

REPORTABLE (55)

JAYESH SHAH
v
PROFESSOR CHARLES NHERERA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & CHATUKUTA JA
HARARE: 17 OCTOBER 2023 & 6 JUNE 2024

L. Uriri with S. M. Hashiti and M. Ndhlovu, for the appellant

T. Magwaliba with T. R. Hove, for the respondent

CHATUKUTA JA:

1. This is an appeal against the whole judgment of the High Court (the court *a quo*) handed down on 16 December 2021. The court *a quo* granted the respondent damages in the sum of US\$30 000.00 for malicious prosecution and US\$100 000.00 for malicious arrest and detention. The damages were to be paid at the equivalent rate of the local currency of RTGS reckoned at the time of payment.

FACTUAL BACKGROUND

2. The respondent was the Chairman of the board of directors of Zimbabwe United Passenger Company ('ZUPCO'). He was also Vice-Chancellor of the Chinhoyi University of Technology and a member of the Zimbabwe Examinations Council and the Parastatals Advisory Council. He held various positions in other local and regional organisations. The appellant had an interest in a company known as Gift Investments (Pvt) Ltd which supplied mini-buses to ZUPCO. The buses were supplied pursuant to a tender process approved by the State Procurement Board.

3. In November 2011, the respondent issued summons against the appellant claiming damages in the sum of US\$100 000 for malicious prosecution and US\$300 000 for malicious arrest and detention, interest thereon at the rate of 5% per annum and costs of suit. The respondent averred that the appellant had made allegations that he had, in his capacity as the Chairperson of ZUPCO Board of Directors, solicited for a bribe from Gift Investments (Pvt) Ltd in order to facilitate the purchase by ZUPCO of 17 buses from the company. The company had previously sold some buses to ZUPCO with the authority of the State Procurement Board. Seventeen buses painted in the corporate colours remained in the company's stock. ZUPCO had not placed an order for the buses which were not covered by the authority issued by the State Procurement Board. He contended that the appellant made reports on the allegations to various people, high ranking government officials and institutions. As a result of these allegations against him, he was arrested by the police on 21 March 2005 and detained on charges of corruption. He was arraigned before the Regional Magistrates Court, Harare, for contravening s 3 (1) (a)(i) of the Prevention of Corruption Act [*Chapter 9:16*]. The trial magistrate found him guilty and sentenced him to 3 years' imprisonment of which one year imprisonment was suspended for a period of five years on condition of future good behaviour. The effective sentence was 2 years' imprisonment.
4. Aggrieved, the respondent filed an appeal before the High Court against both conviction and sentence. On 19 November 2009, the High Court quashed the conviction and set aside the sentence. By then, the respondent had served the effective sentence of two years. The claim for damages was instituted soon thereafter. The respondent averred in his claim that he was subjected to humiliation from the time of arrest up to his acquittal. As a result of his arrest, prosecution and imprisonment at the instance of the appellant, he suffered injury

to his reputation, both locally and internationally and injury to his dignity. He was also deprived of his liberty. He lost his positions as the Vice Chancellor of Chinhoyi University of Technology and as the Chairperson of ZUPCO Board of Directors.

5. The appellant admitted in his plea to having made the report to the police. He however denied having done so maliciously. He averred that he only informed the police that the respondent had solicited a bribe from him and the information was true. He maintained that the decision to arrest the respondent was made by the police and not by him after the police had formulated a reasonable suspicion that an offence had been committed. He also denied causing the prosecution of the respondent. He argued that the decision to prosecute the respondent was made by the Attorney General in the exercise of his constitutional mandate. He averred that the decision to imprison the respondent was made by the trial magistrate after due consideration of the evidence placed before her during trial.
6. At the trial, the appellant applied for absolution from the instance at the close of the respondent's case. The appellant submitted that the respondent had no *prima facie* case against him. The court *a quo* granted the application. It held that there was evidence that the respondent had solicited for a bribe. It further held that the respondent failed to show how he had arrived at the damages he was claiming.
7. Disgruntled by the decision, the respondent noted an appeal before this Court under SC 634/19. He argued that the court *a quo* had misdirected itself in granting the appellant absolution from the instance. This Court determined the appeal in (*Nherera v Shah* 2019 (1) ZLR 462 (S); SC 51/19) (*Nherera v Shah*).

