DALAM MAHKAMAH TINGGI MALAYA DI PULAU PINANG
[GUAMAN SIVIL NO: 21NCVC-27-06/2012]

ANTARA

SYED IDRUS SYED AHMAD **... PLAINTIF**
(NO.K/P: 430526-09-5033)

DAN

1. **AFANDI ABDUL MANAP**
2. **JABATAN ALAM SEKITAR PULAU PINANG**
3. **KOPERASI GABUNGAN NEGERI PULAU PINANG BERHAD**
4. **KGN HIN BUS CO SDN BHD**

... DEFENDAN-DEFENDAN

GROUNDS OF JUDGMENT

INTRODUCTION

1. The Plaintiff brings this action for the tort of negligence against the first and Second Defendants for getting him involved in an environment case in the Session Court Georgetown *vide* criminal summons 63-111-09 even though he was no longer a director of the Fourth Defendant.

2. The Plaintiff had resigned as director in 2001. The First Defendant was the prosecuting officer who conducted the said case in the Sessions Court. The Second Defendant was the director of the Jabatan Alam Sekitar, Pulau Pinang is brought in as the principal of the First Defendant.

3. The Plaintiff sued the third and Fourth Defendants for failure to inform and to take any action to remove the name of the Plaintiff as a director from the Fourth Defendant's list of directors with the Companies Commission Malaysia and also for not informing the Second Defendant that the Plaintiff had resigned from the Fourth Defendant's company since 2001. The Fourth Defendant is a subsidiary of the Third Defendant.

4. This case had one gone for trial. The Plaintiff had one witness (himself). The Second and Third Defendants called five witnesses and the third and fourth Defendants had a witness each.

EVIDENCE

5. The Plaintiff (SP1) gave evidence that some policemen came to his house at Edgecumbe Road on 12-2-2010 to effect/serve a warrant of arrest on him. As the Plaintiff was not in his house at that time, the police allowed the request of the Plaintiff's wife to have the Plaintiff surrender and report to the Pulau Tikus Police Station.

6. Thereafter SP1 went to the police station and was informed that the warrant was for his failure to appear in Court for the summons case. SP1's wife then signed a bond for the release of SP1 and for his appearance in Court on 19-2-2010. SP1 said he was on the point of collapse.

7. On 19-2-2010, when SP1 attended and appeared at the Sessions Court, Georgetown, his warrant of arrest was cancelled by the Court and was ordered to attend Court on 5-3-2010. On 5-3-2010 when SP1 appeared in Court, he was informed about the charge and a copy of the charge sheet was given to him.

8. According to SP1, that was the first time he realised that he was charged as a director of the Fourth Defendant for an offence committed in 2006 by the Fourth Defendant. SP1 then explained to the prosecutor that he was totally innocent as he was no longer the director of the Fourth Defendant as at 2006.

9. SP1 claimed that the prosecutor refused to listen and SP1 claimed trial for the case which was adjourned to 12-7-2010 for full trial. After that SP1 went to consult his lawyer who then wrote to the Second Defendant on 6-4-2010 informing them that the Plaintiff was no longer a director of the Fourth Defendant since 2001 and therefore not privy to the offence committed by the Fourth Defendant in 2006. (see: bundle C pages 8-12).

10. According to SP1, there was no reply from the Second Defendant but sometime on 4 & 5-7-2010 representatives from the Second Defendant went to see him at his home and shop in Pitt Street to persuade him to plead guilty. They also tried to get him to sign a statement which SP1 declined to do. The Plaintiff testified that he

was badly affected by the visits as he was treated as a common criminal.

11. Subsequently, SP1 visited the Fourth Defendant's office and pleaded with its director Dato' Seri Haji Samsuri to inform the Second Defendant that he was not responsible as he had resigned as a director in 2001. According to SP1, Dato' Seri Haji Samsuri did nothing.

12. On 12-7-2010, SP1 arrived in Court early and he went and asked the prosecutor if he was withdrawing the charge. According to SP1, the prosecutor answered in the negative and tried to get him to plead guilty. SP1 said that he nearly had a heart attack, was breathless with palpitations and shaking all over. It was when his lawyer appeared in Court, that he was calmed down by his lawyer. When the case was called up, the prosecutor informed the Court, they were withdrawing the charge against the Plaintiff and was replacing the Plaintiff's name with another director of the Fourth Defendant.

13. Under cross examination, SP1 agreed that he was not arrested by the police and on 19-2-2010 when the charge was read to him in the Court, he understood it. SP1 agreed that D16 was a statement recorded from him on 6-7-2010 by the Second Defendant's officer. SP1 also agreed that the offence was not a serious one as it was about a bus emitting excessive smoke. SP1 denied that he did not suffer any health problem throughout the whole episode. SP1 claimed that the condition of health became worse after that.

14. SP1 disagreed that Dato' Seri Haji Samsuri had written to inform the Second Defendant on his status as a director of the Fourth Defendant. SP1 refused to disclose the amount of fees that he had paid to his lawyer stating that it was confidential. In prayer 24(d) of Plaintiff's amended statement of claim he claimed RM125,000.00 for the legal fees incurred by him for the case. The Plaintiff's case is based on the oral evidence of SP1. The witnesses for the second and third Defendants were SD1, SD2, SD3, SD4 and SD5.

