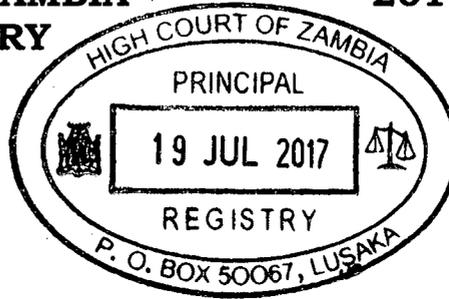


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2014/HP/1609



B E T W E E N:

JAY CHISANGA

1ST PLAINTIFF

WIDEGATE IMPORT AND EXPORT LTD

2ND PLAINTIFF

AND

UNITED BANK OF AFRICA

DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 19th day of
July, 2017**

For the Plaintiff : Ms. N. Mbuyi, Messrs Ituna Partners

For the Defendant : Mr. F. Zulu & Mr. J. Mulongo, Messrs MSK Advocates

J U D G M E N T

Case Authorities Referred To:

1. *Saidi v The People, Selected Judgment No. 30 of 2015, SCZ Appeal No. 144 of 2015*
2. *Zambia Publishing Co. Ltd v Eliya Mwanza (1979) Z.R 76 (S.C)*
3. *Mubita Mbanga v The Attorney General (1979) ZR 234*
4. *The Attorney General v Sam Amos Mumba (1984) Z.R 14 (S.C)*
5. *J.Z. Car Hire v Malvin Challa and Scirocco Enterprises Limited (2002) Z.R 112*

Other Works Referred To:

1. *Chitty on Contracts 29th Edition, London, Sweet and Maxwell, 2004*
2. *Winfield & Jolowicz on Tort, 19th Edition, London, Sweet & Maxwell, 2014*
3. *Osborn's Concise Law Dictionary 12th Edition, Sweet & Maxwell 2013*

By an Amended Writ of Summons the Plaintiff seeks the following reliefs:

- i. Damages for malicious prosecution from the Defendant's action of reporting the Plaintiffs to the Drug Enforcement Commission.**
- ii. Damages for mental anguish and intimidation suffered by the 1st Plaintiff as a result of the Defendant's action of reporting the Plaintiffs to the Drug Enforcement Commission without reasonable and lawful cause.**
- iii. Damages for loss of business**
- iv. Costs**
- v. Any other relief the Court may deem fit.**

The Statement of Claim discloses that sometime in June, 2014, the 1st Plaintiff deposited a cheque of K32,500.00 into the 2nd Plaintiff's account held at the Defendant Bank. He was advised to check on the payment after three days and when he went to the Bank he discovered the cheque had not cleared. After a few hours, the 1st Plaintiff returned to the Bank and was told that the cheque was ready and he withdrew cash.

The 1st Plaintiff states that sometime in June, 2014, the Defendant's employees told him that the cheque was mistakenly cleared, and asked to return the money. He refused to return the money because he considered that the credit on the 2nd Plaintiff's account arose from an honoured cheque.

The Plaintiffs aver that the Defendant in July, 2014, reported the 1st Plaintiff to the Anti-Money Laundering Unit of the Drug Enforcement Commission for money laundering. He was subsequently interrogated on a number of occasions and in front of his workers and this caused him to suffer trauma. The 1st Plaintiff avers that under duress he wrote a letter dated 29th July, 2014, to the Defendant in which he undertook to pay back the money.

The 1st Plaintiff states that on 17th September, 2014, he wrote another letter to the Defendant where he retracted his earlier commitment to the bank because he feared to incur loss. The Plaintiffs claim to have suffered loss of reputation and business as a result of the malicious report to the Anti-Money Laundering Unit.

The Defendant settled a Defence where it avers that the Plaintiff's cheque never cleared and the 2nd Plaintiff was mistakenly credited with K30,000.00 on 23rd June, 2014. It states that the 1st Plaintiff agreed to return the money by a letter dated 29th July, 2014.

The Defendant denies that it reported the Plaintiffs to the Drug

Enforcement Commission, asserting that as a financial institution, it is under statutory obligation to report any suspicious activity to the Financial Intelligence Centre. The Defendant avers that the Plaintiffs are not entitled to any of the reliefs sought given that the 1st Plaintiff was never arrested, charged nor prosecuted.

