

WASHINGTON DOZVA  
versus  
MICHAEL NYAMAYARO  
And  
M.D. CHASSART & SON (PVT) LTD  
t/a SURREY ABBATTOIR

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 19 and 27 November, 2013

### **Civil Trial**

*T.S. Manjengwah*, for the plaintiff  
*T.Mpofu* for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

MATHONSI J: The plaintiff is a director of a company known as Donapro Breeders (Pvt) Ltd which was engaged in running a butchery business but has since closed shop. He instituted summons action against the first defendant, the Group Security and Administration Manager of the second defendant, a company involved in the wholesale of meat products, claiming a sum of US\$90 000.00 as “damages for wrongful arrest and unlawful detention”, prescribed interest and costs of suit on an attorney and client scale.

The plaintiff averred that on 20 May 2011, he was wrongfully and unlawfully arrested and detained at the instance of the defendants in an effort to recover money owed to the second defendant by Donapro Breeders (Pvt) Ltd, a company in which he is one of the directors. The defendants actively procured his arrest by giving information to the police and gave directions to the police on what they should do thereby constituting the police officers as their agents.

He pleaded further that the first defendant drove the police officers from Marondera to Donapro Breeders (Pvt) Ltd premises in Mbare, Harare where he directed them to arrest the plaintiff which they did. The first defendant then drove the police officers and the plaintiff to Marondera, dropping them at the police station where he was detained for 72 hours. He was later released at Marondera Magistrates’ Court after the public prosecutor had declined to prosecute him on the basis that the dispute was a civil one.

In their joint plea, the first and second defendants disputed the claim averring that they merely reported a case of fraud to the police, who independently verified the report and asked to be provided with transport to check on the plaintiff and his company which had taken meat products from the defendants on credit only to become evasive on payment and changing addresses. To date the debt incurred in 2010 remains unpaid.

The defendants denied directing the police or constituting the police officers as their agents who arrested and detained the plaintiff on their own, believing that an offence had been committed. The first defendant has no power over the police as would enable him to order them to effect an arrest. The arresting details were not cited in the proceedings.

In the joint Pre Trial Conference Minute of the parties, the issues for trial were identified as:

1. whether the plaintiff was unreasonably arrested and detained at the instance of the defendants;
2. whether the police should be joined in the suit;
3. the damages, if any, sustained by the plaintiff.

The plaintiff testified that Donapro Breeders (Pvt) Ltd in which is a co-director was in the business of selling meat products operating from Mbare and Simon Mazorodze Street, Harare. They approached the second defendant with an application for a credit facility. After a vetting process, they were granted the facility to order meat products on credit and they did business with the second defendant for a while.

The plaintiff stated that they were buying chickens and beef for resale but failed to service the debt resulting in them falling into arrears. On 20 May 2011 he was at their butchery in Mbare when he saw the first defendant arriving in the company of three police officers. He was seeing the first defendant for the first time. The police officers told him that they were looking for Alfonse Nyasha who was his co-director at Donapro Breeders. When he told them that Nyasha was not present they demanded that he identifies himself. Whereupon the first defendant informed the police that the plaintiff was one of the directors they were looking for and should be arrested.

After being told that the police were carrying out inquiries in connection with money owed to the second defendant, he was immediately arrested and directed to sit at the back of a pickup vehicle which was being driven by the first defendant.

They drove to Matapi Police Station where they remained for a while before returning to the butchery looking for Nyasha who was still not present. The vehicle was again driven to

Matapi Police Station where they dropped one of the police officers, a female, before proceeding to Marondera at about 16.30 hours. Along the way the first defendant stopped the vehicle at Cresta Lodge informing the police officers that he wanted to go into the bar. Handcuffs were removed from him and he was allowed to also enter the bar first going into the toilet. At the first defendant's expense, himself and the 2 police officers ordered soft drinks while the first defendant ordered a beer.

After the drinks they resumed their journey stopping once again at Mutangadura Shops where the first defendant bought all of them sadza and soft drinks while he again drank a beer. He took the opportunity to telephone his wife to inform her of his arrest. It was at that stop over that the first defendant chided him advising him to eat his sadza as there was no food where he was being taken to. They proceeded after that arriving in Marondera where he was immediately detained. He remained in the cells for 72 hours before being taken to court on a Monday.

