

EARNEST MACHEKA
versus
PAUL METCALFE
and
MAIZELAND SOS

PATEL J
HARARE, 3-4 April 2006, 26 June 2006, 17 September 2007

Civil Trial

Mr. Chihambakwe, for the plaintiff
Mr. Hwacha, for the defendants

PATEL J: The plaintiff in this case is a farmer by vocation and he also happens to be a prophet. He claims payment in the sum of \$4.5 million (revalued) as damages for defamation (\$2.5 million) and damages for unlawful arrest and detention (\$2 million).

The 1st defendant is employed by the 2nd defendant. The latter is a non-governmental organisation that carries out farming operations designed to feed three orphanages in the Shamva and Bindura areas. The defendants deny having wronged the plaintiff and dispute his claim. However, they accept that if the 1st defendant is found liable the 2nd defendant would be vicariously liable as his employer at the relevant time.

At the close of this trial, both counsel were directed to file their closing submissions by specified dates. Submissions for the plaintiff were duly filed on the 7th of July 2006. However, counsel for the defendants has yet to comply with this direction despite several reminders through the Registrar.

The Evidence

The plaintiff, Earnest Macheke, testified that he has been a prophet for over 30 years and was known as such in Maizeland, Bindura, over the past 8 years. On the afternoon of the 19th of December 2002, he was working his field when the 1st defendant arrived with six of his workers. He accused the plaintiff of having

stolen some pipes and uttered the words “thief Macheke”. His workers then searched the plaintiff’s house but found nothing. At that time, there were about 150 to 200 people waiting at his home and within earshot of the 1st defendant’s utterances to the effect that the plaintiff was a thief and should be taken to gaol. One of the workers then handcuffed the plaintiff. An hour later, a policeman arrived. The 1st defendant told him that the plaintiff was a thief and should be arrested and detained for having stolen the pipes. Thereafter, the plaintiff and others were driven to various farms within the locality. At DAPP Farm six pipes which the plaintiff had sold to DAPP were identified as having been stolen and were taken by the policeman. The plaintiff was then taken to Chiwaridzo Police Camp. At certain points during these trips the 2nd defendant’s workers referred to the plaintiff as a thief in the presence of various local residents. At the police camp, the plaintiff was charged and arrested. He was detained for three days and nights before being released on bail. The criminal charge against him was finalised on the 19th of October 2004. The charge was withdrawn before plea on the basis of the evidence of his co-accused, Reiny Nyemba, who stated that she had sold the six pipes to the plaintiff. He later collected the pipes from the police camp and refunded DAPP the money that he had been paid. No one has claimed the pipes since then. The plaintiff remains a prophet to the present day but no one seeks his services because of the allegation of theft levelled against him. Prior to his arrest, he operated as a prophet on three days every week and saw hundreds of people whom he successfully served.

Conrad Gumira, who has known the plaintiff since 1990 and who belongs to the same church, gave evidence in support of the plaintiff’s case. He used to attend the plaintiff’s sessions as his unpaid helper. The plaintiff was a well known prophet in the Bindura area. He did not charge for his healing services and provided them gratuitously. He was able to cure many ailments, including paralysis

and asthma. On the day in question, Gumira was present at the plaintiff's house. The 1st defendant arrived with six others and said he was looking for the thief Macheka. He then proceeded with his companions to the fields and returned after a while with the plaintiff. After the plaintiff's house was searched, the 1st defendant declared that the thief Macheka was going to gaol. Many people, possibly 180 persons, had gathered at the scene at that time. A police officer arrived after an hour and was told by the 1st defendant that he had caught the thief Macheka who had stolen his pipes. All the parties then drove away with the plaintiff to look for the stolen pipes. Gumira has known the 1st defendant since 1999 and was able to positively identify him in court. After the plaintiff was arrested very few people came to consult him as a prophet. Gumira continues to visit the plaintiff at his house every Friday. He discussed this case with the plaintiff only on one occasion about a year ago.

