RICKY NATHANSON

Versus

(1) FARAI MTELISO
(2) THE OFFICER IN CHARGE BULAWAYO CENTRAL POLICE STATION
(3) COMMISSIONER GENERAL OF POLICE
(4) THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO: 22, 26 & 27 JULY 2017 & 14 NOVEMBER 2019

Civil Trial

Adv. P. Dube instructed by K.I Phulu, for the plaintiff
L. Musika, for the second, third and fourth defendants

BERE J: [1] This case raises issues regarding minority rights in this country and one hopes, this judgment, in a way, will help spark a frank national conversation of these issues which we appear to have been shy or less enthusiastic to openly discuss.

[2] On 15 August 2014, the plaintiff who is a transgender issued process out of this Court seeking damages against the defendants.

The plaintiff's claim was framed under different headings as stated hereunder:

"(i) Payment of $100 000.00 being damages for unlawful arrest.
(ii) Payment of $100 000.00 being damages for unlawful detention.
(iii) Payment of US$300 000.00 being damages for emotional distress and contumelia.
(v) Payment of US$100 000.00 being examplory damages.

(vi) Legal interest on the cumulative amount claimed reckoned from the date of service of summons to date of full payment.

(vii) Costs of suit.

Alternatively

A. As against the first defendant, nominal constitutional damages of US$1 (One United States Dollar);

B. As against the 2nd, 3rd and 4th defendants jointly and severally, the one paying to absolve all others, constitutional damages in the sum of US$2 000 000.00 (two million Unites States Dollars).

C. Legal interest reckoned from the date of issue of summons to date of full payment.

D. Costs of suit."

It is necessary that before I deal with this case I briefly deal with the aspect of transgender status of the plaintiff.

<u>Transgender status</u>

Nolo's Plain English Dictionary defines transgender as:-

> "The state of a person's gender identity (self-identification as male or female) not matching their assigned sex at birth."

The new Oxford American Dictionary describes transgender as:

> "Denoting or relating to a person whose sense of personal identity does not correspond with the gender assigned to them at birth."

In the Indian case of *NAVTE J Singh Jonah & Ors v Union of* India THR. Secretary Ministry of Law & Justice[1] the learned Chief Justice of India, Dipak Misra, had occasion to comment on transgender status. He lucidly put if as follows:

[1] WRIT PETITION (CRIMINAL) NO. 76 of 2016 pp 6-7

> "The eminence of identity has been luculently stated in National Legal Services Authority v Union of India and Ors, popularly known as NALSA case, where the Court was dwelling upon the status of transgenders. RADHAKRISHNAN, J, after referring toCatena of judgment and certain international Covenants, opined that gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporates both or certain aspects of both male and female physiology. The learned judge further observed that at times, genital anatomy problems may arise in certain persons in the sense that their innate perception of themselves is not in conformity with the sex assigned to them at birth and may include pre-and-post operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Elaborating further, he said:-
>
> > "Gender identity refers to each person's deeply felt internal and individual experience of gender, which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress and mannerisms. Gender identity therefore refers to an individual's self-identification as a man, woman, transgender or other identified category."

6. Adverting to the concept of discrimination he stated:-

> "The discrimination on the ground of "sex" under Article 15 and 16, therefore, includes discrimination of the ground of gender identity. The expression of "sex" used in Article15 and 16 is not just limited to biological sex of male or female, but intended (sic) to include people who consider themselves to be neither male nor female"

7. Dealing with the legality of transgender, RADHA KRISHMAN J ruled:

> "The self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified as either male or female. Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender, for example hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither male nor woman, but a "third gender"

The learned Judge proceeded and concluded that transgenders are entitled to enjoy civil rights enjoyed by the community in India and that they must not be discriminated against.

I have no doubt that although the focus in the Supreme Court of India was on the rights of the Indian Citizens, there is international flavor in the Court's analysis of transgender citizens and their expectations. I draw an analogy with our own Constitution whose elaborate bill of rights speaks to no discrimination against the citizen's rights and I derive maximum inspiration from the analysis made by the Indian Court on issues to do with transgenders.

These are citizens who because of *inter alia*, their hormonal composition defy their assigned sex at birth. Their behavior is at loggerheads with what we think them to be. Their self-identification is a mismatch with their assigned sex at birth. Their conduct is not driven by stubbornness or adventurism but by who they are.

In this regard I can do no better than quote the introductory part of the judgment by Dipak Misra, CJI, in the *SinghJonah &Ors* case (*supra*) where the learned Judge remarked:-

> "Not for nothing, the great German thinker, Johann Wollfgang Von/Goethe, had said, "I am what I am, so take me as I am", and similarly, Arthur Schopenhouer had pronounced, "No one can escape from their individuality."[2]

This is the unmistakable loud cry that I can clearly hear from this transgender citizen before me in these proceedings and whose case I am set to consider.

[2](supra) p.1

THE BACKGROUND

[3] The facts of this case which broadly speaking are not in dispute and accord well with the evidence given in this case can be summarized as follows:

[4] The plaintiff is a transgender litigant whom I shall refer to as "she" for convenience in this judgment. On 16 January 2014, the plaintiff was at the Palace Hotel where she intended to meet with a client for whom she had done some tax returns.

[5] Whilst in the bar, the plaintiff was called over by the 1st defendant who was in the company of another male, drinking, with a bottle of whisky on the table.

[6] The first defendant informed the plaintiff that his friend was attached to the President's Office and did not like what the plaintiff was doing.

[7] The first defendant then asked the plaintiff to give them $20 to buy more whisky if the plaintiff wanted the two men to let her go. The plaintiff declined and this then triggered a chain of events for the worse for the plaintiff.

[8] The first defendant there and then threatened to fix the plaintiff and immediately made a telephone call to a Mr Gora alleging that there was a man walking around in a woman's dress, who needed to be fixed.When the plaintiff attempted to leave the hotel, she was prevented

by the first defendant and his friend as threatened and subsequently detained for forty minutes until the arrival of the police.

[9] More drama ensued when the police arrived. Six members of the police reaction group who the plaintiff described as "riot police" arrested her, bundled her into the back of their open truck and took her to Bulawayo Central Police Station.

[10] At the police station the plaintiff was ordered to remove her shoes and instructed to sit on the floor behind the counter in the charge office. During this time the plaintiff who had been presented as a man masquerading as a female had photographs of her taken by curious members of the public, as well as members of the press who had been attracted to the exchanges between the plaintiff and the first defendant.

[11] More drama was to occur at the police station when the plaintiff was whisked away to a side room by four uniformed male police officers and another in civilian attire. The five officers started arguing and speculating on the plaintiff's gender – the argument centered on whether or not the plaintiff was a man or a woman. There is disagreement on what exactly transpired when the plaintiff was at the police station. The plaintiff alleged that the officers ordered her to lower her pair of trousers for them to verify her gender.

[12] On seeing the plaintiff's genitalia, the officers started laughing and jeering at her. Their curiosity remained unquenched. The plaintiff was taken back to the charge office

where she found the first defendant animatedly giving his statement in support of the plaintiff arrest.

[13] During that same evening the plaintiff was removed from the Bulawayo Central Police Station and escorted to United Bulawayo Hospital (UBH) for "gender verification" examination by a doctor who, upon examination recommended that the plaintiff be further examined by a gynaecologist at Mpilo Central Hospital. The doctor recommended that the plaintiff be kept alone at the police station.

[14] The plaintiff was taken back to Bulawayo Central Police Station where she was detained overnight.

[15] On 17 January 2014 the plaintiff was taken to Mpilo Hospital for further examination to verify her gender. The gynaecologist's findings were that although the plaintiff was biologically a man she was a transgender. Upon her return to the police station the plaintiff was again detained for the night in the same cell after walking all the way from Mpilo Hospital due to absence of transport.

[16] On the same date before she was lodged back into her cell the plaintiff had a warned and cautioned statement recorded from her. In that statement the plaintiff confirmed that although she was biologically a man she had overpowering female hormones that led her to act like a female. Her indication in that statement was that she was admitting to the charge of c/s 46 of the Criminal Codification and Reform Act [*Chapter* 9:23].

[17] On 18 January 2014, the plaintiff was taken to court and remanded out of custody on charges of criminal nuisance, the factual allegations being that she had entered a female toilet when she was a man.

[18] The first defendant who had initiated the arrest of the plaintiff was livid and threatened the public prosecutor and the plaintiff outside court and this forced the plaintiff to move away from her home as she feared for her safety. Because of this threat, for quite some time the plaintiff had to stay in hiding.

[19] On 4 November 2015 the charges against the plaintiff were terminated with a refusal of further remand by the magistrate, on the grounds that there did not seem to be a clear cut offence disclosed on the facts cognizable under s 46 of the Criminal Law Codification and Reform Act [*Chapter* 9:23] as read with the third schedule. This case has never been resuscitated. It is this background that has prompted the plaintiff to file this suit.

THE RESPONDENT'S PLEA

[20] All the respondents in this case were properly served with plaintiff's summons commencing action. The first defendant defaulted in filing any papers. The second to fourths defendants filed their plea in this Court on 15 December 2016.

[21] In their plea, the defendants made an abortive attempt to raise the plea of prescription as a preliminary point.

[22] In addition, the defendant pleaded on the merits. In essence, they denied liability in its entirety and further denied the narration of events as given by the plaintiff. The defendants also alleged that the amounts claimed by the plaintiff were outrageous and therefore unacceptable.

[23] The plea of prescription was eventually abandoned and I shall not allow this issue to detain me in this judgment.

THE EVIDENCE FOR THE PLAINTIFF'S CASE

[24] The plaintiff's case comprised of the evidence of the plaintiff herself and Philip Francis Moses, a clinical psychologist who attended the plaintiff to deal with her post traumatic stress disorder after her ordeal with the police.

[25] The plaintiff's evidence largely confirmed the background of this case as summarized in this judgment. She confirmed the circumstances under which she was arrested and confirmed that the first defendant was the author of her arrest after she had refused to give her $20 to buy a bottle of whisky. She said that the first defendant and her friend threatened to fix her.

[26] She said that after she had been detained for about 45 minutes at Palace Hotel in Bulawayo by the first defendant and his friend, it was the first defendant who pointed her out to six "riot police officers", who bundled her into a police vehicle and drove her to Bulawayo Police Central Station where she was immediately detained.

[27] The witness told the court that her detention was not without drama. The drama started with a horde of members of the public and the press who took pictures of her as she arrived at the police station as some had witnessed the misunderstanding she had had with the first defendant and followed her from Palace Hotel to Bulawayo Central Police Station.

[28] The witness gave a sordid description of how she was taken to a private room by five police officers who villainously ordered her to lower her garments for them to verify her gender. The officers' crude examination of the plaintiff's genitalia failed to give them a clue as to the gender of the plaintiff. The plaintiff said that the five officers crowned their most degrading and dehumanizing invasion of her by fidgeting and laughing at her because of what they had seen of her. They literally jeered at her and made public comments about their discovery of the plaintiff's genitalia.

[29] The plaintiff continued the narration of her ordeal by saying that, the crude police examination which was not conclusive of her status was followed by her being ordered to go to United Bulawayo Hospitals (UBH) for a further gender verification exercise. She said she had no choice as her permission or consent for examination was never sought.

[30] At UBH, the plaintiff was again forced to disrobe for a further examination by a doctor, who after examining her recommended that a further examination be carried out by a gynecologist at Mpilo Hospital.

[31] The rest of the plaintiff's testimony fitted well into the summary of the background of this case and of particular note was that the examination at Mpilo Hospital was the finding by the gynecologist that although the plaintiff was biologically a man, she had overpowering female hormones that led her to act and live as a female. The plaintiff said from the examination the gynecologist concluded that the plaintiff was transgender.

[32] The plaintiff also testified that from the time of her arrest until her release on bail, she suffered the misfortune of being kept in a dark cell with no lights, with a heavy smell of waste human matter and urine, and that in that cell she was invariably kept with bare feet, having been routinely ordered to remove her shoes.

[33] The plaintiff went further to say that for the three days she was kept in police cells she was given a blanket which she felt was infested with lice, and because of that she could not use it. She had to endure extreme cold nights as she awaited the outcome of police investigation into her conduct.

[34] It was the plaintiff's uncontroverted evidence that each time the police officers changed shifts the officers would continuously tout or mock her by asking whether she was a man or a woman and that for some reason the police officers preferred to keep her outside her

cell paraded or displayed for all to see. According to the plaintiff, this humiliation continued unabated.

[35] Further to this, the plaintiff testified that both her arrest and subsequent appearance in court attracted quite some negative publicity which affected her modeling business in a negative way. She said back in 2005 she had started running a modeling business and that at the time of her arrest she had registered twenty modeling students whom she was grooming. Given that her image had been heavily battered, all these activities came to an abrupt end.

[36] The negative press statements against the plaintiff were confirmed by exhibits one and two both of which were produced by consent during the plaintiff's evidence in chief. Exhibit one, a Daily News article was headed "'Gay' director flees home after receiving threats."

[37] This report confirmed the threats to the plaintiff and that she indeed ran an Agency called Ricochet Modeling Agency and that at some stage the plaintiff had to unceremoniously leave her place for a safe house because of threats uttered to her by the first defendant during court proceedings.

[38] Exhibit two was an article from the Herald newspaper which was headed "'Gay' Shemale cause stir in court", and covered a lot of negative comments about the plaintiff as testified by the plaintiff herself in court.

[39] Commenting on the newspaper articles, the plaintiff reiterated that the publicity had mounted a combined assault on her personally and fast tracked the demise of her business as a Modeling Agency and that in the process she had been degraded and debased mainly because of her transgender status.

[40] The plaintiff further commented on the manner in which she was examined by the five police officers who literally demanded that she lowered her pair of trousers for them to see her genitalia. In her own words she said, "the whole exercise, I found it to be totally debasing and degrading. It was excruciating to go through that. When taken to hospital for examination, it was a continuation of the degrading and debasing exercise. I was treated in such an inhuman and totally demoralizing manner."

[41] Under cross examination by Mr *L Musika*, who appeared for the respondents the appellant stuck to her story, moving not a single inch from it.

[42] For clarity's sake, I produce some of the exchanges that took place between Mr *Musika* and the plaintiff during cross-examination.

"Q. Tell the court the reason why the police officers made you to pull down your pair of trousers.

A. Because they wanted to see if I was both a woman and a man at the same time.

Q. Was there any reason for the police to refer you to hospital

A. I cannot answer for the police.

Q. The police wanted to establish your gender. They did ask you to pull down your pair of trousers.

A. They did ask me to which I did. I had no option.

Q. When the police took you aside did they say anything

A. They were arguing about my gender and then one of them askedme to pull down my trousers.

Q. At hospital you underwent an examination by doctors

A. Yes

Q. Can you blame the conduct of doctors on the police

A. Yes

Q. There was a dispute of gender which had arisen as a result of the report made against you by the first defendant that you had used a female toilet whilst you are a man. Can you blame the police for their effort to verify your gender?

A. The demand that I remove my trousers without a court order is a major violation of my rights.

Q. But the allegations were that you had used a female toilet, they could not charge you without medical verification

A. They should not have humiliated me for three days without taking me to court.

Q. Do you agree that they could not have charged you without carrying out investigations.

A. There is a better way of handling my situation.

Q. The police are not allowed to accept a fine before investigations

A. I do not know.

Q. I put it to you that referring you to hospital was part of

their investigations

A. I agree with that but I do know some ethics of the law. I

know that a court order is required for such an examination.

Q. What was your response when you were formally charged for contravening s 46

A. I admitted to have used the toilet.

Q. At the time of your arrest police had reasonable suspicion that you had committed an offence.

A. Yes, but it was a malicious arrest, there was no law that prevented me from using a toilet of my choice.

Q. Did Mteliso (first defendant) make a false report to the police.

A. No."

[43] Further in her evidence in chief the plaintiff disclosed that when she was taken to the two hospitals for gender verification the police officers did not give her prior notice or seek her consent for the impending examination. She also indicated she could not have taken the initiative to object to either the examination by the police or that at the hospital as she was extremely frightened as this was her first time to be taken to a police station.

[44] As the excepts of the plaintiff's cross-examination show, the defendants did not seem to be in disagreement with the plaintiff's evidence. She was clearly not shaken by her cross-examination and she struck me as an honest witness.

[45] Phillip Francis Moses, a registered clinical psychologist with impressive professional qualifications and notable experience in clinical psychology was the second witness for the plaintiff.

[46] The witness is a holder of a Master of Science in Clinical Psychology from the University of Zimbabwe as well as a Bachelor of Arts [Hons] Social Science [Psychology], from Middlesex University, London, United Kingdom. He is a Registered Clinical psychologist with the Allied Health Professional Counsel of Zimbabwe, and at the time of giving evidence he was backed up by twenty years of experience in clinical psychology.

[47] The witness was roped in to assist the plaintiff in managing her post-traumatic stress disorder. He said the plaintiff was referred to him for psychological assistance by the South African Investigation Centre. The evidence of this expert was largely uncontroverted and can be summarized as follows:

[48] He said that the psychological assessment of the plaintiff was through a clinical and behavioral interview. This was complemented by the use and administration of SSQ 14[3] [Shona Systems Questionnaire] and Post Traumatic Stress Disorder Checklist [PSDT][4].

[49] The witness consulted with the plaintiff in July 2017. Using established and internationally accepted questionnaires and clinical methods, the witness established from the plaintiff that although she was very cooperative, composed and articulate during the interview, the experience of her arrest and the attendant publicity had taken its toll on her. As the plaintiff

[3]. This is a 14 item questionnaire that assess psychopathology, which is widely used and validated in Zimbabwe

[4] . PTSD is approved by the Australian Government and is used extensively at the Australian Centre for Post Traumatic Mental Health, University of Melbourne.

explained the details of her ordeal, she became tearful but still managed to speak coherently and logically through her tears and sobbings.

[50] Through the interview the expert witness established that the sudden appearance of six armed Zimbabwe Republic Police Officers who arrested the plaintiff and ordered her to jump into the police van at the Palace Hotel [the scene of the arrest] was most frightening and intimidating to the plaintiff. The plaintiff further revealed to him the extreme humiliation and terrorization of her being ordered to undress in front of five inquisitive and curios officers who made rude and funny comments on her genitalia. The plaintiff said this was the most traumatic and dehumanizing experience that she went through. The very narration of these events evoked painful emotions and cognitions of the trauma that happened about three years before the expert consulted with the plaintiff.

[51] Further, according to the expert the plaintiff's also suffered excruciating psychological pain from the media reports that came out after her arrest especially those articles concerning her court appearance, which eventually led to the collapse of her modeling business and her relationship with a partner.

[52] In the expert's assessment, the plaintiff's SSQ 14 total score was six out of a possible total score of 14 indicating mild anxiety and psychological distress as a result of what she experienced.

[53] Overally, the witness assessed that the plaintiff had suffered post-traumatic stress disorder as a result of her arrest and the subsequent invasive examinations that were carried out upon her both by the police and at the two hospitals at the behest of the police without seeking her consent first. The witness concluded that although the major features of the plaintiff's post-traumatic stress disorder had remitted due to the plaintiff's own initiative of reading appropriate literature, having a supportive family and the expert's interventions, going forward the plaintiff still required to attend psychotherapy sessions with a professional psychotherapist of her choice for psychological treatment to deal with her overall psychological health.

[54] During both his evidence and cross-examination, this witness gave the impression to the court that his testimony was characterized by that desire to assist the court in appreciating what transpired and nothing more. His cross-examination merely affirmed his credibility.

THE DEFNDANTS EVIDENCE

[55] It is important to note that initially Mr *Musika* who appeared for the three defendants had indicated that no evidence would be led on behalf of the defendants because there were no witnesses and that the defendants were not challenging the facts as narrated by the plaintiff. This explains why no summary of evidence was formally filed with the court in preparation for the pre-trial conference and subsequently this trial.

[56] However, just before the case started Mr *Musika* somersaulted and applied to lead evidence from Enock Masimba, a Chief Inspector in the Zimbabwe Republic Police, who was at the time based at Bulawayo Central Police Station. He was the Officer in Charge at the Station. I must mention that this officer's evidence was never recorded and consequently plaintiff's counsel or the court had not been favoured with a summary of his evidence in the way provided for by the rules of this Court. It will also be noted that this witness had the benefit of sitting in court at the time the plaintiff gave the bulk of her testimony.

[57] The witness was not directly involved in the investigations of this case. This witness's evidence must be looked at within context of the plaintiff's testimony. It must be remembered that the plaintiff's major complaint was targeted against the arresting details, the investigating officer and the officers who ordered her to lower her garments to verify her gender. None of these officers gave evidence in Court.

[58] The officer's evidence confirmed that according to the information given to him (obviously by the officers who did not give evidence in court), the plaintiff was arrested by members of police reaction group after a report had been made to them by an informant that the plaintiff had been seen entering a women's toilet at Palace Hotel when she was a man.

[59] The officer denied that five officers at the charge office had ordered the plaintiff to lower her pair of trousers to enable them to verify her gender. This denial was made by the witness despite the fact that he was himself not one of those officers who was accused of such invasive conduct.

[60] In his evidence the witness was adamant that as far as his office was concerned the arrest of the plaintiff was lawful because there was a reasonable suspicion that the plaintiff had entered a female toilet when she was a man. He said that this on its own justified the police to arrest the plaintiff.

[61] The officer went on to say that as far as the police were concerned it was mandatory that the plaintiff be examined by a government medical officer to verify her gender before any charge could be formally laid against her.

[62] The officer, through his evidence made the startling revelation that even if the plaintiff had objected to being medically examined, the police officers would have forced her to undergo the examination to enable them to find out if indeed she had committed 'the offence in question'. This admission merely confirmed the plaintiff's averment that her consent was never sought when these invasive examinations were conducted upon her person. This also confirms the tenor of the plaintiff's cross-examination by the Defendants' counsel, *Mr Musika*, as partly recorded in this judgment.

[63] When pushed under cross examination by Advocate *Dube* who appeared for the plaintiff, the witness changed his position and told the court that the plaintiff had in fact consented to undergo the gender verification examination.

[64] However, the officer was unable to produce any notes in the form of a police diary log to confirm that the plaintiff had been engaged on the aspect of the alleged consent to her gender verification investigations.

[65] There were practical difficulties to the court in accepting this witnesses' evidence as representing the truth of what transpired. This was partly because the witness was literally testifying on behalf of other police officers who were the main actors in dealing with the plaintiff. His evidence was largely hearsay and there were no cogent reasons advanced by the defendants 'counsel why the officers directly involved could not themselves testify to rebut the serious allegations directly made against them by the plaintiff. This officer was far from convincing as a witness. The unconvincing nature of his evidence was understandable especially given the circumstances under which he was roped into these proceedings by the defendants' counsel.

THE ISSUES FOR DETERMINATION

[66] The issues that call for the determination of this case largely derive from the joint-pre-trial conference minute filed by the parties in this case on 27 September 2016. I would conflate them into basically four issues *viz*

1. Whether or not the plaintiff was unlawfully arrested and maliciously prosecuted.
2. Whether or not the plaintiff was subjected to the treatment she stated in her summons and declaration.

3. Whether or not as a result of that conduct the plaintiff suffered damages as summarized in her declaration and pre-trial conference minute.
4. Whether or not the plaintiff is entitled to the damages as laid out under separate headings in her summons.
5. The quantum of such damages.

THE LAW

[67] The basis of the plaintiff's claim is that the first and second defendants set the law in motion against her without probable or reasonable cause for doing so, and that the second defendant acted without any reasonable belief in the truth of the information received from the first defendant.

[68] Further, the plaintiff averred that the cumulative effect of the conduct of the defendants was extremely abusive, malicious alternatively indifferent and uncaring which resulted in the plaintiff being unlawfully arrested and detained, maliciously prosecuted and in the process being deeply humiliated and emotionally injured in her person and dignity.

[69] Throughout her testimony, the plaintiff sought to demonstrate that her arrest was unlawful and it is appropriate at this stage to address the issue of the plaintiff's arrest.

[70] It was the plaintiff's uncontroverted testimony that after she had refused to give the first defendant twenty dollars for whisky, the latter made a mobile call to one, Gora and

openly told him that the plaintiff needed to be 'fixed' for "being a man imitating to be a woman," and that when the plaintiff tried to walk out of the hotel she was detained by the first defendant in the hotel until a group of six armed riot police officers arrived at the scene forty five minutes later, arrested, bundled her into an open truck and took her to the police station in typical military style.

<u>Arrest without a warrant</u>

[71] It is common cause that the plaintiff was arrested by six armed police officers who did not have a warrant to arrest her. In this country the arresting of a suspect without a warrant by a peace officer or a police officer is regulated by the provisions of s 25 of the Act[5]. The section sets out in clear terms the different categories of persons who should be arrested without a warrant and the basic requirements which must be satisfied before such an arrest is effected. For the avoidance of doubt the section in question leads as follows:

"**25 arrest without warrant by peace officer**

(1) Any peace-officer and any other officer empowered by law to execute criminal warrants is hereby authorized, subject to the general or specific directions or a superior officer or person placed in authority over him to arrest without warrant.

(a) any person who commits any offence in his presence.

(b) any person whom he or she has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule or the Ninth Schedule Provided that if, in the case of an offence mentioned in the Ninth Schedule, the peace officer or other officer concerned has reason to believe that the office is sufficiently serious to justify the issue by the Attorney General of a certificate referred to in subs (3b) of section thirty-two, the officer concerned shall not effect an arrest I terms of this paragraph.

[5] CRIMINAL PROCEDURE AND EVIDENCE ACT [CHAPTER 9:07]

(i) Unless he or she is a police officer who is of or above the rank of assistant inspector, or is given leave b such an officer to effect the arrest; and

(ii) Where the alleged offence is disclosed by an anonymous complaint, unless the officer concerned ….. which it was made:

(c)…..

1. CRIMINAL PROCEDURE AND EVIDENCE ACT [*CHAPTER 9:01*]

(2) ……….
(3) ………..Circumstances"

[72] Section 25 makes specific reference to offence mentioned in the first schedule or the ninth schedule. A perusal of these schedules does not include as one of its criminal offences the entering of a female toilet by a male person or vice versa. Such an offence does not seem to appear anywhere as a crime in this country

[73] If the plaintiff was arrested outside the provisions of section 25, her arrest could not possibly have been lawful. It must therefore be accepted, that when the plaintiff alleged that her arrest was unlawful, it was indeed unlawful. The legislature in its wisdom put a cap on the arrest of suspects and the police officers are not expected to hysterically respond to calls of the arrest of suspects but to satisfy themselves on reasonable grounds that the suspect has committed an offence before arresting such an individual. It was a monumental risk for the police officers to arrest the plaintiff and subsequently deprive her of liberty on the strength of the mere pointing out by the first defendant. The evidence led and accepted by this Court clearly point to a situation where the first defendant maliciously set the law in motion against the plaintiff in order to fix her as he openly stated. The involvement of the six riot police officers elevated the

malicious arrest to an even higher and unacceptable level. The plaintiff's undisputed evidence suggests that after the officers had spoken to the first defendant they immediately arrested her without even finding out from her what had happened or letting her know why she was being taken to the police station in the first place.

[74] Basic police procedure demands that before one is arrested, he/she must be advised of the reasons for her/his arrest. Police officers are not given an open cheque as it were to blindly arrest a suspect for if this were to be allowed, many individuals would be left cruelly vulnerable. Given that the first defendant and the arresting details did not give evidence on the circumstances leading to the arrest of the plaintiff, the court must accept the plaintiff's version on the manner and nature of the arrest as being truthful. This Court must also accept as narrated by the plaintiff that as she tried to walk away from the Palace Hotel, the first defendant and his colleague stopped her from leaving. The court must further accept as per plaintiff's evidence that her detention at Palace Hotel was clearly actuated by malice and spite. What followed this unlawful detention by the first defendant was a continuation of acts of unlawful conduct by the police details when they arrested the plaintiff.

[75] Mr Musika, for the defendants argued that in arresting the plaintiff the police were relying on s 219 of the Constitution of Zimbabwe Amendment (no 20)[6]. Act 2013 which speaks to the police service and its functions. Defendant's counsel argued that the police officers were justified to arrest the plaintiff because she was alleged to have committed a criminal offence by using a ladies toilet whilst she was a male. He further argued that the plaintiff, in her

[6] Act 2013

warned and cautioned statement admitted to having committed this offence. Section 46 of the Criminal Law (Codification and Reform Act)[7] was singled out as the section which the plaintiff had violated.

[76] I do not believe that Mr Musika's argument was well anchored for the following reasons; As correctly argued by Advocate *Dub*e, who appeared for the plaintiff, at the time the plaintiff was arrested she was not made aware of the reasons for her arrest. It is clear from the evidence of the sole defendants' witness that the police arrested the plaintiff in order to investigate the offence that she was alleged to have committed. But the accepted legal passion is that police do not arrest in order to investigate.

[77] The position of our law is neatly captured by the Supreme Court of Zimbabwe in the case of *Botha vs Zvada and Anor*[8] where the court held as follows:

> "For an arrest to be lawful the arresting officer has first to establish that he has reasonable grounds for suspecting that the appellant had committed the murder. But even where there are reasonable grounds for suggesting that the first schedule offence has been committed, the power of arrest, which is discretionary power, has to be exercised reasonably, where a person is arrested when it is not reasonable to arrest him, the arrest will still be unlawful."

[78] MUSHORE J, in *Tafadzwa Mushunje vs Tracy Sihle Hany and Minister of Home Affairs and Commissioner of Police and Prosecutor General*[9] makes the following remarks:

[7]Chapter 9:23 (supra)
[8]1997 (1) ZLR 415 (s) at P415 F-G
[9]HH 465-18 at p5

> An arrest is *prima facie* wrongful unless it is legally justified. In Zimbabwe the plaintiff needs to prove that the arrest or imprisonment was illegal. The plaintiff does not have to prove that there was intention to cause him or her harm or to act illegally. The animus *injuriandi* is presumed to exist."

[79] Even if it is assumed that the police officers who arrested the plaintiff in this case, genuinely believed that by entering a female toilet when she was a male plaintiff had committed a criminal offence one is left to wonder whether the police needed to use such a high handed approach as what they did in this case. Their conduct was tantamount to using a 16 pound hammer or a machine gun to crush an ant. By any stretch of imagination the conduct could not possibly have been justified by any fair minded person. In my mind, such conduct was both excitable and unacceptable. It gets worse if one considers the fact that the plaintiff was only meaningfully advised of the reasons of her arrest on the 3rd day of her arrest, on 17 January 2014, that is, when she was warned and cautioned.

[80] This was confirmed by Mr *Musika* during the cross-examination of the plaintiff. Even the sole state witness confirmed this in his evidence when he said the police could only lay charges against the plaintiff after she had undergone medical examination. What this boils down to is that at the time they arrested and detained her, the police officers did not know the offence that the plaintiff had committed. This cannot be the position of our law in so far as the arrest of suspects is concerned.

[81] Mr *Musika*, through his cross-examination of the plaintiff sought to justify her arrest on the basis that when she was subsequently warned and cautioned of contravened section

46 of the Criminal Law (Codification and Reform) Act[10], she admitted to the charge. That cannot possibly be a sound argument because the truth of the matter is that the conduct of the plaintiff did not fit into any one of the situations created by the cited section. The underlining factor is that the plaintiff's conduct did not warrant that she be charged for violating the cited section so her alleged admission to a non-existent charge is neither here nor there.

[82] Perhaps the closest section which the plaintiff could possibly have violated was if she had entered the toilet and come face to face with anyone in circumstances where that individual would have felt her or his dignity impaired by the presence of the plaintiff is s 95 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act[11]. Despite this however, a violation of this section would have required a complainant alleging criminal insult by the plaintiff's conduct. In the absence of such complainant, the plaintiff could not possibly have committed this offence. Whichever way one looks at the facts of this case, the inescapable conclusion is that the plaintiff did not commit any cognisible offence warranting her arrest and subsequent deprivation of liberty as the evidence shows. There can be no debate that the plaintiff's arrest was both high-handed and unlawful.

[83] As is apparent from the plaintiff's pleadings, her claim is built around the alleged unlawful arrest and malicious prosecution.

[84] In her closing submissions Advocate *Dube* urged the court to make a definitive finding on both the unlawfulness of the arrest and the subsequent malicious prosecution of the

[10]Chapter 9:23
[11]Chapter 9:23

plaintiff. Counsel also passionately urged the court to make a specific finding that the investigations against the plaintiff while in the custody of the police were both invasive and a disturbing violation of the plaintiff's guaranteed Constitutional rights.

[85] I have already demonstrated in this judgment why I believe that the plaintiff's arrest was unquestionably unlawful. I could go on and on to expand on this but I do not consider it necessary at this stage to do so.

[86] I intend to focus on the alleged treatment of the plaintiff when she was lodged in police cells upon her arrest from the Palace Hotel. Advocate *Dube* alleged that it was clear from the testimony of the plaintiff that the plaintiff's rights were trampled upon and that such conduct cannot go uncensored.

[87] Our new Constitution[12] which we all pride ourselves with has spelt out in greater details under its Chapter 4 a myriad of the citizen's rights including the rights of those arrested and detained. I would want for a moment to focus on the rights as encapsulated under s 50 of the Constitution of the Republic of Zimbabwe and relate same to the treatment to which the plaintiff was subjected to at the hands of the arresting details. The section in question provides as follows:

[88] "**50 Rights of arrested and detained person**

(1) Any person who is arrested -

[12]Constitution of Zimbabwe Amendment (No. 20) Act 2013

(a) must be informed at the time of arrest the reason for the arrest;

(b) ………

(c) must be treated humanely and with respect for their inherent dignity;

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention and ….

(9) any person who has been illegally arrested or detained is entitled to compensation from the person responsible for the arrest or detention, but a law may protect the following persons from liability under this section –

(a) a judicial officer acting in a judicial capacity reasonably and in good faith;

(b) any other public officer acting reasonably and in good faith and without culpable ignorance or negligence."

[89] As the undisputed evidence of the plaintiff suggests, the plaintiff was not informed of the reasons of her arrest at the time of her arrest.

[90] The first defendant threatened to fix the plaintiff by roping in some other state agents and this threat was immediately realized when six riot police officers pounced on her in military style and bundled her into their motor vehicle before driving her to the police station. Both the first defendant and the arresting details did not testify to rebut these serious allegations. It is therefore easier for the court to make a definite finding that the plaintiff was arrested in order to fix her and that at the time of her arrest, she was not informed of the reasons for her arrest.

[91] More perplexing and disturbing is the treatment of the plaintiff when she was now lodged in the police cells. The plaintiff's uncontroverted evidence was that she was taken to a side room by four police officers in uniform and one in civilian attire who started discussing her gender. The plaintiff was then ordered to pull down her pair of trousers so that the five male officers could satisfy their curiosity by physically checking her genitalia. After their examination, they started laughing and making fun of the plaintiff.

[92] I imagine how unease one feels if they have to go to a medical doctor of their choice (someone who is specifically trained on issues of confidentiality), and expose their genitalia, if a medical need arose. Imagine five male strangers demanding and ordering one to display their genitalia for them to examine it. It is better left to imagination how the plaintiff must have felt after this invasive conduct by these five police officers. It must naturally have gotten worse for the plaintiff when the officers started fidgeting and making fun of her after this inconclusive examination.

[93] To my mind this is one example of the kind of inhuman and degrading treatment spoken to by sections 50, 51 and 53 of the Constitution of the Republic of Zimbabwe. It was insensitive and cruel for the officers to have done this to the plaintiff. The only witness for the defendants made an abortive attempt to rebut these serious allegations against the police officers. Like earlier on stated, this officer's evidence had inherent shortcomings in it. In the first place, he was clearly not one of the offending officers who examined the plaintiff. Secondly, he was not even the investigating officer of this case and thirdly, and more telling, he only got a report of this case (according to his own testimony), after the plaintiff had been arrested and detained.

The officer clearly did not have first-hand information on what happened to the plaintiff. Wherever his evidence is at variance with that of the plaintiff, it is more persuasive to lean towards the evidence of the latter. In any event, the defendants completely fractured their case by failing to avail those officers against whom the plaintiff pointed at as the chief culprits. Their situation was further compounded by the first defendant's failure to avail himself and testify in this case.

[94] The plaintiff's ordeal did not end with the inhuman and degrading treatment at the hands of the police. According to the plaintiff, after the inconclusive invasive conduct by the police officers on her, the plaintiff was handed over to another police officer who asked her to give a statement about what had happened at the Palace Hotel. It must be understood that up until this stage no charge had been brought to the plaintiff's attention as the police did not know the offence the plaintiff had committed

[95] The plaintiff's unchallenged evidence was that at this stage she went through the processes of a suspect like having a picture of her taken, being ushered into a dark, dirty,
Urine-stingy room with no lights with her basic belongings like her handbag, cellphone and shoes taken away from her. I find it strange that the police officers would have decided to go this far without understanding why they were treating the plaintiff in this manner. None of them knew what offence the plaintiff had committed.

[96] The plaintiff's suffering this evening was far from over. Her evidence which was confirmed by officer Enock Masimba was that later that same evening the plaintiff was

Sherphered to United Bulawayo Hospital to compulsorily undergo a gender verification examination. I use the term "compulsorily" well guided by the evidence of Masimba who conceded under cross-examination that the police did not think it was necessary to seek the plaintiff's consent because she was under investigation. In fact, according to this witness, the police officers did not believe the plaintiff had any choice – she had to undergo this examination to assist them frame an appropriate charge against her.

[97] The forced examination which required the plaintiff to strip down her pair of trousers for the second time that evening revealed that the plaintiff was transgender but because the doctor conceded he was not qualified to make conclusive examination he referred the plaintiff for a second examination by a gynaecologist at Mpilo Central Hospital.

[98] Following the recommendations by the doctor at United Bulawayo Hospital, the plaintiff was subjected to a further examination by a gynaecologist at Mpilo Central Hospital on the following day, 17 January 2014. The examination confirmed the plaintiff's transgender status.

[99] I have not the slighted doubt in my mind that the accumulative effect of the treatment of the plaintiff whilst under police arrest speaks to serious violations of her constitutional rights by the police. When the plaintiff testified that her rights were trampled upon, she must therefore be believed. I accept her position.

Malicious arrest and prosecution

[100] The position of the law in this country and beyond this jurisdiction has been sufficiently explored and the legal position firmly spelt out. It is not for me to try and reinvent the wheel.

[101] In this regard, I find comfort from the instructive remarks by MALAN AJA in the case of *Reylant Trading (Pvt) Limited v Shongare and Anor*[13] where put it this way:

> "Malicious prosecution consists in the wrongful and intentional assault of the dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with '*malice*' or *animoiniuriarum*."[14]

[102] In the case of (1) *Econet Wireless (Pvt) Ltd* (2) *Godfrey Mangezi* (3) *Transaction Payment Solutions* v *Ngonidzashe Sanangura*[15] MALABA DCJ (as he then was) luculently reaffirmed the legal position in the following words;

In order for one to succeed in an action for malicious prosecution, one must prove four requirements, namely:

> "that the prosecution was instigated by the defendant; it was concluded in his favour; there was no reasonable and probable cause for the prosecution and that the prosecution was actuated by malice."
>
> See also *Thompson & Anor* v *Minister of Police and Anor*."[16]

[13] 2007 (1) ALL SA 375 (SCA) para 5
[14] SC 52/2013 at p. 9
[15] 1972 (1) SA 371 ( )
[16] 1968 (3) SA 98 A

[103] The common denominator that runs through all these decisions is that it is an actionable wrong to procure the arrest or prosecution of another by setting the law in motion against him/her maliciously without reasonable cause.

[104] In *Maoki v Reckitt and Colman (Africa) Ltd and Anor*[17] the court defined malice as:

> "the defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully but nevertheless continued to act, reckless as to the consequence of his or her conduct (*doluseventualis*). Negligent on the part of the defendant (or I would say, even gross negligence) will not suffice."

[105] I have already dealt in this judgment about the manner in which the plaintiff was arrested and made the inevitable conclusion that the arrest itself was both unlawful and malicious. The malice started with the first defendant openly declaring to the plaintiff that she needed to be fixed. When the police officers got involved in both the arrest and treatment of the plaintiff under arrest, that malice remained visible.

[106] It was the undisputed evidence of the plaintiff that when she was taken to court and granted bail, the first defendant was visibly animated and went further to threaten the plaintiff in the presence of the police thereby forcing the plaintiff to go into hiding for quite some time.

[107] The malice on the part of the rest of the defendants is among other things demonstrated by their determination to deprive the plaintiff of her liberty without first

[17] 1968 (3) SA 98A

acquainting themselves with the charge which was to be preferred against the plaintiff. In other words, the police officers plunged themselves into a blind arrest of the plaintiff. The sad result was that the preferred charge of contravening s 46 of the Criminal Law (Codification and Reform) Act[18]was found to be unsustainable. It is a fact that ever since the court declined to keep the plaintiff on remand on 11 May 2014, no effort has been made to prosecute her. The inevitable conclusion that I make is that there is no recognized offence which the plaintiff committed, which the plaintiff committed which warranted her to be treated in the manner the defendants did to her. This, in my view demonstrates the whole malice that surrounded both the arrest and the prosecution of the plaintiff. The situation which the defendants put themselves in could have been easily avoided if they had made an effort to acquaint themselves with the law before abusing the plaintiff.

[108] The first defendant was properly served with court papers and decided not to defend the action. I cannot speculate on his position or attitude towards this claim. I cannot avoid granting default judgment against him.

[109] The tenor of my judgment throughout clearly shows that the conduct of the police in the handling of this matter is such that they cannot escape liability. Having played a prominent role in the arrest of the plaintiff, as reasonable officers they should have foreseen that beyond the arrest of a suspect lies the real possibility of prosecution and they had a duty thrust upon them to ensure that the arrest itself was both lawful and devoid of malice. This, they failed to do hence they cannot escape liability in this case.

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[18]Chapter 9:23

[110] It is my intention at this stage to proceed and deal with the assessment of damages due to the plaintiff.

QUANTIFICATION OF DAMAGES

[111] The quantification of damages is one of the greatest challenges faced by courts in many of these cases. This is primarily so because there is no mathematical formula in place which one can rely on. Invariably one has to rely on the decisions arrived at in other similar matters but bearing in mind that every case is unique in its own way.

[112] I note that this case was initiated when the country was using, *inter alia* the United States dollar as its official currency hence the plaintiff's claim was pegged in that currency. Because of the changes in our law, I am unable to consider the claim in the hitherto official currency but only in the Zimbabwe dollar currency. The quantification of what I consider to be the appropriate amount of damages shall be done in the officially acceptable currency.

[113[I have already pronounced on the unlawfulness of the plaintiff's arrest. I now move to deal with the actual quantification of damages bearing in mind the claims made by the plaintiff in her summons.

[114] In this regard, I derive guidance from P J Visser and J M Potgieter's *Law of Damages Through the Cases*[19]where the authors underscored the factors to be considered in the computation of such damages. The author highlighted the need to consider the following factors: devaluation of currency, escalation of awards, doubling of cost of living and the status of the plaintiff, the duration of the deprivation of liberty, the level of the humiliation and the malice, generally the circumstances that contributed to the plaintiff's misfortune, the nature of the charge and above all the nature of the plaintiff's suffering. These factors can never be exhaustive. They are only guidelines.

[116] GUBBAY CJ, in one of the leading cases in this country, *Muzonda v Minister of Home Affairs and Anor*[20]eloquently spoke on some of the considerations that guides the Court in the assessment of damages. The learned Judge eloquently remarked:

> "The deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. The importance which attaches to such a fundamental right was eloquently spoken of by REYNOLDS J in *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (H) at 346B-D. I can do no better than repeat his words:
> "Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. Long before the Magna Carta codified the principle almost eight hundred years ago, man has pursued and jealously guarded his right to freedom of person. In the words of Thomas Jefferson – "The God who gave us life gave us liberty at the same time." Revolutions have been staged and wars have been fought in the name of freedom. This includes Zimbabwe's own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe, and the courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principle involved --- Instance of unwarranted or oppressive assumptions of power may always be challenged in the courts."

[19] 3rd Edition, publishes by Juta& Company at pp628-630
[20] 1993 (1) ZLR 92 at pp100-101 E-A

[117] For three days, the plaintiff in this case was not only deprived of her liberty, but was subjected to forced anatomical examination in the most crude and naked manner by adventurous members of the police force. As if that was not enough, she was then subjected to further invasive examination by two doctors at two different medical institutions – all because of her transgender status, something that she did not invite upon herself.

[118] While all this was happening the plaintiff was treated like a fully-fledged criminal by being kept in a filthy environment, the police cells.

[119] Through the conduct of the police, the plaintiff was made cheap fodder by newspaper reporters some of whom labelled her a "gay shemale." Social media equally played havoc on the status of the plaintiff. It is clear that all these could have been avoided if the police had not abused their discretion in arresting and detaining the plaintiff in the manner they did.

[120] As already stated the plaintiff herself testified on the impact the whole ordeal had on her. She lost business and had her relationship terminated due to negative publicity which forced her to go into hiding.

[121] It was not demonstrated by the police that the plaintiff's case could not have been handled without depriving her of her liberty. There was no evidence that there was a possibility that the plaintiff evinced any signs of escaping if not arrested, or that she was going to commit any crime or would obstruct police investigations if she was not arrested. See Mazonda's case (*supra*, p. 99-C-F.

[122] One cannot avoid concluding that the conduct of the police in arresting and detaining the plaintiff, was quite outrageous, because clearly, they abused their discretion in arresting her. The conduct complained of against the plaintiff is one of those where police would have easily conducted their investigations while the plaintiff continued to enjoy her freedom.

[123] It is a universally acceptable principle in the quantification of damages that the award made is never meant to enrich the victim but merely to try and vindicate or salvage some kind of dignity for the pain endured by the victim.

[124] The downward spiral of the value of the currency is one consideration which, must not escape the attention of the court. There can be no doubt that in this country the purchasing power of our dollar is at its worst and because of this, reference to those cases where the quantification of similar damages was done ten or so years ago may not be very helpful.

[125] I have already explained in greater detail the emotional distress and loss of dignity suffered by the plaintiff due to the conduct of the police. The forced invasive examinations stole from the plaintiff her very core of humanity. When the plaintiff testified that because of what she went through she suffered some excruciating pain and that she was totally demoralized by the negative publicity of her case that followed, this must be understood in its proper context.

[126] The expert witness, Phillip Francis Moses, a clinical psychologist confirmed the pain endured by the plaintiff.

[127] The prosecution of the plaintiff was both thoughtless and malicious. A rudimentary attempt by the police to acquaint themselves with the preferred charge would have clearly established that the charge was not well grounded. At that stage, the arrest would not have been carried out at all.

[128] In the case of *Musundire v OK Zim Ltd*[21], when this Court was faced with an almost similar case, the court awarded damages in the sum of $8 500. But it must be remembered that at the time the currency in force in this country was among others United States dollars. This award was made in 2012. The damages were only for unlawful arrest. In the instant case the plaintiff was arrested and prosecuted.

[129] In the case before me, it occurs to me to be superfluous to claim separately for exemplary damages in light of the other claims made under the other separate headings. That claim shall be dismissed.

[130] In concluding this judgment, I believe it is both profitable and instructive to borrow the wise words of the learned Chief Justice of India, Dipak Misra, who stated as follows:

> "The emphasis on the unique being of an individual is the salt of his/her life. Denial of self-expression is inviting death. Irreplaceability of individuality and identity is grant of respect to self. This realization is one's signature and self-determined design. One defines oneself. That is the glorious form of individuality."[22]

[21] 2012 (1) ZLR 292 (H)
[22] NAVTE J SINGH JONAR & ARS v UNION OF INDIA & ORS (supra) at p. 1

[131] Transgender citizens are part of the Zimbabwean society. Their rights ought to be recognized like those of other citizens. Our constitution does not provide for their discrimination It is nothing but delusional thinking to wish away the rights of transgenders.

[132] To avoid the recurrence of what happened to the plaintiff in this case, it might be prudent to construct unisex toilets as an addition to the resting rooms in public places.

In the result I make the following order:

1. That judgment be and is hereby granted in favour of the plaintiff against the defendants jointly and severally the one paying the others to be absolved.

2. That the defendants be and are hereby ordered to pay to the plaintiff $100 000-00 being damages for unlawful arrest

3. That the defendants be and are hereby ordered to pay to the plaintiff $100 000-00 being damages for malicious prosecution.

4. That the defendants be and are hereby ordered to pay to the plaintiff $200 000-00 being damages for emotional distress and *contumelia*.

5. That the defendants pay interest at the prescribed rate on the amount awarded from the date of judgment to the date of payment in full.

6. That the defendants pay costs of suit.

Phulu & Ncube *p*laintiff's legal practitioners
Attorney General's Office, defendants' legal practitioners