

ERIC MUSUNDIRE
versus
OK ZIMBABWE

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 28 February 2011; 1 March 2011,
7 October 2011 & 6 March 2012

Opposed Court Application

Mr D. Muzawazi, for the plaintiff
Mr O. Ochieng, for the defendant

BERE J: The OK Grand Challenge Jackpot promotion has become an exciting annual national event to many Zimbabweans as it affords many lucky winners a rare opportunity to win various prizes ranging from motor vehicles, residential stands and an assortment of other items. It is an event which is aggressively advertised both in the print and electronic media.

Having responded to the OK Grand Challenge Jackpot Promotion in 2010, the plaintiff landed himself in trouble. This civil suit is a direct result of the plaintiff's desire to participate in one such a promotion. It caused a nightmare to the plaintiff. Indeed it earned the plaintiff quite some traumatic experience.

The largely agreed facts in this matter can be summarised as follows:-

The plaintiff is employed as a manager by Zimbabwe Institute of Public Administration and is based in Darwendale, a few kilometres outside Harare, the Capital City of Zimbabwe. His duties entail being in charge of around 100 employees and it is his sole responsibility to oversee the day to day operations of the institute.

In 2010 and pursuant to the irresistible advertisement by the defendant inviting customers to participate in the OK Grand Challenge Jackpot Promotion the plaintiff went to OK Bazaars Supermarket in Marimba and bought various groceries worth \$999,98 as a result of which he got coupons enabling him to participate in the exciting competition. Exhibit I on

page 27 of the plaintiff's bundle of documents was produced to confirm the transaction made by the plaintiff.

At the conclusion of the OK Grand Challenge Jackpot Promotion, and to be precise, on 9 June 2010, the plaintiff emerged as one of the few lucky winners of the items on offer. The plaintiff's name appeared in the Herald and the Chronicle (two national newspapers) as having won a microwave.

After attending to one or two housekeeping issues with the organizers of the promotion, the plaintiff was confirmed as a winner and invited to attend the prize giving ceremony which was to be held at Rainbow Towers, Zimbabwe on 16 June 2010. Rainbow Towers is one of the leading hotels situated in the capital city of Zimbabwe, Harare. On 16 June 2010 the plaintiff excitedly attended at the Rainbow Towers for the prize giving ceremony. To demonstrate his excitement in attending the grand occasion the plaintiff went to the Rainbow Towers in the company of his family and some workmates so that they would be witness to his rare exciting moment.

There was a dramatic turn of events at the Rainbow Towers. The plaintiff was later to regret why he had ever participated in the OK Grand Challenge Jackpot Promotion. Plaintiff and two of his colleagues (also winners of the OK Grand Challenge Jackpot Promotion) were lured into a car and arrested for having committed fraud in the acquisition of the coupons which they had used in participating in the competition.

For the next four days the plaintiff and his colleagues were shoved from one police station to the other starting with Braeside Police Station, Ahmed House and Harare Central Police Station. They were made to endure extremely difficult and painful experiences as they were forced to sleep in squalid condition, being routinely transferred from Ahmed House to Harare Central Police Station barefooted and in handcuffs. The plaintiff and his colleagues were treated as criminals. To the ordinary on looker, they were indeed criminals on parade.

Plaintiff and his co-accused were only released after Mawere had submitted an affidavit which outlined the plaintiff's innocence in the whole exercise.

THE EVIDENCE

The story told by the plaintiff was quite detailed and revealing.

Having properly acquired the coupons as advertised by the defendant, the plaintiff used the coupons to participate in the competition and in the month that followed he was

advised he was one of the lucky winners and invited to Rainbow Towers, Zimbabwe for the prize giving ceremony on 16 June 2010. The plaintiff attended the event with colleagues and his family members.

Things took a dramatic turn when the plaintiff and two other would be winners were lured into a parked car by the defendant's risk and services Manager, one Osborne Tariro Mawere (Mawere).

