PROFESSOR CHARLES NHERERA
versus
JAYESH SHAH

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 4 May 2021, 5 May 2021 and 16 December 2021

CIVIL TRIAL

T Magwaliba, for the plaintiff
L Uriri, for the defendant

MATHONSI J: The facts of this matter are aptly captured in two earlier judgments. The first is a judgment of this court in *Nherera* v *Shah* 2015 (2) ZLR 455 (H) which granted absolution from the instance at the conclusion of the plaintiff's case. The second is a judgment of the Supreme Court on appeal in *Nherera* v *Shah* SC 51/19 which allowed the plaintiff's appeal against the grant of absolution from the instance and remitted the matter to this court for continuation of the trial proceedings.

For completeness and to put the matter in proper perspective I will summarise those facts as follows. On 30 November 2011 the plaintiff sued out a summons against the defendant claiming damages of US$100 000.00 for malicious prosecution and US$300 000.00 for malicious arrest and detention.

The plaintiff alleged that on 21 March 2006 and on several divers other occasions the defendant had reported that he had solicited for a bribe in order to facilitate the purchase of certain buses from Gift Investments (Pvt) Ltd, a company in which the defendant had an interest, by Zimbabwe United Passengers Company ("ZUPCO"), another company in which the plaintiff was the chairperson of the Board of Directors.

The plaintiff alleged that when making the report the defendant knew that it was false and malicious. All he intended to do was to coerce the plaintiff and ZUPCO to purchase his company's buses without following proper tender procedures. The plaintiff averred that as a result of the defendant's report he was arrested, prosecuted for contravening a provision of the Prevention of Corruption Act [*Chapter 9:16*] (now repealed), and sentenced to 3 years

imprisonment of which one year imprisonment was suspended on condition of future good behaviour.

It was further alleged by the plaintiff that on 19 November 2009 this court quashed the conviction on appeal and set aside the sentence. By procuring his arrest, prosecution and imprisonment, so the plaintiff alleged, the defendant maliciously caused him injury to his reputation, dignity and liberty thereby entitling him to damages aforesaid.

In contesting the claim, the defendant denied instigating the plaintiff's arrest, prosecution and detention. He however admitted placing information that he held before a police officer in good faith, in the honest and *bona fide* belief that the plaintiff had solicited for a bribe. The act of conveying that information, so the defendant pleaded, was neither wrongful nor as result of a subjective malicious intent to injure the plaintiff.

According to the defendant, the decision to arrest was that of the police upon a consideration of all the relevant information and the formulation of a reasonable suspicion that the plaintiff had committed a criminal offence. The decision to prosecute was that of the Attorney General of Zimbabwe (now the Prosecutor General), in the exercise of a constitutional mandate and upon consideration of all relevant facts.

The defendant further averred that the decision to imprison the plaintiff was that of the trial magistrate upon consideration of all the evidence placed before her and in the discharge of her lawful mandate. He insisted that the information conveyed to the police was true and was conveyed in good faith in the discharge of a subject's obligation to adhere to the laws of Zimbabwe.

The defendant admitted in his plea at para 5.1 thereof, that he "reported to the police" that the plaintiff had solicited for a bribe as alleged. He asserted that he did no more than place a report before the police who were not obligated to arrest the plaintiff upon the making of such report. The police could only do so upon formulating a reasonable suspicion that an offence had been committed.

Regarding the quashing of the conviction, the defendant denied that it meant that the allegations he made were false or that the plaintiff had not solicited for a bribe, or that the report he made was malicious.

The issues for trial, as determined by the parties at a pre-trial conference held before a judge and set out in the joint pre-trial conference minute they signed, are as follows:

1. Whether the report to the police was the cause of the plaintiff's arrest, prosecution and detention.

2. Whether the said report was made in good faith or whether it was false and malicious.
3. Whether the prosecution failed.
4. What damages, if any, were suffered by the plaintiff as a result.

Only two witnesses testified during the trial. The plaintiff stood against the defendant with each of them testifying against the other.

THE PLAINTIFF'S EVIDENCE

The evidence of the plaintiff in support of the claim is set out in detail in both the judgment of this court given upon an application for absolution from the instance at the close of the plaintiff's case and in the Supreme Court judgment. No useful purpose would be served by repeating that evidence in this judgment.

