HB 20-18
HC 2047/14
XREF HCR 95/13

TENSON DANHA
versus
OLIVER MUDZONGACHISO N.O
and
THE JUDICIAL SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 30 JANUARY 2018 AND 8 FEBRUARY 2018

Criminal Trial

G Sengweni for the plaintiff
ABC Chinake for the defendants

MATHONSI J: This case calls for discussion on the liability of a judicial officer for conduct and indeed decisions taken in the course of court proceedings. It raises the question as to what extent and under what circumstances a judicial officer may be held civilly liable for actions taken during proceedings in court and in a way it also raises the issue of the circumstances under which the Judicial Service Commission, as the employer of judicial officers, may be held vicariously liable for the actions of its judicial officers taken during court proceedings. It is therefore as rare as the teeth of a hen.

The plaintiff is a 62 year old insurance salesman employed by an insurance company he prefers not to disclose who has brought an action against the defendants for general damages in the sum of $45000-00 for trauma and embarrassment sustained as a result of a conviction and sentence by the first defendant, a provincial magistrate then sitting at Masvingo Magistrates Court, for negligent driving. He also claims a sum of $5000-00 special damages being legal costs incurred in respect of that conviction and sentence. The material part of the plaintiff's declaration is:

> "4. Sometime in February 2013 the 1st defendant fraudulently convicted and sentenced the plaintiff at Masvingo Magistrates Court at Masvingo despite him pleading not guilty.

5. The plaintiff through his legal practitioners of record applied for review of the proceedings leading to the quashing of the fraudulent proceedings and an order for the matter to be tried *de novo.*
6. The plaintiff stood trial *de novo* before a different magistrate and was found not guilty and acquitted.
7. The 1st defendant's conduct caused irreparable damage to the plaintiff as he was traumatised by this act, in addition he was also embarrassed by such as it impacted negatively on his reputation.
8. The 1st defendant's conduct at trial was unwarranted, because despite the plaintiff having pleaded not guilty, he went on to enter a plea of guilty, convicted and sentenced the plaintiff and the latter suffered damage amounting to $50 000-00 including costs he incurred in engaging a legal practitioner for a review of the fraudulent proceedings.
9. The 2nd defendant is also vicariously liable since the 1st defendant was acting within the scope and course of his employment.

WHEREFORE, plaintiff prays for an order for payment of:

(a) An amount of US$45000-00 being general damages for trauma and embarrassment suffered plus $5000-00 representing special damages for the costs incurred seeking legal assistance.
(b) Interest at the prescribed rate from date of issue of summons to date of full and final payment."

The suit was contested by both defendants who, in their separate pleas denied liability of any form. Putting the plaintiff to the proof of any fraudulent conduct, the first defendant denied that the plaintiff's acquittal at the trial *de novo* proves fraud on his part or that such acquittal at the trial *de novo* could found a legal claim against the first defendant. The first defendant drew attention to the fact that criminal prosecutions are made by the National Prosecuting Authority and are not at the instance of the second defendant or any of its judicial officers. As such no cause of action arises against the defendants from a criminal prosecution initiated by another authority.

The first defendant also put the plaintiff to the proof of the trauma and embarrassment allegedly suffered and the negative impact on his reputation. The second defendant also refuted the averments made by the plaintiff, maintaining that any trauma or embarrassment occasioned by the prosecution of the plaintiff should be visited on the door step of the Prosecutor General who initiates criminal prosecutions and not on the defendants whose mandate is to try such cases.

No liability attaches to the defendants where they have executed their duties without fraudulent conduct.

The issues for determination at the trial as formulated by the parties at a pre trial conference they held before a judge on 27 June 2017 are:

1. Whether the record of proceedings of 4 December 2012 by the first defendant represents the truth of what transpired in court.
2. Whether the first defendant fraudulently convicted and sentenced the plaintiff at the magistrates court in case number MS 292/12.
3. Whether the alleged conduct of the first defendant is capable of causing the plaintiff trauma and embarrassment.
4. Whether the defendants are liable to the plaintiff in damages and if so the quantum thereof.