It is the first defendant who again provided them with transport to go to court. The prosecutor asked him how the business was run and when he informed him that they were running a company, the prosecutor decided that it be dealt with in court. In due course he was set free after it was decided that it was a civil dispute.

The plaintiff stated that credit was given to the company Donapro Breeders and that deliveries were made to the two butcheries at No. 30 Simon Mazorodze Street and Mbare, Harare. A total of eight or nine deliveries were made. He did not receive any written demand from the second defendant in respect of the arrears although demand was made telephonically. He had explained to the second defendant that as they had sold the meat products on credit, they were unable to pay the debt.

Upon his detention, the police officers told him that he was being detained for money owed to the second defendant and that if he paid it back, he would be released.

Under cross examination, the plaintiff admitted that his company owed the defendants about \$9 000.00 which arose between 27 April and 26 June 2010 which money has not been paid up to now. He admitted that the delivery notes or invoices issued to the company by the second defendant, which were produced as exhibits 1, 2 and 3 were addressed to their address in Simon Mazorodze Street and that they were signed for by their Manager one Zitsanza. When he was arrested on 20 May 2011 a year had lapsed since liability was incurred but payment had not been made, and no payment plan had been submitted to the second defendant.

The witness admitted that in terms of the credit facility payment was due within 14 days after delivery. He confirmed that at the time of his arrest, they had closed the butchery in Simon Mazorodze Street. He agreed that after closing that shop they did not send a letter to the second defendant notifying it of that fact. He was made to concede that if the second defendant believed it had been defrauded when no payment was made and the shop was closed, the people to chase were the directors of the debtor who included himself.

The plaintiff conceded that there was nothing wrong with pressing charges against a fraudster although to him it was wrong to cause the arrest of a business partner without first sitting down with them to chart a way forward. He also conceded that although he wants to be paid damages for his arrest, himself and his company remain indebted to the second defendant to this day.

Maud Dozva is the wife of the plaintiff who testified on his behalf. All that she added to the plaintiff's case is the story that on the day the plaintiff was taken to court in Marondera, the first defendant had come to the police station and given police officers two crates of cascade drinks which they drank.

At the close of the plaintiff's case *Mr Mpofu* for the defendants made an application for absolution from the instance on the basis that the plaintiff has not made out a case upon which the defendants could be called upon to answer or resist. He argued that the plaintiff's suit is for wrongful arrest and as it is evident that he was arrested without a warrant, for such arrest to be made there must exist a reasonable suspicion in the mind of the arresting detail that an offence has been committed. It therefore behoves the plaintiff to establish that there was no reasonable suspicion that he had committed an offence.

Mr Mpofu submitted that the evidence led shows that there was indeed ground for a reasonable suspicion in that the plaintiff is a director of a company which had not only failed to pay for meat products delivered to it in more than a year but had also closed shop and started evading the creditor without even disclosing where it had relocated to. As a director, the plaintiff's case is that he could not be arrested for the infractions of his company, a point which is not sustainable by virtue of the provisions of s 277(3) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

In respect of the claim for unlawful detention, *Mr Mpofu* submitted that for that to succeed, the plaintiff must show that the arrest was unlawful. If the plaintiff failed to show that there was no reasonable suspicion that an offence had been committed, he cannot succeed in showing that the detention was unlawful as the police are generally entitled to

detain a lawfully arrested person. The plaintiff's situation being even more unpalatable because he did not cite the arresting details.

On the quantum of damages, *Mr Mpofu* submitted that the plaintiff had not led any evidence on that. He having been decisively quiet on damages, contenting himself with a recital of his arrest and detention, there is nothing placed before the court for the defendants to resist.

*Mr Manjengwah* for the plaintiff opposed the application submitting that the crux of the matter was whether there was a reasonable suspicion that Donapro Breeders had committed an offence. In his view, while it is true that the company owed some money to the second defendant, that is not an offence and therefore nothing can be imputed on the directors. To *Mr Manjengwah*, if any company owing money could be said to be committing an offence, that would be the end of commerce. He took the view that the criminal justice system was being abused to force the plaintiff to pay a debt which was undue.

On the issue of quantum, *Mr Manjengwah* submitted that the defendants could not be absolved because that is an issue to be determined by the court based on the length of detention in line with case law.