In a dramatic movie style manner the plaintiff and the other suspects were bundled into a motor vehicle belonging to the defendant but being driven by Mawere after being advised that they were under arrest and taken straight to Braeside Police Station. It was the plaintiff's unchallenged evidence that when they arrived at Braeside Police Station they were surprised to learn that their docket had been opened a few days before they were brought to the police station. The plaintiff stated he gathered that this docket had been opened as a result of the report made to Braeside police station by Mawere. For the first time, Plaintiff and his co-suspects were advised of the fraud charges allegedly committed against the defendant and accused of having fraudulently acquired competition coupons. The plaintiff protested his innocence to both Mawere and the Braeside Police officers but to no avail.

It was the plaintiff's further testimony that when he told the police and Mawere that he had legitimately acquired the coupons Mawere respondent by saying that, that would be established later.

The plaintiff testified that on that day he together with 30 suspects slept crammed in a dirty room barefooted with only one blanket which was taken by the other inmates who had been in the police cells before him. This was the first time the plaintiff had been to a police cell and he slept on the floor with no blankets at all in a cold night. He was wearing a jean and a T shirt. He said he was in a state of shock and that he never ate anything.

The following day the plaintiff and two of his co-suspects were transferred to CID Serious Frauds Section in handcuffs. According to the plaintiff, their transfer was caused by the alleged seriousness of their case. In the presence of Mr Mawere, the plaintiff said he was questioned and continued to protest his innocence to no avail. Mawere was said to have indicated to the CID details that he would take the coupons to O.K Marimba to verify the explanation proffered by the plaintiff.

The witness testified that from CID Serious Fraud Section they were transferred to Harare Central Police Station still handcuffed and passing through a congested taxi rank and

a bus terminus. This movement was made around 5pm which is one of the busiest hours of the day.

At Central police station the plaintiff and his co-suspects were ordered to remove their shoes and other personal items before being thrown into the cells again. The plaintiff summed up his painful experience in the following words;

“There was no food at the Central Police Station. I did not have anything to eat. I was in a state of shock and stress and could not take anything. The whole situation of being dragged across town and knowing I would have another night in cells, knowing I had genuinely acquired the coupons caused me stress and shock.”

Q. what transpired after supper?

A. we moved two floors to the cells, barefooted, stamping on water, urine, on the way up.

Q. where was this water coming from?

A. from the ablution facilities within the cell areas

The witness went on to explain the night’s ordeal – he testified they slept on concrete slabs in the cells with no blankets at all.

When asked by his counsel to describe the cells the witness shook his head as if going down painful and heart- tearing memories and retorted as follows:-

“Very dark, no lighting, ablution facilities producing serious ordures. We were 12 of us crammed in a single cell.”

The witness told the court that he endured the night and the subsequent two nights sleeping in similar conditions. It was only on the fourth day of his arrest and detention that he and his colleagues were advised that their case was going to be withdrawn after Mr Mawere had confirmed that indeed the plaintiff had genuinely acquired the coupons from O.K Marimba.

It was the witness’s testimony that instead of the plaintiff moving swiftly to have them released, it was only on the following day that Mr Mawere from O.K brought an affidavit which eventually secured the plaintiff and his co-suspects’ release. Their release

was on 19 June 2010 after the defendant's representative had carried out investigations which confirmed the plaintiff and his co-suspects' innocence. They were, after all innocent.

The witness concluded his testimony by saying that prior to him being arrested and bundled into custody the defendant had made no attempt at all to seek an explanation as regards how he had acquired the coupons in question. All the investigations were only carried out after the plaintiff had been deprived of his liberty on what turned out to be false allegations.

At the conclusion of his testimony the plaintiff said that the defendant's representative, Mr Mawere had caused or instigated his arrest and in his own word he stated;

“but for the report by OK about fraud I would not have gone through what I went through.”

The witness's evidence was that he tried to engage the defendant with a view to at least get an apology and his microwave which he had won as a result of his participation in the competition but nothing came his way.

