

REPORTABLE (27)

OK ZIMBABWE LIMITED
v
ERIC MSUNDIRE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA
HARARE, JULY 16, 2013

D. Ochieng, for the appellant

S. Hashiti, for the respondent

GARWE JA

[1] After hearing submissions from counsel, the court issued the following order:

- “(1) The appeal be and is hereby dismissed with costs.
- (2) The reasons for this order are to follow.”

[2] What follows are the reasons for the order.

FACTUAL BACKGROUND

[3] The appellant, OK Zimbabwe, is a company duly incorporated in terms of the laws of Zimbabwe. It is a major player in the retail sector and for a number of years has conducted what has come to be known as the “OK Grand Challenge Promotion.” That promotion provides an opportunity for a number of its customers to win various items, such as motor vehicles, residential stands and electrical goods.

- [4] The respondent, Eric Msundire, was employed as manager by the Zimbabwe Institute of Public Administration situated at Darwendale just outside Harare. It was common cause at the trial that he purchased various grocery items from the OK Bazaars Supermarket in Marimba worth \$999.98. Consequently he was given a number of coupons which he completed and deposited into a selected container.
- [5] On 9 June 2010 the appellant, through the public media, announced a list of names of persons who had won various items in the promotion. The respondent's name was one of the names so announced.
- [6] Shortly thereafter, the appellants' risk and services manager, one Osborne Tariro Mawere, received what he termed an anonymous call. The caller suggested that there had been fraud in the manner in which some of the participants had obtained coupons to participate in the promotion. Mawere accordingly proceeded to Braeside Police Station where he lodged a complaint based on the anonymous call and consequently a docket was opened for the purpose of investigating the complaint.
- [7] It is pertinent to mention that Mawere had been a police officer in the Zimbabwe Republic Police and at the time he retired from the force occupied the rank of Assistant commissioner. At the time of the 2010 promotion he had been employed by the appellant for thirteen years. He also was the holder of a Bachelor of Commerce Degree in Risk Management.
- [8] The appellant invited the winners of the promotion to attend the prize giving ceremony at the Rainbow Towers, Harare, on 16 June 2010. It is common cause that

the invitation was intended to identify certain of the winners of the promotion and to cause their arrest by the police. The police also attended the ceremony at the behest of Mawere but stood some distance away, near Mawere's vehicle, which the latter had provided to facilitate the apprehension and conveyance of the suspects.

[9] The respondent attended the event in the company of his family and workmates, some of whom had also been announced as winners. Mawere then lured the respondent and two of his colleagues to the car where the police were waiting. At the vehicle, it was alleged that they had been involved in the fraudulent acquisition of the coupons used in the competition. In the company of the police, Mawere then drove them to Braeside Police Station where they were detained.

[10] For a period of four days, the respondent and his colleagues were transferred from one police station to another. They were made to endure extremely difficult and painful conditions and in particular were made to sleep in squalid conditions.

[11] It was common cause at the trial that at the time of their arrest, no investigations had in fact been carried out to ascertain whether or not the respondent had in fact been involved in any fraudulent acquisition of coupons. It was also common cause that the investigations were carried out by Mawere only after the arrest of the respondent and his colleagues. It was also common cause that when Mawere eventually took the coupons used by the respondent to the relevant branch for verification, he confirmed that in fact the purchase had been in order and that the respondent had not been involved in any wrong doing.

[12] The respondent and his colleagues were only released after Mawere had deposed to an affidavit in which he exonerated them of any wrong doing.

THE PROCEEDINGS IN THE COURT A QUO

[13] The respondent, feeling aggrieved, instituted an action in the High Court seeking damages for defamation, *inuria* and deprivation of liberty.

[14] The appellant denied all liability, pointing out that all it had done was to make a report to the police. The appellant also sought to rely on an exemption clause that indemnified it against all claims of any nature whatsoever arising out of the promotion.

