

SOUTH AFRICA / JUDGMENT

Jacobs v Minister of Safety and Security (CA 327/2012) [2013]

ZAECGHC 95 (23 September 2013)

[2013] ZAECGHC 95

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, I Schoeman

CASE / FILE NUMBER

CA 327/2012

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, GRAHAMSTOWN

Case No.: CA 327/2012

Date Heard: 23 August 2013

Date Delivered: 23 September 2013

In the

matter between:

THEMBIKILE

JACOBS

.....Appellant

and

MINISTER

OF SAFETY AND SECURITY

.....Respondent

JUDGMENT

EKSTEEN J:

- [1] The appellant issued summons in the Magistrate's Court of Port Elizabeth against the respondent on 25 September 2007 claiming damages for an alleged wrongful and unlawful arrest and detention. The magistrate, after hearing evidence, dismissed the appellant's claim. This is an appeal against the judgment of the magistrate.

[2] The arrest of the plaintiff arose from the unfortunate events which followed after the commission of a robbery with aggravating

circumstances which occurred at the Algoa Park Kwik Spar in Port Elizabeth on 18 September 2006. It is common cause that the appellant

had nothing at all to do with the robbery, however, as a result of information provided to the investigating officer, Sergeant Makaula (Makaula), he decided to arrest the appellant. The appellant was detained following his arrest for almost 48 hours before he was unconditionally released when information came to the attention of the investigating officer which led him to doubt the correctness of his earlier information. These events gave rise to the litigation.

[3] It is necessary at the outset to have regard to the portions of the pleadings which are material to the issues in the appeal. In the Particulars of the Plaintiff's Claim the plaintiff alleged:

"3. On or about 18th October 2006 and at the Plaintiff's residence within the area of jurisdiction of this Honourable Court, the Plaintiff was

wrongfully and unlawfully arrested by a member or members of the South African Police Services.

4. Thereafter the Plaintiff was wrongfully and unlawfully detained at Algoa Park Police Station at the instance of the aforesaid member or members of the South African Police Services until the 20th October 2006 whereafter he was released at 05:00am.

5. In consequence of the said arrest the said member or members wrongfully and maliciously set the law in motion by bringing a false charge of armed robbery against the Plaintiff. The Plaintiff was released from the cells at Algoa Park Police Station on the 20th October 2006 at 05:00am.

6. When laying this charge and giving the information pertaining thereto, the member or members of the South African Police Services had no reasonable or probable cause for doing so, nor did he/she have any reasonable belief in the truth of the information given.

7. ..."

[4] Upon delivery of the summons the defendant directed a request for further particulars to these paragraphs to the plaintiff. The request contained the following, inter alia:

"2. AD PARAGRAPH 3 THEREOF:

2.1 ...

2.2 Who allegedly arrested Plaintiff? Plaintiff is required to furnish Defendant with full names and ranks of the police official who allegedly arrested him.

2.3 On what charge or charges was Plaintiff allegedly arrested?

2.4 On what basis in fact and/or in law is it intended to allege that the Plaintiff's arrest was wrongful and unlawful?

2.5 ...

3. AD PARAGRAPH 4 THEREOF:

...

4. AD PARAGRAPH 5 THEREOF:

Precisely how were the said members malicious in bringing the charge of armed robbery against Plaintiff?

5. AD PARAGRAPH 6 THEREOF:

5.1 Is it intended to allege that the information pertaining to the charge of armed robbery was given by the member/members of the South African Police Services?

5.2 Precisely who allegedly gave the said information?

5.3 To whom and when was the said information given?"

[5] These enquiries elicited the following responses:

"2. AD PARAGRAPH 3:

2.2 Sgt. K.C. MAKAULA

2.3 The Plaintiff was arrested on the charge of ARMED ROBBERY.

2.4 This is a matter of evidence and the information is accordingly refused.

3. AD PARAGRAPH 4:

4. AD PARAGRAPH 5:

The plaintiff was never charged.

5. AD PARAGRAPH 6:

5.1 This is correct as per notice of rights in terms of constitution Serial No 423241.

5.2 The Plaintiff was informed that Sgt MAKAULA was arresting the plaintiff on the charge of armed robbery.

5.3 The information was given to the plaintiff on the 18th October 2007."

[6] In its plea the defendant pleaded to paragraphs 3, 4 and 5 of the Particulars of Claim as follows:

"3. AD PARAGRAPHS 3, 4 AND 5 THEREOF:

Save to admit that Plaintiff was arrested on the 18th October 2006 and released on the 20th October 2006 by members of the South African Police Service, further allegations contained herein are denied as if separately and

specifically traversed and Plaintiff is accordingly put to the proof thereof.

