

NOREST MAPANGA
versus
WILLIAM MUPEPE
and
HOMESTAKE MINING & TECHNICAL
SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16-17 May 2016, 17 January 2017 & 8 March 2017

Civil Trial

E Samundombe, for the plaintiff
S Mahuni, for the defendant

MUREMBA J: The plaintiff issued summons claiming US\$250 000-00 being damages for malicious arrest, detention and prosecution as a result of the first defendant's conduct during the course and scope of his employment with the second defendant.

The second defendant is a duly registered company which owns Primrose Mine in Kwekwe. The first defendant was employed by the second defendant as a security manager. In his declaration the plaintiff averred that on 21 September 2010 the first defendant laid false charges to the effect that the plaintiff had stolen gold slime from Primrose Mine. This resulted in the arrest, detention and prosecution for theft in contravention of s 379 of the Mines and Minerals Act [*Chapter 21:05*] at Kwekwe Magistrates Court. The plaintiff averred that he was acquitted on 7 March 2012.

The plaintiff averred that when the first defendant laid the charges of theft against him he had no reasonable cause for doing so and neither did he have any reasonable belief in the truth of the allegation. The plaintiff said that as a result of the first defendant's conduct he was dismissed from employment as a General Manager. He said that he suffered damages for contumelia, deprivation of freedom and discomfort. The plaintiff averred that the first defendant's malicious conduct entitles him to the amount of damages that he is claiming. He averred that the second defendant being the employer of the first defendant is vicariously

liable for the conduct of its employee who was acting in the course and scope of his employment when he laid the false allegations.

In their plea the defendants averred that on 19 September 2010 the first defendant discovered that 75 000 tonnes of gold slime had been stolen from the second defendant's mine. He made a report to the police and the plaintiff was arrested pursuant to the investigations that were made by the police. Police investigations established that the plaintiff instructed his two employees Innocent Mwaisowa and Clive Moyo to collect 75 000 tonnes of gold slime from the second defendant's mine. Statements to this effect were recorded by the police. The defendants averred that the fact that these two witnesses turned hostile in the criminal trial does not mean that the plaintiff is innocent. They said that he is not entitled to any damages at all. They further averred that they were not aware that the plaintiff was dismissed from employment, but if he was as he says, they are not liable for his loss. They said that the plaintiff should pursue his case with his former employer in terms of the Labour Act [*Chapter 28:01*]. The second defendant went on to make a counter claim for damages in the sum of US\$ 1002 700-00 being the value of the stolen 75 000 tonnes of gold slime. However, it withdrew the counter claim at the start of the trial.

At the pre-trial conference the parties agreed that the following issues determine the matter.

- a) Whether the defendants maliciously and wrongfully caused the arrest of the plaintiff.
- b) Whether the plaintiff suffered damages as a result of the arrest, detention and prosecution.
- c) Quantum of damages.

When parties led evidence during trial it emerged that the following was common cause. The plaintiff was employed as a General Manager at Good Hope Mine in Kwekwe. Good Hope Mine is owned by the plaintiff's brother one Armstrong Mapanga. Good Hope Mine and Primrose Mine where the first defendant worked as a Security Manager are adjacent to each other. It is the first defendant who reported the theft case to the police. After reporting the matter to the police he accompanied them to Good Hope Mine on the very day he reported the matter. The report resulted in the arrest of the plaintiff. Resultantly, the plaintiff was detained and prosecuted. He was acquitted at the close of the State case after his subordinates Innocent Mwaisowa and Clive Moyo turned hostile. This caused the State to withdraw charges after plea.

The law in respect of actions for malicious arrest, detention and prosecution

It is an actionable wrong to procure the imprisonment or arrest of anyone by setting the law in motion against him maliciously and without reasonable cause¹. In the case of *Thompson & Anor v Minister of Police*² the court stated that an arrest is malicious where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty. The court went on to lay down the factors that should be considered in a case for claim for damages for wrongful arrest and detention. The factors are as follows:

- (i) That the defendant set the law in motion.
- (ii) That the defendant acted maliciously and;
- (iii) Without reasonable and probable cause and;
- (iv) He acted without a duty of care towards the plaintiff.

