REGIS MAGAUZI

versus

ELVAS MARI

And

RIVERTON ACADEMY

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 26 September 2024
Judgment delivered on 29 January 2025

A. Muchandiona; for the plaintiff
T. Tabana; for the defendants

CIVIL TRIAL

ZISENGWE J: The plaintiff seeks to recover from the two defendants, jointly or severally, the sum of US$50 000 being damages for malicious prosecution. He claims that the defendants maliciously set in motion a process that led to his arrest on allegations of fraud and his subsequent prosecution in the magistrates Court. He alleges in his declaration that the first defendant made the report of fraud against him to the police while fully knowing that there was no probable cause for doing so nor did he entertain any reasonable belief in the truthfulness of the information which he supplied to the police.

The claim is firmly resisted by both defendants who deny any malice in making the police report which led to the plaintiff's prosecution. They aver that they acted in good faith and gave an honest statement to the police leaving the police to act on their own judgment. They therefore completely deny liability.

The Evidence

The plaintiff was the sole witness for the plaintiff's case and for their part, the defendants called Elvas Mari (the first defendant) as their only witness. From the evidence as a whole the broad outline of the events leading to this suit are the following. The second defendant is a private educational institution situated on the outskirts of the city of Masvingo. At the material time the first defendant was its Managing director. He had a broad remit and was basically charged with running the schools falling under the second defendant including oversight of its financial affairs. The plaintiff on the other hand had a son enrolled at one of the schools ("the school") falling under the academy. When the events which ignited the present suit occurred, the plaintiff's son was enrolled at the school. He was doing his Advanced levels. Throughout the five years immediately preceding the one in question, the plaintiff had paid the requisite school fees without ado.

Enter Francis Jekera. He is a former school mate of the plaintiff. From the evidence as a whole, he appears to be the culprit behind the attrition which subsequently ensued between the parties.

He approached the plaintiff and somehow misled him into believing that he (i.e. Jekera) had an arrangement with the Commercial bank FBC wherein they (i.e., FBC) would pay fees for his (i.e., Jekera's) children. He also managed to convince the plaintiff that since his children were no longer in school, yet funds were still being paid to the school by FBC, those funds could be channelled towards the payment of the plaintiff's son's fees. For his part the plaintiff would then pay back the Jekera. The plaintiff agreed. The arrangement was therefore that the money deposited by FBC into the school's account meant for Jekera's children would instead be credited to the plaintiff's child's account.

In his evidence, the plaintiff stated that he got confirmation of this arrangement from the then Deputy Headmaster of the school, one Mugoni. He however did not endeavour to obtain corresponding confirmation from FBC bank. Critically, the evidence shows that documentary proof of payment would be submitted to the school ostensibly showing that FBC had created the school account with the amounts in question.

It was not until October 2018, when the first defendant took over the administrative reins at the school that the documents produced as proof of payment were exposed to be fake as no money reflected thereon had been credited to the school account. That was the incendiary spark which ignited the chain of events that culminated in the present suit. Incidentally, the plaintiff was not the only parent affected as several others found themselves in a similar situation.

It is common cause that the school then sought to recover from the plaintiff the fees supposedly covered by the fake proofs of payment. Meanwhile, the plaintiff unsuccessfully tried to recover the amounts he had paid to Jekera leaving him with no option but to approach the civil court for relief in that regard.

The defendants also reported Jekera for fraud in respect of some parents who had been defrauded by him. That report was made at Borrowdale police Station in Harare.

It is further common cause that after the plaintiff was confronted by the school over the whole issue, he agreed to pay back the money school fees in question. Initial calculations suggested that he owed the school $26 100. However, upon further scrutiny it was discovered that the correct figure was $16 515. The evidence also shows that the plaintiff proceeded to pay US$6 000 on 14 October 2018, leaving a balance of $10 515.

Things however came to a head when the plaintiff refused to pay that outstanding amount in United States Dollars insisting as he did, on paying on the same through the now defunct RTGS currency. He maintained that the law entitled him to do so. It is from this stage on that the versions of the parties diverge.

The plaintiff's version

According to the plaintiff, he then proceeded to deposit the sum of RTGS10 515 into the school's account representing what he regarded as full payment of the outstanding fees. This, according to him did not go down well with the school authorities who in thinly-veiled threats informed him that they were going to get back at him. It was his evidence that the school then withheld his son's Advanced level results. They only backtracked and released those results when he sued them in the High court for their release. Copies of the correspondences exchanged between the parties in that regard were produced in court as exhibits. So too were copies of the court application in question.