The witness further stated that the allegations which were falsely raised against him portrayed him in bad light; to his family, friends and workmates as the impression created was that despite holding a responsible position at his workplace, he was a dishonesty person.

For all the trouble that he went through for doing nothing wrong really except to innocently participate in a competition organised by the defendant the plaintiff said he wanted damages broken down as follows:

- (i) \$100 000-00 for defamation
- (ii) \$50 000-00 for injuria and contumelia; and
- (iii) \$200 000-00 for unlawful arrest

The plaintiff was subjected to an unusually brief but pointed cross-examination whose thrust was to show that he had targeted the wrong defendant in this case. The emphasis of the cross-examination was to show that the plaintiff's claim did not lie against the defendant but against the police.

The cross-examination did not show that the defendant was in disagreement with the plaintiff's narration of events. The only point of divergence was the interpretation of those events.

The closure of the plaintiff's case was followed by an application for absolution from the instance which the court considered and dismissed signifying the opening of the defendant's case. It was at this stage that the claim for defamation was formerly abandoned by the plaintiff.

The sole witness for the defendant was Mr Osborne Tariro Mawere (Mawere), its risk and services Manager.

He advised the court that he has worked for the defendant for the past 13 years. He stated that following information received from an anonymous caller he lodged a report with the police which resulted in the arrest and subsequent detention of the plaintiff and his co-suspects.

The witness' narration of events leading to the arrest and detention of the plaintiff almost tallied with the story told by the plaintiff.

He confirmed having made the arrangements with the police to have the plaintiff and his co-suspects arrested at the Rainbow Towers and using his motor vehicle to transport them to Braeside police station. His evidence took the court through the arrest, detention and the subsequent release of the plaintiff and his colleagues.

During his testimony, the witness's attention was drawn to a portion of the advertisement by the defendant which was to the effect that "all participants and winners indemnify OK Zimbabwe (the defendant), their agencies and partners against any and all claims of any nature whatsoever arising out of and or from their participation in anyway whatsoever in the promotion including as a result of any act or omission, whether negligent, grossly negligent or otherwise on the part of OK Zimbabwe" See exhibit 2.

The witness testified that to the best of his knowledge the plaintiff's participation in the Grand Challenge Jackpot Promotion was not excluded by this rule implying that the defendant should be exempted from liability.

Under cross examination the witness disclosed that other than the 13 years of his work as a risk and control manager for the defendant, he had, prior to his engagement with the defendant been a senior police officer with the rank of Senior Assistant Commissioner, and well versed in police operations. He said he knew that once he had received an anonymous call concerning the alleged fraud involving competition coupons, it was imperative for him to carry out investigations first.

It was quite revealing that during cross-examination the witness conceded that at the time he masterminded the arrest of the plaintiff, he had himself not carried out investigations on behalf of the defendant.

The witness further told the court under cross-examination that he was surprised to see the police officers detaining the plaintiff and that he could not remember seeing the plaintiff being handcuffed at the time of his arrest.

Mawere further revealed under cross-examination that he had escorted the plaintiff from the podium at Rainbow Towers to where the police were - 200 metres away from where the winners function was being held, transported the plaintiff and the other suspects to Braeside police station using his motor vehicle.

He said it was him personally who conducted the investigations which eventually led to the release of the plaintiff and his co-suspects. He also confirmed that he was present at all times when the plaintiff was being interviewed or questioned by the police.

It was quite revealing that when questioned by the court the witness conceded that he had not acted diligently in rushing to have the plaintiff arrested before carrying out internal investigations not only to verify the so called tip off from the defendant's informant, the anonymous caller but to also check on the explanation given by the plaintiff. Mr Mawere conceded that with the benefit of hindsight, the plaintiff's detention could have been avoided.

At the close of the defendant's case I requested the two legal practitioners to file written submissions. I appreciate the detailed and well thought submission presented.

