IN THE HIGH COURT OF ZAMBIA **2007/HP/344**
AT THE PRINCIPAL REGISTRY
LUSAKA

BETWEEN:

LEVY HAMALALA **1ST PLAINTIFF**
JUSTIN HACHULU **2ND PLAINTIFF**

V

THE ATTORNEY GENENAL **DEFENDANT**

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this14th day of December, 2012.

For the Plaintiff: *N. Dindi of Messrs Dindi and Company.*
For the Defendant: *Lt. M. Namwawa, State Advocate, Attorney General's Chamber's.*

JUDGMENT

Cases referred to:

English cases:

1. *Thorp v Holdworth [1876] 3 C. L. D. 637.*
2. *Hicks v Faulkner [1881] Q.B.D 167.*
3. *Bradford Corporation v Pickles [1895] A.C. 587.*
4. *Mohammed Amin v Jogendra Kumar Bannerjeee [1947] A. C. 322.*
5. *Ginski v McIver [1962] 1 ALLE. R.696.*
6. *Stapeley v Annetts and Another [1969] 3 ALL E.R. 1541.*

Australian cases:

1. *Gould v Mount Oxide Mines Limited [1916] 22 C.L.R. 490.*
2. *Dare v Dulham [1982] 148 C.L.R. 858.*

Canadian case:

Kvello v Miazga [2010] 1 W.N.R.45.

Zambian cases:

1. *Gaynor v Cowley (1971) Z.R. 50.*
2. *Mbanga v Attorney General (1979) Z.R. 234.*
3. *Kariba North Bank Limited v Zambia State Insurance Corporation Limited (1980) Z.R. 94.*
4. *Mundia v Senator Motor Limited (1982) Z.R. 66.*
5. *Mulimba and Another v Attorney General Appeal Number 117 of 2005. (unreported).*

Legislation referred to:

1. *Constitution, cap 1, Articles 13 (1) (e); 15; and 22.*
2. *Narcotic Drugs and Psychotropic Substances Act cap 96, s. 9.*
3. *Criminal Procedure Code, cap 88, s. 26 (a).*

Works referred to:

1. *Michael A. Jones, Clerk and Lindsell on Torts, Twentieth Edition, (Thomson Reuters (Legal) Limited, 2010).*
2. *Blair, Brennan, Jacob, and Langstaff, Bullen and Leake and Jacobs Precedents of Pleadings, Seventeenth Edition, Volume 9, (Thomson Reuters (Professional) U. K. Limited, 2012).*
3. *Margaret Brazier, Street on Torts, Ninth Edition, (London, Butterworths, 1993).*
4. *W.V.H. Rodgers, Winfield and Jolowicz on Torts, Thirtieth Edition, (London, Sweet and Maxwell, 1989).*

This action was commenced by way of writ of summons on 11th April, 2007. In the writ, the plaintiff claims for the following:

(a) damages for malicious prosecution;
(b) any other relief as the Court may deem fit; and
(c) costs.

The writ of summons was accompanied by a statement of claim, also dated 11th April, 2007. In the statement of claim, the plaintiff averred as follows: on or about the 12th March, 2006, the defendant maliciously and without reasonable and probable

cause,charged the plaintiffs before the Principal Magistrate's Court, presiding at Lusaka, with the offence of cultivation of psychotropic substances contrary to section 9 of the Narcotic Drugs and Psychotropic Substances Act. Further, on or about 21st April, 2006, the plaintiffs appeared before the magistrates Court. And the Court after a summary trial of the charge, found the plaintiff's with no case to answer, and accordingly acquitted the plaintiffs of the charge on 9th October, 2006. In consequence of the prosecution referred to above, the plaintiffs claim that they were injured in their reputations, and were put to considerable trouble, inconvenience, anxiety, and expenses. And as such have suffered losses and damages.

On 20th May, 2008, the defendant filed a memorandum of appearance, accompanied by the defence in this matter. In the defence dated 20th May, 2008, the defendant denied the plaintiff's claims and maintains that the defendant arrested the plaintiffs on reasonable suspicion of having committed a crime.

