

SHEPHERD ZUZE
And
LEVITICUS DEMBEDZA
And
PAUL LINO
And
TENDAI SABURINYO
versus
CO-MINISTERS OF HOME AFFAIRS (N.O)
And
COMMISSIONER GENERAL OF POLICE
And
SERGENT MUTINGONDO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 18, 24-25 July 2017 & 30 August 2017

Civil Trial

N Chigoro, for 1st, 2nd and 4th plaintiffs
No appearance for the 3rd plaintiff
K Chimiti, for the defendants

MUREMBA J: The plaintiffs' claim is for delictual damages in the sum of \$200 000.00 for each one of them against the defendants.

The Plaintiffs aver that these damages arise as a result of them having been unlawfully arrested and detained by the third defendant between February 2012 and March 2012 in the absence of a reasonable suspicion that they had committed an offence. They further averred that they were detained at Harare Remand Prison where they were deprived of their liberty, comfort, basic amenities of life and were subjected to psychological stress. They averred that they were

tried and discharged at the close of the State case. They averred that the defendant had no lawful right to act in the manner they did and are thus liable to pay them damages as claimed.

In their plea the defendants admitted that when the third defendant arrested the plaintiffs he was acting in the course and scope of his duties as a police officer and as such the first defendant would be liable on the basis of vicarious liability. They however challenged the basis upon which the second defendant, the Commissioner General of Police is being sued for damages since he neither arrested the plaintiffs nor is he the employer of the third defendant who is a fellow employee. They averred that the plaintiffs' claims against him should fail.

The defendants averred that the arrest and detention of the plaintiffs was lawful as the third defendant had formulated a reasonable suspicion that they had committed the offences of assault and kidnapping which one Okeke had reported against them at Borrowdale Police Station. The defendants averred that the plaintiffs who were police officers had taken part in the arrest of Okeke for a purely civil dispute which had previously been reported at their station and were therefore aware of. They said that as the plaintiffs arrested Okeke, they assaulted him causing him injuries and he subsequently filed a report of kidnapping and arrest. The defendants further averred that the detention of the plaintiffs at Harare Remand Prison had nothing to do with them as the prison does not fall under their jurisdiction. They further averred that the fact that the plaintiffs were discharged at the close of the State Case does not mean that there had been no reasonable suspicion that the offences had been committed. The defendants further averred that the quantum of damages the plaintiffs are seeking is challenged on the basis that it is unprecedented.

What needs to be established is whether the plaintiffs' arrest was unlawful.

At trial the third plaintiff despite being served with the notice of set down, did not attend. So his claim is dismissed.

The plaintiffs' evidence

During trial it emerged that at the time material to this case, the plaintiffs were all police officers in the Zimbabwe Republic Police. The second plaintiff, Leviticus Dembedza was the officer in charge of Shift one at Harare Central Police Station whilst the other plaintiffs were his

subordinates. At the time this trial was conducted, only the first plaintiff was still in the employment of the Zimbabwe Republic Police. Each one of the plaintiffs testified.

The first plaintiff, Shepherd Zuze's evidence was as follows. He is a constable. On 4 February 2012 around 2 pm whilst he was at work at Harare Central Police Station he was instructed by Sgt Bandera to go the Borrowdale and arrest a suspect by the name of Jerome Okeke (Okeke). There was a complainant who had reported a case against him. Her name was Synodia Moyo. Together with third and fourth plaintiffs who were fellow constables they left for Borrowdale to arrest Okeke. They passed through Borrowdale Police Station since it is the police station that polices Borrowdale area seeking permission to enter their area and effect arrest. Assistant Inspector Mukomba who was the member in charge of Borrowdale Police Station granted them permission and gave them one Constable Mariche to accompany them to Okeke's place. They found Okeke at home. They arrested him and took him to Borrowdale Police Station where they explained to Assistant Inspector Mukomba how they had executed their duties. The Assistant Inspector even saw Okeke. Okeke never made any complaint to him. They proceeded to Harare Central Police Station with Okeke. Upon arrival, the plaintiffs' shift had knocked off duty. They then left Okeke together with Synodia Moyo in the hands of Chief Inspector Chikandiwa who was the officer in charge of the new shift before they went to their homes.