FINDINGS BY THE COURT A QUO

[15] The facts giving rise to the delictual claim were found by the court to be largely common cause. It was Mawere who had personally conducted the investigations and was present at all times when the respondent was being interviewed. The court found that Mawere had handled the investigations in an “extremely reckless” manner and had caused the arrest of the respondent without verifying the authenticity of the anonymous call or carrying out investigations into the allegations, even after the respondent had protested his innocence.

[16] The court further found that it was Mawere who had “masterminded” the arrest, used his vehicle to “deposit” the respondent at Braeside Police Station, actively participated in the interrogation and that, at the time the police officers detained the respondent, they personally had no reasonable suspicion that the latter had committed

an offence and appeared content to leave everything in the hands of Mawere. The court also found that whilst it would have been more prudent for the respondent to have sued the police as well, such non-joinder was not fatal.

[17] The court *a quo* was also of the view that owing to the reckless and malicious manner in which Mawere had conducted himself, the exemption clause had to be restrictively interpreted in order to protect members of the public such as the respondent against blatant abuses of exemption clauses. The court *a quo* accordingly found that the appellant could not exempt itself from Mawere's reckless and unacceptable conduct in causing the unnecessary arrest of innocent members of the public before carrying out even the most basic of investigations.

[18] In the result the court awarded judgment in favour of the respondent in the sum of \$8 500.00 for unlawful arrest, interest thereon at the prescribed rate and costs of suit.

[19] It is against that order that the appellant has appealed to this Court. The appellant's grounds of appeal raise four issues. These are:-

19.1 that the court *a quo* erred in concluding that the appellant had restrained the liberty of the respondent or had directed that this be done.

19.2 that the court erred in concluding that the appellant had acted with *animus injuriandi*.

19.3 that the court *a quo* erred in finding that the appellant was liable for the acts of the police who arrested and detained the respondent in the exercise of their own discretion.

19.4 alternatively, that the court *a quo* erred in not finding that the appellant's liability was excluded by the exclusionary clause contained in the rules of the competition.

COURT A QUO MADE FINDINGS OF FACT

[20] The facts before the court *a quo* were largely common cause. Based on those facts the court found that Mawere did not simply report a suspected fraud. He had in fact fully participated in stage - managing the award winning event in order to identify the respondent and others and cause their arrest. He had no *iota* of evidence that the respondent had committed an offence. Indeed the police had no such evidence and were happy to allow Mawere to lead the investigations. In short, although the police detained the respondent, this was at the instance of Mawere, in circumstances where neither Mawere nor the police officers had reasonable suspicion that an offence had been committed. For an arrest to be lawful, the arresting detail has to show that he had reasonable grounds for suspecting that the accused had committed an offence. *Botha v Zvada & Anor* 1997(1) ZLR 415 (S), 419 A-B.

WHETHER THE COURT A QUO ERRED

[21] It is important to reiterate that the findings made by the court *a quo* were consistent with the facts which were generally agreed by the parties. Consequently, in the absence of a suggestion that the court *a quo* misdirected itself in making those conclusions, this Court, as an appellate court, has no power to interfere with those findings. My view of the matter is that not only is there no basis upon which this Court can interfere with the findings of fact made by the court *a quo* but also that the findings were in fact consistent with the proven facts.

[22] The finding by the court *a quo* that the appellant, through Mawere, together with some members of the police force, unlawfully detained the respondent cannot be impugned.

[23] The position is now settled that whilst the action for unlawful arrest and detention is usually brought against the police or other uniformed forces, a private individual can also commit this delict – Feltoe, *A Guide to the Zimbabwe Law of Delict*, 3rd Edition 2001, p56.

THE QUESTION OF ANIMUS INJURIANDI

[24] The position is also settled that in our law, unlike South Africa, once unlawful arrest or imprisonment are proved, *animus injuriandi* is presumed and intention is not a requirement for this delict – Feltoe, *op cit*, at page 56.