What this means is that the defendant should have made a report to the police which resulted in the arrest of the plaintiff. The plaintiff is supposed to place before the court sufficient evidence to show malice on the part of the defendant in reporting the matter to the police which led to the prosecution and subsequent acquittal of the plaintiff³.

Malicious prosecution concerns misuse and abuse of the criminal process. It is not every prosecution that is concluded in favour of the accused person that necessarily leads to a successful claim for malicious prosecution. The subsequent acquittal of the plaintiff *per se* does not demonstrate malice on the part of the defendant⁴. So much depends on the absence of a reasonable and probable cause, and the *animus iniuriandi* of the defendant in instigating, initiating or continuing the prosecution.

For the plaintiff to succeed in an action for malicious prosecution he must prove the following⁵.

1. That the prosecution was instigated by the defendant;
2. It was concluded in favour of the plaintiff;
3. That there was no reasonable and probable cause for the prosecution

¹ Mc Kennon *Law of Delict* 7th Ed @ p 259.

² 1971 (1) SA 371.

³ *Mushambi v Zimpapers* HH 150/11.

⁴ *Mushambi v Zimpapers* HH 150/11.

⁵ C Okpaluba *Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth Decisions* 155N1427- 3781 at p 4

4. That the prosecution was actuated by malice. See also Neethling, Potgieter and Visser *Law of Delict* 343. *Rudolf v Minister of Safety and Security* 2009 (5) SA 94 (SCA).

Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified⁶. It is about the honest belief of the defendant that the facts available at the time constituted an offence and that a reasonable person could have concluded that the plaintiff was guilty of such an offence. In *Hicks v Faulkner* 1878 8 QBD 167 171 reasonable and probable cause was defined as,

“an honest belief in the guilt of the accused based upon a full conviction founded on reasonable of the existence of a state of circumstances which assuming them to be true, would reasonable lead to any ordinary prudent and cautious man, placed in the position of the accuser, the conclusion that the person charged was probably guilty of the crime imputed.”

In that case it was stated that the test contains both a subjective and an objective element. There must be both actual belief on the part of the prosecutor and the belief must be reasonable in the circumstances. The defendant must have subjectively had an honest belief in the guilt of the plaintiff and such belief must also have been objectively reasonable. A defendant will not be liable if he held a genuine belief in the plaintiff’s guilt based or founded on reasonable grounds.

Reasonable and probable cause and malice are two distinct grounds, but they are often difficult to distinguish as they tend to overlap. It is improbable to find that a person acted maliciously where there is reasonable and probable cause to prosecute or to find that the defendant who was motivated by malice had reasonable and probable cause to prosecute. The finding that there was reasonable and probable cause to prosecute invariably neutralizes the existence of malice in the circumstances. The two requirements appear inseparable in most cases⁷.

The test for “absence of reasonable and probable cause” is when the defendant did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged⁸. The test contains both the subjective and

⁶*Newman v Prinsloo* 1973 SA 125 (T) 149(H).

⁷ C Okpaluba *Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth Decisions* 155N1427- 3781 at p 4

⁸ *Beckenstrater v Rottcher and Thevissen* 1955 (1) SA 129 (AD) at 136 A – B.

objective element which means that there must be both actual belief on the part of the defendant and also that belief is reasonable in the circumstances⁹.

In *Maoki v Reckitt and Colman (Africa) Ltd and Anor*¹⁰ a case involving a claim of malicious prosecution malice was defined as follows;

“The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or I would say, even gross negligence) will not suffice.”

