

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

**2013/HP/0959**

**BETWEEN:**

**FRED CHITENGI CHINGOLE  
AND  
THE ATTORNEY GENERAL**



**PLAINTIFF**

**DEFENDANT**

**Before Hon. Mrs. Justice M.S. Mulenga on the 29<sup>th</sup> day of February, 2016**

FOR THE PLAINTIFF : IN PERSON  
FOR THE DEFENDANT : MAJOR F.H. CHIDAKWA, SENIOR STATE  
ADVOCATE - ATTORNEY GENERAL'S  
CHAMBER

---

## **J U D G M E N T**

---

**Cases cited**

- 1. Richman Chulu v Monarch (Z) Limited (1981) ZR 33**
- 2. Chatyoka Chisanga v The Attorney General 2010/HP/1127 (unreported)**
- 3. The Attorney General v Sam Amos Mumba (1984) ZR 16**
- 4. Chrsitopher James Thorne vs Christopher Mulenga and two Others (2010) ZR 221 vol 1**
- 5. Murray v Ministry of Defence [1988] 1WLR 692 at 703 to 704,**
- 6. Daniel Chizoka Mbandangoma v The Attorney-General (1979) Z.R. 45 (H.C.)**
- 7. Andrew Tony Mutale v Crushed Stones sales Limited (1994) SJ 98 (SC)**

The Plaintiff commenced this matter by Writ of Summons dated 8<sup>th</sup> July, 2013 claiming the following reliefs:

- a. Damages for wrongful arrest, detention, wrongful and false imprisonment in the sum of K250,000.00*
- b. Damages for false and malicious prosecution in the sum of K150,000.00*

- c. Damages for defamation of character, embarrassment, trauma or mental stress, loss of freedom and rights in the sum of K150,000.00*
- d. Damages for loss of business under KUTUCHI TRADING AND IMMIGRATION CONSULT in the sum of K400,000.00*
- e. Damages for loss of shares of profits of ZAMBIA RESOURCES INNOVATION LIMITED in the sum of K700,000.00*
- f. Interest, costs and any other relief the Court may deem fit and just.*

The Plaintiff states in his Statement of Claim of even date that he is a Zambian national and a retired civil servant who served in various positions the last ones being First Secretary of Zambia High Commission Pretoria, South Africa and Senior Section officer, Immigration HQ in Lusaka. That the Defendant is sued on behalf of the Zambia Police Service by virtue of the State Proceedings Act Cap 71 of the Laws of Zambia.

The Plaintiff states that he was one of the shareholders and Directors of a company called Zambia Resources Innovation Limited which was registered and incorporated in the Republic of Zambia under the Companies Act Cap 388 of the Laws of Zambia and dealing in buying, selling and exporting gemstones. Under the said company he was entitled to a share of profits of the said company. He also registered a company under the Registration of Business Names Act, Cap 389 of the Laws of Zambia called Katuchi Trading and Immigration Consult and he was dealing in immigration matters.

On 25<sup>th</sup> May, 2009 he was arrested by the Defendant's agents on allegations of obtaining goods by false pretences contrary to section 309 of the Penal Code Chapter 87 of the Laws of Zambia from Greenfell B. Mwila and he was placed in the police cells. On 2<sup>nd</sup> June, 2009 he was re-arrested for obtaining goods by false pretences and obtaining pecuniary advantage by false pretences contrary to section 309 of Cap 87 of the Penal Code from Eddie Chenda Mwikuta, Greenfell B. Mwila and Crystal Car Hire Limited and on the same date he was released on police bond or recognizance.

Further on 12<sup>th</sup> June, 2009 he and his co-accused appeared in the Subordinate Court and the prosecution applied to split the charges into three and the application was granted. In the first case under cause no. 2SP/H/99/2009 he was charged with the offence of obtaining goods by false pretences from Eddie Chanda Mwikuta. In the second case he was charged with the offence of obtaining pecuniary advantage by obtaining 500 x 25kgs bags of mealie meal and 200 x 5 litres containers of cooking oil from Greenfell B. Mwila.

