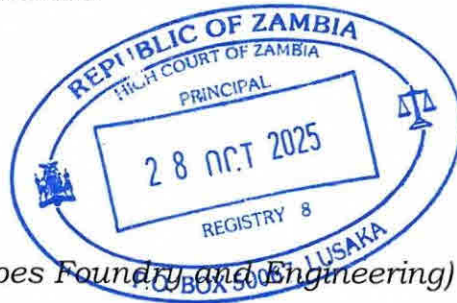


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

**2020/HP/0404**

*(Civil Jurisdiction)*



**BETWEEN:**

**HEROD BANDA** *(T/A Heroes Foundry and Engineering)*

**PLAINTIFF**

**AND**

**LUSAKA WATER AND SEWERAGE COMPANY  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

**BEFORE HON. MADAME. JUSTICE E.P MWIKISA AT LUSAKA THE ...<sup>TH</sup> DAY  
OF OCTOBER, 2025**

FOR THE PLAINTIFF:	G. PINDANI OF CHONTA, MUSAILA AND PINDANI ADVOCATES
FOR THE 1 <sup>ST</sup> DEFENDANT:	C.B.C SIKAZWE, IN-HOUSE COUNSEL, LUSAKA WATER AND SEWERAGE COMPANY
FOR THE 2 <sup>ND</sup> DEFENDANT:	N. NKHAZI, STATE ADVOCATE, ATTORNEY GENERAL'S CHAMBERS

# JUDGMENT

**Cases referred to:**

1. *Galaunia Farms Limited v National Milling Corporation Limited and Another* (2004) ZR 1
2. *Zambia Railways Limited v Pauline S. Mundia and Brian Sialumba* (2008) ZR Vol 1, p 287
3. *Khalid Mohammed v Attorney-General* (1982) Z.R. 49
4. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172.
5. *Attorney General v Sam Amos Mumba* (1984) Z.R. 14
6. *Philip Mhango v Dorothy Ngulube and Others* (1983) ZR 61

7. *Attorney-General v D.G. Mpundu* (1984) Z.R. 6 (S.C.)
8. *Victor Konie v The Attorney General* (1990 - 92) ZR, 20
9. *Kafue District Council vs. Chipulu* (1995-97) Z. R. 190
10. *Makayi and Another v Muhetu Wachata and Another* (1992) *Selected Judgment Simposya v Eric Masauso Phiri and others* — Appeal No. 158/2009
11. *Aspro Travel Limited v. Owners Abroad Group Plc* [1995] 4 All ER 728
12. *The Attorney General v Clarke* Appeal No 96 of 2004
13. *Kariba North Bank Limited v Zambia State Insurance Corporation Limited* (1980) Z.R. 94
14. *Anti-Corruption Commission v Charles Sambondu* SCZ Appeal No. 054/2013

**Legislation referred to:**

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

**Other works referred to:**

1. *Phipson on Evidence*, 17<sup>th</sup> edition in paragraph 6-06 at page 151
2. *Halsbury's Laws of England*, 4<sup>th</sup> Edition Volume 28 at paragraph 43,1340
3. *Gatley on Libel and Slander*, 7<sup>th</sup> edition paragraph 57,
4. *Clerk and Lindsell on Torts*, 20<sup>th</sup> edition, Sweet & Maxwell 20101, at page 1070
5. *Black's Law Dictionary*, 9<sup>th</sup> edition

The Plaintiff commenced this action by way of writ of summons and statement of claim, seeking the following reliefs:

- (a) **damages for loss of business as particularised between 20<sup>th</sup> August, 2018 and 9<sup>th</sup> July, 2019 when the defendants maliciously seized the plaintiff's patterns, raw materials, equipment and manufactured products thereby paralysing production;**
- (b) **Damages for defamation of character;**
- (c) **Damages for malicious prosecution;**
- (d) **Damages for unlawful detention;**
- (e) **Interest on any amounts found due;**

- (f) Any other relief the Court may deem fit;**
- (g) Costs.**

In the accompanying statement of claim, the plaintiff stated that he was a businessman operating under the name Heroes Foundry and Engineering, in the business of recycling scrap metal and manufacturing manhole covers, aluminium, bronze and cast iron products since 1999. The 1<sup>st</sup> defendant is a limited company providing water reticulation services to the public. The 2<sup>nd</sup> defendant is the chief legal advisor to the Government of the Republic of Zambia and is sued pursuant to section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

The plaintiff stated that sometime in 1999, he bought factory equipment and patterns from Vulcan Foundry to manufacture manhole covers, copper, aluminium, bronze and cast iron products. He manufactured and sold the products to the public. That between August, 2018, and September 2019, he received orders from the following customers for the manufacture of various products:

<b><u>Name of customer</u></b>	<b><u>Contract/order value</u></b>
<b>a) Fairface enterprises</b>	<b>ZMW 30, 250.00</b>
<b>b) Angles Technical</b>	<b>ZMW25,000.00</b>
<b>c) Millennium Challenge</b>	<b>ZMW2,000,000.00</b>
<b>Total business value</b>	<b><u>ZMW2,055,250.00</u></b>

The plaintiff stated that he also received several verbal orders and enquiries from the public to manufacture products, and that the 1<sup>st</sup> defendant previously purchased products from him.

The witness testified that on 25<sup>th</sup> August, 2018, whilst working at his factory, officers from the 1<sup>st</sup> defendant company in the company of police officers, without a search warrant, stormed his factory premises and started loading some products made by the plaintiff. That they also loaded equipment, raw materials and patterns (items) used to manufacture products into their motor vehicle. That when he asked the defendants' officers why they were seizing his property their response was that they were recovering stolen property belonging to the 1<sup>st</sup> defendant.

The plaintiff stated that he pleaded and tried to reason with the defendants' officers not to go ahead with the seizure, as the items were not stolen, but manufactured by him in his factory, on orders made by members of the public. He said that he invited them to wait and witness how he manufactured his products, but the defendants' officers were uncompromising. That they maliciously and forcibly loaded his items into their motor vehicle after which they ordered him

to jump into their vehicle to Matero Police Station. That the plaintiff under protest got into his motor vehicle registration number ALC 8361, and was forced him to drive to the police station, accompanied by other police officers. That this instantly halted any further production and business operations.

The plaintiff testified that he was taken to the Criminal Investigations Department (CID) at Matero Police Station, where he was confined from 11:00 hours to 21:00 hours. That he was released without a charge and has never been taken to court to date. He stated that all his seized items remained in the custody of the 2<sup>nd</sup> defendant at the instance of the 1<sup>st</sup> defendant from 25<sup>th</sup> August, 2018, until 9<sup>th</sup> July, 2019.

That further, the Zambia Police Spokesperson issued the following statement, which was broadcast on Zambia National Broadcasting Corporation (ZNBC):

***“Mr Herod Banda, the Director of Heroes Foundry and Engineering has been arrested as a suspect and is in police custody after recovering the confiscated items from Heroes Foundry and Engineering’s premises.”***

The plaintiff stated that the words spoken by the Zambia Police spokesperson at the instigation of the 1<sup>st</sup> defendant’s complainant,

in their natural and ordinary meaning, meant and were understood to mean:

- (a) that the plaintiff stole and/or procured manhole covers/cast iron products that were missing/stolen from the 1<sup>st</sup> Defendant;**
- (b) that the plaintiff was a businessman who deals in stolen properties and therefore fraudulent in his dealings; and**
- (c) that the plaintiff is a criminal.**

The plaintiff further stated that the 2<sup>nd</sup> defendant's statement which was also broadcast on social media platforms generated various comments from members of the public who disparagingly condemned the plaintiff. That the comments lowered the plaintiff in the estimation of right-thinking members of society. Further that the plaintiff is also an elder at church, and has suffered reputational damage among the congregants as he could no longer be trusted. That as a result of the foregoing, the plaintiff's character, integrity and standing as an engineer, businessman and a Christian, has been gravely injured/damaged.

The plaintiff alleged that he lost business and suffered financial ruin due to the defendants' malicious actions, and has suffered loss and damage, as follows:

<b><u>Particulars of special loss/damage</u></b>	<b><u>Order value</u></b>
<b>a) Fairface enterprises</b>	<b>ZMW30, 250.00</b>
<b>b) Angles Technical</b>	<b>ZMW25,000.00</b>
<b>c) Millennium Challenge</b>	<b><u>ZMW2,000,000.00</u></b>
<b>Total business value</b>	<b><u>ZMW2,055,250.00</u></b>

On 3<sup>rd</sup> October, 2018, the plaintiff, said that his advocates wrote a letter to the 1<sup>st</sup> defendant demanding inter alia, for the return of his seized items for him to continue operating his business which had completely shut down. That in its reply dated 11<sup>th</sup> October, 2018, the 1<sup>st</sup> defendant maliciously and/or unreasonably declined to return the items.

The plaintiff stated that the defendants failed to prosecute him for any criminal act within 48 hours of his arrest or any time thereafter and detained his items for almost a year from 25<sup>th</sup> August, 2018 to 9<sup>th</sup> July, 2019, before carrying out investigations to come up with the truth. That the defendants acted maliciously and negligently without regard to the plaintiff's rights and business interests when they seized and detained his items before conducting investigations. The plaintiff stated the following as particulars of negligence and malicious prosecution:

- (a) apprehending and detaining the plaintiff from 11:00 hours to 21:00 hours on 25<sup>th</sup> August, 2018 before concluding investigations;**
- (b) failing to take the plaintiff to Court within 48 hours of apprehending him or any time thereafter;**
- (c) failing to return the plaintiff's seized goods/ assets within 48 hours from 25<sup>th</sup> August, 2018, after seizing them or a reasonable time thereafter;**
- (d) failing to consider the plaintiff's business interests when seizing the Plaintiff's patterns, raw materials and products;**
- (e) detaining the plaintiff's goods, patterns, equipment and raw materials for almost 1 year.**

In its defence filed on 28<sup>th</sup> April, 2020, the 1<sup>st</sup> defendant denied that its officers confiscated the plaintiff's items. It stated that the seizure and confiscation of the plaintiff's items was at the instance of the Zambia Police Service. The 1<sup>st</sup> defendant also denied publishing any defamatory statements or being in possession of the plaintiff's items.

Regarding the plaintiff's claim that the defendants failed to take the plaintiff to court or to prosecute him for any criminal act, the defendant stated that it does not have the legal privilege to prosecute.

Similarly, the 2<sup>nd</sup> defendant denied all the plaintiff's claims, and stated that on or about 25<sup>th</sup> August, 2018 Detective Sergeant Namate received a complaint from Mr Kelvin Zulu, who stated that he found some manhole covers belonging to the 1<sup>st</sup> defendant along Muzilikazi Road, which were reported stolen from Matero Township a few

months earlier. Acting on that report, Detective Sergeant Namate, in the company of Mr Kelvin Zulu, and three other police officers, found the items reported at Heroes Foundry and Engineering Company and the same were taken to Matero Police Station for verification.

The 2<sup>nd</sup> defendant further stated that the plaintiff was called for interviews at Matero Police Station, where a brief warn and caution statement was recorded. That once investigations were completed, it was established that the plaintiff was the owner of the seized items, and the items were returned to him.

At the trial of the matter, the plaintiff called 4 witnesses.

PW1 was the plaintiff, Herod Banda, a businessman and Mechanical Engineer by profession, of residing in Makeni, Lusaka. He testified that he is the Executive Director of Heroes Foundry and Engineering Company and referred to the certificate of registration at page 1 of the plaintiff's bundle of documents. That the company was registered on 24<sup>th</sup> August, 1999 and is located in Muzilikazi Road, Heavy Industrial Area in Lusaka. That the company is also registered with the Zambia Association of Manufacturers and the Zambia Metal Recycling Association.

PW1 testified that the company deals in recycling scrap metal which the company buys from various dealers. That they then make products such as manhole covers, bronze and aluminium billets and copper products, which they supply to construction companies, filling stations and other engineering companies that make products from the materials they supply.

PW1 further testified that he is a member of Bread of Life Church located in Emmersdale, where he is also the Chief Elder, the second from the presiding Bishop and main advisor and leader of National Council of Elders which is responsible for church policy formulation and the Advisory Board to the Bishop of the church comprising 10 senior elders in the church. That the church has branches within and outside Zambia.

According to PW1, their workshop has patterns and templates which are used to make products according to the customer's specifications. He gave a detailed description of a process known as sand casting, and added that the patterns they use were purchased from Vulcan Foundry in 1999, which was in a similar business as theirs, but had since closed. He listed some of his clients, namely, BP

filling stations, Fairface Construction, J.J Lowe, Angles Construction and other engineering companies.

PW1 testified further that on 25<sup>th</sup> August, 2018, he was in his office attending to customers when around 10:00 hours, he saw a vehicle marked with the insignia of Lusaka Water Sewage Company (LWSC) entering the premises. That he saw men wearing overalls labelled LSWC in the vehicle and that when everyone exited the vehicle, he saw policemen one of whom was carrying a firearm. That he waited in his office thinking that they would go to his office, but instead the defendants' officers went straight into the workshop. That he then got worried and followed them to the workshop, where he found the 1<sup>st</sup> defendant's officers pointing at some products and patterns, which they said were the items stolen from them.

He said that he asked the 1<sup>st</sup> defendant's officers and the police officers if they had a search warrant, but they were very uncompromising and did not show him a search warrant. He said that he tried to explain to them that the products were made in the Company using the same patterns they were claiming belonged to the 1<sup>st</sup> defendant. That he offered to demonstrate the production process

to them but they insisted that the plaintiff did not have the capacity to make them. That the officers loaded the machine, manhole covers and patterns onto the 1<sup>st</sup> defendant's motor vehicle, and tried to push him into the same vehicle. That he refused to get into the vehicle and said he would drive himself to Matero Police Station instead. That one of his employees Mweene Mayombwe, was also taken to Matero Police Station. That the items loaded onto the vehicle belonged to Fairface and Angles Construction, to whom he assured timely delivery of their products.

That at the police station, he was taken to the Criminal Investigations Department (CID), where he was asked to explain how the seized items came into his possession. He said that he explained to the police that some of the products were made in the workshop, and that others were patterns used to make the products. That among the seized items was a product labelled Vulcan Foundry, which he bought from a contractor, namely Mr Chongo, who was asked to do some work in the Zambia National Breweries premises. He explained further that Mr Chongo, gave him a gate pass and receipts from Zambia Breweries showing that he had paid for them. That he handed the documentation to the police, who called Mr Chongo.

It was his testimony that he was detained at the police station from 11:00hours to 21:00hours, and that the police informed him that they were keeping the items seized for investigations, which he did not object to. He said that he insisted that the items were his, and that he was ready to give the Police any further information that they needed.

PW1 continued that he had earlier promised Fairface Enterprises Limited and Angles Construction that he would deliver their products on time. That after some time, Fairface and Angles Construction called him to ask why he had not delivered their orders. He said that he also received inquiries from Geotech, who were working on the Millennium Challenge Project, requesting for manhole covers for their drainages in Lusaka valued at ZMW 2,000,000,000 (Two Million Kwacha). The plaintiff referred to a list of items that were seized at page 2 of his bundle of documents. He reiterated that some of the seized items were for an order that had since been cancelled. That the police did not give him a document to sign after they collected his items. He testified that he was told to report to the police station at least 3 times a week.

In addition, the witness referred to a quotation he gave Geotech at page 7 of his bundle of documents, and added that Geotech was constructing the Millennium drainage but he was unable deliver as the patterns he used were in the custody of the police. He also referred to correspondence by phone and emails between Geotech and himself, per pages 8 to 10; and at page 11, is the manhole cover Geotech wanted him to make for them.

He also referred to an order from Fairfax requesting them to supply manhole covers at ZMW 30,250.00 at page 40 of his bundle of documents; and an order from Angles Construction requesting the plaintiff to supply 10 manhole covers at ZMW 25,000.00 per page 41 and a cancellation of the order by Angles Construction at page 42.

He further referred to an order from Fairface dated 22<sup>nd</sup> February, 2019, requesting the plaintiff to supply 22 manhole covers; and to page 44, a letter by Fairface cancelling the order.

The witness was referred to page 6 of the 1<sup>st</sup> defendant's bundle of documents, and testified that he had no idea where the picture was taken from. He was then referred to page 1 of the 1<sup>st</sup> defendant's

bundle of documents and identified the following finished products and patterns that were confiscated from his premises:

- (a) 1a and 1b were manhole covers made using 1;**
- (b) 2a is a pattern and 2b was a product made by his company;**
- (c) 3a and 3b and 3d patterns used to produce 3c;**
- (d) 3e was assembled upside down;**
- (e) 3f is a product made from 3a or 3b;**
- (f) 4a and 4b are products made using 4c which is a pattern.**

That four (4) days after he was released, PW1, was shocked to receive a phone call from a fellow member of his church, Mwitwa Cassidy, who told PW1 that he had seen a news item live broadcast on ZNBC main news announcing that PW1 had been arrested by the police and was in custody. That Mwitwa Cassidy was surprised that PW1 was home. That he also received calls from Zambia Manufacturers Association and the Recycling Association whom he assured that the products were genuinely obtained. That his Bishop and many other people he had business dealings with, including individuals who had known him for a very long time, also called him.

PW1 referred the court to a letter he wrote to ZNBC dated 18<sup>th</sup> November, 2019, at page 47 of the plaintiff's bundle of documents requesting to buy footage of the news item. That ZNBC informed PW1

that it could not retrieve the news item because it had lost the data (per page 48 of the plaintiff's bundle of documents).

He continued to testify that a year later, the police wrote a letter to his lawyers stating that due to insufficient evidence, the items would be released to the plaintiff. By then, he said that he had lost the orders from Geotech and that when he asked the police if they had a letter from LWSC authorising them to release the said items, he was informed that LWSC said it was confidential. He referred the court to a letter of demand dated 3<sup>rd</sup> October, 2018 addressed to the 1<sup>st</sup> defendant to return the confiscated property and damages for loss of business, at pages 3 and 4 of his bundle of documents and that the 1<sup>st</sup> defendant responded to that demand by way of letter dated 11<sup>th</sup> October, 2018, at page 5 of the said bundle of documents.

PW1 also referred the court to a letter at page 45 of his bundle of documents dated 13<sup>th</sup> August, 2019, addressed to the officer in charge at Matero police station to release the confiscated goods. That the officer in charge at Matero Police station responded by way of a letter dated 9<sup>th</sup> September, 2019, at page 45 of the said bundle of documents.

Regarding his reputation as a very senior member of the church, PW1 testified that he felt that the church may not hold him in the same regard as a credible person. That the people he deals with in business now thought of him as a thief who did not conduct business honestly.

In cross examination, PW1 testified that the seized products were for Fairface and Angles Construction. The witness was referred to the order at page 40 of his bundle of documents dated 10<sup>th</sup> January, 2019, and asked to explain his testimony in chief that some of the orders he lost were from the seizure which was done on 25<sup>th</sup> August, 2018. His response was that fast selling products were made just before the rainy season when construction companies want to cover their manholes. That the products that were confiscated on 25<sup>th</sup> August, 2018, were made in anticipation of orders from Fairface and Angles construction.

PW1 conceded that the police were in order by investigating suspected crimes. When asked why the 1<sup>st</sup> defendant ought to be held liable for loss of business when the police were doing their job, PW1's response was that he expected the police to do their job within a reasonable time. That when his advocates wrote to the police to

release the items, their response was that the 1<sup>st</sup> defendant was insisting that the items belonged to them and that their engineers had positively identified them, as per paragraph 3 on page 5 of the plaintiff's bundle of documents. When asked to show proof that the police stated that their delay in investigations was at the instance of the 1<sup>st</sup> defendant, his response was that the 1<sup>st</sup> defendant should be held liable for loss of business because they reported to the police that they had lost items, and when they went to the plaintiff's premises, the 1<sup>st</sup> defendant's officers, claimed that the seized items belonged to the 1<sup>st</sup> defendant. The witness conceded that the 1<sup>st</sup> defendant was in order to report the matter to the police having lost its property.

In further cross examination, PW1 was referred to a quotation for manhole covers at page 7 of the plaintiff's bundle and explained that the email correspondence at page 8 of the plaintiff's bundle of documents was about manhole covers. He stated that Geotech was undertaking the Millennium Challenge project. He did not have evidence to the effect that Geotech was contracted by Millennium challenge, but that he was informed by Geotech that they wanted to use the manhole covers on the Millennium project.

When referred to paragraph 21(d) at page 6 of the plaintiff's bundle of pleadings, PW1 reiterated that the police were in order to arrest him but that the police seized the items from his premises and arrested him at the instance of the 1<sup>st</sup> defendant. That the police were partly to blame because they did not act independently as they were led by the 1<sup>st</sup> defendant and as such, acted jointly. That the 1<sup>st</sup> defendant's officers identified the items and the police acted on what they were told, and in a way were instructed.

He testified that did not listen to the broadcast or hear the words that were uttered, and that it was communicated to him by a third party. When referred to page 40 of the plaintiff's bundle of documents he testified that manhole covers can be made with other materials such as plastic. That heavy duty manhole covers are made with cast iron, and heavy trucks could pass over them, such as the ones found in filling stations. He said that he knew what the customers meant when they said heavy duty manhole covers since he had been dealing with the said customers for some time. That they made only circular heavy duty manhole covers.

In further cross examination by Ms Nkhazi, the learned State Advocate, PW1 testified that he was also claiming damages for malicious prosecution. He testified that he was not charged and was not taken to court. He however conceded that he was charged for being found in possession of stolen items.

He conceded that the police can make an arrest when a report is made and that they can confiscate items suspected to be stolen.

In re-examination, PW1 testified that the claim for loss of business arises because he was unable to manufacture the orders he received after his products and patterns were confiscated over a period of one year.

PW2 was Cassidy Yassa Mwitwa, of Chalala Rockfield, a Pastor at Bread of Life Church, who serves as the personal assistant to the General Overseer of Bread of Life Church. He testified that he has known the plaintiff through the church for over 22 years, and as a self-employed businessman who ran a foundry workshop. He said that he knew the plaintiff to be a man of integrity, a virtue which earned him the position of chief elder in Bread of Life Church international. That as an elder, the plaintiff leads a council of 11

elders, which is an advisory board to the General Overseer of the Church.

He testified that on the material date, he was home watching TV at 19:00 hours, when he tuned into ZNBC to listen to the news. That the main news items were read out and it was disturbing and emotionally draining to hear the newscaster announce to the nation that a combined team from the 1<sup>st</sup> defendant company and Zambia Police, had confiscated stolen manhole covers believed to be the property of the 1<sup>st</sup> defendant from the plaintiff. That the police had arrested the owner of the company, Mr Herod Banda, in connection with the stolen manhole covers.

He testified further that the news was very disturbing because the plaintiff is a man held in high esteem and a high-ranking leader of their church, and for a leader to be found in a criminal case had great potential to erode the confidence of church members and the church leadership at large. That this also had great potential to scatter the church. That during that news hour, he was further disturbed when he began to receive numerous phone calls from their church members and sister churches who sought clarification regarding the

plaintiff's involvement in the news item. He said that the news was followed by a video clip in which a police spokesperson in the company of the 1<sup>st</sup> defendant's officer standing next to a LWSC branded van, confirmed that the police, in the company of LWSC, had recovered stolen manhole covers believed to be property of LWSC from Heroes Foundry and Engineering Company of Lusaka, and that the police had arrested Mr. Harold Banda of Makeni, Lusaka. That they were clad in work suits branded with LWSC.

That in a disturbed state of disbelief, he tried to reach the plaintiff by phone but his phone went unanswered. That the plaintiff later returned his call and asked him if he had watched the 19:00 hours news to which he responded that he had. That he explained to the plaintiff what the news caster had reported on that day, as narrated to court. The plaintiff confirmed that he had been arrested and detained at Matero Police Station in connection with the confiscated manhole covers to assist the police with investigations, but that he was released later in the evening. That the plaintiff expressed shock that the case had been broadcast despite his efforts to prove to the police and the 1<sup>st</sup> defendant that the confiscated items were manufactured by his company.

That PW2 continued to follow up on the case with the plaintiff who had indicated to him that the matter needed to be brought before the courts of law, with the hope that his name would be cleared as he had been defamed. That almost a year later, the plaintiff showed him a letter from the police stating that they had returned the confiscated manhole covers to the plaintiff and cleared him of the criminal charge, as per page 46 of the plaintiff's bundle of documents. PW2 further testified that the matter had brought a lot of embarrassment as the plaintiff who was now deemed a criminal.

In cross-examination, PW2 testified that the newscaster mentioned that the events occurred on the same date. When referred to paragraph 12 of the statement of claim on page 4 of the plaintiff's bundle of pleadings, PW2 stated that he availed the plaintiff the extract or caption of the news. He said that he confirmed that none of the 1<sup>st</sup> defendant's officers made a statement on the matter. He said that he was not sure when the video clip was made.

PW3 was 34 year old Mweene Moyongwe, a salesman at Heroes Foundry and Engineering in the employment of the plaintiff for 8 years. His testimony mirrored that of PW1 that on 25<sup>th</sup> August, 2018

at around 10:00 hours while they were working, a van labelled LWSC entered the premises and two police officers in the company of officers clad in LWSC work suits disembarked from the van. That one of the police officers was armed. He testified that the said police officers started searching the premises without talking to anyone, and went to the polishing bay where they found manhole covers which were about to be polished. That the 1<sup>st</sup> defendant's officers pointed at the manhole covers and patterns and said to the police "these are our manhole covers". That they started loading the manhole covers, the manhole cover patterns made of cast iron, and products that were about to be polished, into their van. That when he asked them why they were loading the items without search warrants, they told him to keep quiet or else they would shoot him.

PW3 told the court that the plaintiff asked them for a search warrant but was told that there was no search warrant and that Zambia Police could search anywhere they wanted. That as they were loading the manhole covers, into the van, the policemen instructed PW1 to jump into the van but he refused saying he would drive himself. That an armed police officer went with PW1 in his car. That PW3 was also forced onto the police van and they drove to Matero Police Station.

At the police station, the witness said that he was ordered to remove his shoes, and was taken to the CID office where he was held until 15:00 hours of the same day. That he then went back to work and waited until 18:00 hours but PW1 did not return to the office. That the manhole covers and their patterns were offloaded at Matero Police Station. According to PW3, the 1<sup>st</sup> defendant's officers said that their manhole covers were missing, but that they collected a whole set of manhole covers, which they returned almost a year after they were confiscated.

There was no cross-examination.

PW4 was Emmanuel Mutale Chongo, of Chilenje South. He testified that he is a businessman dealing in solid waste and recycled material. He said that he retired from Zambia Breweries in 2010 and that his company is registered in the name of Iman Chongo Construction Hardware.

He testified that he met the plaintiff after he retired early in 2012, and that his former employer Zambia Breweries, asked him to do housekeeping by collecting and buying scrap metal, plastic bottles, empty sugar bags as well as empty plastic drums. He provided a

detailed explanation of the process for purchasing scrap metal at Zambia Breweries, and continued to testify that on 25<sup>th</sup> August, 2018, he was called by the Security Manager at Zambia Breweries and told that policemen from Matero Police Station wanted to speak to him. That when he went to the Security Manager's office, he found three police officers, one of whom was Officer Moono, who took his particulars and told him to go to Matero Police Station the following day.

That the policemen asked PW4 what he had sold to the plaintiff and he responded that he sold scrap metal to him. He said that they told him that they found the plaintiff with manhole covers, to which he responded that he only bought scrap metal from Zambia Breweries. That the police demanded for weighbridge papers, a receipt and gate pass signed by the Risk Manager, which he gave to Officer Moono. That they told him that they would call him later after studying the documents.

That the following day, PW4 went to officer Moono's office who asked him how much he sold the scrap metal to the plaintiff for, and that PW4 handed over the receipts for payment received from the plaintiff,

for the same. That PW4 said that he had a letter from Zambia Breweries confirming that he bought genuine products from Zambia Breweries and that he left the documents with the officer who never returned to him.

There was no cross examination.

The 1<sup>st</sup> defendant called 2 witnesses in support of its case. DW1 was Darius Mapumba of Chelstone extension, Lusaka the Head of Security for the 1<sup>st</sup> defendant.

His testimony was that in August 2018, he received a phone call from the Zone Manager for Matero who informed him of a place within Matero where manhole covers and frames that were being stolen from the sewer network were seen. That he asked him to report the matter to the police, to transport the police to the site and that he would follow them later. That he immediately started off for Matero Police Station and called a superintendent under their Matero Sewerage Plant who he wanted to go and identify the said frames and covers to determine if they belonged to the 1<sup>st</sup> defendant. That while on the way, the 1<sup>st</sup> defendant's Matero Zone Manager told him that the police were already at the site. That when he arrived at the site, the police

asked him to identify the materials that belonged to the 1<sup>st</sup> defendant, but asked them to wait for Dominic Sitambuli, the superintendent from Matero.

That after successfully identifying some frames and covers, the police officers requested DW1 to help transport them to Matero Police Station where he recorded a statement and left the police station. That the matter dragged on and the police insisted that they were still investigating. PW4 told the court that the police wrote to the 1<sup>st</sup> defendant stating that because of insufficient evidence, the confiscated materials were returned to the plaintiff, as per page 46 of the plaintiff's as bundle of documents.

The witness testified that the police detained the plaintiff at Matero Police Station, and that the 1<sup>st</sup> defendant has no power to prosecute or arrest, but only to report a matter to the police. He added that he only made one statement at Matero Police Station. That when his office receives a report of a stolen item, his role is to inspect and confirm that indeed the item in question was stolen, to report the matter to the police for investigations and possible prosecution.

In cross-examination, DW1 testified that they protect their property through the police, armed personnel and engage other security companies.

He testified that he was informed about the stolen items by the Zone Manager for Matero area, Mr Kelvin Zulu. That the items found had the words "Foundry" written on them. That he went to the plaintiff's premises alone and found workers with Mr Zulu. That the workers did not insist that the items belonged to the plaintiff, as the police were already there. He was referred to page 1 of the 1<sup>st</sup> defendant's bundle of documents, and confirmed that those were the items confiscated by the police.

Concerning his work, the witness testified that as Head of Security, he was employed to protect company property, and he was responsible for recovering any company property that went missing. When referred to page 5 of the plaintiff's bundle of documents, he testified that he saw the items mentioned and they did not have any of the 1<sup>st</sup> defendant's labels. That he was not aware that the 1<sup>st</sup> defendant was previously the plaintiff's client or that the plaintiff previously supplied items of a similar nature to the 1<sup>st</sup> defendant.

That he was not aware that the plaintiff manufactured the products found at his premises. He said that the police officers were armed and that he was not aware that the plaintiff offered to demonstrate how he made his products. He conceded that he was aware that the 1<sup>st</sup> defendant uses manhole covers but did not know where it bought them from. That when the superintendent identified the products, the police ordered that they be taken to the Police Station. He conceded that the 1<sup>st</sup> defendant did not have a monopoly over those items.

When referred to page 6 of the 1<sup>st</sup> defendant's bundle of documents, he confirmed that the confiscated manhole covers could fit on the frame, shown to him but that the police did not visit the crime scene. He said that the police acted on the report given to them by the 1<sup>st</sup> defendant that they were losing manhole covers and frames. He added that he was not aware that the police went to the plaintiff's site and that he did not carry any documentary evidence to the plaintiff's premises to show that the items belonged to the 1<sup>st</sup> defendant. That he was not aware that the confiscation paralysed the plaintiff's business.

DW1 testified that he made monthly follow ups on his report and was worried that the investigations were taking long. When referred to pages 6 and 7 of the defendant's bundle of documents and asked if there was any proof that the frames were tampered with, DW1's response was that the cover at page 6 was stolen and the frame remained, whereas both frame and covers at page 7 were stolen. He testified that he did not know who installed the covers and could not confirm that they were stolen.

In re-examination, DW1 testified that the confiscated goods were in the custody of the police.

DW2 was Dominic Sitambuli of Matero, a superintendent under the 1<sup>st</sup> defendant, where he has worked for 27 years. That his job includes cleaning, inspecting and replacing faulty sewer lines, repairing damaged manhole covers and covering the manholes without covers.

He testified that sometime in August, 2018, DW1, Mr Mapumba, called him and asked him to report to the plaintiff's premises to help the police with investigations as their sewer infrastructure/manhole frames and value boxes had been found at the plaintiff's premises.

He said that he rushed to the site and found DW1 waiting for him in the company of police officers.

That DW1 briefed him and they went into the plaintiff's premises where he saw heaps of scrap metal which he identified, namely, heavy duty manhole covers and frames bearing the inscriptions of Vulcan Foundry, Lusaka Foundry/Talbros. That the items were rusted signifying that they were stored in a harsh environment. He testified further that the 1<sup>st</sup> defendant's infrastructure was old and when it was constructed, the manhole covers were supplied by the companies that existed at the time, at reasonable cost. That the manhole covers were strong and heavy such that traffic could pass on them. He therefore had reasonable cause to believe that the said manhole covers were from the 1<sup>st</sup> defendant's infrastructure.

That after he pointed out the items, the police took them to the Police Station for further investigations. That he gave his statement at the Police Station, and the police promised that they would get back to him as soon as the investigations were completed.

DW2 continued to testify that the heavy manhole covers were made from cast iron. When referred to page 1 of the plaintiff's bundle of

documents he confirmed that the image was of the seized items. He went on to say that in order for a company to manufacture the items, it must have a testing laboratory, ladles to convey the smelted metal to the sand moulds, green sand and space for casting the covers and vibrating plates. That the plaintiff's company did not have the capacity to manufacture such heavy duty cast iron items that were found on their premises.

DW2 referred to page 1 of the 1<sup>st</sup> defendant's bundle of documents, and identified the items as belonging to the 1<sup>st</sup> defendant. When asked why the 1<sup>st</sup> defendant could not produce proof of ownership, the witness responded that it was difficult to prove ownership of the items because the 1<sup>st</sup> defendant was founded in 1990 and most of the sewer infrastructure was done in the late 1970s and early 1980s. That prior to the formation of the 1<sup>st</sup> defendant company, it was a department under Lusaka City Council under the engineering and sewerage directorate. That it was later passed on to the 1<sup>st</sup> defendant but no documentation was handed over other than maps of the sewer system.

In cross examination, DW2 testified that the 1<sup>st</sup> defendant doesn't make manhole covers. That they do repair damaged manhole covers with concrete slabs, and if the manhole has no cover, they cover it with a concrete cover.

When DW1 was referred to paragraph 3 on page 5 of the plaintiff's bundle of documents, he testified that those were their items that were stolen and sold to scrap metal dealers. When referred to page 1 of the 1<sup>st</sup> defendant's bundle of documents, he testified that the instruction he was given was to identify the items stolen from their infrastructure and that he did not inquire about 1a or 1b.

He told the court that did not ask the plaintiff's workers whether they had a manufacturing bay, and he did not see any manufacturing process. That there were a lot of items that were being cleaned and painted and that the items that were being cleaned were not captured. Further that the scrap metal found at the premises was being smelted on the site and that it was part of the manufacturing equipment but not all of it.

DW2 further testified that he was not aware that the plaintiff was an engineer and did not inquire where he got the Vulcan foundry

patterns from. He also testified that he was not aware that the police spokesperson in the company of the 1<sup>st</sup> defendant's officers appeared on TV to announce that the plaintiff was found in possession of the stolen items. That the security services manager informed him about the progress of the investigations.

The 2<sup>nd</sup> defendant called 2 witnesses in support of their case.

DW3 was Detective Sergeant Fred Nalukena Namate, who is based at Emmersdale Police Station, and has been in the service for 26 years.

He testified that in August, 2018, when he was based at Matero Police Station as a scenes of crime officer, dealing with cases of a criminal nature before they were reported to CID, the 1<sup>st</sup> defendant's personnel filed a report that they had spotted some manhole covers at a location in Matero.

That acting on that report, he went to the CID section for them to accompany him and the complainant to the scene located at Buseko Market, Muzilikazi Road, where the manhole covers were spotted, since it was suspected that they were stolen.

That when they arrived at the scene, the complainant pointed at some manhole covers which were about to be taken to the smelter room.

That DW3 requested the plaintiff for the manhole covers to be taken to the Police Station. That the 1<sup>st</sup> defendant's officers loaded the manholes onto their vehicles, and transported them to the police station in the company of the plaintiff. That the matter was handed over to CID for further investigations. DW3 added that his duties were to preserve property that has been kept as exhibits in a case.

In cross examination by counsel for the 1<sup>st</sup> defendant, DW3 testified that the manhole covers were transported to the Police Station in the 1<sup>st</sup> defendant's vehicle, and kept at the CID section.

In further cross examination by Counsel for the plaintiff, DW3 testified that he received a complaint from an employee of the 1<sup>st</sup> defendant, and went to the scene in the complainant's vehicle accompanied by other police officers. He testified further that he was in uniform but not armed, although the general duty officers were armed. According to DW3, he did not need a warrant to search the premises because the case had been reported by the complainant.

DW3 testified that they seized only manhole covers from the scene. When referred to page 2 of the plaintiff's bundle of documents, he testified that he was not sure if those were the items that they

confiscated. He was referred to page 1 of the 1<sup>st</sup> defendant's bundle of documents and confirmed that those were the items they seized, but that they did not inspect them before seizing them. That he did not know whether there were any markings on the seized items as they were left with the CID.

DW3 added that prior to the incident, he did not know the plaintiff or the complainant until he enquired from the people at the plaintiff's premises. That the plaintiff never told him that he manufactured the items and when he asked the plaintiff where got the items from, the plaintiff informed him that he had a lot of suppliers who brought him scrap metal. DW3 told the court that he saw the smelting machines and there were a lot of manholes covers which were about to be smelted at the premises, but that the plaintiff was not the manufacturer of the items.

DW3 testified that there were four officers present, one general duty officer, and three officers from CID namely, Detective Sergeant Sialumbi, Detective Sergeant Moono and himself. That the plaintiff did not invite any of them to see how the items were manufactured. He told the court that he questioned the plaintiff at the scene and

was told by the plaintiff that he was in the business of manufacturing manhole covers. That he was not aware that the 1<sup>st</sup> defendant was the plaintiff's customer, neither did he at any point witness how the plaintiff manufactured the manhole covers.

DW3 reiterated that he entered the premises and collected the items pointed out by the unknown reporter. That he did not investigate further as it was not his duty to do so. That he did not want to put the plaintiff in one of their vehicles but that the plaintiff came in his own vehicle and followed them. That he was not seated or accompanied by their police officers in his vehicle. He was not aware that the plaintiff was kept at Matero Police Station from 11:00 hours to 21:00 hours and that he was not aware of anything that happened thereafter.

In re-examination the witness testified that he did not know the name of the person who made the complaint as statements were taken by CID. He stated that there was nothing sinister in having an armed officer at the scene.

DW3 explained that when following a complaint, they do not need a search warrant because they go to the scene with the complainant.

That items that are seized are taken to the office for further investigations. That in this case, they proceeded with the complainant's report and seized the items for further verification. He further testified that the plaintiff showed him the smelting machine used to smelt scrap metal and manholes. That the manhole covers were yet to be smelted and were not end products.

DW4 was Assistant Superintendent Shabanyambi Chompo, a police officer from Chamba Valley in Lusaka, based at the Scenes of Crime Division, Lusaka. That he joined the Police Service on 1<sup>st</sup> July, 1997. His testimony was that in August, 2018, he was working at Matero Police Station as a Criminal Investigations Office. That a report of theft was made by an employee of the 1<sup>st</sup> defendant, Kelvin Zulu, to the effect that several manhole covers had been stolen by unknown criminals around the residential areas of Matero. That the complainant added that as they were moving around, they spotted manhole covers which were kept at a certain premises within Matero. He continued to testify that a team of police officers under Matero Police Station including Detective Sergeant Namate proceeded to the plaintiff's premises where they found the manhole covers which were

taken to Matero Police Station. That the plaintiff, whom he later came to know, was questioned with regard to the manhole covers at the Police Station. That the investigations continued and the 1<sup>st</sup> defendant, who were claiming ownership of the said items were advised to produce identification of their manhole covers whilst the confiscated manhole covers were in custody of the police. That investigations continued and the docket was forwarded to the CID office. That the manhole covers were later returned to the plaintiff as the 1<sup>st</sup> defendant could not produce any proof to show that they were the owners of the said manhole covers.

In cross examination, DW4, testified that he had 21 years' experience in the force at the time of the incident. He testified that he conducted his investigations independently, and that the 1<sup>st</sup> defendant did not dictate to him or his colleagues how to conduct their investigations. He testified that they did not keep the manhole covers on instructions from the 1<sup>st</sup> defendant.

That after the investigations a decision was made to release the manhole covers to the plaintiff.

In further cross examination, by Counsel for the plaintiff, DW4 testified that during his time at Matero Police Station, he was the supervisor, and as such participated in the investigations. When referred to page 1 of the 1<sup>st</sup> defendant's bundle of documents, the witness agreed that those were the items seized from the plaintiff's premises. When referred to pages 8 to 13 of the 1<sup>st</sup> defendant's bundle of documents, DW4 agreed that those were the manhole covers.

When referred to page 6, 7 and 14 of the said bundles of documents he testified that he did not go to the site where the manhole covers were stolen from. He testified that he could not recall what their findings were and he did not know if any of the manhole covers at page 1 of the 1<sup>st</sup> defendant's bundle of documents belonged to the 1<sup>st</sup> defendant. He confirmed that the seized manhole covers were kept at the Police Station, and that the investigations took long from 25<sup>th</sup> August, 2018, to August, 2019, because they were vast.

DW4 continued to testify that the plaintiff was detained because there was an allegation of theft. That the plaintiff was cautioned but not charged. The witness further testified that the police do hold on to the exhibits while concluding or continuing with investigations. He

conceded that the arrest and seizure of the items was done after the 1<sup>st</sup> defendant made a complaint to the police and that the 1<sup>st</sup> defendant led the police to the plaintiff's premises. He, however could not recall whether there was an announcement on ZNBC about the manhole covers purportedly being stolen by the plaintiff. He was unable to specify whether the plaintiff was supposed to be reporting to the police after being released.

In re-examination, the witness testified that they kept the items for fear of them being moved.

The parties filed written submissions for which I am indebted to Counsel.

I have considered the evidence on record as well as the parties' submissions and authorities cited therein.

In order to succeed in this action the plaintiff must prove his case against the defendants to the requisite standard, namely, a balance of probabilities as the burden of proof in a civil action lies on the party who asserts the affirmative of the issues. The learned authors of Phipson on Evidence 17<sup>th</sup> edition in paragraph 6-06 at page 151 stated the following regarding the burden of proof in civil cases:

***“so far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If when all the evidence is adduced by all the parties, the party who has the burden has not discharged it, the decision must be against him.”***

In **Galaunia Farms Limited v National Milling Company Limited and Another**<sup>1</sup>, the Supreme Court held that ***‘the burden to prove any allegation is always on the one who alleges’***.

The standard to which the plaintiff must prove his case is on a balance of probabilities. In the case of **Zambia Railways Limited v Pauline S. Mundia and Brian Sialumba**<sup>2</sup>, the Supreme Court stated that:

***“the old adage is true that he who asserts a claim in a civil trial must prove on a balance of probabilities that the other party is liable.”***

Thus, in the present case, the plaintiff bears the burden to prove the claims put forth. If he fails to prove his case against the defendants on a balance of probabilities, judgment will not be entered in his favour even if the defendants’ case fails, as was held in **Khalid Mohammed v Attorney General**<sup>3</sup> and in **Wilson Masauso Zulu v Avondale Housing Project Limited**<sup>4</sup>.

That being said, the plaintiff's first claim is for damages for loss of business is based on the allegation that the defendants' officers seized the plaintiff's patterns, raw materials, equipment and manufactured products (the items). That consequently, the seizure of the plaintiff's items paralysed the plaintiff's production and resulted in the plaintiff failing to deliver the orders made by named customers.

It is well settled that a claim for loss of business must be pleaded as special damages and strictly proved. The case of the **Attorney General v Sam Amos Mumba**<sup>5</sup> is instructive in that regard. Further,

the Court in the case of **Philip Mhango v Dorothy Ngulube**<sup>6</sup> held that -

***"It is of course for any party claiming a special loss to prove that loss, to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty."***

In resolving the issue, I have examined the pleadings and the evidence adduced by the parties. To start with, the 1<sup>st</sup> defendant in its defence stated that the confiscation of the plaintiff's goods was done at the instance of the Zambia Police, and at no point was it in possession of the plaintiff's goods. The 2<sup>nd</sup> defendant's defence was

that the police officers acted on the report of stolen items made by the 1<sup>st</sup> defendant's officer Mr Kelvin Zulu. This was confirmed by DW1 who testified that in August, 2018, Mr Kelvin Zulu who was the Matero branch manager of the 1<sup>st</sup> defendant, reported to Matero Police that manhole covers belonging to the 1<sup>st</sup> defendant, had been stolen, and that the stolen manhole covers were seen at the plaintiff's premises. Police officers in the company of Mr Zulu went to the plaintiff's premises and according to the plaintiff and DW1's testimony, seized the items listed on page 2 of the plaintiff's bundle of documents that were pointed out by Mr Zulu. DW3 and DW4 confirmed that they confiscated the items at page 6 of the 1<sup>st</sup> defendant's bundle of documents from the plaintiff's premises.

It is clear from the evidence that the seizure was done at the instance of the 1<sup>st</sup> defendant's officers. The plaintiff alleged that the seized items were used for manufacturing products in his workshop and that other items were products he manufactured on order, but failed to demonstrate that he had manufactured those items.

The plaintiff testified that he suffered loss of business because he was unable to manufacture the orders that he had received after his

items were seized for a period of over one year, which orders were subsequently cancelled. That Fairface Enterprises placed an order on 10<sup>th</sup> January, 2019, as shown at page 40 of the plaintiff's bundle of documents, which was cancelled on 8<sup>th</sup> April, 2019, as per page 44 of the said bundle of documents. Similarly, that Angles Technical Services placed an order on 29<sup>th</sup> November, 2018, which was cancelled on 14<sup>th</sup> January, 2019, as per pages 41 and 42 of the plaintiff's bundle of documents, respectively. There is however no evidence to the effect that Geotech placed an order which was subsequently cancelled, as the plaintiff conceded that the document at page 7 of the plaintiff's bundle of documents was a quotation.

When the plaintiff requested for the release of his items on 3<sup>rd</sup> October, 2018, as per page 3 of his bundle of documents, the 1<sup>st</sup> defendant's response at pages 5-6 of the said bundle of documents, was that the investigation was still on - going.

DW3 testified that the items were confiscated because they were about to be smelted. According to PW1's testimony, he asked the defendants' officers if he could demonstrate how the products were manufactured. DW1 denied that the plaintiff offered to demonstrate

how he made his products. He said that he saw the items listed at page 5 of the plaintiff's bundle of documents but that they did not have any of the 1<sup>st</sup> defendant's labels, and that DW3 seized the items that were identified by the 1<sup>st</sup> defendant's superintendent. The officers did not attempt to establish whether the plaintiff was indeed the owner of the items. None of the defendant's officers inspected the items or conducted a preliminary search of the premises to ascertain the plaintiff's assertions that he manufactured the products or that the products belonged to him.

As a result of the seizure of the plaintiff's items, which were kept in police custody for almost a year, the plaintiff was unable to undertake his trade which resulted in loss of business. To that end, I find that the plaintiff has proved his claim in respect of the loss of business for orders cancelled by Fairface Enterprises and Angles Construction.

With respect to the claim for loss of business in the amount of ZMW 2,000,000.00 from Geotech, PW1 testified that he received inquiries from Geotech who were working on the Millennium Challenge Project, requesting for manhole covers for their drainages in Lusaka.

In the case of **Attorney General v D.G Mpundu**<sup>7</sup> it was held that:

***“Special damage on the other hand, is such loss as the law would not presume to be the consequence of the defendant’s act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings and at the trial it must be proved by evidence both that the loss was incurred and it was a direct result of the defendant’s conduct.”***

It is incumbent on the plaintiff to show that the loss was suffered as a result of the defendant’s conduct. To support his claim, the plaintiff produced a quotation for manhole covers at page 7 of his bundle of documents and email correspondence at pages 8 to 10 of the plaintiff’s bundle of documents. The plaintiff testified that he was unable to deliver as the patterns he used were in the custody of the police. It is worth noting that the quotation also refers to the supply of a sample as requested. This suggests that an order had not yet been made by Geotech.

The case of **Victor Koni v The Attorney General**<sup>8</sup> cited by Counsel for the plaintiff in their submissions in which the Supreme Court stated that where the oral evidence of loss of profit is not challenged it is not necessary for the claim to be supported by independent or documentary evidence, does not aid the plaintiff in this case, because in that case, the Court considered that in the appellant’s nature of

business, taxi drivers do not give receipts and do not keep written records of their transactions. In this case, the plaintiff produced letters of other cancelled orders as proof of loss incurred.

In the case of **Khalid Mohammed v The Attorney General**<sup>(3)</sup> cited earlier, the Supreme Court held that **“a plaintiff cannot automatically succeed whenever a defence has failed, he must prove his case.”** Further, the Supreme Court in the case of **Kafue District Council vs. Chipulu**<sup>9</sup>, stated that **‘as a general rule, any shortcomings in the proof of a special loss should react against the claimant’**. Based on the foregoing, although the defendants made a bare denial of the allegation, the plaintiff must still discharge the evidential obligation to prove the special damage. I find that the quotation produced by the plaintiff with respect to ZMW2,000,000.00 does not sufficiently discharge that burden. I accordingly dismiss that portion of the claim.

The plaintiff's second claim is for damages for defamation of character. According to the plaintiff, he did not listen to the ZNBC broadcast or hear the words that were uttered. The statement was communicated to him by PW2 Cassidy Yassa Mwitwa, who testified

that he was watching the 19:00hours ZNBC news, when the newscaster announced that a combined team from the 1<sup>st</sup> defendant and Zambia Police had confiscated stolen manhole covers believed to be property of the 1<sup>st</sup> defendant from the plaintiff and that the company had also arrested the owner of the company, Mr Herod Banda, in connection with the stolen manhole covers. The 1<sup>st</sup> defendant denied publishing any defamatory statements, and the 2<sup>nd</sup> defendant made general denials of the claim, and did not traverse the averments made by the plaintiff.

A defamatory statement, as held in **Matthews Makayi and Another v Muhetu Wa'chata and Another**<sup>10</sup> which endorsed **Gatley on Libel and Slander 7<sup>th</sup> edition paragraph 57**, is defined as follows:

***“Any imputation which may tend to injure a man’s reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory. To be actionable, words must impute to the plaintiff some quality which would be detrimental or the absence of some quality which is essential, to the successful carrying on of his office, profession or trade.”***

The meaning of defamation is the publication without justification or excuse, of that which is calculated to injure the reputation of another or to lower him in estimation of his fellows and right-thinking

members of the public by exposing him to hatred, contempt or ridicule.

Before it can be determined whether or not particular words bear a defamatory meaning, it is necessary for the Court to determine their meaning the list of what is defamatory:

**“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary person.**

**Having determined the meaning, the list is whether, under the circumstances in which the words were published, the reasonable person would be likely to understand them in a defamatory sense. Words which tend to diminish the esteem in which a person is held by the criminal classes or by persons out of sympathy with the law will not support an action for that is not a standard which court can recognise”.**

**The fact that the particular person to which the words were published did not believe them to be true is irrelevant and does not affect the right of action, although it may affect the question of damages”.**

Thus, in this case, I need to determine the natural and ordinary meaning of the words contained in the police statement and which words the plaintiff contends are defamatory of him. In determining whether the words are defamatory of the plaintiff, I have to consider the natural and ordinary meaning of the words to a reasonable man.

In **Aspro Travel Limited v. Owners Abroad Group Plc**<sup>11</sup> Schieman

LJ stated that:

***“the ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only general knowledge and not fettered by any strict legal rules of construction would draw from the words.”***

The ordinary man would understand the quoted words in this case to mean that the plaintiff is dishonest in his business dealings. The words may also imply that the plaintiff might have or has entered into illegal transactions to acquire the items that were found on his premises or that he is a thief.

In their submissions, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively raised the following defences: that the publication was true, and that the publication complained of was made in *bona fide* discharge of the 2<sup>nd</sup> Defendant’s duty and without malice as the words were published on account of events as they had transpired in a matter of public interest. These defences were not pleaded in the defendants’ respective defences. In the case of **The Attorney General vs Clarke**<sup>12</sup>, it was held that:

***"A party cannot rely on unpleaded matters except where evidence on the unpleaded matters has been adduced in evidence without objection from the opposing party."***

Further, the Court in the case of **Kariba North Bank Limited v Zambia State Insurance Corporation Limited**<sup>13</sup>, 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."* The defendants' submissions in that regard will not be considered. Be that as it may, I find that the allegation of defamation in this case is based on hearsay from PW2 and no ZNBC clip was produced to confirm that those words were indeed reported or uttered. For that reason, the claim for damages for defamation of character falls away and is not granted.

The plaintiff's third claim is for damages for malicious prosecution. The Learned authors of **Halsbury's Laws of England 4<sup>th</sup> edition** at paragraph 1340 define malicious prosecution in the following terms:

***"A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in the motion of 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 plaintiffs favour. The plaintiff must also prove damage."***

The Supreme Court in the case of **Anti-Corruption Commission v Charles Sambundu**<sup>14</sup> guided as follows in respect of proving such a claim:

**"There are primarily five essential elements which a plaintiff should establish in order to prove malicious prosecution. These have been enumerated by the learned authors of Bullen & Leake & Jacob's Precedents of Pleadings, Vol. 1, 16<sup>th</sup> edition, who have indicated in paragraph 2-12, that to establish a claim for damages for malicious prosecution, the claimant must plead and establish that:**

- (a) He was prosecuted by the defendant, i.e. that proceedings on a criminal charge were instituted or continued by the defendant against him;**
- (b) The proceedings were terminated in the claimant's favour;**
- (c) The proceedings were instituted without reasonable and probable cause;**
- (d) The defendant instituted the proceedings maliciously; and**
- (e) The claimant suffered loss and damage as a result."**

In other words, the plaintiff must prove that he was prosecuted, that the prosecution was terminated in his favour, that the Defendant acted without reasonable and probable cause, that the Defendant did so with malice and lastly that the Plaintiff suffered loss.

I have considered the plaintiff's particulars on malicious prosecution, the first being that he was apprehended and detained from 11:00hours to 21:00hours on 25<sup>th</sup> August, 2018 before concluding

investigations. The first element that must be proved by the plaintiff is that he was prosecuted.

The learned authors of **Halsbury's Laws of England, 4<sup>th</sup> edition Vol. 45(2) at para 460, page 308** define a prosecution as follows:

***“A prosecution exists when a criminal charge is made before a judicial officer or tribunal.”***

From the foregoing definition, a prosecution is commenced when an information or charge is laid or rather when an accused person is brought before a judicial officer. From the evidence on record, it is clear that the plaintiff was never prosecuted. In consequence, the other elements of malicious prosecution never visited him. Further, the particulars of the negligence and malicious prosecution outlined in the statement of claim do not fall within the elements that must be proved in a claim for malicious prosecution. I find that the plaintiff has failed to discharge the burden of proof in proving the essential elements of malicious prosecution, and I accordingly dismiss the claim.

I now turn to consider the claim for damages for unlawful detention. It is not disputed that the plaintiff was taken to the Criminal Investigations Department (CID) at Matero police station, where he

was confined from 11:00 hours to 21:00 hours. According to the statement of claim, the plaintiff was released without a charge and has never been taken to court to date.

Articles 13 (1)(e), (2) and 3 of the Constitution of Zambia provides for the protection of the right to personal liberty in the following terms:

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

**(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;**

**(2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.**

**(3) Any person who is arrested or detained-**

**(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;**

**and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.**

In addition, section 26(d) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia empowers the police to arrest a person

without a warrant of arrest, in whose possession anything is found which may reasonably be suspected to be stolen property, or who may reasonably be suspected of having committed an offence with reference to such thing.

In short, although the Constitution provides for the protection of right to personal liberty, it is lawfully permissible to deprive a person of their liberties on account of Articles 13(3) of the Constitution, and section 26 of the Criminal Procedure Code cited above.

The plaintiff stated that the defendants failed to prosecute him for any criminal act within 48 hours of his arrest or any time thereafter. PW1 testified that when they arrived at the police station, he was taken to the Criminal Investigations Department (CID) where he was asked to explain how the seized items came into his possession. The 2<sup>nd</sup> defendant stated in its defence that the plaintiff was called for interviews at Matero police station, where a brief warn and caution statement was recorded.

It was argued by the defendants that the detention of the Petitioner was based on reasonable ground and suspicion. In his testimony,

PW1 testified that he was informed of the reason he was detained.

**Black's Law Dictionary** defines 'reasonable and probable cause' as:

***“Such grounds as justify any one in suspecting another of a crime and keeping him in custody thereon. It is a suspicion founded upon circumstances sufficiently strong to warrant reasonable man in belief that charge is true.”***

It is trite that that even in cases where the information given to law enforcement does not contain enough evidence to support a prosecution, the person who provided that information will not be liable. This is because the criteria stated under the Criminal Procedure Code is that of reasonable suspicion and not beyond a reasonable doubt. The case of **Daniel Chizoka Mbandangoma v The Attorney General**<sup>15</sup> is further instructive. The Court in that case held that:

- (i) In order to justify the arrest of the plaintiff the defendant must show that at the time of the arrest, the arresting officer had reasonable suspicion that the plaintiff had committed the offence with which he was charged.**
- (ii) The arrest of the plaintiff was unlawful. The police can only arrest persons for offences and have no power to arrest anyone in order to make inquiries about him.**
- (iii) It is improper for the police to detain persons pending further investigations without bringing them before court as soon as practicable, but it is equally improper to require persons released on bond to present themselves at the police station for the same purpose.**

For an arrest to be legal, the person confining the suspect should inform the suspect of the reason why they are being confined. In his testimony in chief, PW1, informed the Court that the police were in order to arrest him but that the police arrested him at the instance of the 1<sup>st</sup> defendant. In cross examination, he conceded that the police can make an arrest when a report is made to them and that they can confiscate items suspected to be stolen, but not for long. That further, DW4's unchallenged testimony was that the plaintiff was detained because there was an allegation of theft. The plaintiff was cautioned but was not charged.

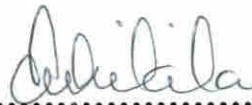
I find as a fact that the arresting officer in this case had reasonable suspicion that the plaintiff had committed the offence of theft or of being found with stolen goods. This is in line with section 33(1) of the Criminal Procedure Code, which allows for the detention of persons who are suspected of committing an offence at the police station for a reasonable period of time. For the forgoing reason, the plaintiff's claim for damages for unlawful detention lacks merit and is hereby dismissed.

For the avoidance of doubt the plaintiff succeeds on the 1<sup>st</sup> claim for damages in respect of the loss of business for orders cancelled by Fairface Enterprises and Angles Construction, to be assessed by the DR.

In the circumstances, I refer the matter to the DR for assessment. I further award the plaintiff costs to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this 28<sup>th</sup> day of October, 2025.



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**E.P MWIKISA**  
**JUDGE**