FINDINGS OF THIS COURT IN *NHERERA v SHAH* SC 51/19

8. The court made the following findings:

- (a) In order to succeed in his claim for damages, the respondent was required to prove four requirements, being that:
- i. the arrest, prosecution and detention were instigated or procured by the defendant;
 - ii. there was no reasonable and probable cause for his arrest, prosecution and detention;
 - iii. the arrest, prosecution or detention was actuated by malice; and
 - iv. the prosecution failed.
- (b) there was sufficient evidence before the court *a quo* that the appellant had instigated or procured the respondent's arrest. The appellant had admitted in his plea that he had informed the ZUPCO Board, the then Minister of Local Government, Dr Chombo, the then Governor of the Reserve Bank, Dr Gono and the then Minister of State Security, Mr Goche. He had also admitted in the plea that he made a report to the police. He further admitted that he was granted immunity from prosecution by the police and the Attorney General so that he would assist in the investigation of the allegations he had made against the respondent and assist in a successful prosecution of the respondent;
- (c) there was no evidence suggesting that the respondent had attempted to solicit for a bribe from Gift Investments. The appellant did not, *prima facie*, have reasonable and probable cause for the respondent's arrest or prosecution;
- (d) the court *a quo* seriously misdirected itself in relying on evidence adduced in the Magistrates' Court during the respondent's prosecution which was not adduced and

tested before it. This was particularly so where the criminal proceedings had been set aside by the High Court on appeal on 19 November 2009;

- (e) The judgment of the High Court quashing the respondent's conviction was extant. The court *a quo* should not have ignored it. Following the judgment of the High Court, the requirement that the prosecution had failed had therefore been met;
- (f) The question of malice could only be determined after the appellant's testimony in his defence. The appellant had disputed, during the cross examination of the respondent, that he had made a report to the police. There was therefore need for putting the appellant on his defence so that he would, among other issues, explain the inconsistency between his admission in his plea that he denied under cross examination of the respondent that he ever made a report to the police;

9. In the final analysis, the court held that the respondent had established a *prima facie* case against the appellant. It concluded that the court *a quo* ought to have dismissed the application for absolution from the instance. It ordered as follows:

- “1. The appeal be and is hereby allowed with costs.
- 2. The judgment of the court *a quo* is set aside and in its place the following substituted:
“The application for absolution from the instance be and is hereby dismissed with costs.”
- 3. The matter is remitted to the court *a quo* for continuation of the trial proceedings.”

PROCEEDINGS BEFORE THE COURT A QUO

10. After the above findings by this Court in *Nherera v Shah (supra)*, the trial proceeded before the court *a quo* with the appellant testifying. The appellant adopted his plea, his testimony

in the criminal proceedings against the respondent in the Magistrates Court and affidavit he deposed to on 27 July 2006 as part of his evidence on oath. His evidence was as follows.

11. In 2005 respondent demanded a US\$5 000.00 bribe per bus for ZUPCO to flight a tender for the purchase of buses. He did not make a report to the police as alleged by the respondent. He however informed a number of people about the respondent's conduct. These included the ZUPCO Board, the then Minister of Local Government, Dr Chombo, the then Governor of the Reserve Bank, Dr Gono, the then Minister of State Security, Mr Goche, and some Central Intelligence Officers.

12. He informed the police sometime in April 2005 that the respondent had solicited for a bribe in 2003 to facilitate the renewal of a lease agreement between Gift Investments and ZUPCO. He had paid the respondent and Bright Matonga a total of \$20 000.00. The respondent was arrested in relation to the 2005 solicitation after he made reports to the government officials.

DETERMINATION BY THE COURT A QUO

At the conclusion of the trial, the court *a quo* made the following findings.

13. The findings by the Supreme Court in *Nherera v Shah (supra)* were binding on it. The Supreme Court had determined that the appellant placed information before a police officer that the respondent had solicited a bribe from him leading to the arrest, prosecution and detention of the respondent. He did not, *prima facie*, have any reasonable and probable cause for doing so. The prosecution of the respondent had failed when his conviction was quashed on 19 November 2009. The respondent had therefore established a *prima facie* case on these issues. The appellant was required to rebut the *prima facie* case.

14. As regards the appellant's testimony, the court *a quo* made the following findings:

The appellant was not a credible witness. He had admitted in his plea (which was now part of his evidence-in-chief) to making the report to the Police leading to the arrest, prosecution and detention of the respondent. His oral evidence was inconsistent with his plea. The oral evidence was also at variance with his evidence during the respondent's criminal trial where he again admitted making the report. It was common cause that the respondent was arrested, prosecuted and imprisoned after the accusations of soliciting for a bribe were levelled against him by the appellant. The appellant failed to disprove the *prima facie* case found to have been established by the respondent on appeal in *Nherera v Shah (supra)*. He had caused the arrest of the respondent without reasonable and probable cause and had done so in bad faith. His report to the police was therefore malicious.

15. The court *a quo* further held that the appellant's liability had been proved and the requirements for delictual damages satisfied. It further held that the respondent suffered humiliation, ill-treatment in prison and lost his employment due to the arrest, prosecution and imprisonment. The court *a quo* found that the respondent had not led evidence on how the sums of US\$100 000 for malicious prosecution and US\$300 000 for malicious arrest and detention were arrived at. It however held that it still could make an award on the strength of relevant principles on the assessment of damages evolved from the jurisprudence coming out of our courts. It held that the claim for \$100 000.00 for malicious prosecution was extremely excessive and, in its stead, awarded the respondent US\$30 000.00. It also found the claim of US\$300 000 for malicious arrest and detention to be excessive and awarded the respondent US\$100 000 instead. The court *a quo* further concluded that the damages would be paid in RTGS dollars at the interbank rate prevailing on the date of payment.