The plaintiff counsel moved the court to award the plaintiff at least \$50 000 in form of damages for the unlawful arrest whilst counsel for the defendant maintained that the defendant be exempted from liability basically on two fronts, namely, that the plaintiff had targeted the wrong defendant and that in any event the plaintiff's participation was governed by the defendant's rules of indemnification. He relied on rule 6 which was one of the rules regulating the conduct of the participants in the competition.

Further, the plaintiff's counsel argued that there was improper splitting of claims by the plaintiff by separately claiming for injury on one hand and secondly framing another claim under unlawful arrest.

I will deal with these legal issues later in this judgment after assessing the evidence that was adduced in this case.

ASSESSMENT OF THE EVIDENCE

There was no real challenge posed by the evidence led in these proceedings mainly because the two witnesses who testified are generally agreed on what transpired. They differ on the interpretation of that evidence.

The plaintiff felt very strongly that the evidence justified the award of the damages as claimed or at least as requested by his counsel during submissions.

The defendant's counsel's position from the same facts was that the plaintiff had failed to prove its case and that at most it is the police officers who actually arrested the plaintiff who ought to have been sued.

It is clear to me that the evidence as presented by the plaintiff was truthful, his narration of events starting with his participation in the Grand Challenge Jackpot Promotion, followed by his dramatic arrest at the Rainbow Hotel and his subsequent deprivation of liberty for the three days that followed could not be faulted.

It was quite clear from the plaintiff's testimony that his misfortune was triggered by the extremely reckless manner in which Mawere handled the alleged fraud in the acquisition of coupons for the defendant's business promotion. In the court's view one does not blindly or religiously act on information from an anonymous source without first doing basic or elementary investigations to establish the credibility or otherwise of such a report.

The position of Mawere in this case was compounded by the undeniable fact that Mawere was not a lay person. The evidence showed that he is quite a sophisticated individual. He projected himself as an experienced former police officer who retired from the force holding the rank of a Senior Police Commissioner. In addition, he holds a Bachelor of Commerce in Risk Management, backed by 13 years experience as the Risk and Services Manager for the defendant.

It is further noted that at the time Mawere received information concerning the alleged fraud, the witness had all the means at his disposal to carry out investigations to verify the correctness or otherwise of such potentially very serious allegations. The witness chose not to do so but to set in motion and in a meticulous and callous manner the events leading to the arrest of the plaintiff despite the plaintiff having protested his innocence from the very beginning.

To start with, Mawere invited the plaintiff to the Rainbow Towers under the pretext that he was required to collect his prize won in the competition yet he knew that he was setting a trap for the arrest of the plaintiff. Mawere himself masterminded the arrest of the

plaintiff in a typical movie style, used his motor vehicle to “deposit” the plaintiff at Braeside Police Station. Mawere actively participated in interviewing or questioning the plaintiff. To demonstrate his malice, it is quite significant, that Mawere never bothered to question the plaintiff about the alleged fraud before the latter was arrested.

Mawere’s reckless conduct went beyond maliciously causing the plaintiff’s arrest. The uncontroverted evidence was that even before the plaintiff had been brought to the police station Mawere had caused the plaintiff’s docket to be opened at Braeside Police Station. Not only this but it was also made clear to the plaintiff that he would only be released if Mawere brought an affidavit to that effect, and indeed it was Mawere’s affidavit which led the plaintiff to regain his liberty after Mawere himself had masterminded the snatching away of that liberty.

I have no doubt in my mind that at the time the police officers detained the plaintiff they had nothing on them to show there was reasonable suspicion that the plaintiff had committed the alleged criminal offence. The plaintiff’s case would have been neater if he had jointly sued the police with the defendant.