The 1st defendant, Paul Metcalfe, has been employed by the 2nd defendant as its Farms General Manager since October 1986. He testified that on the 19th of December 2002 he was not at the farms but away in Kariba. He left the farm on or about the 16th of December and only returned after Christmas. He had gone to Kariba with family friends in order to get away from the farm invasions that were taking place at that time. He only heard of the events *in casu* after returning from Kariba when he was told what had transpired by his Security Officer, Dadila Sibanda. The theft of pipes had been reported to the police but the plaintiff was not pinpointed as the alleged thief. Metcalfe himself would not have acted or made utterances as alleged by the plaintiff because of the prevailing political sensitivity at that time. He has not had any differences with the plaintiff and has had no reason to be malicious towards him. He once took some visitors from Switzerland to observe one of the plaintiff's sessions. He has never spoken to the police or made any statement concerning the theft of pipes. He does not know Leonard

Maumbe, the policeman who investigated the theft, and has not been called to testify in the criminal matter. When asked to comment on the police officer's affidavit dated the 25th of August 2005, he stated that its contents were false. Under cross-examination, he accepted that there was no mention of his absence in Kariba at the relevant time either in the defendants' plea or amended plea or in their first summary of evidence (filed on the 7th of June 2005). This fact was only mentioned in the second summary of evidence (filed on the 22nd of June 2005).

Goliath Katsande is the Operations Sergeant in the Security Department at the 2nd defendant's farms. On the 19th of December 2002, he was advised by a farm worker that some pipes had been stolen. He telephoned the police who then despatched four officers to investigate and conduct searches at various homesteads. The 1st defendant was away during this period and had not been seen for the past two days. At the plaintiff's house, two out of five pipes were identified as belonging to the 2nd defendant. There were only about eight or nine people seated outside the plaintiff's house. The 1st defendant was not present and no one there called the plaintiff a thief. Katsande did not handcuff the plaintiff. Thereafter, the 2nd defendant's staff, together with the police and the plaintiff, proceeded to DAPP farm where they recovered six of the stolen pipes. The plaintiff and the pipes were then taken to the police station. The plaintiff was arrested as a result of investigations conducted by the police and not by the 2nd defendant's staff.

At the close of the defence case, plaintiff's counsel requested that Leonard Maumbe be subpoenaed to testify. This request was allowed by consent, subject to the defence case being reopened, and the matter was adjourned to avail the witness in question.

Leonard Maumbe is a constable with the Zimbabwe Republic Police. On the day in question, he was on duty at Chiwaridzo Police Post. He received a telephone call from one of the 2nd defendant's farms and spoke to a white man who said that they had caught the

thief of their irrigation pipes and that their Security Supervisor was coming to lodge a formal report. Maumbe awaited the arrival of three policemen from the Support Unit and the 2nd defendant's Security Supervisor, Dadela Sibanda. The latter confirmed that her Manager, Paul Metcalfe, had telephoned and that the thief had been apprehended. They all proceeded to the plaintiff's house where he found that the latter had already been arrested and handcuffed. Some of the 2nd defendant's workers said that the plaintiff was the thief of their pipes. Maumbe then took over the investigations and handcuffed the plaintiff with his own cuffs. There were about 70 or more people from the plaintiff's church who were present at the house. The 1st defendant arrived after a short while in a separate motor vehicle and pointed at the plaintiff saying "there is the thief". He spoke loudly so that others who were nearby would have heard his statement. The plaintiff was taken into the Support Unit vehicle and all concerned proceeded to various farms in the vicinity. The plaintiff indicated that he had bought some pipes from one Reiny Nyemba and sold them to DAPP Farm. These pipes were retrieved from the DAPP Farm manager. Nyemba was then arrested and taken with the plaintiff to the Police Post. Nyemba and the plaintiff were both charged with the theft of irrigation pipes. Subsequently, Maumbe was transferred to a different station and he handed the docket over to another officer. He later heard that the cases against the plaintiff and Nyemba were withdrawn before plea. On the 25th of August 2005, Maumbe was asked by the plaintiff to swear to an affidavit for the purposes of his civil claim. This affidavit [Exhibit 1] correctly reflected what happened, in particular that the 1st defendant was the initiator of the theft report and was in charge of the 2nd defendant's staff during the events that took place thereafter. The affidavit was prepared from his own recollection of events and without the assistance of the docket. Under cross-examination, Maumbe accepted that there were adequate grounds for arresting the plaintiff. He also prepared the remand papers

[Exhibits 2 and 3] on the basis of having entertained a reasonable suspicion of theft. He acted according to his own professional judgement and was not instructed or influenced to do so by the 1st defendant. At the end of his testimony, Maumbe positively identified the 1st defendant as the person that he saw at the plaintiff's house on the day in question.

On assessing all the evidence before the Court, it seems relatively clear that the plaintiff was telling the truth as to what transpired on the day in question. Apart from exaggerating his prophetic prowess and the magnitude of his fame and flock, he was generally credible as to the manner in which he was treated and dealt with at the relevant time. His evidence was also corroborated by Gumira and the testimony of Constable Maumbe.