Aggrieved by the court *a quo*'s decision, the appellant noted an appeal to this Court on the following grounds of appeal:

GROUND OF APPEAL

1. The court *a quo* erred and misdirected itself in law in holding that the *dicta* of this Court in *Nherera v Shah* SC 51/19 that there was at the close of the plaintiff's case a *prima facie* case (a test in any event not applicable to absolution from the instance) mitigating against the grant of absolution from the instance meant that if, in the court's opinion, the appellant had not controverted "the *prima facie* evidence of the plaintiff mutated to proof of the plaintiff's case on a balance of probabilities" in entertaining the first Respondent's application as a court of first instance.
2. The respondent having relied on the appellant's affidavit statement to the police, a statement that the appellant also adopted in his evidence before the court *a quo* in circumstances in which the High Court had found on the basis of the same affidavit statement in *Zimbabwe United Passenger Company v Shah*, which judgment was upheld on appeal to this Court, that the appellant had in fact paid a bribe to the respondent with whom he had a corrupt relationship, the court *a quo* erred in holding that the appellant had not controverted the "*prima facie*" evidence of the respondent.
3. *A fortiori* in holding as impugned in ground of appeal number 2 above, the court *a quo* infringed the appellant's right to the protection of the law guaranteed in s 56 of the Constitution of Zimbabwe.
4. For even the stronger reason, the court *a quo* erred in finding that the appellant's statement was not given in good faith and did not constitute reasonable and probable cause but constituted a malicious and act wrongful instigating (*sic*) criminal proceedings against the respondent.

5. The court *a quo*, having held that the respondent had not led evidence on the financial prejudice he allegedly suffered in his defence of the criminal proceedings or how he arrived at the sums claimed as damages erred in any event, in not granting absolution from the instance at the close of the trial in respect of the damages claimed.
6. The court *a quo*, having made a finding of the fact, and held in *Nherera v Shah* 2015 (2) ZLR 455 at 470 C-D (H) that the respondent “*did not attempt to show how the damages claimed were arrived at*”, which judgment was set aside on a different basis and no further evidence having been led by the respondent since this finding, erred and misdirected itself and acted arbitrarily in awarding any damages.
7. In proceedings as complained of in grounds of appeal 5 and 5 (*sic*) above, the court *a quo* breached the appellant’s right to the protection of the law protected and guaranteed in section 56(1) of the Constitution as well as the dictates of a fair trial contemplated in section 69(1) of the Constitution.
8. The court *a quo* erred in any event in awarding damages that are inconsistent with those awarded in comparable cases and are, on the facts of the case, so outrageous that no court acting properly would have awarded the quantum of damages and in a currency other than the legal tender of the Republic of Zimbabwe.

PROCEEDINGS IN THIS COURT

Submissions by the appellant

16. The appellant abandoned grounds 3 and 7 which were raising constitutional issues not dealt with in the court *a quo*.

17. Mr *Uriri*, for the appellant, submitted that, notwithstanding the decision in *Nherera v Shah SC 51/19*, the respondent did not establish his case on a balance of probabilities at the close of his case *a quo*. Counsel argued that the Supreme Court had applied a wrong test in determining whether the appellant was entitled to absolution from the instance. He argued that the respondent was required to establish whether, at the close of his case, there was evidence upon which a reasonable court, acting carefully, might have given judgment for the respondent on the issues before the court. It was argued that the court had erroneously stated that the respondent needed to and had established a *prima facie* case.
18. It was further argued that the appellant had led evidence, in the form of a judgment of the High Court in *Zimbabwe United Passenger Company v Jayesh Shah & Gift Investments (Private) Limited* HH 238/17 (HH 238/17) in which a finding had been made that the respondent had solicited from and was paid a bribe by the appellant. It was further argued that this Court also held in *Gift Investments (Private) Limited v Zimbabwe United Passenger Company & Jayesh Shah* SC 99/20 (SC 99/20) that the appellant had bribed the respondent and the then Chief Executive Officer of ZUPCO, in a bid to induce the renewal of a lease between Gift Investments (Private) Limited and ZUPCO, from 01 January 2004 to 31 December 2009. It was submitted that the facts in that case were centred on the same issues as in the present appeal. It was further submitted that the findings in both HH 238/17 and SC 99/20 constituted sufficient evidence to rebut the respondent's *prima facie* case. It was argued that the findings in both matters established that there was a relationship of corruption between the appellant and the respondent. Counsel argued that the appellant had rebutted the respondent's *prima facie* case and established on a balance of probabilities that he had not maliciously instigated the respondent's arrest and subsequent prosecution and imprisonment.