It was in the wake of this development that the second defendant reported the plaintiff to the police on allegations of fraud. It was on that basis that the prosecution of the plaintiff ensued. His application for discharge at the close of the state case was unsuccessful. He was however acquitted at the conclusion of the trial. The period over which the trial proceedings took place spanned some 2 years.

Following his acquittal, the plaintiff instituted the present suit seeking to recover US$50 000 for malicious prosecution as earlier mentioned. The figure was broken down as follows:

a) US$25 000 being the costs reasonably expended by plaintiff in in defending himself against false charges including travelling and substance costs from the time of his arrest up until he was acquitted.
b) US$25 000 being damages for *contumelia*.

It is the plaintiff's position that the defendants in initiating criminal prosecution against him for fraud knowing fully well that he was the victim and not the perpetrator of the fraud were callous and malicious. According to him the statement submitted by the first defendant at Borrowdale police station against Jekera showed that he was fully aware of this fact. He could therefore not conscionably have made an about turn some four months later to allege that he was a co-perpetrator of the fraud.

He contends therefore that the report of fraud was made for no other reason than to get back at him for refusing to pay the outstanding amount in United States dollars.

The defendants' case

The position of the defendant in denying liability throughout the proceedings can be summarised as follows. Firstly, that the plaintiff was the author of his own problems in making the arrangements with Jekera who turned out to be no more than a fraudster. Related to the above is the defendants' position that by electing to make payment through a third party (Jekera) effectively acted through an agent.

Thirdly, and perhaps most importantly, the defendants aver that in reporting the case and in presenting the facts to the police, did no more than that which they were legally entitled to do. Further they contend that they were neither overbearing to the police nor did they do the actual

prosecution of the case, the latter which was the exclusive preserve of the National Prosecuting Authority, hence no liability can attach to them for the prosecution.

Additionally, according to them, the fact that the plaintiff's failed attempt at being discharged at the close of the state case buttressed that a *prima facie* case existed. They contend that his acquittal was not synonymous with proof of his innocence. Rather it was merely a failure by the State to prove the case beyond reasonable doubt.

The evidence of Elvas Mari, who testified for the defendant's case was no more than an articulation of the above position. He insisted that his role was merely to present to the police all the documentary proof, particularly the proofs of payment presented to the school which did not reflect in the school's bank account. He further indicated that all he informed the police in his statement was that the school suspected that a fraud had been committed. Thereafter he testified in the trial in question. He categorically denied that the report to the police was false in anyway. Needless to say, he denied acting with any malicious intent. It was his further evidence under cross examination that other parents were also reported to the police over the same issue.

As far as the report at Borrowdale police station is concerned, it was Mari's evidence that this related to the complaint against Jekera and had nothing to do with the plaintiff.

He would be taken to task during cross examination on why he made the allegation in his statement to the police that plaintiff had connived with Jekera to defraud the school knowing fully well that the plaintiff had in fact sued Jekera in Harare for having defrauded him.

He flatly denied that the report was actuated by malice on account of the plaintiff's refusal to pay the outstanding fees in United States dollars.

The issues

The main issue for determination is whether the report of fraud by the defendants to the police against the plaintiff was actuated by malice. This is inter-related with whether or not there was reasonable or probable cause for the prosecution. If this question is answered on the negative, then *cadit quaestio.* If, however, it is established that the defendant's acted with malicious intent, the question that follows is the quantum of damages appropriate in the circumstances.

For a claim for malicious prosecution to succeed, four prerequisites must be satisfied, namely:

a) The prosecution must have been instigated or set in motion by the defendants
b) The prosecution must have been concluded in plaintiff's favour
c) There was no reasonable or probable cause for the prosecution
d) The prosecution was activated by malice

See *Nherera* v *Shah* SC51/19; *Econet Wireless (Pvt) Ltd* v *Sanangura* 2013 (1) ZR 401 (S); *Bande* v *Muchunguri* 1999 (1) ZLR 476 (H)

Whether the prosecution was instigated by the defendants

As earlier stated, the defendant's position under this head was that all they did was to place before the police the objective facts of the case together with the requisite documentary evidence and left the rest to the officials to exercise their judgment. They therefore claim that no liability can attach them for doing so. Reliance was placed *inter alia* on two cases. Firstly, they relied on *Zenda* v *Duro* HH-667-14 where CHIGUMBA J in dismissing a claim for damages arising from malicious prosecution expressed the view from the facts of that particular case that it had not been shown that the respondent's statement to the police had not been shown to be false in a material way. Further the court stated that the applicant had failed to show that the police had been influenced by the respondents to prefer the charges against the applicant.

