

LLOYD GARIKAYI NDANGARIRO

Versus

JOSEPH BAKURU TAYALI

And

TONGAI KAMUTINGONDO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 & 22 FEBRUARY & 26 APRIL 2018

Civil Trial

Ms Mutshina for the plaintiff
M. Ncube for the 1st defendant
M. T. T. Chitere for the 2nd defendant

MAKONESE J: Where a litigant is suing for payment of damages based on wrongfulness, such damages are not just there for the taking but must be proved on a balance of probabilities. The cause of action based on *actio injuriarum* requires proof based on wrongful intentional impairment of the person, dignity or reputation of the plaintiff by the defendant. To succeed in such a claim, the plaintiff must allege and prove impairment of the relevant aspect of the personality relied upon. The plaintiff must allege facts, which objectively speaking are sufficient to lead to a reasonable inference of wrongfulness.

In this matter plaintiff issued summons seeking against the defendants, jointly and severally payment of a total sum of US\$32 000, broken down as follows:

- (a) the sum of US\$12 000 being cash unlawfully seized from the plaintiff by the defendants.
- (b) the sum of \$10 000 being damages for impairment of dignity
- (c) payment of the sum of US10 000 being damages for unlawful arrest and detention.

The nub of the plaintiff's case is that he is a senior police officer in the Zimbabwe Republic Police holding the rank of Chief Inspector. Plaintiff has been in the service of the police force for twenty years. Plaintiff alleges that on the 28th August 2012 he was arrested by 2nd defendant who at the material time was a junior police officer holding the rank of Assistant Inspector. Plaintiff contends that his arrest was at the instigation of 1st defendant following a dispute over certain mining claims in the Shangani area. The plaintiff further contends that he was ordered to surrender all the money he had, and that a total of US\$12 000 in cash was taken from him unlawfully, against his will. In addition, as a result of his arrest by a junior officer, 2nd defendant, who was acting in connivance with the 1st defendant, plaintiff's dignity was impaired and he suffered damages in the sum of US\$10 000.

The defendants disputed the plaintiff's claims. 1st defendant indicated that following theft of gold nuggets at his mine on the night of 28 August 2012 he prevailed upon the plaintiff to attend at the CID offices at Development House, Gweru to explain himself. 1st defendant averred that plaintiff freely attended at CID offices and confessed to having extracted 2kgs of gold nuggets from his claims. Plaintiff duly apologised and offered to repay the value of the gold. Plaintiff then immediately handed a sum of US\$4 000 which he had on his person. Later that same night plaintiff collected a further sum of US\$8 000 from his house which he handed to the plaintiff. 2nd defendant averred that he did not effect any arrest on the plaintiff and that the money paid to 1st defendant was not forcibly taken from the plaintiff. The defendants aver that the plaintiff's claims for damages are without any foundation.

Plaintiff's case

Plaintiff testified in this matter and confirmed that he is a senior member of the Zimbabwe Republic Police holding the position of Chief Inspector. At the time the matter arose, he held the same position. Plaintiff stated that he was walking along 6th Street in Gweru on the 28th August 2012 at around 7pm. As he approached Automobile Association Offices, he was in the company of his son, when he was approached by a white ZANU (PF) double cab motor vehicle. 2nd defendant disembarked from the car and indicated that he was under arrest. He was

informed that the issue involved theft of gold nuggets and that a report had been made by 1st defendant. Plaintiff stated that he was driven to CID offices where he was wrongfully and unlawfully detained from about 7pm to about 10pm without any justification or reasonable cause. Plaintiff testified that he was subsequently made to surrender the money that he had on his person totaling US\$4 000. He was taken to his Mkoba residence in Gweru where a further sum of US\$8 000 was taken from him. Plaintiff stated that he did not surrender the money voluntarily but was threatened with arrest and detention. The plaintiff confirmed that he was released at Chicken Inn in Gweru around 10pm that same night. He did not make a report of his alleged unlawful arrest and detention immediately after his release.

