

DICKSON CHAERUKA  
and  
ELIAS MATANDA  
and  
EDSON NYAMBANJE  
and  
PORTIA SIBANDA  
and  
ISAAC KAPENI  
and  
REGIS DURI  
and  
ALLEN CHAKABUDA  
and  
JUSTIN MUWONDA  
and  
BEATRICE KWENDEPI  
and  
GILES MAWONEKE  
and  
STEPHEN MAJAHA CHANDAKABATA  
and  
CHRISTIN MUKOLOSA  
and  
JACKSON MTISI  
and  
SUPERIOR BOKA  
and  
LAINA SHARARA  
and  
DELIWE MUNYONGWA  
and  
ARCHFORD MARIGA  
and  
BABRA CHIVIGE  
and  
ADAM NHAMO

versus

MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE N.O  
and  
COMMISSIONER GENERAL ZIMBABWE REPUBLIC POLICE N.O  
and  
ASSISTANT COMMISSIONER FLORENCE MARUME N.O

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 9 and 19 May 2022

## **CIVIL TRIAL**

*P Nyakureba*, for the plaintiffs  
*P Garwe*, for the defendants

MUZENDA J: All the 19 plaintiffs who are members of the Zimbabwe Congress of Trade Union for the Eastern Region (ZCTU) are claiming from the 3 defendants jointly and severally the following:

- a) *Payment in the total sum of ZWL \$38 million broken as follows:*
  - (i) *\$500 000 for unlawful arrest for each*
  - (ii) *\$500 000 for unlawful detention for each*
  - (iii) *\$1 000 000 for malicious prosecution against the defendants*
- b) *Interest thereon at the prescribed rate from the date of issue of summons to date of full and final payment.*
- c) *Costs of suit on a legal practitioner-client scale.*

*On 13 July 2021 all 3 defendants entered appearance to defend the claim.*

### Background

Plaintiffs in their declaration state that they were arrested by police on 11 October 2018 at the specific instructions of third defendant. They were detained in police cells without reasons for their arrest. All were then handed over to the law and Order section. Later all plaintiffs were alleged to have had participated in a gathering with the intention to promote public violence breaches of the peace or bigotry alternatively that they had encumbered or obstructed the free passage along Jameson Street, Mutare intending to carry out a demonstration. Plaintiffs were detained in holding cells for two nights before appearing in court. Plaintiffs believe that both the arrest and detention were wrongful.

After trial by the Magistrates Court, at Mutare all plaintiffs were discharged and acquitted at the close of the state case on 13 November 2020. Plaintiffs content that all defendants intentionally and maliciously instigated the criminal legal action against them. Defendants did so without probable cause and plaintiffs were maliciously prosecuted. They added that they were not promptly informed of the reason for their arrest, there was no

reasonable suspicion that an offence had been committed or was about to be committed and that third defendant instigated the prosecution. When third defendant acted, she did so in the course and scope of her employment and first and second defendants are vicariously liable.

Defendants on the other hand state in their plea that all plaintiffs were informed of the reason of their arrest instantly at the time of their arrest at the offices of ZCTU Eastern Region at No. 14 Jameson Street, Mutare. Defendants add that plaintiffs were arrested whilst participating in a gathering with intent to promote public violence and what defendants did was to maintain law and order. To the defendants a full criminal docket was compiled and a criminal record was opened leading to the prosecution of plaintiffs. All 3 defendants deny liability and pray for the dismissal of plaintiff's, claim.

#### Issues for determination

Parties agreed to proceed on the basis of a slated case and the issues were spelt out as follows:

- a) *whether or not the arrest and detention of plaintiffs was unlawful*
- b) *whether or not the prosecution of the plaintiffs was malicious*
- c) *if the answers to (a) or (b) are affirmative, the quantum of damages*
- d) *whether or not first and second defendants are vicariously liable for the delicts of third defendant in the circumstances.*

Paragraphs (a) and (b) are summarised as follows for purposes of determination.

Whether or not the plaintiffs arrest, detention and prosecution was lawfully conducted based on reasonable suspicion as well as the factual issues of whether plaintiffs were treated as amplified in the declaration?

