

LUKE DAVIES
versus
PREMIER FINANCE GROUP LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 7 to 9 September and 26 October 2010

B. Chikowero, for the plaintiff

A. Moyo, for the defendant

PATEL J: The plaintiff herein claims the sum of US\$150,000 as damages for malicious misconduct allegations brought against him by the defendant in April 2008. The defendant denies any malice or illegality on its part.

Consequently, the principal issue for determination in this case is whether or not the misconduct allegations and proceedings brought against the plaintiff were motivated by malice, prejudice and without legal basis. The second issue is whether or not the plaintiff suffered any damages and, if so, the quantum thereof.

Evidence for the Plaintiff

Luke Jim Davies, the plaintiff, testified as follows. He joined the defendant company in June 2006 as its Procurement Manager and was promoted to the post of Administration Manager in August 2007. Throughout 2007 he received good performance appraisals from his superiors and his performance reviews contained no allegations of misconduct. Again, an independent external group audit was conducted from June to August 2007 and an internal audit followed from November to December 2007. Neither of these audits implicated the plaintiff as regards his work-related activities in 2007.

From March 2008, he reported to Mr. Vambe, the Acting Chief Finance Officer. At that time, a secret investigation was carried out into his department by the internal audit unit. This was instigated by

Mr. Chigogwana, the Managing Director, and Ms. Nyamupachitu, the Chief Human Resources Officer, both of whom saw the plaintiff as an obstacle to their self-serving fraudulent activities. The plaintiff was not consulted during the investigation and neither he nor his staff participated in the process.

In April 2008, he was served with an Administration Department Investigations Report focusing on the performance of his duties in 2007 [Exhibit 1]. The findings contained in the Report were false and unfounded. Vambe handed the Report to the plaintiff and asked him to respond. He did so in detail as regards the six charges levelled against him [Exhibits 2 and 2A-2F]. Later that month, despite his detailed responses which showed that there was no good cause for disciplinary proceedings, he was served with a notice to attend a hearing to answer charges of misconduct [Exhibit 3].

The hearing was conducted at the end of April and the minutes of that hearing were produced in early May [Exhibit 4]. Later in May, he received the determination of the Hearing Officer [Exhibit 5]. He was found guilty on one out of the six charges and sentenced to a severe written warning valid for 6 months. He then appealed against that finding through his lawyers at the end of May [Exhibit 6]. The appeal was conducted in mid-June and minuted the next day [Exhibit 7]. The determination of the Appeals Officer, which was received a few days later, upheld the original finding of guilt as well the penalty imposed [Exhibit 8].

Thereafter, the plaintiff appealed to the Labour Office and the matter was referred to compulsory arbitration. The arbitration hearing was held in October and the arbitral award was handed down in November 2008 [Exhibit 9]. The arbitrator set aside the finding of guilt and ordered the cancellation of the written warning.

According to the plaintiff, Ms. Nyamupachitu's malice was evident from two letters that she wrote in November 2007 confirming his appointment to the post of Administration Manager

[Exhibits 10A & 10B]. She was malicious because his promotion diluted her position in the Human Resources Department, as appears from the organogram attached to Exhibit 10B. She also benefited from the unprocedural purchase of her company car by having it under-priced. Together with Chigogwana, she orchestrated the allegations against the plaintiff. Chigogwana himself engaged in various corrupt and fraudulent activities involving the over-priced procurement of computer equipment and luxury cars for the defendant company. Following several independent audits, he was dismissed from the company in 2009.

In November 2008, the defendant unilaterally terminated the plaintiff's employment, contrary to his wishes [Exhibits 11A & 11B]. The estimated equivalent of his earnings at that time was *circa* US\$3,000 per month, including salary and various executive allowances. Thereafter, the defendant has declined to issue a certificate of service, thereby preventing him from access to other jobs through employment agencies. Such certificate is essential as a rule for employment in the financial sector.

The plaintiff is qualified as a Chartered Buyer, through the United Kingdom Chartered Institute of Purchase and Supply, and holds an MSc degree in strategic management from the University of Derby. He also holds various board positions, including Finance Deacon of the Celebration Church and Chairman of the Zimbabwe Chartered Institute of Purchase and Supply from 2006 to 2008. Although the allegations against him were not publicised outside the defendant company, they not only undermined his position within the company but also penetrated and prejudiced his public life through word-of-mouth. The allegations were also discussed at the AGM of the Zimbabwe Chartered Institute of Purchase and Supply in November 2008. Consequently, he lost his re-election to the chairmanship of that body and also had to defend himself before the United Kingdom Institute.

The plaintiff claims damages for malicious prosecution by the defendant company acting through its functionaries, namely, Nyamupachitu and Chigogwana, resulting in psychological distress to himself and his family. Furthermore, because of the damage to his reputation in the financial sector, he has been unemployed since November 2008.

