay a charge, this amounts to 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. In *Baker v Christine* 1920 WLD 14, BRISTOWE J said the test is whether the defendant did more than tell the detective the facts and leave him to act his own judgment. The principle that giving an honest statement of fact to the police on which the prosecution is then instituted is not instigating a prosecution was referred to with approval by PRICE J in *Modnitsky Rosehberg* 1949 (1) PH 15 at pp 15-16. See also *Waterhouse v Shields* 1924 CPD 155 at 160, *Prinsloo & Acoir v Newman* 1975 (1) SA 481 (A).”

See also *Econet Wireless* case at 408C.

The police arrested the plaintiffs and charged them for contravening section 41 (b) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*], that is ,disorderly conduct in a public place. The section reads as follows,

**“41 Disorderly conduct in public place**

Any person who, in a public place,

- (a) intentionally engages in disorderly or riotous conduct; or
  - (b) uses threatening, abusive or insulting words or behaves in a threatening, abusive or insulting manner, intending to provoke a breach of the peace or realizing that there is a real risk or possibility that a breach of the peace may be provoked;
- shall be guilty of disorderly conduct in a public place and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both.”

To prove this offence, it must be proved that the conduct complained against took place in a public place, the accused, intentionally engaged in disorderly conduct or used threatening, abusive or insulting words, or behaved in a threatening, abusive or insulting manner, intending to provoke a breach of the peace and realizing that there was a risk or possibility that a breach of the peace may be provoked.

The conduct complained against was observed by the police officers who arrested the plaintiffs at the scene of the offence. It is incumbent on a police officer to find corroborative evidence where he has a statement in support of an offence before he effects an arrest. Where the policeman himself witnesses the events that are subject of the offence charged, corroboration may be unnecessary. A reasonable person in the position of the arresting details would have formed the suspicion that the plaintiffs had committed an offence.

The plaintiffs protested in a public place, being Sam Levy's Village. They admitted that abusive and insulting words were uttered. The words shouted were, 'fuck beaches' and 'racist, racist'. These words are abusive. The words "Hapana anopinda nhasi," translated to mean, 'no one is getting in 'are threatening. I am satisfied the words uttered were abusive, threatening and insulting. This sort of behavior shows that the plaintiffs intended to provoke a breach of the peace and did in fact breach the peace. They hindered fellow workers from entering the offices. They insulted them and used threatening language. They threatened to kill. Zhuwau and Chiseko apologized to the court for the abusive words used. Banda also participated in the protest by urging the other plaintiffs on. The plaintiffs acted in common purpose. The behavior of the plaintiffs posed a real risk or possibility of a breach of the peace. They assaulted and pushed Kapfupi and another security guard. There was a potentially explosive situation. If the other side had fought back, an explosive situation could have arisen. There was a danger that the public might get involved. Banda testified that at some stage he went and sat at the entrance because he feared that the public might want to enter the building and probably confront their employers. The public at some stage were shouting that the other security guards were taking sides. There was a real risk or possibility that a breach of the peace may be provoked.

There was reasonable suspicion that the plaintiffs had committed the offence charged at the time of the arrest. The police had discretion whether or not to arrest the plaintiffs. Once a

finding that the police had reasonable suspicions of commission of an offence, there cannot be any malice on the part of the defendant.

The fact that the plaintiffs were acquitted at the close of the State case is not a reflection that the plaintiffs acted lawfully. The prosecution case was a single witness case. The reason for the discharge is that the court was not satisfied that the State called sufficient evidence to support its case. The court was also not satisfied with the evidence of the defense witness. The court found that the witness avoided answering questions and did not give his evidence objectively and had things to hide and did not rely on his evidence. The court found that there was no evidence to corroborate the defense witness's evidence that the other employees were hindered from getting into the offices and do their work. The plaintiffs admitted in evidence that they uttered insulting words. The first plaintiff incited the other plaintiffs. It is clear that the plaintiffs caused public disorder. The court took issue with the fact that the arresting details were not called to explain why they preferred the charge. The Magistrates Court found that the state failed to lead evidence that the plaintiff used, threatening, abusive or insulting words. The videos that capture part of the events of the day were not produced. As a result, there was no sufficient evidence of the words uttered at the gathering. The court was not satisfied that the accused behaved in a manner that provoked the peace or was likely to provoke the peace. It must be appreciated that there are many reasons for acquittals some of which may be due to technical reasons or the fact of a poor prosecution. The criminal prosecution was badly conducted. The discharge of the plaintiffs is inconsequential

The finding of the Magistrates court has no effect of binding this court. The court found the defense witness to be credible. He maintained his version of events and was not shaken under cross-examination. The burden of proof in a criminal trial is that of proof beyond a reasonable doubt and hence the burden is more onerous than in a civil trial where proof is on balance of probabilities. Proceedings in a criminal trial are not binding on a subsequent civil trial. A person who pursues a civil claim after a criminal trial has to lead evidence afresh and findings of fact made by the civil court on the basis of the evidence led. Whilst the criminal court found that the plaintiffs did not use threatening and abusive words, it is clear that such were used. The evidence that fellow workers were barred from entering their offices was not disputed in this case; it was shown that after the two ladies, who are supposed to be secretaries were insulted; they went away without carrying the stone in the car. The matter has taken a different twist. The fact that an accused

has been acquitted after a criminal prosecution does not mean that he did not commit the offence nor does it entitle him to a finding of malicious prosecution. He is not entitled to a finding of malicious prosecution because a criminal court acquitted him. Each matter has to be decided on the evidence led in the different trials and findings of the different courts. If the Magistrates Court had heard the evidence of the abusive and insulting words and seen the videos produced in this court, it is unlikely that it would have acquitted them of the charge they faced. At the end of the day the enquiry rests on whether there was reasonable commission of an offence at the time of arrest.

In the result, I must conclude that the evidence led discloses that the plaintiffs committed the offence for which they were charged. That they were acquitted is purely luck. The police were present during part of the commotion and viewed for themselves what was happening. They formulated reasonable suspicion that the plaintiffs had committed the offence charged and were justified in arresting the plaintiffs. They cannot be faulted for their conduct. The arrests were lawful. The defendant was entitled to bring proceedings against the plaintiff's in a bid to protect their own rights and bring the plaintiffs to justice and aid in the maintenance of law and order. There was no abuse of process or malice on the part of the defendant. The defendant simply reported the incident to the police who attended and arrested the plaintiffs. The defendant left the police to act on their own judgment. The police preferred the charge on their own. There was no instigation from the defendant. There cannot be malice in a prosecution where it has been shown that the police acted appropriately in arresting an accused. The fact that the plaintiffs were acquitted after the criminal trial does not carry the day. I am not satisfied that the defendant intentionally, maliciously and frivolously caused the plaintiff's prosecution.

Consequently, the plaintiffs have not shown any justification for a claim for damages.

In the result, it is ordered as follows,

The plaintiff's claim is dismissed with costs.