

BONGANI NCUBE

Versus

DETECTIVE CONSTABLE ARTWELL SIBANDA

And

FELIX TANDI

And

BRIAN MUNYANYI

And

MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 12, 13 & 28 FEBRUARY 2019

Civil Trial

G. Nyoni for the plaintiff
P. Taruberekera for the defendants

MAKONESE J: The right to personal liberty is enshrined under section 49 (1) of the Constitution of Zimbabwe (Amend No. 20) 2013, which provides as follows:

- “(1) Every person has the right to his personal liberty which includes the right –
(a) not to be detained without trial;
(b) not to be deprived of their liberty arbitrarily or without just cause.”

The right to personal liberty is a fundamental right. Such right is not absolute and can be lawfully limited in terms of section 86 (2) of the Constitution of Zimbabwe. The relevant provision provides that:

- “(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, freedom, taking into account all relevant factors, including –
- (a) the nature of the right concerned;
 - (b) the purpose of the limitation, in particular whether it was necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest.”

The plaintiff, a professional engineer who worked his way up to the rank of Senior Engineer in the Department of Water Resources in Zimbabwe prior to setting himself independently in the Republic of South Africa became a victim of arrest by the 1st defendant on 4th of April 2017. On this day, in the early hours of the day, plaintiff arrived at Victoria Falls at the Zimbabwean border with Zambia. He was enroute to Livingstone, Zambia. He was driving his motor vehicle, a Hyundai 1X 35 motor vehicle being registration number DVW 9502 L. Plaintiff was in the company of his brother Ndodana Ncube. He intended to drive through to Zambia on personal business and then return to Zimbabwe and travel back to Bulawayo and then to South Africa on urgent business. After completing the immigration formalities at the border and upon submitting the vehicle papers to the police officers manning the exit point he was informed by 1st defendant that his registration papers was fake. Despite plaintiff’s protestation that his documents were authentic, plaintiff was ordered to drive his motor vehicle to Victoria Falls Police Station. He was advised that an INTERPOL clearance was necessary and that his motor vehicle was suspected to be stolen. A Form 66 was opened and the plaintiff’s details were recorded indicating that an Enquiry Report had been initiated. Plaintiff was kept at the police station from around 10:30 am up to 18:00 hours when he was advised that he would have to return the following morning. The Hyundai motor vehicle was detained and booked as an exhibit. On the 5th of April the plaintiff was advised that his motor vehicle had been cleared with INTERPOL and that he was required to sign an indemnity form to have his motor vehicle released. This experience is probably endured by many other travellers passing through our posts.

The plaintiff claims that 1st, 2nd and 3rd defendants, committed, during the course and scope of their employment, wrongful and unlawful interference with his right to personal liberty as enshrined in section 49(1) of the Constitution of Zimbabwe. The plaintiff alleges that by physically confining him within the police station against his will, and accusing him of being a suspected car thief, the defendants violated his right to personal liberty without reasonable cause.

In their defence, the defendants contended that they were carrying out their constitutional mandate in terms of section 219 (1) and (2) of the Constitution of Zimbabwe which provides as follows:

- “(1) There shall be a police service which is responsible for –
- (a) detecting, investigating and preventing crime.
 - (b) Preserving the internal security of Zimbabwe;
 - (c) Protecting and securing the lives and property of the people;
 - (d) Maintaining law and order
 - (e) Upholding this Constitution and enforcing the law without fear or favour ...”

The issues for determination by this court were set out in a joint pre-trial memorandum of issues filed on 25th October 2018. It sets out the issues as follows:

- (1) Whether or not 1st, 2nd and 3rd defendants acted in a wrongful and unlawful manner towards the plaintiff.
- (2) Whether or not plaintiff should be awarded damages for wrongful and unlawful deprivation of personal liberty in the sum of US\$50 000,00 or any amount the court considers appropriate in the circumstances of this case.

The plaintiff's case

The plaintiff led oral testimony from its first witness **RONNIE DUBE**. He testified that he is the Town Clerk for the town of for Victoria Falls. He is a personal friend of the plaintiff for many years. He is known to the defendants in this matter. He is particularly known to 2nd defendant who confirmed in his evidence that he considered Ronnie Dube as his friend. He worked well with the defendants in the town of Victoria Falls. He generally had a good

relationship with the police. On the 4th April 21017 he received a phone call from the plaintiff who indicated that he had encountered problems with the 1st defendant at the Victoria Falls border. He requested the witness to obtain an e-mail from ABSA Bank in South Africa to prove that he was the owner of the Hyundai 1X 35 motor vehicle and that he was authorized to drive the car to Zambia. The witness testified that he secured the e-mail in question which he personally hand delivered to the CID at Victoria Falls. The witness confirmed that the police accepted the e-mail to be genuine. However, he did not remain at the police station and returned to his office. There was no meaningful cross examination of this witness. What came out clearly from the evidence of Ronnie Dube is that if the documents from ABSA were taken to be authentic by the defendants there was no basis of any reasonable suspicion that the motor vehicle could be stolen. There was indeed no basis for treating the plaintiff as a suspected car thief. The evidence of Ronnie Dube was precise and credible. His evidence allayed any doubt that there could have been any reasonable suspicion in that none of the defendants queried the authenticity of the letter from ABSA Bank in South Africa. The witness is a well known and respected resident of Victoria Falls and the police recklessly disregarded the veracity of the documents he delivered to them.

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The evidence of this witness was that on the 4th April 2017 he was travelling to Livingstone in Zambia. He was in the company of his brother. He was driving a Hyundai 1X 35 motor vehicle. He had in his possession documents tendered into the records as exhibit one. The witness had an original copy of the Temporary Permit issued at Beitbridge Border Post. He had a copy of the Zimbabwe Revenue Authority payment in respect of the permit. He had with him a copy of the Registration Certificate in respect of the motor vehicle. He had a copy of the Insurance for the motor vehicle. It is normal for all visitors from the Republic of South Africa who drive motor vehicles into Zimbabwe that are on Hire Purchase to have in their possession a letter from a Bank financing the purchase of such motor vehicle. In this case the Plaintiff had a letter from ABSA BANK in South Africa. It is essential to note that the letter from ABSA indicated in the last paragraph that:

“We attach a copy of the registration certificate, the original has been retained with ABSA Bank until the vehicle finance agreement has been fully settled.”

The first defendant was handed all the documents in respect of the vehicle and queried why the register number on the copy of the registration book was different from the registration number on the registration plates attached on the vehicle. The witness explained that the register number on the registration (TVL 082 W) was the vehicle register number which is issued out when the vehicle is manufactured. That number incidentally appears on the letter from ABSA Bank. The same register number also appears on the vehicle licence disc affixed to the windshield of the motor vehicle. The 1st defendant never cared or bothered to check the licence disc, nor did he care to listen to the witness' explanation. 1st defendant arrested the witness and told him that the motor vehicle was suspected stolen. He arbitrarily effected an arrest on the witness and confined his movement and kept him in his office the entire day. Even when an e-mail was brought to the police station and hand delivered by Ronnie Dube, 1st defendant insisted that he did not *deal* with e-mails. Because of his arrest plaintiff was totally grounded and paralysed as he was not able to pursue his affairs for the whole day and the better part of the next morning. The 2nd defendant conceded under cross examination that plaintiff was virtually grounded and could not enter Zambia and later travel to see his father in law who was critically ill in Harare. Plaintiff's father in law subsequently died before the plaintiff could see him.

The plaintiff had a shattering experience and was labelled a suspected car thief. The arrest took place notwithstanding that plaintiff had all the relevant documents and a Temporary Import Permit issued by ZIMRA officials in Zimbabwe. The plaintiff asserts that he was arrested on mere suspicion by 1st defendant and 2nd and 3rd defendants participated in the arbitrary arrest. There was no reasonable or just cause for his deprivation of liberty and the actions of the defendants were consequently unlawful. A mere inspection of the details on the licence disc and a proper reading of the letter from ABSA Bank would have made the defendants aware that there was no way the witness would be in possession of an original registration book for the motor vehicle since the vehicle was still on hire purchase. The plaintiff persisted that he was entitled to damages in the sum of US\$50 000 as compensation for his unlawful deprivation of liberty.

The plaintiff was subjected to intrusive cross examination by counsel for the defendants. He maintained that he was unlawfully detained against his wish in a police station for the whole day. He repeated his version that 1st defendant queried the difference between the register number on the registration certificate and the number on the registration plates. He explained that in South Africa they no longer issue police clearances in respect of motor vehicles as all motor vehicles are secured at the exit points. The plaintiff explained that in South African they use a system known as ENATIS (which stands for Electronic National Administration Traffic Information System). It became evident that the defendants, and indeed counsel for the defendants, were not aware of this system. The defendants simply focused on the clearance by INTERPOL. They refused to listen to any explanation by the plaintiff.

The plaintiff's case was closed without leading further oral evidence. What became clear was that the plaintiff's evidence was consistent with the events of the 4th April 2017. The evidence was clear, consistent and credible.

Defence case

All the defendants gave evidence under oath. 1st defendant, **ARTWELL SIBANDA** was the first to testify. He is a Detective Constable based at Victoria Falls. He had been in the police service for seven years. On the relevant day he was deployed at the Victoria Falls border post. His duties were to check, amongst other things, vehicles that were being driven into Zambia. In general, his duties involved the detection of criminal activities at the border. He confirmed the narration by the plaintiff to a large extent. He asked the plaintiff to produce his documents for his Hyundai motor vehicle. On checking the papers he queried why the papers were photocopies. He then ordered the plaintiff to drive his vehicle to Victoria Fall Police Station. 1st defendant did not accept the plaintiff's explanation, particularly that where a motor vehicle is under Hire Purchase, the Bank does not release the original book until all payments have been settled. The main point of misunderstanding appears to have been that 1st defendant was not aware that the vehicle register number is not the same as the number on the vehicle registration plates. Also apparent was the fact that the 1st defendant was not aware that all the details in

respect of the motor vehicle are inscribed on the licence disc which is affixed to the windshield. Had 1st defendant bothered to cross check the details on the licence disc and the documents handed to him by the plaintiff, the anomalies he raised would not have arisen at all. In his evidence 1st defendant stuck to his version that all he needed to do was an INTERPOL check to verify the registration details of the vehicle.

Under cross examination it was put to the 1st defendant that all South African vehicles go through a scanner and are cleared on the South African side of the border. 1st defendant seemed not interested in that explanation which should be known to all law enforcement authorities in this country. It was also evident under cross examination that 1st defendant was not even aware that all the details relating to the car and reflected on the licence disc and these are:

- (a) Register number
- (b) Engine number
- (c) Chassis number
- (d) Make of vehicle
- (e) Mass of vehicle
- (f) Vehicle registration number.

Whilst the 1st defendant insisted that he inspected the motor vehicle, it is clear why he did not verify the details on the motor vehicle itself by conducting a physical check of the engine number and chassis number. He did not pay any regard whatsoever to the e-mail from ABSA Bank delivered to the police station by Ronnie Dube. I find the evidence of the 1st respondent to be highly speculative. He came to the conclusion that the motor vehicle could have been stolen without any reasonable cause. There was no reasonable suspicion of an offence have been committed. 1st defendant's evidence is not consistent and credible in that he gave the impression that he was not aware that an e-mail confirming ownership of the motor vehicle had been brought to the police station, in person by a highly regarded resident of the resort town of Victoria Falls. When it was put to him that there are no police clearance documents from the South African Police, for motor vehicles entering Zimbabwe, 1st defendant denied knowledge of

that fact despite clear evidence from the plaintiff that no such documents are now being generated because of the ENATIS system of checking and clearing motor vehicles. It surely cannot be possible that a police officer based at the border would not have such a critical details. 1st defendant was an evasive witness. He could not explain clearly the basis of his reasonable suspension.