The Defendant states that the 1st Plaintiff's alleged interrogation, intimidation and malicious prosecution should have been directed to the Drug Enforcement Commission which was not joined to this action. Its counterclaim discloses that the Plaintiffs have failed to return the K30,000.00, which was mistakenly paid on 23rd June, 2014. The Defendant counterclaims:

- a) **K30,000.00 being money mistakenly paid to the Plaintiffs, which amount the Plaintiffs promised to refund.**
- b) **Interest on (a) above at current Bank of Zambia lending rate from 29th June, 2014, up to date of full and final settlement.**
- c) **Costs of or incidental to the action**

The 1st Plaintiff, **Jay Ernest Chisanga**, Director of the 2nd Plaintiff Company testified as **PW1**. His evidence was that sometime in June, 2014, he supplied clothes and tiles that he imported from China to Alcore Enterprises. Alcore Enterprises paid the 2nd Plaintiff a cheque of K32,500 which he deposited at the Defendant Bank on 20th June, 2014. On 23rd June, 2014, he went

to the Defendant Bank at 10.00 hours to inquire if the cheque had cleared but found that it was not ready. PW1 returned to the Bank at about 12.00 hours and discovered that the 2nd Plaintiff's account had been credited with K32,500, upon which he withdrew K30,000.

PW1 testified that the employees of the Defendant Bank called him the following day and told him that the cheque had bounced. He called Alcore Enterprises Limited which assured him that there was nothing wrong with the cheque. PW1 stated that the Defendant Bank never handed him the refer to drawer cheque, the Defendant's employees later followed him to his business premises.

PW1 testified that he was summoned by Fanny Banda of the Drug Enforcement Commission (DEC) Anti-Fraud Department after a few days, where he was interrogated. His effort to contact the Managing Director of Alcore Enterprises proved futile.

PW1 testified that Fanny Banda and another officer from DEC followed him to his business premise, Plot 99, Central Street, Jesmondine, where they interrogated him and some of his workers

in the presence of his clients. The interrogation embarrassed him and caused his business to slump.

PW1 testified that the DEC officers forced him to pay back the money, because they threatened to prosecute him. According to PW1, he wrote a letter to the Defendant Bank under duress where he promised to return the money. He however changed his mind after he received legal advice from his Advocates. PW1 testified that he was convinced that the Defendant Bank reported him to DEC because the officers showed him the cheques during his interrogation.

On the Defendant's counterclaim, PW1 testified that he withdrew money from the 2nd Plaintiff's account on the belief that the cheque had cleared. He stated that if the cheque had not cleared, then the Defendant would have referred the cheque to the drawer. PW1 testified that he was mistreated by the DEC officers causing him mental anguish. His customers lost faith in him and his business never recovered from the episode. PW1 was surprised to discover that the 2nd Plaintiff owed the Defendant K40,000.

In **cross-examination**, PW1 stated at page 8 of the Defendant's Bundle, that cheque No. 639 from Alcore Enterprises Limited had been dishonoured and accordingly referred to drawer. He confirmed the visits from the Defendant's employee and Fanny Banda to his business premise in June and July, 2014, respectively. PW1 stated that there were about fifteen clients when the DEC officers went to his store.

PW1 also stated that he was prosecuted at the instance of either DEC or the Defendant. He did not file any statement into Court proving his claim for loss of business. He maintained that he was traumatised by the DEC officers even though not treated for trauma. He never returned the money to the Defendant

In **re-examination**, PW1 stated that he was not aware that the Defendant rejected cheque No. 639 until the date of trial. The trauma caused him to suffer depression and headaches.

Chewe Mulenga testified as **PW2**. His evidence was that he works for PW1 and while at the store in June, 2014, two officers from DEC went to the store to interrogate some workers and PW1.

It was PW2's evidence that PW1's business experienced a slump after the DEC officers' interrogation and the number of daily clients reduced from eighteen to five. Some clients disparaged PW1's business. PW2 also stated that he was not regularly paid because of the loss of the business.

In **cross-examination**, PW2 stated that the clients who disparaged PW1's business were not present when the DEC officers went to the store.

The witness was not **re-examined**.

The Defendant's only witness **was Petronella Kapalu**, who testified as **DW1**. Her evidence was that on 20th June, 2014, PW1 deposited a cheque at the Defendant Bank, which was supposed to clear at 12.00 hours on 23rd June, 2014. PW1 went to the Bank and insisted the Teller to pay him. The Teller called the Clearing Department and was told that it had not received adverse information about the cheque. DW1 stated that the Teller, assumed that the cheque had cleared and paid PW1 the sum of K30,000.

DW1 testified that PW1's account was not debited with money because the cheque bounced. Further, PW1 was informed of the dishonoured cheque and was asked to return the money. He promised to do so and asked the Bank employees to meet him at Access Bank Cairo Road. When they met, PW1 refused to return the money. On 24th June, 2014, DW1 sent the Teller and a co-worker to collect the money but PW1 refused to return the money and referred them to Access Bank.

DW1 testified she pleaded with PW1 to return the money and told him that the Teller and Supervisor would face serious sanction. There was no reaction from PW1. DW1 stated that sometime in July, 2014, the Defendant reported the matter to the Financial Intelligence Unit at the Bank of Zambia. PW1 wrote a letter to the Defendant on 30th July, 2014, in which he undertook to return the money but later retracted his commitment.

DW1 testified that cheque No. 639 worth K32,500 was rejected by the Bank on 23rd June, 2014 and referred to drawer. DW1 prayed for the reliefs set out in the counterclaim.

In **cross-examination**, DW1 stated that she was employed by the Defendant Bank in 2013 and had over fifteen years banking experience. DW1 testified that banks no longer exchanged physical cheques, which were paid or unpaid but instead relied on electronic images sent by correspondent banks. DW1 testified that she did not know how DEC obtained the dishonoured cheques. She was not aware if the Financial Intelligence Unit gave the cheques to the DEC. She did not know why the same cheque number appeared on the cheque from Alcore Enterprises Limited and the 2nd Plaintiff but speculated that the same cheque number could have been used on the withdrawal slip and counter-leaf given by the Bank.

The witness was not **re-examined**.

Learned Counsels filed written submissions for which I am grateful. Learned Counsel for the Plaintiff submitted that the Defendant sought to cover up its mistake and negligence on the dishonoured cheque and engaged DEC to inflict pressure on the 1st Plaintiff.

Counsel argued that although the Plaintiff did not lead direct evidence on the Defendant's involvement of DEC, the circumstantial evidence disclosed that the DEC officers had the actual cheques. She added that the officers from DEC coerced the 1st Plaintiff into repaying the Defendant K30,000 when he had already expressed that he was not liable. Counsel cited the case of **Saidi v The People**¹ where the Supreme Court citing *Lord Heward, Chief Justice of England* at the time at page 21 stated as follows:

"It has been said that the evidence against the applicants is circumstantial, so it is but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics."

Counsel further cited the **Learned Authors on Chitty on Contract 29th Edition** at page 513 paragraph 7-007 where they state thus:

"...The law therefore allows a party to avoid any promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made or that of his agent. Contracts made under such circumstances are said to be made under duress..."

Counsel submitted that the Plaintiffs could not be held liable for the Defendant's loss because it used illegitimate means to coerce

the 1st Plaintiff. She also submitted that because of the duress, the Plaintiff was entitled to damages for mental anguish and referred me to the case of **Zambia Publishing Co. Ltd. v Eliya Mwanza**².

In response, Learned Counsel for the Defendant submitted that the 1st Plaintiff testified that he did not appear before any Court and thus failed to prove his claim on malicious prosecution.

Learned Counsel further submitted that in terms of section 29 (2) of the Financial Intelligence Centre Act (the Act), the Defendant was under an obligation to report the suspicious transactions on the 2nd Plaintiff's account. Counsel cited section 5 of the Act which inter alia provides for the functions of the Financial Intelligence Centre as follows:

- “ 5 (2) (a) Receive request and analyse suspicious transaction reports requires to be made under this Act or any other written law, including information from any foreign designated authority.**
- (b) Analyse and evaluate suspicious transaction reports and information so as to determine whether there is sufficient basis to transmit reports for investigation by the law enforcement agencies or a foreign designated authority.**
- (c) Disseminate information to law enforcement agencies where there are reasonable grounds to suspect money laundering or financing of terrorism....”**

Counsel contended that from the statutory provisions, the Financial Intelligence Centre has authority to inform law enforcement agencies of suspicious transactions. Counsel submitted that any damage suffered by the Plaintiffs was at the instance of the Financial Intelligence Centre and not the Defendant.

On the loss of business, Counsel submitted that Plaintiffs never adduced evidence to show that the Plaintiffs' flow of business before and after the interrogation by the officers from DEC at the Plaintiffs' business premises experienced a slump. Counsel prayed to the Court to dismiss the Plaintiff's claims and to find for the Defendant on its counterclaim.

I have seriously considered the pleadings, evidence adduced and the written submissions filed on behalf of the respective parties. From the material before me, there are two issues that arise for determination and these are, firstly, whether the Plaintiff is entitled to damages for malicious prosecution and mental anguish? and secondly, whether the Plaintiff is liable to repay the Defendant K32,500.00?

The facts in this case are quite ordinary and largely not in dispute. Briefly stated, they disclose that the 1st Plaintiff deposited a cheque of K32,500 into the 2nd Plaintiff account on 20th June, 2014. The cheque was given value on 23rd June, 2014 by the Defendant Bank and before it received confirmation from Access Bank on whether it had been honoured. When the Defendant Bank discovered that the cheque had been dishonoured it referred it to the drawer on 23rd June, 2014, and immediately informed PW1. The Defendant made all efforts to recover the money but PW1 never returned the money to date.

PW1's evidence is that he was not liable to return the money to the Defendant because it was genuinely paid to the 2nd Plaintiff after the cheque had cleared. If anything, the Defendant had the option of pursuing its claim with Alcore Enterprises. He also contended that in the process of trying to wrongfully recover the money from him, the Defendant Bank reported him to DEC, whose officers intimidated him and caused him to suffer mental anguish and trauma. He also suffered loss of business.

On the other hand, the Defendant contended that PW1 was never arrested nor prosecuted and could not have suffered malicious prosecution. Further, PW1's evidence was not suggestive of mental anguish, intimidation or trauma caused by the officers from DEC. In addition, PW1 failed to prove his claim of loss of business.

According to **Osborn's Concise Law Dictionary**, malice is defined as ill will or evil motive. The Dictionary further states that malice in the law of tort is a constituent of malicious prosecution. The Learned Authors of **Winfield & Jolowicz, on Tort**, at pages 20-006 20-017, state that in order to found an action for malicious prosecution, a claimant has to prove the following elements:

- i. *The Defendant prosecuted him;*
- ii. *The prosecution ended in the Plaintiff's favour;*
- iii. *The prosecution lacked reasonable and probable cause;*
and
- iv. *The Defendant acted maliciously.*

The elements of malicious prosecution were restated in the case of **Mubita Mbanga v Attorney General**³, where Muwo J, as he then was, stated thus:

"the Plaintiff has to prove on a preponderance of evidence that he was "prosecuted" which is the first essential of the case and

secondly that the prosecution was “malicious”; he has to do the same in respect of the second part of his claim in the writ.”

The essentials of malicious prosecution are four. They are:

1. *Prosecution*
2. *Favourable termination of the prosecution*
3. *Lack of reasonable and probable cause, and*
4. *Malice*

In simple language this means that the Plaintiff must prove that he was prosecuted and that the prosecution terminated in his favour and the accuser acted without reasonable and probable cause and did so with malice..... Although in a number of cases judicial attempts to define the word “malicious” have not been completely successfully, a consensus of opinion among Judges has been that there must be some other motive on the part of the accuser than a desire to bring justice to the person whom he honestly believes to be “guilty.”

From the evidence adduced, I find that the Plaintiffs have not established their claim of malicious prosecution. PW1 was never prosecuted, and in consequence, the other elements of malicious prosecution never visited him. The claim for mental anguish is also unsuccessful as no medical evidence was adduced by PW1 to support his claim for trauma. I do not accept that mental anguish or trauma can be proved by headaches or self-diagnosed depression.

In the case of **The Attorney General v Sam Amos Mumba**⁴, it was held that:

“Where loss of business forms part of the claim, it must be pleaded as special damages and strictly proved.”

Further, in the case of **J.Z. Car Hire v Malvin Chala and Scirocco Enterprises Limited⁵**, the Supreme Court held that:

“It is for the party claiming any damages to prove the damage. ... we have considered the Learned Deputy Registrar’s judgment and the submissions before us and we have been unable to fault the Learned Deputy Registrar in his holding that there was no evidence of loss of business to be quantified. We agree with Mr. Mwananshiku that the mere production of the hire chart charges was not proof that this particular motor vehicle was ever hired and what average earnings it made for the Appellants per month.”

After carefully analyzing the evidence adduced, I find that the claim for loss of business has not been proved. The evidence led by the Plaintiffs’ witness that the number of clients reduced after the DEC officers interrogation was somehow countered by PW2’s evidence that the clients who disparaged PW1’s business were not in store at the material time. Further, there was no evidence adduced to show how the 2nd Plaintiff’s flow of business was running before and after the interrogation. All in all, the Plaintiffs have failed to prove any of their claims. They are dismissed forthwith.

On the other hand, I find merit in the Defendant's counterclaim that it mistakenly paid the 2nd Plaintiff K32,500.00. The evidence at page 8 of the Defendant's Bundle shows that the cheque from Alcore Enterprises was deposited into the 2nd Plaintiff's account on 20th June, 2014 and referred to drawer on 23rd June, 2014. This is the same date that the money was mistakenly paid out to PW1. PW1 was immediately informed of the development but disregarded the advice.

I take the view that PW1 had no basis for holding on to money which was paid on the 2nd Plaintiff's insufficiently funded account. It is therefore logical that the Plaintiffs must return the Defendant's money.

I accordingly enter judgment for the Defendant in the sum of K32,500.00 and interest accrued thereon before this action. Thereafter, the K32,500.00 will attract interest at the short term deposit rate from the date of Writ to judgment, and from the date of judgment to final payment at the current lending rate to be determined by the Bank of Zambia.

Costs shall abide the event to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 19th day of July, 2017.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE