THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 668/2008

In the matter between:

MINISTER OF SAFETY AND SECURITY **Appellant**

and

PIETER SAMUEL THEO SLABBERT **Respondent**

Neutral citation: ***Minister of Safety & Security v Slabbert*** (668/2008) [2009] ZASCA 163 (30 November 2009])

Coram: **Harms DP, Mthiyane, Lewis, Mhlantla JJA, et Hurt AJA**

Heard: **12 November 2009**

Delivered: **30 November 2009**

Summary: Delict – arrest and detention – Trial court having regard to issues not pleaded or fully canvassed – Further detention of the plaintiff justified.

ORDER

On appeal from: High Court, Grahamstown (Kroon J sitting as a court of first instance).

(1) The appeal is upheld with costs including the costs of two counsel.
(2) The order by the court below is set aside and replaced with an order in the following terms:
'The plaintiff's claims are dismissed with costs'.

JUDGMENT

MHLANTLA JA (Harms DP, Mthiyane, Lewis JJA and Hurt AJA concurring):

[1] This is an appeal with the leave of the court below against a judgment of Kroon J in the High Court, Grahamstown, in terms of which the appellant was ordered to pay damages allegedly suffered by the respondent by reason of unlawful detention. The appellant is the employer of the police officers who arrested and detained the respondent for being drunk and disorderly in public. The respondent instituted action against the appellant claiming damages for wrongful arrest and detention, assault and malicious prosecution on the basis that the appellant was vicariously liable for his employees' wrongful acts. In this judgment I

shall refer to the respondent as the plaintiff and the appellant as the defendant.

[2] During the night of 5 February 2005 Constable Magoxo and a colleague were on patrol duty in Klipplaat when they encountered a bakkie parked in the middle of Main Street. This motor vehicle constituted an obstruction to traffic. Shortly after their arrival at the vehicle, the plaintiff approached them and they observed that he was drunk. The vehicle belonged to the plaintiff who attempted to drive it despite Magoxo's request that the plaintiff get a sober driver to drive it for him.

[3] Realising that the plaintiff would constitute a danger to other road users, Magoxo arrested him for being drunk and disorderly in a public street. The plaintiff resisted arrest. He was only subdued after Magoxo had used pepper spray on him and some force was applied. He was then taken to the local police station where he was detained overnight. While Magoxo was processing his detention, the plaintiff's wife arrived and requested that he be released into her care. As the plaintiff was still in a drunken state, Magoxo declined to release him. He explained that the plaintiff would be released after four hours if he were found to be sober, otherwise he would be detained further until he sobered up sufficiently. Apparently the police in Klipplaat have a practice in terms of which they keep suspects held on drunk and disorderly charges in detention for four hours to enable them to dry out or sober up. Constable Magoxo's refusal was in terms of that practice. The plaintiff was eventually released at 07h15 the next morning and was issued with a notice directing him to appear in court on a specified date. The charge was however subsequently

withdrawn. As mentioned above he sued the defendant for various wrongful acts.

[4] At the conclusion of the trial, the claims for assault, malicious prosecution and wrongful arrest were dismissed. The court found that the plaintiff had been lawfully arrested for being drunk and disorderly in public. The court, however, divided his detention into two periods, namely, the period before the plaintiff's wife requested that he be released into her care and the period following the request until his release the next morning. The court found that his initial detention was justified. Regarding the other period, it found that his further detention was unlawful and held the defendant liable to compensate the plaintiff. It awarded him damages in the sum of R20 000.

[5] The court below found that, as Magoxo had applied the practice that a person arrested for drunkenness be detained for a minimum period of four hours, the plaintiff's detention following his wife's request for his release was not justified. Following the judgment in that court in *Van Niekerk v Minister of Safety and Security*[1] the court below held that the refusal to release the plaintiff rendered his further detention wrongful. The reasons underlying the court's finding were as follows:

'In the present case, too, the evidence was that when Magoxo, after locking the plaintiff in the cells, went to talk to the plaintiff's wife she requested the release of the plaintiff. The request was refused on the basis of the implementation of the practice referred to above. The inference is that the request of the plaintiff's wife that he be released into her care, carried with it the implicit undertaking that she would see to his welfare. By that stage the plaintiff had long since adopted a calm and submissive attitude. The plaintiff was known to Magoxo, his particulars had been secured, and

[1] Case No 1212/05 ECD (15 June 2006).

there was no reason to apprehend that he would not stand trial to face any charge preferred against him.
I am satisfied that the invasion of the plaintiff's constitutional rights to freedom constituted by his continued detention subsequent to his wife's request for his release was unjustifiable, and the exigencies of the matter could have been met at that stage by the issue to him of the J534 notice and releasing him into the care of his wife.'

[6] It is against this conclusion that the defendant launched the appeal.

[7] The issue on appeal is whether the high court's finding that part of the plaintiff's detention was unjustified addresses an issue covered by the case pleaded and established by the plaintiff.

[8] A determination of this issue requires a consideration of the pleadings and to a lesser extent the evidence led at the trial. In the particulars of claim, the plaintiff alleged that the arrest and detention were wrongful because there were no reasonable grounds for his arrest and detention and that the arresting officers were aware of this fact. The relevant part of the particulars of claim reads:

'(a) Op Februarie 2005 en te Hoofstraat, Klipplaat, binne die jurisdiksie gebied van die bogemelde Agbare Hof, is die Eiser wederregtelik en onregmatiglik deur lede van die Suid-Afrikaanse Polisiediens (hierin verder na verwys as "die SAPD lede") sonder 'n lasbrief gearresteer en van sy vryheid ontneem, en was die SAPD lede te alle relevante tye wederregtelik en opsetlik die oorsaak dat die Eiser te die Suid-Afrikaanse Polisiediens se aanhoudingselle te Klipplaat aangehou is terwyl daar, tot die wete van die SAPD lede geen wettige gronde vir die arrestasie, aanvanklike aanhouding en verdere aanhouding van die Eiser was nie.

(b) Eiser was vanaf ongeveer 22h30 op 6 Februarie 2005 tot ongeveer 08h00 op 7 Februarie 2005 in aanhouding.

(c) Te alle relevante tye en meer in besonder ten tye van die Eiser se arrestasie en aanhouding soos hierbo vermeld was die SAPD lede aan diens, en het hulle opgetree binne die diensbestek van hulle diensverhouding met die Verweerder.

(d) Bovermelde arrestasie, aanhouding en verdere aanhouding is *animo iniuriandi* deur die SAPD lede versoorsaak en uitgevoer.'

[9] In his plea the defendant denied all the above allegations and in amplification contended that the arrest and detention were justified by law. He averred that the plaintiff was arrested for committing an offence in the presence of police officers. It is no longer disputed that the plaintiff was drunk and disorderly in public. Nor is it in doubt that the officer who arrested him complied with the provisions of s 40 of the Criminal Procedure Act 51 of 1977 which authorises an arrest without a warrant.

[10] The question that arises for consideration is whether the case pleaded by the plaintiff covers the assertion that the refusal to release him into his wife's care rendered the further detention unlawful. A perusal of the particulars of claim shows clearly that such a case was not pleaded. As stated, the arrest and detention were challenged on the basis that the police had no legal justification for effecting them. As expected, the defendant's plea addressed only that issue.

[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to

plead a particular case and seek to establish a different case at the trial.[2] It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*,[3] this court said:

'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'.

[13] The issue on which the court below relied as a basis for liability was not fully canvassed at the trial presumably because it was not pleaded and the parties' attention was not drawn to it. It was fleetingly touched upon during Magoxo's cross-examination. The response elicited was that the plaintiff was still drunk at the time his wife made the request. The issue was not pursued and furthermore the plaintiff's wife did not testify to support the contention.

[14] Counsel for the plaintiff submitted that the plaintiff ought to have been released into his wife's custody even if he were drunk. There is no merit in this submission. It has to be borne in mind that the plaintiff's wife never testified. No attempt was made to assess whether or not the

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[2] See particularly *Moaki v Reckitt & Colman (Africa) Ltd and another* 1968 (3) SA 98 (A) at 102A; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107; *Buchner and another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 216H-J; *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 902H.

[3] 1976 (1) SA 708 (A) at 714G.

inebriated plaintiff would have submitted to his wife's control once released; whether he would have refrained from behaving in a drunk and disorderly manner and whether he would have remained with his wife once released. There is furthermore no evidence that he was no longer a danger to himself and/or members of the public. The evidence therefore does not support the conclusion that the plaintiff was calm and submissive at the time of the request for his release. The police had subdued him and he remained in their control.

[15] In the matter of *Nelson v Minister of Safety and Security*,[4] the appellant's 18 year old son Romano had been arrested and detained after a police operation on a charge of riotous behaviour. He was kept in the police cells until 10h00 the next morning. It appeared that Romano had been arrested after he had been seen by a police officer, Holland, staggering drunk in the middle of the road brandishing a bottle of beer, behaving in a riotous and disorderly fashion and obstructing traffic. The full bench in dismissing the appeal held:

'That he co-operated to the extent of giving his name and address to the police and that he had seemingly calmed down after being taken to the police is not a sufficiently good reason. It is to be expected that people who are drunk and disorderly will revert to their previous pattern of behaviour as soon as the police have turned their back. Indeed, I believe that it would have been irresponsible for the police to have released Romano unless they could be sure that he was no longer dangerous.'

[16] In this case too we have no evidence to suggest that it would have been safe or sensible to release the plaintiff into his wife's care. No one knew how he would have behaved if released. The judge a quo also did

[4] [2007] ZAECHC 40 (14 June 2007) at para 8.

not know, yet made a finding without any factual basis. It is not necessary, in my view, to comment in any detail on the high court's inferential reasoning. Suffice it to say that the inferences it drew were not supported by the established facts.

[17] It follows that the court below erred in finding that the plaintiff's further detention was not justified. As a result its order must be set aside. I have read the judgment of Harms DP and agree with it.

[18] In the result the following order is made:

(1) The appeal is upheld with costs including the costs of two counsel.

(2) The order by the court below is set aside and replaced with an order in the following terms:

'The plaintiff's claims are dismissed with costs.'

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N Z MHLANTLA
JUDGE OF APPEAL

HARMS DP:

[19] The facts of the case appear from the judgment of Mhlantla JA. I concur in her judgment but wish to elaborate on the consequences of the high court’s finding that continued detention was wrongful.

[20] The right to dignity and freedom and security of the person are core values of the Constitution and any arrest and detention of a person amounts to a prima facie infringement of these rights. Our common law adopted the same approach and it is for this reason that the police, if challenged, have to justify an arrest and detention. This means that the

police bear the onus of proving that the arrest and detention are not wrongful.

[21] The onus can arise only after the issue itself has arisen. The aggrieved person must claim that a particular arrest or detention was wrongful before the police are saddled with this onus. As pointed out in the judgment of Mhlantla JA, the plaintiff's case was that his arrest and detention were unlawful because he had not been drunk and disorderly. His case on the pleadings was not, in the alternative, that his detention had become unlawful when his wife and friend arrived.

[22] A court is not bound by pleadings if a particular issue was fully canvassed during the trial. But there is not the slightest suggestion that the matter was so canvassed. As a matter of fact, neither the plaintiff's friend nor his wife testified on his behalf in respect of his state of intoxication at the police office. One can only assume, in the absence of any other explanation, that they would not have supported him. In other words, the police had at the end of the plaintiff's case not the slightest inkling that they had to defend the continued detention after the arrival of the plaintiff's wife at the police station. The defendant was entitled at that stage, at the very least, to know that it had to establish that the legality of the continued detention was an issue. Cases by ambush are not countenanced.

[23] One gains the impression from his questioning that the trial judge assumed that the police had a duty to check every few minutes whether the plaintiff was still drunk and disorderly and unless they are able to show from minute to minute that his detention was no longer required they would have failed to discharge their onus. The police in this case

visited the cells regularly and found after the first visit that the plaintiff was asleep. The implication that they should have woken him to check his state of inebriation and to release him in the middle of the night appears to me to be farfetched.

[24] I would like to recount the learned judge's reasoning and relate it to the evidence. He held that the plaintiff was not only drunk and disorderly but that he was also intent on committing the offence of drunken driving and that the police were accordingly 'obliged' to arrest and detain him. He further held that 'the plaintiff's drunken condition and disorderly attitude was also sufficient, at least initially, to lock him up in the cells.' He then posed the question which was not an issue, as I have sought to point out, namely whether his continued detention was justified.

[25] In answering this question the learned judge referred to the fact that after locking up the plaintiff Magoxo went to talk to the plaintiff's wife. She had requested his release. The judge held that (a) the request was refused on the basis of the implementation of a police practice to release such a person only after four hours; (b) the wife's request carried with it the 'implicit undertaking that she would see to his welfare'; and (c) by that stage the plaintiff had long since adopted a calm and submissive attitude.

[26] I fear that the trial judge misconstrued the evidence. Plaintiff's counsel was unable to support these factual findings on the record. Magoxo made it quite clear that the plaintiff was at that stage still drunk and that his wife was fully aware of the fact. He also said that 'if anyone could have come to the police station and requested his release, then he would have been released if he was sober.' As to the second point, it was

never suggested to Magoxo that the wife was able or willing to look after the plaintiff's welfare in his inebriated state. And as to the last point, if the conclusion was based on the fact that the plaintiff, after having been sprayed with pepper, handcuffed and locked up, was submissive I can understand it: but that does not justify the conclusion that he was entitled to be released.

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LTC HARMS
DEPUTY PRESIDENT

Appearances:

For Appellant	E A S Ford SC N J Sandi N N Dullabh & Co, GRAHAMSTOWN The State Attorney, BLOEMFONTEIN
For Respondent	H J van der Linde SC A Frost G P Van Rhyn, Minnaar & Co Inc, UITENHAGE Honey Attorneys Inc, BLOEMFONTEIN