15. SD1 was the investigating officer of the Second Defendant. He testified that a bus PCG 7588 belonging to the Fourth Defendant had

emitted excessive smoke on 10-8-2006 and a compound notice was issued to the driver of the said bus with an offer of compound of RM 2,000.00 (D4). When the compound was not paid within the specified period, SD1 made a search at the Road Transport Department to find out the registered owner of the bus. (see D6). The owner of the bus was the Fourth Defendant.

16. SP1 then proceeded to make a search on 29-10-2007 with the Companies Commission Malaysia on the Fourth Defendant in order to find out the status of the company and its board of directors. D7 is the search document where the Plaintiff was still named as one of the directors of the Fourth Defendant. Under cross-examination, SD1 said that the company's search was made to confirm the information on the company including its officers. According to SD1, the search made was in accordance to the Department's procedure and it was sufficient information.

17. SD2 was the prosecuting officer for the Second Defendant. His authority to prosecute was derived under Section 377(b) Criminal Procedure Code. SD2 testified that sometime in May 2008, he

received an investigation papers from SD1 with a suggestion that the Fourth Defendant be charged with an offence under Section 22(1) Environmental Quality Act 1974. SD2 then proceeded to obtain the consent to prosecute from the Deputy Public Prosecutor (D5 is the consent). On 1-10-2009, the case was registered as 63-111-09 at the Sessions Court Georgetown against the Fourth Defendant. SD2 testified that the decision to prosecute the case came from the Deputy Public Prosecutor.

18. According to SD2, the summons 63-111-09 was served on the Fourth Defendant on 9-11-2009. Thereafter on the first mention date on 16-11-2009, at the Sessions Court, a warrant of arrest was applied for against the Plaintiff as not a single representative of the Fourth Defendant appeared in Court.

19. There were several other mention dates given by the Court and it was only on 19-2-2010 that the Plaintiff appeared in Court and requested for trial of the case. At the next mention date on 5-3-2010, the Plaintiff appeared in Court and again he claimed trial and the next date for trial was fixed for 12-7-2010.

20. SD2 testified that on 6-4-2010, the Second Defendant received a letter from the Plaintiff's lawyer requesting for the charge be withdrawn as the Plaintiff was no longer a director of one Fourth Defendant since 30-6-2001. SD2 then went to obtain instruction form the Deputy Public Prosecutor on 5-5-2010 based on the information supplied by the Plaintiff's lawyer. SD2 was instructed by the Deputy Public Prosecutor to withdraw the charge against the Plaintiff and to have a statement recorded from the Plaintiff. SD2 testified that on 6-7-2010, an officer of the Second Defendant met the Plaintiff at Jalan Kapitan Keling for the recording of the statement but the Plaintiff refused to cooperate.

21. According to SD2, when the case was called up on 12-7-2010, the charge against the Plaintiff was withdrawn but the charge against the Fourth Defendant remains. SD2 then applied to the Court to replace the name of the Plaintiff to one Dato' Hamid Arabi bin Md Salih which was allowed. On the next date 24-9-2010, Dato' Hamid appeared in Court, pleaded guilty to the charge and a fine of RM2,500.00 was imposed by the Court.

22. Under cross examination, SD2 denied that that the Plaintiff was wrongfully arrested with the warrant of arrest in respect of the charge SD3 was the other prosecuting officer who conducted the case against the Fourth Defendant on 16-11-2009. According to SD3, when the case was mentioned on the same date, nobody appeared for the Fourth Defendant. As such SD3 applied for a warrant of arrest against a director of the Fourth Defendant ie, the Plaintiff.

23. SD3 said he chosed the Plaintiff at random by using the information in the companies search. (D7). The Plaintiff's name appeared as a director in D7. SD3 testified that the warrant of arrest was granted and was prepared by the Court. He then applied to the police to execute the warrant of arrest. D14 is the warrant of arrest. The warrant of arrest was not served on the Plaintiff on 18-1-2010 and 29-1-2010 mention dates. It was on 19-2-2010 that the warrant of arrest was served on the Plaintiff who attended Court and claimed trial.

24. Under cross examination, SD3 testified that he referred to the companies search that was in the investigation papers for the names

of the directors. SD3 testified that the search information was the current one from the Companies Commission.

25. SD4, an officer of the Second Defendant testified that on 6-7-2010, he recorded a statement from the Plaintiff. D16 is the statement. Under cross examination SD4 said that the Plaintiff refused to answer all the questions that he asked.

26. SD5 was the process server of the Second Defendant. He testified that he had served the Summons 68-11-2009 at 355-B, Jalan C.Y Choy which was the workshop and office of the Fourth Defendant. SD5 testified that he had earlier on gone to address 31-A, Jalan Bricklin, Georgetown but there was nobody at the address. SD5 served the summons on a male person who was the supervisor of the premises but he refused to receive it. As such SD5 pasted the summons on the door of the office at the premises. SD5's affidavit was marked as D11.

