NGONIDZASHE SANANGURA

versus

ECONET WIRELESS (PVT) LTD

and

GODFREY MANGEZI

and

TRANSACTION PAYMENT SOLUTIONS (PVT) LTD

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE 5, 6, 7 September and1, 2, 4 and 17 October 2012

**Civil Trial**

*N Chikono,* for the plaintiff

*H Nkomo,* for the defendants

KUDYA J: On 12 August 2011, the plaintiff issued summons against the first and second defendants for malicious prosecution and against third defendant for defamation. He claimed US$530 000-00 for malicious prosecution being US$ 300 000-00 for loss of earnings, US$150 000-00 for pain and suffering, US$70 000-00 for contumelia, US$10 000-00 for legal fees and US$180 000-00 for defamation and interest on these amounts and costs of suit. The defendants contested the action. In addition, the first defendant filed a counterclaim that it later withdrew on 2 October 2012 with a tender of the plaintiff’s wasted costs. This judgment is concerned with the main claim only.

The plaintiff, the chief executive officer of and majority shareholder in Flamsrock Trading (Pvt) Ltd (Flamsrock) gave evidence on his own behalf and produced six documentary exhibits. He called the additional testimony of Tamutswa Mugadza, a former customers’ service employee of Flamsrock. The second defendant, a loss control and investigations officer of first defendant testified on his own behalf and for the first defendant. In addition, Chido Kwande, a legal officer of the first defendant testified as did Ophias Sherewa, the managing director of the third defendant. The third defendant was a subsidiary of and distributor of electronic airtime for the first defendant. The defendants produced a further two documentary exhibits.

The following evidence was common cause. On 10 February 2009 the third defendant, represented by Ophias Sherewa, and Flamsrock, represented by the plaintiff, entered into an agreement, exh 8, for the supply of electronic airtime generated by the first defendant by the former to the latter. Flamsrock bound itself to sell prepaid airtime vouchers purchased at a discount of 71/2 % through three TPS terminals and the third defendant undertook to service the terminals and guaranteed their smooth operation.

On Tuesday 31 March 2009, the plaintiff was arrested by detective assistant inspector Mazenyera and detective sergeant Dodo of Gweru Central police station at his workstation at the corner of Robert Mugabe Street and First Street in Harare for the theft of electronic recharge card pins belonging to the first defendant. The detectives were in the company of the second defendant and Innocent Mango, an account manager of the first defendant. He was taken to the offices of the third defendant in Pegasus House along Samora Machel Avenue in Harare. He was interrogated for two hours. Thereafter, he was detained at Rhodesville police station for two nights before he was driven to Gweru Central Police Station on 2 April 2009. He engaged the services of a legal practitioner in Gweru to represent him. He was taken to court on Monday 6 April where he was remanded in Hwahwa Remand Prison until he was granted bail on 8 April 2009. He surrendered his passport as part of his bail conditions. On or about 6 April 2009, the plaintiff secured the position of a consultant with a South African company, Dawn Advisory Services (Pty) Ltd for the Musina Burial Society Project. The full details of the project proposal are set out in the 42 paged document, exh 6. His application for the return of his passport to travel for the board meeting of 24 April 2009 in connection with the project failed and resulted in the cancellation in exh 3 of his consultancy by Dawn Advisory Services. He remained on bail until 17 August 2009 when the charges against him were withdrawn before plea for lack of evidence. Meanwhile on 12 May 2009, the third defendant wrote exh 2 to the plaintiff cancelling the pre-paid airtime agreement.

On 24 August 2009, the plaintiff wrote a letter of demand to the defendants. It was responded to on 27 August, exh 4, by the present erstwhile legal practitioners of the defendants. Soon thereafter the plaintiff sued the defendants in HC 4343/2009. The matter was withdrawn at the pre-trial conference stage as a result of the resuscitation of the criminal proceedings. Dawn Advisory services engaged the services of the plaintiff as a consultant in another project based in Kimberly in the Northern Cape province of South Africa in terms of the conditions set out in the employment agreement exh 1, executed in Johannesburg on 2 November 2009. On 12 November 2009 he obtained a five year work permit, exhibit 5, to take up employment in the Republic of South Africa with Dawn Services as a consultant.

At the instigation of the first defendant, on 28 April 2010 the Director of Public Prosecutions, in exh 7, acceded to the demand of the first defendant to resuscitate the withdrawn charges of theft of recharge pins opining that he had a case to answer. The plaintiff was summonsed and tried for two counts of theft on the unchanged evidence that had led to the withdrawal of the charges. Amongst the witnesses called by the State were the second defendant and an employee of the first defendant Abishama Amerigo. The plaintiff attended his trial from Kimberly, South Africa until he was acquitted at the close of the prosecution case. He then launched the present action.

