

LUKE CHAHWANDA
versus
NATIONAL FOODS HOLDINGS LIMITED
and
LEWIS NGWENYA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 22-23 June 2017 & 16 August 2017

Civil trial

A. Masango, for the plaintiff
R. Stewart, for the defendants

MUREMBA J: The plaintiff's claim is for damages for malicious arrest and detention allegedly arising from the second defendant's action of laying a charge of theft against the plaintiff at Marimba Police Station.

The plaintiff is employed by the first defendant as a Warehouse Controller. The second defendant is also employed by the first defendant as a Manager. In his declaration the plaintiff averred that he was falsely accused by the second defendant on 15 April 2014 of having stolen stock feeds and having hidden them in a skip below the rubbish which was meant to be disposed. He averred that the second defendant humiliated him at the work place in front of his subordinates by insulting him. He called him a thief, an idiot and a fool. Around 2100 hours he was ordered into a Chitkem Security Company van at the instance of the second defendant and was driven to Marimba Police Station. At the Police Station the second defendant continued with the malicious accusations of theft. The plaintiff was thrown into the cells and was detained for 2 nights from 15 April 2014 to 17 April 2014 when he was then cleared of the charges after investigations were made by the police.

The plaintiff averred that the first defendant is vicariously liable for the actions of the second defendant who was acting in the course and scope of his employment in his capacity as the manager. The plaintiff averred that as a Warehouse Controller he is in charge of ensuring that the skip which is a rubbish dumping container is collected for emptying once it is full. He averred that the second defendant was activated by malice when he caused his

arrest. The plaintiff averred that as a result of the malicious arrest he suffered injury and loss of reputation. At the police station he was made to sit on the cold floor, was harassed by the police and he was denied proper blankets and food.

The plaintiff averred that he suffered damages in the sum of \$10 000-00 due to malicious arrest and detention. Consequently he wants the two defendants to pay him that amount jointly and severally, the one paying the other to be absolved. He further averred that he suffered damages in the sum of \$5 000-00 due to loss of reputation and he wants the defendants to pay him that amount. On loss of reputation the plaintiff averred that he was paraded as a thief before his co-workers and subordinates. As such they no longer have respect for him. He suffered considerable distress and embarrassment.

In their plea the defendants denied that the second defendant insulted the plaintiff by calling him names in front of his co-workers and subordinates. They said that the second defendant carried out an inspection of the load that was in the skip which revealed some stolen raw materials hidden underneath the rubbish. The defendants averred that the second defendant handed over the matter to the Loss Control Manager who called in the police as is the recommended course of action in cases of theft. They said that it is the duty of the plaintiff to inspect the skip before it is collected for dumping.

The defendants denied that the second defendant ever went to Marimba Police Station as the matter was being handled by the Loss Control Manager, Victor Mujeri. They said that the second defendant never insisted or had anything to do with the plaintiff being detained in police custody. The defendants averred that the second defendant merely reported a theft in which the plaintiff and several other employees were implicated. The defendants averred that a crime had been committed under the plaintiff's watch and they reasonably believed that the plaintiff was complicit in the crime. They averred that the matter was therefore appropriately reported to the Police who carried out the appropriate investigations. The defendants denied any malice on the part of the second defendant since the overall responsibility over the skip and disposal of waste was that of the plaintiff.

In his replication the plaintiff averred that no crime had been committed as no one was convicted of the crime by the court. The plaintiff averred that there was no reason for him to be arrested.

The issues that call for determination are the following.

1. Whether or not the defendants maliciously caused the arrest of the plaintiff.

2. If so, whether or not the plaintiff suffered damages and the quantum of damages if any.
3. Whether or not the plaintiff suffered loss of reputation.
4. If so, whether or not the plaintiff suffered damages and the quantum of damages if any.

The factors that are considered in cases for claim for damages for malicious arrest and detention are that the defendant must have set the law in motion; the defendant acted maliciously; without reasonable and probable cause and he acted without a duty of care towards the plaintiff. See *Thompson & Anor v Minister of Police* 1971 (1) SA 371. The defendant must have made improper use of the legal process to deprive the plaintiff of his liberty. The onus is on the plaintiff to lead evidence showing malice by the defendant in reporting the matter.