27. SD6 was the Third Defendant's witness. He gave evidence that the Plaintiff was an ex-director of the Fourth Defendant which is a

subsidiary company of the Third Defendant. SD6 testified that the Fourth Defendant had paid the fine for the said offence on 29-9-2010. SD6 testified that upon knowing that the Plaintiff was summoned by the Second Defendant, the Third Defendant paid RM3,000.00 to the Plaintiff for his legal fees and that a letter dated 18-3-2010 was issued stating that the Plaintiff had resigned as a director of the Fourth Defendant on 30-6-2001.

28. SD7 was the Fourth Defendant's witness. SD7 testified that he knew about the summons against the Fourth Defendant from a letter dated 4-3-2010 written by the Second Defendant to the Fourth Defendant. SD7 testified that the Fourth Defendant had never received the summons as stated in the affidavit of service D11 of the Second Defendant. SD7 said that it was in the month of August or September 2010 that the summons was served on the Fourth Defendant. SD7 appeared in Court on 24-9-2010, pleaded guilty and paid the fine of RM2,500.00.

29. SD7 testified that when the Plaintiff resigned as a director of the Fourth Defendant on 30-6-2001, the Fourth Defendant had informed

the Registrar of the Companies Commission by serving to them Form 49 of the Companies Act. The Form 49 (D23) dated 30-6-2001 informing the Companies Commission that the Plaintiff had resigned as a director on 30-6-2001 was received and acknowledged by the Registrar of Companies on 27-7-2001.

30. In the subsequent Forms 49 dated 29-8-2001 (D25) and 1-4-2003 (D24), the name of the Plaintiff was no longer listed as a director of the Fourth Defendant. D24 and D25 were received and acknowledged by the Registrar of Companies. SD7 said that the letter (D2) dated 8-3-2010 about the resignation of the Plaintiff as a director of the Fourth Defendant was sent to the Second Defendant (Bundle C page 12 refers). But upon further cross examination SD7 said he did not know whether the said letter was sent to the Second Defendant. SD7 tendered the Third Defendant 2001 Annual Report (D21) to prove that the Plaintiff was no longer a director of the Fourth Defendant.

31. SD7 testified that the Plaintiff never came to inform him about the summons issued against him. SD7 said under cross examination,

that 355 B Jalan C.Y Choy is not the address of the Fourth Defendant. According to SD7, the said address was the workshop of the Fourth Defendant where their workers worked there.

ISSUES TO BE TRIED

32. The Plaintiff being unhappy and dissatisfied over the whole episode of having him involved in the case which he is not responsible for alleged negligence on the part of the Defendant. As against the First and Second Defendants the particulars of negligence are:

a) Failed to ascertain from KGN Hin Bus Co. Sdn. Bhd as to whether the Plaintiff was a director of the company on the date the said offence was committed on 10-8-2010 before charging the Plaintiff as the director of the said company.

b) Failed to take the necessary action to serve the summons on the Plaintiff before applying to the Court for a warrant of arrest to be issued against the Plaintiff.

As against the Third and Forth Defendants, the particulars of negligence are:

c) Failed to inform the Companies Commission and failed to take the necessary action to remove the Plaintiff's name from the list of names of directors of KGN Hin Bus Co. Sdn Bhd after receiving and consenting to the letter of the Plaintiff dated 18-5-2001 to resign from the position of a director of the said company beginning 30-6-2001.

d) Failed to take the necessary action to inform the Second Defendant that the Plaintiff was longer holding the position of a director of KGN Hin Bus Co. Sdn. Bhd. and had resigned from the position since 30-6-2001.

33. The Plaintiff now claims exorbitant amounts of damages against the Defendants as follow:-

a)	Damages due to trauma, and mental health instability, pain and suffering, including insomnia, mental disorders and medical expenses.	RM300,000.00

b)	Damages for contempt by society, embarrassment, loss of reputation in the eyes of society and good name in the business world as well as losses in business.	RM300,000.00
c)	…… (withdrawn)	
d)	Legal cost to be paid by the Plaintiff due to an Arrest Warrant and Summons (Case No: 63-111-09) at Sessions Court, Georgetown.	RM125,000.00
e)	General damages and punitive damages and compensation.	RM250,000.00
f)	Interest at the rate of 8% per annum calculated from the date of 12th February 2010 until date of the settlement	

34. The Second and Third Defendants denied any negligence and the gist of their defence was that the actions taken by them in the said

proceeding was regular and in accordance to the existing law and regulations.

35. The Third and Fourth Defendants denied any negligence and the gist of their defence was that they had notified by way of Form 49 Companies Act 1965 to the Registrar Companies Commission on 30-6-2001 and it was not their responsibility if the Companies Commission did not update their data on the current directors of the company and still list the Plaintiff as a director.

36. The Third and Fourth Defendants also pleaded that the proceeding was taken by the Second and Third Defendant and therefore had nothing to do with them. The Third and Fourth Defendants also alleged that they were never informed by the First and Second Defendant about their proceeding against the Plaintiff and their knowledge of the Summons No. 63-111-2009 was to the extent that the First and Second Defendants had issued the said summons against the Fourth Defendant.