In *Bande v Muchinguri* 1999 (1) ZLR 476 (HC) in a claim for damages for malicious prosecution it was held that the term ‘malice’ did not mean spite or ill-will or a spirit of vengeance but had a wider connotation. It was said to include 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.

Having outlined the law I will now turn to deal with the factors that the court should consider in determining whether or not the plaintiff is entitled to the damages that he is claiming.

a) Whether the defendants set the law in motion.

It is common cause that the first defendant is the one who made the report to the police resulting in the arrest of the plaintiff on 21 September 2010. Evidence which was led by the plaintiff shows that when the police came to arrest him they came in the company of the first defendant. So, yes, the first defendant set the law in motion but only in so far as he is the one who made the complaint but he did not identify the plaintiff as the suspect.

b) Whether the first defendant acted maliciously and without reasonable and probable cause.

In alleging malice, the plaintiff in his testimony stated that when the police came to arrest him on 21 September 2010, they came in the company of the first defendant who had told them that he suspected him (the plaintiff). The plaintiff said that the first defendant even explained to him why he was having him arrested. He said that the plaintiff said that it was because Good Hope Mine was adjacent, just 5 minutes’ walk away. He said that it was

⁹ J Neethling, JM Potgieter and P J Visser Neethling’s *Law of personality* 2 ed (2005) at 176.

¹⁰ 1968 (3) SA 98A 2 103 – G – 104E.

therefore only logical that people from Good Hope Mine are the only people who could have stolen the slime. The plaintiff further said that when the police came to arrest him they also told him that apart from the first defendant who was suspecting him, they also had two of his subordinates at work who were implicating him, i.e. Clive Moyo and Innocent Mwaisowa.

The plaintiff said that he was arrested for stealing 75 000 tonnes of slime which is just impossible because such slime is as huge as the whole High Court building including the height thereof. He said that for such a tonnage one needs to do 2500 trips using a 30 tonne vehicle. He said this cannot be done in a month. He said that at his work place he only had two 7 tonne trucks. He said that these could not have ferried such a huge amount of slime in one day since he was alleged to have stolen the slime on 20 September 2010, the day before he was arrested. He said that furthermore this slime was not even found at Good Hope Mine. He said that you cannot hide 75 000 tonnes of slime. He said that it is not true that the second defendant's mine can only be accessed through Good Hope Mine. The plaintiff stated that the statements that were recorded from Clive Moyo and Innocent Mwaisowa were recorded well after his arrest and detention and as such the authenticity of the statements is doubtful. He said that these statements must have been drafted to justify his arrest. He said that in court Clive Moyo and Innocent Mwaisowa denied having made those statements to the police. The plaintiff further stated that the first defendant in his statement to the police he did not say that he suspected him (the plaintiff) because he had been implicated by the two witnesses Clive Moyo and Innocent Mwaisowa. The plaintiff further said that the second defendant's slime dump is manned 24 hours a day by two armed security guards at any given time such that it is impossible for anyone to steal the slime. The plaintiff stated that in light of the foregoing it was clear that the first defendant maliciously caused his arrest as he was acquitted at the close of the State case after Clive Moyo and Innocent had testified as State witnesses. The plaintiff stated that when these two witnesses testified in court they said that they had been coerced into making false statements to the police and to frame him by the first defendant. The plaintiff said that for these reasons he decided not to sue Clive Moyo and Innocent Mwaisowa, but the defendants only. The plaintiff said that he was arrested without reasonable cause.