In his evidence the plaintiff stated that he is an insurance broker who has survived on selling insurance policies of varying nature since 1 February 1990. He appeared before a magistrate, the first defendant, at Masvingo on 4 February 2013 facing a charge of negligent driving in contravention of s52 (2) of the Road Traffic Act [Chapter 13:11] the allegations being that on 29 August 2011 near Chevron Hotel along Masvingo-Beitbridge Road in Masvingo he had negligently driven a Nissan Sunny motor vehicle registration number B976 APN resulting in an accident with a haulage Freightliner truck with horse registration number MBP45-24 and trailer registration number MB3048.

The plaintiff testified that when the charge was put to him he pleaded not guilty. He was then given a chance to explain himself, presumably to give his defence outline, which he did. He stated that it was in the course of doing so that first defendant stopped him. The latter then asked him to address the court in mitigation of sentence which he queried given that he had pleaded not guilty. When he questioned how the guilty verdict was arrived at the first defendant strongly warned him and threatened to charge him with contempt of court. The threat forced him to keep quiet. He was thereafter convicted and sentenced to pay a fine of $50-00 or in default of payment 20 days imprisonment.

The plaintiff stated that he did not have the money with him but insisted on lodging a complaint with the Provincial Magistrate in charge of the station. From there on he was being escorted by a prison officer. He was denied access to the Provincial Magistrate and was kept under guard by the prison officer for about three hours while he waited for relatives to come and pay the fine for him. Later during that day someone came and paid the fine for him after which he went away, a free man.

The plaintiff made reference to the record of proceedings as generated by the first defendant and stated that it does not represent what transpired in court. According to the record, a plea of not guilty was entered. Following that the plaintiff presented his defence outline. Although the record which the plaintiff produced appears incomplete I have accessed the full record from HCR 95/13 which I was referred to. It reads in pertinent part thus:

> "Charge Put and Understood
> Pleaded – Not Guilty
> State Outline annexure A
> Defence Outline s188 explained
> The state outline is incorrect. I was driving facing south and it was peak hour. I was moving slowly and vehicles were near each other. I saw this vehicle attempt to enter from this way like a bus stop. I passed it slowly and I never gave it the opportunity to enter the road. I then heard a bang from my vehicle. I then heard that I was being pushed. Well I did wrong. Well my vehicle was hit.
>
> By Court
> Plea altered to Guilty s271 (2) (b)
> Facts admitted
> Elements
> Q: You hit this vehicle as alleged?
> A: Yes
> Q: A reasonable driver ought to have avoided this collision?
> A: Yes
> Q: Knew act was unlawful?
> A: Yes
> Q: Any right to do so?
> A: None
> Q: Any defence?
> A: None
> Guilty as pleaded
> 1st offender
> Mitigation

> Aged 56 years, married with 5 children. I am a pensioner with $50-00. I am sorry. I have no assets.
> Sentence
> Accused is a first offender who is married. Since he has stayed so long without offence I feel a fine is appropriate."

The plaintiff admitted under cross examination that it is that same record which was taken on review in HCR 95/13 certified by the clerk of court as a true record of proceedings. In that matter this court, per CHEDA J, issued an order on 23 May 2013 quashing the proceedings and ordered a trial *de novo* before a different magistrate. The plaintiff had made a review application in which he cited the state as the first respondent and the first defendant herein as the second respondent. The order was granted in default after the respondents did not file opposition.

In his evidence the plaintiff went on to say that prior to his court appearance on 4 February 2013 he had met the public prosecutor who had suggested to him that they should settle the matter out of court. He did not elaborate. Asked why the first defendant would have produced a fraudulent record which is not a true reflection of what transpired in court, the plaintiff stated that there was some corruption among police officers but he was "puzzled" as to why the magistrate would do that, a piece of evidence not helpful at all. He later explained that the magistrate appeared to be in a hurry and wanted to quickly finalise the case, a far cry from the allegations of fraud.