It should suffice to state that the plaintiff denied having solicited for a bribe from the defendant at all. He denied holding a meeting with the defendant at Kensington Shopping Centre at which he was allegedly recorded by the defendant demanding a bribe.

It was the plaintiff's testimony that ZUPCO could not purchase buses without going through tender procedures and without the approval of the tender board. The defendant made false accusations against him and went to the extent of fabricating a recording which he played to various individuals and institutions in order to cause his arrest and imprisonment. The defendant did so after he, as the chairperson of the ZUPCO Board and other Board members, had steadfastly refused to bend to the defendant's demands to purchase his buses, which had already been painted with ZUPCO colours, without following procedure.

In the plaintiff's view, the defendant was intent on causing his arrest and imprisonment in order to get him out of the way. Without him, the defendant would clandestinely sell the buses to ZUPCO as he later did after the plaintiff's imprisonment.

The plaintiff insisted that it was the defendant's report which instigated his arrest. The fact that the defendant was also picked up by the police at some point was of no moment especially as he subsequently solicited for, and obtained immunity from prosecution, and proceeded to testify against the plaintiff during his criminal trial at the magistrates' court. According to the plaintiff, it is not true that the defendant had been a reluctant witness at the criminal trial.

In fact, according to the plaintiff, his criminal trial commenced on 2 May 2006 with the defendant promptly taking the witness's stand to testify against him. He did so before the then

Attorney General gave him immunity and before he deposed to his lengthy witness's statement on 27 July 2006.

The plaintiff stated that he was convicted by the magistrates' court and sentenced to 3 years imprisonment of which 1 year imprisonment was suspended on condition of future good behaviour. Following sentence, he was incarcerated at Harare Central Prison for a period of 1 year. The conditions at that prison were appalling. The diet was bad, the cells were bad and the ablution facilities dehumanising.

After his stint at Harare Central Prison, the plaintiff said he was transferred to Connemara Prison in Midlands. The conditions at that prison were much better as he could even visit his family once a week. He said he remained there until he was released in February 2008 having been given a remission of part of his effective 2 year prison term. All in all he served an effective 16 months imprisonment.

The plaintiff stated that he is a professor of education and currently the Pro- Vice Chancellor of Women University in Africa. He submitted his curriculum vitae detailing his professional activities. He was the founding Vice Chancellor of Chinhoyi University of Technology reporting *inter alia* to the President of Zimbabwe in his capacity as Chancellor of the University.

He stated that in that position he collaborated with other Universities both local and abroad. He had a string of international relations with other universities like the University of Colombo and the University of Shexiang in China where he did collaborative research. He had benefits that accrued to him like a ministerial car (mercedes benz), entertainment, housing, security, fuel and cell phone allowances as well as educational benefits for his children and wife. He enjoyed annual holiday within the region with his wife.

The plaintiff added that he is married with two children a daughter and a son. At the time of his incarceration his daughter had just started first year tuition at the University of Cape Town while the son was doing form 3 at Gateway High School in Harare where his wife was a teacher. When he was imprisoned, apart from the embarrassing treatment he was subjected to, including being stripped of the suit he had been wearing and being given tattered prison garb, he lost his job and its attendant benefits. His professional development "moved backwards." He lost his research networks and consultancies including his chairmanship of ZUPCO.

The plaintiff did not particularise his claim for damages beyond what I have stated above. He did not set out how he arrived at the figure of US$100 000.00 for malicious prosecution and US$ 300 000.00 for malicious arrest and detention as delictual damages.

THE DEFENDANT'S EVIDENCE

In his oral evidence in court the defendant stuck to his defence as set out in his plea with quite some difficulties especially during cross examination. He adopted his plea as part of his evidence on oath. He also adopted his testimony in the criminal proceedings as part of his evidence on oath before this court. Apart from that, the defendant also adopted his witness affidavit deposed to on 27 July 2006 as part of his evidence before this court.

The essence of the defendant's evidence is that he did not make a report to the police about the plaintiff having solicited for a bribe. This is at variance with the contents of his plea. According to the defendant he had approached the then Minister of Local Government, Dr Chombo, the then Governor of the Reserve Bank, Dr Gono, the then Minister of State Security, Goche, and some Central Intelligence Officers and confided in them that the plaintiff had demanded from him a US$5 000.00 bribe per bus for ZUPCO to flight a tender for the purchase of buses.

The defendant stated that he had attended a meeting on 28 January 2005 at Minister Chombo's office at which the plaintiff had been in attendance. After the meeting the plaintiff had directed him to follow him to Kensington Shopping Centre. Upon meeting the plaintiff at that Vali's coffee shop, the plaintiff repeated a solitation he had made previously, namely that the defendant should pay US$ 5000.00 per bus to him for the supply of 80 buses to ZUPCO. This was a condition the plaintiff imposed for ZUPCO to flight a tender for the supply of the buses.

The defendant stated that he recorded the conversation on his cell phone. The recording was later given to the police but not before he had played it to Minister Chombo and other officials including the ZUPCO Board at a meeting convened by Minister Chombo on 21 March 2005.

Although he had pleaded that he had placed information to the police and indeed reported to the police that the plaintiff had solicited for a bribe from him, the defendant stated in his *viva voce* evidence that he did not do so. Instead, riding on the evidence he had given at the criminal trial of the plaintiff, the defendant stated that around 10 April 2005, the police had picked him up and taken him to the police station for purposes of charging him with corruption.

It was during interrogation by the police, who beat him up and tortured him in the process, that he disclosed to them that the plaintiff had solicited for a bribe in 2003 as a result of which he paid him and Right Matonga a total of $20 000.00 to renew a lease Gift Investments had. After his release he left the country and was not prepared to return because of the manner of the police had treated him.

It was only a year later that Gula Ndebele, then the Attorney General, started calling him entreating him to return to the country to assist with the case involving, *inter alia,* the plaintiff for him to do so he demanded assurance that he would not be subjected to further abuse at the hands of the police. He later demanded full immunity from prosecution and would not settle for anything less than the immunity granted by the Attorney General himself.

The one given by Superintendent Magwenzi in a letter dated 24 April 2006 was, according to the defendant, not enough. I mentioned in passing though that when he testified at the criminal trial on 2 May 2006, the only immunity letter given to him was that of Superintendent Magwenzi. The one given by Attorney General Gula Ndebele was only written on 20 July 2006 just a few days before the defendant submitted his lengthy witness's statement. He said that statement was for the purpose of prosecuting others including Minister Chombo and Bright Matonga.

The defendant insisted that in 2005 the plaintiff again solicited for a bribe from him. This time, as already stated, he wanted to be paid $ 5000.00 for each bus ZUPCO was to purchase from the defendant's company. Although he did not pay the bribe, this is the information he disclosed to the authorities leading to the plaintiff's arrest.

According to the defendant, the case involving the bribe of US$ 20 000.00 for the renewal of the Gift Investment (Pvt) Ltd lease with ZUPCO has come before this court. It was the finding of TSANGA J, who presided over that case which finding was upheld by the Supreme Court on appeal, that the defendant had been involved in a corrupt relationship with the plaintiff and Matonga. He has accepted that finding.

As to whether the prosecution of the plaintiff failed, the defendant stated that it did not. According to him, the involvement of Johannes Tomana, who had been a Board member and legal advisor of ZUPCO at the material time, the legal practitioner of the plaintiff when he instituted a defamation claim against the defendant in 2006 and an active defence witness at the plaintiff's criminal trial, meant that the concession made by the State was tainted. The State, which in 2009 when it conceded the plaintiff's appeal against conviction and sentence was led by Tomana, deliberately compromised the case in favour of the plaintiff.

Issues for determination

I have already outlined the issues that were placed before this court for determination at the trial. The determination of those issues has now been affected by the judgment of the Supreme Court which has made quite pointed findings which are binding on this court by virtue of the doctrine of *stare decisis*. This court is therefore restricted by those findings to the extent that most of the issues have now been determined. What remains to be determined now is very narrow indeed.

I now proceed to examine the issues on turn.

Whether the defendant's report to the police was the cause of the plaintiff's arrest, prosecution and detention

It is common cause that the plaintiff was arrested, prosecuted and imprisoned following accusations of soliciting for a bribe levelled against him by the defendant. In response to the plaintiff's claim, the defendant filed a plea in which he made unequivocal admissions.

Firstly, the defendant admitted placing information before a police officer that the plaintiff had solicited for a bribe. His defence was that his act of conveying that information to the police was not wrongful and not malicious.

Secondly, the defendant specifically pleaded another admission in para 5.1 of his plea, namely that he reported to the police that the plaintiff had solicited for a bribe. His defence, following the admission, was that he had done no more than place a report before the police but the police were under no obligation to act upon the report. The police could only act once a reasonable suspicion that an offence had been committed was formulated.