In elaboration of the aforesaid denials Defendant avers that Plaintiff was arrested in terms of Section 40(1)(b) of the Criminal Procedure Act for armed robbery.”

[7] While averments were made in respect of malicious proceedings it is immediately apparent from the reply to the request for further particulars that the appellant was not charged and indeed no claim was made for damages in respect of malicious proceedings. In argument before us Mr Horn, who appeared on behalf of the appellant, advised that no reliance was placed on the averments relating to malicious proceedings, save to the extent that it may have an impact upon the extent of the quantum of damages to be awarded in respect of the claim for wrongful and unlawful arrest. Although there was some dispute on the pleadings relating to when the appellant was detained, it was agreed at the commencement of the trial that he was detained at 05h00 on 18 October 2006 and was released at approximately 05h00 on 20 October 2006. I shall revert later herein to the pleadings to the extent that it is necessary.

[8] Makaula was the only witness to testify at the trial. He was the investigating officer in respect of the robbery with aggravating

circumstances and he carried out the arrest of the appellant. It emerges from his evidence that he was not present at the scene of the robbery on 18 September 2006. He states that a cash delivery vehicle had visited the Algoa Park Kwik Spar to collect money when the officials were robbed. It appears that when the guards had received the money on their way out of Kwik Spar the guard that was carrying the money was confronted by an armed male of African descent. A firearm was pointed at him and he was disarmed of his service weapon before he was dispossessed of the bag containing R301 245,80.

[9] It was some time after the robbery had occurred that Makaula was appointed as the investigating officer. It transpired at this stage that one Warrant Officer Nonopi had already carried out the arrest of a number of suspects who were being held in custody. His enquiries led him to understand that a member of the public had contacted the police through the emergency number 10111 advising that he had information about the suspects who were involved in the robbery. Nonopi visited this member of the public and interviewed him. Apparently this member of the public then and there pointed out four African gentlemen alleging that they were involved in the robbery. Nonopi accordingly arrested them.

[10] Makaula had no involvement in any of these events, however, as the investigating officer, he testifies that when he became involved he questioned the grounds for the arrest of these men. Nonopi therefore introduced him to the member of the public, who, it turns out, is one Mgidlana. Makaula proceeded to interview Mgidlana. During the course of the interview Mgidlana advised that he was indeed an active participant in the robbery, he having been designated to drive a getaway vehicle.

[11] It is apparent from the evidence that the information obtained from Mgidlana was the only information which Makaula had at his disposal in respect of the alleged perpetrators of the offence. He states that he realised that the robbery was a serious matter and that he was not able to take it lightly. In these circumstances, after discussing it with his superior, he decided to obtain a declaration from Mgidlana in terms of section 204 of the Criminal Procedure Act, 51 of 1977 (the CPA). It is apparent from this

declaration that Makaula had probed the background of the witness. This revealed that he had previously been arrested, during 1999, for the unlawful possession of a firearm. The charges were later withdrawn against him and thereafter, in 2000, Mgidlana states that he decided to supply the police with information because he did not want to rot in jail and because the rewards paid to informers were enticing to him. Mgidlana declared that since 2000 he has acted as a police informer. Makaula, however, was not familiar with him before the interview which he held with him to which I have referred earlier.

[12] In the section 204 declaration Mgidlana mentions a number of persons by name who participated in the armed robbery. One of the names mentioned therein is one "Mthusi". This, Makaula says, it later transpired was an alias of the appellant. The section 204 declaration was made on 2 October 2006.

[13] Makaula, it appears, was still not content to act on this information and accordingly enquired from Mgidlana whether he would

be prepared to make a statement before a magistrate as to what happened during the robbery. This Mgidlana agreed to do and on 9

October 2006 he was taken to Magistrate du Preez. A confession was duly noted from him.

[14] On receipt of the confession Makaula considered that he now had sufficiently reliable information at his disposal to proceed to arrest the persons identified by Mgidlana. He did not, however, have the full names and addresses of these persons and accordingly took Mgidlana along with him to point out the suspect and his abode. On 18 October 2006 Mgidlana pointed the appellant out and the arrest occurred. The purpose of the arrest, Makaula states was to bring the appellant before court. At the time of the arrest, however, certain cell phones were found in the possession of the appellant and Makaula states that he proceeded to have the data on the cell phones analysed to determine whether these phones were utilised in the course of the robbery. In these circumstances he did not bring the appellant before court immediately.

