IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 1 OF 1997

(Being High Court, Lilongwe District Registry
Civil Cause No. 91 of 1992)

BETWEEN:

PRESS (FARMING) LIMITED (A Firm).....APPELLANT

- and -

MAJID ISAAT.....1ST RESPONDENT

- and -

FAROOK ISAAT.....2ND RESPONDENT

- and -

RASHID ISAAT.....3RD RESPONDENT

- and -

KENNETH MGANGILA.....4TH RESPONDENT

- and

REX CHATATA.....5TH RESPONDENT

- and -

IDRISS ALI.....6TH RESPONDENT

BEFORE: THE HONOURABLE THE CHIEF JUSTICE

THE HONOURABLE MR JUSTICE UNYOLO, JA

THE HONOURABLE MR JUSTICE KALAILE, JA

W Msiska, Counsel for the Appellant

Msungama, Counsel for the Respondents

Chirambo (Mrs), Official Interpreter/Recorder

J U D G M E N T

Unyolo, JA

The respondents were arrested by the Police after an employee of the appellant had reported a case of attempted theft of a water pump at one of the appellant's estates known as Kakoma 1. The respondents were tried for the offence in the Principal Resident Magistrate's Court at Lilongwe and were acquitted on a submission of no case to answer. They then instituted civil proceedings in the Court below for damages for false imprisonment, slander and malicious prosecution. They also claimed special damages. They succeeded on the claims for false imprisonment and slander and also on the claim for special damages. In respect of the claim for false imprisonment, the Court awarded aggravated damages. Being dissatisfied with that decision, the appellant appealed to this Court.

Several matters arise for determination in this appeal. The first concerns whether the proferred evidence supported the pleadings and findings on the claim for false imprisonment. Paragraph 4 of the statement of claim is directly relevant on this aspect of the case. The paragraph provides:

"On or about the 11th November, 1990 the said Mr Chisambo, acting in the course of his employment, wrongfully directed and procured the Police Officer to arrest the plaintiffs and take them into custody on a charge then made by the defendant's employee that the plaintiffs had stolen the defendant's water pump from the said Kakoma 1 Estate."

In argument, counsel for the appellant submitted that there was no evidence on record supporting the allegation made in the paragraph just reproduced, namely, that the appellant's employee, Mr Chisambo, made a charge to the Police that the respondents had stolen the appellant's water pump, and directed and procured the Police to arrest the respondents and take them into custody. Counsel submitted that rather the evidence was that after the appellant found that the water pump had been interfered with, the matter was referred to the Police and that after visiting the estate and interviewing the respondents, the Police, on their own, made the decision to arrest the respondents and take them into custody.

Counsel for the respondents disagreed with this submission. He contended that there was ample evidence which showed that Mr Chisambo did make a charge of attempted theft against the respondents and directed and procured the Police to arrest them and take them into custody.

It is trite that the crucial issue in an action for false imprisonment is whether the defendant or his servants or agents made a charge against the plaintiff on which it became the duty of the police to arrest. If the defendant made such a charge, then he is liable. He is, however, not liable if he merely gave information, or merely stated the facts, and the police acted according to their own judgment. In **Admarc v. Stambuli, MSCA Civil Appeal No. 6 of 1984**, it was stated on this point that if the defendant went to the police station and stated that he suspected that an offence had been committed and requested the police to investigate, that would be laying an information because any arrest subsequently would take place on the discretion of the police, after examining the facts.

Referring to the evidence, it was common case that there was a confrontation between the appellant's employees and the respondents during the night of 21st October 1990 on a road within the appellant's estate at Kakoma 1 Estate. There was evidence that a water pump at the estate was found to have been tampered with. It was not disputed that the matter was reported to the Police on 22nd October 1990. It was also not disputed that the respondents were arrested on 11th November 1990. It

is instructive to reproduce the respondents' evidence on this part of the case. PW1, who is the 5th Respondent, said:

"Next morning everybody went to his office for the usual duties until on 11th November 1990 when I went back to my office I had a message saying that I should report at the Police Station. It was Lilongwe Police Station. It was almost lunch hour I was told to report at CID's office to meet Mr Sikazwe, CID. When I went there I found my friends, Majid with two brothers, plus the other two, meaning Farook Isaat and Rashid Isaat, Mgangila, plus Idriss. I was the sixth one. Mr Sikazwe invited us into the office. He

asked one by one of us what happened on that particular day. I did not meet a gentleman by the name of Chisambo at the Police. Each one of us was asked separately. After giving all the statements at around 1 o'clock pm, we were all locked in at the Police Station by the Police."

And PW2, the 1st Respondent, who was the only other witness on the respondents' side, said:

"After sometime I received a phone call from my brother who used to stay at Chilinde that there were some policemen who wanted to see me at the Station together with my gun. I went to tell my friend Rex (PW1). We went together there and we were put into cells. We went to Lilongwe Police Station of Old Town. I found Mr Sikazwe. He told me that they had been looking for me and my friends. He claimed that I had gone to Kakoma Estate to steal a water pump. This was through information from a Farm Manager of the said Estate. Afterwards, a statement was recorded from me and my friends. We were not released to go home. It was on 11th of November 1990."

Stopping here for a moment, it will be seen that there was conflict between the respondents' case on their pleadings and the evidence they adduced. As we have shown, the respondents' allegation, according to their statement of claim, was that it was one, Chisambo, who, on 11th November 1990, directed and procured the Police to arrest them, charging them with having stolen a water pump. The evidence, however, does not bear this out. As we have indicated, the two respondents who testified at the trial said that when they called at the Police Station, on this date, the 11th November 1990, having learnt that they were wanted, they met a Mr Sikazwe, not Mr Chisambo. Actually, we have shown that PW1 expressly stated that he did not meet Mr Chisambo. Again, it will be seen that there was a discrepancy between the allegation made in the statement of claim and the evidence on the question of the charge the appellant's employees specifically made against the respondents. In the statement of claim, the charge was said to be that of theft of a water pump. In the evidence, it was said that the charge was that of attempted theft of the water pump. Observably, no amendment of the statement of claim was sought. In our view, these were material contradictions which dealt a devastating blow to the respondents' case.

The police officer who dealt with the case and interrogated the respondents was not called as a witness in the civil action in the Court below. The learned trial Judge seems to have held it against the appellant that the appellant did not call the police officer. With respect, we are unable to join with the learned trial Judge in this view. In accordance with the time-honoured principle of the law of evidence, he who affirms must prove the assertion. The burden, therefore, lay on the respondents to prove that the appellant made a charge against them.

The learned trial Judge expressed the view that by reporting the matter to the Police, Mr Chisambo must have, simply by that act, procured the Police to arrest the respondents. He said that the Police had not much option but to arrest the respondents since the water pump belonged to Press Farming. What was implied was that since the appellant company was one of the companies that belonged to the former Head of State, the Police had little choice but to arrest the respondents when the appellant made the report.

With all respect, the learned trial Judge's view is not supported by the evidence. As we have indicated, the police did not arrest the respondents soon the report was made. The evidence showed that the Police carried out investigations which included a visit to the Estate, and it was only some twenty-two days later that they called the respondents to the Police Station for interrogation. The evidence showed that it was after the interrogation that the respondents were taken into custody.

Looking at the evidence as a whole, the distinct impression that is made is that the appellant's employee merely stated facts to the Police about what had transpired at the estate on the relevant night when they met with the respondents and confronted them, and that the Police, using their own judgment, arrested the respondents and took them into custody. We are, therefore, unable to support the finding that was made by the learned trial Judge on this aspect of the case.

The second issue that arises for determination in this appeal is whether the claim for slander was proved. Counsel for the appellant pointed out that the respondents' case, according to their statement of claim at paragraph 8, was that when they got to the Police Station on 11th November 1990, Mr Chisambo, the appellant's Estate Manager, said to one, Mr Sikazwe, a police officer, in the presence of other bystanders, the following words:

"These are the thieves, lock them in."

Counsel submitted that there was nothing in the evidence to support this allegation.

Looking at the evidence, the submission is borne out. None of the respondents who testified at the trial said that he heard Chisambo utter the alleged words. Actually, as already pointed out, PW1, the 5th Respondent, said that he did not meet Mr Chisambo at the Police Station. He said that he met Mr Sikazwe who told him that it was alleged he wanted to steal the water pump. It is clear that there was a radical departure between the respondent's case as pleaded and the evidence that was adduced. In the circumstances, we are unable to support the finding by the learned trial Judge on this point.

The other two issues that were raised for the Court's determination in this appeal were whether the special damages that the Court below awarded were specifically and strictly proved. The second issue was whether aggravated damages can be awarded where aggravating circumstances had not been pleaded. What happened in the present case was that the learned trial Judge awarded aggravated damages, although no aggravating facts or circumstances were specifically pleaded in the respondents' statement of claim.

Having come to the conclusion that the respondents failed to prove their case on both the false imprisonment and slander claims, the questions just mentioned fall out naturally. Since, however, the second issue, relating to aggravated damages, raises a general question, we think that it might be useful that the Court comments on this, particularly having been told by Counsel that the law appears to be silent on this aspect.

There is plenty of authority for the proposition that a plaintiff need not specifically plead general damage(s) or particulars thereof: see **paragraph 18/12/19** of the **Supreme Court Practice, 1995 Edn**. It is trite that special damages, however, must as a rule be specifically pleaded. Exemplary damages are one example of special damages that must be specifically pleaded, together with the facts on which the party pleading relies: see **paragraph 18/12/6** of the **Supreme Court Practice**, supra.

Referring to aggravated damages, the matter is also covered by authority. **Paragraph 18/12/6**, just cited, states that "the facts relied on to support a claim for aggravated damages should be specifically pleaded". Two cases are cited, namely, **Rookes v. Barnard (1964), 1 All ER 367** and **Perestrello e Companhia Limitada v. United Paint Co. (1969), 3 All ER 479**. The short answer to the question raised on this aspect of the case is, therefore, that aggravated damages must be specifically pleaded, together with the facts on which the claim is made. This conclusion, in our view, is further supported by the general requirement of any statement of claim that it should, to repeat the well-known words of **Cotton, LJ** in **Philipps v. Philipps (1878), 4 QBD 127 at 139**, "put the defendants on their guard and tell them what they have to meet when the case comes for trial".

In the instant case, the learned trial Judge, therefore, erred in awarding aggravated damages when the same, and particulars thereof, were not pleaded or claimed specifically in the statement of claim.

The final position is that for the foregoing reasons, this appeal must succeed in its entirety with costs, and the findings made by the Court below and the damages it awarded are set side.

PRONOUNCED in open Court this 25th day of August 2000, at Blantyre.

Sgd .....

R A BANDA, CJ

Sgd .....

L E UNYOLO, JA

Sgd .....

J B KALAILE, JA