The trial of this action commenced on 18th July, 2011. The 1st plaintiff; Levy Hamalala testified on his own behalf, and on behalf of the 2nd plaintiff; Justina Hachulu. I will continue to refer to him as the 1st plaintiff. The 1st plaintiff recalls that on 12th March, 2006, he was together with the 2nd plaintiff, accused of having cultivated *cannabis sativa.* And accordingly, were charged of the offence of cultivating psychotropic substances, contrary to section 9 of the Narcotic Drugs and Psychotropic Substances Act.

The plaintiffs appeared in Court on 21st April, 2006. The plaintiffs denied the charge. And the trial continued up to 9th October, 2006, when the plaintiffs were acquitted. The ruling of the Subordinate Court acquitting the plaintiffs was in the following terms:

"IN THE SUBORDINATE COURT.
OF THE FIRST CLASS.
HOLDEN AT LUSAKA.
(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE

V

LEVY HAMALALA

AND

AUSTIN HACHULA

RULING – CASE TO ANSWER

The prosecution brought four (4) witnesses who in a nutshell testified that the two (2) accused persons were reported to the D.E.C. by informers as persons cultivating cannabis in Kalwana village.

The evidence on record is that the D.E.C. proceeded to some field on their own and using their said sources. Information and uprooted some plants from some fields which in their wisdom was cultivated by the accused persons.

No evidence was adduced to link the accused persons to the actual cultivation of the said Cannabis.

Not a single witness testified evidentially to the effect that the plant exhibited in this case belonged or were owned by the accused. In fact, the accused were not present when the plants were uprooted.

IN THE PEOPLE V WINTER MAKOWELA AND ROBBY TAYA BUNGA (1979) Z.R. 290 HC.

The High Court said that a submission on no case to answer may be properly made.

1. *There has been no evidence to prove an essential element in the alleged offence; and*

2. *When the evidence of prosecution has been so discredited a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.*

In this case both these (2) scenarios above are present. Consequently, it appears to me that a case is not made out against the accused persons sufficiently to require them to make a defence. I therefore dismiss this case and acquit the accused persons forthwith pursuant to section 206 of the Criminal Procedure Code, chapter 88 of the laws of Zambia.

DELIVERED IN OPEN COURT ON THE 9TH DAY OF OCTOBER, 2006.

HONOURABLE E. MASUWA

MAGISTRATE CLASS I

The 1st plaintiff testified that the effect of the Ruling referred to above was that there was no case to answer. And the plaintiffs were consequently acquitted. Finally, the 1st plaintiff testified that they have to come to Court in order to prosecute the claim for the malicious prosecution, as well as to recover the costs incurred in defending themselves in the Court below.

The defendant called one witness; Sibongile Mwanza. And I will continue to refer to her as DW1. DW1 recalled that on 9th April, 2006, she was on duty, and received information that they were some people cultivating dagga in Namwala Village, in Mazabuka District. The information specifically identified the plaintiffs as the offenders.

Upon receipt of the information, DW1 assembled a team to follow up the matter in Mazabuka District. When the team arrived in Mazabuka, it called upon, and introduced itself to the headmaster of the school in the village where the plaintiffs reside. The team explained its mission to the headmaster. And requested that it be led to the homes of the plaintiffs. The headmaster obliged.

When the team reached the 1st plaintiff's home, it was informed that the 1st plaintiff had left for Kafue to purchase some fish. The 1st plaintiff's wife was informed that the team

had come to search their fields, because the team had information that they were growing *cannabis sativa*.

DW1 testified that the 1st plaintiff's wife confirmed that in the fields where charcoal was being burnt, there was some *cannabis sativa*been grown. The 1st plaintiff's wife is said to have shown the team the field. And the team found the *cannabis sativa*in the field. The 1st plaintiff's wife denied having any knowledge about the presence of the *cannabis sativa* in the field, albeit she had heard rumours about the same.

The team proceeded to uproot the *cannabis sativa*. And in the company of the 1st plaintiff's wife, transported the *cannabis sativa*to Lusaka. The 1st plaintiff'swife was later detained. The following day, DW1 recorded a statement from 1st plaintiff's wife. On 11th April, 2006, DW1 decided to release her.

On the same day, the plaintiffs were interviewed by DW1. And later warned and cautioned. In due course, the plaintiffs were arrested and detained. Ultimately, the *cannabis sativa*was taken for analysis at the University of Teaching Hospital (UTH) laboratory. Afterwards, criminal proceedings were launched in the Subordinate Court against the plaintiffs, which resulted in the acquittal of the plaintiffs.

After the closure of the trial, on 15th July, 2011, Mr. Dindi filed submissions on behalf of the plaintiffs. Mr. Dindi pointed out that in order to prove the tort of malicious prosecution, the following elements need to be proved;

1. that a plaintiff was prosecuted in a criminal court of competent jurisdiction;
2. that a plaintiff was acquitted of the criminal offence; and
3. that the criminal proceedings were actuated by malice and without any reasonable or probable cause.

Mr. Dindi. went on to submit that the position of the law in Zambia is grounded in Article 13 (1) (e) of the Constitution which enacts as follows:

"13(1) A person shall not be deprived of his personal liberty, except as may be authorized by law in any of the following cases:

(a) Not relevant.

(b) Not relevant.
(c) Not relevant.
(d) Not relevant.
(e) Upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law in force in Zambia;"

Further, Mr. Dindi submitted that section 26 (a) of the Criminal Procedure Code is in these terms:

"26 Any police officer may without an order from a magistrate and without warrant, arrest.

(a) Any person whom he suspects, upon reasonable grounds of having committed a cognizable offence;

Mr. Dindi argued that in view of preceding provisions, there must be a reasonable cause to suspect that a plaintiff committed an offence for criminal proceedings to be instituted against any person, and the Courts have laid down that, where there was no reasonable cause to institute criminal proceedings, then such proceedings are deemed to have been actuated by malice. Mr. Dindi submitted that it is not in dispute that the plaintiffs were tried in the Subordinate Court for cultivating in this case psychotropic substances, and that they were eventually acquitted because there was no evidence adduced to link the accused persons to the actual cultivation of the *cannabis sativa*. Consequently, Mr. Dindi contends that there was no reasonable or probable cause for them to be prosecuted on allegations of cultivating *cannabis sativa*because the *cannabis sativa*was neither found in their possession nor in their field.

Mr. Dindi pressed that the decision to arrest the plaintiffs was capricious and malicious. He went on to argue that capricious arrests not only inconvenience citizens, but also amount to abuse of power and the legal process. Mr. Dindi noted also that the most disconcerting of all this is that malicious prosecutions violate constitutional rights, such as the right to personal liberty; protection from inhuman treatment, and freedom of movement as provided for in Articles 13 (1) (e); 15; and 25 of the Constitution respectively.

In a word, Mr. Dindi submitted that on a balance of probabilities, the plaintiffs have made their case against the State because they have shown that they: (1) were prosecuted; (2)

acquitted at the end of the prosecution case; and (3) they was no reasonable or probable cause whey they were subjected to the prosecution.

Therefore, Mr. Dindi submitted that the whole legal process was a malicious charade aimed at persecuting them.

As regards damages, Mr. Dindi submitted that the plaintiffs find sanctuary in the Supreme Court decision of *Mulimba and Another v The Attorney General Appeal Number 117 of 2005 (unreported.)*And urged me to award the plaintiffs damages for false imprisonment, malicious prosecution, and torture in the sum of K 100, 000, 000=00 each, together with interest, and costs of this action.

On 5th August, 2011, Lt. Namwawa filed the submissions on behalf of the defendant. Lt Namwawa submitted that in an action for malicious prosecution, the onus is on the plaintiff to prove the cause of action. And in doing so, the plaintiff must prove the following:

a) the prosecution;
b) favourable termination of the prosecution;
c) lack of reasonable and probable cause; and
d) malice.

However, Lt Namwawa elected to focus on the third and fourth requirements listed above. He pointed out that in *Gaynor v Cowley (1971) Z.R. 50,* the Court aptly defined reasonable and probable cause as being a genuine belief based on reasonable grounds that a criminal offence had been committed. In this case, Lt Namwawa pointed out that the 1st plaintiff testified in the examination-in-chief that he was accused of having planted *cannabis sativa* withthe 2nd plaintiff.

However, during cross-examination, Lt Namwawa pointed out, the 1st plaintiff testified that he had been arrested because it was discovered that the *cannabis sativa* was being grown in the field where himself and the 2nd plaintiff burnt their charcoal. In any event, the 1st plaintiff revealed also during cross-examination, that prior to their arrest, both plaintiffs had heard from different sources that someone was cultivating *cannabis sativa*in their

field; and a rumour that they later confirmed to be true. The discovery was made a week before the officers from the Drug Enforcement Commission (DEC) visited the site. Lt Namwawa wondered why such a crime was not reported to the local police.

In the circumstances, Lt Namwawa submitted that the officers from DEC were merely carrying out their duties in procuring the arrest of the plaintiffs. And contends that there was reasonable and probable cause for the officers to proceed in the manner they did because, first, it is not denied that the *cannabis sativa*was being illegally cultivated. And second, that the cultivation was being done in the plaintiff's field. In the premises, Lt Namwawa pressed that it was reasonable to suspect that a crime had been committed by the plaintiffs.

As regards malice, Lt Namwawa submitted that in *Mbanga v Attorney General (1979) Z.R. 234,*malice was defined as being some motive on the part of the accuser other than a desire to bring to justice the person whom he believes to be guilty. Further, Lt Namwawa submitted that the question of the existence of malice was one of fact, and the burden of proving it was on the plaintiff. Lt Namwawa also pointed that in *Gaynor v Cowley case* (supra), it was observed that the foundation for malicious prosecution lies in the abuse of the process of the Court by wrongly setting the law in motion. And that the tort is designed to discourage the perversion of justice for an improper motive. Granted what has been stated above, Lt Namwawa submitted that there was nothing about the way the DEC officers conducted themselves which would suggest the presence of malice. The officers were merely carrying out their functions as law enforcement officers. Lastly, Lt Namwawa, submitted that the fact that the plaintiffs were acquitted does not negate the circumstances leading to their arrest. Lt Namwawa maintained it was reasonable to effect the arrest of the plaintiffs. The acquittal, he pressed did not subtract or take away anything from the reasonableness of the arrest.

Lt Namwawa was also confounded about the introduction of the claim of false imprisonment at the stage of submissions. He submitted that the claim for false imprisonment was not pleaded. And therefore objected to reference to a matter that was not pleaded. In aid of this submission, Lt Namwawa drew my attention to the case of

Mundia v Senator Motors Limited (1982) Z.R. 66, where it was stated that the object of pleadings was to give a fair notice of the case which was to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the partners. Once the pleadings have been closed, Lt Namwawaargued, the parties are bound by their pleadings. In this regard, Lt Namwawa brought to my attention the case of *Kariba North Bank Limited v Zambia State Insurance Corporation Limited (1980) Z.R. 94*, where the Court held that one of the most important functions of pleadings is: *"to tie the hands of the party so that he cannot without leave go into any matter not fairly included therein*."

Overall, Lt Namwawa submitted that the plaintiffs have failed to discharge the burden of proof in proving the essential elements of the tort of malicious prosecution. Accordingly, urged me to dismiss the claim.

MALICIOUS PROSECUTION

I am indebted to counsel for the spirited arguments and well researched submissions. I must state from the outset that the foundation of the action for malicious prosecution lies in the abuse of the Court by wrongfully setting the law in motion. The tort is therefore designed to discourage the perversion of the machinery of justice for an improper purpose. (see *Mohamed Amin v Jogendra Kumar Bannerjee [1947] A. C. 322 at 330*, per Sir John Beaumont.)Margaret Brazier, in Street on Torts, Ninth Edition, (London, Butterworths, 1993) at page 476, observes that the tort of malicious prosecution is not regarded with favour by the Courts because it runs counter to the policy of freedom to prosecute suspected criminals and to the interest in bringing litigation to a close. This judicial attitude, Brazier notes, is reflected in the development of the requirement that there must be an absence of reasonable and probable cause. I will revert to this requirement in a moment.

ESSENTIAL ELEMENTS OFMALICIOUS PROSECUTION

There are four essential requirements that need to be proved in order to sustain an action for malicious prosecution. First, there must be prosecution by the defendant. Thus the law must be set in motion against a plaintiff on a criminal charge. Second, the

prosecution should end in favour of the plaintiff. Third, the prosecution should have been instituted without reasonable and probable cause. Fourth, the prosecution should have been instituted maliciously. The onus or burden of proving everyone of these requirements is on the plaintiff. It is also instructive to note the observation of Lord Denning M R in *Stapley v Annets and Another, [1969] 3 ALL E.R. 1541,* at page 1543, that:

"in action for malicious prosecution the burden is on the plaintiff to prove malice and absence of reasonable and probable cause. If the defendant denies it, it is not the practice to require the defendant to give particulars of his denial. It is only if he puts forward a positive allegation that he should be required to give particulars of it."

REASONABLE AND PROBABLE CAUSE

The first two requirements referred to above are relatively easy to prove. However, the third and fourth requirements usually pose a challenge to prove. Little wonder that the learned authors of Clerk and Lindsell on Torts, Twentieth Edition, (Thomson Reuters (Legal) Limited, 2010) observe in paragraph 16-30, at page 1083 as follows:

"The question of reasonable and probable cause may create difficulties in the conduct of a trial, not so much from its own inherent difficult as from the manner in which it presents itself. Since first it involves the proof of a negative, and secondly, in dealing with it the judge has to take on himself a duty of an exceptional nature. The claimant has in the first place to give some evidence tending to establish an absence of reasonable and probable cause operating on the mind of the defendant. To do this, he must show the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appears that those facts were within the personal knowledge of the defendant."

The House of Lords in *Hicks v Faulkner [1881] Q.B.D.167*, approved the definition of "reasonable and probable cause" by Hawkins, J. as follows:

"An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

In*Ginski v McIver [1962] ALL E.R. 696*, the House of Lords held that in order that the plaintiff succeeded on the issue of reasonable and probable cause, he must prove one or other of the following:First, that the defendant did not believe that the plaintiff was

probably guilt of the offence. In this regard, evidence should be given by the plaintiff of some fact or facts which either inherently or coupled with other matters proved in evidence, would permit the inference that the defendant did not believe the plaintiff's guilt. Second, that a person of ordinary prudence and caution would not conclude, in the light of the facts in which he honestly believed, that the plaintiff was probably guilty.

The learned author of *Clerk and Lindsell on Torts,* (supra) observe in paragraph 16-31 at page 1038, that in Canada actions for malicious prosecution may succeed against Crown prosecutors only in exceptional circumstances. Thusthe Supreme Court of Canada held in *Kvello v Miazga [2010] 1 W.W.R. 45*, that "reasonable and probable cause" is not a question of subjective belief in the guilt of the claimant. As a public servant, the prosecutor must set aside personal views as to likely guilt and innocence and make a professional assessment of the strength of the case.The Supreme Court of Canada note inthe *Kvello* case (supra) that given the burden of proof in a criminal trial, belief in "probable" guilt therefore means that the prosecutor believes, based on the existing state of circumstances, that proof beyond reasonable doubt could be made out in a Court of law. To hold otherwise, and to require the prosecutor's decision to be based on personal views, the Supreme Court went on, would run counter to the impartial and quasi-judicial role of the prosecutor which is an important aspect of the proper administration of Justice.