The submission by the appellant that the court *a quo* erred in finding that the appellant had acted with *animus injuriandi* consequently is without merit.

THE EXEMPTION CLAUSE

[25] The exemption clause that formed part of the promotion read:

“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)”

[26] The appellant argued in the court *a quo* that based on this clause, it was not liable in delict for the misfortunes that befell the respondent, such liability having been

indemnified by the respondent in deciding to participate in the promotion on that basis.

[27] The court *a quo*, relying on various authorities, concluded that such clauses are not religiously accepted and that where a party seeks to indemnify itself against the reckless and malicious conduct of its employees, such indemnification must be curtailed and the party may not seek to avoid liability as a consequence thereof.

The question is whether the court *a quo* was correct in this regard.

[28] In general, parties to a contract are at liberty to exempt each other from the consequences flowing from a breach of the contract. For this reason, corporate entities and public institutions providing a particular service or engaged in a contractual relationship with another exempt themselves from liabilities they would otherwise incur. In general if both parties are aware of the exemption no real difficulties are encountered. However, such an exemption can be an expensive trap for an unwary client.

[29] For the above reason, the courts, in order to protect the public, have set limits to the exemption that they will permit by interpreting such a clause narrowly. In doing so the court endeavours to ascertain what the parties intended the exemption to cover. However an exemption that is *contra bonos mores* will not be permitted. For example a party may not exempt himself from his own fraud.

[30] The approach of the courts is to adopt a narrow interpretation of exemption clauses and adopt the principle that, unless the scope of the exemption is clearly expressed, it

must be interpreted as giving minimum protection to the party in whose favour it operates.

[31] In *Tubb (Pvt) Ltd v Mwamuka* 1996 (2) ZLR 27 (S), this Court had occasion to restate the principles applicable in exemption clauses. These may be summarised as follows:

- the words of the exemption clause must be read as part of the contract and must be sufficiently clear and comprehensive for a court to give effect to them.
- any ambiguity as to meaning and scope of the exemption must be interpreted against the *proferens* unless he proves that the words used embraced the contingency that has arisen.
- if there is not an express reference to negligence in the exemption, the court must consider whether the words are wide enough to cover negligence on the part of the defendant or his servants and if so whether the claim for damages may be based on some ground other than negligence.
- where the existence of an exemption excluding liability for negligence is not in dispute, the burden of establishing any other possible ground for liability such as gross negligence or *dolus*, rests upon the claimant.
- the exemption must be within the knowledge of the other party at the time the contract is entered into.
- a party cannot exempt himself from liability for wilful misconduct, or criminal or dishonest activity of himself, his servants or agents or from damage resulting from gross negligence on his part or that of his servants.

[32] In a related context, the Consumer Contracts Act [*Chapter 8:03*], provides that where a court finds a consumer contract to be unfair, it may, *inter alia*, cancel the whole or

part of a contract, vary the contract, enforce part only of the contract, declare the contract enforceable for a particular purpose only, order restitution or reduce any amount payable under the contract. Such power may be exercised by a court *mero motu* or on application by any affected party. A court is, *inter alia*, entitled to find a contract to be unfair if, in all the circumstances, the contract is unreasonably oppressive.

[33] Whilst participation in a promotion might not constitute a “consumer contract” as defined, and I make no firm pronouncement in this regard, it is clear that the general principles applicable to exemption clauses have been captured in the Act.

DISPOSITION

[34] I agree with the court *a quo* that Mawere was both reckless and malicious. He was acting within the scope of his duties as a risk and loss manager. It would be unconscionable for the appellant to seek to be exempted from liability in these circumstances.

[35] For the above reasons the appeal was found to be without merit and was dismissed with costs.

ZIYAMBI JA: I agree

HLATSHWAYO JA: I agree

Atherstone & Cook, appellant's legal practitioners

Mtombeni, Mukwasha, Muzawazi & Associates, respondent's legal practitioners