Regarding the quantum of damages, the plaintiff stated that what he is claiming "is an estimate" of his loss. As an insurance salesman his job requires confidence, someone who can stand before people without being embarrassed. It requires him to drive and therefore if for some reason his driving licence were cancelled he would lose his job. His driver's licence was never cancelled and he did not lose his job although he tried to insinuate that from the time of his conviction right up to last year the conviction and sentenced affected him as he was unable to discharge his duties properly. He had been embarrassed and traumatised. The plaintiff could however not relate those claims to the reality on the ground, namely that the conviction and sentence were quashed by this court barely three months later on 23 May 2013. He therefore could not have been prejudiced by it beyond that date.

He stated further that in quantifying damages he took into account that he is in line to succeed in some chieftainship in Chivi (he has not yet succeeded). If the conviction had remained he would have been automatically disqualified from succeeding in the chieftainship. The relevance of that state of affairs is not apparent from his evidence given that the conviction did not stand. In the end the plaintiff was only restricted to complaining that being guarded by a prison officer at the clerk of court's office without being handcuffed, not in cells because he was never put in cells, embarrassed him in the eyes of members of the public, something completely insignificant.

Under cross examination the plaintiff was forced to give away a lot of ground. He conceded that the first and second defendants did not cause his prosecution. He conceded that the embarrassment of standing trial on a criminal charge did not have anything to do with the defendants. He accepted that his entire claim is premised on fraudulent conduct by the first defendant and that as such he was required to prove an intention to defraud on the part of the first defendant. Having conceded that, the plaintiff was unable to proffer any reason why the first defendant would single him out for fraudulent activity. Neither could he point to any malice on the first defendant's part, which in any event was never alleged in his pleadings. The plaintiff also agreed that in his pleadings he had not alleged any negligence on the part of the magistrate as a basis for liability leaving fraud as his only cause of action.

When the plaintiff closed his case Mr *Chinake* for the defendants applied for absolution from the instance arguing that the plaintiff had badly failed to establish a valid claim against the defendants. He failed to establish what would constitute fraud on the part of the magistrate and having failed to even plead wrongfulness, unlawfulness or negligence on the part of the magistrate but electing to rely only on fraud, the plaintiff must grieve because such fraud is not borne by the evidence led.

The application was opposed by Mr *Sengweni* for the plaintiff who, while conceding that the onus is upon the plaintiff to prove fraud, submitted that a *prima facie* case for fraud was proved because the fraudulent proceedings were set aside by this court on review. Mr *Sengweni* submitted further that the second defendant is vicariously liable for the first defendant's "wrong and unlawful deed." He further submitted that the first defendant misrepresented the facts by

recording that he put questions and recorded answers from the plaintiff which only existed in his mind. The first defendant was given an opportunity to dispute the allegations in the review application but did not do so.

The *locus classicus* on the test for absolution from the instance which has been followed in this jurisdiction in a number of cases is *Gascoyne* v *Paul & Hunter* 1917 TPD 170 where at 173 D E VILLIERS JP laid it out as;

> "At the close of the case for the plaintiff, therefore, the question which arises for consideration of the court is: Is there evidence upon which a reasonable man might find for the plaintiff? ---. The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant ---- in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against (the defendant)."

The formulation of that test was embraced in this jurisdiction by the Supreme Court in *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) where the court sought to draw a distinction between what the court "might" and what it "ought" to do. At 5 B-D BEADLE CJ said:

> "The distinction here between 'might' and 'ought' in this context is an important one. It must be assumed that any judgment which a court 'ought' to give must be the correct judgment, as no court 'ought' to give a judgment which is incorrect. Once it is accepted that a judgment which a court 'might' give may differ from that which it 'ought' to give, it is clear that the judgment which it 'might' give and which differs from the judgment which it 'ought' to give must be an incorrect judgment. As a matter of logic, therefore, in considering what a reasonable court 'might' do, allowance must be made for its making a reasonable mistake and giving an incorrect judgment. --- The test, therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make – a definition which helps not at all."

See also *Walker* v *Industrial Equity Ltd* 1995 (1) ZLR 87 (S) at 94; *Nestroros* v *Innscor Africa Ltd* 2007 (2) ZLR 267 (H) at 268 E – H; *Manyange* v *Mpofu & Others* 2011 (2) ZLR 87 (H) at 93G –H, 94A; *Efrolou (Pvt) Ltd* v *Muringani* (2) 2013 (1) ZLR 309 (H) at 316 D-E.