Under cross-examination, the plaintiff admitted that he received his full pay and benefits throughout the disciplinary proceedings. He also conceded that he did not raise the question of malice before the Hearing Officer and the Appeals Officer, nor did he object to Chigogwana chairing the appeal proceedings. This was despite the fact that he was legally represented at both hearings. He further accepted that his acquittal by the arbitrator was based on certain procedural weaknesses in the internal disciplinary proceedings.

Evidence for the Defendant

Prisca Nyamupachitu has been employed by the defendant as its Chief Human Resources Officer since September 2003. She holds two diplomas in education and training management as well as a BSc degree in sociology from the University of Zimbabwe and an MBA degree from the Zimbabwe Open University. Her evidence was as follows.

She was involved in hiring the plaintiff in 2006 and has worked with him until 2008. She did not encounter any problems in her working relationship with the plaintiff at any time. The plaintiff was promoted to the post of Administration Manager with two other managers, the Fleet Manager and the Procurement Manager, becoming his subordinates. Before that, these two managers reported to the Chief Operating Officer and not to the witness as claimed by the plaintiff.

The witness wrote Exhibit 10A, citing the 1st of September 2007 as the effective date of the plaintiff's promotion, that being the

date initially fixed by the Chief Finance Officer, Mr. Chimbera. She then received an instruction from Chimbera that the plaintiff's promotion date was to be the 1st of August 2007. Consequently, she wrote Exhibit 10B superseding Exhibit 10A, simply revising that date in accordance with Chimbera's instruction.

As regards disciplinary proceedings generally, the initial investigation is carried out by Internal Audit, Security and Investigations or the relevant head of department, depending on the nature of the allegations concerned. The matter is then referred to Human Resources and, if there are reasonable grounds for instituting disciplinary proceedings, that department appoints a Hearing Officer with the requisite disciplinary training to hear the matter.

Exhibit 1 resulted from a Reserve Bank of Zimbabwe (RBZ) audit of the defendant from April to June 2007. The RBZ issued a corrective order in November 2007, ordering the removal of certain staff and requiring the tightening of control systems in all departments. This called for an audit of all departments within the defendant company, including the plaintiff's department.

The Administration Department was initially audited in November 2007. This was followed up by another audit resulting in Exhibit 1. It was not necessary for the internal auditors to advise or consult the plaintiff in these investigations. Thereafter, he was duly called upon to respond to the issues raised in Exhibit 1.

Following the plaintiff's responses, the Acting Chief Finance Officer, Mr. Vambe, felt that the plaintiff had not satisfactorily addressed certain issues and that there were reasonable grounds for disciplinary proceedings. He then approached Human Resources and, having analysed all the papers, that department agreed that there were reasonable grounds to prefer misconduct charges. The witness then appointed the head of Personal Banking, Mr. Makombe, as the Hearing Officer. The latter acquitted the plaintiff on five charges but found him guilty on one charge. The plaintiff appealed

and the appeal was heard by Chigogwana, who was one of two Managing Directors, the other not having been available at that time. The Chief Executive Officer, Mr. Hounsell, decided that Chigogwana should be the Appeals Officer in this case.

In November 2008, the arbitrator overturned the finding of guilt and the penalty imposed upon the plaintiff. Consequently, the witness pulled out the written warning from the plaintiff's personal file and sent a memorandum to him confirming that fact, thereby implementing the arbitrator's decision.

Soon afterwards, Hounsell forwarded Exhibit 11 to the witness, who then processed the plaintiff's terminal benefits and deposited them into his current account. Subsequently, the plaintiff referred his termination to the Labour Office and then to arbitration on several grounds. The arbitrator determined that his contract of employment had been lawfully terminated. The witness was not aware of any appeal against that determination.

In July 2008, in keeping with the defendant's motor vehicle policy, the witness exercised her right to purchase her company car, a second-hand Mercedes Benz. The Fleet Manager, Mr. Chideya, who was the plaintiff's subordinate, obtained three market value quotations and sent an e-mail to the witness [Exhibit 12]. This e-mail was copied to the plaintiff as the Administration Department Manager and he was therefore involved in or aware of the process. The Chief Executive Officer then fixed the price at US\$31,250 which was the highest quoted price. This was converted to the Zimbabwe Dollar equivalent of \$846 trillion, using the bank rate, and reflected in the vehicle purchase agreement between the defendant and the witness [Exhibit 13].

As regards certificates of service, the defendant's standard form shows when the employee joined the group, the position held, the date of termination and the reason for termination [Exhibit 14]. It does not contain any other detail or reference. In any event, the

plaintiff did not at any time request the witness or anyone else in Human Resources to furnish a certificate of service.