- [15] Mgidlana, in the meantime, was placed under witness protection somewhere in the Free State. On the day after the arrest, on 19 October 2006, prior to bringing the appellant before court, Makaula states that he discovered, whilst interviewing and tracing other suspects, that there was reason to doubt the reliability of Mgidlana. Two of the suspects who had been previously arrested appeared to have sound alibis. Makaula accordingly summoned Mgidlana back to Port Elizabeth and upon interviewing him Mgidlana admitted that he had falsely implicated persons in this offence. The appellant was accordingly not brought before a court and was released early in the morning of 20 October shortly before 05h00.
- [16] In the appeal Mr Horn has raised three arguments. Firstly, he argues that on the facts of the present matter the suspicion held by Makaula was not objectively reasonable, rendering the arrest of the appellant unlawful. In the event that it is found that the arrest of the appellant was lawful, it is argued, secondly, that Makaula failed to inform the appellant of the reasons for his arrest and detention and his right to apply for bail as required by section 39(2) and 50(1)(a) of the CPA which rendered it unlawful from 05h00 on the morning of 18 October 2006 until his release. Thirdly, and in the alternative to the second contention, it is argued that the detention of the appellant was unreasonably long, and therefore became unlawful at 09h00 on the morning of 18 October 2006 when the police failed to bring the appellant before a court as soon as was reasonably possible, as required by section 50(1)(b) of the CPA.
- [17] It is not in dispute that on the form of the pleadings the respondent bore the onus to prove that the appellant's arrest and subsequent detention was justified.
- [18] The respondent in this case has raised as a justification for both the arrest and the subsequent detention the provisions of section 40(1)(b) of the CPA. Section 40(1)(b) of the CPA provides:
- "(1) A peace officer may without warrant arrest any person-*
- (a) ...
 - (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
 - (c) ..."
- [19] In order to succeed in a defence based on this section of the CPA, the defendant is required to establish:
- (i) that the arrestor is a peace officer;
 - (ii) that the arrestor in fact entertained a suspicion;

(iii) that the suspicion which he held was that the suspect (the arrestee) had committed an offence which is referred to in Schedule 1 (not being the offence of escaping from lawful custody); and

(iv) that the suspicion rests upon reasonable grounds.

(See *Duncan v The Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.)

[20] It is not in dispute that Makaula was a peace officer nor that he entertained a suspicion that the appellant had committed the offence of robbery with aggravating circumstances. Robbery with aggravating circumstances is an offence referred to in Schedule 1 of the CPA. On behalf of the appellant it is argued, however, that the suspicion did not rest on reasonable grounds and that the arrest for this reason was unlawful.

[21] In *Mabona and Another v The Minister of Law and Order and Others* 1988 (2) SA 654 (SE), upon which Mr Horn relies, Jones J considered the approach which should be adopted at 658E-I where he stated:

“... The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980

(4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[22] I am in full agreement with the sentiments expressed by Jones J in *Mabona*, supra, however, each case must of necessity depend upon its own facts and circumstances. The lawfulness of an arrest, it has been held, is closely connected to the facts of each situation (see *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) at 64 para [20]). *Mabona's* case supra concerned information obtained from a secret police informer. In this regard Jones J noted at 658I-659D that:

“Every reasonable policeman knows that our courts regard the evidence of informers with caution. Informers are categorised with accomplices,

quasi -accomplices and police traps as witnesses whose evidence must be subjected to close and careful scrutiny before it is accepted at all unless it is corroborated. The reason is plain. This sort of witness has a motive to misrepresent the facts, and he is frequently in a position to give circumstantial detail which may give false implication of an accused person a misleading ring of truth. The

second defendant ought to be aware of the possible danger of an uncritical acceptance of the word of an informer, and, indeed, he agreed with the proposition put to him in cross-examination that inaccurate or false information is from time to time given to the police by informers. If the courts are cautious about accepting evidence given on oath and subject to cross-examination, all the more reason for the police to be cautious about believing an informer's unsworn and untested information. Ordinarily, a police arrest is based upon a sworn complaint supported, perhaps, by sworn statements from witnesses. In the case of an informer, however, who insists upon anonymity and whose anonymity is jealously protected by the police, this safeguard is missing. The informer makes no formal statement or complaint. I do not suggest that the police cannot or should not arrest a suspect without a warrant in the absence of sworn statements implicating him. The circumstances of a particular case may justify their doing so. But I am of the view that where no sworn statement is available a reasonable policeman will less readily entertain a suspicion.”