It has been stated again and again, as repeated by PATEL J (as he then was) in the *Manyange* case, *supra,* at 93G that;

> "--- in practice, the courts are loath to decide upon questions of fact without hearing all the evidence from both sides, and have usually inclined towards allowing the case to proceed."

It is a fact however that every case depends on its own facts. In my view, where clearly there is no chance in the world of the court making a reasonable mistake from the evidence led and granting judgment for the plaintiff, it would be completely unfair to saddle the defendant with the task of answering to a non-existent case merely because courts generally prefer deciding the case after gathering all the evidence including that of the defendant. The procedure for granting absolution exists in our law and should be resorted to where clearly there is no *prima facie* case made by the plaintiff.

In the present case the plaintiff's case hinges entirely on a fraud allegedly committed by the first defendant in recording that which did not happen in court. Only the plaintiff gave evidence and he did not see the wisdom of adducing any corroborative evidence from anyone who may have been in court on 4 February 2013, from the public prosecutor, to the interpreter and indeed even the prison officers who were in attendance. The plaintiff therefore took a calculated risk of his uncorroborated evidence falling short of the required standard thereby bringing his entire case tumbling down. His evidence was pitted against the official court record which he himself relied upon when he brought the proceedings on review.

That record shows that a plea of not guilty was entered by the first defendant. It shows that the plaintiff was allowed to give a defence outline which I reproduced earlier. It is clear that the not guilty plea was only altered after the plaintiff appeared to admit that he had tried to overtake the haulage truck when the collision occurred. The magistrate then recorded that the facts alleged by the state where being admitted. After that some facts were then put to the plaintiff which he admitted before a guilty verdict was entered. Thereafter mitigation was taken in which the plaintiff's personal circumstances were recorded. I must say that I find it quite interesting that the plaintiff chose not to produce the second page of the record for purposes of this trial which I was only able to access from the review application which I was referred to.

It is also remarkable that even in HCR 95/13 the plaintiff had initially submitted an incomplete record. The matter had to be removed from the unopposed roll of 2 May 2013 and the presiding judge endorsed on the record:

"Applicant must file the full record of proceedings."

It was presumably after that endorsement that the full record was filed resulting in the order being granted on 23 May 2013 by another judge. I have painstakingly assessed the contents of the record of proceedings because it forms the basis of the plaintiff's claim. It is to that record that we must turn to find the fraud upon which the plaintiff's claim is premised. I have been unable to find any fraud.

Granted the plaintiff's evidence is that the magistrate recorded what did not happen in court but then the second page of the proceedings clearly shows that what is recorded there may have taken place. The magistrate would not have known the plaintiff's personal circumstances including his age, marital status and indeed that he was a pensioner with five children if that information was not given by the plaintiff himself. Those recorded details may have informed the plaintiff's repeated submission of an incomplete record in order to paint a wrong picture.

Whatever the case, what the record only proves is that the magistrate altered a not guilty plea to that of guilty following what the plaintiff had said in his defence outline. It is significant that the plaintiff has not directly disputed the contents of the defence outline. Is the alteration of the plea fraudulent conduct? I think not. In my view that only goes to show an irregularity in the proceedings which is perhaps the reason why the proceedings were set aside and a trial *de novo* ordered. I do not agree with Mr *Sengweni's* submission that the setting aside of those proceedings proves fraud. To even make that submission betrays desperation in the extreme.

In the very short judgment of this court in *S* v *Muleya* 1992 (1) ZLR 68 (H), a case in which the trial magistrate had found the accused guilty at the end of the cross-examination of the complainant by the accused and without giving the accused the chance to present his defence, CHEDA J makes the crucial point at 69A –C that;

> "The accused is entitled to present his defence no matter how unreasonable it may appear. Otherwise if the courts were to be allowed to form an opinion then stop in the middle of the trial and convict the accused this would lead to a serious miscarriage of justice. Once the accused has pleaded not guilty there should be a full and fair trial, no

> matter what opinion the court may have. The full trial may not be necessary where the accused changes or alters his plead or makes certain specific admissions which change the position. In this case there was a serious misdirection by the magistrate in not completing the trial."