On the other hand, the 1st defendant's version that he was elsewhere at the time and not involved in any way with the plaintiff's detention is very difficult to accept. No evidence was lead from any of the friends he was allegedly with in Kariba to support his alibi. Katsande's evidence did not really take the 1st defendant's case any further. In short, the 1st defendant's alibi was starkly falsified by the testimony of the plaintiff and by that of Gumira and Maumbe. In this respect, I am unable to perceive any persuasive reason why these witnesses would wish to falsely implicate the 1st defendant as to his role and involvement in the events under consideration. It is clear to me that he was present on the day in question and that he did and said what he is alleged by the plaintiff to have said and done.

Defamation

The delict of defamation is succinctly defined by Feltoe: *A Guide to the Zimbabwean Law of Delict* (2nd ed.) at p.32, as follows:

"Defamation causes harm to reputation, that is, the estimation in which a person is held by others (his good name and standing). A defamatory statement is one which is published and injures the person to whom it refers by lowering him in the estimation of reasonable, ordinary

persons generally; it diminishes his esteem or standing in the eyes of ordinary members of the general public. It may also cause the target of the statement to be shunned or avoided or may expose him to hatred, ridicule or contempt. Finally, a person can be defamed by casting aspersions on his character, trade, business, profession or office.”

The approach to be applied in determining whether or not a person has been defamed is a three-pronged one, as enunciated by BARTLETT J in *Chinamasa v Jongwe Printing and Publishing Company (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 149, and in *Madhimba v Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H) at 400. This approach was affirmed by the Supreme Court in *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) at 356, as follows:

“The three stages of the test are that a court must:

(a) first, consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words;

(b) secondly, assess whether that is the meaning according to which the words would probably be reasonably understood; and

(c) thirdly, decide whether the meaning identified is defamatory.”

Applying this test *in casu* there is little doubt that the plaintiff was defamed by the 1st defendant. The latter described the plaintiff as a thief, initially, over the telephone in discussion with Maumbe and, subsequently, at the plaintiff’s homestead in the presence of the plaintiff’s family and followers. The plaintiff was also labelled as a thief by the 2nd defendant’s workers during their quest for the stolen pipes in the surrounding farms. The 2nd defendant is therefore vicariously liable not only for the 1st defendant’s conduct but also for the statements made by their workers. The defendants have not raised any defence of justification for their utterances and it consequently follows that the statements ascribed to them were made unlawfully. Both defendants are accordingly held liable for having unlawfully defamed the plaintiff.

Unlawful Arrest and Detention

The delict of unlawful arrest and detention is committed when a person, without lawful justification, restrains the liberty of another by arresting or imprisoning him or her. According to Feltoe, *op. cit.*, at p.48:

“In our law it would seem that for this action it has to be proved only that the arrest or imprisonment was illegal and not that there was intention to act illegally or there was intention to cause harm Thus, the view that inevitable mistake is no defence would seem to be correct in our law. On the other hand, it is argued that this action falls under the *actio injuriarum*, but such *animus* is presumed. In our law, as opposed to South African law, *animus injuriarum* is still a totally fictional requirement and therefore intention is not a requirement for this delict.”

Under our law, force is not a prerequisite for this delict and neither is pecuniary loss. Damages can be awarded for any affront or humiliation stemming from the unlawful arrest and imprisonment of the plaintiff. Although this action is usually brought against governmental authority, arising out of illegal arrest and detention by members of the police or other uniformed force, a private individual can also commit this delict against another private individual. See *Mapuranga v Mungate* 1997 (1) ZLR 64 (H).

The evidence adduced and accepted *in casu* shows that the plaintiff was apprehended by the 2nd defendant's workers at the instigation of the 1st defendant who was unquestionably in overall control of those workers. The plaintiff was then handcuffed and detained for over an hour, notwithstanding his protestations of innocence, before police officers arrived to take over the criminal process. The charge of theft against the plaintiff was subsequently withdrawn before plea, it presumably having been accepted that he was an innocent purchaser of the stolen pipes. The defendants obviously cannot be held liable for the arrest and incarceration of the plaintiff by the police as these actions, on the evidence of Maumbe, resulted from the exercise of his own professional assessment of the matter. However, the defendants have proffered

no lawful justification for having apprehended and handcuffed the plaintiff at his home before the arrival of the police. The need to curtail the plaintiff's liberty at that time is simply not apparent from the evidence before the Court. Accordingly, the 1st defendant must be held directly liable for having unlawfully and arrested and detained the plaintiff at his homestead, while the 2nd defendant is vicariously liable for the unlawful actions of its workers and the 1st defendant.