There were several disputes of fact between the parties. One of the disputes was whether or not the plaintiff was related to the second defendant. The two parties agreed that the plaintiff’s mother shared the same surname as the second defendant. The two had never met until 2008 when the second defendant investigated a theft committed against the first defendant allegedly by the plaintiff, Whatmore Jonga and Tinashe Simba in CRB 4671/08 that is still to be tried. The second defendant disputed the relationship. The plaintiff failed to adduce evidence to establish the relationship. I find that they are not related.

The second dispute concerned the utterances and conduct of the second defendant towards the plaintiff during the period he was under arrest. The plaintiff averred that the second defendant exhibited hostility towards him. He directed the police on what to do. At one time the police allowed the second defendant to interrogate him in private at Gweru Central police station. The second defendant took the attitude that an employee of the first defendant had supplied the plaintiff with the recharge pins in question; and when he failed to extract a confession confirming this belief, he threatened the plaintiff would rot in Hwahwa prison and requested the police to deal with him without mercy. The plaintiff’s witness Tamutswa Mugadza stated that the second defendant visited Flamsrock offices twice on the day the plaintiff was arrested and once two or three days later. He demanded the keys and the combination to the office safe from Tendai Handiro. He returned and took the witness to Pegasus House for questioning. He wanted to know where Flamsrock employees were printing airtime that he said the plaintiff had stolen from the first defendant. Tamutswa Mugadza confirmed the high handed manner exhibited by the second defendant even in the presence of the police.

The second defendant denied these allegations. He stated that he carried out investigations on the stolen recharge pins in Makoni Chitungwiza. One of the purchasers, Needmore Haji led him to David Chimbirimbiri who in turn led him to the plaintiff. He invited the plaintiff for an interview at the head office of the first defendant in Masasa. He interviewed him in the presence of his account manager Innocent Mango, the business risk manager Innocent Chadyiwa, and a fellow investigator Nkosana Kanye; all employees of the first defendant. The plaintiff claimed that he had received 150 cards worth US$750-00 from one Tony and provided the meeting with Tony’s Telecel cellular number. He did not have the full details of Tony such as his surname, business and residential address. He indicated that Tony was a walk-in supplier who asked his supervisor Tendai Handiro to sell the recharge pins for him on commission. Tendai Handiro wrote his name and the details of the transaction in a register for that purpose. Tony would come daily to collect his proceeds less commission from the sale. He provided the physical description of Tony and his suspicion from his accent that he was a foreigner. The second defendant apparently believed him for he requested him and he agreed as a business partner of the first defendant to trap Tony.

Two weeks elapsed without feed back from the plaintiff. Then the late sergeant Dodo from Gweru telephoned the second defendant over a deactivated recharge voucher. The voucher had been sold by Judith Nyamukunda in Gweru who held more of the deactivated recharge vouchers. Judith led the detective sergeant and detective assistant inspector Mazenyera to Caleb Majiri who was arrested at Pennywise in Eastlea Harare. They were driven by Innocent Mango from Gweru to Harare. Majiri had received 450 recharge pins worth US$2 250-00 from the plaintiff and was detained at the third defendant’s Pegasus House offices. The plaintiff was arrested and taken to the same offices. He did not disclose supplying Caleb with 450 recharge vouchers until Caleb was produced before him by the police. The second defendant asked the plaintiff in the presence of the police why he had not disclosed providing Caleb with these recharge vouchers. He maintained that the recharge vouchers had been supplied by Tony. Thereafter the second defendant drove the two police detectives, plaintiff, Caleb and Innocent Mango to Gweru in his Mazda 626. In his summary of evidence and the letter written by his counsel, exh 4, the second defendant further indicated his belief that the plaintiff had a fiduciary duty to disclose air time distributors who were selling airtime at rock bottom discounts to the first defendant.

I discerned from the second defendant’s summary of evidence and his testimony both in chief and under cross examination that he believed from the time of Caleb’s arrest to the time he left the witness box that he had an unassailable case of theft of recharge pins against the plaintiff. The second defendant reinforced his belief that the plaintiff was a dishonesty person from the 2008 investigations. The 2008 theft of 45 international test roaming sim cards lost by first defendant were traced to a retired army captain Salani who had supplied them to Chimbirimbiri. Chimbirimbiri had in turn supplied them to the plaintiff who refilled them in a sim box where they were all recovered from the plaintiff and his two colleagues. The second defendant thus believed that he had a strong case of theft against the plaintiff. This was based on the 600 recharge pins worth US$ 3 000-00 that were traced back to him. The plaintiff had incomplete information on Tony notwithstanding that Flamsrock did business with him from October 2008. He did not voluntarily disclose supplying 450 recharge pins to Caleb.