#### The Law

In the matter of *Manjoro v Minister of Home Affairs and Others*<sup>1</sup> it was held that:

“For an arrest to be lawful, the arresting detail must ensure that before he arrests, he has verified the information or report which he has received. He must formulate a reasonable suspicion that an offence has been committed. If an arresting detail does not properly exercise his mind and the report turns out to be false, the arrest becomes unlawful. The onus is on the person who has effected an arrest to justify the lawfulness of the arrest. An arrest only becomes lawful where the arresting detail has formulated a reasonable suspicion that an offence has been committed.”

---

<sup>1</sup> 2018 (1) ZLR 279 (H) per Dube J (as she then was)

*In Banda and Others v Mutual Finance (Private) Limited*<sup>2</sup>

“An arresting detail must have formulated a reasonable suspicion that an offence has been committed by the suspect in question. The question as to whether a reasonable suspicion exists or not must be resolved objectively. Once a defendant has established reasonable cause for the arrest, there ceases to be a malice on the part of the defendant. To the contrary, where there is no reasonable and probable cause for the arrest of the plaintiff, it may mean that plaintiff was not at fault and therefore the arrest was unlawful.”

It was held further that: <sup>3</sup>

“In a delictual action for malicious prosecution the following are the requirements:

- a) that the prosecution was instigated by the defendant
- b) that the matter was finalised in favour of the plaintiff
- c) that there was no reason or probable cause for the prosecution or continued prosecution, and
- d) that the prosecution or its continuation was actuated by malice on the part of the defendant.”

It was further held in the same case that:

“That instigating proceedings means setting the law in motion against the plaintiff. The plaintiff is then entitled to sue for the infringement of his liberty if the arrest was unlawful. The plaintiff must show that the defendant did more than just give a candid account to the police or other agents of the law. The defendant only becomes liable if besides giving information, he proceeds to lay a charge. That amounts to active instigation of proceedings which cannot be shrugged off by alleging that the prosecution was at the discretion of the public authority before whom information is placed.”

An acquittal of an accused person by the magistrate court has no binding effect on the High Court in a subsequent civil trial for malicious prosecution.

In the matter of *Nherera v Shah*<sup>4</sup> citing the case of *Econet Wireless*, MALABA DCJ (as he then was) said:

“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 the 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. The test for determining the existence of reasonable suspicion is an objective one. 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.”

Application of the law to the facts

---

<sup>2</sup> 2018 (1) ZLR 287 (H) per Dube J (as she then was)

<sup>3</sup> (*supra*)

<sup>4</sup> 2015 (2) ZLR 455(H) at p 409

Facts summarised by the state leading to the prosecution of all plaintiffs indicate that on 8 October 2018 a colleague of the plaintiffs Tenison Muchafa made a written notification to the police seeking permission to hold a demonstration march from ZCTU offices along Jameson Street along Railway Street. Hebert Chitepo Street then proceeded to Government Complex situated along Robert Mugabe Road where they intended to hand over a worker's petition to the Resident Minister for Manicaland province. On 10 October 2018 Police Regulating Authority turned down the notification and plaintiffs were notified. On 11 October 2018 police learnt about plaintiff's gathering, they proceeded to ZCTU offices and found a group of workers, plaintiffs among them holding placards and singing denouncing a recently introduced government monetary policy. In actual fact the plaintiffs regardless of being denied the opportunity to demonstrate wanted to proceed with the intended march, according to the police then proceeded to arrest and detain twenty (20) employees, nineteen of whom are the plaintiffs. All the nineteen plaintiffs were charged of contravening s 37 (2)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] that is acting together with the intention of forcibly disturbing peace, security or order of public or any section of the public. Alternatively all nineteen plaintiffs were charged with contravening s 46 (2)(f) of the same Criminal Law code that is all nineteen acting in common purpose blocked or obstructed the free passage along Jameson Street while intending to carry out a street demonstration.

All plaintiffs admit being at ZCTU offices at the time, so gathering is apparently not in dispute. All plaintiffs were arrested "*Whilst going about their business and neither had the intention to commit any criminal offence*". It is not clear from the pleadings what business plaintiffs were doing. It is upon these facts that the court has to decide whether or not the arrest and detention of the plaintiffs was unlawful and whether the subsequent prosecution was malicious.