Be that as it may, I am also satisfied that it would be a reckless appreciation of the role played by Mawere in the drama associated with the arrest and subsequent detention of the plaintiff to spare him. Mawere cannot, in my view, and by any stretch of imagination purport to have been an innocent bystander in the chain of events leading to the situation the plaintiff found himself in. In the eyes of the Court, Mawere remains the architect of the injury that stalked the plaintiff. There was no reasonable justification whatsoever for Mawere to act in the manner he did. The alleged misjoinder is not fatal to plaintiff’s case. See order 13 Rule 87 (1) of High Court Rules, 1971.

Accepted, the police might have used their discretion to arrest and detain the plaintiff but the shadow of Mawere remains visible throughout the whole episode. It was Mawere’s reckless conduct which landed the plaintiff in trouble for doing nothing really except to participate in the business promotional activities of the defendant at the invitation of the defendant. It would be a very unfair law which fails to recognise the evil that Mawere did.

It is common cause that when Mawere acted in the manner he did he was acting in the cause and scope of his employment with the defendant. Vicarious liability must by operation of law stalk the defendant.

The conduct of Mawere is not without precedent. See the case of *Mapuranga v Mungate*¹ and *Earnest Macheke v Paul Metcalfe and Maizeland SOS*².

Let me at this stage deal with the issues of law raised by the two counsels in this matter.

It will be noted that the claim for defamation having been withdrawn during the proceedings, the plaintiff's claim remained under two headings, viz, injuria and unlawful arrest.

THE ALLEGED IMPROPER SPLITTING

Counsel for the defendant argued very strongly that the plaintiff's claims under these two separate headings amounted to improper splitting of claims. The argument was that the plaintiff could only claim under either head of damages but not both.

R.G. Mckerron³ in dealing with the aspect of *actio injuriarum* remarks as follows:

“The interests of personality protected by the *actio injuriarum* are those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity or reputation....

Examples of such acts are assaults of all kinds, the unjustifiable infliction of any restraint upon the liberty of another, the use of defamatory or insulting words concerning another, the malicious and unwarranted institution of criminal proceedings against another....”

In the case of *Masawi v Chabata & Anor*⁴ where the plaintiff was seeking damages for wrongful and unlawful arrest and imprisonment the learned judge, GREENLAND J recognised that for the purpose of the *actio injuriarum* an unlawful, arrest had been made and maintained by threats.

It occurs to me that in a claim for damages one may not refer to unlawful arrest without triggering the aspect of the injury to the plaintiff's feeling caused by such an act.

¹ 1997 (1) ZLR 64

² HH62-2007 per PARTE J

³ The law of Delict, A treatise on the principle of liability for civil wrongs. In the Law of South Africa, By R G Mckerron, 7th edition, Juta & Co. Ltd, Cape town, 1971 at p.53

⁴ 1991 (1) ZLR 148 (HC) (headnote, p.1)

In other words damages for unlawful arrest are awarded in recognition of the *injuria* associated with that unlawful conduct. If this position is accepted, it appears to be quite superfluous in a civil suit to claim for *injuria* under one heading and unlawful arrest under another heading. The claim should basically be under one heading and I take the point that there may have been improper splitting in the plaintiff's claim. I intend to address this anomaly by awarding one globular figure for damages.

THE INDEMNIFICATION CLAUSE

It was argued by the defendant's counsel that the plaintiff, having indemnified the defendant by participating in the competition as per the rules of the competition, could not possibly bring the instant civil action against the defendant.

Heavy reliance was placed on rule 6 of the competition which was to the following effect:

"All participants and winners indemnify OK Zimbabwe Limited, the Advertising Agencies and partners against any and all claims of any nature whatsoever in the promotion (including as a result of any act or omission, whether negligent or otherwise on the part of OK Zimbabwe)"

I note that in practice such clauses are not blindly or religiously accepted by our courts as the learned author R H CHRISTIE observes when he states:

"Obviously the law cannot stand aside and allow such traps to operate unchecked, and the courts have protected the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit and by interpreting exemption clauses narrowly."⁵

In the same breadth, I also find the remarks by INNES CJ quite apposite when the learned judge stated:

"Hence contractual conditions by which one of the parties engages to verify all representations for himself and not to rely upon them as inducing a contract, must be confined to honest mistake or honest representations. However wide the language, the court will cut down and confine its operations within these limits."⁶ (My emphasis)

⁵ The law of contract in South Africa, R.H Christie, Butterworths, Durban, Pretoria 1st ed. 1983 reprint. Pp188-189

⁶ Wells v SA Alumenite Co. 1972 AD 69 at 72

Questioned around this exemption clause during cross-examination, the plaintiff explained that he could not have thrown away his constitutional rights as afforded by the Bill of rights by participating in the defendant's jackpot promotion. I agree with the observation by the plaintiff. I have already made a specific finding that Mawere was both reckless and malicious in the manner he dealt with the plaintiff and I am satisfied that the defendant must not be allowed to avoid liability by seeking refuge in clause six of the competition. Allowing it to do so would offend public policy considerations which demand that innocent and unsuspecting individuals be protected by the law.

QUANTUM

Having concluded that the defendant cannot escape liability in this case I must now move to consider quantum for such damages.

As I have already highlighted elsewhere in this judgment, I am fully cognisant of the fact that in arresting and detaining the plaintiff, the police, who for some strange reason have not been joined in these proceedings clearly abused their discretion. Be that as it may, I do not consider the non joinder of the police to be fatal to the plaintiff's case because the conduct of Mawere can be clearly separated from that of the police.

Causing the unnecessary arrest of an individual has its attendant consequences and the injuria caused to the victim is something the courts frown at.

The plaintiff in this case was punished for doing nothing but to participate in an activity of the defendant at the invitation of the defendant. In quantifying damages in this case I am guided by the remarks of GREENLAND J in the case of *Masawi v Chabata*⁷ where the learned judge stated:

“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 feeling. The court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim.”

⁷ *Masawi v Chabata* 1991 91) ZLR 148 (HC) at 159

In *casu* the plaintiff explained in greater detail how Mawere masterminded his arrest right in front of his wife and colleagues who had come to join him in celebrating his moment of joy as one of the winners in the competition.

He explained how Mawere remained firmly in charge of the whole episode from the time of his arrest up until his release. I have not the slightest doubt that Mawere's moral blameworthiness remained significantly high. His overzealousness and evil arm remained visible throughout the pain endured by the plaintiff.

Given the aspect of dollarization, there is very little that can be derived from cases of a similar nature in terms of *quantum* as the majority of the awards were made in the Zimbabwe dollar.

However, I consider the figures proposed by the plaintiff's counsel as overzealously high and unacceptable.

In my endeavour to arrive at a fair quantum for damages I have had to consider the awards made in the following cases and converting the amounts awarded from Zimbabwe dollars into United states dollars using the ruling market rate at the time;

- (1) *Masawi v Chabata and Anor* 1991(1) ZLR 148 (HC)
- (2) *Karimazondo and anor v Minister of Home Affairs* 2001 (2) ZLR 363 (H)
- (3) *Minister of Home Affairs and Anor v Bangajena* 2000 (1) ZLR 306 (SC)
- (4) *Botha v Zvada and Anor* 1997 (1) ZLR 415 (SC) and
- (5) *Ernest Macheke v Paul Metcalfe and Maizeland* SOS HH62-2007

I consider that taking into account all the factors in this case a figure of \$8 500 as damages would be appropriate.

Order

In the result it is ordered that:

- 1) Judgment be and is hereby granted in favour of the plaintiff against the defendant for:-
 - a) Payment of the sum of \$8 500-00 as damages for *action injuriarum*.
 - b) Interest thereon at the prescribed rate calculated from 7 October 2011 to date of payment in full; and

c) Costs of suit.

Messrs Mtombeni, Mukweshu Muzawazi, legal practitioner for the plaintiff
Messrs Atherstone and Cook, legal practitioner for the defendant