The second case relied upon was that of *Nherera* v *Shah* SC-51-19 where it was held as follows:

> "First, that the arrest, prosecution and detention was instigated or procured by the defendant. The word "instigate" is wide enough to include the setting in motion of events that lead to the arrest of the person accused of criminal conduct. *Google* defines "instigate" to mean to bring about or initiate an action or result. It also means to put in motion, lay the foundations of, sow the seeds of, activate. The word "procure" means to persuade or cause someone to do something. The law requires that a defendant must have been actively instrumental in setting the law in motion. Simply giving a candid account, however incriminating to the police, is not sufficient. The test is whether the defendant did more than tell the detective the facts and leave him to act on his own – *Econet Wireless*

(Pvt) Ltd v *Sanangura* 2013 (1) ZLR 401(S), 408 AB; *Bande v Muchinguri* 1999(1) ZLR 476(H), 484."

In *Econet wireless (Pvt) Ltd & Others* v *Sanangura* (Supra) MALABA DCJ (as the then was) had occasion to reflect the subject of what constitutes "the instigation of prosecution". He said:

> "Placing information and facts before the police does not in itself amount to instigating prosecution. It would amount to instigation if besides giving information the defendant proceeds to lay a charge OR overbears on the police to institute proceedings when they would not otherwise commence or institute."

The learned judge proceeded to refer to an earlier judgment of his in *Bande v Muchinguri* (*supra*) where the following was stated at p484.

> "The question is whether Mr Muchinguri instigated the institution of the prosecution against the plaintiff. J G Fleming: The Law of Torts 7 ed at p 582 states that:
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> > The defendant must have been actively instrumental in setting the law in motion. Simply giving a candid, account however incriminating, to the police … is not the equivalent of launching a prosecution: the critical 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 an active instigation of proceedings which he cannot shrug off by saying that they were in the last resort initiated at the discretion of the public authority‖"

The question that vexes the mind *in casu* is whether the first defendant went beyond merely furnishing the police with relevant information and proceeded to lay a charge (the question of him overbearing on the police does not arise *in casu*). This question is best answered not only in light of the statement submitted to the police by the first defendant but also in the context of the background of that report to the police.

The material portions of the first defendant's statement read:

1. Sometime in September 2018 we discovered that TR Magauzi a student at Riverton Academy, Masvingo [had] credit payments at the school of $16 515US. Then we checked with the bank statements at Standard Chartered and found that there was no money payment done.

2. After checking with the bank statements, we approached Regis Magauzi father of the student and told us that he was giving Francis Jekera to pay the fees. Then we approached Francis Jekera what happened about fees but he told us that he had paid the fees.

> 3. After a long time, we asked Francis Jekera to bring proof of bank statements that shows that he paid fees but he failed. As the director of the school, we decided to send the child back home. *Then Francis Jekera and Regis Magauzi approached us and told us that they did not pay fees instead they were doing fake transactions*.
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> 4. Then the father of the child came to pay some of the fees amounting to $6000 US on the 12th of October 2018 and agreed that he was going to pay the other fees. Then on the 10th of January 2019 Regis Magauzi did a transfer of $10 515 Bond and I told him that the credit payment was supposed to be $16 515US and from there he has not paid.
>
> 5. The value of the stolen money is $16 515US and the value recovered was $9004US
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> (my italicisation for emphasis)

The above statement would have amounted to no more than placing before the police relevant facts and leaving them to exercising their own judgment, but for the portion of the statement I have italicized.

This particular part of the statement was not only false in light of the overall evidence adduced, but it also created the impression that the plaintiff had admitted to the school authorities having connived with Jekera to defraud the school. This in turn was quite clearly designed to induce the police into arresting and charging the plaintiff. It also explains in part why the state outline contained the allegation that the plaintiff and Jekera connived to defraud the second defendant in school fees in respect of the plaintiff's son. The thread of the allegations running through the State Outline is suggestive of plaintiff working in cahoots with Jekera to defraud the second defendant, which of course was false.

Where someone places materially false information to the police or withholds from them critical information, the effect of which is to create a false impression of the alleged perpetrator having committed an offence, amounts in my view to "instigating" a prosecution.