FELIX TANDI

The second witness for the defence was **FELIX TANDI**. He is a Detective Assistant Inspector. He has been in the police service for 15 years. On the day in question he was the Acting Officer In Charge. He is also personally known to Ronnie Dube the 1st witness for the plaintiff. The evidence of this witness was largely of a formal nature. He simply received a report from 1st defendant and he acted on it. He authorized the opening of an enquiry into the matter of a suspected stolen vehicle on Form 66. The witness repeated 1st defendant's explanation that the motor vehicle was suspected stolen because the plaintiff did not have original documents, particularly the registration book. He stated that there was reasonable suspicion that the motor vehicle was stolen because of the absence of a police clearance in respect of the motor vehicle. Further, the vehicle register number and the number on the registration plates were not in tandem. The witness admitted that he did not physically check the motor vehicle but delegated the instructions to 1st defendant. As with the 1st defendant the 2nd defendant appeared unaware of the distinction between a vehicle register number and a vehicle registration number as reflected and the registration plates. It was also clear that 2nd defendant was also not aware that all the details of the motor vehicle are contained on the vehicle registration disc affixed to the windshield. 2nd defendant suggested that he did not actually read the letter from ABSA Bank but relied on what 1st defendant had told him. He authorized the detention of Plaintiff's motor vehicle.

I found the evidence of 2nd defendant of little probative value. He did not examine the motor vehicle. He did not care to check the details on the letter from ABSA Bank, which would have informed him that original registration books are not issued to persons who have vehicles on finance schemes. The evidence of this witness did not assist the defence case. It did not establish the reasonable suspicion that led to the impounding of the motor vehicle and the deprivation of plaintiff's liberty.

BRIAN MUNYANYI

The 3rd defendant gave evidence under oath. He is a Detective Sergeant based at Victoria Falls. He has sixteen years experience. He confirmed that he was at the station when 1st defendant brought the plaintiff in connection with the suspected stolen motor vehicle. He stated that he did not bother much about the whole issue as he was busy with other duties. He was surprised when a complaint was raised against him. The defendant was subjected to cross examination by plaintiff's counsel. He failed to explain why direct evidence against him that he is the one who had indicated that he had information pertaining to a buyer of the motor vehicle in question in Zambia, was not challenged by counsel for the defendants. He also could not explain why evidence linking him to the incident regarding that alleged informer from Zambia was not challenged. In my view, 3rd defendant was involved in this matter. Plaintiff was clear in his evidence that he was arrested at the border by two officers who took him to the police station. Besides, there was no case of mistaken identity raised by the 3rd defendant.

Analysis of the law

The plaintiff has a constitutional right to personal liberty as enshrined in the Constitution under section 49 (1). Plaintiff's right or the right of any other person for that matter cannot be lightly interfered with by police officers except in accordance with the law. In *Mapuranga v Mungate* 1997 (1) ZLR 64 (H), MALABA J (as he then was), stated as follows at page 77G.

“The plain and uncontestable principle is that every person has a right to personal liberty. The law prohibits completely interference with or infraction into the personal liberty of one man by another except in specific instances and in accordance with the procedures prescribed by law. The mere intentional seizure or physical confinement of a person by another for any time, however short, prima facie constitutes the delict of false imprisonment.”

It is my view, that police offices in the exercise of their duties have powers to interfere with the personal liberty of a person in certain restricted circumstances. The principle is stated that “liberty ends where the point of arrest begins”. The power of police officers to interfere with liberty of a person without warrant is exercised in terms of section 25 (1) (b) of the Criminal Procedure and Evidence Act (Chapter 9:07). That section reads as follows:

- “(1) Any peace officer and any other officer empowered by law to execute criminal warrants is hereby authorized ... to arrest without warrant.
(b) Any person whom he or she has reasonable grounds to suspect of having committed any offences mentioned in the First Schedule or Ninth Schedule.”