The second defendant was however aware that the plaintiff could not have stolen the recharge vouchers without inside assistance from an employee of the first defendant. The plaintiff did not have the passwords that would provide him access to the information operating systems of the first defendant. He also did not have access to the computer hardware of the first defendant.

The second defendant’s investigations of 24 March 2009 within the first defendant revealed that 150 recharge pins sold in Chitungwiza were part of many that were generated for Innscor Zimbabwe Ltd by Jacqueline Chingosho of the first defendant’s inventory department on 27 February 2009. Innscor had requested recharge pins of US$2-00 denominations. The inventory department generated US$5-00 pins. Innscor declined to collect them. Chingosho e-mailed Tawanda Munhenga and Solomon Manda of the information system department to immediately deactivate them. Munhenga of his own accord did not do so but chose to route them back into the system and placed them at the bottom of the reallocation tray. The 450 recharge vouchers were part of the many that were generated for OK Zimbabwe Ltd by Emmanuel Gonde and Jacqueline Chingosho in the inventory department on 24 February 2009. These were personally delivered by the first defendant’s OK Zimbabwe account manager Abishama Amerigo to OK Zimbabwe on a flash stick on 25 February. Mr Mandizha of OK Zimbabwe Ltd loaded the file into his company’s system. The recharge cards were for the wrong denominations. The inventory supervisor of the first defendant Felix Mpala e-mailed the information system department to deactivate the recharge pins and copied the e-mail to Mr Mandizha at OK Zimbabwe Ltd. Again, Tawanda, in his wisdom defied the e-mail and filed the active recharge pins at the bottom of the reallocation platform.

The awareness held by the second defendant that the plaintiff could not have acted without inside information coupled with his belief that he had a strong case against him in all probability led him to utter the words attributed to him by the plaintiff; that for failing to disclose his accomplice in the first defendant he would rot in Hwahwa prison. The highhanded manner in which the second defendant acted was confirmed by Tamutswa Mugadza. I therefore believed the plaintiff’s story on the words and conduct of the second defendant towards him.

I also find that the second defendant, for reasons best known to himself falsely claimed that the Gweru police did not receive a report of complaint from the first defendant before they came to Harare to arrest Caleb and thereafter the plaintiff. He used a written report he made after the plaintiff had been arraigned as proof of this averment. He however admitted that the late sergeant Dodo was drawn into the investigations by the hue and cry raised by the deactivation of the recharge pins that had been sold to the general public in Gweru by Judith Nyamukunda. He further admitted that Dodo telephoned him. He did not disclose his conversation with Dodo. The probabilities are that he explained that deactivation was a result of theft of the recharge pins from the first defendant. He thus made a verbal report of theft. That he did so was confirmed by his averment that Gweru police opened a Report Received Book (RRB) number and a Crime Register (CR) number. It is further confirmed by his averment that he went to Gweru with Innocent Mango, a fellow employee of the first defendant whose car conveyed the Gweru police to Harare to arrest Caleb Majiri. It was contrary to his story that the police was informed by the customer care department of the first defendant that the recharge pins that were deactivated had been stolen. It contradicted the averments in para(s) 3.1 of the plea and 6 of the summary of evidence that the arrest followed a report from the first defendant. The second defendant falsely claimed the existence of a fiduciary duty on the plaintiff to notify the first defendant of discounts that were below the standard ones it provided. Such a clause does not appear in exh 8. He failed to produce such a condition under cross examination.

At the pre-trial conference held on 17 January 2012, seventeen issues were referred to trial. Of these, fourteen were for the main claim and three for the counter claim. At the commencement of trial, I reduced the seventeen issues to five. I perceived the issues for determination for both the main and counter claim to be:

1. Whether the arrest and prosecution of the plaintiff was actuated by malice by the first and second defendant;
2. Whether the letter of 12 May 2009 was defamatory of the plaintiff;
3. What is the measure of damages due to the plaintiff in each instance
4. Whether the plaintiff stole the first defendant’s recharge pins
5. In what amount is the plaintiff liable to the first defendant?

The withdrawal of the counterclaim leaves three issues for determination. I proceed to deal with each issue in turn.

1. *Whether the arrest and prosecution of the plaintiff was actuated by malice*

It was common cause that the plaintiff was arrested by the police and prosecuted by the Attorney-General in terms of the powers conferred on both State institutions by the Constitution and the Criminal Procedure and Evidence Act. The plaintiff did not join these State institutions in the present suit. He was not obliged to do so. In the defamation case of *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) at 324G REYNOLDS J stated that:

“Furthermore, and to the best of my knowledge there is no reason why the plaintiff should not proceed against only one of two or more possible defendants, and no reason why he should not recover a total award from that defendant.”

Even though the sentiments were stated in a defamation case, in my view they apply with equal force to malicious prosecution. The case of *Bande* v *Muchinguri* 1991 (1) ZLR 476 (H) at 483G-484A, is by implication to the same effect. MALABA J, as he then was, stated that:

“I now decide whether Mr Bande has established on a balance of probabilities the elements of the delict of malicious prosecution. A prosecution was of course instituted against Mr *Bande* which terminated in his favour. The criminal proceedings were instituted by the public prosecutor in the exercise of the delegated powers of the Attorney-General contained in s 76(4) (a) of the Constitution of Zimbabwe. The question is whether Mr Muchinguri instigated the institution of the prosecution against the plaintiff.”

In my view, a plaintiff has the absolute choice to elect who to proceed against in a suit of malicious prosecution. The question for determination is whether the plaintiff has established the elements of the delict of malicious prosecution.

The plaintiff averred that the first and second defendants instigated his prosecution. The plaintiff established that he was arrested by detective assistant inspector Mazenyera. He established that the complainant who made the report against him through its customer care department and the second defendant was the first defendant. He established that he was arrested at the instance of the second defendant who at all times acted for the first defendant. This was confirmed by the second defendant and para(s) 3.1 of the plea and 6 of the defendants summary of evidence. The first and second defendants denied acting in malice and averred that they simply told the detectives the facts and left them to act on their own judgment. In addition they averred that the detectives were engaging in an arresting spree commencing with the arrest of Judith, then Caleb before they arrested the plaintiff.

The onus remains on the plaintiff to prove malice on a balance of probabilities. In our law, malice has been definitively defined in many cases. I refer to the following cases: *Monckten* v *British South Africa Co* 1920 AD 324 at 331- 332, *Bande* v *Muchinguri, supra*, at 484 B-D, 484G-484A, 487E-488A; *Mugwadi* v *Nhari* 2001 (1) ZLR 36 (H) at 42E, *Mugadziwa* v *Shoko* HH 34/2006 at p 12-13 of the cyclostyled judgment and *Garwe* v *Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) at 234F-236D. Malice in delict has a wide meaning. It covers spite and ill-will, often referred to as express malice or *dolus directus;* indirect and improper motive, often referred to as implied malice or *dolus indirectus,* and “statements that he did not know to be true, reckless whether the statements were true or false” (*dolus eventualis*).

It was not disputed that Innocent Mango, an account manger employed by the first defendant and the second defendant were present during the arrests of Judith, Caleb and the plaintiff. They took an active as opposed to a passive role. The second defendant and through him the first defendant went beyond merely making a report and identifying the plaintiff. He provided transport to the police. He provided interrogation room at Pegasus House situated at a distance far greater than Harare Central Police Station from Flamsrock offices. By his own admission, the second defendant interviewed the plaintiff in the presence of police officers. He drove the handcuffed plaintiff to Gweru and threatened him with a long jail term for declining to name an employee of the first defendant whom he believed had provided him with the recharge pins.

Charges were withdrawn by a prosecutor in the exercise of his own professional judgment on 17 August 2009. The first and second defendants were prompted to act by the plaintiff’s letter of demand of 24 August 2009. In exh 4, on 27 August 2009, the defendants’ erstwhile legal practitioners of record expressed their intention to seek a certificate declining prosecution to facilitate a private prosecution insisting that there was an overwhelming case of theft against the plaintiff. The letter from the Director of Public Prosecutions, exh 7 demonstrates that the defendants entered into communication with her office. The Director of Public Prosecutions did not act of her own accord to review the decision made by her subordinate on 17 August 2009.