When the first defendant testified on 17 January 2017 he had since retired from working for the second defendant as a Security Manager. His evidence was as follows. At the time material to this case he was working for the second defendant as a security manager and he had been working in that capacity for 15 years. His duties involved guarding the second

defendant's property against being stolen and to report to the police when theft occurred. He said that because of the passage of time he could not remember the dates very well, but sometime in August or September 2010 he noticed that about 75 000 tonnes of slime had been stolen from the second defendant's dump site which is about 50-70m away from the mine. He said that the slime must have been stolen over a long period of time without anyone noticing it. He said that when he noticed it he suspected Armstrong Mapanga, the owner of Good Hope Mine. He said that he never suspected the plaintiff because he did not even know him at that time. He said that he only got to know him about a week before he went to make a police report about the theft. The first defendant said that when he discovered the theft he suspected Armstrong because the mine dump from where the slime was stolen is close to where Good Hope Mine is. Besides, for anyone to access that dump site from outside Primrose Mine they have to go through Good Hope Mine which is fenced and gated and the gate is always manned. He said that each time he visited Good Hope Mine he found the gate locked and manned and someone would open it for him. The first defendant further said that he had also observed some tractor tyre marks from the dump site leading to Good Hope Milling Plant. He said that before he went to report the matter to the police he decided to go and ask Armstrong Mapanga about his suspicions because he was a friend. He said that that is when he met the plaintiff for the first time. He said that he asked him about the whereabouts of Armstrong and he said that Armstrong had gone to church in Mutare. He said that he asked the plaintiff about the stolen slime and he denied any knowledge about it. He said that he eventually went to report the matter to the police without having seen Armstrong. The first defendant said that when he reported the matter he told the police that he suspected Mr. Mapanga meaning Armstrong Mapanga. He said that the police then asked him to accompany them to Good Hope Mine. He said that upon arrival the police then interviewed the tractor driver. They asked him if he had gone to collect some ore from Primrose Mine and the driver admitted saying that he had been sent by the plaintiff. The first defendant explained that what caused the police to interview the tractor driver was that at the time that he was inspecting the dump site before going to the police to make a report some illegal miners shouted to him that the slime had been collected by a tractor from Mapanga. He said that when he then went to report the matter to the police he gave them that information. The first defendant said that when the tractor driver made the admission of having collected the slime that is when they took the plaintiff and the driver to station. The first defendant said that there was also another employee of Good Hope Mine who was also saying that he was also involved in loading the

ore. However, during trial the tractor driver and this other employee both turned hostile and denied that they had ever collected slime from Primrose Mine. He said that when this happened he was seated outside the court room waiting to give evidence. He said that he was then called by the prosecutor and informed of the developments. He said that the prosecutor told him that she had no choice but to withdraw charges against the plaintiff and she withdrew the charges.

The first defendant disputed that the mine dump from where the ore was stolen is manned at all. He said that there are several mine dumps that are dotted around the mine, but they are not manned by security guards. He said that it is the mine alone that is manned. He said that mine dumps are checked and monitored randomly as the slime is meant to be processed at a later stage. He said that he put the tonnage of the stolen slime at 75 000 tonnes because he had asked the Mining Surveyor who told him that the last measurement of the slime at that particular dump site had been recorded as 150 000 tonnes. He said that from his observation half of it had been stolen. He said that the stealing had been possible because the dump site is situated on the eastern side of the mine and the slime was being stolen from the dump eastern side. He said that anyone who was viewing the dump site from the western side would think that it was intact. He said that even if the thieves would make noise or use noisy machinery like a front end loader in stealing the slime people from the second defendant might not have paid any attention because operations at Good Hope Mine are done at the back of the dump site in question. So normally no one pays attention to noise coming from that direction.

The first defendant said that he gave a statement to the police on 21 September 2010. The statement was produced during trial and he was cross examined extensively on it. In that statement he stated why he suspected Mr. Mapanga. He stated that 6 months before he reported the matter to the police, the second defendant's mine dump which is adjacent to Good Hope Mine was in good order. It had slime which was about 5 metres high. He said that in the first week of August 2010, he visited the mine dump again only to discover that almost half of the slime had been stolen. He said that he strongly suspected Mr. Mapanga because no other person has access to the dump site except him. He said that any other person who might want to access that particular second defendant's mine dump has to pass through Good Hope Mine of which Good Hope Mine is fenced and gated. The first defendant said that there was a clear indication that Mr. Mapanga whom he was referring to as the accused had used his tractor to ferry the slime from the mine dump because there were some tractor tyre prints.

