JORUM MAVHIZA
and
WILSON TAPFUMA
versus
INSPECTOR MUWAMBWI
and
CONSTABLE BVOKOTO
and
THE CO-MINISTERS OF HOME AFFAIRS

HIGH COURT OF ZIMBABAWE
ZHOU J
HARARE, 19, 20 and 21 May 2014

J. Dondo, for the plaintiffs
Ms G. Garise Nheta, for the defendants

ZHOU J: In July 2012 the plaintiffs, who are employed by the Zimbabwe National Water Authority (hereinafter referred to as ZINWA) attended at the Zimbabwe Republic Police camp at Chirundu to disconnect water supplies owing to unpaid water charges. They discovered the following day that the water had been reconnected. Having advised their superiors in Harare about the unauthorised reconnections, the plaintiffs were instructed to remove the water meters and plug the pipes so that the water supplies would be disconnected. They did that. A day later they were taken to Chirundu Police Station where they were kept from about nine o'clock in the morning up to about half past four in the afternoon when they were released after they had reinstated the meter and restored the water supply to the police station. Based on the above facts, the plaintiffs instituted the instant action for damages for unlawful arrest and detention against the first and second defendants who are officers of the Zimbabwe Republic Police, and the third defendant who is responsible for the police.

In their plea the defendants denied that the arrest and detention of the plaintiffs was unlawful or wrongful, and averred that they acted on reasonable suspicion that the plaintiffs had committed the offence of theft of a water meter. The defendants stated that the plaintiffs had removed the meter in the middle of the night without notifying the relevant authorities,

and that the police had only discovered that the meter had been stolen the following morning. That discovery, according to the plea, triggered a report and an investigation into the theft of the meter. The investigation revealed that the meter had been taken by the plaintiffs, hence their arrest and detention. They only released the plaintiffs after it was established that the meter had been removed for non-payment of water charges.

The two plaintiffs gave evidence. Jorum Mavhiza is employed by ZINWA as operator-in-charge of purification of water, new connections and disconnection of water supplies where clients have defaulted in their payments. He is based at Chirundu. He testified that prior to 6 of July 2012, he had discussed the issue of the unpaid water bills for Chirundu Police Station with a Mr Bare who was the Member-In-Charge at that station. When a decision was taken to disconnect the water supplies to the police station he informed Bare. On the day that the disconnections were effected he spoke to Bare who suggested that they disconnect the water at the charge office and at the residential area of the police camp. The water supply to Bare's residence was not disconnected because, according to the first plaintiff, a small amount was owed. He and the second plaintiff carried out the disconnection by a method which he described as putting pieces of plastic on the meter. The witness stated that he discovered the following day that the water had been illegally reconnected. He did not know who had restored the water connections. He advised his superiors in Harare who, in turn, instructed him to disconnect the water supply by removing the meter and plugging the pipes. The second disconnection was carried out in the morning around eleven o'clock. Having removed the meter, the witness and the second plaintiff took the meter to their office where they labelled it and kept it together with other meters. The following morning, 6 July 2012, at about eight o'clock, the first defendant came to the witness's work place at the ZINWA offices. He complained about the disconnection of the water and suggested that they could not live harmoniously because of that. The witness stated that he advised the second defendant that they could only restore the water supplies upon instruction from their superiors. The first defendant left. At about nine o'clock that same morning the second defendant came and advised the plaintiffs that he was taking them to the police station because they had stolen a water meter. Before being taken to the police station the plaintiffs telephoned their Head Office in Harare to notify them of the development. They shut down the plant and went to the police station accompanied by the second defendant. Upon arrival at Chirundu Police Station the plaintiffs were introduced by the second defendant as the persons who had stolen the meter. They were ordered to sit on a bench behind the counter in

the charge office. They were ordered to remove their shoes and to switch off their mobile phones. They had to seek leave to be allowed to ask someone to bring food for them which they only ate late in the afternoon. The first defendant came to the police station at about three o'clock in the afternoon. After a conversation with the plaintiffs' manager, a Mr Makwangudze, the first defendant ordered the plaintiffs to collect the water meter and restore it to where they had removed it and reconnect the water supply. The plaintiffs were only released from the police station after four o'clock in the afternoon after they had reconnected the water supply to the police station.

The second plaintiff, Wilson Tapfuma, was at all material times employed by ZINWA as a water operator. His evidence was materially the same as that of the first plaintiff. The two were taken to the police station together and were released at the same time.

Evidence for the defendants was given by the first and second defendants. The first defendant, Teddy Muvambwi, was at the relevant time the officer in charge of the Criminal Investigations Department at Chirundu Police Station. He denied that the plaintiffs were arrested or detained on 6 July 2012. He testified that on that day he received a report of a theft of a water meter. The meter had been stolen from Chirundu Police Station. As a senior officer who resided in the police camp he caused a report of a theft to be recorded in the Reports Received Book (RRB). He then instructed the second defendant to investigate the theft while he went to the Zambian side of the border to attend a meeting. While he was still at the meeting he received a telephone call from the second defendant advising him that the meter had been located at the ZINWA offices. He was further advised that ZINWA employees had removed the meter while disconnecting water supplies for non-payment of the water charges. When he went back to the police station after the meeting he found the plaintiffs in the charge office waiting for him. He stated that he advised the plaintiffs that the meter was Government property which could not be removed without following some laid down procedures. He told them to restore the meter and use other methods of disconnecting the water supply. During examination in-chief, he was asked if he had visited the ZINWA offices in the morning of 6 July 2012 at about eight o'clock as alleged by the plaintiffs. He stated that he did not recall doing that. Later in cross-examination he flatly denied going to the ZINWA offices in the morning.

The second defendant, Takauya Bvokoto, gave evidence that he is a police officer based at Chirundu. He works in the charge office under the Investigations Department. He stated that on 6 July 2012 he was in the charge office when the first defendant and one Vimbe

who was a Member In Charge at Chirundu Police Station came to report a case of theft of a water meter. The first defendant was the complainant. Vimbe recorded the report in the Reports Received Book. The second defendant was instructed by the first defendant to investigate the theft. He stated that he took with him the relevant documents and handcuffs and proceeded to the scene of the theft. He observed that the meter was missing. He then went to the ZINWA offices. According to him ZINWA employees were suspects because they sometimes worked at the place where the meter was and had been mentioned as suspects by the complainant. At the ZINWA offices he spoke to the first plaintiff and informed him of his investigation. He was advised that the meter in question had been removed for non-payment of water charges. He was shown the meter which was properly labelled and was kept in a room where there were other meters. From the explanation given he accepted that no offence had been committed. He nevertheless asked the two plaintiffs to accompany him to the police station so that they would explain to the first defendant their reason for removing the meter. He stated that before they left the ZINWA offices the plaintiffs asked for permission, which he granted, to telephone their superiors in Harare. At the police station he made the plaintiffs to sit on a bench meant for witnesses. When he finished work at 1300 hours he informed his colleagues that the plaintiffs were not under arrest but were waiting for the first defendant. He asked the plaintiffs to go and get food if they wanted but they refused.

Based on the pleadings filed by the parties, three issues were referred to trial, namely:

(1) Whether the arrest and detention of the plaintiffs effected by the defendants was lawful?

(2) Whether the plaintiffs suffered damages (sic) arising from the arrest and detention?

(3) Quantum of damages.

It is clear from the above issues and, indeed, from the defendants' plea, that the arrest and detention of the plaintiffs were admitted. The defendants' case as pleaded was that the arrest and detention were lawful because of the reasonable suspicion that the plaintiffs had committed an offence. Even in their draft minute which they filed prior to the pre-trial conference the defendants had proposed the first issue to be formulated as follows: "Whether or not the first and second defendants acted unlawfully by detaining the first and second Plaintiff(s) for not more than 48 hours". The evidence which the two defendants gave before this court is inconsistent with their plea. Such evidence has no value as it contradicts their defence. For what it is worth, the evidence ineluctably points to an unlawful arrest. Firstly, the defendants in their evidence testified on what they consider to be the proper procedure for

arresting a person. According to them the procedure entails the laying of the police officer's hand on the shoulder of the person being arrested, followed by the notification to that person as to why he is being arrested. On their own evidence, that procedure was not followed when the plaintiffs were arrested. Secondly, both defendants admitted that they accepted from the explanation given by the plaintiffs as to why the meter had been removed that no offence had been committed. But they nonetheless proceeded to arrest and detain the two plaintiffs for close to eight hours. Thus the arrest and detention are rendered unlawful by the absence of reasonable grounds for the deprivation of liberty. Thirdly, even if there was a genuine belief that an offence had been committed, having found that the meter in question was being kept at the ZINWA offices by the plaintiffs who had removed it during the course and scope of their employment, it was an improper exercise of the discretionary power to proceed to arrest and detain them. The fact that the second respondent did not consider it necessary to take the meter with him when he took the plaintiffs to the police station shows that he did not believe that there was a chance that it might go missing.

The defendants contended, in their evidence in this court, that the taking of the plaintiffs from their work place at nine o'clock in the morning and the keeping of them on a bench in a police station for close to eight hours should be classified as something else other than an arrest and detention. In the case of *Muyambo* v *Ngomaikarira & Ors* 2011 (2) ZLR 51(H) at 55A-C, PATEL J (as he then was) stated the law as follows:

> "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 *Macheka* v *Metcalfe & Anor* HH-62-07 (at pp 6-7) and the authorities there cited. As is explained by Feltoe *A Guide to the Law of Delict* (2nd ed) at p 48, the plaintiff need only prove that the arrest or imprisonment was illegal and not that there was intention to act illegally or to cause him harm. In our law, unlike South African Law, *animus injuriandi* is presumed and, therefore, intention is not a requirement for this delict. Moreover, the use of force is not a prerequisite and neither is pecuniary loss. Damages can be awarded for any affront or humiliation stemming from the unlawful arrest and imprisonment of the plaintiff. Although this action is usually brought against members of the police or other uniformed force, a private individual can also be held liable for this delict committed against another private individual. See *Mapuranga* v *Mungate* 1997 (1) ZLR 64(H)."

The plaintiffs were taken to the police station by the second defendant. They did not voluntarily make a trip to the station. The visit by the second defendant to the plaintiff's place of employment was preceded by an earlier visit by the second defendant during which a subtle threat was made by stating that they could not live harmoniously in light of the

disconnection of the water supply by the plaintiffs. In his evidence in chief the first defendant did not unequivocally deny that he went to the ZINWA offices around eight o'clock on 6 July 2012. Instead, his evidence was that he did not "recall doing that". It was only during cross-examination that he sought to categorically deny the morning visit to ZINWA offices. In any event, the plaintiffs were not challenged by the defendants through cross-examination when they testified on that visit. There are other inherently unconvincing aspects of the defendants' evidence. The second defendant could not explain why the plaintiffs would ask him for permission to telephone their superiors in Harare at the time that he was at their offices if he had not purported to arrest them. His suggestion that the plaintiffs opted to go with him to the police station because they needed company and someone to be chatting with does not make sense given that this was during normal working time and even he was in uniform and on duty. The suggestion that the plaintiffs were made to sit on a bench meant for witnesses is equally tenuous. The plaintiffs were not witnesses even according to the testimonies of the defendants. If they regarded them as visitors who had come to explain the removal of the meter only, then they would have allowed them to sit on the bench which was meant for the visitors or those that came to report cases. There was also no dispute that the plaintiffs only had food late in the afternoon. I do not accept the second defendant's statement that he had given them the option to go and get food and they had refused. The second plaintiff testified, and his testimony was not challenged, that he suffered from an ulcer and was denied the opportunity to take his medication which he had not brought to the police station. It was never suggested to both plaintiffs in cross-examination that they had been told to go and get food and they had refused to do that. The defendants only made those assertions when they were giving evidence themselves.

The defendants' version that they merely asked the plaintiffs to attend at the police station for the purpose of explaining to the first defendant the reason for removing the meter must therefore be rejected.

The defendants' assertion that they were not aware that the meter had been removed by the plaintiff does not accord with the probabilities. The meter was removed in broad daylight, around eleven o'clock in the morning. There were persons around when it was removed. Mr Bare who was an Officer-In-Charge had been notified. The plaintiffs had on the previous day disconnected the water supply to the police station and someone had unlawfully reconnected it. That first disconnection was not done at night but during the day.

The plaintiffs had the opportunity to call Bare to testify, as he is one of them. They did not do that.

In my view, the plaintiffs have proved that they were unlawfully arrested and detained by or at the instance of the defendants. Exhibit 1 and the evidence of the second defendant show that the first defendant was, in fact, the person who initiated the arrest. He was the complainant. The second defendant was the one who effected the arrest and detention. At all material times the two were acting within the course and scope of their employment with the third defendant.

As regards the quantum of damages, the position of the law is that an action for unlawful arrest and detention is one that falls under the *action injuriurum*, "and so proof of actual damage is not necessary to support such an action. Even if no pecuniary damage has been suffered the court will not award a contemptuous figure for the infringement of the right to liberty." PER KORSAH JA in *Botha* v *Zvada & Anor*1997 (1) ZLR 415(S) at 422F. In the case of *Muzonda* v *Minister of Home Affairs & Anor* 1993 (1) ZLR 92(S) at 100E GUBBAY CJ stated:

> "The deprivation of personal liberty is an odious interference and has always been regarded as a serious injury."

See also *Minister of Home Affairs & Anor* v *Bangajena* 2000 (1) ZLR 306(S) at 309G-H; *Muyambo* v *Ngomaikarira & Ors (supra)* at 55F-H; *Botha* v *Zvada & Anor (supra)* at 422F; *Masawi* v *Chabata & Anor* 1991(1) ZLR 148(H) at 159.

These authorities show that damages for unlawful arrest and detention should be exemplary and punitive in order to deter would-be offenders.

The factors which are relevant in assessing the appropriate quantum of damages for unlawful deprivation of liberty and *contumelia* are set out in Visser and Potgieters' *Law of Damages* (2nd ed.) at p.472-4. These include:

> "the circumstances under which the deprivation of liberty took place, the presence or absence of improper motive or 'malice' on the part of the defendant, the harsh conduct of the defendants, the duration and nature (e.g. solitary confinement) of the deprivation of liberty, the status, standing, age, and health of the plaintiff, the extent of the publicity given to the deprivation of liberty, the presence or absence of an apology or satisfactory explanation of the events by the defendant, awards in previous comparable cases, the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed, the high value of the right to physical liberty,

> the effects of inflation, and the fact that the *actioinjuriurum*also has a punitive function."

In the case of *Muyambo* v *Ngomaikarira & Ors (supra)* at p. 57C damages in the sum US$3 000 were awarded where the plaintiff was unlawfully arrested and detained some 300 kilometres away from his residence for three days. In *Musundire* v *OK Zimbabawe Ltd* 2012 (1) ZLR 292(H) where the plaintiff was arrested and detained for four days at the instance of the defendant's employee, and was moved from one police station to another and made to spend time in squalid conditions, in handcuffs and barefoot, a sum of US$8 500-00was awarded. Mr *Dondo* referred me to the case of *Conelius Muskwe* v *Minister of Home Affairs* HH 83-13, in which there were reasonable grounds for arresting but this court found that the power of arrest was improperly exercised. In that case a total of US$1 500-00 was awarded, $1000-00 being for the deprivation of liberty while $500-00 was for *contumelia*. The awards confirm the pertinent observation by the Supreme Court that "awards of damages made in recent decisions provide only general guidance" and that "each case is in a sense without parallel, having individual subjective aspects to it" *Muzonda* v *Minister of Home Affairs & Anor* at p 101E-F; *Botha* v *Zvada & Anor (supra)* p 422G-H.

In the instant case each of the plaintiffs asked for a sum of US$50 000, of which $35 000-00 is in respect of "physical discomfort and anguish" while a sum of $15 000 is for *contumelia*. Unlike in some of the cases referred to above, the plaintiffs *in casu* were not handcuffed, and were allowed to sit on a bench at the police station. They spent eight hours but that was during the day. However, they were deprived of their liberty in circumstances where they had removed the meter in question in the honest performance of their work. I have taken into account, too, the evident abuse of the powers, as the defendants abused their positions to obtain a reconnection of water by arresting and detaining the plaintiffs. This is a case in which an improper motive or malice is clearly established. The fact that the first defendant became a complainant as well as investigating officer in the matter points to an undue interest which affected the manner in which the case was handled. At the police station the plaintiffs were ordered to remove their shoes. That, in the circumstances, amounts to inhuman and degrading treatment. The evidence of the first defendant that he found them wearing their shoes cannot be believed. Firstly, when they testified that they were ordered to remove their shoes that evidence was not challenged. Secondly, it is curious that the first defendant would upon entering the police station mind the issue of whether or not the plaintiffs were wearing shoes when he knew and should have been concerned at that they had

been waiting for him for more than six hours. The plaintiffs were ordered to switch off their mobile phones and were denied food at the appropriate time. In the circumstances, it seems to me that an award of US$5 000-00 for the deprivation of liberty and $1 000-00 for *contu melia* for each of the plaintiffs would accord with justice.

In the result, judgment is hereby granted in favour of the plaintiffs against the defendants jointly and severally, the one paying the others to be absolved, for payment of a sum of US$12 000-00, together with interest thereon at the prescribed rate from the date of judgment to the date of full and final payment, and costs of suit.

Dondo& Partners, plaintiffs' legal practitioners
Civil Division of the Attorney-General's Office, defendants' legal practitioners