On 20 February 2012 around 5 pm the third defendant came to the first plaintiff and informed him that he wanted to record a statement from him about how they had arrested Okeke. He was taken to Borrowdale Police Station where he was warned and cautioned that he was under arrest and being charged for kidnapping Okeke. A warned and cautioned statement was recorded from him. He was put in the cells. On the next day of 21 February 2012 he was taken to Harare Magistrates Court where he was placed on remand. He was denied bail and was remanded in custody from that day to 29 February 2012 when he was eventually released having been granted bail by the High Court on 28 February 2012. When the matter was eventually tried, he was found not guilty and acquitted. He said that his arrest was unlawful because after his acquittal he went back to work but no one there ever asked him where he had been all along. People just kept quiet as if nothing had ever happened.

On the quantum of damages he said that they are justified because his arrest and incarceration caused him untold suffering. The incarceration caused him to lose his liberty.

Whilst at remand prison he was always in leg irons wearing torn prison garb. Each time his family came to visit him they would cry seeing him in such a poor state. The food and place of sleep were horrible. Fellow inmates mocked him as they asked him if police officers also commit crimes. He said that his family suffered because of his absence. The first plaintiff further said that he lost a lot of money in the form of legal fees as he engaged lawyers to deal with his case. His image was tarnished as the matter was published in the Herald and Newsday of 23 February 2012. He said that his work record was also tarnished. He had completed 4 years in service but because of the matter, he failed to write an examination for his promotion.

Under cross examination the first plaintiff admitted that he had not presented any evidence to show that he had been detained at Borrowdale Police Station. However, he said that he was detained there for one day and the police opposed bail on the Form 242 resulting in him being denied bail at court. He said that the police knew that the kidnapping charges were false because there is no way as a police officer he would kidnap a person and take him to the police station. He said that if the allegations were true, his arrest would not have taken so long from 4 February 2012 to 20 February 2012. The first plaintiff admitted that indeed Okeke had made a report against him and even went to court to testify against him. Asked why he (the first plaintiff) had sued the defendants, fellow police officers instead of Okeke, he said that it was because the police are supposed to investigate cases first before effecting an arrest. He said that if they had done proper investigations, they would have discovered that there was no truth in Okeke's report. The first plaintiff further said that he was saying this because during their criminal trial in the Magistrates' Court Garikai Gwangwava, the Officer In Charge of Harare District testified that he did not know why they (plaintiffs) had been arrested because police officers do not kidnap people from their homes and bring them to the police station. The first plaintiff blamed the defendants for his incarceration at prison saying that were it not for the police who refused bail, the court would not have sent him to prison. This plaintiff said that they had arrested Okeke for an offence of theft of trust property. He said that when they went and arrested him they did not know that that case was pending before the civil courts.

The second plaintiff, Leviticus Dembedza's evidence was as follows. At the time material to this case he was employed by the Zimbabwe Republic Police as an Inspector and was stationed at Harare Central Police Station. He was in charge of shift one. On 4 February 2012 his

shift started work at 6 am and finished at 3 pm. In the morning one Synodia Moyo came to his office with a reference number saying that the previous night she had reported her case against one Jerome Okeke for theft of trust property to Assistant Inspector Jaja who was the officer in charge of the night shift. She said that Assistant Inspector Jaja had said that the police could not go and arrest Okeke since it was at night, so he told her to come in the morning.

The second plaintiff said that using the reference number Synodia Moyo gave him, he searched for the docket and located it with the help of Sergeant Bandera whom he then tasked to find other police officers to go with him to arrest Okeke. That was done. He said that by the time they returned with Okeke their shift had knocked off duty and he had gone home. On the next day he then asked these officers how they had carried out their task. The other 3 plaintiffs explained that they had gone and arrested Okeke, brought him to station and had handed him over to Chief Inspector Chikandiwa who had then released him to go to his home.