The first defendant further stated that he made enquiries from the accused's manager by the name Norest and he (Norest) denied the allegations. He said that on 21 September 2010 he then made a report to the C.I.D department at Kwekwe Central Police Station and the police officers accompanied him to Good Hope Mine. He said that an enquiry was made with Mr. Mapanga's driver who confessed that he would drive the ore to Mapanga's mill on his instruction. In the statement the first defendant did not state the quantity of the ore that was stolen or the value thereof.

The statements of the two subordinates of the plaintiff were produced as exh(s) 1 and 2 by the defendants' counsel during his cross examination of the plaintiff. The two statements belong to Clive Moyo and Innocent Mwaisowa who testified as State witnesses during the criminal trial of the plaintiff in the magistrates' court. These two are former employees of Good Hope Mine who were working under the supervision of the plaintiff at the time material to this case. Clive Moyo in his statement stated that he was employed as an assistant tractor driver and knew the accused person, Norest Mapanga (the plaintiff) as the mine manager of Good Hope Mine. He said that on 19 September 2010 he knocked off duty at 1800 hours and went home. At about 1930 hours the plaintiff phoned him and told him to report back to work at the mine as a matter of urgency. On arrival he was told that Mr. Milanzi the mine driver was not around. He was therefore tasked to go and ferry 2 loads of slime dump from Primrose Mine using the Massesy Ferguson tractor belonging to Good Hope Mine. At 2000 hours he drove the tractor to Primrose Mine in the company of 5 loaders: 4 of whom were hired whilst the 5th was Innocent on employee of Good Hope Mine. Clive Moyo said that they ferried 2 loads of slime dump from Primrose Mine to Good Hope Mine and finished at 2200 hours.

Clive Moyo said that since it was now late he was driven by the plaintiff in his motor vehicle up to the Roasting Plant so that he would not be mugged by thugs.

Clive Moyo's statement was recorded on 22 September 2010 at Minerals Unit Kwekwe by a police officer who did not state his name nor sign the statement. Only his Force Number 051380 X was stated. However, Clive Moyo's signature was affixed.

Innocent Mwaisowa stated the following in his statement. He was employed by Good Hope Mine as a general hand. On 19 September 2010 at around 1900hours he was phoned by the plaintiff when he was already home from work. He was asked to report back at work. He went back to the mine. The plaintiff told him to wait for Clive Moyo whom he said was going to drive them to Primrose Mine where he said they were going to ferry some slime dump. At

2000 hours, Clive Moyo came and they went to Primrose Mine in a Massey Ferguson tractor. He said that all in all they were 5 people including the driver. They ferried 2 loads before the plaintiff dismissed them for the night at 2200hours.

Innocent Mwaisowa signed the statement. The statement shows that it was recorded on 15 October 2010 by Detective Sergeant Kasekete, but he did not sign the statement.

What is clear from the foregoing is that the person who actually caused the arrest of the plaintiff is the tractor driver upon being interviewed by the police. I say this because what is pertinent from the *viva voce* evidence of the first defendant and his statement to the police which the plaintiff was not able to controvert is that the person that he suspected was Armstrong Mapanga, the brother to the plaintiff who happens to be the owner of Good Hope Mine, and not the plaintiff. In his statement to the police the first defendant said that he knew the accused, Mr. Mapanga as a miner in the area and in the same statement he actually referred to the plaintiff by his first name as the accused's manager. From this it is clear that the person that he was referring to as the accused could not have been the plaintiff but his brother Armstrong. So the person that he reported to the police was Armstrong, not the plaintiff. The accused only ended up being arrested because of the tractor driver who upon being interviewed by the police said that he had been sent to collect the slime by the plaintiff. Had it not been for the tractor driver, the plaintiff would not have been arrested because the police were after Armstrong when they went to Good Hope Mine with the first defendant. So on the basis of this alone, I make a finding that the first defendant did not act maliciously against the plaintiff when he reported the matter to the police because he did not report him as the suspect. So the issue of whether or not he acted without reasonable cause does not even arise under the circumstances.