Such a report is neither honest nor candid. It is tainted by a material untruth or untruths designedly to subtly sway the police and the prosecuting authority to proceed with the prosecution. The dictum from *Prinsloo* v *Newman* 1975(1) SA 481 (A) at 492 relied upon by the plaintiff is apposite. Muller JA stated that:

> "On the other hand, where an informer makes a statement to the police which is wilfully false in a material respect but for which no prosecution could have taken place, he "instigates" a prosecution and may personally liable"

Absence of reasonable or probable cause

In *Econet Wireless (Pvt) Ltd & Others* v *Sanangura* (*Supra*), MALABA DCJ (as he then was) explained the term reasonable or probable cause in the following terms:

> "The phrase 'reasonable and probable cause for 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 them to be true, would reasonably lead 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 *casu*, the chronology of events which culminated in the report being made undoubtedly demonstrate the absence of such genuine belief. The evidence shows that when the first respondent made the report to the police on behalf of the school, he was quite aware that the plaintiff as a matter of fact was the victim of a fraud by Jekera. I am fortified in this conclusion by the following. Firstly, the timing of the police report in question gives the defendants away. It only came after the plaintiff had flatly refused to pay the outstanding fees amounting to $10 515 in United States dollars. He had insisted on paying it, and did pay it in local RTGS currency. It was only after the attempt to arm-twist the plaintiff into acceding to pay the said amount in USD had failed that the defendants resorted the subterfuge of making a police report of fraud. They had done so by withholding his son's 'A' level results. Such a report cannot be said to be *bona fide*. It was actuated by some other motive.

Secondly, the first defendant, on behalf of the second defendant had earlier reported Jekera at Borrowdale police station wherein he submitted a statement showing that the plaintiff (among other parents) had been defrauded by Jekera. The first defendant could therefore not, in all sincerity, turn around and claim that the same person whom he had characterised as being the victim of a fraud was in the same breath the perpetrator thereof.

Thirdly, the uncontroverted evidence of the plaintiff was that the defendants were aware that he had successfully sued Jekera in the High Court sitting at Harare for the recovery of the sums he had paid him towards his son's school fees.

Fourthly and perhaps indirectly so, the fact that the plaintiff dared to sue the defendants for the release of his son's A' level results, which suit came against the backdrop of the dispute over the currency in which the outstanding fees were to be paid, constituted a clear demonstration of the plaintiff's conscience. He would not have been so brazen to do so had he defrauded the defendants. The defendants were aware of this.

The overall impression created, therefore, was that the instigation of the prosecution by the defendants against the plaintiff was *mala fide*. It was actuated by malice. The defendants sought to get back at plaintiff not only for refusing to pay the outstanding school fees in United States dollars but also for having the temerity of suing them for the release of his son's fees.

The question of whether or not the plaintiff by agreeing with Jekera for the latter to pay fees for him created a relationship of agency is neither here nor there. What is critical is whether the defendants had reasonable or probable cause to believe that the plaintiff had acted fraudulently towards the second defendant, which quite clearly, they did not.

Whether the prosecution was concluded in plaintiff's favour

The fact that the plaintiff was not discharged at the close of the State case cannot serve to deflect liability. What is critical is that the prosecution must have been concluded in plaintiff's favour.

On the whole, I found the plaintiff to be a credible witness. Not only did he fare quite well on the witness but also his evidence neatly dovetailed with the documentary exhibits produced. It also equally tallied with the time-lines of the events that led to the police report and his arrest. The first defendant on the other hand was not impressive as a witness. He could not satisfactorily explain why the report to the police came at the time it did. More particularly he failed to explain why the school's attitude towards the plaintiff suddenly changed from him being a victim of the fraud to being the perpetrator thereof. It would be stretching the bounds of credulity to suggest that it was coincidental that the report was only made hot on the heels of the stand-off with the plaintiff over the currency in which the outstanding fees were to be paid.

For the foregoing I am satisfied that the plaintiff has on a balance of probabilities proved the delict of malicious prosecution against the two defendants.

