

COLLIN BENYURE  
versus  
ANNAH BENYURE

THE HIGH COURT OF ZIMBABWE  
**DUBE-BANDA J**  
HARARE; 29 January 2025

**Malicious prosecution**

*T F Chibadzwa* and *Ms A Ndoro*, for the plaintiff

DUBE-BANDA J:

[1] This is an action for damages for malicious prosecution. The plaintiff claims the sum of USD\$20 000.00 for emotional stress; USD\$30 000.00 damages for his reputation; and USD\$10 00.00 for legal costs incurred during the prosecution. The defendant did not file a notice to defend, resulting in the matter being set down on the unopposed roll. After hearing plaintiff's counsel, I dismissed the claim in an *ex-tempore* judgment. The plaintiff has requested written reasons for the decision to dismiss his claim. These are they.

[2] The defendant is seventy-one-years old. She has children with the late Sylvester Benyure, and the plaintiff is her stepson. The declaration states that on 8 May 2024 the defendant falsely claimed that the plaintiff destroyed her seven roomed house at Benyure homestead, Nyamakosi Village, Mutoko ("homestead"). It is averred that the plaintiff was subsequently charged with the crime of contravening s 140 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. It was further pleaded that at the time the allegations were made, the defendant did not own or possess a seven roomed house at the homestead. It was further stated that the Master of the High Court ruled that the plaintiff's mother was the only surviving spouse and the defendant's marriage was null and void. The local chief ruled that the defendant's name neither appeared in the village register nor had she settled at the village. The magistrates court upheld the decision of the chief, and the High Court declared that the plaintiff's mother was the sole occupier of the homestead.

[3] The fact that the matter was not defended is inconsequential. The grant of an order is a judicial function. The court must be satisfied that the plaintiff has proved his case in terms of the requirements of the law. The *onus* is on the plaintiff to prove on a balance of probabilities

the following requirements: (a) that the defendant set the law in motion (instigated or instituted the prosecution) against him; (b) that at the time he instigated or instituted the legal proceedings the defendant was without any reasonable and probable cause to do so; (c) that the defendant was actuated by express or implied malice (any indirect and improper motive) to set the law in motion against him; (d) that the prosecution terminated in his favour; and (e) that he suffered damages as a result of the prosecution. See *Bande v Muchinguri* 1999 (1) ZLR 476 (H).

[4] The first question is whether the prosecution was “instigated or instituted” by the defendant, in the context in which the words are used in a claim for malicious prosecution. The plaintiff must allege and prove that the defendant instigated or instituted the proceedings. It is trite that the mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient. See *Lederman v Moharal Investments (Pty) Ltd* [1969] 1 All SA 297 (A). The test is whether the defendant did more than tell the officer the facts and leave him to act on his own judgment. In other words, simply giving a candid account, however incriminating, to the police is not the equivalent of instigating or instituting a prosecution. See *Nherera v Shah* SC-51-19. In *casu*, in her statement to the police, the defendant stated that on 8 May 2004 she received an anonymous call informing her that the plaintiff had demolished her house. On the same day she passed through the homestead and saw that indeed her seven roomed, unroofed house had been demolished. She gave the value of the damage and that nothing was recovered. This is the information the defendant provided to the police. She mentioned the plaintiff only as a suspect and informed the police that she neither saw him, nor anyone saw him demolishing the house. She was candid that her information was based on an anonymous call she received. On the premise of that account and the investigations the police arrested and preferred a charge against the plaintiff. The defendant did no more than tell the police the facts as she knew them and left it to the police to investigate the matter. The decision to arrest and charge the plaintiff was exclusively that of the police. The investigating officer attended the scene, saw a demolished house, because if he had not seen it, he would have said so in his statement and closed the investigations. In addition, the magistrates’ court in its judgment (appeal from the chief’s court) stated thus:

“Despite several warnings reprimands and instructions not to construct the defendant (defendant in *casu*) had ignored this when she proceeded to construct a new structure which the court observed during the inspection in loco as it was a semi building farm brick structure which was a beam level.”

[5] The defendant had a house at the homestead. The question whether she had a right or not to build a house at the homestead does not arise in this matter. It is irrelevant. The point is that she had a house at the Benyure homestead. Her house was demolished, and this is what she reported to the police. The conduct of the defendant cannot be said to amount to an active instigation of criminal proceedings.

