

ZIMBABWE UNITED PASSENGER COMPANY LIMITED
versus
MARTINA MUSHANGWE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 15 October 2016 & 23 November 2016

Trial

L Mazonde, for the plaintiff
D Mwonzora, for the defendant

MATANDA-MOYO J: The plaintiff sued the defendant for the delivery of 12 576 litres of diesel which it claims was stolen or siphoned by the defendant without the plaintiff's authority. Alternatively the plaintiff sought the recovery of monetary value of such diesel in the sum of \$17 606.40, plus interest at the prescribed rate plus costs of suit on a higher scale.

The defendant opposed the assertion that she stole diesel whilst admitting to have drawn the said diesel in pursuance of an agreement between the parties. She disputed the value of the diesel as given by the plaintiff. She pleaded that a litre of diesel cost \$1.26 and thus the value is \$15 845.00. The defendant has not refused to return diesel but delayed due to the plaintiff's action.

The defendant made a counterclaim against the plaintiff for damages for unlawful arrest in the sum of \$20 000.00, damages for loss of liberty in the sum of \$100 000.00. She also claimed for loss of business and loss of future business totalling \$1 200 000.00. She claimed for legal costs incurred in defending a criminal suit against her for theft of the same diesel in the sum of \$30 000.00. Lastly she claimed defamation damages in the sum of \$150 000.00 plus costs of suit.

The plaintiff opposed the defendant's counter claim on the basis that the report to the police was not malicious. The plaintiff believed that the defendant had committed an offence. Thereafter the police formulated their own opinion and arrested the defendant, detained her and had her prosecuted. The plaintiff challenged the damages claimed. The defendant denied

being liable to defamation damages claimed as it was not the source of the report by the newspaper. The plaintiff also challenged the quantum thereof.

At Pre-trial Conference a judgment by consent was granted that

- 1) The defendant shall deliver 12576 litres of diesel to the plaintiff and pay costs of suit on a legal practitioner and client scale.
- 2) Alternatively, the defendant shall pay the plaintiff the sum of \$17 606. 40 being the equivalent value of 12 576 litres of diesel
 - 2.1. The defendant shall pay interest on the above amount at the prescribed rate from date of judgment to date of payment in full.
- 3) Enforcement of this order is suspended until this court has resolved the defendant's claim in reconvention against the plaintiff.

The issues referred for trial were;

- a) Whether or not the plaintiff maliciously made a police report against the defendant and
- b) Whether or not the defendant is entitled to the quantum of damages claimed in the summons.

The defendant gave evidence in support of her claims. She testified that she is the Director and owner of Miracle Petroleum. Her business involves retailing of petroleum products in Zimbabwe. On 12 November 2013 Miracle Petroleum represented by this witness entered into a lease agreement with Unioil Zimbabwe (Pvt) Ltd whereby Miracle Petroleum leased Masvingo fuel depot from Unioil for 5 years, commencing 15 November 2013 to 15 November 2018. It was a term of the lease agreement that at all times the depot should have fuel products. A breach of this term would result in cancellation of the lease.

She testified that she agreed to a request by the plaintiff for an arrangement whereby the defendant would provide fuel to the plaintiff's buses on credit, payable after two days. That relationship went on until the plaintiff owed her \$44 000.00. She terminated the arrangement with the plaintiff providing a payment plan for the \$44 000. After the plaintiff finished paying they resumed the business relationship. Sometime in December 2014 she was phoned by Mr Mapfumo from the plaintiff to provide storage facilities for the plaintiff's diesel. At that point she testified that she had in stock 4 000 litres which she asked the plaintiff to buy so that they could resume the new arrangement. They agreed that the defendant would continue serving her clients from the plaintiff's supplies which she would replace later. There were ZUPCO employees on site who would record all transactions. She

testified she used the 12576 litres of diesel as per agreement between the parties. She was then surprised to see the plaintiff's employee Mr Magwizi coming to her house in the company of the police to cause her arrest. At that time she had agreed to pay for the fuel and there was nothing untoward done by her in the transaction. The police used the plaintiff's vehicle in her arrest. She spent 2 days and 2 nights in police cells and was only released after paying bail. She was arrested on Christmas Eve. This witness was tried and acquitted of the charge of theft of such diesel.