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.

The remarks made by this court in *Wamambo* v *Municipality of Chegutu* 2012(1) ZLR 452(H) at 458D-F are opposite in this regard:

> "It is therefore mysterious that the defendant led evidence which had the effect of withdrawing a confessionary pleading without attempting to amend such pleading, and ultimately without any leave of the court. No explanation whatsoever was given for doing so. Even if I was inclined to do so, I am unable to exercise the discretion reposed upon me to allow the defendant to withdraw the admission because, as stated earlier, I have not been requested to do so.
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> The admissions made by the defendant amount to a confessionary pleading and as such they are taken for granted, making it unnecessary for the plaintiff to prove them: *Adler* v *Elliot* 1988(2) ZKLR 283(S) at 288C; *Copper Trading Co (Pvt) Ltd* v *City of Bulawayo* 1997(1) ZLR 134(S) at 143H-144B and 144G."

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. In its judgment cited above the appeal court stated:

> "[49] In this plea to the appellant's claim before the High Court, whilst denying instigating the plaintiff's arrest, detention and prosecution, the respondent accepted that he placed information before a police officer in the *bona fide* belief that the plaintiff had solicited for a bribe. In para 5.1 of his plea, he admitted reporting to the police.
>
> [50] In his evidence before the court a quo, the appellant stated that the respondent had made allegations to all and sundry that he, the appellant, had solicited for a bride. He stated that the respondent made a report not only to senior government officials but also the Attorney-General's Office and to the police. He further stated that the respondent had gone to the extent of manufacturing a tape recording which he alleged contained evidence of the solicitation. He also testified that the respondent had even approached the Reserve Bank Governor and had been given the sum of US$5 000 in order to entrap the appellant.
>
> [51] Contrary to the findings of the court a quo, the respondent himself accepts that he made a report to the police. That plea, weighed against the evidence given by the appellant, *prima facie* established that the appellant (sic) not only reported the matter to the authorities, but that he involved himself further in attempts to incriminate the appellant.
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> [52] Going by the cross-examination of the appellant by counsel for the respondent, it is apparent that the respondent's stance is that since he did not personally approach the police to make a report, he could not have procured or instigated the arrest of the appellant. In my view that cannot be correct. If a person approached the National Prosecuting Authority alleging corruption on the part of an accused person, and the person so accused is consequently arrested by the police, the former can hardly be heard to state that the arrest was not a consequence of

> the report he made to the Authority. The arrest would be regarded as being the result of the report made to the Authority. The fact that the report was made indirectly would, in my view, not alter the fact that the arrest was set in motion by such person. On the basis of the evidence given before it, the court a quo should, in my view, have concluded that the respondent *prima facie* set in motion the events that led to the arrest of the appellant." (The underlining is for emphasis)

The foregoing conclusion by the appeal court settles the issue completely. The defendant was therefore required to demonstrate, in his evidence in rebuttal, that the *prima facie* case found by the appeal court could be and was rebuttable by his own account.

Yet the defendant expended a lot of energy and spent all his time repeating the same story that even though he reported to high ranking officials that the plaintiff solicited for a bribe, it was not his business that the plaintiff was subsequently arrested. In his view, because he did not personally approach the police, this exonerated him from wrong doing. The defendant is wrong in that regard. 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.

I conclude that the defendant's report, whether to high ranking government officials or to the police, was the cause of the plaintiff's arrest, his prosecution on a charge of corruption and his incarceration.

Whether the said report was made in good faith or whether it was false and malicious

Subsumed in this issue for trial is the pertinent question of whether there was reasonable and probable cause for filing a report that the plaintiff had solicited for a bribe. In a case where no other witnesses, except the antagonists, testified the whole case centre on the plaintiff's word against that of the defendant. Sight must, however not be lost of the fact that the onus of proof very well rests on the plaintiff to prove his case, but the entire case emanates from the defendant's accusations against the plaintiff.

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.

Other than the defendant's word that there was solicitation which the plaintiff vehemently denied, the only other piece of evidence relied upon as proving it was the audio recording. The recording was not produced in this court. Reliance was only placed on its transcript produced at the criminal trial. The transcript presented everyone, including the defendant himself, with some difficulties.