The defendants did not have any new evidence to supplement the evidence upon which the withdrawal was based. Chido Kwande, the legal officer of the first defendant knew as did the external counsel that the onus to prove theft of the recharge pins by the plaintiff lay on the State. The plaintiff did not bear any onus to prove his innocence. All that was required of him was to proffer a story that was reasonably possibly true. He had informed the second defendant two weeks before his arrest how Tony had left the recharge vouchers with Tendai Handiro, a manager with Flamsrock for sale on commission. The plaintiff was not personally involved having met Tony once. At the time the first defendant used to pay for services rendered in air time vouchers rather than cash. The fact that the second defendant did not cause his arrest at the time demonstrated the reasonableness of the plaintiff’s story. It was the same story he told the police after Caleb Majiri’s airtime was traced back to him. He was consistent. It was the duty of the police to find evidence to contradict the plaintiff’s story. It does not appear that his version was contradicted by Tendai Handiro, otherwise the State would have called him to witness against the plaintiff. Tendai Handiro does not appear to have disputed the existence of Tony or the register of walk-in suppliers of airtime for sale on commission. Of the total of 130 200 stolen recharge pins worth US$ 651 000-00, only 600 worth US$ 3 000-00 were sold by the plaintiff’s runners. This miniscule number did not warrant the conclusion that the plaintiff stole all or any of the missing recharge pins. In any event, there was no evidence to show that the plaintiff had access to the passwords held by the four personnel in the Inventory and Information System departments. The plaintiff did not have access to the first defendant’s computer system. The first and second defendants were aware that security had been compromised by the failure of Tawanda to deactivate the airtime. The airtime had been loaded into a customer’s system, and was apparently attached to the e-mails dispatched to some of the first defendant’s employees. Amerigo had loaded some of the recharge pins on his flash stick. There was no way of knowing what he did with that information between 25 February and 24 March 2009.

These factors demonstrate the utter weakness of the criminal case against the plaintiff. This must have been glaring apparent to the first and second defendants and their legal advisors; hence the attempt to link the plaintiff by some alleged telephone call history with Emmanuel Gonde in paragraph 10 of the second defendant’s summary of evidence, an averment that was abandoned during the trial. In my view, the first and second defendant did not pursue his arrest and prosecution with any intention to see justice prevail. The second defendant was driven by spite that a man he believed was a thief was escaping from his grip as he had done in the 2008 theft charge. He had him incarcerated and prosecuted to force him to reveal the thief or thieves embedded in the first defendant. Chipo Kwande testified for the first defendant that she worked as a team with the second defendant. The second defendant at all times acted in the course of his duties. The external lawyers acted on the first defendant’s instructions.

I find that the first and second defendant acted out of spite in instigating the arrest and prosecution of the plaintiff. Neither did they have reasonable and probable cause. The arrest and prosecution was clearly based on untrue facts and was pursued recklessly without regard to whether they were true or false. All the three bases for malice have been demonstrated by the words and conduct of the second and first defendant, respectively. The improper motive that drove the initial arraignment in remand court was to force the plaintiff to reveal the employee of the first defendant who had supplied him with the recharge pins. The charges were again resuscitated with the improper motive of punishing him for failing to disclose the insider in first defendant who both the first and second defendant believed had supplied him with the recharge pins.

Accordingly, I find that the prosecution of the plaintiff for two counts of theft of recharge pins belonging to the first defendant was actuated by malice attributable to the first and second defendant.

* 1. *the measure of damages due to the plaintiff*

In the *Bande* case at 488D MALABA J approved the formulation in Joubert *The Law of South Africa* Vol 15 para 617 that:

“The successful plaintiff in an action for malicious prosecution is entitled to damages for both injury to personality and pecuniary loss suffered. The former are awarded as a *solatium* under the *actio iniuriarum* while the latter constitute compensation under the *actio legis Aquilia*."

The plaintiff claimed pecuniary loss suffered in the form of loss of earnings in the sum of US$300 000-00 and legal fees in the sum of US$10 000-00. His major loss was in the Musina Burial Society Project, whose full proposals and projections are set out in exhibit 6, in which he had a 25% share. His involvement was cancelled on 7 May 2009 by exh 3 after he failed to attend the board meeting of 24 April 2009. His application for the release of his passport, surrendered as part of his bail conditions, failed. His projected earnings in the Musina Project in the form of dividends and pay outs over a period of five years were calculated at ZAR 14 934 750-00 the equivalent of US$1 991 300-00 at the cross rate of ZAR7.5 to US$1-00. He claimed a much lower figure of US$300 000-00 on the basis of erroneous legal advice that Zimbabwean Courts were loath to award such a high amount. Loss of earnings falls into the category of special damages where a party is awarded the actual loss that he proves. The project commenced on 1 June 2009 and another consultant was appointed in his place. The plaintiff failed to access the actual out turns of the project. Mr *Nkomo* submitted and Mr *Chikono* conceded that the plaintiff failed to prove his actual loss in the Musina project. He thus failed to establish his actual loss from the project.