19. Mr *Uriri* further contended that the court *a quo* erred in granting the respondent damages in circumstances where the respondent did not lead evidence justifying the *quantum* of such damages. He argued that when the matter was remitted *a quo*, the respondent did not lead further evidence and particularly on the damages that he sought. It was further argued that the award for damages contravened the law in that it was denominated in United Dollars which was not the legal tender in use in Zimbabwe. It was submitted that s 3 (2) (b) & (c) of the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019, Statutory Instrument 212 of 2019, (the Regulations) proscribed settlement of any obligation and demand of the payment of anything, in foreign currency.

Submissions by the respondent

20. *Per contra*, Mr *Magwaliba*, for the respondent, argued that the respondent was not a party to HH 238/17 and SC 99/20. It was further argued that the findings in those cases were not therefore applicable more so as the respondent never had an opportunity to defend himself. It was submitted that the findings related to the appellant's own confession to have paid the respondent a bribe. It was further submitted that the respondent could not be bound by the appellant's confession.

21. It was submitted that the judgment in *Nherera v Shah*, being a judgment of the Supreme Court, was binding on the court *a quo*. The court *a quo* therefore did not misdirect itself when it held that it was bound by the Supreme Court judgment.

23. Mr. *Magwaliba* submitted that the award of damages by the court *a quo*, was made on the basis of the evidence on record as to the harm suffered by the respondent. He further argued that there was no need to lead evidence on the quantification of the damages as they could not be arrived at with mathematical precision. He submitted, as regards the applicable currency, that the law does not preclude the granting of an award in foreign currency.

ISSUES FOR DETERMINATION

1. Whether or not the court *a quo* misdirected itself in holding that it was bound by the judgment in *Nherera v Shah* SC 51/19.
2. Whether or not the court *a quo* misdirected itself in holding the appellant liable for damages for malicious arrest, prosecution and detention.
3. Whether or not the court *a quo* misdirected itself in awarding damages in favour of the respondent in the absence of evidence from the respondent on how the damages were computed.
4. Whether or not it was competent for the court *a quo* to award damages denominated in United States dollars.

ANALYSIS

Whether or not the court *a quo* misdirected itself in holding that it was bound by the judgment in *Nherera v Shah* SC 51/19

24. The appellant argued that the test in an application for absolution from the instance at the close of a plaintiff's case is not that there is a *prima facie* case as held by this Court in *Nherera v Shah* (*supra*). It was submitted that the appropriate test is whether at the close of the plaintiff's case there is evidence upon which a reasonable court acting carefully might give judgment in favour of the plaintiff. It was further submitted that the court *a quo* therefore misdirected itself in relying on the findings of the Supreme Court when it held that the respondent had established a *prima facie* case which the appellant was required to rebut in his evidence.
25. This Court set out in *Nherera v Shah* (*supra*) the four requirements that the respondent was required to establish in order to succeed in his claim. It remarked at para 58 that:

“[58] In order to get judgment in his favour, a plaintiff must prove four requirements. First, that the arrest, prosecution and detention was instigated or procured by the defendant. The word “instigate” is wide enough to include the setting in motion of events that lead to the arrest of the person accused of criminal conduct. Google defines “instigate” to mean to bring about or initiate an action or result. It also means to put in motion, lay the foundations of, sow the seeds of, activate. The word “procure” means to persuade or cause someone to do something. The law requires that a defendant must have been actively instrumental in setting the law in motion. Simply giving a candid account, however incriminating to the police, is not sufficient. The test is whether the defendant did more than tell the detective the facts and leave him to act on his own – *Econet Wireless (Pvt) Ltd v Sanangura* 2013 (1) ZLR 401(S), 408 AB; *Bande v Muchinguri* 1999(1) ZLR 476(H), 484. Second, a plaintiff must prove that there was no reasonable and probable cause. Third, that the arrest, prosecution or detention was actuated by malice. Lastly, that the prosecution failed.”

It held that the respondent had satisfied the first requirement. It held that the evidence led before the court *a quo* established that the appellant *prima facie* set in motion the events that resulted in the arrest of the respondent. The respondent had testified that the appellant had admitted in his plea that he made the report to the police. He had also made a report not only to senior government officials but also to the Attorney General’s Office. He further approached the Reserve Bank Governor and had been given the sum of US\$5 000 in order to entrap the respondent. The court thereafter concluded that the court *a quo* ought to have dismissed the application for absolution from the instance. It then allowed the appeal. It further substituted the court *a quo*’s judgment with an order dismissing the application for absolution from the instance.

26. The Supreme Court had spoken. Decisions of this Court are absolute as the Supreme Court is the final court of appeal in all matters, except in matters of a constitutional nature. The court in *Kasukuwere v Mangwana* SC 78/23, at p 17, quoted with approval the case of *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Limited & Anor* 2018 (2) ZLR 743 (CCZ) at 757 A wherein it was held that:

“What is clear is that the purpose of the principle of finality of decisions of the Supreme Court on all non-constitutional matters is to bring to an end the litigation on the non-constitutional matters. A decision of the Supreme Court on a non-constitutional matter is part of the litigation process. The decision is therefore correct because it is final. It is not final because it is correct.