37. From the submissions of the Plaintiff and the Second and Third Defendants, the cause of action is based on malicious prosecution. Although the Plaintiff had pleaded negligence and is unclear about his cause of action the Plaintiff had quoted the case of *Vijendran Ponniah v. MBF Country Homes & Resorts Sdn Bhd (dahulu dikenali sebagai Glocard (M) Sdn Bhd) & Anor* [2002] 1 AMR 740 which is a case based on malicious prosecution as its cause of action.

38. The submissions by the Second and Third Defendants that the Plaintiff's claim was based on malicious prosecution is on point and correct in approach to the issues in this case. As to the Third and Fourth Defendants, they submitted that they were not negligent at all. There is no issue of malicious prosecution between the Plaintiff and the Third and Fourth Defendants.

THE LAW

39. In order to succeed in proving malicious prosecution, it is incumbent on the Plaintiff to prove four essential ingredients. These ingredients are laid out in the case of *Taib bin Awang v. Mohamad bin Abdullah v. Mohamad bin Abdullah & Ors* [1988] 2 MLJ 413 at page 415, I quote:-

1. "In an action for malicious prosecution, the Plaintiff must prove that:-

a) the Defendants prosecuted him;

b) the prosecution ended in the Plaintiff's favour;

c) that the prosecution lacked reasonable and probable cause; and

d) that the Defendant acted maliciously."

40. This case made reference to three English cases as its authority, quote;-

"In Everett v. Ribbands & Anor., it was held that in action for malicious prosecution it is essential for the Plaintiff to aver and prove that the proceeding complained of, terminated in his favour. Somervell L.J at page 202, quoted a passage of the judgment of Crompton J. in Bynoe v. Bank of England which was confirmed by the Court of Appeal which is-

> *There is no doubt, on principle and on the authorities, that an action lies maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the Plaintiff, though not for a mere conspiracy to do so without actual legal damage.....But in such an action is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the Plaintiff, if from its nature it be capable of such a termination. The reason seems to be that, if in the proceeding complained of, the*

decision was against the Plaintiff, and was still unreversed, it would not be consistent with the principle on which law is administered for another court not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

"In Basebe v. Matthews and Wife, Byles J. said at page 687:

I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determine in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of Vanderberg v. Blake (Hardr. 194), where Hale, C.J, says that, 'if such an action should be allowed,'-that is, an action against a custom-house officer for seizing good, which were afterwards condemned as forfeited by

judgment of the proper court, - "the judgment would be blown off by a side-wind."

"In that same case, Montague Smith, J said at page 688,

But, in such an action, it is essential to show that the proceeding alleged to be instituted maliciously without probable cause has terminated in favour of the Plaintiff, it from its nature it be capable of such termination. The reason seems to be, that, if in the proceeding complained of the decision was against the Plaintiff, and was still unreversed, it would not be consistent with principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause. 'The only ground upon which Mr. Wood has attempted to distinguish this case from the current of authorities is, that here Plaintiff had no opportunity of appealing against the conviction. If we yielded to his argument, we should be constituting, ourselves a court of appeal in a matter in which the

legislature has thought fit to declare that there shall be no appeal. It was intended that the decision of the magistrate in a case of this sort should be final. It cannot be impeached in an action."

41. *Taib bin Awangi (Supra)* case was followed in *Gasing Heights Sdn Bhd v. Aloyah binti Abd Rahman & 6 Ors* [1996] 3AMR 3001 at page 3010, it ruled that-

"The claim for malicious prosecution against the Defendants could not succeed because the action was manifestly premature. Dato' Harun Idris referred me to the relevant passages in JP Aggarwala's Pleadings in India [1990] Vol. 1 at pp 128,129 at para 103, 104 and also at p 131 and the Privy Council in Balbhaddar Singh v. Badri Shah AIR [1926] PC 46, B Madan Mohan Singh v. B Ram Sunder Singh AIR [1930] All 326 at 328 and also Taib bin Awang v. Mohammad bin Abdullah & Ors [1983] 2 MLJ 413. I agree that it was not open to the developer to launch a claim for malicious prosecution until the

proceedings in the motion had been finally resolved. That could only be when the appeal had been concluded."

42. And at page 3018 of the case the law on malicious prosecution is clearly spelt out, quote:-

"(3) There is well-established tort know as the tort known as the tort of malicious prosecution. Its essential ingredients are conveniently set out in a passage in 45 Halsbury Law (4th edn) para 1368, which sets out the matters which have to be pleaded to establish a tort of this nature:

> *A plaintiff must expressly state in his statement of claim: (1) the previous proceedings instituted by the defendant of which complains; (2) that in so far as they were capable of doing so they terminated in his favour; (3) that there was no reasonable and probable cause for the defendant instituting or carrying on those proceedings; (4) that the defendant was actuated by malice; and (5) that he had suffered damage.'*

Paragraph 1371 suggest that an analogous action lies for bringing 'malicious civil proceedings'. The same suggestion is made in Clerk and Lindsell on Torts (15th ed 1982) para 18-38, where it is stated:-

> *"An action lies for the abuse of ordinary civil process, which differs only from an action for malicious prosecution in that the gist of it seems to be special damage. Malice and absence of reasonable and probable cause must be proved in the same manner in the one as in the other. Similarly, malice is a question for the jury, who may but are not bound to inter form its presence the want of reasonable and proper cause; it must be approved also that the proceeding came to a due legal end.*

The tort referred to in Clerk and Lindsell para 18-38 is plainly the same as that referred to in 45 Halsbury's Laws (4th edn) para 1371.