To begin with, its source was shrouded in mystery. The defendant initially claimed that he had recorded the conversation on his laptop. That is what he told the police. At the criminal trial, he swung round to say he had recorded it using a Dictaphone device in his Siemen cellphone. He was taken to task in cross-examination before this court on the source of that evidence. I can only say that his prevarication did not paint him in good light.

That is not all. The recording itself was said to be inaudible by the majority of the witnesses at the criminal trial. Yet the defendant vouched for the correctness of the transcript of the criminal proceedings when he had the opportunity to present his case before this court.

The Supreme Court was unequivocal in its rejection of the audio recording. With that rejection also went any semblance of evidence that the plaintiff had solicited for a bribe. The court stated:

> "[61] The second issue is whether, *prima facie*, he had reasonable and probable cause. This is of course, a question of fact. The appellant denied ever soliciting for a bribe and stated that this whole episode was fabricated in order to get him out of the way. This was a case of one person's word against that of the other. It was common cause that ZUPCO had not, at that stage, ordered any buses from Gift Investments and that no tender procedures had been followed. The tape recording did not incriminate the appellant. It was largely inaudible. Other than the respondent's mere say so, there is no other evidence which suggests that the appellant may indeed have attempted to solicit for a bribe. It was the appellant's testimony that the respondent was desperate to offload, onto ZUPCO, a number of buses which were already painted in ZUPCO colours, even though no tender board approval had been sought or granted prima facie, therefore, on the basis of the evidence given by the appellant *a quo*, there was no reasonable or probable cause for the arrest and prosecution of the appellant. This was not an issue that could be determined in favour of the respondent at the stage of absolution and required that the respondent, as defendant, be put on his defence."

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 having 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.

Whether the prosecution failed

In my view, following the pronouncement of the Supreme Court on appeal against the grant of absolution from the instance at the close of the plaintiff's case, this is no longer a live issue for determination at this trial. I say so because there was nothing really that the defendant could do in his evidence to respond to the appeal court's finding that the plaintiff's prosecution failed.

To that extent, no amount of evidence led by the defendant before this court could upset the definitive finding that the common cause facts established the final requirement for a successful claim for malicious arrest, prosecution and detention that the prosecution instigated by the defendant failed.

The Supreme Court found that the order granted by two judges of this court on 19 November 2009 allowing the plaintiff's appeal against both conviction and sentence, "fully and finally" quashed the conviction and sentence of the plaintiff. The appeal court concluded:

> "[63] Finally, that the prosecution failed is not in doubt. The Attorney-General's Office gave detailed reasons why it did not support the conviction, consequent upon which both conviction and sentence were set aside."

The pronouncement by the Supreme Court that the prosecution failed is binding on this court it being final and definitive in respect of that issue. The issue has therefore been resolved. When the defendant went on and on in his evidence about how the involvement of Tomana had polluted the resolution of the appeal, he was engaged in an exercise in futility, the issue having ceased to be alive one.

What damages, if any, were suffered by the plaintiff as a result?

This court has found that the defendant's report was the cause of the plaintiff's arrest, prosecution and detention. As a result of that report, the plaintiff spent 16 months enduring, initially, very appalling and humiliating prison conditions.

This court has also found that there was no reasonable and probable cause for the arrest of the plaintiff. Accordingly the report made by the defendant could not have been made in good faith and it was false. As a result the existence of malice on the defendant's part is inferred from the absence of reasonable and probable cause by operation of law.

The failure of the prosecution triggered by the defendant's report, has been finally and definitively determined on appeal. What all this means is that the requirements grounding delictional damages have been satisfied. The liability of the defendant is proved. As a corollary to that, the plaintiff is entitled to damages for the delict committed against him. What remains to be determined is the quantum of those damages.

Damages are simply a sum of money given as compensation for loss or harm of any kind. See Munkama, Exall, Munkman on Damages 1. The process of assessment requires the court to determine the general standard or measure of damages to be awarded. What has gained notoriety is that it is impossible to determine the actual consequences of an event without comparing the position before the event.

In respect of compensatory damages for delict, the purpose of an award is to place the plaintiff in the position he would have been in if the wrong had not been committed. In the words of Lord Backburn in *Livingstone* v *Rawyards* (1880) 5 App Case 25 at 39:

> "Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who had been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Certain broad principles in the assessment of damages generally have evolved from the jurisprudence coming out of our courts. In *Minister of Defence and Anor* v *Jackson* 1990 (2) ZLR 1 (S) the Supreme Court set out some of the guidelines and principle to be followed when assessing damages. Though not exhaustive and the case dealt with bodily injury they include the following:-

(a) General damages are not a penalty but compensation. The award is designed to compensate the victim and not punish the wrongdoer.

