

DANIEL MUSUSA
and
THERESA SHAMU
versus
TARIRO PAUL MACHIRIDZA

HIGH COURT OF ZIMBABWE
MHURI & MUCHAWA JJ
HARARE, 6 July 2023 & 10 January 2024

Civil Appeal

Mr G *Unzemoyo*, for the appellants
Mr N L A *Mupure*, for the respondent

MHURI J: In March 2020, respondent issued summons in the magistrates' court against the two appellants claiming payment of a sum of \$300 000 being general damages for malicious arrest and prosecution at the instance of the two appellants.

The particulars of claim were that:-

1. on 13 November 2019, the appellants (defendants in the court *a quo*) caused the malicious arrest and prosecution of the respondent (plaintiff in the court *a quo*) by making a false report to the police.
2. as a result of the false report, respondent was arrested and charged on allegations of theft of trust property in terms of section 113(2) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] and a docket CR 174/5/19 was opened.
3. the appellants insisted on the arrest of the respondent on the above allegations knowing the same to be false and notwithstanding clear evidence to the contrary.
4. in the circumstances the appellants acted without reasonable and probable cause as the allegations were simply meant to malign the respondent's character.
5. at the insistence of the appellants, the respondent was hauled before the magistrates' court to face the spurious and malicious charges on 15 November 2019 and again on 12 March 2020 and on both occasions the Prosecutor General's Office declined prosecution as respondent had no case to answer.

6. as a result of the false and malicious allegations by appellants respondent suffered general damages of malicious arrest and prosecution in the amount of ZWL\$300 000.

The appellants' plea was to this effect, that:-

- a. the arrest was not malicious. The arrest was made on reasonable suspicion. The report was not false as respondent was paid an amount of US\$2 220.60 by their former employer but he did not remit it to them as from March 2019 making them believe that he had stolen the money hence they acted correctly and within their rights to report the matter to the police.
- b. respondent had not paid them their money 1 year 6 months after it was paid to him. He was then hauled to the magistrates' court.
- c. prosecution was not declined, the matter was still to be tried in court. There is no ruling by any court that their allegations are false or the finding that the arrest and being brought to court for vetting by the prosecution is malicious or unlawful.
- d. the amount of ZWL\$300 000 was simply plucked from the air, it's not justified nor deserved.
- e. they prayed for the dismissal of the claim by respondent.

After going through all the procedures, the matter went through a full trial after which the trial court ruled in favour of the respondent and granted the claim as follows:-

1. Defendants (plaintiffs herein) to pay ZWL1 500 000 being general damages for malicious prosecution.
2. Defendants to pay interest at the prescribed rate calculated from the date of summons to date of full and final payment.
3. Defendants to pay costs of suit on an ordinary scale.
4. Defendants to pay jointly and severally the above amounts the one paying the other to be absolved.

The issues referred for trial for the court's determination were:-

- i) whether or not the report to the police by the appellants was false and malicious.
- ii) whether or not the defendants caused the malicious prosecution of the respondent.
- iii) whether or not the respondent was entitled to damages and the quantum thereof.

At the conclusion of the trial, the trial court found as undisputed that:-

- the two appellants were respondent's clients and respondent had successfully represented the two appellants in a civil matter resulting in an award of US\$2 279 in appellant's favour.
- after the successful litigation respondent received the sum of US\$2 279 on behalf of the appellants. The amount was paid into the respondent's firm Nostro account in March 2019 as trust funds.
- respondent after receiving the cash he instructed the firm's bank to transfer the money into a third party's Nostro account which third party was instructed to receive the money on behalf of both appellants.
- after the money was transferred by respondent the money that reflected in the third party's bank account was in Zimbabwean dollars instead of United States dollars which respondent had received on their behalf and the parties agreed that the money be sent back to respondent so that the error be rectified by the bank.
- respondent was accused of theft of trust property by appellants after the appellants had not received their money in full. Appellants made a report to the police which led to the subsequent arrest and prosecution of respondent.

From the evidence adduced before it, the trial court made the observations that, just before refunding respondent the US\$686.22 erroneously sent, appellants on 2 April 2019 rushed to the Law Society to file a letter of complaint against respondent (Exhibit 3). On 8 April 2019, respondent replied to the letter of complaint addressing the Law Society, attaching proof of transfer that he made on 28 March 2019 from his FCA CABS account to the nominated account on behalf of appellants. In May 2019 appellants rushed to make a police report for theft of trust funds despite the reply and proof by respondent to the complaint on 8 April 2019.

The error or fault was with the bank and not respondent. The bank (CABS) wrote a letter to the officer in charge ZRP Mabelreign informing the police that an amount of US\$2 060.59 and not RTGS was debited from respondent's FCA account 1124822860.

