

REPORTABLE (ZLR) 39

(1) ECONET WIRELESS (PVT) LTD (2) GODFREY MANGEZI
(3) TRANSACTION PAYMENT SOLUTIONS
v
NGONIDZASHE SANANGURA

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & PATEL AJA
HARARE, MAY 13, 2013**

T Mpfu, for the appellants

C Chikono, for the respondent

MALABA DCJ: At the end of hearing argument for both parties the court allowed the appeal with costs. It was indicated at the time that reasons for the decision to allow the appeal would follow in due course. These are they.

On 12 August 2011 the respondent issued out summons in the High Court claiming damages for malicious prosecution against the first and second appellants and damages for defamation against the third appellant. After a full trial the court *a quo* awarded the respondent the sum of US\$20 000.00 for general damages for malicious prosecution with interest and the sum of US\$2 000.00 for defamation damages with interest.

The first appellant is a company registered in terms of the laws of Zimbabwe dealing in the business of production and sale of airtime recharge cards and the second appellant is employed by the first appellant as a Loss Control and Investigating Officer. The third appellant is a company registered in terms of the laws of Zimbabwe carrying out the

business of providing electronic recharge cards to dealers through terminals that it supplies and services in terms of a dealership contract. It is a subsidiary of the first appellant.

On 10 February 2009, the third appellant entered into a dealership contract with a company called Flamsrock Trading (Pvt) Ltd in terms of which the latter would buy prepaid electronic airtime vouchers at a discount from the first appellant for resale through the third appellant. The company was represented by the respondent who is its Chief Executive Officer. On 24 March 2009, the first appellant discovered that recharge cards which, had been prepared for Innscor and OK Zimbabwe but subsequently withdrawn before being supplied were being sold in the open market at very low prices ranging between \$4 and \$4,30c. After the recharge cards had been withdrawn they were expected to have been deactivated before they could be supplied to interested customers.

It appears that the responsible persons within the first appellant who had access to the relevant computer did not deactivate. An employee within the first appellant who had access to the computer, using a flash stick, managed to retrieve information regarding the recharge cards.

The second appellant was tasked with investigating the theft of the recharge cards. He started by having all the affected recharge cards deactivated. The action resulted in an outcry from the people who had purchased the cards. As a result of the inquiries, he was led to one, David Chimbiriri who was involved in the sale of cards in Makoni area of Chitungwiza. When asked about the source of the cards, David Chimbiriri indicated that he got the cards from the respondent. At that time, 150 cards were recovered.

The respondent was asked about the cards found in possession of David Chimbiriri. He admitted having given them to him. He indicated that he got the cards from a person called Tony whom he said he met once at his Internet Café. He said he recorded the name of the person and his Telecel number in a book. The cellphone number which the respondent gave to the third appellant is 023 414 444. When the second appellant dialled the number, it was not in use. Investigations with Telecel revealed that the number was false and non-existent.

The respondent could not give full details of the particulars of Tony. When he was cross examined in court he said he did not have the book in which he had recorded Tony's particulars. The second appellant gave the respondent the benefit of doubt at the time, believing as a dealer he would assist the first appellant to identify and apprehend Tony or the person who had stolen the recharge cards. The respondent was given a week within which to look for Tony, whom he had said would come to the shop to collect the money for the 150 recharge cards.

During that week the second appellant received a call from Detective Assistant Inspector Dhlodhlo of Gweru Police who indicated that they had apprehended one Joice Nyamakandi who was due to collect money from people who were selling recharge cards belonging to Econet at low prices. The people were complaining that the cards had been deactivated. The second appellant indicated to the police that he was handling a case of theft of those recharge cards. On the basis of an arrangement with the police, he drove to Gweru and met with Joice Nyamakandi who had been arrested by the police. Joice Nyamakandi indicated that she had been given authority to collect money by her boyfriend, one Caleb Majiri who resided in Harare.

The Police, the second appellant and Joyce Nyamakandi drove to Harare where Caleb Majiri was arrested. He indicated that he had been given 100 recharge cards by the respondent. The Police and the second appellant approached the respondent at his Internet Cafe in the absence of Caleb Majiri. When asked about the recharge cards, the respondent again insisted he had obtained 150 recharge cards from one Tony.