The correctness of the decision at law is determined by the legal status of finality. The question of the wrongness of the decision would not arise. **There cannot be a wrong decision of the Supreme Court on a non-constitutional matter.**”(Own emphasis)

27. The Supreme Court decision, being final was correct. Because of the principle of *stare decisis*, the decision was binding on the court *a quo*. The principle of *stare decisis* is that a lower court cannot depart from findings on questions of fact and law made by a superior court. See *Denhere v Denhere & Anor* CCZ 9/19, *Diana Farm (Pvt) Ltd v Madondo NO & Anor* 1998 (2) ZLR 410 (H).

28. The question pertaining to absolution from the instance at the close of the respondent’s case having been decisively dealt with by a Superior Court, the court *a quo* could not depart from the judgment in *Nherera v Shah*. It therefore correctly determined that it was bound and that put to rest the questions on whether the respondent had established a *prima facie* case that the appellant, without reasonable cause, caused the arrest, prosecution and detention of the respondent by making a patently false report. It is therefore an exercise in futility to delve into the submissions by the parties on the correctness or otherwise of the Supreme Court decision. All that the court *a quo* was therefore required to do was to determine whether, following the appellant’s evidence in rebuttal, the respondent had established his claim on a balance of probabilities.

Whether or not the court *a quo* misdirected itself in holding the appellant liable for damages for malicious arrest, prosecution and detention.

29. The appellant argued that he led evidence that controverted the *prima facie* case held in *Nherera v Shah* to have been established by the respondent. It contended that the court *a quo* misdirected itself when it made a finding that the *prima facie* evidence of the respondent mutated, at the end of the trial, to proof on a balance of probabilities. It further contended that the court *a quo* should not have found the appellant liable for damages for malicious arrest, prosecution and detention.

30 At the conclusion of the trial, the court *a quo*, considered the respondent's evidence together with the appellant's evidence. It arrived at the conclusion that the respondent had indeed established that the appellant had instigated the respondent's arrest, prosecution and detention. Its findings were distinct from but consistent with the findings of this Court in *Nherera v Shah*. It related to the admissions made by the appellant in para 5.1 of his plea that he reported to the police that the plaintiff had solicited for a bribe and that the police did not have an obligation to act on the report unless they formulated a reasonable suspicion that an offence had been committed. It held at pages 7 to 8 that:

“None of the admissions made by the defendant were withdrawn neither was there any attempt to amend the plea. More importantly, the defendant did not explain in his evidence or in his closing address why what was clearly a confessionary pleading could be contradicted by *viva voce* evidence given by the same pleader. The impression created by the defendant is that an admission made in pleadings could be cast away by the presentation of evidence contradicting it.

The law relating to admissions must be taken as settled in this jurisdiction. A party to civil proceedings may not, without the leave of the court, withdraw an admission made, nor may it lead evidence to contradict any admission the party has made. By the same token, a party cannot be allowed to attempt to disprove admissions it has made.

This is by virtue of s 36 of the Civil Evidence Act [*Chapter 8:01*] which also makes it unnecessary for any party to civil proceedings to disprove any fact admitted on the record of proceedings. Subsection (4) of s 36 also makes it clear that it shall not be competent for any party to civil proceedings to disprove any fact admitted by him on the record of proceedings.....

Accordingly, the fact that the defendant placed information before a police officer and that he made a report that the plaintiff solicited a bribe from him is taken for

granted. The plaintiff did not have to prove that fact. Equally, it was not competent for the defendant to attempt to disprove what was in fact admitted by him on the record of proceedings.

In any event, whatever my views may have been on the admission made would have counted for nothing because the Supreme Court has already made conclusive findings on it.”

31. The remarks by the court *a quo* clearly establish that the court did not mutate the findings of this Court in *Nherera v Shah (supra)* that the respondent had established a *prima facie* case to proof of his case on a balance of probabilities. It arrived at its own separate decision. The appellant, however, chose to harp on the remarks of the court *a quo* at p 9 that:

“The Supreme Court has said so and the *prima facie* evidence of the plaintiff mutated to proof of the plaintiff’s case on a balance of probabilities.”

The appellant has, in no doubt, chosen to turn a blind eye to the context in which the remarks were made in in para 30. The remarks came at the end of an analysis by the court *a quo* of the all the evidence that had been adduced before it. The appellant therefore sought to gain mileage out of just that one sentence.