On 20 February 2012 whilst at work he was approached by Superintendent Gowe who said that he wanted statements from the police officers who had arrested Okeke. Shortly thereafter the third defendant also came to the second plaintiff's office saying that he wanted to record warned and cautioned statements at Borrowdale Police Station from the police officers who had arrested Okeke. The first plaintiff being the only one who was available at that time, was taken to Borrowdale Police Station and did not return to Harare Central Police Station for duty.

On 22 February 2012 the Officer in Charge of Borrowdale Police Station, Chief Inspector Jaravani came to the second plaintiff's office and asked for his particulars which he duly supplied. Chief Inspector Jaravani said that he wanted to record a warned and cautioned statement from him in respect of assault and kidnapping charges Okeke had laid against him and the other plaintiffs. It was said that the police officers who had gone to arrest Okeke had assaulted him with button sticks and kidnapped him. The second plaintiff said disturbed by this, he went to see the Dispol, Chief Inspector Gwangwava and asked him what was happening and whether they had committed any offence. The Dispol asked him to come the next day so that they would discuss the matter. On the next day, 23 February 2012 at 5am whilst he was sleeping at home, Chief Inspector Jaravani and the third defendant, Sergeant Mutingindo came to his home. They said that they had come to take him to Borrowdale Police Station where he was

supposed to go and sign a warned and cautioned statement they had prepared. He was taken there and was made to sign the statement that had already been prepared. Around 1pm he was taken to the Attorney General's office by the third defendant and Inspector Marichoro. Okeke was now also there, but the second defendant did not know him yet.

At the Attorney General's office, one Dube attended to them. Dube shouted at him (second plaintiff) accusing him of being a thief who wanted to steal from people. When the second plaintiff asked what the matter was, Dube gave no explanation but continued to rant. He (Dube) took the phone and spoke with someone at court saying that he was now sending one of them and that he was supposed to go to remand prison. He was then taken to Harare Magistrates Court together with Okeke. At court, he was remanded in custody. At prison he was always kept in leg irons. He asked the prison officers why it was so and he was told that it was feared that since he was a trained person he could break from prison. He was in prison from 23 February 2012 to 29 February 2012 having been granted bail on 28 February 2012 by the High Court. When the matter was eventually tried he was found not guilty and was acquitted.

The second plaintiff said that their arrest was unlawful because when he instructed the other plaintiffs to go and arrest Okeke he was performing his daily duties. He said that the police officers who arrested him did not properly investigate the case because they never asked him how and why Okeke was arrested. Instead he was just taken and put in prison.

The second plaintiff said that as a result of his arrest and detention, he suffered the following prejudice. The matter was published in the newspapers and was read country-wide. His name was tarnished. He had to leave the police force because he felt that no one trusted him and he did not know what his subordinates who were under his supervision were thinking and even those above him. None of them had visited him at prison. He said that when he was acquitted of the charges he was forced to leave the police force when he had indicated in his papers that he still wanted to continue working for the organization.

The second plaintiff further said that his friends and family now believe that he left the police force because he is a criminal who committed a criminal offence. He said that although he got a good reference from the police, it is difficult for him to get another job as his image was tarnished as a kidnapper. He said that his arrest and detention caused his family to suffer. His wife who was in court when he was remanded in custody collapsed whilst carrying a baby on her

back. He did not even get to see what happened to her and the baby after they fell because the prison officers whisked him away from the court room. Whilst at prison, his wife would visit him and see him in leg irons. Life in prison was a nightmare as the toilets would suffer from blockages and they (inmates) would be ordered to unblock them using their bare hands and blankets. Fellow inmates gave him a torrid time as they mocked him for having been arrested. He said these were people he had arrested whilst he was still at Harare Central Prison. His child who was in boarding school had to return home because he could not cope with the fact that his father had been arrested. He only went back to school after his father had been released from remand prison.

Under cross examination the second plaintiff was asked how a person is arrested. He said that it is after a report has been made against him. The police then talk to the complainant and the accused and then decide whether or not the accused has committed the alleged offence. They then arrest him if so satisfied. Asked how the accused is called to station, he said police officers are sent to go and bring him. He said these police officers tell him about the offence being levelled against him and then invite him to station. The second plaintiff contended that before his co-plaintiffs were arrested, the first person who should have been approached and asked what had happened was himself. He said that their arrest as plaintiffs was unlawful because in arresting Okeke they had followed the laid down procedure. They had received a report against Okeke. They caused him to be brought to station and there was nothing wrong with that. He further said that he does not see why he was personally arrested for having arrested and kidnapped Okeke when he did not personally go to arrest Okeke. All he did was send some police officers to go and collect him.