The evidence that is common cause

From the evidence led at trial it emerged that the following evidence was common cause. The plaintiff was and is still employed by the first defendant as a warehouse controller and he reports to the second defendant. The plaintiff facilitates the dumping of waste from several departments. He is part of the process of dumping waste. When the skip is full he is notified and he then goes to inspect it. After inspection he prepares a document which he signs. The second defendant co-signs and signs a gate pass for the waste to be removed from the premises for dumping purposes. After the gate pass has been signed by the second defendant, the plaintiff calls a tractor which then loads the skip and takes it out of the premises. It is common cause that this is what happened on 15 April 2014. The plaintiff was called to inspect the skip by Simon Matereke, a general hand, which he did. The necessary documents were prepared and signed by both the plaintiff and the second defendant. The tractor was called in to collect the skip which it did. When the tractor was by the gate about to leave the premises of the first defendant, the second defendant intercepted it and called it back to the premises' canteen for an inspection in the presence of the plaintiff and his co-workers. The second defendant ordered that the skip be off loaded or over turned which was done. Several sealed bags containing wheat bran and wheat feed from the production department were seen. This resulted in the matter being reported to Marimba Police. The plaintiff and his colleagues who had to do with the disposal of the skip were taken there in a Chitkem Security Company vehicle. The plaintiff was detained there for 2 nights and was

later released without charges being laid upon him. His co-suspects were taken to court where they were later acquitted of the charges.

Plaintiff's evidence vis a vis issues in dispute

What needs to be ascertained is whether or not the second defendant maliciously caused the arrest of the plaintiff and insulted him resulting in his loss of reputation. If the answers are in the affirmative, the next question will be: did the plaintiff suffer any damages and if so what is the quantum thereof?

The plaintiff averred that there was no reasonable and probable cause for his arrest as there was no evidence of him having committed any theft. He said that his arrest was at the instigation of the second defendant who initiated the whole process without any reasonable and probable cause. He led evidence from 2 witnesses. He was the first to testify and his evidence was as follows. Although he facilitates the dumping of waste from different departments within the first defendant by inspecting the skip to see if it is full before authorising its removal from the premises for dumping, he will not be present when the different departments will be loading the waste into the skip which is a huge bucket or container where all the waste is dumped. The skip is situated behind the premises at an area which is not normally worked by people. He normally works at the front of the premises in the raw materials department. On 15 April 2014 he inspected the skip and authorised its removal. A tractor came and loaded the skip. When the tractor was by the gate he was called by the second defendant via a phone call to come to the gate. The plaintiff who was in his office, about 300m away from the gate proceeded to the gate. At the gate the second defendant asked him three times what was in the skip to which he replied that it was waste as he could see. The second defendant hailed insults at him labelling him a fool and a thief. The second defendant also asked him to confess so that he could forgive him. A general hand, Mr Simon Matereke who was also by the gate was also questioned in the same manner as the plaintiff had been questioned. The second defendant then ordered the tractor back to the canteen about 1km back into the premises for an inspection. The plaintiff was instructed to walk back to the canteen as the second defendant drove in his motor vehicle with other people inside. As the second drove he would stop and ask the plaintiff to tell the truth of what was contained in the skip. When the plaintiff responded he would drive off. He did that three times before they got to the canteen. At the canteen people or co-workers had just finished eating. They gathered around the tractor as the second defendant continued to rant and vociferate about the plaintiff being a thief and a fool. The skip was turned over and all waste

was on the ground. There were several sealed bags. When they were opened it was noticed that these were bags from the production department as they contained mixed products such as wheat bran mixed with chunks and poultry pellets. The production department is a different department from which the plaintiff works. The plaintiff does not oversee the dumping of waste into the skip by this department. He only receives authorisation letter for dumping after this department would have already dumped its waste. The plaintiff said that even after the second defendant had seen these products he had him arrested. He took the plaintiff to Mr Mujeri, the Head of Security and gave instruction that he be arrested. Mr Mujeri asked the plaintiff to write a report on that day which the plaintiff did. The report was about the events that had happened the previous week. The report was produced as exh 1A. What is pertinent from the report is that the plaintiff said in the third paragraph, "According to the procedure nothing like raw materials should have been placed without my knowledge and was surprised to see good materials in the bin." In the last paragraph he said, "We also bag off wheat feed from silo 12 and that product mixture was never reported to me (*sic*) and according to Mr Matereke the product was fast tracked during my absence by production which is led by Mr Magwaza to the bin without my knowledge."