Although we have not heard full argument on this point, we have great doubt whether any general tort of maliciously instituting civil proceedings exists. The courts have countenanced claims by a plaintiff complaining of a malicious and unjustified arrest or of malicious and unjustified institution of bankruptcy or liquidation proceedings, but the case have not (to our knowledge) gone beyond these limited categories. There are dicta suggesting that in the case of an ordinary civil action, however maliciously and unjustifiably brought, the successful defendant has no cause of action in tort (see Johnson v. Emerson (18710 LR 6 Exch 329 at 372 per Martin B and Quartz Hill Consolidated Gold Mining Co v. Eyre [1883] 11 QBD 674 at 678 per Brett Mr)."

43. On the ingredients of "acted maliciously' and "without reasonable or probable cause", reference can be made to the case of *Shaw Ming Jeong Frank v. Banque Indosuez* [1994] 3 SLB 51 where it held that;-

1) *"To establish the tort of malicious prosecution, the plaintiff had to prove that his prosecution had been instituted by the bank at the instance of Lin, that Lin had acted maliciously and without reasonable or probable cause, that the proceedings against him had terminated in his favour. It was not disputed that the last condition was fulfilled.*

2) *At the material time Lin had been in a position to procure the banks' institution of the bankruptcy proceedings against the plaintiff, and he had in fact done so.*

3) *However, there was nothing in the plaintiff's evidence to indicate that Lin had been motivated by personal enmity or malice against the plaintiff when instituting the bankruptcy*

proceedings against him, 'malice' referring to an improper and wrongful motive'.

4) *'Want of reasonable and probable cause' referred to want of genuine belief, based on reasonable grounds, that there were good grounds in law for the presentation of the bankruptcy petition at the time it was presented upon an available act of bankruptcy. The burden of proving this element lay on the plaintiff.*

5) *The invalidity of the bankruptcy notice and the resultant absence of an available act of bankruptcy did not automatically show a want of reasonable and probable cause to bring a bankruptcy petition. This would only be established if it was proved that the person bringing the petition either knew the act of bankruptcy to be untrue, or did not bona fide believe it to be true.*

6) *A judgment creditor instituting bankruptcy proceedings was under no duty to inquire into the solvency or otherwise of the*

judgment debtor nor to exhaust other methods of execution before serving the bankruptcy notice. If the judgment debtor failed to comply with the notice, the judgment creditor had right to present bankruptcy petition. A judgment creditor would only be said to have no reasonable probable cause for bringing a bankruptcy petition if the judgment itself had been obtained by fraud, or if after the judgment had been obtained the judgment creditor had discovered that the judgment had been wrongly obtained.

7) *Accordingly, as the bank was a judgment creditor of the plaintiff, its failure to realize its security over the property did not evidence a want of reasonable and probable cause for its bringing of the petition.*

8) *The plaintiff had failed to prove that the bank did not bona fide believe the act of the bankruptcy to be valid, or that the judgment it had procured had been wrongly obtained or obtained by fraud, and he had thus also failed to prove that the*

bankruptcy petition against him had been brought without reasonable and probable cause."

44. It was also held in the case of *Chao Yan San v. Yuen Ten Soo* [2000] 3AMR 3057 at;-

"2. "It would be wrong to infer malice just because of the absence of reasonable and probable cause for the respondent to have lodged the police report against the appellant. In action for malicious prosecution, malice is an ingredient which must be proved."

DECISION

45. Between the Plaintiff and First and Second Defendants, the subject matter in this case can be divided into two parts.

46. In the first part, it is not disputed the summons that was registered in the Sessions Court on 1-10-2009 was lawful and done in a regular manner. It is not disputed that the offence under the Environmental

Quality Act was committed by the Fourth Defendant and a compound was earlier on issued against their bus driver. The consent to prosecute the case was also obtained from the Deputy Public Prosecutor who ordered that the Fourth Defendant be charged. This is a genuine criminal summons case, not something that is fabricated.

47. In the second part of this case, the summons was served on the Fourth Defendant by SD5 who served it at address 355-B, Jalan C.Y Choy, 10300, Georgetown. According to SD5, he had gone to address 31-A, Jalan Briklin, Georgetown to attempt to serve the summons but there was nobody there. Hence, he went to the Jalan C.Y Choy address which according to him was the workshop and office of the Fourth Defendant.

48. SD5 then pasted the said summons on the office door, after the supervisor of the premises refused to accept service. His affidavit of service D11 was used to prove service of the summons before the Session Court on 16-11-2009 when the prosecuting officer SD3 applied for a warrant to be issued against a director of the Fourth Defendant.