It was after he was confronted with the information that he had given the recharge cards to Caleb Majiri that the respondent admitted to having obtained 450 more recharge cards from Tony. He denied giving Caleb Majiri 600 recharge cards. At that time Tony still had not come to collect the money from the respondent, suggesting that he was non-existent. On the basis of the unreliable information on the identity of Tony, the false Telecel number which he gave, the insistence that he had obtained only 150 cards from Tony and the denial of having given the 600 recharge cards to Caleb Majiri, the Police decided to charge the respondent with the offence of theft.

The respondent was detained at Rhodesville Police Station in Harare on the orders of Detective Sergeant Mazenyere, the Investigation Officer. The next day he was taken to Gweru in one of the first appellant's cars since police had no transport.

A statement was recorded from the second appellant at Gweru Police Station. The respondent appeared at Gweru Magistrates Court charged with the offence of the theft of the recharge cards from the first appellant on 6 April 2009. He applied for bail which was opposed by the State. He was granted bail on 8 April 2009. He was placed on remand on the ground that there was reasonable suspicion that he had committed the offence. The charge

was withdrawn before plea on 17 August 2009 and the recharge cards recovered as exhibits were released into the custody of the respondent.

The first and the second appellants were not happy with the withdrawal of the charge. The Investigation Officer had not been consulted by the public prosecutor. The first appellant was of the view that the respondent, on the facts, had a case to answer, for receiving stolen property, the possession of which he had failed to explain. The first appellant wrote to the Director of Public Prosecution expressing dissatisfaction with the withdrawal of the charge.

On 28 April 2010, the Director of Public Prosecution wrote to the first appellant's legal practitioners in the following terms:

“I have communicated with our Gweru office and are proceeding to have the accused Sanangura and another prosecuted by way of Summons as charges had already been withdrawn.

The accused persons have a case to answer and we are therefore resuscitating the matter.

I have therefore directed that the accused be summoned and taken to court for prosecution as soon as possible.”

When the respondent was brought to court, he was acquitted at the end of the State case. The reasons for the acquittal are not known. The first appellant was unhappy with the respondent's acquittal because it believed that there was failure to place appropriate weight on the facts showing that the respondent had received stolen property for which he failed to give a satisfactory explanation.

In the meantime the third appellant had on 12 May 2009 written a letter to Flamsrock Trading (Pvt) Ltd terminating the contract for supply of prepaid airtime which the parties had entered into. The letter of termination reads as follows:

“This letter serves to advise you that your contract with Transaction Payment Solutions has been terminated with immediate effect.

The decision follows the fraudulent activities on your account that prejudiced Econet Wireless Zimbabwe (Pvt) Ltd of prepaid airtime. We can confirm we have retrieved the two TPS terminals from your site.

We regret that our relationship had to be prematurely terminated under such circumstances.”

After the acquittal, the respondent issued summons claiming damages for malicious prosecution and defamation. He alleged that the first and the second appellant instigated his prosecution when they had no reasonable cause to do so.

He alleges that there was no evidence that he had stolen recharge cards from the first appellant. He was not employed there and had no access to passwords to the computer where those cards were stored. He said that his prosecution was instituted because of malice. He further alleged that there was bad blood between his family and that of the second appellant. He however did not give reasons for the alleged sour relationship. He only stated the nature of the relationship was that his mother and the second appellant shared the same totem. Needless to say the second appellant denied the allegation of a family relationship going beyond the mere fact that the respondent’s mother shared the same totem with him. The second appellant had indicated that he had met the respondent when he was investigating another case of theft of recharge cards at Econet. The said charge was later withdrawn against the respondent.

The respondent said the second appellant had threatened that he would rot in jail if he did not admit the theft of the recharge cards. Although the respondent tried to use these allegations to prove the element of malice, the second appellant denied them. The second appellant said if indeed there was malice, he would not have let the respondent go free after the first interview when he admitted receiving stolen property belonging to the first appellant.

On the question of lack of reasonable cause for the institution of the prosecution, the respondent said that it was instituted when the prosecutor in Gweru had made up his mind to withdraw the charge. He also said that his acquittal at the end of the State case proved that the first and the second appellant had no case against him.