On being cross-examined, the plaintiff was unable to satisfactorily explain how that 2nd defendant was able to locate him at a specific point in Gweru that evening. It became apparent that there must have been some communication between plaintiff and 2nd defendant prior to the meeting. The probabilities favour the view that indeed 2nd defendant and plaintiff did communicate that evening about plaintiff's precise location. The probabilities also favour the view that 2nd defendant having located the plaintiff must have discussed his reasons for seeking him out, as plaintiff was his superior. It is logical that the 2nd defendant would have invited the plaintiff to discuss the matter at CID offices. The plaintiff must have gone on his own volition to meet the 1st defendant who was the complainant in the theft of gold. It is improbable that the plaintiff who held a high ranking position in the police force would have failed to protest against and unlawful arrest. The probabilities also favour the conclusion that plaintiff and 1st defendant discussed the theft of gold and that a settlement was reached at CID offices where plaintiff was to repay the value of the gold. After gaining his "freedom" at around 10pm on the night of 28th August 2012 Plaintiff nothing about the alleged unlawful dispossession of his money amounting to US\$12 000. Plaintiff admitted that he took no action for a period of five months from the date of the unlawful arrest. He did not take action that same night so that the "criminals" could be accounted for whilst they still had the money. This is what a reasonable man in plaintiff's shoes should or ought to have done. The plaintiff's conduct is not consistent with the conduct of a wronged senior police officer. No explanation is given why he did not file criminal charges.

Whilst plaintiff painstakingly tried to dramatize the manner of his “arrest”, the evidence from his son **Joseph Ndangariro** indicated that 2nd defendant was respectful of the plaintiff as he referred to him as “Boss”, in his conversation with the plaintiff. There was no evidence placed before the court indicating that plaintiff was mishandled or treated in any humiliating manner on the night in question. The plaintiff was aware of the arresting procedures and ought to have complained about the 2nd defendant’s conduct there and then. Plaintiff’s evidence on how he parted with a substantial sum of money is not convincing. He was not searched. He admitted that he handed over the money on his person amounting to US\$4 000 at the CID offices. Plaintiff did not explain how the defendants would have known that he had a further sum of US\$8 000 at his Mkoba residence. The plaintiff’s conduct leads to the irresistible conclusion that plaintiff knew that he had illicitly obtained the money from the sale of gold nuggets he had extracted at Shangani the previous night.

It is important to note that plaintiff conceded under cross examination that he had not carried out any mining activities at all at his own New Eclipse 8 claim. The question that arises is that if he did not mine there where did he get the gold nuggets and what was he doing at the Shangani Farm?

Defendant’s case

Both defendants denied that the plaintiff was ever placed under arrest. 1st defendant testified that he was contacted by one of his guards at his mine in Shangani on the night of 27th August 2012. He was alerted to the fact that plaintiff and some other persons had invaded his mining claims at New Eclipse 7 mining claims. 1st defendant produced documents to show that he was authorized to prospect at his mining claims. This position was confirmed by the Mining Commissioner. The 1st defendant’s guard was also called to testify. He corroborated 1st defendant’s assertions that the plaintiff had arrived at Eclipse 7 mine in the dead of the night. He was glad in police uniform. He was carrying a pistol. He ordered all the guards to switch off their mobile phones. The guards were ordered to assist in the extraction of gold nuggets. After taking off with the gold, the guard called 1st defendant in the early hours of the 27th August 2012.

1st defendant indicated he would attend to the matter the following morning. The 1st defendant confirmed that on the 28th August 2012 he had met the plaintiff at CID offices at Gweru around 7pm. He stated that he asked the police officers to leave him in an office with the plaintiff so that the two would discuss in private. The plaintiff admitted that he had extracted 2kgs worth of gold. The plaintiff proposed to give 1st defendant the money that was on his person in the sum of US\$4 000. The plaintiff then drove to Mkoba in Gweru where he collected a further sum of US\$8 000. The 1st defendant accepted the US\$12 000. The plaintiff then left the CID offices and they parted company around 10pm at Chicken Inn. 1st defendant was shocked when some months later plaintiff filed charges for extortion against him and 2nd defendant. These allegations were however dismissed by the court for lack of evidence.