32. The appellant further sought to rely on the findings in the judgments in HH 238/17 and SC 99/20 as evidence that he had controverted the respondent’s *prima facie* evidence. As correctly submitted by the respondent, the findings in those two cases were not relevant to the determination of the trial *a quo* and this appeal. The appellant appealed in SC 99/20 against the decision in HH 238/17. At the core of the two matters was the validity of a lease between Gift Investments and ZUPCO. The High Court had made a finding, which was upheld on appeal, that the appellant had been involved in a “corrupt relationship” with the respondent. The finding was based on the appellant’s own admission before the court of having paid the respondent and Bright Matonga a bribe in the sum of US\$20 000 in order to induce the two to influence ZUPCO to renew the lease agreement. Firstly, the two cases

related to a different *causa* from the present appeal which relates to the purchase of buses. Secondly, the respondent was not a party to the proceedings in both matters and therefore the findings therefrom could not be used against him. In fact, the appellant sought to “mutate” the findings on his own admitted corruption to prove corruption on the part of the respondent in an apparently unrelated matter on the strength of an alleged “corrupt relationship”. It is inconceivable how “a corrupt relationship” in one matter would have “mutated” to be evidence of corruption in totally different circumstances.

33. The respondent was further required to prove that the appellant had acted without reasonable and probable cause. He was also required to prove that the appellant’s conduct was actuated by malice. The court *a quo* held that the respondent had proved that the appellant acted without reasonable and probable cause and his report was actuated by malice. I can do no more than quote the remarks by the court *a quo*. It remarked at page 9 that:

“It is the defendant who pointed an accusing finger against the plaintiff that he was a bribe-monger. It is that accusation that anchored the state case in the criminal prosecution. So the defendant was also required to establish the solicitation for the prosecution to succeed.”

And at p 10-11-

“The defendant indeed had an opportunity to rebut the plaintiff’s case when he was put to his defence. His evidence in this regard was entirely unhelpful to his cause. He did not improve on his inaudible audio recording. Apart from that, he was an extremely poor witness whose testimony was thrown into disarray even before he was cross-examined. In the end I was left in no doubt that the defendant possessed no evidence whatsoever, other than his own word, that the plaintiff solicited for a bribe.

This being a case to be determined on a preponderance of probabilities, I cannot help but conclude that the probabilities weigh heavily against the defendant. What business person imports into the country buses already painted in a potential buyer’s colours before the latter has even flighted a tender for those buses? Apart from that, so desperate was he to have the tender flighted (as if it was guaranteed he would win it), that he did not hesitate pressurising the

Minister to fire the plaintiff for not authorising the tender. This is a person who was already leasing space right at the potential buyer's premises to warehouse the same buses. It occurs to me that the probabilities are that at that stage the defendant would have done anything to offload the buses, including fabricating the story of the bribe. I come to the conclusion that the defendant has done nothing in his testimony to disgorge the *prima facie* case found to have been established by the plaintiff on appeal. Therefore, that case has become proof of the absence of reasonable and probable cause for the arrest of the plaintiff.

In our law the existence of malice is inferred from the absence of reasonable and probable cause for prosecuting the plaintiff. I have no hesitation in finding that the defendant did not lodge a report against the plaintiff in good faith. Quite to the contrary, the report was not only false it was also malicious. He set about to abuse the legal process maliciously and without reasonable and probable cause for bringing criminal proceedings against the plaintiff.”

The above remarks are apt and require no further elaboration. The court *a quo* cannot be faulted for making those findings.

34. It is common cause that the conviction of the respondent was quashed and the sentence set aside on appeal by the High Court. The Supreme Court again pronounced itself on the question and remarked at para 35 that:

“...The reality is that the order was made by two judges of the High Court after considering the record of the proceedings as well as the reasons given by the Attorney General in conceding the appeal. The effect of that order was to fully and finally quash the conviction and sentence.”

35. This Court cannot lightly interfere with such findings. It can only do so where the court *a quo* grossly erred in its finding of facts. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E. The appellant has not shown that the court *a quo*'s findings were in any way irrational. The court *a quo* therefore correctly found that the respondent had proved all the four requirements and that the appellant was therefore liable for the damages claimed by the respondent.

Whether or not the court *a quo* misdirected itself in awarding damages in favour of the respondent in the absence of evidence from the respondent on how the damages were computed.

36. The appellant submitted that the court *a quo* erroneously awarded damages to the respondent in circumstances where the respondent had not adduced evidence justifying the *quantum* of such damages. He also argued that the court *a quo* quantified the damages in spite of its finding that no evidence on quantification had been adduced. It was contended that absolution from the instance ought to have been the appropriate judgment of the court *a quo*.

37. It is trite that damages for the cause of action brought by the respondent cannot be computed with mathematical precision. Because the damages are not capable of precise calculation, the determination of the *quantum* of damages is within the discretion of the court which must be satisfied that the *quantum* to be awarded is just and fair. It is therefore not always necessary that a party leads evidence to establish the *quantum*. In *Minister of Defence and Another v Jackson* 1990 (2) ZLR 1 (S) GUBBAY JA remarked that:

“What is essential is for a trial court to draw on its own experience in making an assessment of damages – **an exercise which is necessarily dependent upon some degree of surmise, conjecture and imagination, for general damages are not capable of exact arithmetic calculations.**” (Own emphasis)