To illustrate the application of the requirement of reasonable and probable cause" in the Zambian context, I will refer to the case of *Gaynor v Cowtey [1971] Z. R. 50*. The facts of the case were that the defendant and the plaintiff were partners in a business of building contractors. The plaintiff was given the use of a Datsun vanette both for the work of the partnership, as well as his private use. Following a dispute between the partners over the return of the vanette, the defendant made a false report to the police that his vanette had been stolen, and later added to it that the plaintiff was seen heading towards Kasama.The plaintiff was later arrested by the police. Following representations by the plaintiff's lawyer that the dispute between the parties was of a civil nature, the plaintiff was released from custody. The plaintiff sued for false imprisonment and malicious prosecution.In delivering judgment, Baron, J, observed as follows at page 56:

"*The essentials of an action for malicious prosecution are set out by the various text writers and need no repetition, save as to the question whether there was a prosecution, these essentials are clearly satisfied in the present case; the defendant did not have reasonable and probable cause in that he did not have genuine belief based on reasonable grounds that a criminal offence had been committed and he was actuated by malice in that he had an improper motive, namely a desire to obtain through the machinery of the police some redress which should have been sought by civil process."*

To conclude this discussion of "reasonable and probable cause," it is instructive to note the observation of the learned author of Street on Torts (supra) at pages477-478 hat it is impossible to enumerate all the factors which may be relevant in deciding whether there was reasonable and probable cause. Particularly important points would be that the defendant acted in good faith on the advice of counsel, or on the advice of the police,the defendant had taken care to inform himself of the true facts.

MALICE

The fourth requirement that needs to be proved in order to sustain an action for malicious prosecution is malice.In *Mbangav Attorney General [1979] Z. R. 234,* Muwo, J, observed at page 235 that judicial attempts at defining the word malice have not been completely successful. Be that as it may, he observed that consensus of opinion among judges has been that there must be some other motive on the part of the accuser than a desire to bring to justice the person whom he honestly believes to be guilty. Muwo, J, went on to observe at page 235 that the question of existence of malice is one of fact, and the burden of proving it is on the plaintiff. It has also long been the law that malice and lack of reasonable or probable cause must be separately proved. The absence of reasonable had probable cause may therefore be evidence of malice.To sum up, malice means spite or ill will. It also more aptly means improper motive. The proper motive for any prosecution is of course to ensure and secure the ends of justice. If therefore the securing of the ends of justice in a prosecution was not the true and predominant motive, then malice is proved.

FUNCTIONS OF PLEADINGS

There is another matter that I would like to discuss before I determine the question whether or not the plaintiffs have on the facts of this case, proved malicious prosecution. This is, the function of pleadings. The basic rule is that pleadings are binding on the parties at trial. Within that framework, Courts have laid down some valuable statements of principle. I will consider some of those statements below:First, in one early Judgment, in*Thorp v Holdsworth 1876 3 Ch.D.637*, Jessel M. R. said at page 639:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules… was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

Second, in *Gould v Mount Oxide Mines Limited [1916} 22 C.L.R. 490*, Isaacs and Rich JJ of the High Court of Australia said at page 517:

"Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them, and meet each other on issues fairly fought out, it is impossible for them to hark back to the pleadings and treat them as governing the area of contest…There are qualifications, no doubt, and each case must depend for the proper application of the principle upon its own facts."

Third, the High Court of Australia developed the preceding themes *in Dare v Pulham [1982] 148 C.L.R. 658,*when it observed at page 664 that*:*

"Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it. They define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial; and they give a defendant an understanding of a

plaintiff's claim in aid of the defendant's right to make a payment into Court. Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings. But where there is no departure during the trial from the pleaded cause of action a disconformity between the evidence and particulars earlier furnished will not disentitle a party to a verdict based upon the evidence. Particulars may be amended after the evidence in a trial has closed…"

Lastly, in *Kariba North Bank Company Limited v Zambia State Insurance Corporation Limited (1980) Z. R. 94,* the function of pleadings was lucidly summarized by Commissioner *Kakad* as follows:

(a) to inform the other side of the nature of the case they come to meet;
(b) to prevent the other side from being taken by surprise;
(c) to enable the other side to know what evidence they ought to be prepared with and to prepare at trial;
(d) to limit the generality of the pleadings or of the claim or the evidence;
(e) to limit and define the issues to be tried and to which discovery is required; and
(f) to tie the hands of the party so that he cannot without leave go with any matter not fairly included in.

It is also noteworthy, that the learned authors of Bullen and Leake and Jacob's Precedents of Pleadings, Seventeenth Edition, volume 1 (London, Thomson Reuters (Professional) U. K. Limited, 2012) point out in paragraph 1-12 at page 10 that other considerations identified by Jacob, the leading modern exponent of civil procedure, include setting the limits of the action and providing a record of the ambit of the dispute for the purposes for *res judicata* and issue estoppel.

I will now pass to apply the law to the facts of this case. It is common ground that the plaintiffs were prosecuted by the defendant. And the prosecution terminated in favour of the plaintiffs. What is in dispute however is whether or not, first, the prosecution was instituted without reasonable and probable cause. And second, whether it was malicious.The plaintiff's major contention is that there was no reasonable and probable cause for them to be prosecuted on allegations of cultivating *cannabis sativa,* because

the *cannabis sativa* was neither found in their possession, nor in their fields. The following excerpt in cross-examination of the first plaintiff is instructive in determining whether or not there was no reasonable and probable cause for the prosecution.

"Q: Why was the second plaintiff with you.

A: We used to move together and we were jointly charged. We used to burn charcoal together and we learnt that at that location somebody was growing cannabis [sativa].

Q: Where we you burning the charcoal.

A: 2 to 3 kilometers east of my home.

Q: From whom did you hear that Cannabis [sativa] was been grown in your field

A: I heard from people that where we were burning charcoal somebody was growing dagga. We verified. It was true and we reported the matter to a village headman.

Q: In those circumstances was it unreasonable that you were arrested.

A: It was wrong because when they went to uproot, I was not there. When I reported that is when I was arrested.

Q: Why did you not report to the police.

A: Where we stay there are procedures, so I followed standard procedure for reporting to the headmen."

In light of the preceding testimony, Lt Namwawa submitted, and I agree with the submissions that, first, there was reasonable and probable cause for the officers of DEC to proceed in the manner they did because it is not denied that the *cannabis sativa* was being illegally cultivated. Second, that the cultivation was being done in the plaintiff's field. In the premises, it was reasonable to suspect that a crime had been committed by the plaintiffs.

I also agree with Lt Namwawa that it is not enough for a plaintiff in an action for malicious prosecution to claim that an acquittal is proof of absence of a reasonable and probable cause to prosecute. A plaintiff must do something more. A plaintiff must adduce evidence tending to establish an absence of reasonable and probable cause operating on

the mind of the defendant. To do this, a plaintiff must show the circumstances in which the prosecution was instituted, and demonstrate also that the defendant had personal knowledge that the real facts did not suggest or establish criminal liability.In a word, an acquittal does not *ipso facto* subtract from the reasonableness of the prosecution.

I further agree with the submissions by Lt Namwawa that there was nothing about the way they DEC officers conducted themselves, that suggested that they were prompted by anything other than a desire to secure the ends of justice. In a nutshell, the plaintiffs have not been able to prove malice on the facts of this case.

Before I conclude, I would like to endorse Lt Namwawa's submissions that it is procedurally improper for Mr Dindi to introduce new claimsfor, false imprisonment, and torture, at the stage of submissions. The introduction of these claims constitutes an unacceptable departure from the pleadings, and has the effect of taking the defendant by surprise; a practice which is deprecated or frowned upon by Courts.

The net result if that the claim for malicious prosecution has failed. And I accordingly, dismiss it. Costs follow the event. Leave to appeal is hereby granted.

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Dr P Matibini, SC

HIGH COURT JUDGE