It was put to him that s 50 of the Constitution requires that he proves that the police officer who arrested him acted unreasonably and negligently which he said he had proven.

Asked how he had arrived at the damages of US\$200 000, he said that his wife and children were injured when they fell down in court. When the wife came to prison to visit him the child had a bandage on the head. The wife's operation on the stomach was affected. He was asked to give a breakdown showing the different factors which caused him to arrive at that amount to which he said he was unable to do so.

The fourth plaintiff, Tendai Saburinyo's evidence was as follows. He said that he was a constable in the Zimbabwe Republic Police at the time material to this case. On 4 February 2012 whilst at work he was assigned by Sergeant Bandera who had been instructed by the second plaintiff, Leviticus Dembedza to go and arrest one Okeke. Since he was a constable he was supposed to take orders from his superiors. So he complied together with the other constables, first and third plaintiffs. He said that Sergeant Bandera had shown them the complainant Synodia Moyo and the docket which had the initial report reference. His account of what happened from the time they left Harare Central Police Station up to the time they brought Okeke to the same station from his home in Borrowdale is similar to the account that the first plaintiff, Shepherd Zuze gave. I will not repeat it. In addition to this account the fourth plaintiff said that when they got to Okeke's place in Borrowdale he started making phone calls mentioning names of senior police officers at Harare Central Police Station. In particular he mentioned Gowe's name and Gowe was the Dispol Minor. He said that at the time they tried to arrest Okeke, he resisted arrest and they had to handcuff him.

On 2 March 2012 whilst at home, the third defendant came and said he wanted to take him to Borrowdale Police Station for the recording of a warned and cautioned statement, but because he (fourth plaintiff) had a 3 day old child he requested that he not be taken to station. The third defendant ended up recording the warned and cautioned statement at the fourth plaintiff's place and left after advising him to attend court on 5 March 2012. On 5 March 2012 he went to court and was remanded out of custody on \$100 bail, but because he didn't have the money, he was remanded in custody for 3 days. He was only released after paying the money.

He said that he was claiming US\$200 000 because he suffered a lot. He suffered from anxiety as he wondered and worried about his fate. At work, colleagues induced fear in him as they were telling him that he was going to be convicted. Some even gave him names of traditional healers he could consult in order to be acquitted. At work he was being stigmatized and was being seen as an enemy by the superiors. He said that it hurts that they were accused of having committed offences they never committed and were just carrying out duties they had been assigned to do. He said that relations at work soured to the extent that he ended up losing his job and at the time of his trial, he was still unemployed.

The fourth plaintiff explained that his arrest was unlawful because if they had done anything wrong they should have been asked to write reports which should have been deliberated upon first before they were charged with the criminal offences. He said that all they did was to go and collect a suspect and brought him to station. He said that that cannot be called kidnapping. He said that the police officer who arrested him, (the third defendant) did not act reasonably.

Under cross examination it was put to the fourth plaintiff that Okeke had reported that when the plaintiffs came to arrest him they assaulted him. In response he said that if they had assaulted him then the member in charge at Borrowdale Police Station would have noticed it. He said that in any case he would have been happy if his superiors had asked him about the assault allegations before charging him with the criminal charges. He said that the third defendant did not act reasonably because at the time he came to record these warned and cautioned statement from him on 2 March 2012 the matter was already pending before the courts. He said that it was even being alleged that he was on the run since the other plaintiffs were already on remand. He then said that he was not saying the third defendant was wrong in the manner he arrested him, but it was the arrest which was unlawful. He said he was claiming damages for detention in prison because were it not for the unlawful arrest he would not have been detained.