The plaintiff said according to what he wrote in his report he should not have been taken to the police. There was no reasonable and probable cause for this. The plaintiff said that he believes that this was just a way of trying to get rid of him and it was pre-planned as Mr Matereke, the general hand had already admitted that these items had been dumped by Brian Magwaza in the skip and there were documents to prove that the items had been dumped in the skip. The plaintiff said that Mr Magwaza even admitted that he had had a meeting with the second defendant and they had agreed to use wheat feed or wheat bran to clean the machinery so that there would be no contamination. The plaintiff said that the wheat bran or wheat feed that was contaminated was the one that was found in the skip.

The plaintiff said that he was arrested together with Simon Matereke, Mandla Ncube, the tractor driver and his assistant and one Simba. At the police station they were made to sleep on a very cold floor, were made to use wet and urine smelling blankets and eat horrible food. When the police investigated the matter he was cleared of the allegation and released. The plaintiff said that Mr Mujeri told the police that he (the plaintiff) had not committed the offence but the second defendant had insisted that he be detained. He said that he was detained for two nights from 15 April 2014 at 2333hours to 17 April 2014 at 1400hours.

The plaintiff said that there was no reasonable and probable cause for the second defendant to cause his arrest because the second defendant who said had acted on the basis of an anonymous call to the effect that certain products had been stolen and hidden in the skip on Saturday was aware that the plaintiff had not been on duty on that Saturday. The plaintiff said that the raw materials department where he works comprises the Group Foreman, Checkers, Overseers and Supervisors but these were not arrested except for him which proves beyond doubt that the defendants wanted to get rid of him and were actuated by malice. The plaintiff said that the second defendant wanted to get rid of him because there were 2 warehouse controllers and he wanted to remain with the junior one. He said he made this conclusion because after this incident the second defendant offered him a retrenchment package but later abandoned it after the plaintiff had asked him or suggested to him to write to the retrenchment board. The plaintiff said that he is still employed by the first defendant.

Under cross examination the plaintiff stated that no crime had been committed on 15 April 2014. He said that although he had written in his report that good raw material had been found in the skip, investigations by the police later revealed that this was contaminated material. The plaintiff said these goods were valueless and he was later assigned to dump them again. He said that Simon Matereke, the general hand; the tractor driver and his assistant and Mandla Ncube were found not guilty and acquitted at Mbare Magistrates Court. The plaintiff said no one was convicted. All these people who were arrested and taken to court were connected to the skip. The plaintiff said that the second defendant did not believe that a crime had been committed because he had authorised the same items to be dumped. He said that all the people who had been arrested in the matter had been arrested in a bid to get rid of him as the second defendant wanted the other suspects to implicate him. He said that the whole case was about him. He said that the second defendant is not a security officer and as such he should not have interrogated him.

Simon Matereke's evidence was as follows. He worked for the first defendant for 24 years before he quit. At the time material to this case he was still employed but later quit after it had been alleged that he had put some stolen items in the skip and he was arrested on 15 April 2014 together with the plaintiff on allegations of theft. His duties at the time he was still employed were that of a general hand and they included dumping of waste into the skip. On the Saturday which preceded Tuesday 15 April 2014, he loaded waste material into the skip. The plaintiff was not on duty. On Tuesday 15 April 2014 the skip was full. He informed the plaintiff who signed the necessary documentation before he (Simon Matereke) took it to the