[24] In the present case Makaula was alive to the caution which he is required to exercise in accepting the information of an informer. He testified that the information which he received from Mgidlana accorded with his information in respect of the events which had occurred during the robbery and was accurate in respect of the time and circumstances. He states that Mgidlana “actually knew the whole incident”. To this extent his report was corroborated by the objective facts. Makaula was not, however, prepared to act on the information which Mgidlana provided to him without seeking some further safeguard.

[25] In view of the circumstances Makaula approached his superior and it was decided to take a section 204 declaration from Mgidlana. In making the section 204 declaration Mgidlana committed himself to undergoing a Polygraph test and testifying in criminal proceedings.

He acknowledged that he realised that he was not being granted immunity from prosecution and that he understood that he could only

be discharged from prosecution if, after testifying, the court was satisfied that he had answered frankly and honestly all the questions put to him. With this knowledge Mgidlana proceeded to make his section 204 declaration confirming his own participation and thus exposing himself to prosecution if it should later transpire that the information which he had provided to Makaula was false.

- [26] Still Makaula was not satisfied that he could rely on the accuracy of this information, hence the request that Mgidlana make a confession before a magistrate. Whereas the section 204 declaration could not be used in evidence against Mgidlana in the event of his prosecution, the confession taken by a magistrate could indeed be used against him and these circumstances, as evidenced by the preliminary questions put to him, were duly explained to him by the magistrate. Notwithstanding this warning, Mgidlana was prepared to proceed to make a confession in respect of his role, and that of others, in the robbery knowing full well that if his evidence were not found to be honest in due course he could be convicted of a very serious offence on the strength of this confession.
- [27] In these circumstances I think that Mgidlana was in a very different position to an ordinary informer as considered by Jones J in Mabona. He did not seek anonymity nor was his identity to be protected by the police. He had undertaken to testify in a court of law and portrayed to Makaula that he was prepared to expose himself to prosecution if the information which he provided were found to be false. Moreover, he formally admitted his participation in the offence before a magistrate and appeared therefore to be ready to put his own liberty on the line if his version proved to be false. I think that these are considerations which would rightly weigh heavily with a reasonable man in the position of Makaula. I think that a reasonable man in the position of Makaula would indeed have considered that there were good and sufficient grounds for suspecting that the appellant did partake in the robbery with aggravating circumstances. I do not think that he took the information provided to him lightly as is evident from the steps which he took before acting on the information. There does not seem to me to have been any satisfactory mechanism at his disposal to have checked the correctness of the assertion made by Mgidlana in respect of the appellant's participation. I do not think that his suspicion could be said to have been flighty or arbitrary.
- [28] The conduct of Mgidlana was of course reprehensible in the extreme. It is most regrettable that an innocent person came to be arrested as a result of his deceitful conduct, however, I do not think that Makaula can be criticised for holding the suspicion, which I consider to be reasonable on the facts of the matter, that the appellant had participated in the robbery. In the circumstances I do not think that the first argument can be upheld.
- [29] I proceed to consider the second and third arguments advanced. I have set out what I consider to be the material portions of the pleadings for the purposes of the appeal. The function which pleadings fulfil in litigation was discussed in *Imprefed (Pty) Ltd v National Transport Commission* 1993
- (3) SA 94 (A). Kumleben JA and Nienaber JA, in their joint judgment, at 107C- E state:

"At the outset it need hardly be stressed that:

'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.'

(Durbach v Fairway Hotel Ltd 1949

(3) SA 1081 (SR) at 1082.)

This fundamental principle is similarly stressed in Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd ed at 113:

"The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision."

[30] In Kali v Incorporated General Insurances Limited 1976 (2) SA 179 (D) at 182A Milne J stated:

"...a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass

another."

[31] The question which arises for consideration in respect of the second and third arguments on appeal is whether the case pleaded by the appellant covers the assertions: (i) that Makaula had failed to inform the appellant of the reasons for his arrest and detention and his right to apply for bail as required by section 39(2) and section 50(1)(a) of the CPA; and, (ii) that the detention of the appellant was unreasonably long and therefore became unlawful when the police failed to bring the appellant before a court at 09:00 on 18 October

2006. A perusal of the relevant portions of the pleadings, which I have set out above, reveals clearly that the case argued in respect of the second and third arguments on appeal was never expressly pleaded.