(b) Compensation must be so assessed as to place the injured party, as far as possible, in the position he or she would have occupied if the wrongful act causing the injury had not been committed.

(c) Since no scales exist by which pain and suffering can be measured, the quantum of compensation can only be determined by the broadest of general considerations.

(d) The court is entitled, and it has a duty, to heed the effect its decision may have upon the course of awards in the future.

(e) The fall in the value of money is a factor which should be taken into account in terms of purchasing power but not with such adherence to mathematics as may lead to an unreasonable result.

(f) Awards must reflect the state of economic development and current economic conditions of the country.

In *Muzeya* v *Marais and Anor* 2004 (1) ZLR 326 (H) at 337 G-338 A. CHINHENGO J advocated the adoption of the principle of nominalism in dealing with all obligations sounding in money on the basis that a departure from the principle will create such uncertainty in the law that the whole system will become unworkable. He concluded:

> "Therefore a debt sounding in money must be paid in terms of the nominal value of the currency irrespective of any fluctuations in its purchasing power. In any event, I think the principle of nominalism is even-handed because it places the risk of deprecation of currency on the creditor and that of appreciation on the debtor."

This court also dealt with that issue in *Fabiola* v *Mvudura Louis* HH 25/09 where Makarau JP (as she then was) ruled that the court has a discretion to award judgment in the currency that will redress the injury and adequately compensate the plaintiff for the loss. See also *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe (Pvt) Ltd* 1989 (3) SA 191; *Zimbabwe Express Services (Pvt) Ltd* v *Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326.

Regarding the time at which to measure delictual damages, the general rule is that the time at which to measure them is ordinarily the date of the delict because that is when the plaintiff's patrimony is reduced. See *Parish* v *King* 1992 (1) ZLR 216 (S) at 225 D-G; 226 A-D; *Phillip Robinson Motors (Pty) Ltd* v *N.M. Danda (Pty) Ltd* 1975 (2) SA 420 (A) at 429 F-G.

That rule is however not cast in stone. It is a flexible one depending on the type of loss and also on the overriding principle that in awarding damages, the court should try to assess an amount which is fair to the plaintiff and to the defendant. In doing so, the court is not obliged

to follow one or other method of calculation. See *General Insurance* v *Summons Nhlumayo* 1987 (3) SA 577 (A) (quoted with approval in *Parish* v *King*, supra). The primary consideration is to award the wronged party the value of his order or her loss.

In assessing damages this court is constrained by the fact that the plaintiff only claimed two globular figures of US$100 000.00 for malicious prosecution and US$300 000.00 for malicious arrest and detention. Having done so, he did not lead evidence breaking down how these sums are arrived at. The closing submissions made by counsel are equally unhelpful in that no breakdown is given and neither is there any method of calculation given. It is as if the plaintiff left everything in the hands of the court after laying out the details of the suffering.

For his part, the defendant did not let out anything at all. While it was apparent from the judgment of the Supreme Court that it was "game over" in so far as liability was concerned, the defendant chose not to make any concessions be it in respect of liability or the quantum of damages. He was content to doggedly deny all form of liability. The task of quantification is therefore onerous indeed.

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.

This court will have to estimate what it was worth to see her daughter through the remaining years at University of Cape Town and his son to progress from form 3 at Gateway until completion of University education. No evidence was given on how the children progressed after his arrest.

This court will also have to estimate how much the plaintiff lost in earnings at Chinhoyi University of Technology. He said at the material time he was earning in Zimbabwe currency "in excess of three million Zimbabwe dollars." I take it to be an annual income. After spending

16 month in prison it took him another 6 months to get a job initially at Urban Development Cooperation where he rose to the position of Acting Chief Executive Officer.

The plaintiff did not prove the rest of the earnings he lost either as Board Chairman of ZUPCO or as consultant of universities. I am unable to take any of these into account.