From the observations it made, the trial court was of the view it was not necessary for the appellants to cause the arrest and prosecution of respondent. It was a clear banking system error that was communicated to appellants that respondent was not to be punished for by going through criminal arrest. It was the trial court's view that from the evidence, appellants by

reporting to the police, they clearly set the law in motion, and caused respondent's arrest. They acted maliciously by rushing to make the report to the police of theft when the case had been handled by the Law Society and proof that the money had not been stolen had been attached.

Aggrieved by the trial court's ruling, appellants filed this appeal. As per the notice of appeal, the appeal is based on 7 (seven) grounds. At the hearing of the appeal, appellants' legal practitioner indicated that without abandoning rest of the grounds, he will address the court on grounds 1 and 2 upon which the appeal can be disposed of.

Grounds 1 and 2 read as follows:-

1. The court *a quo* erred at law when it ruled that the prosecution of respondent was instigated by the appellants considering that the respondent did not prove that appellants did more than just report the matter.
2. The court *a quo* erred and misdirected itself at law when it awarded general damages for unlawful arrest to respondent considering that the court *a quo* ruled that the arrest was lawful.

It was appellants' submissions that the placing of information before the police does not amount to instigation. Appellants did not give orders or commanded police to arrest. Reliance was made on the cases of:

- ECONENT WIRELESS (PVT) LTD & ORS v SANANGURA SC 52/13
- NHERERA v SHAH HH 845/15
- OK ZIMBABWE v MUSUNDIRE SC 23/15

It was submitted that in the present case, there was no evidence to support that the police were commanded. The matter was taken to court where it ended at the vetting office. There was no prosecution. In the premis the court *a quo*'s finding was not supported by any evidence

As regards ground 2, it was submitted that respondent did not address the grounds 2, 4, 5, 6 and 7. Since the court *a quo* found that the arrest was lawful delictual damages were not to be awarded. Appellants referred to the case of ZUVARIMWE & ANOR v NARAN & ANOR 2014 (1) ZLR 449 (H) to bolster their argument.

As regards ground 3, appellants' submission was that the court *a quo* erred in finding that there was no reasonable and probable cause for the arrest and that the arrest was out of malice. If

one considers the chronology of the events, the court's findings of facts are irrational and outrageous warranting this court's interference.

In response it was submitted on behalf of the respondent that there is no reason why the court *a quo*'s ruling should be vacated. Appellants' plea discloses an admission that there was instigation. The moment there is confessional pleading, there is no onus to prove. Reliance was made on the case of:-

WAMAMBO v MUNICIPALITY OF CHEGUTU 2012 (1) ZLR 452 H

It was submitted further that the case of NHERERA v SHAH HH 845/15 is of no relevance as it was overturned by the Supreme Court under SC 51/2019.

The report to the police was not made in good faith as it was false. The court *a quo* assessed the evidence placed before it and correctly found that the arrest was indeed malicious and false. Reference was made to the case of S v TAMBO 2007 (2) ZLR 33 (H).

As regards ground 2, it was submitted that the finding that the arrest was not unlawful relates to quantum of damages to be awarded hence the award of RTGS 1.5 million instead of RTGS 3 million.

As regards ground 3 the submission was that, the submission by appellants that there was reasonable and probable cause for appellants to cause the arrest of respondent flies in the face of the court *a quo*'s findings on page 9 paragraph 2 of the record of proceedings.

As for the rest of the grounds, the submission was that these were redundant as a concession was made that grounds 1 and 2 will resolve the appeal. Finally it was submitted that there is no basis for the appeal and it ought to be dismissed with costs on the higher scale.

It is a trite legal position that an appellate court will not interfere with the court *a quo*'s factual findings unless the findings are irrational or grossly unreasonable.

HAMA v NATIONAL RAILWAYS OF ZIMBABWE 1996 (1) ZLR 664 at page 670 C
– E is the *locus classicus* on this position. KORSAH JA had this to say:

“The general rule of law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such conclusion.”

The court *a quo* as earlier stated made the findings that, appellants set the law in motion by making a police report of theft of trust property, that the arrest was motivated by malice and that there was no reasonable or probable cause for respondent's arrest.

The question to be answered is, did the court *a quo* err or misdirect itself when it found that the appellants set the law in motion resulting in the arrest of respondent. The answer in our view is in the negative. Appellants were aggrieved by what they saw as a delay in the payment of their money by respondent. They were aggrieved by the amount in RTGS dollars which was deposited in their nominated account by, who they thought was respondent. In their summary of evidence, appellants stated:-

“That the defendants will testify that it was in fact their report to the police and investigations that ensued that uncovered and resulted in the defendants being paid their money.”

In their closing submissions appellants stated:-

“The defendants clearly had probable cause to suspect theft of their money by the plaintiff as his conduct was suspicious.....
It took 1 year 6 months for the defendants to get their money paid by the plaintiff through police investigations.”

In an application for rescission of a default judgment, first appellant deposed in his founding affidavit to the effect that:-

“The applicants had not received their money from a legal practitioner in whose trust account the money was deposited and as such were within their rights to report the matter to the police for the arrest of the respondent.