[32] In respect of the second argument, the contrary was pleaded. In his further particulars the appellant acknowledged that he was arrested on 18 October 2006 for armed robbery. The appellant expressly stated that Makaula informed him that he was being arrested

on the charge of armed robbery and that Makaula advised him so on 18 October 2006 (the reference to October 2007 in the further

particulars is patently an error as is evidenced by the fact that summons was issued on 27 September 2007) as set out in his Notice of Rights in terms of the Constitution bearing serial number 423241. It was therefore the appellant's case on the pleadings that Makaula advised him on the day of the arrest of the reason for his arrest and provided him a notice setting out his rights. Although this particular notice was not placed before court, the docket which was before court contained "Notice of rights in terms of the Constitution" given to other suspects. Such notice contains all the rights which section 50 of the CPA requires to be explained. In these circumstances the considerations underlying the second argument on appeal were never in dispute at the trial. It is not open to the appellant on the one hand to provide further particulars that the arresting officer did advise the appellant that he was being arrested for armed robbery and gave him a notice setting out his rights and then, on the other hand, opportunistically, to suggest that the respondent had failed at the trial to prove these factors. Not surprisingly, none of

these factors were dealt with in the evidence of Makaula in chief nor were they raised in cross-examination. In the circumstances the second argument must fail.

[33] It is argued in support of the third contention that all that the appellant was required to allege is that he was detained and, once this is admitted, it was incumbent upon the respondent to plead and to prove facts which justify the entire duration of his detention. In support of this contention reference is made to *Zealand v The Minister of Justice and Constitutional Development and Another*

[2008] ZACC 3; 2008 (4) SA 458 (CC).

[34] It is of course true that once the respondent admits the arrest and detention of the appellant the burden to justify the deprivation

of liberty upon which the appellant relies is placed on the respondent. In *Zealand supra* Langa CJ at p. 468-469 (para [25]) stated:

“This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that

interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.”

[35] *Matshoba's* case is reported at 1990 (1) SA 280 (A). *Matshoba* was not detained pursuant to the provisions of the CPA. *Matshoba* had been detained in Worcester and initially held in the Worcester Prison in terms of regulation 3(1) of the Emergency Regulations made in terms of section 3(1)(a) of the Public Safety Act, 3 of 1953. Regulation 3(1) authorised any member of the South African Police Services to detain a person if he was of the opinion that such detention was necessary for the maintenance of the public order, the safety of the public or of the detainee, or the termination of the state of emergency. In terms of regulation 3(2) such detention could endure for a maximum period of 14 days unless, the Minister, in terms of regulation 3(3) authorised the further detention of the detainee in writing by notice addressed to the head of a particular prison to authorise the latter to hold the detainee in that prison for such period as the Minister authorised. A detainee could only be transferred from that prison to another prison if the Minister, or somebody authorised by the Minister,

authorised the transfer to such other prison by notice in writing in terms of regulation 3(4).

- [36] When the application for the release of Matshoba was brought he was held at the Victor Verster Prison. The only manner in which he could lawfully have been detained in the Victor Verster Prison was if a notice pursuant to the provisions of regulation 3(4) had been issued. The onus, it was held, was on the Minister to establish that such notice had been issued. The respondent failed to do so. Matshoba's case was not a claim for damages and the duration of the detention was not relevant. If at the time of the application the respondent was unable to justify Matshoba's detention he was entitled to his release.
- [37] In Zealand's case too, Zealand did not contend that he was detained pursuant to an arrest in terms of the CPA. Zealand had been convicted of a serious crime and was detained in the maximum security section of the prison as a sentenced prisoner. He appealed against his conviction and his appeal was successful. By virtue of an administrative error, which Zealand contended constituted a breach of a legal duty, alternatively was negligent, he was not released and his detention in the maximum security section of the prison continued for an extended period thereafter.
- [38] In Zealand's case, however, the pleaded case was that unlawful detention in the maximum security section arose from the breach of the legal duty and negligence to which I have referred. The Constitutional Court examined the form of the pleadings and concluded that sufficient averments had been made to cover the case argued on appeal. (See Zealand, *supra*, footnote 6 p. 467-468). The defendant accordingly knew the case it was required to meet was one that the detention in maximum security for the duration of the period pleaded was unlawful by virtue of the said breach of duty alternatively, negligence. (See Zealand, *supra* para [23] p. 467-468.)
- [39] Against this background I revert to the present case. Once the jurisdictional facts set out in section 40(1)(b) of the CPA have been satisfied a peace officer may invoke the power set out in the section, i.e. he may arrest the suspect. If he decides to do so (and the exercise of his discretion is not in issue in this appeal) the provisions of section 39(3) of the CPA come into play. Section 39(3) of the CPA provides:
- "(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody."*
- [40] In the circumstances an arrest lawfully effected pursuant to the provisions of section 40(1)(b) of the CPA results in the lawful detention, at least initially, of the arrestee. To this extent the present case is distinguishable from the situation which prevailed in either Zealand or Matshoba. An arrest is, however, fully regulated by legislation. Section 39(3) deals only with the general legal consequences of an arrest. Any subsequent detention which is not sanctioned by the CPA cannot be legalised by section 39(3). So, for example, the detention of a person lawfully arrested will become unlawful after the lapse of 48 hours if he is not brought before a court within the time prescribed by section 50 of the CPA. His detention will then become unlawful as a result of the failure to bring him before court within the