On the quantum of damages he is claiming, he justified them by saying that the matter was published in the papers yet he had been carrying out national duties. He said that he had not committed any assault and kidnapping on Okeke. He said that he wanted \$50 000 for defamation. He said that he never got to cherish the birth of his second born child and wanted another US\$50 000.00 for that. At prison he was always in handcuffs and leg irons. He said that after they had arrested Okeke, his (Okeke's) matter was investigated and he was not taken to court. He said if the same investigations had been made in their (plaintiff's) case they would not have been taken to court.

The defendants' evidence

Two witnesses testified for the defendants. The first was Isaac Gowe, a Superintendent in the Zimbabwe Republic Police. At the material time he was stationed at Harare Central District Headquarters. He said that in December 2011 Synodia Moyo and her husband came to his office

complaining that the police were reluctant to arrest Okeke, a Nigerian national who was withholding their property. The matter was being investigated by Sergeant Mutemi. Superintendent Gowe said he called for the docket. Upon perusing it he realised that Okeke was withholding the property for non-payment of rentals. He said that it was clear to him that this was a civil case. So he directed Synodia Moyo and her husband to go to the Civil Court. At the same time he asked Sergeant Mutemi to refer the matter to the National Prosecuting Authority (the then Attorney-General's office) for its opinion.

In 2012 Synodia Moyo, came again to Isaac Gowe's office, she was now with Okeke. The two wanted the police to solve their dispute. Together with the officer commanding Harare District (the Dispol), Chief Superintendent Gwangwava they discussed the matter and agreed that the matter was purely civil. They told them that the docket had been referred to the National Prosecuting Authority for opinion and they left. Isaac Gowe said he was surprised to learn that Synodia Moyo had come back again and made the same report at Crime Commercial Unit which is a different section with its own officer commanding. He said that he was surprised one night when Okeke phoned him complaining that he was being arrested for the same offence by some officers. He said that he asked to speak to these officers over the phone but Okeke advised that these officers were refusing to talk to him over the phone. Isaac Gowe said that he wanted to tell these officers the circumstances of the case and that the docket had been referred to the National Prosecuting Authority and that there was no need to arrest Okeke.

Isaac Gowe said on the next morning he met the Dispol, Chief Superintendent Gwangwava who also said that he had been phoned by Okeke about the same matter. He also said that the officers had refused to talk to him over the phone. Isaac Gowe said that he later learnt that Okeke had made a report of assault and kidnapping at Borrowdale Police Station against the officers who had arrested him. Isaac Gowe said he was later approached by the third defendant who was the Investigating officer. He said that he wanted to interview the officers (the plaintiffs) and he referred him to their respective officers in charge. He said that he later learnt that these officers were tried in court and were acquitted.

About the plaintiffs alleging that they were unlawfully arrested, he said that Okeke had reported them for arrest and kidnapping. Upon receiving a report the police have a duty to investigate the allegation and if there is evidence to prosecute, the accused are taken to court. He

explained the procedure in detail. He said when a person reports, the report is recorded in the Report Received Book or in the Initial Report Record. A statement is recorded from the complainant if he is there. The matter is referred to the investigation section for allocation to an Investigating Officer (I.O). The I.O. has a duty to gather evidence. In an assault case he has to establish whether indeed the complainant was assaulted. He does this by recording statements from witnesses to the assault. The complainant is also referred to hospital for medical examination. For kidnapping, statements are recorded from witnesses who might have witnessed the kidnapping. The accused's role is to have a warned and cautioned statement recorded from him and the docket is then sent to the National prosecuting Authority (NPA) for assessment of evidence contained therein. The National Prosecuting Authority will then decide whether the matter should be taken to court or not. He said *in casu* the fact that the NPA referred the matter to court means that it was satisfied that the plaintiffs had a case to answer. He said that it does not matter that the plaintiffs were later acquitted in court.

Isaac Gowe said that the plaintiffs should be claiming damages from the Ministry of Justice because it is the National Prosecuting Authority which assessed the evidence in the docket and referred it to court. He said that again it is the National Prosecuting Authority which prefers charges against accused persons. He said that the police do not arrest to investigate but investigate to arrest.