In *Masawi v Chabaya* 1991 (1) ZLR 148 (HC) GREENLAND J held as follows at page 161A:

“Liberty is a sacrosanct fundamental human right which must be meaningfully protected by the courts. A court must guard against trivializing a human rights breach involving liberty simply because it is categorized as court”.

The Supreme Court considered the question of the exercise by the police of their part to arrest without warrant under the Criminal Procedure and Evidence Act in the case of *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (SC) and at page 96B – C, the court held that:

“In order to safeguard the liberty of an arrest made without a warrant, it is essential for a peace officer to demonstrate the reasonable grounds upon which arrest was based. The importance of the citizens of a democracy is self-evident. Yet society must also be protected against crime. Thus, what has to be struck is a necessary consideration between the individual’s right to liberty and that of society to be protected from crime. It is done by requiring proof of a peace officer that before arresting without a warrant he must satisfy himself that reasonable grounds of suspicion do exist. That requirement is very limited. He is not called upon before acting to have anything like a prima facie case for conviction. Certainly a to the truth is not involved for otherwise it ceases to become suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking.”

In this matter what is of concern is that the defendants were not aware of the basic requirements for a traveler with a foreign registered motor vehicle. The plaintiff had all the necessary papers. Throughout the, trial the defendants exhibited a shocking level of lack of knowledge regarding the documents required to clear a Zimbabwean citizen driving a motor vehicle with foreign plates intending to cross the border into Zambia. The police and all law enforcement officers must familiarize themselves with the basic requirements for clearance of vehicles for the smooth movement of persons. This court cannot accept that an experienced officer would have no knowledge regarding a basic fact that, a bank in South Africa cannot give a person the original registration book in respect of a motor vehicle when full payment has not been made, and the vehicle is still under a car purchase scheme. The court cannot accept the assertion by the defendants that they are not aware that a country such as South Africa no longer issues police clearance for motor vehicles.

In *Fieldman v Minister of Home Affairs* 1992 (2) ZLR 304 (SC) the Supreme Court stated at p 122A that:

“The standard for the deprivation of personal liberty under section13 (2) of the Constitution are facts and circumstances sufficient to warrant a prominent man in suspecting that the accused person had committed or was about to commit a criminal offence. The standard represents necessary accommodation between the individual’s fundamental right to the protection of his personal liberty and the state’s duty to control crime”.

I am satisfied, that the plaintiff succeeded, in discharging he burden of proof of proving his case on a balance of probabilities against the defendants. His liberty and was needlessly confined in a police station. His vehicle was impounded. He was labeled a suspected car thief. Such arbitrary deprivation of personal liberty is wrongful and unlawful.

Quantum

In a relief for monetary compensation for damages there is no fixed formula for the determination of quantum of damages. The determination of the amount awarded to a large degree, is in the discretion of the judge. All circumstances must be taken into account to determine what is just and fair. In the present case, 1st defendant's arrest of the plaintiff and the impounding of the car was triggered by mere suspicion which was entirely contradicted by the documents whose authenticity he had no basis for entertaining reasonable suspicion. The 1st defendant was made aware that plaintiff was a Zimbabwean with family in Victoria Falls. His explanation of the documents he possessed was reasonable. The authenticity of the documents was verified by an e-mail generated from the bank. The 1st defendant never bothered to verify the documents. He acted irrationally and with haste. He failed to execute his duty diligently and as a result recklessly came to a wrong conclusion of fact, that the motor vehicle was suspected stolen.

It is observed that the damages sought by the plaintiff are not supported by any decided cases. A fair amount of damages would be a sum of US\$5 000, 00.

In view of the fact that plaintiff has been unnecessarily put out of pocket by the defendants, he is entitled to a full recovery of his costs on the higher scale.

In the result it is ordered as follows:

1. The defendants are ordered to pay damages in the sum of US\$5 000 ,00 jointly and severally, the one paying the other to be absolved together with interest at the prescribed rate.

2. The defendants are ordered to pay costs on an attorney and client scale.

Messrs Dube-Banda, Nzarayapenga & Partners, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendant's legal practitioners