As a result of the arrest Unioil terminated her lease with it in January 2015. The lease was supposed to expire on 15 November 2018. She testified that between January 2015 and 15 November 2018 she lost business to the tune of \$15 000 per month. She produced various invoices from Petrotrade showing what she used to be supplied with in terms of fuel products.

She testified that she also used to deal with the Department of Roads. She attached one invoice showing that on 21 February 2014 the Department of Roads paid her \$1 350.00 for fuel. She also attached a letter showing at one time the Ministry of Health deposited \$10 000.00 into her business account for fuel for Masvingo Hospital. Overallly she testified that business was thriving. She also said she had been approached to supply diesel for the Masvingo-Beitbridge dualisation programme. She could not participate after her lease was cancelled.

On damages for detention she testified that she was detained on Christmas Eve and only released on 26 December 2014 on bail. She was a single parent who was denied her freedom for 48 hours. She believed damages of \$100 000.00 would be appropriate. On the issue of defamation damages she testified that she was and is a prominent person in Masvingo. The article published in the new newspapers embarrassed her. She said she is entitled to damages in the sum of \$540 000.00. Under cross examination she conceded she had not made any claims for loss of Masvingo-Bitbridge dualisation business. She also conceded that she knew that the police were looking for her on 22 December 2014 but she had not reported to the police station. She claimed she was in Harare. She also conceded that on the 14 of December 2014 she visited the police station. She deposed to an affidavit in relation to the fuel she had received on behalf of ZUPCO. She maintained her story that she had sold the diesel to her clients in conformity to an oral agreement she had entered with the plaintiff. The plaintiff was aware that she had not stolen any fuel at all times and maliciously caused her arrest over a civil matter. She also said the fact that she never charged the plaintiff

for the storage of its fuel is an indication of the existence of the oral agreement. She maintained the plaintiff maliciously caused her arrest. The police came to arrest her in the company of Mr Magwizi and she was ferried to the police station in the plaintiff's vehicle.

On the defamation suit she was quizzed that the article referred to Martina Munyangadze. She responded that that is her other name. She also conceded she had provided no evidence for legal costs claimed.

Tigere Magwizi testified for the plaintiff. He testified he is employed by ZUPCO in Masvingo. He testified that he was not privy to any agreement entered into between the plaintiff and the defendant. The plaintiff in that agreement was represented by Prince Mapfumo. He testified that on 13 December 2014 he made a report to the police for theft of fuel by the defendant. The defendant attended at Masvingo police station where she deposed to an affidavit that she would reimburse the fuel by 16 December 2014. On 24 December 2014 after the defendant had failed to honour her undertaking to the police, the police contacted this witness and requested transport assistance to go and arrest the defendant. This witness obliged. His role was simply driving the police to the defendant's place and leaving the police with the defendant at the police station. This witness denied that the defendant was carrying on business before the deal with the plaintiff. On 3 December 2014 when the plaintiff's fuel was delivered, the defendant's tanks were empty. He queried documents produced by the defendant as not authentic. On p 20 the purported documents from ZUPCO are not on ZUPCO letterhead and are also not signed. He insisted at the time of her arrested she was not trading otherwise she could have easily reimbursed the diesel.

Under cross-examination he said the defendant was only arrested for two days.

Under cross-examination he conceded he accompanied the police to the defendant's house at around 10pm on 24 December 2014. He insisted he never played any role in the arrest save for providing police with the requested transport. He maintained when he made the report he understood that the defendant had stolen the plaintiff's diesel. The diesel kept at the defendant's place was only meant for ZUPCO buses.

