

NKOSINATHISOLOMON ABU-BASUTU

VERSUS

KHULUMANI MOYO

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 29 NOVEMBER & 12 DECEMBER 2013

Mr G. Moyo, for the Plaintiff

Defendant in default

CIVIL DAMAGES

MAKONESE J: The plaintiff filed a claim in this Honourable court seeking the following relief :-

“(a) Payment in the sum of R2 450 000 due for damages for detention of plaintiff by South African Authorities for 98 days as a result of defendant having stolen money from his employer, deposited it with a bank account of a company jointly owned by the parties, i.e Masiqhame Trading 1356 CC and withdrawing the said money for his own use without the knowledge of the plaintiff. The defendant, by his actions, procured the arrest, charging and subsequent detention, for fraud of the plaintiff and the defendant’s actions in so doing were wrongful and plaintiff suffered damages of R25 000 per day for the 98 days. Despite demand, the Defendant has refused to pay.

Or Alternatively

(b) Payment in the sum of R2 450 000 being damages arising out of plaintiff’s detention by South African authorities for fraud arising out of Defendant’s breach of trust and duty of care bestowed on him and / or which he owed the plaintiff in using the bank account of the parties’ South African company called Masiqhame Trading 1356 CC (Registration 2008/102749/23). The defendant, during plaintiff’s absence, without his knowledge and in breach of the said trust in appropriately or allegedly stole money from his employer and deposited it into Masiqhame Trading’s bank account and withdrew it thereafter, for his own use before fleeing to Zimbabwe. Despite demand the defendant has refused to pay.

Or Alternatively

- (c) Payment in the sum of R2 450 000 due in respect of damages for embarrassment, trauma and humiliation suffered by the plaintiff for 98 days when he was arrested, charged and detained by South African authorities as a result of Defendant's alleged criminal activities where it is alleged that he, without the plaintiff's knowledge, stole money from his employers, deposited it into a bank account of Masiqhame Trading, the parties' Closed Corporation and thereafter withdrew it for his own use before fleeing from South Africa to Zimbabwe. Despite demand, the Defendant has refused to pay."

The Deputy Sheriff effected service of the summons at the defendant's place of residence on the 25th April 2013. The defendant entered an Appearance to defend on the 6th May 2013. A Notice of Intention to Bar was filed and served on his legal practitioners on the 31st May 2013. The defendant failed to file his plea and was duly barred on the 18th June 2013. The Plaintiff has made an application for default judgment and in his Affidavit of evidence he avers that defendant was his friend and a co-director of Masiqhame Trading a company registered in the Republic of South Africa. Following the incorporation of the said entity the parties opened a Bank Account with Nedbank South Africa (Account Number 1906492050). The plaintiff and the defendant never utilized the bank account. The defendant worked elsewhere whilst the plaintiff was working for another company. The plaintiff avers that during the period 31 August 2010 and 4th July 2011 the defendant fraudulently transferred money from his employers amounting to R9 093 615.33 to the Masiqhame Trading Nedbank account. The defendant's employers were Barloworld Logistics and were based in South Africa. The defendant then proceeded to withdraw all the ill-gotten funds from the Masiqhame Trading Nedbank account for his personal use without plaintiff's knowledge. The defendant fled from South Africa once he had finalised these illegal transactions and never returned to South Africa. The plaintiff remained in South Africa totally oblivious of the activities of the defendant related to the transfer of funds from Barloworld Logistics to Masiqhame Trading account. On the 18th January 2012 the plaintiff was picked up by the HAWKS (Commercial Crimes Unit) of South Africa and detained in connection with the illegal transactions that had been effected by the defendant.

The Plaintiff was questioned by the South African authorities from 18 January 2012 to 23 January 2012. It was then that plaintiff discovered that defendant had stolen R9 million from his employer, transferred it to the Masiqhame Trading account before withdrawing it for his own personal use. Plaintiff was kept in detention cells and formally charged with the defendant in absentia. Plaintiff was released from remand prison on 25th April 2012 after 98 days of deprivation of liberty, when charges against him were provisionally withdrawn.

Upon his release from custody, plaintiff confronted the defendant who did not deny his wrong doing. In spite of his initial promise to compensate plaintiff for the trauma and

humiliation caused by his actions, defendant eventually became hostile and refused to compensate plaintiff. Legal proceedings were commenced against the defendant who has been duly barred for failing to file a plea.

The plaintiff claims damages at the rate of R25 000 per day for each day that he spent in custody as a direct consequence of defendant's actions. Plaintiff claims that during his incarceration, he suffered trauma, humiliation and his dignity was severely impaired. He was seen by friends and associates as a criminal. His credit worthiness was seriously affected as he failed to service his accounts due to the wrongful detention. His family was deprived of a husband and a father for the entire period. The plaintiff was subjected to severe pain and anguish for being locked up in jail for so good cause. The Plaintiff avers that he then suffered unimaginable trauma. It was his first time to experience being arrested, interrogated and appearing in court under high security.

The plaintiff further indicates that the defendant had benefited from his illegal conduct and used the proceeds of the criminal transactions to purchase a house in Malindela, Bulawayo, 5 Toyota Quantum vehicles, a Mercedes Benz GL, a Mercedes Benz A160, a Toyota Yaris, a Toyota Double Cab, Toyota Hiaca vehicles, opened sports bars and other businesses in Bulawayo. The plaintiff contends that defendant owed him a duty of care to ensure that whatever he did with the joint Bank Account did not affect or cause harm to him. The plaintiff further contends that the defendant's failure to apologise and his apparent lack of contrition increases his moral blameworthiness. The plaintiff who is a professional accountant has become almost unemployable and his dignity and self-esteem has been heavily detented.