second defendant for his signature and issuance of the gate pass. Simon Matereke then let the tractor into the premises to collect the skip. After the tractor had collected the skip he proceeded to the gate together with it where he gave the gate pass to the security officer before he proceeded out of the gate to buy himself a coke from the vendors. On his way back he saw the second defendant's motor vehicle blocking the tractor. The second defendant directed the tractor to go back into the premises and also called him into his motor vehicle. When he got in, he found two other men in the car and he (Simon) was the fourth person. At that time the plaintiff was nowhere near the gate. The second defendant drove from the gate back into the premises and when they were by the weighbridge the second defendant saw the plaintiff by the gate and asked him to run to where they were. The second defendant shouted that the plaintiff was a thief. As the second defendant drove to the canteen he stopped three times as the plaintiff was running following behind. At the canteen the second defendant ordered that the skip be off loaded or overturned. At that juncture the plaintiff arrived. The second defendant asked the plaintiff what was in the skip to which he said it was waste.

In the skip there was waste and some sacks of waste which had come from the production department. Second defendant then left them in the hands of security personnel who later took them to Marimba Police Station in their motor vehicle. Simon Matereke said that it is the second defendant who caused their arrest. He said that he was arrested on theft allegations yet this was waste from the production department which had been brought by personnel from that department under the escort of security personnel.

Simon Matereke said that he was taken to Mbare Magistrates Court where he was found not guilty and acquitted. He said that the CCTV footage was played in court showing what had transpired on Saturday when the waste was brought for dumping in the skip. He said that the plaintiff was not seen in that footage. He said he is the one who was seen as the bins were being brought for dumping in the skip. He said that there was no reasonable and probable cause for the plaintiff to be arrested together with the others as he had not been at work on that Saturday. He said that when the tractor was overturned the people who were present were the tractor driver, his assistant and other workmates. He said that he would not know if there was any bad blood between the plaintiff and the second defendant at the material time.

Under cross examination Simon Matereke said that when the skip was overturned at the canteen two security personnel; Mr Mujeri and Mr Chinakidzwa were present. He said that he did not know who reported the matter to the police. He said that the people who

brought the sacks to the skip from the production department were also arrested and taken to court. He said when the skip was overturned at the canteen there were 8-12 people but they were casual employees.

The defendants' evidence

The second defendant was the sole witness. He testified as follows. At the time of the incident he was the Operations Executive of the stock feeds business unit and was the plaintiff's supervisor. His duties involved handling reports related to his subordinates. On Tuesday 15 April 2014 he received an anonymous call on his mobile phone to the effect that the plaintiff had concealed some product in the skip on Saturday 12 April 2014. The caller hid his identity. The second defendant decided to take the lead since it is very normal for them to receive tip off calls. The second defendant informed his superiors and told them what he was going to do. He went on to view the CCTV footage for Saturday. On viewing it he saw some people whom he could not identify loading some sealed bags into the skip. These bags were loaded at the bottom or underneath the waste which was used to conceal them. This was suspicious. He phoned the Loss Control Manager, Victor Mujeri with the intention to have him take up the matter, but he was not at the premises at that time. He said that he later learnt that he had gone to court to testify in a certain matter.

The second defendant said that when he went back to his office he found documents which had already been signed by the plaintiff having been placed in his in tray for his signature to authorise the collection of the skip for emptying purposes. At that very moment Simon Matereke came to collect the gate pass indicating that the tractor which collects the skip had arrived. Since the tractor belonged to a third party and could not be kept waiting he signed the gate pass and gave it to Simon Matereke. When Simon Matereke left, the second defendant also left his office to go and look for someone to help him intercept the tractor. He came across an internal auditor whom he requested to assist him. They got into his (the second defendant's) motor vehicle and drove to the gate where they intercepted the tractor soon after it had been cleared to exit the gate. He directed it to go back to the canteen for an inspection. At the same time he phoned the plaintiff and asked him to come to the gate. He spotted Simon Matereke outside the premises dealing with some vendors. He asked him to come over. When he came he invited him into the car and they drove in front of the tractor leading it to the canteen. On their way back and as they were at the weighbridge they met the plaintiff making his way to the gate. He asked him to go back so that they meet at the

canteen. He denied insulting the plaintiff at three various spots before getting to the canteen. He said that when the plaintiff got to the canteen he asked him three times if he had inspected the skip before affixing his signature authorising its collection to which he said yes. He said that he asked the plaintiff if he was sure and he said he was. The second defendant said that he then ordered that the skip be emptied and at that time a number of employees had gathered around. There was waste, open bags and sealed bags with uncontaminated product. The product was viable with an economic value of about US\$520.00. He said that because of lapse of time he could no longer remember the tonnage thereof. He said that he then phoned the laboratory supervisor to come and help sort out the different categories of the product and give a report on the suitability of the material.