49. According to SD3, the Plaintiff was chosen as he was among the names of directors listed in the Companies Commission's official search D7. Thereafter, the Court having being satisfied that the summons was properly served and that the Plaintiff was a director of the Fourth Defendant, issued the warrant of arrest against the Plaintiff when no representative from the Fourth Defendant appeared in Court.

50. On the issue of service of the summons, although the Plaintiff pleaded that the First and Second Defendant failed to take necessary action to serve the summons on the Plaintiff before applying to the Court for a warrant of arrest to be issued against the Plaintiff, the Plaintiff did not at all cross examine the witnesses of the First and Second Defendant on the validity of the service of the summons on the Fourth Plaintiff.

51. The service of the summons by SD5 on the Fourth Defendant was properly done in accordance to section 39(b) of the Environmental Quality Act where summons may be served by "leaving the same at

the usual or last known place of abode or business of such person in a cover addressed to such person".

52. In the present case, SD5 had pasted the summons on the Fourth Defendant's office which could be considered as its usual or last known place of business. It is my finding of fact, that the service of the summons by SD5 complied with the above provision of the law. Be that as it may, the issue of service of summons is a non issue to the Plaintiff as the person to be served was the Fourth Plaintiff.

53. As for the warrant of arrest issued against the Plaintiff, SD3 had testified that he chose the Plaintiff's name at random from D7. The warrant of arrest was issued not to charge the Plaintiff as alleged but to compel him to appear on behalf of the company which is legal entity and not a person.

54. As, I see it, the legality of the issuance of the warrant of arrest is not an issue here. The Plaintiff's is dissatisfied that the First and Second Defendants failed to ascertain from the Fourth Defendant as to whether the Plaintiff was a director of the company on the date the

said offence was committed on 10-8-2010 before charging the Plaintiff as the director of the company.

55. When SD3 picked the name of the Plaintiff from D7, he did not have knowledge that the Plaintiff was no longer a director. SD3's decision was based on D7, an official document of the Companies Commission and whether it was not updated by them, is not the responsibility of SD3.

56. The Companies Commission has to answer for not updating its information and not SD3. It is my finding of fact that SD3 had ascertained that the Plaintiff was a director of the Fourth Defendant from D7 as that was the best source of information for the public at large to ascertain who are the directors of any company. According to SD1, according to his department's procedure, the search in D7 was sufficient for the purpose of obtaining information about directors of a company.

57. The warrant of arrest was served on the Plaintiff on 17-2-2010 and he appeared in Court on 19-2-2010 and claimed trial. Thereafter, on 6-

4-2010, the Plaintiff's lawyer made representation to the Second Defendant by informing them that the Plaintiff was no longer a director of the Fourth Defendant since 30-6-2001.

58. The Fourth Defendant then took the necessary action and on 5-5-2010 obtained the instruction from the Deputy Public Prosecutor to withdraw the charge against the Plaintiff. On 12-7-2010, when the Plaintiff appeared in Court, the charge was withdrawn against the Plaintiff. The charge against the Fourth Defendant remained and the Plaintiff was replaced by another director. On 24-9-2010, one Dato' Hamid pleaded guilty on behalf of the Fourth Defendant and the company was fined RM2,500.00,

59. The Plaintiff had leveled a lot of allegations of malice and without reasonable and proper course in his submissions against the First and Second Defendant. However the question is; has the Plaintiff proved a case of malicious prosecution against the First and Second Defendants?

60. It is my considered view that the Plaintiff had not proven that the prosecution lacked reasonable and probable cause and that the Third and Fourth Defendants acted maliciously. As was stated in the facts earlier on, SD3 had to select one of the directors from D7 for the issuance of the warrant of arrest. SD3 was very frank when he said he picked at random from D7 which was supposed to contain the latest information on the company including its directors.

61. As can be seen in D7, there are four directors, hence there is nothing in proper to pick one of them. As to why SD1 did not go beyond D7 and search for Form 49 Companies Act, it is my view that Form 49 Companies Act (D23 & D25) is a return giving particulars in register of directors, managers and secretaries and changes of particulars of a company to the Registrar of Companies, and the information contained therein was not made available to SD1 when he made an official search. SD1was only provided with D7 by the Companies Commission. SD1 and SD3 were therefore not responsible for the information in D7 which was not updated by the Companies Commission.

62. Hence, when SD3 applied for the warrant of arrest based on D7, he cannot be said to act lacking in reasonable and probable cause just because he chose the Plaintiff instead of any of the other directors. It must be noted in D7 and in Form 49 (D23 and D25), all are listed as directors and there is no mention of who is the managing director. If the managing director is mentioned, then SD3 would be wrong in making his choice of the Plaintiff, instead of the managing director.

63. As I have stated earlier, the summons was served in accordance with the law and as such it was not proven by the Plaintiff that the service lacked reasonable and probable cause. For SD3 when he applied for the warrant of arrest against the Plaintiff, he believed the summons had been served based on D11, the affidavit of service of SD5. When SD3 picked Plaintiff's name from D7 for the warrant of arrest it was based on the information in D7.

64. The fact that the Plaintiff turned out not to be a director when SD3 applied for the warrant does not automatically show a want of reasonable and probable cause to bring a charge against the Plaintiff. This would only be established if it was proved that SD3 knew that

the information that the Plaintiff was a director of the Fourth Defendant was untrue or did not believe it to be true. The Plaintiff was unable to prove SD3 knew that the Plaintiff was no longer a director of the Fourth Defendant when he applied for the warrant of arrest. In actual fact, SD3 did not know that the Plaintiff was no longer a director.

65. Want of reasonable and probable cause in the present case situation referred to want of genuine belief based on reasonable grounds, that there were good grounds in law for the application and issuance of the warrant of arrest against the Plaintiff upon the non appearances of the representative from the company when the summons had been served on them. The Plaintiff has to prove this element.

66. The burden of proving malice lay on the Plaintiff. Malice refers to an improper and wrongful motive. In the first place, there is nothing in the evidence of the Plaintiff to indicate that the First and Second Defendants had been motivated by personal enmity or malice against the Plaintiff by the issuance of the warrant of arrest against him to face the charge leveled against the Fourth Defendant.

67. The Plaintiff could not prove that when SD3 applied for the warrant of arrest it was motivated by malice. SD3 was just doing his job of making the application when summons was served and no one appeared on behalf of the Fourth Defendant. SD3 relied on D7 and just because it turned out to be unreliable does not mean SD3 acted with malice against the Plaintiff.

68. From the chronological order of events, the First and Second Defendants' had acted on the representation of the Plaintiff's lawyer promptly and the charge against the Plaintiff was withdrawn on 12-7-2010. There is no malice on the First and Second Defendants as they withdrew the charge against the Plaintiff upon realising that the Plaintiff was not a director on the date of the offence. If the First and Second Defendants were motivated by malice, they would have continued with the charge against the Plaintiff. Hence, the Plaintiff was unable to prove the element of malice against the First and Second Defendants. Finally, as the charge was withdrawn against the Plaintiff, there is no prosecution that ended in the Plaintiff's favour as the case against the Plaintiff never went on for trial until the end.

69. The Plaintiff had made some serious allegations such as he was arrested by the police, that the Second Defendant did not take any action when the Plaintiff's lawyer made representation, and when the Plaintiff appeared in Court on 12-7-2010, SD3 tried to persuade him to plead guilty against the First and Second Defendants. However, they were proven to be untrue.

70. The Plaintiff was never arrested by the police. He admitted it and agreed that he was merely put on bond to appear in Court. The representation of his lawyer was acted upon by the First and Second Defendants who withdrew the charge against the Plaintiff. The allegation of the Plaintiff against SD3 that SD3 persuaded him to plead guilty was a mere allegation and not proven by the Plaintiff. It is my considered view that the Plaintiff was not telling the truth on this point because it would be silly of SD3 to persuade the Plaintiff knowing that the charge against him was to be withdrawn, and that SD3 could easily replace the Plaintiff with another director of the Fourth Defendant.

71. With regards to the Plaintiff's claim against the Third and Fourth Defendants for negligence, the particulars of negligence are contained in paragraph 21(c) and (d) of amended writ of summons and amended statement of claim dated 7-6-2013.

72. The first issue of negligence raised is whether the Third and Fourth Defendants failed to inform the Companies Commission and failed to take the necessary action to remove the Plaintiff's name from the list of names of directors of KGN Hin Bus Co. Sdn. Bhd. after receiving and consenting to the letter of the Plaintiff dated 18-5-2001 to resign from the position of a director of the said company beginning 30-6-2001.

73. It is not disputed that the Plaintiff resigned as a director of the Fourth Defendant on 30-6-2001. From the evidence given by SD7, the Fourth Defendant had filed Form 49 with the Companies Commission upon receiving the resignation letter from the Plaintiff. This is proven by Form 49 (D23) dated 30-6-2001 acknowledged receipt by the Companies Commission on 27-7-2001 informing them that the

Plaintiff had resigned as the Fourth Defendant's director on 30-6-2001.

74. Then there were Form 49 (D24) dated 1-4-2003 which was received by the Companies Commission 28-4-2003 and Form 49 (D25) dated 29-8-2001 which was received by the Companies by the Companies Commission on 19-9-2001 where the name of the Plaintiff was no longer listed as a director of the Fourth Defendant. In fact the name of the Plaintiff was removed from the directors list after the Fourth Defendant submitted Form 49(D23) to the Companies Commission.

75. Hence, it is my finding that the Fourth Defendant had taken reasonable steps to inform the Companies Commissions about the resignation of the Plaintiff as a director by serving Form 49 on the Companies Commission which is in accordance to the requirement of the Companies Act 1965. The Third and Fourth Defendants should not be blamed for the negligence of the Companies Commission for not providing the correct information in the Companies Commission search report as the updating of the information was not within the power, control and duty of the Third and Fourth Defendants.

76. On the second issue of negligence raised is whether the Third and Fourth Defendants failed to take the necessary action to inform the Second Defendant that the Plaintiff was no longer holding the position of a director of KGN Hin Bus Co. Sdn. Bhd. and had resigned from the position since 30-6-2001.

77. It is not disputed that D2 dated 18-3-2010 was sent together by the Plaintiff's lawyer to the Second Defendant when the Plaintiff's lawyer wrote a letter on 6-4-2010 to the Second Defendant informing that the Plaintiff was no longer a director of the Fourth Defendant. D2 was a letter prepared by the Third Defendant informing that the Plaintiff had resigned as a director of the Fourth Defendant on 30-6-2001. That D2 was sent to the Second Defendant was confirmed by the testimony of SP1.

78. The above facts proved that the Third and Fourth Defendants had taken the necessary action by promptly preparing D2 on 18-3-2010 for the use of the Plaintiff's lawyer to prove to the Second Defendant that the Plaintiff had resigned as a director of the Fourth Defendant on 30-6-2001. There was no evidence at all to prove that the Third

Defendant did not cooperate with the Plaintiff when he needed the letter D2.

79. Other than preparing D2 for the Plaintiff, the Third Defendant also paid the legal fees of RM3,000.00 to the Plaintiff's lawyer on behalf of the Plaintiff for defending the Plaintiff in the summons case 63-111-2009. The fact that the legal fees was paid was admitted by the Plaintiff.

80. When the charge against the Plaintiff, was withdrawn, the Fourth Defendant remained as charged for the offence. According to SD7, he appeared in Court on behalf of the Fourth Defendant on 24-9-2010, pleaded guilty and paid the fine of RM2,000.00.

81. The above mentioned facts proved that the Third and Fourth Defendants had taken the responsibility to pay for the Plaintiff's legal fees and to quickly resolve the matter by pleading guilty and paying the fine. It was all done for the benefit of the Plaintiff.

82. I will now consider whether the Plaintiff had proven the damages that he is claiming under the various heads of damages. The burden of proving damages is on the Plaintiff who has to prove damages in an action for malicious prosecution.

83. Spenser Wilkinson. J had in the case of *Haji Ahmad v. Sadah (f)* [1954] 20 MLJ 101 at page 102, held that,

"it was common ground that maintenance proceedings although criminal in form are civil proceedings in substance. It has been laid down that in order to support an action for malicious proceedings it is necessary to prove damage and that there are three sorts of damage, any one of which is sufficient to support the action. The first is damage to a man's fame; the second is damage to his person; and the third is damage to his property; and the action is maintainable if, and only if, it falls within one or other of those three heads (per Buckley L.J in Wiffen v. Bailey and Remford Urban Council citing the judgment of Lord Holt, C.J in Savile v. Roberts."

84. For item (a) damages due to trauma, and mental health instability, pain and suffering including insomnia, mental disorders and medical expenses, the Plaintiff did not prove the health problems that he had suffered by producing medical evidence pertaining to his current health status to the Court. The Plaintiff merely made allegations such as he was on the point of collapse when he went to the police station to sign the bond for his appearance in Court, on 12-7-2010 he was breathless, and had palpitations and was shaking all over in Court, and finally the stress and strain has badly affected his health such as having nightmares and shakes. Hence without these allegations being proven by medical evidence, they remained at best mere allegations.

85. For item (b) damages for contempt by society, embarrassment, loss of reputation in the eyes of society and good name in the business world as well as losses in business, the Plaintiff did not prove the particulars as alleged as no witnesses were called to support and prove these allegations. There were no documents or accounts produced by the Plaintiff to prove his business losses. Except for the fact that the Plaintiff testified that he was a former lecturer at USM

(Universiti Sains Malaysia) Penang and that now he is businessman, nothing else was stated by him in his evidence given in Court about any of the particulars claimed in this head of damages.

86. For item (d) legal costs to be paid by the Plaintiff due to an Arrest Warrant and Summons (case no: 63-111-09) at Sessions Court, Georgetown, it was proven in the evidence of the Third and Fourth Defendants that they have paid RM3,000.00 for the said legal fees. As such the Plaintiff did not suffer any loss for this item.

87. As to item (e) general damages and punitive damages and compensation. To succeed in proving this head of damages, the Plaintiff has to show "some form of outrageous conduct involving intentional wrongdoing coupled with element of oppression, cynicism, or flagrancy" (see *Balakrishnan Subramaniam v. Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & 3 others* [2013] 1 LNS 404. Unfortunately the Plaintiff did not produce any proof that the First and Second Defendants had behaved in such manner in relation to the case against the Plaintiff. The case was withdrawn against the Plaintiff and there was no evidence to show

that the Plaintiff was punished for the offence that he was not responsible for. The conduct of the First and Second Defendants were any professional as they went about to obtain a withdrawal of the charge against the Plaintiff after finding out the truth.

88. In the result, based on my above findings, the Plaintiff had not proven his case on malicious prosecution / negligence against all the Defendants. The Plaintiff failed to prove all the elements of malicious prosecution ie,;

a) the prosecution ended in his favour;

b) the prosecution ended in the Plaintiff's favour;

c) that the prosecution lacked reasonable and probable cause;

d) the Defendant acted maliciously; and

e) the Plaintiff proved damage.

89. He had also not proven the damages as claimed. Hence, the claim of the Plaintiff was dismissed with cost of RM 10,000.00 to each of the Defendants.

Dated: 5 AUGUST 2014

(WONG TECK MENG)
Judicial Commissioner
High Court of Malaya at Penang

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