The evidence showed that the parties had a business relationship. Initially the plaintiff was a client of the defendant. The contract was later novated to one where the plaintiff would store its own diesel for use at the defendant's place. The parties differ on the terms of this new arrangement. The plaintiff insisted the diesel was only for use by itself. The defendant on the other hand vehemently denied that and averred that the agreement was that she could still sell the diesel to her clients and reimburse. Such agreement was entered into between

Prince Mapfumo representing the plaintiff and the defendant. Such Mapfumo was never called to testify despite the plaintiff being aware that the terms of that agreement were the basis for the claim I was left with no option but to draw an inference that the defendant's version of events was the correct one *moreso* in view of the fact that the plaintiff failed to say how the defendant was going to benefit from such an arrangement. Being a businesswoman it is highly improbable that the defendant would accept to store the plaintiff's diesel for free. The plaintiff's version is discarded as it makes no business sense. It is common cause that the defendant sold 12576 litres of the plaintiff's fuel. But that was never theft. It remained in the civil domain where the plaintiff could simply sue the defendant for the fuel. Making a report of theft in the circumstances was malicious.

From the evidence it is clear that the plaintiff did play an active role in the arrest of the defendant. It is common cause the police went to arrest the defendant in the presence of an employee of the plaintiff. That employee drove the defendant to the police station where she was detained.

The requirements for the delict of malicious deprivation of liberty are as follows;

- 1) That the defendant set the law in motion or instigated or instituted the proceedings.
- 2) That the defendants acted without reasonable and probable cause in instigating the arrest and
- 3) That the defendants acted with malice or *animo injuricada* and
- 4) The prosecution has failed.

See *Bunde v Muchinguri* 1999 (1) ZLR 476 (H), *Min of Justice & Constitutional v Moleko* (2008) 3 ALL SA 47 (SCA). Did the plaintiff do more than just tell the police the facts of the case and leave them to act on their own judgment. Not at all. The plaintiff actively participated in the arrest of the defendant.

See *Muyambo v Ngomaikaira & Ors* 2011 (2) ZLR 51 (H).

In the case of *OK Zimbabwe Ltd v Musundire* SC 23/15 the court said;

“Whilst an action for unlawful arrest and detention is usually brought against the police or other uniformed forces, a private individual can also commit this delict. The position is also settled that in our law, unlike South Africa, once unlawful arrest or imprisonment are proved, *animus injuricandi* is presumed and intention is not a requirement for this delict.”

See also Feltoe, *A guide to the Zimbabwe law of delict* 3rd edition 2001 p 56. In the case of *OK Zimbabwe (supra)* matter where the facts are to some extent similar to the present one damages were awarded in the sum of \$8 500.00.

Mc Kerron in his book *Law of delict* 7th ed at p 259 states;

“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.”

I am satisfied that in the present case the defendant managed to prove on a balance of probabilities that the plaintiff acted maliciously, cruelly and without reasonable and probable cause in causing her arrest and detention for 48 hours. The plaintiff was aware of the contractual arrangement between itself and the defendant. It chose to pursue criminal charges on a purely civil matter.

In *Botha v Zwada* 1997 (1) ZLR 415 the court found in regards to quantum of damages that;

“..... deprivation of liberty is a very serious infraction of fundamental rights”

In assessing damages this court has to look at past determined past matters. In the case of *Abu – Basutu v Moyo* HB 173/13, \$30 000.00 damages were awarded for a detention of a period 98 days. In *Mavhiza and Another v Muwambwe and Others* 2014 (1) ZLR 605 (H) damages in the sum of \$5 000-00 were awarded. In *OK Zimbabwe Ltd* above damages in the sum of \$8 500.00 were awarded.

It is however trite that each case has to be determined on its own merits. In this case there is no evidence of ill treatment at the police station. However it was not to cause one’s detention on the Christmas Eve. I am of the view that damages in the sum of \$5 000.00 suffice.

The defendant also claimed damages for loss of business and loss of future earnings. Such damages are special damages and require proof. Firstly the defendant must prove the nexus between the wrong doing and the damages suffered. From evidence led the defendant testified that the lease contract was cancelled due to the arrest. She referred to a clause of the lease agreement which says that the agreement would be terminated if the garage was kept dry. The defendant has in my opinion failed to show on a balance of probabilities that it was the arrest which caused the landlord to terminate the lease. On the contrary evidence led show that the defendant failed to procure fuel. She even failed to replace the plaintiff’s fuel as she had not received supplies in a long time. No connection was proved between the dryness of

the garage and the arrest and detention of the defendant. Even the loss of future earning has not been linked to the plaintiff's actions. For liability to arise, there must be a causal link between the plaintiff's conduct and the defendant's loss. See *Natal Fresh Produce Growers Association and Others v Agriserve (Pvt) Ltd and Others* 1990 (4) SA 749 (N), *Gibson v Berkowitz and Anor* 1996 (4) SA 1029 (W), *International Shipping Co (Pvt) Ltd v Bentley* 1990 (1) SA 680 (A).

I am satisfied that no causal link has been proven between the plaintiff's conduct and the defendant's losses. The defendant was in trouble business wise before the arrest. Her losses cannot be linked to the arrest and therefore those claims cannot succeed.

The defendant claimed damages for legal costs. It is common cause that the defendant was represented by a lawyer during the criminal proceedings. Naturally I would have had no problems awarding these damages had the defendant placed before the court evidence on how the figure of \$30 000-00 was arrived at. No receipts or invoices were produced before this court. VAN WINSEN JA in the case of *Mkwananzi v Vander Merwe and Anor* 1970 (1) SA 609 (A) at 631 quoted with approval *Herman v Shapiro and Co* 1926 TPD 367 at 379 where STRATFORD J said:

“Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, it is certain that pecuniary damage has been suffered, the court is bound to award damages.....

It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in these circumstances the court is justified in giving, and does give, absolution from the instance.”

In *Khopper v Mazoko* 1930 TPD 860 at 855 TINDALL J said;

“..... where a plaintiff is in a position to lead evidence which will enable the court to assess the figure he should do so and not leave the court to guess at the amount.”

See also *Mbundire v Butress* 2011 (1) ZLR 501, *Muyambo v Ngomakumira* 2011 (2) ZLR 51 at 57D, *Samangura v Econet Wireless* 2012 (2) ZLR 304, *Munhuwa v Mhukahuru Bus Service (Pvt) Ltd* 1994 (2) ZLR 382 and *Visser and Potgieter Law of Damages* at p 437 D.

The court cannot be expected to award arbitrary amounts where the plaintiff had in her possession evidence to prove her claim but decides to withhold such evidence from court. I am thus unable to grant the damages sought under this heading.

The defendant also sought defamatory damages as a result of a publication in the Herald on the story. It is common cause that such publication arose from a matter in court. The plaintiff had caused the malicious arrest of the defendant which ended up in court. The Herald picked the story and published such story. The plaintiff argued that there has been no suggestion that it was responsible for the publication. A reading of the publication shows that the source of the article was not the plaintiff. The plaintiff argued that without such connection then the claim for defamation must fail.

In its pleadings for defamation the defendant states in para 6 that;

“On the 27 December 2014 the plaintiff caused to be published in the Herald Newspaper falsehoods that defendant had stolen diesel from the plaintiff

Our law is clear that whoever alleges must prove. The claim was premised on the allegation that it was the plaintiff who caused the publication. From the evidence led before me no such evidence was produced. In her heads of argument the defendant seems to have abandoned the claim as she never referred to same. If so that abandonment would have been well taken as no evidence was led to show that it was the plaintiff who caused the Herald to publish such story. I shall therefore not dwell on that aspect.

In the result I am of the opinion that the defendant managed to prove her claim in relation to wrongful arrest and detention. The other claims fail due to lack of proof.

Accordingly I order as follows;

1. That the plaintiff pay to the defendant the sum of US\$5 000.00 for unlawful arrest and detention.
2. That the other claims are dismissed.
3. That the plaintiff pays costs of suit.

Mhishi Legal Practice, plaintiff's legal practitioners
Mwonzora & Associates, defendant's legal practitioners