In deciding an application for absolution at the end of the plaintiff's case the legal test to be applied is whether there is evidence upon which a reasonable man might find for the plaintiff: *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1993 (3) SA 184 (TK) 185 B – D: BEADLE C.J. stated it clearer in *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 RLR 1 (AD) 5 D, a pronouncement which was followed in *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor.* 1998 (2) ZLR 547 (H) 552 G – H and *United Air Charterers (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) 343 B – C, when he said;

“The test, therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make – a definition which helps not at all.”

GUBBAY C.J. took it further in *United Air Charterers (Pvt) Ltd v Jarman (supra)* stating:

“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him.”

See also *Lourenco v Raja Laundry (Pvt) Ltd 1984 (2) ZLR 151 (S) 158 B – E; Modcraft Engineering (Pvt) Ltd v Tenda Buses (Pvt) Ltd HH 207-13; Katsande v Welt Huinger Hilfer & Anor HH 396-13*

In *casu*, the plaintiff based his claim on wrongful arrest and unlawful detention and not on the usual cluster of claims falling under malicious report, or malicious proceedings or prosecution. It is however common cause that the arrest itself was effected by the police officers from Marondera who were in the company of a lady police officer from Matapi Police Station. It is common cause that the detention was done by the same police officers from Marondera at their police station. It is difficult to fathom how the defendants could be said to be liable for that arrest and detention.

I agree with *Mr Mpofu* that in our law, an arrest without a warrant is based on the existence of a reasonable suspicion in the mind of the arresting detail that an offence has been committed. One therefore has to interrogate the arresting detail as to what informed his decision to effect an arrest. Regrettably he has not been cited.

What we however have is the evidence of the plaintiff that he should not have been arrested because he and his company were doing business with the defendants and should have been allowed to sit down with the defendants and negotiate a way forward. He also took the view that as a director he should not have been arrested for the liability of his company. Both these arguments are not premised on any recognisable legal principle. So is the argument advanced by *Mr Manjengwah* that to arrest anyone for a debt owed by a company will spell the end of commerce. Quite to the contrary, it is the attitude of so many business people in this country, the plaintiff included, who have now devised what may be called the Zimbabwean way of doing business, which will see the demise of our commerce. It now seems acceptable and normal for business people to gladly incur liabilities and then do everything in their power to avoid paying. How else can one explain the conduct of the plaintiff in this matter? A man forms a company, incurs debts in the name of that company and then simply relocates to Mbare where he continues operating without bothering to pay off the business debt. When he is finally cornered a year later and is arrested he not only cries foul but litigates for \$90 000.00 seriously believing that he has been injured, while still refusing to pay what he owes. Instead he closes the company.

In terms of s 277(3) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*];

“Where there has been any conduct which constitutes a crime for which a corporate body is or was liable to prosecution that conduct shall be deemed to have been the conduct of every person who at the time was a director or employee of the corporate body, and if the conduct was accompanied by any intention on the part of the person responsible for it, that intention shall be deemed to have been the intention of every other person who at the time was a director or employee of the corporate body;

Provided that, if it is proved that a director or employee of the corporate body took no part in the conduct, this subsection shall not apply to him or her.”

This should really put the matter to rest. As long as Donapro Breeders (Pvt) Ltd had taken meat products under circumstances suggesting that it intended to defraud the defendants, they were within their rights to report the matter to the police for possible prosecution and a reasonable suspicion existed rendering the arrest and subsequent detention of the directors or employees in pursuance thereof, lawful. As a director, the plaintiff fell squarely within the ambit of that provision, and was liable for arrest and detention.

It is not gainsaid to hold that a company should not be prosecuted for owing a debt, as the present inquiry goes beyond that to the circumstances under which the failure to pay arose. The defendant had reason to believe that a fraud had been committed.

I conclude therefore that on the evidence led on behalf of the plaintiff, there is no way in which a court might make a reasonable mistake and give judgment for the plaintiff. Put differently, there is no evidence upon which a court might find for the plaintiff.

Accordingly I make the following order, that;

- (1) Absolution from the instance is hereby granted.
- (2) The plaintiff shall bear the costs of suit.

*Wintertons*, plaintiff's legal practitioners

*Coghlan, Welsh and Guest*, defendants' legal practitioners