The plaintiff also suffered loss of earnings during the period he attended trial after the charges were resuscitated. He established that he commenced employment in Kimberly with the company that had withdrawn his contract in the Musina Project. He commenced employment on 1 December 2009 and worked with the company as a consultant until November 2011. In terms of his contract of employment, exhibit 1, he was amongst other things, entitled to 19% commission for any underwritten business above budget and a performance based annual bonus. He lost out on earning higher commission and performance bonus by his attendance of trial at Gweru. He also incurred travelling and accommodation expenses each time he attended trial. He however failed to quantify his losses on the Kimberly project arising from his travels for trial to Gweru and the cost of those travels.

The plaintiff further averred that he operated an internet café from which air time was sold and a medical consultancy in the name of Flamsrock. The internet café and air time sales were under the direct supervision of Tendai Handiro while the medical consultancy fell under his personal purview. It was common cause that the air time business collapsed on 12 May 2009 after the third defendant cancelled the pre-paid airtime agreement. He estimated that Flamsrock lost net earnings US$ 7 800-00 per 26 day month. He alleged that by the time he closed down the internet café in April 2011 business earnings had dropped from between US$600-00 and US$800-00 a day before his arrest to US$300-00 a day by the time he closed down. He did not time frame the losses suffered by Flamsrock. He did not attempt to quantify the loss he suffered in the medical consultancy. He attributed his local losses to his arrest and that of his employees which affected production. He did not produce any documentary evidence to establish Flamsrock earnings and losses such as cash flow statements, bank statements or tax returns. He did not indicate how these earnings and losses affected his personal income. Again Mr *Chikono* conceded that the plaintiff failed to prove his local losses.

He was represented by two legal practitioners during his initial remand and later during trial proceedings. He paid legal fees and was issued receipts. He did not produce these receipts nor call the legal practitioners in question to establish the actual amount he paid in legal fees. He thus failed to prove his claim of US$10 000-00.

According to *Mbundure* v *Buttress* SC 13/11 at p 4-5 of the cyclostyled judgment, where a party suffered actual loss but fails to produce evidence which is within its power, the court has no other option than to absolve the defendant from the instance.

The claims for pain and suffering and contumelia fall under general damages. They arise from injury to the personality of a plaintiff. They are often referred to as infringements or impairments to the reputation and dignity of a plaintiff. They cover the pain arising from both physical and psychological injury to his personality. The plaintiff claimed the sum of US$220 000-00 for pain and suffering and humiliation caused to his personality, reputation and dignity by the malicious prosecution.

He was handcuffed from Gweru to Harare. He was also handcuffed and placed in leg irons at Gweru Magistrates Court and Hwahwa prison. He suffered physical pain from the handcuffs and leg irons but did not sustain visible injuries. He spent six days in police cells in Harare and Gweru and two days in Hwahwa prison. The conditions were unpleasant, traumatic and tortuous. He did not bath during this ordeal. He slept on the floor. His body was sore. The police cells were overcrowded. It was a painful and discomforting experiencing. He experienced anxiety associated with arrest and prosecution. As a chartered accountant, certified with Serge International since 2009, he feared that his reputation that he had built and achieved as an ethically minded accountant would be destroyed.

According to *Bande’s* case the actual detention and prosecution accompanied by a serious denial of rights to personal liberty of the plaintiff without reasonable and probable cause aggravates the damages. The plaintiff lost his liberty for one week. He underwent the embarrassment, humiliation and expense of a bail application and trial. He lost an opportunity to participate in a lucrative project in South Africa. Even during the present proceedings the first and second defendant characterised him as a criminal. These considerations justify a punitive award of damages that overshadow the equivalent amounts in United States dollars in comparable cases such as *Bande’s* case and *Nheta* v *Fernades* HB 29/94 of approximately US$2 000-00, respectively. In any event the present matter was more serious than *Bande’s* case and had more disastrous consequences than *Nheta’s* case. The damages I estimate as fair and adequate compensation are in the sum of US$ 20 000-00.