[6] In addition, the plaintiff's affidavit of evidence merely re-cycles the contents of the summons and declaration. Such is unhelpful. The allegation that the defendant made a false statement is not in sync with the facts of this case. The demolished house was at the centre of the case, the police could not have arrested, and the prosecution could not have prosecuted the plaintiff if there was no demolished house. There was a demolished house. There is no evidence that besides giving information to the police the defendant proceeded to lay a charge and was overbearing on the police to institute proceedings when they would not have otherwise done so. See *Econet Wireless (Pvt) Ltd & Ors v Sanangura* 2013 (1) ZLR 401 (S). The defendant did not make a false statement or report in a material respect which would constitute instigation, for purposes of fulfilling the requirement of having 'instigated' the plaintiff's prosecution in the context of a claim for malicious prosecution.

[7] The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable or probable cause, a phrase which means an honest belief founded on reasonable grounds that the institution of proceedings is justified. *Beckenstrater v Theunisen* [1955] 1 All SA 146 (A). It is a question of fact to be decided on the evidence and in the light of all the circumstances. In essence, the plaintiff must prove a negative in the sense that he has to give some evidence tending to establish an absence of reasonable and probable cause operating on the mind of the defendant at the time she made the police report. To do this he must show the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him unless it also appears that those facts were within the personal knowledge of the defendant. If they were not, it must be shown what was the information on which the defendant acted. See *Econet Wireless (Pvt) Ltd & Ors v Sanangura* 2013 (1) ZLR 401 (S). The defendant honestly entertained a belief that her house was demolished, and that the suspect was the plaintiff. She suspected the plaintiff because she received an anonymous call that it was him who demolished her house, and because it was him who sought to evict her from the homestead. This is the information she told the police and the court. The defendant in this case confined herself to giving information on what she honestly believed transpired. Malice may be inferred from the absence of reasonable and probable cause

to commence or continue a prosecution. In other words, a want of reasonable and probable cause may be evidence of malice, where the court may conclude that there was no honest belief in the accusation made. In *casu*, there is no evidence of malice. In other words, the plaintiff has not proved an absence of reasonable and probable cause operating on the mind of the defendant. Therefore, the plaintiff failed to prove the aspect of malice in the context of a claim for malicious prosecution.

[8] The fact that the proceedings were terminated in favour of the plaintiff is common cause. The plaintiff was discharged at the close of the case for the prosecution. To contextualise the termination in favour of the plaintiff, this court must analyse the reasons for the discharge. In the discharge ruling, the court stated that:

“It is (sic) court’s contention that indeed the evidence adduced on behalf of the State is such that no court acting carefully can safely convict. There is no evidence of any eye witness to testify that indeed the accused person committed the offence with which he is being charged off. The sole witness called by (sic) State contends that she neither saw the accused person committing the offence nor heard an eye witness tell her that he or she had perceived the accused committing the offence. The essential elements of the offence have not been established to warrant placement of the person to his defence.”

[9] The defendant was discharged not because there was no demolished house. In fact, a closer reading of the ruling shows that the issue of a demolished house was common cause. The court did not say it was discharging him because the defendant lied that her house was demolished. What the trial court stated in the ruling is what the defendant had said from the onset, that she neither witnessed the demolition nor had a direct witness to it. Therefore, the fact that the proceedings were terminated in favour of the plaintiff is of no consequence. It is of no moment.

[10] In conclusion, there is no evidence that the defendant abused the process of the court by wrongfully or maliciously setting the law in motion against the plaintiff. There is no evidence that the defendant acted without reasonable or probable cause. There is no evidence of malice. The termination of the proceedings in favour of the plaintiff is of no moment. The plaintiff has not proved a claim of malicious prosecution. It is for these reasons that this action must fail.

[11] The plaintiff has not discharged the *onus* of showing the liability of the defendant, and he is therefore not entitled to judgment in his favour. In the circumstances, the issue of quantum of damages does not arise.

In the result, the plaintiff's claim is dismissed.

**DUBE-BANDA J:.....**

*Tadiwa and Associates*, plaintiff's legal practitioners