In the first case, cause no. 2SP/HP/99/2009, he was on police bond and in the second and third matters he and his co-accused were granted cash bail in the sum of K5,000.00 each and they failed to raise the said sums and they were placed in prison. The State failed to prosecute the first matter under Cause No. 2SP/H/99/2009 and on 11<sup>th</sup> February, 2010 the Subordinate Court

dismissed the matter and acquitted him. In the second and third matters he was prosecuted in the Subordinate Court and in November, 2010 and 28<sup>th</sup> September, 2011 he was acquitted, respectively

The three cases had attracted public attention and each time there was a hearing several members of the public were attending the hearing in open court. That as a result of the criminal proceedings against him, his co-shareholder and director in Zambia Resources Innovation Limited wound up the company and went back to South Africa. His company called Katuchi Trading and Immigration Consult also closed and to date has remained closed and he was suffering loss of business and dividends. Further, as a result of the criminal proceedings against him, he has suffered embarrassment, trauma, inconvenience and his character has been injured and he has lost his freedoms and rights and thus the claims.

The Defendant in the Defence dated 12<sup>th</sup> November, 2014 denies the claims and admits only to the extent that the Plaintiff was jointly charged with his business partner Tresford Chomba for a criminal offence. The Defendant avers that the Plaintiff was given police bond and charged for obtaining pecuniary advantage by false pretences contrary to the law and the matter was taken before the Subordinate Court.

It is also admitted that the Plaintiff was charged for a criminal offence after investigations and a complaint lodged by one Greenfell Mwila. That the bail conditions are at the court's discretion and the Plaintiff underwent the due process of the law. That the Plaintiff's matters were under one cause number in the Subordinate Court and were split and reallocated to different courts due to complaints from the Plaintiff and his co - accused.

That the Plaintiff was acquitted in only one matter but his business partner, Mr. Tresford Chomba was convicted and sentenced to imprisonment. That they are not responsible for any loss or damage suffered by the Plaintiff, if any, and the Plaintiff is not entitled to any reliefs claimed or at all.

At the trial the Plaintiff testified that he was arrested on 25<sup>th</sup> May, 2009 on allegations of obtaining goods by false pretences. On 2<sup>nd</sup> June, 2009 he was rearrested on similar charges that he had obtained goods from Eddy Chanda, Mwikuta, Greenfell Mwila and Crystal Care Hire Limited. He was given police bond. Then on 12<sup>th</sup> June, 2009 he appeared in the Subordinate court. The prosecutor applied to split the charges which application was granted. In the first case he was charged with obtaining goods from Eddie Mwikuta, second count involved Crystal Car Hire and the third case was obtaining pecuniary advantage involving 500 x 25kg bags mealie meal and 200 x 5 litres containers of cooking oil from Greenfell Mwila. In the first case he continued on police bond but in the

second and third cases he was granted cash bail of K5,000.00 which he failed to pay and he was then taken to remand prison. The state failed to prosecute the first matter under cause no. 2SP/H/99/2009 and so on 11<sup>th</sup> February, 2010 the Subordinate Court dismissed the matter and acquitted him.

The second and third matters were prosecuted and in November 2010 and 28<sup>th</sup> September, 2011 he was acquitted. These matters were in open court and as a result of continuous adjournments the cases took 1 year and 5 months. Consequently, he lost his business that is, Zambia Resources Innovation Limited which was wound up as his South African co-director left the country for South Africa. They were dealing in gem stones and he held 50% shares and had a licence to deal in gem stones. His co director had access to international markets where they used to export on the basis of his licence and export permit to India.

His other company Katushi Trading and Immigration Consultant was also closed as there was no one to carry on the business as he was a sole director. He had experience in immigration having worked in the Immigration Department and he was registered as Immigration Consultant with the Ministry and the code of conduct was that no consultant shall have criminal proceedings and he was therefore deregistered. In both companies the financial rewards were substantial and he lost the chances of not only continuing in business but also access to actual returns in financial terms.

Further, these were the only forms of professional and career attributes he had and he has no source of income as the result of court proceedings.

Under cross examination the Plaintiff testified that he had no relationship with Zambia Aids Fund as he withdrew his shares. He explained that the said company was constituted by him and his co director Chomba. He was the managing director while Chomba was director finance. His relationship with the co-director was to ensure they were running the organization registered as limited by guarantee meaning they were not shareholders in terms of material or financial investments and that no dividends accrued to either of them. He constituted the company in 2009 and the shortly after, the matters arose which caused court proceedings against the two as directors. It was wound up when the proceedings were concluded in 2010.

Between 8<sup>th</sup> and 18<sup>th</sup> May 2009, the company placed an advert in the Zambia Daily Mail, inviting the public specifically business houses to apply as suppliers of food stuffs, attire and transport. Mr. Tresford Chomba his co-director was aware of this advert. Greenwell Hardware responded to this advert by filling an application form and paying an application fee to supply cooking oil and maize meal. Greenwell's company supplied cooking oil and maize meal for about K54,000.00. These goods were meant to be paid for on credit over a period of one month. The Plaintiff and his

co-director then held an official ceremony at Courtyard Hotel where they had a guest of honour present tokens of the commodities to representatives of a few of the beneficiaries from a selection of the clubs that were within their catchment area of Mtendere. He could not remember the club's names and their representatives.

After the Courtyard event, the goods were transported to their warehouse in Mtendere. It was the responsibility of director finance to keep the goods and distribute to beneficiaries. His responsibility was to supervise which included monitoring, receiving and examining reports. His company had the capacity to pay for those goods. It was on the basis of this transaction that he and his co director were prosecuted in the subordinate court.

Within a short period he was summoned to Mtendere police to the effect that there was a complainant, the proprietor of Greenwell Hardware, Mr. Greenwell Mwila. The Plaintiff was held at the police station and informed that the police were investigating the matter because the complaint was that his co-director Chomba Mapalo had been selling the said goods. The Plaintiff was not aware that they were being sold by his co-director. The police recovered some of the goods from businessmen operating from Mtendere market. These were not the beneficiaries.



There was no letter that the supplier would be paid within three (3) days. He stated that there was a contract agreement for a credit facility to the company to pay after one month and unfortunately the matter became a criminal investigation matter that went to court. The company was limited by guarantee and was to be supported by well wishers and donors hence the period they gave in the contract.

Prior to being acquitted, he was found with a case to answer on the charge obtaining goods by false pretences and his partner was found guilty. The appropriate people to answer on what the company was doing were the two of them as directors.

The Plaintiff acknowledged that he did not mention the Zambia National Aids Fund or his co-director in the statement of claim as the reason why he was prosecuted in court below. The police investigation and prosecution of him as director was malicious as they had the contract documents regarding the credit arrangement. The agreement or debt could not be honoured to date as the case had become criminal. The company could not continue the activities of acquiring assistance from donors and well wishers while remanded in custody. The money was not present at the time of contracting.

In re examination the Plaintiff stated that in his responsibility of supervising and monitoring, he had a difficult time trying to ensure

there was no abuse considering the time factor when the goods were delivered and complaint raised by the supplier shows that he had no hand in the same.

DW1 was Lloyd Mwansa, who testified that he was in the Zambia Police Service as a detective constable from 1999 to 1<sup>st</sup> November, 2013 based at CID and frauds section. On 27<sup>th</sup> May, 2009 he was assigned a docket of theft for further investigation in which Greenfell Mwila a director at Greenfell Hardware and Electronic Supplies complained that between 8<sup>th</sup> and 18<sup>th</sup> May, 2009, he saw an advert in Zambia Daily Mail in which Zambia National Aids Fund (ZNAF) had advertised to the public inviting companies to register as suppliers. He responded to the advert and on 14<sup>th</sup> May, 2009, he received a confirmation from ZNAF that his company had been registered with them as a supplier. On the same day he was asked to supply them 500 x 25kg breakfast mealie meal at the cost of K40,000.00 and 200 x 5 litres containers of cooking oil at the cost of K14,0000.00 giving a total came of K54,000.00. On 25<sup>th</sup> May 2009, he delivered the goods to ZNAF and these were received by Mr. Tresdford Chomba and he was told that he would be paid after 3 days. That efforts to try and get the money were futile as the offices were found closed and the directors' phones were switched off. He became suspicious and thus reported the matter to the police.

That acting on the report, investigations were instituted by going to PACRA to find out the directors of ZNAF and records indicated that it was registered with PACRA under certificate no. 78438 on 27<sup>th</sup> April, 2009 and that the directors were the Plaintiff and Tresford Chomba. That the company was registered a week before the adverts started running and that a number of companies had responded to the adverts to supply goods and services to them purporting that the company would pay for the goods and services when the company had no capacity to do so.

They extended their investigations to establish where the goods were being taken and it was revealed that the 500 bags of mealie meal and 200 containers of cooking oil were purported to have been donated to a care group for people living with HIV/AIDS at a function held at Courtyard Hotel. It was later discovered that the directors of ZNAF were actually selling the goods to shop owners around Mtendere market and in the process 160 containers of cooking oil were recovered and 76 bags of mealie meal. The Plaintiff and Tresford Chomba, directors of ZNAF were apprehended, interviewed and later jointly charged with the offence of obtaining pecuniary advantage by false pretences contrary to section 309A (2) (a) of the Penal Code. The Plaintiff was given police bond and the co-accused was not as he had proved elusive before arrest and was committed to court. They were found with a case to answer and put on their defence. DW1 was later informed that Tresford Chomba was convicted while the Plaintiff was acquitted.

As per procedure, the duo were given opportunity to produce evidence that they had capacity to pay being bank account and funders details but they could not do so. They could still not pay the supplier even when the matter went to court. DW1 was aware of several other cases in which his colleagues had been investigating similar matters concerning the same suspects for example hire of transport and other supplies.

Under cross examination DW1 stated that everyone who bought goods stated that they were being delivered by John, the employee driver, who said that he was sent by the Plaintiff as managing director and Tresford Chomba as commercial and administration director. The said John was called to testify. DW1 was aware that two other incidents were being investigated at around the same time and were before different courts. There was a document entered into by ZNAF and Greenwell stating that payment was to be within 30 days and complainant was told within 3 days which is within 30 days. The complainant became suspicious when phones were not being answered and offices were closed. That to date the Plaintiff and ZNAF have not paid back to the complainant. The state gave back the goods recovered to the complainant.

This marked the close of the trial. The parties were given opportunity to file submissions but only the Plaintiff did so on 6<sup>th</sup> November, 2015. The Defendant's submissions which were filed

very late have not been considered. He submits that the proceedings and Judgment of the subordinate courts on pages 16 to 29, 37 to 60 of his bundle of documents reveal that none of the prosecution witnesses connected him to the offences he was charged and prosecuted for. He cites **paragraph 1340 of the Halsbury's Laws of England 4<sup>th</sup> edition**, where it is stated as follows:

**"A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in the motion a criminal charge. To be actionable as a tort the process must have been without reasonable and probable cause, must have been instituted or carried on maliciously and must have terminated in the Plaintiff's favor. The Plaintiff must also prove damage."**

He states that in the current case he was prosecuted and the proceedings terminated in his favour and he was acquitted on 28<sup>th</sup> September, 2011. As to the non existence of reasonable and probable cause for his prosecution he refers to the case of **Hicks v Faulkner (citation not provided)** where Hawkins J states that:

**"I should define reasonable and probable cause to be, 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 ordinarily 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."**

Further in the case of **Richman Chulu v Monarch (Z) Limited (1981) ZR 33** it was held that:

**"False imprisonment only arises where there is evidence that the arrest which led to the detention was unlawful, since there was no reasonable and probable cause."**

In the case of **Chatyoka Chisanga v the Attorney General 2010/HP/1127 (unreported) Chashi J.** stated that:

**"Even assuming that this suspicion had a reasonable basis, there appears to be no basis discernable from the record upon which the Plaintiff was charged with the offence of murder. A perusal of the Judgment by Judge Kakusa also appears to confirm the Plaintiff's testimony that none of the prosecution witnesses adduced evidence to connect the Plaintiff to the offence with which he was charged. The technicality upon which the Plaintiff was allegedly acquitted is therefore inconceivable. Accordingly I find no reasonable or probable cause for the Plaintiff's prosecution".**

That from the evidence that was adduced in the subordinate court, had the police conducted the investigations properly, he was not going to be arrested, charged and prosecuted, therefore, there was a dereliction of duty on the part of DW1 and the Defendant must be held liable for its agent's wrongful acts. Further, that DW1 arrested him without a warrant and without telling the reason of arresting him. In **The Attorney General v Sam Amos Mumba (1984) ZR 16** it was held that:

**"Where a Police Officer makes an arrest without warrant, it is incumbent upon him to inform the person so arrested of the grounds for his arrest unless he himself produces a situation which makes it practically impossible to inform him. Failure to inform the arrested person as soon as reasonably practicable to do so of the true reason of his arrest will in a proper case, constitute false imprisonment. It is not enough where a Police Officer makes arrest without warrant that a police officer has reasons for effecting an arrest without a warrant, if such reasons are kept to himself or if the reasons given are not true. In either situations, such a Police Officer may be held liable for false imprisonment."**

That pages 1 to 5 of his bundle of documents revealed that he held a high position in the civil service and therefore he deserved respect and his arrest and prosecution without any reasonable and probable cause has damaged his good character locally and internationally. Pages 65 and 14 of his bundle of documents show the bad prison conditions he was subjected to.

That his company Katuchi Trade and Immigration Consultancy closed down as a result of his detention and his company was deregistered due to the criminal offences he was facing in accordance with Ministry of Home Affairs - Immigration Department Administrative Guidelines for Regulating Immigration Consultants - Code of Conduct and Rules to be followed by all Immigration Consultants which read in part that:

**"The rules relate not only to conduct but also to the professional practice and discipline of the registered immigration consultant and their employees."**

.....

**iv) no consultant shall be involved in any criminal activities. Such a consultant will be deregistered forthwith."**

That as shareholder of *Zambian Resources Innovations Limited* he was entitled to a share in the profit and surplus when the company is wound up but did not get any as his co-shareholder continued running the company and later on wound it up. That in **Christopher James Thorne vs Christopher Mulenga and two Others (2010) ZR 221 vol 1** it was held that:

**"The Applicant's right to relief is not clear. No shareholder has any right to any item or property owned by the company for he has no legal or equitable interest. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus when the company is wound up."**

That he has proved his claims against the Defendant and prays for Judgment in his favour.

The facts of the case as I find them are that the Plaintiff and his co-accused, *Tresford Chomba*, registered a company limited by

guarantee known as Zambia National Aids Fund (ZNAF) on 29<sup>th</sup> April, 2009. About a week after the company formation, they placed an advert in the Zambia Daily Mail inviting companies or the public to apply to be suppliers of various goods and services. Greenfell Hardware and Electronics Supplies through its proprietor, Greenfell Mwila, applied and paid the requisite application fees. Other companies or enterprises also did the same. Greenfell Hardware supplied mealie meal and cooking oil amounting to K54,000.00 as ordered by ZNAF. The Plaintiff and his co-accused held a ceremony at Courtyard Hotel where three women were presented with some mealie meal and cooking oil as tokens for their clubs. The Plaintiff could neither name the said women nor the clubs that were to be beneficiaries. Less than three days after the ceremony, the offices for ZNAF were closed and Greenfell Mwila later reported to the police that he was also failing to get hold of the Plaintiff and his co-director over the payment which he said Chomba committed to pay within three (3) days while the contract document stated that payment would be within 30 days. Some of the mealie meal and cooking oil was then recovered from various businessmen or marketeers in Mtendere who stated that they were supplied by Chomba. The said Chomba and the Plaintiff as directors of ZNAF were then arrested and charged with three counts of obtaining money or pecuniary advantage by false pretences and were prosecuted in court. The Plaintiff was eventually acquitted while his co-accused was convicted.



I have considered the evidence on record and the Plaintiff's submissions. The Plaintiff claims damages for false imprisonment, malicious prosecution, defamation, loss of business and profits, interest and cost.

The first claim is for wrongful arrest, wrong or false imprisonment. The learned authors of **Clerk and Lindsell on Torts, 19<sup>th</sup> Edition, London: Sweet and Maxwell 2006** define false imprisonment as "**the unlawful imposition of constraint on another's freedom of movement from a particular place...** False imprisonment is actionable per se because as Lord Griffiths put it in **Murray v Ministry of Defence [1988] 1WLR 692 at 703 to 704,**

**"The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage."**

Section 33(1) of the Criminal Procedure Code Cap 88 provides that:

**"When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which such person shall be brought may, in any case, and shall, if it does not appear practicable to bring such person before an appropriate competent court within twenty-four hours after he was so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond: but, where any person is retained in custody, he shall be brought before a competent court as soon as practicable. Notwithstanding anything contained in this section, an officer in charge of a police station may release a person arrested on suspicion on a charge of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge."**

**Daniel Chizoka Mbandangoma v The Attorney-General (1979) Z.R. 45**

**(H.C.)** it was held that:

**"Under s. 33 of the, Criminal Procedure Code the release on bond of a person arrested without a warrant is mandatory if it does not appear practicable to bring the person concerned before an appropriate competent court within 24 hours of his being taken into custody' unless the offence is one of a serious nature....."**

False imprisonment arises only where the Plaintiff proves that the arrest which led to his detention was unlawful since there was no reasonable or probable cause to believe that an offence had been committed. The Plaintiff in his testimony testified that he was arrested on 25<sup>th</sup> May, 2009 and within 24 hours of the arrest he was released on police bond as per page 14 of his bundle of documents. The bond clearly indicates that he was arrested for the offence of obtaining goods by false pretence. This was in relation to cause number 2SP/H/99/2009. The Plaintiff was later remanded in custody under cause 2SP/H/99/2024 after having failed to meet bail conditions set by the court. The Plaintiff in the first cause was indeed given police bond within 24 hours of his arrest and in the second cause he was granted bail whose conditions he failed to meet. I do not see any unlawful restraint occasioned by the Defendant's agent as what was done was within the ambit of the law. DW1's evidence was clear that the Plaintiff was immediately informed of the charges leveled against him and offered police bond. Given the facts of this case as found above, there was reasonable and probable cause for his arrest. The failure to meet bail conditions was squarely on the Plaintiff. Thus the claim for

damages for false imprisonment fails as the Plaintiff has not proved that he was unlawfully restrained.

The Plaintiff also claims damages for malicious prosecution. In order to prove malicious prosecution, four (4) essential elements must be proved as stated on **page 1070 of Clerk and Lindsell on Torts 20<sup>th</sup> Edition, Sweet & Maxwell 2010.** These are that:

**"The claimant must show first that he was prosecuted by the defendant that is to say, that the law was set in motion against him by the defendant on a criminal charge, secondly that the prosecution was determined in his favour and thirdly, that it was without reasonable and probable cause and fourthly that it was malicious."**

The authors go on to state that:

**"The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort."**

The Plaintiff has indeed proved as seen at pages 37 to 61 and 63 of his bundle of documents that he was acquitted of the charges leveled against him. The question that remains is whether the prosecution was without reasonable and probable cause and was malicious.

As already stated above the Plaintiff bears the onus of proving each and every element of malicious prosecution. In **Hicks v Faulkner** Hawkins J states that:

**"I should define reasonable and probable cause to be, 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 ordinarily 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."**

The Defendant thus has to show that there was sufficient ground or cause for thinking that the Plaintiff was probably guilty. The prosecutor must only be concerned whether there is a case fit to be tried and not necessary the probability of conviction or strength of the defence.

DW1's evidence was that the complainant was convinced that he would not be paid his money when the phones for the Plaintiff and his co-director went unanswered and the offices for their company ZNAF closed less than three (3) days after he had delivered a large consignment. Further, that the search at PACRA revealed that the company had only been incorporated a few days prior to the adverts being sent to the public to supply goods to the company. It is also not in dispute that the Plaintiff and his company ZNAF had no money at the time to pay for the goods and have not paid for them to date. It is also admitted by the Plaintiff that the goods which were supplied and were supposed to be distributed to unknown beneficiary clubs were found being sold by several businessmen and marketeers in Mtendere a day or so after sourcing them. The Plaintiff was further found with a case to answer.

Based on these facts, I am satisfied that there was reasonable and probable cause to arrest and set in motion prosecution against the Plaintiff. Thus the claim of malicious prosecution has failed as the element of lack of reasonable and probable cause has not been established satisfactorily. There is no need to establish malice but which, in any event, has not been proved on the facts of this case.

The Plaintiff has not proved malicious prosecution and this claim fails.

As regards the claim for damages for defamation of character, embarrassment, trauma or mental stress loss of freedom and rights

**Paragraph 60 of the 4<sup>th</sup> Edition Reissue of Halsbury's Laws of England**

provides that:

**“No action or prosecution for a libel will lie unless there has been a publication. In a civil action for libel the plaintiff must allege and prove that the defendant published, or caused to be published, 'of and concerning the plaintiff', the words complained of to a third person, namely to some person other than the plaintiff.”**

In **Sim v Stretch [1936] 2 All ER 1237** Lord Atkin stated that:

**“The question then, is whether the words in their ordinary signification are capable of being defamatory.... I propose in the present case the test: would the words tend to lower the Plaintiff in the estimation of right thinking members of society generally? ... it is well settled that the Judge must decide whether the words are capable of a defamatory meaning....”**

The Plaintiff has not stated or provided particulars of which words are complained of to be defamatory. The mere fact that he was prosecuted does not amount to defamation. There must be actual words spoken or written which are defamatory. The Plaintiff has thus failed to prove this claim.

The last main claim is for loss of business and loss of shares of profits in Katuchi Trading and Immigration Consult and Zambian Resources Innovations Limited. As regards in the former company the Plaintiff has produced an account statement to show how much he earned. However this statement only covers less two months,

that is, 15<sup>th</sup> January, 2007 to 5<sup>th</sup> February, 2007 and does not show a long period of business trading to show the loss he has suffered. The said company was registered in April, 2004. No accounts have been produced for the later company as well apart from a couple of transactions for July and August 2009 for which he wrote asking for export permits for emeralds. The gemstone licence for the company was also only granted in April 2009 after the company was registered in December 2007. Further, the Plaintiff claims that the companies were wound up and he has lost a share of the profits. The Plaintiff has not produced evidence to prove the winding up and to prove that he has lost the said profits. The general position regarding special damages as stated in the case of **Andrew Tony Mutale v Crushed Stones Sales Limited (1994) S.J. 98 (SC)** is that they must be specifically pleaded and proved. In the absence of proof of the said proceeds or profits and that the companies were wound up as a result of the Plaintiff being prosecuted, these claims cannot succeed. In addition, these claims are hinged on the main claims of false imprisonment, malicious prosecution and defamation and these main claims having failed the auxiliary claims cannot succeed. This also applies to the claims for interest and costs.

All in all the Plaintiff has not proved his claims.

The Plaintiff's action is accordingly dismissed.

Costs are for the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

**Dated this 29<sup>th</sup> day of February, 2016**



.....  
**M.S. MULENGA**  
**HIGH COURT JUDGE**