1. *Whether the third defendant defamed the plaintiff*

Exhibit 2 formed the basis of the claim of defamation against the third defendant. It was written on the letter head of the third defendant. It sets out the physical, electronic mail address, and website and telephone numbers of the third defendant. I reproduce the letter written by Ophias Sherewa the managing director of the third defendant. It read:

“12 May 2009

Mr Ngoni Sanangura

Chief Executive Officer

Flamsrock Trading (Pvt) Ltd

Carlton Building

84 R Mugabe Road

HARARE

Dear Sir

**RE: TERMINATION OF PREPAID AIRTIME AGREEMENT**

This letter serves to advise you that your contract with Transaction Payment Solutions has been terminated with immediate effect.

The decision follows the fraudulent activities on your account that prejudiced Econet Wireless Zimbabwe (Pvt) Ltd of prepaid airtime. We can confirm we have retrieved the two TPS terminals from your site.

We regret that our relationship had to be prematurely terminated under such circumstances.

Yours sincerely

Signature

Ophias Sherewa

**MANAGING DIRECTOR**

cc: Mr Mangezi-Loss control and investigations officer

cc: Mrs S Mugugu-General Counsel

cc: Mr Toro-HOD Business risk

cc: Mr I Chadyiwa-Risk and loss control manager”.

The plaintiff averred that the letter was highly defamatory and was copied to four people. He also stated that it was read by his fellow employees. Subsequently, the plaintiff’s customers ended up knowing of the cancellation of the dealership licence since the plaintiff was no longer selling airtime. In para 19 of the declaration the plaintiff averred that:

“The third defendant was reckless in writing and publishing the letter since the matter was pending before the courts and there was no allegation pertaining to the actual amount or any evidence directly involving the amount”.*(sic)*

In evidence the plaintiff stated that his personality was his biggest brand in business. He was born on 16 October 1982 and is a chartered accountant. In 2009 he was certified with Serge International, an ethics regulatory body for chartered accountants. He averred that the letter was addressed to him in his personal capacity and that it damaged his reputation by labelling him as a fraudster. Ophias Sherewa who wrote the letter for the third defendant disputed that it defamed the plaintiff. He stated that he wrote the letter to the plaintiff in his official capacity as the managing director of Flamsrock, the company with a prepaid airtime agreement with the third defendant. He stated that the letter was written on the recommendations of the second defendant. He cancelled the agreement on the basis of allegations of theft of airtime belonging to first defendant. He further copied the letter to four internal employees of the first defendant who had a right to receive the letter and an interest in the airtime agreement. He conceded that he wrote the letter without full knowledge of the facts. He also conceded that labelling a businessman a fraudster impaired his reputation and dignity.

The context in which the letter was written was that the plaintiff was facing criminal allegations of theft of recharge pins belonging to the first defendant. He had been arrested, detained, placed on remand and was on bail awaiting trial. The fact of the matter was that Flamsrock had not committed theft against the first defendant. It was not facing any allegations of fraud on its account that had prejudiced the first defendant. In my view, an ordinary reasonable reader of the letter in context would conclude that it was written to the plaintiff personally and that his title and place of business were merely written to confirm his identity and location. That the managing director of the third defendant addressed the letter personally to the plaintiff is highlighted in para 14 of the defendants’ summary of evidence. An unidentified witness, who in my view could only have been the writer of exh 2, would tell the court that:

“He is employed by third defendant…….He will also set out the circumstances under which the dealership agreement with plaintiff’s company was cancelled and this was a result of the *plaintiff’s breach of same by engaging in fraudulent and dishonesty activities prejudicial to the first and third defendants***.** He will testify that the letter was copied to those employees who had a duty to receive it in the course of their work and for purposes of ensuring that the cancellation was effected by all relevant departments.”(italics my own for emphasis)

I hold that the letter was written to the plaintiff in his personal capacity.

The test for defamatory matter was set out in *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) at 317A thus:

“The test that has been long accepted by our courts is whether the imputations made would lower the reputation of the plaintiff in the eyes of ordinary, right-thinking persons of normal intelligence.”

The words “fraudulent activities on your account” in my view are *per se* defamatory of the plaintiff. They portray him as a fraudster. They lower his estimation and injure his standing and reputation in the eyes of the four people to whom it was copied. The letter was published to four internal employees of the first defendant. The averment in the plaintiff’s declaration that it was also read by other employees of Flamsrock was not proved in evidence.

In *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) at 278H-279A SANDURA JP, as he then was, stated:

“It is a well established principle in our law that once it is proved or admitted that a defamatory statement was published the presumption arises that such publication was wrongful and that the defendant acted *animo injuriandi*.”