I consider that in actual monitory terms the income he lost may be gleaned from his letter of appointment as Acting Pro Vice Chancellor dated 8 January 2003. On terms of that letter:

> "Your salary will be paid at the rate of $2 040 000 per annum. You will also receive the following taxable monthly allowances:
>
> - A representation/ entertainment allowance payable at the rate of $10 000 per month.
> - Telephone allowance of $4 000.00 per month
> - Housing allowance of $15 000 per month"

I have had to rely on the breakdown of his income as Pro Vice Chancellor because the plaintiff did not submit his letter of elevation to Vice Chancellor which he says happened about the same time because he went there as Acting Pro Vice Chancellor performing the duties of Vice Chancellor. While it is not clear why the plaintiff's evidence in the regard is vague, I am prepared to accept that as substantive Vice Chancellor he earned salary and benefits of $3 000 000.00 which he stated. This is because his evidence was not challenged in that respect.

In the almost 2 years that he was either in prison or out of work, he would have earned $ 6000 000.00 in Zimbabwe currency. No evidence was led as to how much this would have been in United States Dollars. The globular figure claimed is a thumb suck.

In my view, the court has to draw on experience and surmise in the absence of evidence. I find support in adopting that approach from the remarks of GUBBAY JA (as he then was) in *Minister of Defence & Anor*, *supra*, where he said:

> "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."

The remarks may have been made in the context of general damages for bodily injury but they have equal application to what this court is called upon to assess. I have deliberately adverted to loss of income and other benefits to assist put figures on part of the plaintiff's loss. However, they do not encompass all of the damage he sustained.

Having said all that, I now turn to apply the foregoing principles to the two claims. The plaintiff claims $100 000.00 for malicious prosecution. The law on this delictional claim was discussed in the earlier judgment by this court. In short, the delict occurs when the defendant has maliciously and without reasonable and probable cause instituted criminal proceedings against the plaintiff.

The damages are designed to compensate the plaintiff for being subjected to unwarranted criminal proceedings which are, in this jurisdiction, held in public. During the course of such proceedings the plaintiff suffers both financial prejudice and *injuria* in being paraded in public to answer charges. In doing so, the plaintiff loses time and money. Again, no evidence was led on the financial prejudice he sustained in defending himself during the lengthy prosecution as well as in fighting the conviction and sentence in this court.

I am however of the view, drawing from "experience", from "surmise", from "conjecture" and from "imagination" that the claim for $ 100 000.00 is extremely excessive. In my view an award of US$30 000.00 under this head will meet the justice of the case.

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.

Again drawing on the factors set out in the authorities mentioned above including the duty thrust on the court to bear in mind *inter alia* the effect any award may have on future awards in similar cases and indeed economic development or the economic conditions of this country, I have no doubt that the claim of US $300 000 is again excessive. We live in a small economy where such claims may not be sustainable at all.

Taking into account all the circumstances of the case, I am of the view that a third of what the plaintiff claims, will meet the justice of the case. Accordingly I award US$100 000.00 under the rubric of malicious arrest and detention.

Finally I have to deal with the issue of the currency of the awards. I do not agree with the defendant that the award should be expressed in United States Dollars "but paid in RTGS at a one as to one rate." That submission is a product of a misreading of 54 (1) (d) of SI 33/19 and ss 20 and 22 of The Finance (No. 2) Act of 2019 as well as the judgment in *Zambezi Gas (Pvt) Ltd* v *N.R Barber & Anor* SC 3/20.

What has to be paid in the local currency at the parity rate are assets and liabilities due immediately before 22 February 2019. In this case nothing was due to the plaintiff immediately before that date. He had filed a claim which was being contested. The court was yet to determine both the issues of liability and quantum. Accordingly, while the law preludes this court from issuing a judgment sounding in foreign currency, it does not proscribe the grant of damages in foreign currency to be paid at an equivalent RTGS dollar reckoned at the interbank rate at the time of payment.

In the result it be, and is hereby ordered as follows:

1. Judgment be and is hereby entered in favour of the plaintiff against the defendant in the sum of US$ 30 000.00 for malicious prosecution and in the sum of US$100 000.00 for malicious arrest and detention.
2. Interest on both amounts at the prescribed rate from the date of service of summons to date of full payment.
3. The sums of US$ 30 000.00 and US$100 000.00 together with interest thereon shall be paid in RTGS dollars at the interbank rate prevailing on the date of payment.
4. The defendant shall bear the costs of suit.

Hove and Associates, plaintiff's legal practitioners
Uriri Attorneys at Law, defendant's legal practitioners