For his part, 2nd defendant, **Tongai Kamutingondo**, expressed his dismay at the plaintiff's claims. He indicated that his role in the matter was simply to facilitate the meeting between plaintiff and 1st defendant. He denied that the plaintiff was arrested or detained as alleged. 2nd defendant explained that when he received the complaint of theft of gold he called the plaintiff on his mobile phone. Plaintiff informed him that he was walking along 6th Street. After obtaining the plaintiff's location, defendant proceeded to meet the plaintiff near the AA offices along 6th Street, Gweru. 2nd defendant used the ZANU (PF) double cab motor vehicle because he had no other means of transport at that time. It is a notorious fact that several police stations in the country do not have sufficient resources, especially motor vehicles. 2nd defendant indicated that 1st defendant and the plaintiff elected to be left alone to discuss the matter in private. 2nd defendant was not involved in the payment of the US\$12 000 to the 1st defendant. He indicated though, that the suggestion that he was given a sum of US\$200 from the amount handed to 1st defendant was false.

Analysis of the evidence

From the evidence adduced in court the following factors are common cause:

- (a) Plaintiff was in the company of his son Joseph Ndangariro along 6th Street Gweru on the 28th August 2012 around 7pm

- (b) Plaintiff was approached by the 2nd defendant who indicated that there was a complaint against him in connection with a complaint of theft of gold nuggets filed against him by the 1st defendant.
- (c) Plaintiff was invited to CID offices at Development House in Gweru for discussions with 1st defendant
- (d) Plaintiff agreed to meet 1st defendant and was driven to CID offices
- (e) Following discussions between plaintiff and first defendant, in private, plaintiff surrendered cash amounting to US\$4 000 to 1st defendant before proceedings to Mkoba in Gweru to collect a further sum of US\$8 000.
- (f) Plaintiff was not searched before he surrendered the money.
- (g) Plaintiff was not placed under arrest and no statement was recorded from him
- (h) Plaintiff pressed charges of extortion against the defendants some five months later.
- (i) Plaintiff did not protest about the alleged unlawful arrest at the nearest police station and did not indicate that money had been taken from him without his express consent.

The evidence in this matter indicates that there was a gold rush at a farm in Shangani on the 27th August 2012. Hordes of gold panners invaded the 1st defendant's Eclipse 7 Mine in Shangani before they were dispersed by the police. The plaintiff who held a senior rank of Chief Inspector later came at night brandishing a pistol. He ordered the guards to collect gold nuggets. After taking off with the loot one of the guards called the 1st defendant and alerted him of the occurrence. The following day plaintiff was invited to CID offices in Gweru to explain his involvement in the theft of gold from 1st defendant's claims. The evidence indicates that some form of settlement was reached. Plaintiff agreed to pay the 1st defendant the value of the gold. It would seem that plaintiff was content to part with all the money he had in cash amounting to US\$12 000 just to resolve the case. The evidence led clearly does not show that plaintiff was arrested or detained as alleged in the particulars of claim.

The applicable law

The issues for determination are as follows:

- (a) whether the defendants are liable to pay the sum of US\$12 000 being cash recovered from the plaintiff and was unlawfully seized by the defendants
- (b) whether or not the defendants are liable to pay plaintiff the sum of US\$10 000 as damages for impairment of damages
- (c) whether or not the defendants are liable to pay plaintiff the sum of US\$10 00 as damages for unlawful arrest and detention.

On the first issue of the alleged unlawful seizure of the money there was simply no evidence to show that the money was not handed to the 1st defendant voluntarily. For a party to succeed in proving its case in a civil suit it must prove its claims on a balance of probabilities. In *Zeffert and Paizes, The Essential Evidence*, at page 37, the authors state that:

“A defendant’s failure to give evidence cannot justify a verdict for the plaintiff unless there is enough evidence taking into account the absence to enable the conclusion that his version is more probable than not, that is to say, conclude by balancing of probabilities, that among several conclusions it is the most credible, suitable and acceptable.”

This case in my view clearly shows that plaintiff failed to prove that on a balance of probabilities that his version could be believed. The plaintiff carried the onus to prove that the money was taken from him unlawfully. He failed to discharge that onus.