The Legal Position

The delict of malicious prosecution and detention has usually been brought against government institutions where a person's liberty and freedom is wrongfully deprived. I am of the firm view that in appropriate circumstances actions for wrongful arrest and detention can also be brought against individuals. The test ought to be that where a party's direct or indirect conduct leads to the wrongful arrest of another, the person whose liberty has been infringed is entitled to recourse against the party causing such arrest and detention.

Mc Kerron in his *Law of Delict*, 7th Edition at page 259 and 260 states that:

"It is also an actionable wrong to procure the imprisonment or arrest of anyone by setting the law in motion against him maliciously and without reasonable cause".

The plaintiff has established the essential requirements in claims based on malicious arrest and

prosecution, that is the need to allege and prove that:-

- (i) the Defendant set the law in motion.
- (ii) the defendant acted maliciously and;
- (iii) without reasonable and probable cause and,
- (iv) he acted without a duty of care towards the plaintiff

See: *THOMPSON & ANOTHER v MINISTER OF POLICE* 1971(1) SA 371

It is beyond dispute that the defendant by utilizing the company's bank account for his illicit dealings acted maliciously and set the law in motion against the plaintiff without reasonable and probable cause. The defendant fled South Africa where he went on a spending spree in Zimbabwe well aware that he was exposing the plaintiff to the risk of arrest and detention. The defendant was well aware of the consequence of his actions. As co-directors the defendant owed a special duty of care to the plaintiff not to utilise the company account in a manner that would not endanger the plaintiff in any manner whatsoever. The defendant not only broke the trust between himself and the plaintiff but also breached the duty of care to operate the company's Bank account for lawful means. Plaintiff's arrest and detention was a direct consequence of the defendant's nefarious activities and plaintiff is entitled to compensation for the unwarranted deprivation of his liberty. Plaintiff's life was needlessly disrupted by the incarceration. He was prevented from carrying out his normal duties and his daily activities. His loss of income for the 98 days he was in detention is not capable of easy ascertainment.

In the case of *Botha v Zvada* 1997 (1) ZLR 415 it was held that:

"As regards the quantum of damages ... our courts have quite properly taken the stance that deprivation of liberty is a very serious infraction of fundamental rights"

In casu, the plaintiff's imprisonment was unjustified and unfortunate. Once the defendant had executed his illegal transactions and fled to Zimbabwe, the plaintiff remained as a sitting duck in South Africa. He had to fight to prove that there was no wrongdoing on his part. When the plaintiff was released by the South African authorities he confronted the defendant who showed no remorse. Any award of damages against the defendant should take into account the defendant's unrepentant attitude.

In support of his claim for damages the plaintiff has cited a number of cases which are not helpful as regards an appropriate award of damages. All the cases involve legal suits for damages brought against institutions, more particularly the Home Affairs Ministry or

Commissioners of Police. In the case of *MINISTER OF SAFETY & SECURITY v SEYMOUR* 2006 (5) SA 495, a 65 year old chairman of a Small Scale Farmers Association and Managing Director of a co-operation was awarded R90,000 per day as damages for wrongful arrest.

The plaintiff is claiming a sum of R25 000 per day as damages. The plaintiff has not set out the basis upon which he arrives at the said daily rate. It seems to me that the figure being claimed per day has not been arrived at upon a rational basis. In fact there is no cognisable formula upon which the figure has been based. I propose to approach the quantum of damages by awarding a global figure based on what I perceive to be a fair reflection of an award that would adequately compensate the plaintiff. There is a need in all the circumstances of the case to award exemplary damages regard being had to the following factors:

- (a) the award must be fair and reasonable.
- (b) the award must provide adequate compensation to the injured party.
- (c) the award must penalise the defendant for his malicious and reckless conduct.
- (d) the award must be exemplary, in that the defendant has benefited financially whilst placing the plaintiff at serious risk.
- (e) the defendant has tendered no apology to the injured party.

In articulating the principle and basis upon which the quantum of damages showed be determined, *GREENLAND J*, in the case of *MASAWI v CHABATA* 1991 (1) ZLR 148(H), stated at page 159 A-B:

“As regards quantum it must be borne in mind that the primary object of the action injuriam is to punish the defendant by the infliction of a pecuniary penalty, payable to the plaintiff as solatium for the injury to his feelings. The court has to relate the moral blame worthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim. Because of the various subjective aspects involved, which must necessarily be peculiar to the case, precedence can only be of general assistance.”

As already pointed out most of the cited cases are not helpful because the circumstances of those cases are materially different. This action is being brought against an individual and not a state institution. In this case I note that the defendant benefited to an amount of R9 million. He has acquired various assets and is living large. He has also invested some of the proceeds of the crime to set up sports bars which no doubt are generating some revenue for him. On the basis of the observations I have made above and the principles which I have set out I now turn

to make the award in this matter. The plaintiff is claiming the sum of R 2 450 000 being damages arising out of his wrongful arrest and detention. This amount translates to approximately US\$ 245 000. This is a high award which is unprecedented in this jurisdiction. I am satisfied that adopting the approach I have set out above, a figure in the sum of US\$30 000 would appropriately compensate the plaintiff for the wrongful arrest and detention for the period of 98 days caused by defendant's wrongful conduct.

In the result I make the following order:

1. The plaintiff is awarded damages in the sum of US\$30 000 for wrongful arrest and detention.
2. Interest on the said amount at the prescribed rate from the date of judgment to date of final payment
3. Defendant is ordered to pay costs of suit.

Messrs Moyo & Nyoni, plaintiff's legal practitioners

S K M Sibanda & Partners, defendant's legal practitioners