The second defendant said that at that very time the Loss Control Manager, Victor Mujeri arrived at the scene. The second defendant said that he narrated to him the events that had happened from the time of the anonymous call up to that very moment and asked him to take over the matter. Victor Mujeri carried out his own investigations and came back to him some days later asking for a statement that he was going to take to the police. He said that he then wrote his statement and gave it to Victor Mujeri. The statement was produced as exh 2A. It is a replication of what the second defendant said in his evidence in this trial. The second defendant said that in this whole matter he never saw any police officer except that he was called to court to testify against those that had been taken to court. He said that these were acquitted for insufficient evidence because the prosecutor had not placed before the court all the necessary evidence, for instance, the stolen bags of wheat feed had not been taken to court.

The second defendant denied that he is the one who reported the plaintiff and his co-suspects to the Police. He said that his role ended when he handed over the matter to the Loss Control Manager at the canteen and it is the Loss Control Manager who dealt with it the way he saw fit. He said that other than asking the plaintiff if he had inspected the skip he did not harass or humiliate the plaintiff at all. He said that they had a good working relationship and he had no personal hatred for him. He said that everything happened in the public eye and the search happened before a CCTV camera at the canteen. He said that the plaintiff has always been a hard worker, before and after the incident and he has always held him in high regard. He denied that he had an intention to get rid of him and said that is him who actually appointed the plaintiff to the raw materials department where he works.

Under cross examination the second defendant stated that he would not know whether or not the plaintiff was at work on Saturday 12 April 2014 as he never asked him. He said that he never at any stage allege that the plaintiff had committed theft. He said that although the Loss Control Manager is lower than him structurally, he does not report to him but to Head Office. He said that in this matter when he handed over the matter to him he asked him to handle it and immediately left for his office. He denied that he insisted that the plaintiff be taken to Marimba Police Station. It was put to him that it is him who ordered the plaintiff and his co-suspects to get into the Chitkem Security van in order to be driven to Marimba Police Station. He said that he gave no such order.

Analysis of evidence

What is apparent is that the plaintiff did not adduce any evidence to show that it is the second defendant who reported him to the police for theft on 15 April 2014. The court does not see anything wrong about the actions that the second respondent took on this day when he received an anonymous call implicating the plaintiff in the theft. Upon failing to locate the Loss Control Manager he viewed the CCTV footage and what he saw was suggestive of theft as sealed bags were being concealed underneath waste material. He then questioned the plaintiff and searched the skip in the presence of the plaintiff and other workers. He had been alerted of a crime that had allegedly been committed. He did his best to investigate in the absence of the Loss Control Manager. Thereafter, upon the arrival of the Loss Control Manager he handed over the matter to him. His evidence to the effect that he did not tell the Loss Control Manager how to deal with the matter and that he did not order him to refer the matter to the police remains undisputed. It was the plaintiff's evidence that it is the second defendant who insisted that the plaintiff be referred to the police. He said he learnt of this from Victor Mujeri, the Loss Control Manager. The plaintiff did not say he heard the second defendant giving Victor Mujeri this instruction. Clearly, what the plaintiff was told by Victor Mujeri is hearsay evidence which is inadmissible. What if Victor Mujeri never said it to the plaintiff or what if he lied to the plaintiff? It is evidence which needed to be confirmed by Victor Mujeri himself. It is further interesting to note that when Simon Matereke gave his evidence in chief he said that it is the second defendant who caused their arrest but under cross examination he said that he did not know who had reported the matter to the police.