On the question of damages arising from impairment of dignity plaintiff testified that he felt belittled as 2nd defendant was his subordinate. His status was lowered, moreso, in the presence of his son. To succeed in such a claim the plaintiff must allege facts, which objectively speaking are sufficient to lead to a reasonable inference of wrongfulness. It is not sufficient to merely allege that such an act is wrong. See *C F Allie v Foodworld Stores Distribution Centre (Pvt) Ltd* (2004) ALL SA 369.

By alleging that he was entitled to payment in the sum of US\$10 000 for impairment of his dignity, the plaintiff ought to have shown how his dignity was impaired. He may have felt that a junior officer should not have been involved in requiring him to answer questions relating to the complaint of theft of gold. Indeed the plaintiff may have felt somewhat “belittled”, but

that does not prove wrongfulness. No delictual liability can be established by merely alleging it. In any event the plaintiff made no attempt whatsoever to prove the damages he allegedly suffered. A party who sues for damages must observe that damages are not there for the taking. One cannot pluck a figure from the air and peg an amount of damages he feels he ought to be awarded. A party seeking delictual damages must prove such damages. The plaintiff failed to prove that he is entitled to any damages for impairment of dignity in the sum claimed or any lesser amount.

The plaintiff alleged that he was unlawfully arrested and detained. For that he sought damages in the sum of US\$10 000. Under our law, the delict of unlawful arrest and detention is committed when a person without lawful authority or justification, restrains the liberty of another by arresting or imprisoning him. *Animis injuriandi* will be presumed in that the plaintiff need only prove that the arrest or imprisonment was illegal and not that there was intention to act illegally or to cause harm. See G. Feltoe – *A Guide to the Zimbabwean Law of Delict* (2ed page 48).

See also *Muyambo v Ngomaikarira & Others* 2011 (2) ZLR ST (H), where the court held that the delict of unlawful arrest is committed when the defendant without justification restrains the liberty of another. If the arrest is legal this action cannot be brought. In *Masawi v Chabata and Anor* 1991 (1) ZLR 148 (H), GREENLAND J remarked that:

“The police were faced with a potentially explosive situation and it was proper to assume such measures to diffuse the situation including inviting all parties involved to neutral grounds of a police station where a proper resolution of the dispute would take place.”

In the present matter the 2nd defendant invited the plaintiff to the police station to discuss the complaint regarding the theft of gold nuggets. The conduct of the plaintiff did not indicate that he was placed under arrest and the he was arrested. Even if one were to take the view that the plaintiff was indeed placed under arrest, such an arrest was not proved to be unlawful. As I have indicated before the plaintiff was a senior police officer who could have immediately asserted his rights by protesting against any unlawful conduct. The plaintiff was aware that there were serious allegations of theft of nuggets that were being levelled against him. One would

assume that by discussing the issue in the privacy of the CID offices was the appropriate manner to handle the situation. The Plaintiff appears to have agreed to have the matter resolved amicably. There is no evidence of any undue pressure being brought to bear upon the Plaintiff.

Disposition

I am satisfied that the plaintiff failed to prove his claim for damages. He failed to prove that the money recovered from him was taken unlawfully. The plaintiff was required to adduce evidence on a balance of probabilities to sustain his claims as particularized in the particulars of claim. As regards costs, the defendants aver that the plaintiff is a dishonest litigant. Throughout his trial, the defendants contend that plaintiff was probating and reprobating. To some degree the conduct of the plaintiff in this matter leaves a lot to be desired. I have no doubt that from the evidence adduced in court there was ample proof that plaintiff abused his powers. He travelled all the way from Gweru to Shangani at night and extracted gold from 1st defendant's mining claims. The plaintiff ordered the guards at the mining site to help extract the gold. Throughout the operation he was clad in a police uniform. Such conduct ought to be condemned. This claim for damages should not have been brought up in the first place. I do not believe, however, that the costs against the plaintiff should be on a punitive scale. It is my view that the following is an appropriate order;

The plaintiff's claims against the defendants are hereby dismissed with costs.

Messrs T. Hara & Partners, applicant's legal practitioners
Messrs Phulu & Ncube, 1st defendant's legal practitioners
Chitere Chidawanyika & Partners, 2nd defendant's legal practitioners