Under cross examination he said that he would not know if there was a medical report for Okeke since he was not the I.O. He said that Okeke had obtained his cellphone number and that of the Dispol, Mr Gwangwava on the day they discussed his case with Synodia Moyo. Isaac Gowe disputed that the docket that the plaintiffs acted upon was different from the one that Sergeant Mutemi was handling or dealing with and referred to the NPA. He said it was the same matter. He said that Synodia Moyo had approached Harare Central Police Station Charge Office with a CR number saying Okeke was wanted for that CR number yet it was the same CR that was being investigated by sergeant Mutemi. He said that if the plaintiffs had made efforts to verify with sergeant Mutemi they would have known the correct position of the matter before proceeding to arrest Okeke. He said that what a clever police officer does is that if a person or a complainant gives you a CR number is you check the authenticity of that CR number and then verify with the I.O the nature and circumstances of the matter before you do anything. You do

not just accept the CR and go and arrest the suspect because there is a danger that you might arrest someone who was acquitted of the offence long back.

Isaac Gowe disputed that the arrest of the plaintiffs was unlawful on the grounds that the third defendant was acting on the instructions of his officer in charge or member in charge and as such he was acting on specific written instructions. When he finished investigations he took the docket to the N.P.A. for the assessment of evidence. He said that the referral of the matter to court means that there was evidence against the plaintiffs. He said that the arrest was not unlawful because a complaint had been made against the plaintiffs by Okeke.

The third defendant, Peter Mutingondo's evidence was as follows. Jerome Okeke made a report of assault and kidnapping against the plaintiffs on 4 February 2012 at Harare Central Police Station. The docket was only allocated to him to investigate on 15 February 2012 by the Member in Charge. The third defendant said that instructions were inscribed for him on the docket by the then Member in Charge, Assistant Inspector Seda. Instructions were for him to arrest the accused, record statements from witnesses and conduct all the necessary investigations before the matter could be taken to court. At that time Synodia Moyo who was one of the accused persons was already arrested and in police custody. He recorded her warned and cautioned statement. He went on to record a statement from Okeke's driver who stated that he was present at the time Okeke was arrested. He said that he had witnessed the assault. The third defendant said that he obtained a medical report from Okeke which was corroborating his allegation of assault. Apparently, Synodia Moyo had implicated the plaintiffs except for the second plaintiff in the assault saying that they had committed the assault together when they went to arrest Okeke. He said about the kidnapping charge, Okeke's statement of complaint was saying that he was arrested at 1800 hours, and was detained in a motor vehicle where he was being quizzed and assaulted. He was only brought to station at 2200 hours. The third defendant said that he recorded statements from Sergeant Mutemi, Sergeant Tambulani Makura, Chief Inspector Chikandiwa, a police officer Victor Jaja; Superintendent Gowe, Chief Superintendent Gwangwava (the Dispol). He said that he learnt that the docket in which Sergeant Mutemi was the I.O had been referred to the Attorney General's Office (now the NPA) for opinion whilst the second docket which the plaintiffs had used in arresting Okeke had already been submitted for filing by Sgt Makura of Commercial Crime Unit (CCU).

The third defendant further said that when he interviewed Synodia Moyo she is the one who implicated Shepherd Zuze, the first plaintiff as a co-accused. The third defendant said he went to the Dispol, Chief Superintendent Gwangwava to seek permission to interview the first plaintiff which he was granted. He took the first plaintiff to Borrowdale Police Station where he interviewed him and recorded a warned and cautioned statement from him. He said from there he took him to the Attorney General's office who denied him bail and when he appeared in court he was remanded in custody. He denied that the first plaintiff was ever detained in police cells overnight. He said that he then contacted the complainant, Okeke in order to get the names of the other accused persons and he was referred to Superintendent Gowe whom he said knew the names of the other police officers. He got these as second and third plaintiffs whom Superintendent Gowe said were under his command at Harare Central Police Station. He said it took him long to locate them as they were not always available each time he looked for them. He said that he subsequently located them on separate dates starting with Paul Lino, the third plaintiff. When he eventually located the fourth plaintiff, the other plaintiffs had already been granted bail by the High Court. So he was also granted bail. He said that the second plaintiff, Leviticus Dembedza and Sergeant Bandera were arrested after having been implicated by the other plaintiffs who said that when they went to arrest Okeke they were acting on the orders of these two. He said that he sought guidance from the Attorney General's Office on what to do with these two. He said that he was given a directive that these 2 should be arrested too and be jointly charged with the other plaintiffs. He said that despite the fact that the police were not opposed to bail, the Attorney General's Office had opposed bail against the first, second, third plaintiffs and Sergeant Bandera. He said that all the police officers and the two civilians who had been charged were acquitted on the grounds of insufficient evidence against them.