I associate myself fully with those remarks which however is not to say that a case of fraud has been made. It is not beyond human experience that admissions are made by an accused person during the presentation of his or her defence outline which may lead to an alteration of a plea of not guilty to that of guilty. I am therefore prepared to go only as far as to say that it was irregular for the magistrate to alter the plea and not complete the trial merely because of admissions made in the manner in which those admissions were made. It is an irregularity which does not even begin to establish fraud which by its very nature is a specific intent offence.

That brings me to the issue of the liability of judicial officers for conduct perpetrated during court proceedings. The independence, impartiality and effectiveness of the courts are lofty ideals which are protected by s164 of the constitution. Indeed s165 (3) of the constitution also makes it a constitutional imperative that when making a judicial decision a member of the judiciary must do so freely and without interference or undue influence from any quarter. It is therefore against that backdrop that the scattergun approach adopted by the plaintiff in this matter, of quickly approaching this court with a suit against a judicial officer for what was done in the execution of a constitutional mandate, must be considered. One would have hoped that before embarking on such an exercise care would be taken, especially with the benefit of legal counsel, to ensure that the allegations have the backing of evidence. There is none.

I must state that generally and in particular in cases involving actions and utterances of judicial officers in court proceedings there is a rebuttable presumption that they acted lawfully and within the limits of their authority. It is also presumed that they acted without malice. The existence of lawfulness favouring judicial officers means that a special kind of qualified privilege is established which can however be forfeited only if the plaintiff proves on a balance of probabilities that the judicial officer, in this case the magistrate, was actuated by an improper motive or malice. See *S* v *Udwin* 1981 (1) SA 1 (A); Jonathan Burchell *Principles of Delict*, Juta & Co Ltd, pp 180-181.

The English law traditional position has been that there is a distinction between judicial immunity in the inferior courts and that in the superior courts. In the inferior courts immunity is enjoyed where the judicial officer acts within his or her jurisdiction. The position has been different in superior courts where judges enjoyed absolute or universal immunity for giving erroneous judgments while acting as a judge. See *Fray* v *Blackburn* (1863) 3 B & S 576 where at 578 CROMPTON J remarked:

> "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly."

LORD DENNING departed from that traditional position in *Sirros* v *Moore* 1 QB 118 at 136 where the emminent judge said:

> "And during this time our judicial system has changed out of all knowledge. So great is this change that it is now appropriate for us to reconsider the principles which should be applied to judicial acts. In this new age I would take my stand on this; as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree ----. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law --- but so long as he honestly believes it to be within his jurisdiction, he should not be liable ---. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

It means therefore that the English courts now accord immunity from civil suit to all judicial officers acting within their jurisdiction.

The position of the South African courts, which appears to accord with s50 (9) of our constitution, is that a judicial officer is not liable for damages by mere lack of knowledge or skill but only by fraud or lack of good faith. As stated in *Fingleton* v *R* [2005] HCA 34; (2005) 216 ALR 474 at paragraphs 38-39:

> "This immunity from civil liability is conferred by common law, not as a prerequisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest."

There is no doubt that this immunity is given because the adjudicative function of a judge requires that the judge frequently disappoints a lot of people. To hold a judge personally liable for erroneous decisions would result in an avalanche of law suits which in turn would discourage judges from rendering decisions likely to provoke law suits.

The South African position is succinctly captured by HARMS JA in *Telematric (Pty) Ltd t/a Matrix Vehicle Tracking* v *Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 473F – G. He remarked:

> "To sum up; In different situations courts have found that public policy considerations require that adjudicators of disputes are immune to damages claims in respect of their incorrect and negligent decisions. The overriding consideration has always been that, by the very nature of the adjudication process, rights will be affected and that the process will bog down unless decisions can be made without fear of damages claims, something that can impact on the independence of the adjudicator. Decisions made in bad faith are, however, unlawful and can give rise to damages claims."