prescribed time.

[41] On the pleadings in this matter which I have set out earlier herein the appellant's case was that his arrest and detention

was unlawful because Makaula had no reasonable and probable cause to believe, nor did he have any belief that the appellant had been involved in an armed robbery. (Compare Minister of Safety and Security v Slabbert [2010] 2 All SA (SCA) 474 para [7] to

[10] at p. 477-478.) On this understanding the respondent raised section 40(1)(b) of the CPA as a full justification not only for the arrest, but also for the ensuing detention. This was not met with an exception alleging that the plea lacked averments necessary to sustain a defence nor was any replication forthcoming. On this basis the parties proceeded to trial. On the pleadings therefore, provided the respondent is able to establish that the initial arrest was lawful, I think that it follows, ex lege, that the ensuing detention was lawful unless and until it becomes unlawful for some other reason. If the appellant, on the facts of this case, wished to rely on extraneous circumstances, outside of the arrest itself, for the contention that the detention became unlawful at some subsequent stage it was incumbent upon the appellant to plead this.

[42] The defendant cannot be expected to meet a case which has not been pleaded. (Compare Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA) at para [50] on p. 385.) It is of course true that the onus would be on the respondent to justify the detention after the occurrence of such an alleged event, however, the onus can only arise when the issue giving rise to the alleged unlawfulness arises, i.e. when it is pleaded. (See Minister of Safety and Security v Slabbert supra at 480 para [21].)

[43] It is, however, well-established that a court is not necessarily bound by the pleadings if a particular issue was fully canvassed

during the trial. In South British Insurance Co. Ltd v Unicorn Shipping Lines (Pty) Limited 1976 (1) SA 708 (A) at 714G Holmes JA considered when it would be competent for a court to pronounce upon matters not raised in the pleadings. He stated:

"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence."

This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue."

[44] In the present matter counsel on behalf of the appellant directed a considerable portion of his cross-examination of Makaula

at the delay in bringing the appellant before court. It is not however sufficient for the appellant to deal with an issue which does not arise on the pleadings in cross-examination, no matter how thoroughly it is dealt with. What is required is that the issue

should be fully canvassed by both sides. In the present case I do not think that the defendant ever anticipated that the plaintiff would raise this issue nor was he expected to anticipate it on the form of the pleadings. When Makaula testified in chief, no reference was made to this issue and it is clear to me that it is not a matter on which counsel for the respondent had consulted with Makaula. It was not canvassed by the respondent at all in chief. Respondent did not take up the invitation to canvas the issue in re-examination and I do think that this is a case where it can be said that both parties have fully canvassed the issue of when it would have been reasonably possible to bring the appellant before a court. The third argument must accordingly also fail.

[45] In all the circumstances I would dismiss the appeal with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

SCHOEMAN J:

I agree. The appeal is dismissed. The appellant is ordered to pay the respondents costs of the appeal.

I SCHOEMAN

Appearances:

For Appellant: Adv M F Horn instructed by O'Brien Pieterse Inc, Port Elizabeth c/o Whitesides Attorneys, Grahamstown

For Respondent: Adv M G Ndzondo instructed by State Attorney, Port Elizabeth c/o Netteltons, Grahamstown

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