Quantum of Damages

As stated earlier, the plaintiff's claim is divided into two. $25 000 for costs reasonably he incurred in defending himself against the prosecution including travelling and subsistence costs and $25 000 for *contumelia*. In respect of the former, the plaintiff was able to produce six receipts issued to him by Danziger and Partners, the legal practitioners who represented him during the criminal trial in question. He also produced an equal number of receipts for the fuel he purchased various service stations. The latter receipts cover the period under which he was on trial in Masvingo. He testified that he needed to regularly travel to Masvingo for his trial hence the fuel receipts. At the material time he was ordinarily resident in Harare. The total receipts for the legal fees amounted to US$20 300 while the fuel costs amounted to $531, 30.

As regards the quantum of damages for *contumelia*, the plaintiff based these, inter alia on what he perceives as his relatively high standing in society. This in turn is based on his employment status and his level of education. He also based it on promotion opportunities he missed on account of the Criminal charges hanging over his head at the time. He is currently employed by the United States Agency for international development ("USAID") as a "malaria specialist" having previously been employed in various capacities. He holds a Master's degree in public health. He asserts that he was forced to quit his Doctoral studies in public heath which he was pursuing with Africa University on account of the prosecution.

In Visser & Potgieter, law of damages 3rd edition at 549 50 the learned authors had this to say in this regard:

> "The non-pecuniary damage caused by malicious prosecution (and malicious civil proceedings) consists primarily in impairment of the plaintiff's, good name, physical liberty and feelings of dignity. The factors which influence the amount include the seriousness of the crime for which the plaintiff was prosecuted and the severity of the penalties in the case of conviction; the period of incarceration; the period during which the charge hung over the plaintiffs' heads, despite the plaintiffs' acquittal; persistence by the by the defendant in the charge originally preferred against the plaintiffs; the fact that the charge had not been withdrawn but proceeded with until the plaintiff was acquitted at the end of the State case; malice on the part of the defendant; that the plaintiff has a right to be compensated for personal insult, indignity and humiliation and …

inevitable defamation; the absence of apology on the part of the defendant; and awards in comparable cases (taking inflation into account)."

The court has a discretion on the quantum of damages to be awarded in light of the factors outlined above. See *Minister of defence & another* v *Jackson* 1990 (2) ZLR I (S) & *Jayesh Shah v Professor Charles Nherera* (*supra*)

A perusal of kindred cases reveals that damages for *contumelia* arising from malicious prosecution varies depending on the circumstances of the case. On the one hand such damages can be quite low. In *Patrick Mapiye* v *Minister of Home Affairs & Ors* HH-146-18, for example, the sum of US$1000 was awarded for *contumelia* arising from malicious prosecution. In *Cyntia Fungai Manjoro* v *The Minister of Home Affairs & Ors* HH-153-18 the sum $5000 was awarded. On the other hand, such damages can be relatively high. In *Ricky Nathanson* v *Farai Mteliso & Ors* HB-176-19, for example, the court awarded the sum of US$200 000 in damages for emotional distress and *contumelia*. See also *Jayesh Shah* v *Prof Charles Nherera* SC-55-24.

In the present matter, I find the following factors to be relevant in the assessment damages – that the plaintiff is a person of some standing in society, given his academic and professional background; that the plaintiff had to endure close to three years of the criminal case hanging over his head; that there was no apology that was forthcoming from the defendants for putting the plaintiff through this daunting ordeal; that the plaintiff lost out on academic and career progression on account of the prosecution and the obvious malice that accompanied the prosecution. I however take into account that the plaintiff was not incarcerated on account of the arrest and subsequent prosecution nor was he subjected to any physical or emotional abuse in the course thereof. I hold the view that on the sum of $15 000 for *contumelia* is appropriate.

Costs

The plaintiff beseeched the court to award costs on the punitive scale. He justified this on the basis that the defendants had embarked and persisted his prosecution which was malicious a period of almost 3 years.

I however do not believe that there are convincing grounds to award costs on the punitive scale. Having been awarded recompense for the malicious prosecution, it would in my view amount to double dipping to award costs on the punitive scale for that same reason.

Accordingly, the claim succeeds as follows:

a) The defendants are hereby ordered to pay the plaintiff the following damages -
   i) US$21 000 for costs incurred by plaintiff in defending the prosecution.
   ii) US$15 000 for *contumelia.*
   (the above amounts are payable in the equivalent in value in Zimbabwean currency calculated at the prevailing inter-bank rate on the date of payment.)
   iii) Interest on the amounts awarded at the prescribed rate calculated from date of judgment to date of full payment.
   iv) Costs of suit.

Danziger & Partners; Plaintiff's legal practitioners
Tabana& Marwa, defendant's legal practitioners