It appears from the colour of pleadings and evidence placed before the court most facts are not in dispute. Prior to 11 October 2018 plaintiffs had sought police approval to hold a demonstration. The police did not approve of it and plaintiffs were apprised of same. On 11 October 2018 all plaintiffs in the company of others assembled at the ZCTU offices. That is when they were taken to court for initial appearance and released on bail. In 2020 they were all acquitted and they resolved to sue the defendants. These are facts that were never disputed and from these facts plaintiffs allege unlawful arrest and malicious prosecution. The parties at a joint pre-trial conference agreed to place the burden of proof on the plaintiffs on all aspects.

Third defendant was then the District Commanding officer for Mutare whom plaintiffs alleged instigated their arrest. She did not physically arrest any of the plaintiffs, she did not detain any of the plaintiffs, nor did she testify during Criminal proceedings, her contribution is presumably lying as ordering police details to arrest plaintiffs' no such evidence was adduced by the plaintiffs serve to rely on proceedings of the Criminal Court. No police detail came before the court to state that. The role of third defendant largely depends on what plaintiffs perceive to be what could have happened leading to their arrest. That to me is not enough. Third defendant must be proved to have been the cog or live wire right from the start in order to gauge her liability. It was not enough for plaintiffs to rely from what police witnesses told the trial magistrate as to who gave police orders to arrest the plaintiffs. The plaintiffs also come short of explaining the reason behind third defendant's conduct. What drove her to maliciously instigate the prosecution. I am aware that the term "*malice*" does not mean "*spite*" or "*ill will*" or "*a spirit of negligence*".<sup>5</sup> But such evidence greatly assist the court to interpret a defendants conduct more so where defendant pleads acting in tandem with her duties as a police officer, what else other than maintaining law and order did third defendant aim to achieve so as to "fix" the plaintiff so to speak? Where a defendant in the shoes of third defendant pleads as her sole ground for acting in the manner complained of that is maintaining law and order or enhancing rule of law by a police detail, plaintiff must for further to prove that a defendant has other ultra-motives to behave in the way complained of that ought to be pleaded and proved in court.

The alleged participation of third defendant is one from behind the scenes. The arresting details were not cited by the plaintiffs, the one who warned and charged the plaintiffs remains anonymous. It is necessary that their evidence is vital moreso to check whether any of these police details advised third defendant as to the nature of the allegations view of not pursuing the matter any further. The plaintiffs did not challenge their placement on remand in 2018 and waited till the date of acquittal to know their fate. In reality the plaintiffs themselves believed that there were reasonable and probable cause for their prosecution. They pleaded to the charges and proffered defences to them. They were only acquitted at the close of the state case. The prosecution as well as the trial court believed that there were reasonable grounds to prosecute the plaintiffs and plaintiffs acquiesced up to the stage of their acquittal. To me plaintiffs should have set the law into motion right from the date of initial appearance before a judicial officer. They did nothing.

---

<sup>5</sup> See *Bande v Machingura (supra)* cited in *Banda and others (Supra)*

Plaintiffs also failed to lead evidence to explain the purpose of their gathering on 11 October 2018. What was their “*daily usual business*” they were doing? Do they daily assemble, sing and hold placards? I am satisfied that a reasonable and alert police detail ought to have reacted to such a conduct of plaintiffs and enquire the cause for such a gathering singing obviously and naturally attracts public attention and disturbs peace. I have come to a conclusion that police were within their mandate to arrest and detain all the plaintiffs. Law and Order Department chose an appropriate charge to be preferred against the plaintiffs and referred them for prosecution. I am not convinced that plaintiffs were unlawfully detained at the instructions of the third defendant.

Having examined both the facts of the matter, evidence adduced and the law I am constrained to conclude that the plaintiffs have managed to prove that the prosecution or its continuation for two years was activated by malice on the part of third defendant. It is not clear from the proceedings why she was cited by the plaintiffs. An acquittal of an accused by a criminal court does not accord an aggrieved plaintiff to an automatic entitlement for delictual damages, plaintiff must prove its case on a balance of probabilities in order to succeed. Third defendant is delictually liable for malicious prosecution nor unlawful arrest and detention.

Having come to the conclusion *visa a vis* third defendant’s liability, it equally means first and second defendant are not vicariously liable.

It is accordingly ordered as follows:

Plaintiff’s claims are dismissed with costs.

*Maunga Maanda & Associates*, Plaintiffs Legal Practitioners.  
*National Prosecuting Authority*, Defendant’s legal practitioners