Damages for Defamation

In assessing the quantum of damages in a defamation case, it is necessary to consider a variety of factors. As expounded in the cases – for instance, in *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (HC) at 289, *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H) at 503, *Levy v Modus Publications (Pvt) Ltd* 2000 (1) ZLR 68 (H) at 70-71 & 73, *Mnangagwa v Nyarota & Anor* HH 153-2004, and *Masuku v Goko & Anor* HH 127-2006 – these include:

- (a) the content and nature of the defamatory publication;
- (b) the plaintiff's standing in society;
- (c) the extent of the publication;
- (d) the probable consequences of the defamation;
- (e) the conduct of the defendant;
- (f) the recklessness of the publication;
- (g) comparable awards of damages in other defamation suits;
- and
- (h) the declining value of money.

In applying the above factors it must be borne in mind that damages for defamation are intended *qua solatium* to compensate the plaintiff for sentimental loss and should not as a rule be punitive. See *Shamuyarira's* case, *supra*, at 502-503; *Levy's* case, *supra*, at 73; *Thomas v Murimba* 2000 (1) ZLR 209 (H) at 217.

In the present matter, the 1st defendant and the 2nd defendant's workers imputed to the plaintiff the commission of a very serious crime. These allegations were made in the presence of the plaintiff's family and his followers. They were subsequently repeated several times to other persons in the surrounding farms. As a result of the allegations, which were never mitigated by any retraction or apology, the plaintiff's esteem remains demeaned in the eyes of those who know him, including his adherents who now shun his healing services.

In these circumstances, having regard to comparable awards in the recent past as well as the rapidly declining value of the local currency, I am satisfied that the quantum of damages for defamation sought by the plaintiff is not unreasonable and that he is entitled to the amount claimed in terms of the amended summons.

Damages for Unlawful Arrest and Detention

On the question of damages for wrongful arrest, it is apposite to cite the sentiments expressed by KORSAH JA in *Botha v Zvada & Anor* 1997 (1) ZLR 415 (S) at 42-43:

“As regards the quantum of damages, an action for false imprisonment is one of the forms of *actio injuriarum*, and so proof of actual damage is not necessary to support such action. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to liberty. Our courts have quite properly taken the stance that deprivation of liberty is a very serious infraction of fundamental rights: *Allan v Min of Home Affairs* 1985 (1) ZLR 339 (H) at 346.”

In *Minister of Home Affairs & Anor v Bangajena* 2000 (1) ZLR 306 (S), at 309-310, the Supreme Court reaffirmed the position that deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. For this reason, damages for this wrong should be exemplary and punitive in order to deter would-be offenders.

In properly quantifying the amount of damages to be awarded it was aptly noted by GREENLAND J in *Masawi v Chabata & Anor* 1991 (1) ZLR 148 (HC) at 159, that:

“As regards quantum it must be borne in mind that the primary object of the *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings. The court has to relate the moral blameworthiness 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, precedents can only be of general assistance.”

In *Karimazondo & Anor v Minister of Home Affairs* 2001 (2) ZLR 363 (H) at 372, it was observed by MUNGWIRA J that “the monetary unit in this country has been on a perceptible and alarming downward spiral, with the result that the Zimbabwe dollar is now worth substantially less” Consequently, it was held necessary to take into account the decline in the value of money in recent years in the assessment of damages for unlawful arrest and detention.

In the instant case, the plaintiff was taken from his field and then handcuffed and detained by the defendants for over an hour. He was restrained in this fashion in full view of his family members and followers. His loss of liberty, although temporary, was aggravated by the absence of any justifiable reason for restraining him in that manner and at that time. The situation was further compounded by the fact that the defendants, acting directly and vicariously, opted to take the law into their own hands rather than await the due process of criminal investigation by the police.

All in all, the moral blameworthiness of the defendants was significantly exacerbated by the unjustified physical and mental anguish endured by the plaintiff. Having regard to all of the relevant factors, the quantum of damages for unlawful arrest and detention claimed *in casu* seems perfectly equitable and I see no reason for declining the amount claimed by the plaintiff.

Order

In the result, it is ordered that:-

Judgement be and is hereby granted in favour of the plaintiff as against the defendants jointly and severally, the one paying the other to be absolved, for:-

- (i) payment of the sum of \$4,500,000.00 (revalued);
- (ii) interest thereon at the prescribed rate calculated from the 19th of December 2002 to the date of payment in full; and
- (iii) costs of suit.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners
Dube, Manikai & Hwacha, defendants' legal practitioners