And at 279E-F

“In the circumstances, I am satisfied that where, as in the present case, the words complained of are defamatory in their natural and ordinary meaning the plaintiff need prove nothing more than their publication. There is a presumption that the publication of the defamatory statements by the defendants was wrongful and that the defendants acted *animo injuriandi.* It is for the defendants to rebut that presumption by establishing either of the two defences which they have raised.”

To the same effect is the *Zvobgo* case, *supra,* at 319H-320A:

“As I understand the position, however, if a statement is proved to be defamatory, *animus injuriandi* is presumed or inferred (*Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 401-2; *May v Udwin* 1981 (1) SA 1(A) at 10; *Nydoo v Vengtas* 1965 (1) SA 1 (A) at 20).”

The presumption of an intention to injure is negated by the defence raised by the third defendant of qualified privilege. In stating that he had a duty or legitimate interest to make the statement to persons who had a duty or legitimate interest to receive it the third defendant raised the defence of qualified privilege. See *Mugadziwa* v *Shoko, supra* at p11-12 of the cyclostyled judgment; *Mugwadi* v *Nhari,* supra at 41D. The negation of the presumption simply means that the plaintiff remains with the onus to prove *animus injuriandi* on a balance of probabilities. The plaintiff discharges this onus by establishing in the words of CHINHENGO J in the *Nhari* case *supra* at 42E that:

“the defendant published the letter *mala fide* or with ill-will or that the defendant was actuated by any indirect or improper motive or that he stated what he did not know to be true, reckless whether what he stated was true or false.”

In the present matter the plaintiff’s task of proving malice was simplified by the concession by Ophias Sherewa that he wrote the letter without full knowledge of the facts. In other words he conceded that “he stated what he did not know to be true, reckless whether what he stated was true or false”. The reckless abandon displayed by the third respondent is apparent from its treatment of mere allegations, and false allegations at that, as fact. Accordingly, the defence of qualified privilege does not avail the third defendant. I hold that the third defendant defamed the plaintiff.

* 1. *the measure of damages due to the plaintiff*

The calculation of damages due to the plaintiff is a matter in the discretion of the court. However, the court is guided by the eight criteria set out in *Butau v Madzianike* HH 378/12 at p 9 of the cyclostyled judgment and *Macheka* v *Metcalfe & Anor* HH 62/2007 at p 8 of the cyclostyled judgment.

In applying these criteria, I find that the defamatory matter was in written form and it labelled the plaintiff as a fraudster. The publication was however restricted to four people who worked for the holding company of the third defendant. His image as an honest and ethical businessman was tarnished in the eyes of these four apparently influential employees of the first defendant. The plaintiff is a businessman who held 90% shareholding in a company that enjoyed a lucrative business arrangement with the third defendant. The defendant must have been personally benefitting from the arrangement in his capacity as chief executive officer and majority shareholder.

The probable consequences were in the loss of an un-quantified sum of money due to the plaintiff. I have already found that it was published with reckless disregard to the truth. The third defendant did not render any apology to the plaintiff.

Mr *Chikono* referred to the comparable case of *Nkala* v *Sebata & Anor* 2009 (2) ZLR 203(H) in which the plaintiff was labelled by the defendants a stock thief at a village meeting presided over by the chief with the improper motive of his eviction from the village was awarded defamation damages of US$2 000-00. In recent defamation cases such as *Moyo* v *Nkomo & Anor* HB38/11 and *Manyange* v *Mpofu & Anor* HH 162/11 damages have been awarded on their particular facts in the sum of US$5 000-00 and US$6 000-00 respectively.

I estimate that a fair and appropriate sum that will help assuage the plaintiff’s injured feelings and compensate him reasonably for the injury is US$ 2 000-00.

Costs, in line with the sentiments expressed in *Zvobgo’s* case, *supra* at 330B-D follow the cause.

Accordingly, it is ordered that:

1. The first and second defendant be and are hereby absolved from the instance from loss of earnings and legal fees incurred by the plaintiff for malicious prosecution.
2. The first and second defendant shall jointly and severally the one paying the other to be absolved pay the plaintiff:
3. The sum of US$ 20 000-00 in general damages for malicious prosecution;
4. Interest thereon at the prescribed rate from the date of the service of summons to the date of payment in full.
5. The third defendant shall pay to the plaintiff the sum of US$2 000-00 defamation damages and interest thereon at the prescribed rate from the date of the service of summons to the date of payment in full.
6. The first, second and third defendant shall jointly and severally, the one paying the others to be absolved pay the plaintiff’s costs of suit.

*Ngarava Moyo and Chikono,* plaintiff’s legal practitioners

*Mtetwa and Nyambirai*, defendant’s legal practitioners