The plaintiff took issue with the statements that were recorded from Clive Moyo and Innocent Mwaisowa which were produced as exhibits 1 and 2. He queried why the statements were recorded after he had already been arrested, why the recording police details did not sign the statements and why they omitted some important details like their names and force numbers. He said that for these reasons the statements were not authentic. However, considering that the plaintiff stated in his evidence that when Clive Moyo and Innocent Mwaisowa gave evidence in his criminal trial they indicated that they had been coerced into making the statements, it means that the two admitted having made statements to the police. There being no other statements other than the ones that were produced as exhibit 1 and 2, I take it that these are the very statements that were recorded from the two. That there are

omissions in the statements as enumerated by the plaintiff is neither here nor there because it is on the basis of these statements that the two were called upon by the State to give evidence against the plaintiff in the criminal trial.

It is not disputed that the two witnesses turned hostile when they testified. The plaintiff said that Clive Moyo and Innocent Mwaisowa said that they were coerced into making the false statements against him. The plaintiff said that he was suing the defendants because Clive Moyo and Innocent Mwaisowa proved that they had been coerced by the first defendant to frame him. However, in the absence of evidence from Clive Moyo and Innocent Mwaisowa I find it difficult to accept the plaintiff's story because it is just his word and nothing more. The plaintiff did not substantiate his version of events by leading evidence from Clive Moyo and Innocent Mwaisowa. They should have explained if indeed they were coerced by the first defendant as the plaintiff said. They also needed to explain the circumstances leading to their coercion. They should also have explained how the first defendant coerced them into giving false statements to the police. In the absence of evidence from the two, one cannot be faulted for concluding that in giving evidence the two turned hostile simply because they did not have the courage to testify against their boss face to face in an open court. This behaviour by witnesses who have a close relationship with an accused person is not uncommon and it is very understandable. What even compounded the matter is the fact that the two were accomplice witnesses. Apart from being afraid of testifying against their superior, they could also have been afraid because of the role that they had played in the commission of the offence. Another possibility that cannot be ruled out is that of interference. These are people who were working for the plaintiff's brother. Anything could have happened. Because of these possibilities, this is one case where I am tempted to say that the plaintiff's acquittal in the criminal trial cannot really be taken to mean that he did not commit the offence. Put differently, his acquittal *per se* does not mean that he was innocent. This is a case where malice on the part of the first defendant could only have been proven by the plaintiff by leading evidence from Clive Moyo and Innocent Mwaisowa. In the absence of that I remain convinced that the person who caused the arrest of the plaintiff is Clive Moyo, the tractor driver although he later turned around during trial and distanced himself from the statement that he had made to the police.

In the circumstances of this case, even if the first defendant had told the police that he suspected the plaintiff as the General Manager of Good Hope Mine, I would not say that he acted with malice and without probable cause. There was nothing wrongful about his conduct

because a theft had occurred. It would not be said that he acted without reasonable and probable cause in having the plaintiff arrested because he gave valid reasons for suspecting him. The dump site from where the slime was stolen is close to Good Hope Mine. For anyone to access that dump site from that side, they have to go through Good Hope Mine which is fenced, gated and is always kept locked. Over and above this, the first defendant said that he observed some tractor tyre marks from the dump site leading to Good Hope Mine Milling Plant.

In view of the foregoing, the plaintiff failed to prove that his arrest, detention and prosecution were malicious. The claim is therefore dismissed with costs.

Samundombe & Partners, plaintiff's legal practitioners
Mahuni & Mutatu Attorneys, defendants' legal practitioners