I have said that the South African position relates favourably with our own situation especially having regard to s50 (9) of the constitution which provides;

> "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 and in good faith;
> (b) any other public officer acting reasonably and in good faith and without culpable ignorance or negligence."

What is obvious is that the constitution envisages a law to be put in place to protect judicial officers from personal liability for the illegal arrest or detention of individuals. Although this relates to arrest and detention there can be no doubt that the framers of the constitution had in mind the grant of some kind of qualified immunity for judicial officers. In light of the foregoing one can safely conclude that judicial immunity exists in our jurisdiction but carries with it a rebuttable presumption of a judicial officer's good faith. Such is rebuttable by evidence of fraud or malice. It is qualified immunity.

It would be a sad day indeed for the administration of justice if every litigant aggrieved by the outcome of court proceedings were allowed to sue the presiding judicial officer on flimsy

grounds making spurious and unproven accusations of impropriety as a way of getting at such judicial officer. For that reason the law tends to provide for some form of judicial immunity against civil law suits by litigants to a reasonable extent. That is done in order to safeguard the independence and integrity of the courts who should be allowed to dispense justice independently, impartially with dignity and without fear or favour when resolving disputes between litigants.

In the United States of America, the doctrine of absolute judicial immunity which has studiously followed English Common Law is embedded in that country's jurisprudence. It is settled that a judicial officer enjoys absolute judicial immunity from a civil suit when he or she has acted within his or her jurisdiction and the act in question is a judicial act. It is a doctrine which was formulated as far back as the 19th Century by JUSTICE FIELD in the case of *Randall* v *Brigham* 74 U. S. 523 (1868) and has survived so much criticism up to this date. The learned judge writing for the Supreme Court of that country stated, at p536;

> "--- judges are not liable to civil action for their judicial acts even when such acts are in excess of their jurisdiction, unless perhaps where the acts --- are done maliciously or corruptly."

In an article in the 2012 *Temple Law Review*, under the title: "Absolute Judicial Immunity Makes Absolutely No Sense," at pp 1092 -1093 Timothy M. Stengel summarized the current state of judicial immunity in the United States as:

> "The doctrine of absolute judicial immunity could be summarized in the following way: A judge is immune from a civil suit for damages for an act that is a function normally performed in his or her judicial, not administrative, capacity, regardless of whether that act is alleged to have been performed maliciously or corruptly, and even if that act allegedly violated a constitutionally guaranteed right. Although the cases have addressed a plethora of factual situations, this doctrine leaves open the question of what happens to judicial immunity when a judicial act has been proven or admitted to be malicious or corrupt. ----. There are a variety of reasons offered for judicial immunity. <u>This comment however, distills those reasons into three principle reasons for absolute judicial immunity, as relied upon by the case law: (1) the chilling effect civil liability will have on a vigorous and independent judiciary, (2) the need to shield the judicial system from perpetual or unfounded litigation, and (3) the availability of alternative means to rectify judicial corruption."</u> (The underlining is mine).

The reasons advanced for immunity ring true even in our jurisdiction where there are stout alternative constitutional safeguards and remedies for judicial corruption in the form of disciplinary processes for removal of judicial officers like judges and criminal prosecution for corruption and indeed appellate and review procedure available to disgruntled litigants. On the other hand immunity enhances judicial independence and integrity. It occurs to me therefore that if a litigant decides to sue a judicial officer for civil damages, they must do more than just make unsubstantiated and spurious allegations of impropriety so hollow they cannot place a finger on what it is that officer did or did not do. If we are to entertain such suit the bar must indeed be very high in order to discourage perpetual or unfounded litigation. Unfortunately the plaintiff in this matter has failed to meet that high threshold and must therefore suffer grief.

I am making reference the American jurisdiction in order to underline that while counsel did not refer me to authorities dealing with the subject and my limited research did not yield any there is room for holding that judicial officers should be protected to a certain extent against litigation arising from executing their constitutional mandate. Allowing litigants to bring all manner of suits against judicial officers cuts against the grain of the proper and efficient administration of justice.