From the evidence led it is clear that the search or inspection of the skip happened during the day, but the plaintiff and his co-suspects were only taken to Marimba Police

Station around 2300 hours and no evidence was adduced by the plaintiff to show that at that time the second defendant was anywhere near them or that he was still at work. No evidence was adduced to show that he is the one who ordered them to get into the Chitkem Security van so that they would go to Marimba Police Station as was averred by the plaintiff in his declaration. The plaintiff was therefore not truthful in his pleadings. In the same pleadings he said that the second defendant came to the police station and continued with the malicious accusations of theft against him. During trial no evidence was adduced to show that the second defendant ever set his foot at the police station from the day that the applicant was arrested to the day he was released. In fact no evidence was adduced which shows that the second defendant ever played any role from the time he handed over the matter to the Loss Control Manager. The recording of the statement from the plaintiff was done by the Loss Control Manager in the absence of the second defendant. There is no evidence which shows that the second defendant interrogated the plaintiff after the skip had been searched at the canteen. This therefore, confirms the second defendant's version that he would not know whether or not the plaintiff was at work on Saturday 12 April 2014 as he never asked him. The plaintiff and Simon Matereke were not telling the truth when they said that the second defendant knew that the plaintiff was not at work on Saturday 12 April 2014. The plaintiff's case would have been strengthened by the Loss Control Manager, Victor Mujeri. He is the person who could have explained what prompted him to refer the plaintiff to the police. He would also have explained whether it was the second defendant who insisted that the plaintiff be referred to the police as the plaintiff averred. The second defendant stated that Victor Mujeri as the Loss Control Manager does his job independently of him and does not even report to him, but to head office. No evidence to the contrary was led by the plaintiff. With this position, it is difficult for the court to accept the plaintiff's averment that Victor Mujeri was ordered or instructed by the second defendant to report the matter to the police. The plaintiff just made assumptions that it is the second defendant who caused him to be arrested simply because he is the one who initiated investigations of the whole matter before he handed over to Victor Mujeri. When the second defendant initiated the investigations he had a reasonable and probable cause to do so as he had received a tip off and had also watched the CCTV which revealed suspicious behaviour of theft. The plaintiff had been implicated by the anonymous caller, so in asking the plaintiff whether or not he had inspected the skip, the second defendant was not acting with malice. He is not even the one who referred the matter to the police, it was Victor Mujeri after he had done his own investigations. Since the second

defendant is not the one who reported the matter to police, the issue of him having acted maliciously in reporting the matter to the police does not even arise.

The plaintiff said that he suffered loss of reputation because the second defendant insulted him and called him a thief and a fool in the presence of his subordinates. The second defendant denied it. From the way he gave his evidence, I was satisfied that he was giving a credible account of what transpired and to a certain extent Simon Matereke corroborated him. The plaintiff said that he was insulted at the gate yet both the second defendant and Simon Matereke said that they only met the plaintiff at the weighbridge inside the premises. This means that the plaintiff was not insulted at the gate as he wanted this court to believe. With all the untruths the plaintiff said about the role the second defendant played in his arrest, he did not impress the court as a credible witness. Now it is difficult to believe that he was even insulted, shouted at and humiliated at the canteen. He did not lead any evidence from any of the eye witnesses to corroborate his story, despite saying that there were many people who witnessed the incident. Simon Matereke is not a reliable witness because his evidence was largely in favour of the plaintiff to the extent that he said that it was the second defendant who caused their arrest yet he did not even know who reported the matter to the police. Simon Matereke was arrested together with the plaintiff, so his inclination is to give evidence that is favourable to the plaintiff and against the second defendant. There was need for evidence from an eye witness to corroborate the plaintiff's evidence that he was insulted and humiliated at the canteen. Without that, the court is hesitant to take the plaintiff's word for it. I cannot make a finding that the plaintiff suffered any loss of reputation.

In view of the foregoing, I conclude that the plaintiff did not prove his claims of malicious arrest and detention and loss of reputation against the defendants on a balance of probabilities. In the result, the plaintiff's claims are dismissed with costs.

Muronda Malinga, plaintiff's legal practitioners
Matizanadzo and Warhurst, defendants' legal practitioners