38. In *Minister of Police v Page* (CA 231/19) [2021] ZAECGHC 22, at p 3, it was held that:

“It is trite that in cases involving deprivation of liberty, the *quantum* of damages to be awarded is in the discretion of the trial court, to be exercised fairly, and generally calculated according to what is equitable and good, and on the merits of the case itself (*ex aequo et bono*). As a result, an appeal court should be slow to interfere, unless there are specific reasons to do so”

39. The factors that a court should consider in assessing the damages are spelt out in Visser & Potgieter *Quantum of Damages for injury to Personality* 3rd ed 2012. It is stated at p 545-548 that:

“15.3.9 Unlawful and malicious deprivation of liberty or arrest

In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bono*. Factors which can play a role are the circumstances under which the deprivation of liberty took place: absence of improper motive or “malice” on the part of the defendant; the harsh conduct of the defendants, the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability 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 comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation, the fact that plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and according to some, the view that the *actio injuriarum* also has a punitive function.”

40. The assessment of damages for malicious prosecution is again discretionary taking into consideration the same factors as in the assessment of damages for malicious arrest and deprivation of liberty. (See Visser & Potgieter *Quantum of Damages for injury to Personality* (*supra*), 15.3.11 at pp 549-550).

41. The court *a quo* was mindful of its discretion and the factors to be considered in the exercise of that discretion. After referring to relevant authorities such as *Minister of Defence and Another v Jackson* (*supra*) and *Fabiola v Mvudura Louis* HH 25/09, it remarked at p 14 that:

“However the relevant considerations in assessing the damages, as the authorities cited above show, start from the listing of what the plaintiff was immediately before the event causing his loss occurred. Then there was the event of his arrest, prosecution and detention. It caused what the plaintiff became at the time of his release from prison which determined the reduction *inter alia* of his patrimony and his good image in the eyes of both the public and members of his family.

I have already set out what the plaintiff was before the event. As a result of it, he lost his prestigious and well-paying job as the Vice Chancellor of Chinhoyi University of Technology. While he did not lose his qualifications, he lost his benefits and income. These include the use of his personal issue Mercedes Benz motor vehicle, entertainment, housing, security, fuel and cell phone allowances. He also lost educational benefits for his two children and wife.”

42. It further remarked at p 16 that:

“Regarding the claim of US\$ 300 000.00 for malicious arrest and detention, it should be recalled that the delict occurs when there is no reasonable or probable cause for the allegation of criminal conduct. The institution of proceedings constitutes an abuse of the right to lay genuine complaints. In such circumstances the complaint by the defendant, as has been shown above, is without foundation and intended to cause harm or injury to the plaintiff.

The plaintiff suffered ill-treatment in prison where he endured poor prison conditions and diet. He was taken away from his family and lost his job and other contacts. In fact, the loss of liberty in its self is such deprivation of a constitutional right that it cannot be countenanced where the basis for it is malice. I have related to the financial loss which the plaintiff had to bear over and above all else to show that indeed considerable compensation is called for.”

43. The court *a quo* exercised its discretion judiciously as it took into account the relevant factors requisite in the assessment of general damages for malicious arrest, prosecution and detention. The reference by the court *a quo* to lack of evidence to establish the quantum of damages is therefore of no moment.

2. Whether or not it was competent for the court *a quo* to award damages denominated in United States dollar

44. The appellant impugned the granting of the award denominated in a currency which was not the legal tender of the Republic of Zimbabwe. He relied his submission on s 3 (2)(b) and (c) of the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulation, Statutory Instrument 212 of 2019 (the Regulations). As correctly submitted by the respondent, the law did not preclude the granting of a judgment in foreign currency provided payment thereof could be made in local currency. The Regulations

provide for the exclusive use of the Zimbabwean dollar to settle domestic transactions.

Section 3(1) and (2) of the Regulations reads:

“Exclusive use of Zimbabwean currency for domestic transactions

3. (1) Subject to s 4, **no person who is a party to a domestic transaction shall pay or receive as the price or the value of any consideration payable or receivable in respect of such transaction any currency other than the Zimbabwean dollar.**

(2) In particular (without limiting the scope of subsection (1)) no person shall-

- (a) quote, display, label, charge, solicit for the payment of, receive or pay the price of any goods, services, fee or commission in any currency other than the Zimbabwe dollar; or
- (b) **settle any obligation by barter or otherwise for a consideration that is not denominated by, or is not valued in, the Zimbabwean dollar; or**
- (c) **receive, demand, pay or solicit for payment** by means of any token, voucher, coupon, chit, instrument, unit of account or other means or unit of payment (whether material or digital) that is pegged to, referable to or used in substitution for any foreign currency or unit of a foreign currency.”