Under cross-examination, the witness insisted that Exhibit 1 as read with Exhibits 2A-2F, on an objective and *bona fide* assessment, contained sufficient grounds to prefer misconduct charges against the plaintiff. It was not her function to determine allegations of misconduct but simply to advise whether there were reasonable grounds to proceed with a disciplinary hearing. The decisions of the Hearing Officer and Appeals Officer would have been more informed decisions based on all the evidence and not the papers alone.

When questioned by the Court, the witness explained that she was testifying on behalf of the defendant as part of her Human Resources duties. She has previously represented the defendant as a witness in all the other labour matters that have proceeded beyond the internal procedures of the defendant.

Vicarious Liability

The plaintiff's case, in essence, is that the disciplinary proceedings *in casu* were maliciously instituted by the defendant through its officers, acting in the course and within the scope of their employment with the defendant. These employees orchestrated the proceedings against the plaintiff so as to prevent him from interfering with their fraudulent activities.

The defendant disclaims vicarious liability on the ground that, if the employees were indeed acting so as to defraud the defendant, they were engaged on a frolic of their own and, therefore, cannot have been acting in the course and scope of their employment. While this argument is not entirely without merit, it must be noted that the two employees in question were engaged as senior managers whose respective duties would inevitably have included the performance of disciplinary functions. Thus, even if their ulterior purpose was to sideline the plaintiff so as to further their fraudulent designs, their involvement in the disciplinary proceedings cannot be

said to have been fraudulent *per se*. It was an integral aspect of their work which, according to the plaintiff, they performed in an improper manner. On that basis, if the plaintiff's contention is correct, it seems to me that the defendant cannot absolve itself of any liability that might arise as a consequence of the improper performance by its employees of their designated functions. In short, the defendant's vicarious liability extends to such unlawful actions of its employees as may reasonably be regarded as modes, albeit improper modes, of doing what it has authorised. See *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 742-743; *Zungu v Administrator Natal & Another* 1971 (1) SA 284 (D&CLD) at 285; *Nyandoro v Minister of Home Affairs & Another* HH 196-2010 at 5.

Malicious Allegations and Proceedings

According to Feltoe: *A Guide to the Zimbabwean Law of Delict* (2006), the delict of malicious prosecution or proceedings is committed:

“when D maliciously and without reasonable and probable cause brings legal proceedings against another. Every citizen has a right to use legal proceedings legitimately for the purpose of upholding and protecting his rights. He or she does not, however, have the right to abuse the legal process for the purpose, not of upholding and furthering his or her rights, but instead solely for the purpose of causing harm to P because he or she has malice towards P.

Thus, it constitutes a delict if D, actuated by malice and with no reasonable and probable grounds for doing so, does any of the following: procures the arrest or detention of P by the proper authorities (malicious arrest or detention); or institutes against P unsuccessful civil or criminal proceedings resulting in injury to reputation or pecuniary loss (malicious prosecution); or issues execution against P's property, which writ has been set aside (malicious execution).

... As regards malicious prosecution, the case of *Bande v Muchinguri* (1999) points out that the term 'malice' did not here mean spite or ill-will or a spirit of vengeance; it had a wider connotation. It included any motive different from that which is proper for the institution of criminal proceedings, which is to bring an offender to justice and thereby aid in the enforcement of the law.”

The plaintiff's claim is an *actio iniuriarum* for malicious proceedings or abuse of legal proceedings. For present purposes, the essential elements of this delict are that: the defendant set the law in motion against the plaintiff; in doing so, the defendant acted without reasonable and probable cause, *viz.* without any objective basis; the defendant's conduct was actuated by malice or improper motive; the proceedings were terminated in favour of the plaintiff; and the plaintiff suffered damages as a result of the proceedings. See *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A) at 133-136; *Van der Merwe v Strydom* 1967 (3) SA 460 (A) at 467.

It is common cause that disciplinary proceedings were instituted by the defendant's officers against the plaintiff and that those proceedings were eventually terminated by the arbitral award in the plaintiff's favour. What is in dispute is whether these officers acted without reasonable and probable cause and whether their conduct was actuated by malice or improper motive.

As regards good cause, the plaintiff's position is that the defendant has failed to prove that Exhibit 1 resulted from any corrective order issued by the RBZ. Again, by failing to call the author of the misconduct charges (Vambe) to testify, the defendant has further failed to show good cause for the misconduct proceedings. In light of the plaintiff's detailed and well-documented responses to Exhibit 1, there was no reasonable basis for those proceedings to have ensued. This is demonstrated by the plaintiff's internal acquittal on five of the six charges against him and his eventual acquittal on all charges. As for malice, the defendant's employees deliberately excluded the plaintiff from the investigations culminating in Exhibit 1, in clear breach of the Labour (National Employment Code of Conduct) Regulations 2006 (S.I. 15/2006). Thereafter, their improper motive was also evidenced by their persisting with misconduct charges despite overwhelming documentary evidence to the contrary.

In rebuttal, the defendant's position is that it instituted the disciplinary proceedings against the plaintiff in accordance with the National Code. In so doing, the defendant acted with reasonable and probable cause and followed due process in conducting and concluding the proceedings. The onus of proof in relation to the absence of good cause and the allegations of malice fell squarely on the plaintiff. Having regard to the defendant's evidence countering those allegations, the plaintiff has failed to prove the requisite malice to establish his case.

Section 6 of the National Code permits an employer, who has good cause to believe that an employee has committed an act of misconduct, to suspend such employee with or without pay and benefits. Thereafter, the employer must within 14 working days investigate the matter and conduct a hearing into the alleged misconduct. At such hearing, the employee must be afforded a full opportunity to prepare his case and defend himself, either in person or through a fellow employee, worker's committee member, trade union official or legal practitioner.

In the instant case, the investigation into the plaintiff's department appears to have been conducted pursuant to the RBZ corrective order, as an incident of the requirement to carry out random periodic checks on all of the defendant's departments. The investigation took place without the plaintiff's participation and before any disciplinary action was taken. Although the plaintiff's involvement in the investigation process might have been desirable, I do not think that its absence rendered the investigation irregular. In any event, the plaintiff was asked to respond to the allegations contained in the investigation report and he did so comprehensively and in great detail.

Subsequently, his superior officer, in consultation with the head of the Human Resources Department, considered all the papers and decided that there should be a hearing to determine the allegations of misconduct. They then appointed a colleague to hear

the matter and there is nothing to suggest that this person was anything other than neutral. At the hearing, the plaintiff was legally represented and afforded a full opportunity to present his case. He was exonerated on five of the six charges against him and this decision was upheld on internal appeal. Ultimately, the finding of guilt on the sixth charge was set aside by the arbitrator, who then ordered the defendant to cancel the penalty imposed upon the plaintiff and expurgate it from his record.

In hindsight, given that the plaintiff was entirely absolved of all the charges against him, it is arguable whether there was good cause to believe that he had committed any act of misconduct. However, there is nothing in the evidence before me to dislodge the defendant's assertion that the decision to institute misconduct proceedings was taken on an objective assessment of the papers and that the internal hearings were conducted in accordance with the rules of natural justice. In my view, the fact that the defendant was eventually acquitted does not necessarily mean that there was no reasonable ground from the outset for instituting misconduct proceedings. It seems to me that the genuine purpose of those proceedings was to formally adjudicate the allegations of misconduct that had been preferred in order to determine the plaintiff's guilt or innocence.

In this regard, it is also apposite to consider the specific findings of the arbitrator. Very significantly, he did not dismiss the possibility of some nexus between the internal audits and the charges levelled against the plaintiff. In essence, he acquitted the plaintiff because of "poor workmanship on the minutes of the hearing and determination handed down in this matter", viz. because of procedural and technical defects rather than substantive deficiencies.

As regards malice, it is important to note that the plaintiff did not raise the question of malice or victimisation throughout the disciplinary proceedings, even though he was legally represented.

Moreover, the defendant did not at any stage, as it was procedurally entitled to do, suspend the plaintiff or prevent him from performing his functions. On the contrary, he remained on full pay and benefits from the beginning to the conclusion of the disciplinary proceedings.

As for ulterior motives, it is common cause that Chigogwana was dismissed by the defendant in 2009, apparently in compliance with the RBZ corrective order. However, there was no evidence to sustain the plaintiff's assertion that Chigogwana actively instigated the disciplinary proceedings *in casu*. Again, in Nyamupachitu's case, there is nothing to show that she bore any grudge or ill-will against the plaintiff. His promotion to the post of Administration Manager did not in any way undermine her authority as Chief Human Resources Officer, and her explanation regarding his letters of appointment was perfectly plausible and acceptable. With respect to the acquisition of her company car, it is abundantly clear that this was an arms-length transaction, carried out in full compliance with the defendant's motor vehicle policy and with the plaintiff's knowledge.

Quantum of Damages

In view of my findings on liability, it is obviously not necessary to consider the question of damages. Nevertheless, I think it instructive to point out that the plaintiff's claim for US\$150,000 as damages appears to be ill-conceived for a variety of reasons. Apart from the sheer enormity of the sum in question, the specific headings and sub-headings under which this amount is claimed are entirely unclear. Plaintiff's counsel is directed to bear this in mind when launching similar actions in the future.

Disposition

It follows from the foregoing that the plaintiff has not been able to discharge the onus of establishing his case. He has failed to

show, on a balance of probabilities, that the defendant acted without reasonable and probable cause or that its conduct was actuated by malice or improper motive. This action is accordingly dismissed with costs.

Gutu & Chikowero, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners