

FELIX MAKONYE
versus
MR MUSARA
and
BLESSING NYAMUDA
and
MANIFEST SECURITY

HIGH COURT OF ZIMBABWE
MATHONSI AND MAKONESE JJ
BULAWAYO 22 AND 25 FEBRUARY 2016

Civil Appeal

M. Ndlovu for appellant
Miss N Dube for respondents

MATHONSI J: At the time that the appellant was reported to the police in connection with missing drugs he was employed as a dispensary assistant at Mpilo Hospital pharmacy in Bulawayo. He was working with one other person by the name Sithabile Dlodlo. Their duties involved receiving orders for drugs from hospital wards and dispensing the drugs by placing them in drug boxes. The drugs would then be checked by the security guard from a private security company contracted by the hospital, against the doctors' charts serving the purpose of prescriptions.

The security guard performing those duties was the second respondent who was under the supervision of the first respondent, a chief inspector with one hundred and twenty other security guards under his command. The two were employed by the third respondent, a security company contracted by the hospital.

It so happened that on 13 February 2013, while the parties were performing their respective duties aforesaid, drugs meant for ward C1 at the hospital went missing. After the second respondent had been sent from pillar to post looking for those drugs, she reported the matter to her superior, the first respondent. When inquiries were being made on the missing drugs, the appellant decided to leave his work place and could not be found anywhere. The first

respondent then reported the matter to the police pointing out that it was the appellant and Sithabile Dlodlo who were responsible for dispensing drugs, leading to the appellant's arrest.

After a search was conducted by the police at his house and following inquiries, the appellant was released and no charges were preferred against him except the charge relating to threats of violence against the second respondent for which he paid an admission of guilt fine at the police station. After paying the fine the appellant proceeded to demand that he be taken to court. Although it is not clear how that matter panned out, the charges were subsequently withdrawn after plea.

The appellant then instituted summons action at the magistrates court in Bulawayo for "damages for unlawful detention, false incrimination and defamation" in the sum of \$10 000-00 together with punitive costs against the three respondents. In his particulars of claim, he made the following averments:

- “6. Sometime between the 13th of February 2013 and 20th February 2013 the first defendant reported a theft matter against the plaintiff at Mzilikazi Police Station.
7. The first, second and third defendants together with police officers at Mzilikazi Police Station proceeded to plaintiff's house and conducted a search. The said search was illegal.
8. After the search, the plaintiff was detained at the police station for the whole day and was called back the (sic) subsequent days.
9. As a result of first, second and third defendants' action, the plaintiff suffered humiliation and his good name was tarnished as he was viewed by colleagues and relatives as a thief.
10. Further, the plaintiff was deprived of his liberty on flimsy charges, which were never sustained.
11. As if that was not enough the second defendant proceeded to report false charges of threat of violence, resulting in plaintiff being detained again at Mzilikazi Police Station. The plaintiff was later acquitted of the said charges after the state withdrew the charges after plea.
12. At all material times the first, second and third defendants acted in the course of their employment, hence the employer, Manifest Security is vicariously liable.”

The pleading has its serious frailties and it is not easy to appreciate how such averments could be made against a company. In addition, it is not clear what the basis of the claim was between malicious report, malicious prosecution and defamation of character. At the hearing of the appeal, Mr *Ndlovu* who appeared for the appellant, was adamant that the cause of action was

the “false report” made to the police about the missing drugs thereby relegating the allegations of a false report on threats of violence and defamation to mere foot notes.

The respondents successfully contested the suit in the court *a quo* which dismissed the claim reasoning that there was reasonable suspicion against the appellant as drugs had gone missing under his watch. The court also found that in making the report to the police the first respondent had not acted with malice and that defamation had not been proved either.

The appellant was unhappy with that judgment and noted an appeal to this court on the grounds that the court *a quo* had erred in finding that there was reasonable suspicion that he had committed an offence when such a finding could only be made by the criminal court. In addition the court *a quo* erred in ignoring the “glaring evidence” that the respondents intended to embarrass and falsely incriminate him when no drugs had gone missing at all.

The evidence led at the trial shows that it was common cause that the first respondent merely made a report to the police who then questioned the appellant and later released him. He also made a report about the threats made by the appellant to the second respondent resulting in him paying an admission of guilt fine. It was also common cause that the appellant had not been detained in connection with the missing drugs. He was only detained at his instance after he had paid an admission of guilt fine for threats of violence but later insisted on being taken to court.

The appeal which the appellant has prosecuted is premised on what he regards as a false report of missing drugs and not his misadventure following his admission of guilt on the charge of threats of violence. That is what Mr *Ndlovu* submitted.

The law relating to malicious arrest or imprisonment is succinctly set out by the learned authors G. Feltoe and P Lewin in an article titled: “*Remedies for Unlawful Interference With Personal Liberty in Zimbabwe*” under the heading; Malicious Arrest and Detention and Malicious Prosecution, 1987 volume 5 ZLRev 26 at pages 38-39 where they state:

“The delict of malicious arrest or imprisonment is committed ‘when the defendant had maliciously and without reasonable or probable cause procured the arrest or detention of the plaintiff by the proper authorities.’ Where a person knows or suspects that another person has committed a crime, he has a lawful right to lay a charge against him with the police. If the result of this report is the arrest and imprisonment of the person against whom the charge is laid, that person has no right of action for damages against the reporter if later the charge is dropped. On the other hand, if there is no reasonable and

probable cause for the allegation of criminal conduct and the person making the allegation was acting maliciously in making the report, then this constitutes an abuse of the right to lay genuine complaints and an action for damages will lie after he is released from custody when it is discovered that there is no valid basis for continuing to hold him, where there is no reasonable foundation for believing that the plaintiff has committed a crime and the defendant lays a complaint of criminal conduct knowing or suspecting that this complaint is without foundation and intending simply to cause harm to the plaintiff by having him arrested and held in custody, this delict is committed. In other words, where the motive in laying the complaint is to injure the plaintiff, and there are no reasonable grounds for making the allegation, the defendant can be sued by the plaintiff after the police have released him upon finding the allegation to be baseless. Proof of malice is not an easy matter, but the plaintiff may seek to establish it as a matter of inference from the fact that there was no reasonable ground for suspecting that he had committed a crime, such as to form the basis for the complainant.”

See also *Nherera v Shah* HH 845/15 (as yet unreported); Mckerron, *The Law of Delict*, 7th edition page 259-260.

It would be appreciated that the delict of malicious prosecution is different from that of malicious arrest or imprisonment as it relates to a situation where the defendant, without reasonable or probable cause, institutes criminal proceedings against the plaintiff. With malicious prosecution, the prosecution at the instigation of the defendant takes place but concludes in favour of the plaintiff. With arrest or imprisonment, the police release the plaintiff on their own after satisfying themselves that there is no valid reason for holding him.

Although the appellant’s pleadings and indeed his evidence do not appear to make a distinction between the two, it is clear that his claim is based on malicious arrest. He was never imprisoned for the missing drugs. It is important that litigants claiming under this cluster of delicts plead properly so as to show under which of these delicts they are claiming.

The appellant had the onus of proving that the respondents did not have any reasonable and probable cause for suspecting that he had committed an offence and that they acted maliciously in making the report. It is only upon proof of lack of reasonable or probable cause that an inference can be drawn that the respondents had an ill motive against the appellant or that they were actuated by malice.

The court *a quo* made a finding that the respondents had reasonable cause to suspect that the appellant had knowledge of the missing drugs. That is why in its judgment it stated that there

was “a reasonable suspicion” that the appellant had committed an offence. In my view there was no misdirection whatsoever. I do not agree with Mr *Ndlovu* for the appellant that a determination on the existence of a reasonable suspicious is the province of the criminal court. In fact the essentials of the delict include proof that the reporter had no reasonable or probable cause for suspecting that a crime had been committed which in essence is the same inquiry.

The facts are that drugs were missing. Only the appellant and Sithabile Dlodlo were responsible for dispensing the drugs. When the matter was being investigated the appellant escaped. He said his knock off time had come, but surely a person who is the custodian of missing drugs cannot just leave in the middle of an investigation because his time to go has arrived. His conduct raised a very reasonable cause for suspecting that he had something to do with the missing drugs. Probably he was taking them away especially as he sneaked out unnoticed.

The matter is resolved. There is therefore no merit in the appeal especially as Mr *Ndlovu* did not pursue the issue of the appellant’s arrest for threats of violence, correctly in my view, because it was self-created.

In the result, the appeal is hereby dismissed with costs.

Mlweli Ndlovu & Associates, appellant’s legal practitioners
Messrs Moyo & Nyoni, respondent’s legal practitioners

Makonese J agrees.....