Domestic transactions are defined in s 2 to mean:

“any transaction within Zimbabwe hereby-

(a) goods or services are—

- (i) offered for sale or attempted to be offered for sale; or
- (ii) sold by auction; or
- (iii) exposed, displayed or advertised for sale; or
- (iv) sold under an agreement in terms of the Hire-Purchase Act [*Chapter 14:11*] or by means of staggered payments or instalments; or
- (v) transmitted, conveyed, delivered, distributed, possessed or prepared for sale; or
- (vi) bartered or otherwise exchanged or disposed of for valuable consideration;

(b) any, fee, or levy or commission or other valuable consideration is payable;”

45. It is trite that words of a statute shall be given their ordinary grammatical meaning unless doing so leads to an absurdity. (See *Thandikile Zulu v ZB Financial Holdings (Private) Limited* SC 48/18). The intention of the legislature is clear that the application of the Regulations was limited to domestic transactions as defined only. It was certainly incompetent for anyone to settle any obligation or demand the payment in respect of domestic transactions in foreign currency. However, the Regulations did not proscribe the

granting of judgment denominated in and payment thereof in foreign currency. The Regulations were therefore not applicable to this case. In any event, the court *a quo* ordered that the payment of the damages in United States dollars be converted to RTGS dollars at the interbank rate prevailing on the date of payment. It could competently do so. In *Construction Resources Africa (Pvt) Ltd v Central African Building and Construction Company (Pvt) Ltd & Another* SC 110/22, at p 37, the court citing with approval the case of *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (S), remarked as follows: -

“I am firmly of the opinion that in the absence of any legislative enactments which require our courts to order payment in local currency only, the innovative lead taken both in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL)) and the subsequent extensions to the rule there enunciated, and in the *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C) at 673C-674B and 674E) case in South Africa, is to be adopted. This will bring Zimbabwe into line with many foreign legal systems. See *Mann The Legal Aspect of Money* 4 ed at pp 339-340.

Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of a devaluation in the value of currency between the due date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement.”

46. In view of the above, it is trite that in the absence of an enactment directly prohibiting the courts to order payment in foreign currency, a court is at liberty to pronounce a judgment for damages sounding in foreign currency though such amount may be paid in local currency at the interbank rate prevailing at the date of payment. The court *a quo* therefore did not misdirect itself when it held that the law did not proscribe the grant of damages in foreign currency to be paid in RTGS dollars at an equivalent rate reckoned at the interbank rate at the time of payment.

47. As at the date of the judgment *a quo*, the applicable local currency was the RTGS dollar. It is however common cause that the currency has since changed to the ZIG dollar. This necessitates an amendment of the judgment of the court *a quo* to reflect the change in the local currency. There would be no prejudice to the parties. The Court is empowered in terms of s 22 (1) to issue such judgment as the case may require. This is one such case that requires an amendment to paragraph 3 of the judgment of the court *a quo*.

COSTS

48. The respondent prayed for punitive costs. In the circumstances of this matter, an award of punitive costs is merited. The appeal was frivolous and vexatious and a clear abuse of court process. The appellant irrationally sought to impugn the judgment of this Court in *Nherera v Shah (supra)* where it is trite that the judgment was final and binding on the court *a quo*. He further sought to impute corruption on the respondent relying on decisions in this Court and the High Court which related not only to a different case but in which the respondent was not a party on the basis of what he said was a “relationship of corruption between the appellant and the respondent.” It is difficult to fathom how the respondent could have been held to be corrupt on the basis of a relationship of corruption between the parties. The appellant was represented by counsel who should have known better.

49. The appellant has been unrepentant. He has not shown an iota of contrition. Because of his unrepentance, he has kept the respondent on the judicial radar for the past eighteen years, since 2005 when the respondent was arrested. This appeal reflects the appellant’s resolve at not taking full ownership of his malicious conduct and the consequences thereof. He in fact had the temerity to pray for punitive costs against the respondent, playing the

trump card of a patriotic citizen when in fact he has, to use his own term, “unrelentingly persisted with (the respondent’s) persecution”.

50. In *Chioza v Sawyer* 1997 (2) ZLR 178 (SC), it was held that:

“On this basis I have no hesitation in dismissing the appeal. Nor do I think we can resist the prayer for costs on the higher scale. The appeal was always doomed to failure and litigants, although they have a right to appeal, should not be permitted to force their opponents to incur costs when the appeal is hopeless. It is true we do not penalise every hopeless appeal in this way – see *Mutede v Duly & Co Ltd* S-202-93. But the present case has an element of harassment which justifies such an award. See generally *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 21F; *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607; and *Cilliers Law of Costs* 2 ed p 54 *et seq.*”

(See also *Borrowdale Country Club v Murandu* 1987 (2) ZLR 77 (H))

DISPOSITION

51. The appeal lacks merit. In the result, it is ordered as follows:

1. The appeal be and is hereby dismissed with costs on the legal practitioner and client scale.
2. Paragraph 3 of the judgment of the court *a quo* is amended by the deletion of “RTGS dollars” and substitution thereof with “local currency”.

GWAUNZA DCJ : I agree

GUVAVA JA : I agree

Temple Bar Zimbabwe Inns of Court and Atherstone & Cook, appellant’s legal practitioners

Hove & Associates, respondent's legal practitioner