In fact it was the police case that resulted in investigations which later made the respondent's bank renege from its earlier denial on the whereabouts of the money and admitting their error 2 years down the line to the prejudice of the applicants.”

The above narration clearly shows and supports the finding by the court *a quo* that appellant set the law in motion. The court *a quo* analysed the facts placed before it and came to that conclusion. As stated by UCHENA J (as he then was) in the case of S v TAMBO (supra):-

“The correct judicial assessment of evidence must be based on establishing proved facts whose proof must be a result of a careful analysis of all the evidence led. The final result must be a product of an impartial and dispassionate assessment of all the evidence placed before the court. The judicial officer's duty is to determine the issues before him one way or the other guided by the evidence which he must critically examine.”

These remarks are apt *in casu*.

The next question to be determined is did the court *a quo* err or misdirect itself when it held that the arrest was motivated by malice and that there was no reasonable and probable cause for the arrest.

The law on malicious prosecution as submitted by both parties in their heads of argument is aptly captured in the case of:-

LUKE DAVIES v PREMIER FINANCE GROUP LIMITED HH 235-10

PATEL J (as he was then) had this to say:-

“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.’”

MALABA DCJ (as he then was) in the case of:-

ECONET WIRELESS (PVT) LTD

versus

SANANGURA 2013 (1) ZLR 401 S

quoting with approval DAVIES v PREMIER FINANCE GROUP case (supra) stated as follows:-

“In order for one to succeed in an action for malicious prosecution, one must prove four requirements, namely:

- that the prosecution was instigated by the defendant;
- it was concluded in his favour;
- there was no reasonable and probable cause for the prosecution;
- the prosecution was actuated by malice.

The Learned Judge went further and stated:-

“Placing of information and facts before the police does not in itself amount to instigating prosecution. It would amount to instigation if, besides giving information, the defendant proceeds to lay a charge or over bears on the police to institute proceedings which they would not otherwise commence or institute.”

In the case of:-

BANDE v MUCHINGURI 1999 (1) ZLR 476 H

the point was made that giving an honest statement of facts to the police on which the prosecution is then instituted is not “instigating” a prosecution.

“The phrase” “reasonable and probable cause for a prosecution” refers to an honest belief in the guilt of the accused based on full conviction founded upon reasonable grounds, of the existence of a state of circumstances which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed”; per MALABA DCJ in the ECONET WIRELESS case (supra).

In *casu*, the court *a quo* made the findings on the basis that, appellants instigated the prosecution of respondent by rushing to the police when the money had been deposited in their nominated account.

Following LUKE DAVIES case, it is clear that all appellants did was place information before the police. There is no evidence that they lay charges or overbore on the police to institute proceedings. This is despite the fact that it is them who set the law in motion by placing the facts before the police.

It is not in dispute that the appellants filed a complaint with the Law Society of Zimbabwe. Respondent responded to the complaint attaching proof that he had deposited appellants’ money into their nominated account. It was not disputed however that respondent’s response and proof of deposit was not brought to appellants’ attention, hence at the time they made a report to the police they were not aware of the response. For the court *a quo* then to find that appellants rushed to the police and that they acted out of malice, it erred.

Indeed, from the evidence, respondent gave an instruction to his bank to deposit appellants’ sum in US\$ from his FCA. The bank however deposited RTGS instead. Appellants rejected the RTGS deposit and returned it to the bank and advised respondent and engaged him to have the correct amount in US\$ deposited to no avail until a year and half later.

The record shows that the letter by the bank exonerating respondent which the court *a quo* relied upon in making a finding that appellants had malicious intentions because a reasonable person cannot blame and cause the arrest of an innocent party when there is clear evidence that it was the bank and banking systems that was to blame, was only written a year later after the report had already been made. This shows that at the time of the police report, no such information was brought to their attention. On this note, again the court *a quo* fell into error.

It is also not in dispute that in March 2019 respondent received and deposited into his trust account, US\$2 279 which he was to remit to appellants. Respondent instructed his bank to remit in US\$ the amount to appellants' nominated account. The bank deposited RTGS instead of US\$. This aggrieved appellants and they suspected that respondent had stolen their money. They returned the RTGS to respondent's bank. They engaged him without success. Appellants managed to get their money the following year i.e. 1 year 6 months later after the engagement of the police.

In view of the above, we are of the considered view that appellants established that they had reasonable and probable cause to make a report to the police. The court *a quo* therefore erred in making a finding that there was no reasonable and probable cause to make a report to the police.

In the circumstances we find that the appeal is with merit and we grant it.

It is therefore ordered that the appeal be and is hereby allowed with costs on the ordinary scale. The court *a quo*'s ruling be and is hereby set aside and is substituted as follows:

"The plaintiff's claim is dismissed with costs."

MHURI J:.....

MUCHAWA J:.....Agree

Musara Mupawaenda & Mawere, appellants' legal practitioners
Machiridza Commercial Law Chambers, respondent's legal practitioners