On the second claim the respondent alleged that the letter terminating the contract was addressed to him. He said the reason given for the termination was that there had been fraudulent activities on the account. He said the letter was written at the time allegations of theft of recharge cards were being levelled against him. The letter was suggesting he was a fraudster. He felt the letter was defamatory of him.

The court *a quo* found that the respondent had not established the existence of a sour relationship between his family and that of the second appellant. The allegation of malice had not been proved. Notwithstanding that finding the court *a quo* held that the first and the second appellants instigated the prosecution of the respondent.

The court *a quo* concentrated its mind on the question whether there was evidence produced by the appellants of the respondent having stolen the recharge cards from

the first appellant. It found that the recharge cards could have been stolen by an employee of the first appellant because the respondent had no access to the computers. On that ground the court came to the conclusion that the prosecution had no reasonable cause.

On the second cause of action, the court *a quo* came to the conclusion that the letter was defamatory of the respondent. The court said that allegations of fraudulent activity on Flamsrock Trading (Pvt) Ltd's account portrayed the respondent as a fraudster. It found that the letter was written on the recommendations of the second appellant. The court said:

“The context in which the letter was written was that the plaintiff was facing criminal allegations of theft of recharge pins belonging to the first defendant. He had been arrested, detained, placed on remand and was on bail awaiting trial. The fact of the matter was that Flamsrock had not committed theft against the first defendant. It was not facing any allegations of fraud on its own account that had prejudiced the first defendant. In my view, an ordinary reasonable reader of the letter in context would conclude that it was written to the plaintiff personally and that his title and place of business were merely written to confirm his identity and location.”

The law on the delict of malicious prosecution is clear. In *Luke Davies v Premier Finance Group Limited* HH-235-10, PATEL J (as he then was), said at pp 10-11:

“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.

... 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”.

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; and that the prosecution was actuated by malice. (See *Mohamed Amin v Jogendra Kumar Bannerjee* 1947 AC 322 (PC) 330, *Minister of Justice & Constitutional Development v Moleko* 2008 (3) All SA 47 (SCA) para 8.)

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 overbears on the police to institute proceedings which they would not otherwise commence or institute.

In *Bande v Muchinguri* 1999(1) ZLR 476, MALABA J (as he then was) said at p 484:

“The question is whether Mr Muchinguri instigated the institution of the prosecution against the plaintiff. J G Fleming *The Law of Torts* 7 ed at p 582 states that:

“The defendant must have been actively instrumental in setting the law in motion. Simply giving a candid account, however incriminating, to the police ... is not the equivalent of launching a prosecution: the critical decision to prosecute not being his 'the stone set rolling [is] a stone of suspicion only'. *But if besides giving information he proceeds to lay a charge, this amounts to an active instigation of proceedings which he cannot shrug off by saying that they were in the last resort initiated at the discretion of the public authority*" (the emphasis is mine).

In *Baker v Christine* 1920 WLD 14, BRISTOWE J said the "test" "is whether the defendant did more than tell the detective the facts and leave him act on his own judgment". The principle that giving an honest statement of fact to the police on which the prosecution is then instituted is not "instigating" a prosecution was referred to with approval by PRICE J in *Madnitsky v Rosenberg* 1949 (1) PH J5 at pp 15-16. See also *Waterhouse v Shields* 1924 CPD 155 at 160; *Prinsloo & Anor v Newman* 1975 (1) SA 481 (A).”

Although the court *a quo* found that the first and the second appellants instigated the prosecution of the respondent, the finding is not supported by evidence. The second appellant was called upon by the police in Gweru to give them a statement after they had decided upon their own investigation that there was a reasonable suspicion of the respondent having had committed the offence. The facts, in any case, show that any reasonable person faced with the same facts would have believed that the respondent had committed the offence of receiving stolen property. He had been found in possession of property belonging to the first appellant and had given a patently false statement of how he had acquired the property.