Finally, I have to consider the citation of the second respondent as a party to these proceedings. Mr *Chinake* for the plaintiff submitted that there is no legal or factual basis for joining the second defendant as a party to the suit because no negligence on the part of the first defendant is alleged, no fraud has been established and neither is wrongfulness or unlawfulness established. Mr *Sengweni* on the other hand submitted that the second defendant is liable because as a judicial officer under its employ the first defendant did a fraudulent act rendering it vicariously liable. It is true that vicarious liability is ordinarily a feature of the law of delict making an employer liable for delicts of its employee committed in the course of his or her duty or service unless if, in committing the delict the employee was pursuing his or her own interests. See *Katsande* v *Welthunger Hilfe* & *Another* 2013 (2) ZLR 596 (H) 600G, 601A; *Mkhize* v *Martens* 1914 AD 382 at 390.

In making the same point in *Gwatiringa* v *Jaravaza & Another* 2001 (1) ZLR 383 (H) at 385 B-C, CHATIKOBO J said:

> "Before a master can be held liable for the delicts of his servant the plaintiff must prove that the servant was acting in the course of his employment or, put differently, that he was about the business of his master. Everything depends upon the nature of the act complained of and its relation to the scope of the employment. See *Mkhize* v *Martens* 1914 AD 382 at 391. It is true that it is incumbent upon an employer to choose employees who are sufficiently honest to exercise care towards third parties when carrying out his work, but the employer's liability for the negligence of his employees must ultimately depend on whether the damage or loss to the third party flows directly from the employment."

Although vicarious liability normally arises from negligent performance of duty I do not agree with Mr *Chinake*'s submission that a fraudulent act by an employee does not establish vicarious liability since the fact of fraud points to an act that is outside the ordinary scope and course of employment. This is because our law allows vicarious liability for intentional as well as negligent conduct of a servant. In *Hirsch Appliance Special* v *Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D) security guards of the defendant company employed to protect the property of the plaintiff stole the plaintiff's property themselves. BOOYSEN J held the employer vicariously liable on the two grounds that its non-delegable duty was breached by its employees entrusted by it to perform its business of guarding the premises and goods and secondly that the abandonment of the defendant's work by the guards amounted not only to misconduct for their own benefit but constituted mismanagement in the performance of their work and was the cause of harm to the plaintiff.

The learned author J Burchell, *op cit* at p220 makes reference to cases of state liability for wrongful arrest perpetrated by policemen as a frequent situation in which a master will be held liable for the intentional conduct of a servant. However the plaintiff's difficulty arises out of the signal failure to establish the alleged fraudulent conduct on the part of the employee. It is in my view not enough to establish error on the part of a judicial officer especially in a case such as the present where neither negligence nor error have been pleaded. Our justice system acknowledges that errors in the judicial process do occur and in an adversarial system of justice like ours those errors are corrected by a higher court in the hierarchy of superior courts of record with jurisdiction to do so. That is as it should be and in the plaintiff's case that happened on 23 May 2013 when this court quashed the proceedings. The matter should have ended there because the

plaintiff did not have an inkling of evidence of fraudulent conduct on the part of the first defendant to sustain a civil suit.

Clearly the plaintiff has been propelled by this unbelievable sense of self-importance and what Mr *Chinake* referred to as a "fixation" on becoming a chief in Chivi which blinded his sense of judgment. It is for that reason that he entertained a hope of recouping $50000-00 from a magistrate who fined him $50-00 for a traffic offence preferred by the police and prosecution against him. He did not even begin to prove those damages. I am therefore satisfied that from the evidence led on behalf of the plaintiff no court might possibly make a reasonable mistake and grant judgment in his favour.

In the result it is ordered that;

1. Absolution from the instance is hereby granted to the first and second defendants.

2. The plaintiff shall bear the costs of suit including the disbursements of counsel relating to air travel and overnight accommodation in Bulawayo for attending trial.

Sengweni Legal Practice, plaintiff's legal practitioners
Kantor & Immerson C/o Coghlan and Welsh, defendants' legal practitioners