The third defendant said that the arrest of the plaintiffs was lawful because a complaint had been made against them by Okeke. Their arrest was pursuant to that complaint. He said that he even carried out his duties *bona fide* which is even evidenced by the fact that he did not oppose bail against them and he did not detain them in police cells.

Under cross examination the third defendant maintained that he arrested the second plaintiff upon the instructions of the Attorney General. He said that it was just a directive. He said that Okeke made his report against the plaintiffs on the same day, 4 February 2012 after

being released by Chief inspector Chikandiwa. It was put to him that he obtained Okeke's medical report 11 days after having been allocated the docket. He said that it had been four years since he had investigated the matter and he could not recall. Asked if the police can kidnap a person and take him to a police station he said it depends on the circumstances of the case.

The third defendant disputed that he unlawfully arrested the plaintiffs. He said that he complied with the instructions of the member in charge who allocated him the docket in that he recorded witness statements, verified with dockets that formed the basis of the case, obtained the medical report and arrested the accused. It was put to him that he had obeyed unlawful orders of the Prosecutor to which he replied that the orders had been lawful because a report of assault and kidnapping had been made by Okeke.

The law and its application to the facts

If a person is illegally arrested or detained the person responsible for such arrest or detention is liable to pay damages. S 50 (9) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 reads:

“Any person who has been illegally arrested or detained is entitled to compensation from the person responsible for the arrest or detention...”

The delict of unlawful arrest and detention is committed when a person, without lawful justification, restrains the liberty of another by arresting or imprisoning him. See *Muyambo v Ngomaikarira* HH 138/11 and G. Feltoe, *A Guide to the Zimbabwean Law of Delict* 2nd ed p 77. All that the plaintiff needs to prove is that the arrest or imprisonment was illegal and not that there was intention to act illegally or intention to cause harm to the plaintiff. G. Feltoe, *A Guide to the Zimbabwean Law of Delict* 2nd ed p 77. Intention is not a requirement for this delict.

The defendant's onus is to show that when he arrested or detained the plaintiff he had probable and reasonable cause for doing so. In the case of the police when they arrest a person the arrest must therefore be based on reasonable suspicion that an offence has been committed. The arresting detail must thus furnish sufficient detail linking the suspect or the accused to the offence. See *Cosmas Nyambara v The Co-Ministers of Home Affairs and 3 Ors* HH 99/15. However, in the case of police officers, even if the plaintiff proves that his arrest or detention by them was unlawful or illegal, this does not make them automatically liable to pay damages. For

them to be liable, the plaintiff has to show that over and above the illegality of the arrest or detention, the police in arresting him or detaining him did not act reasonably and in good faith and without culpable ignorance or negligence. Section 50 (9) of the Constitution is pertinent. It reads:

“(9) Any person who has been illegally arrested or detained is entitled to compensation from the person responsible for the arrest or detention, but a law may protect the following persons from liability under this section—
(a) a judicial officer acting in a judicial capacity reasonably and in good faith;
(b) any other public officer acting reasonably and in good faith and without culpable ignorance or negligence.”

The provision means that public officers who will be acting reasonably and in good faith without culpable ignorance or negligence are exonerated. Public officers include the police. Culpable negligence means recklessly acting without reasonable caution. It also means negligence of a higher degree than gross negligence. The negligence is tantamount to wanton disregard of care (www.thefreedictionary.com-accessed on 28 August 2017). Culpable ignorance is the lack of knowledge or understanding that results from the omission of ordinary care to acquire such knowledge or understanding (www.legal-dictionary.thefreedictionary.com accessed on 28 August 2017). This means that if the police in arresting or detaining a person act unreasonably, in bad faith and recklessly without exercising caution or with lack of knowledge or understanding resulting from the omission of ordinary care to acquire such knowledge or understanding, they are liable to pay damages for unlawful arrest or detention.

In *casu* it is not disputed that the person who triggered the police to act against the plaintiffs is Jerome Okeke who reported the case of assault and kidnapping. This was pursuant to the first, third and fourth plaintiffs having gone to his place to arrest him on allegations of theft of trust property on 4 February 2012. The I.O said that according to Jerome Okeke’s statement he made allegations that on being arrested, these police officers had detained him in a motor vehicle between 1800 hours and 2200 hours as they assaulted and interrogated him before taking him to the Police station. It was from this conduct that the allegations of assault and kidnapping arose. It is not in dispute that the first, third and fourth plaintiff went to arrest Okeke at his house and they brought him to station. So by virtue of this fact and the report that was made by Okeke the police had reasonable and probable cause to believe that the alleged offences had been committed. There was reasonable suspicion. The plaintiffs did not dispute that Okeke reported

them. Their only issue is that the third defendant did not carry out thorough investigations before he arrested them. According to the procedure that the plaintiffs and the defendants' witnesses outlined, the I.O. did what was supposed to be done. For an arrest to be effected all that is required is reasonable suspicion. That the police should have then asked for reports from the plaintiffs explaining what had happened when they went to arrest Okeke before charging them is not a requirement of the law. The plaintiffs failed to show the court their authority for this averment. It is not a requirement of the law. As such its non-compliance cannot render the arrest of the plaintiffs unlawful or illegal. It does not matter that the plaintiffs were later acquitted at trial. I make a finding that the first and fourth plaintiffs' arrest and detention was lawful.

As far as the second plaintiff is concerned, the third defendant said that he was given instructions by the Attorney General's Office to arrest him together with Sergeant Bandera. Mr. *Chimiti* in his closing submissions stated that in terms of s 12 of the Police Act police officers are obliged to comply with instructions from the Attorney General. It reads

"12 Compliance with directions of Attorney-General

Where the Attorney-General has in terms of subsection (4a) of section 76 of the Constitution required the Commissioner-General to investigate and report on any matter which relates to any criminal offence or alleged or suspected criminal offence, the Commissioner-General shall forthwith comply with such requirements."

Under the new Constitution the relevant provision is found in s 259 (11) and it reads:

"The Prosecutor-General may direct the Commissioner-General of Police to investigate and report to him or her on anything which, in the Prosecutor-General's opinion, relates to an offence or alleged or suspected offence, and the Commissioner-General of Police must comply with that direction.

The provision makes it clear that if the police are given directives by the NPA they are obliged to comply. It is a fact that the second plaintiff did not go to Borrowdale to arrest Okeke. He sent the other plaintiffs to do so. If they then went on a frolic of their own and assaulted and kidnapped Okeke which is not what the second plaintiff had sent them to do, it was wrong for the Attorney General's office to order that he be jointly charged for criminal charges of assault and kidnapping. Clearly, his arrest and detention was illegal. However, since the third defendant who arrested him was acting on the instructions of the Attorney General's office, he was under an obligation to comply with the instructions. It cannot therefore be said that he acted unreasonably, in bad faith and recklessly without exercising caution or with lack of knowledge or

understanding resulting from the omission of ordinary care to acquire such knowledge or understanding. He is therefore protected under s 50 (9) (b) of the Constitution.

Lastly, I am in agreement with the defendants that in a claim for damages arising from an illegal arrest or detention by the Commissioner General's subordinates, it is improper for the plaintiff to sue the Commissioner General of Police because he is not the employer of the police officers. He is just but a fellow employee. So he cannot be vicariously liable for a delict committed by a fellow employee. The other reason why the Commissioner General of Police should not be sued is that the Commissioner General of Police is an office and not a person. An office cannot be sued. The difference with the first defendant who is the Minister is that the State Liabilities Act specifically provides that the Minister shall be cited as a defendant in such matters.

In view of the foregoing the plaintiffs' claims are dismissed with costs.

Chigoro Law Chambers, plaintiffs' legal practitioners
Civil Division of the Attorney General's Office, defendants' legal practitioners