The finding by the court *a quo* that the first and the second appellant instigated the resuscitation of the charge withdrawn is contrary to the letter of the Director of Public Prosecutions. In the letter, she shows that she exercised her independent mind to have the charge resuscitated. She clearly states that she believed that the respondent had a case to answer. There is no doubt therefore that the first and the second appellants strongly believed on the facts that the respondent had a case to answer, at least on the allegation of receiving stolen property.

They did not have to produce evidence which would prove the respondent's guilt beyond reasonable doubt. It is sufficient for the test of reasonable and probable cause that the respondent was placed on remand by the Gweru Magistrates Court on the ground that there was a reasonable suspicion of him having committed the offence.

The phrase "reasonable and probable cause for a prosecution" refers to an honest belief in the guilt of the accused based on a 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 an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

The judgment in *Relyant Trading (Pty) Limited v Shongwe & Anor* 2007 (1)

ALL SA 375 (SCA) is instructive in this regard. MALAN AJA said at para 5:

“*Malicious prosecution* consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with ‘malice’ or *animus iniuriarum*. Although the expression ‘malice’ is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and Another* Wessels JA said:

‘Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the *quantum* of damages, the motive of the defendant is not of any legal relevance.’”

The acquittal of the respondent was not in the circumstances evidence of lack of ground for his prosecution. As explained by MALAN AJA in *Relyant Trading case supra*, a defendant will not be liable if he/she held a genuine belief in the plaintiff’s guilt founded on reasonable ground. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the defendant in instigating it is not wrongful. The Acting Judge of Appeal said that the requirement of reasonable and probable cause "is a sensible one" since "it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives”.

The finding that the first and the second appellants had reasonable cause to institute the prosecution against respondent establishes absence of malice on their part. In *Mabona v Minister of Law and Order* 1988 2 SA 654 (SE) at 658E JONES J held that the person claiming malicious arrest or malicious prosecution must not only allege but must go further to prove that the defendant acted maliciously and without probable cause. See also *Gellman v Minister of Safety & Security* 2008 1 SACR 446 (W) para 72, *Le Roux v Minister of Safety & Security* 2009 4 SA 491 (KZP) 498 para 24.

In *Bande v Muchinguri* supra at 487E-G the court states:

“Has the plaintiff proved that the defendant was actuated by malice? The plaintiff does not have to prove spite or ill-will on the part of the defendant. The fact that the defendant had no reasonable and probable cause for the prosecution may, in an appropriate case, justify an inference that he was actuated by malice in the sense of being driven by an improper or indirect motive.

Fleming op cit at p 590 states that:

"At the root of it (malice) is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law and that a prosecutor who is primarily animated by a different aim steps outside the pale if the proceedings also happen to be destitute of reasonable cause. 'Malice' has therefore a wider meaning than spite, ill-will or a spirit of vengeance and includes any other improper purpose, such as to gain a private collateral advantage."

In *Brown v Hawkes* (1891) AC 718 at p 722 CAVE J said:

"Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive and malice can be proved, either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.""

This is particularly the case, since the court *a quo* found that the allegation by the respondent of the existence of a sour relationship between families was unfounded. The respondent failed to prove that the first and the second appellants acted without reasonable and probable cause or that their conduct was actuated by malice or improper motive.

On the second cause of action it is clear that the court *a quo* misdirected itself. The letter written by the third appellant concerned the termination of rights and obligations of the relationship it had with Flamsrock Trading (Pvt) Ltd.

The third appellant had no contractual relationship with the respondent in his personal capacity. The reasons it gave of fraudulent activities on the account related to the termination of relationship with Flamsrock Trading Ltd. The letter does not say that the fraudulent activities were committed by the respondent. It could have been anyone. In the plain terms of the letter, it is clear that the relationship which gave rise to the allegation was that between the third appellant and its customer. It was therefore necessary on these facts for the respondent to plead the cause of action based on defamation by imputation. The declaration does not plead defamation by imputation. The court *a quo* overlooked this important point.

For these reasons, the appeal was allowed with costs and the judgment of the court *a quo* set aside and substituted with the order that the claims be dismissed with costs.

ZIYAMBI JA: I agree

PATEL AJA: I agree

Mtewa & Nyambirai, appellant's legal practitioners

Ngarava, Moyo & Chikono, respondent's legal practitioners