



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 5356/10

In the matter between:

STEWART THEODORE TAYLOR

PLAINTIFF

And

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT DELIVERED ON 17 FEBRUARY 2016

GAMBLE, J:

INTRODUCTION

[1] Shortly before midday on Tuesday 28th October 2008 the plaintiff was arrested at a shopping centre in Table View, Cape Town by members of the South

African Police Services stationed at Table View. During the arrest force was used on the plaintiff and he was thereafter detained in the police cells at Table View for two nights before he appeared in the magistrates' court, Cape Town on the morning of 30th October 2008. The plaintiff alleges that the arrest and the subsequent detention were both unlawful and further, that the force that was directed towards him was excessive in relation to the purported arrest. He claims that he sustained injuries during the arrest and seeks damages from the defendant (hereinafter collectively referred to as "the police") in the sum of R450 000 in respect of wrongful arrest, assault and wrongful detention.

[2] The police admit the arrest and subsequent detention and contend that both were lawful. The police further admit that force was applied to the plaintiff during his arrest but contend that only such force as was necessary to bring the plaintiff under control was applied. Accordingly the police contend that they behaved lawfully throughout.

[3] In light of the admissions made in the plea it is common cause that the police attracted the onus of establishing, on a balance of probabilities, that the arrest and consequent detention were lawful and that the force used during the arrest of the plaintiff was justified.

BACKGROUND FACTS

[4] During October 2008 the plaintiff lived with his partner, Belinda Friedland, in a house owned by the plaintiff's father at 165 Blaauwberg Road, Table View. Friedland has a daughter called Jade and a sister called Bronwen de Pontes.

On the night of Friday, 24 October 2008 Jade celebrated her 17th birthday with a party at the house at number 165. Also present at the party, besides Friedland, were de Pontes and the plaintiff as well as a number of teenage partygoers.

[5] Sometime towards midnight an incident occurred in which an uninvited teenager stabbed one of the partygoers just outside of the gate of number 165. In the ensuing melee de Pontes, who was on the pavement trying to shepherd the partygoers not involved in the fight back into the premises, tried to force open the gate. She could not do so because the plaintiff was on the inside trying to keep the gate closed to avoid unwanted elements entering the premises. Eventually the gate was opened and the plaintiff and de Pontes became embroiled in a violent struggle. In evidence before the court de Pontes described the incident in fairly graphic terms and said that the plaintiff punched her repeatedly, threw her to the ground and tore her blouse open. She said that he was intoxicated from the use of narcotics and behaved wildly, both during the attack on her and after he went into the house, where he allegedly destroyed furniture, fittings and the like. While admitting that he was involved in a scuffle with de Pontes, the plaintiff's version as to what happened is different - he suggested that his behaviour was far more controlled and that he was not under the influence of narcotics - but the materiality of these disputes is not relevant to these proceedings.

[6] De Pontes, who stays in the neighbouring suburb of Parklands, reported the matter to the Parklands police on the morning of Saturday, 25 October 2008 and having done so was issued with the so-called J 88 form which she took along with her for completion by her general practitioner during an examination of her injuries. The form (on which a medical practitioner usually records the nature and extent of injuries

on a person after examination) is issued by the police. In the present case the entire's thereon confirm an assault consistent with that described by de Pontes. The assault was also confirmed in evidence by Jade who corroborated her aunt's evidence in material respects.

[7] Evidently Parklands is a satellite police station of Table View and accordingly a case docket was opened by the police under reference number Table View CAS 636/10/2008. During the course of the morning of Tuesday, 28 October 2008 a police constable (now a sergeant) by name of Henfred Claassen was told by his commanding officer at Table View to go and arrest the plaintiff on a charge of assault with intent to commit grievous bodily harm. This related to the events of the previous Friday night at number 165. Claassen took a police vehicle and collected the complainant at her home whereafter the 2 of them then drove to number 165 so that de Pontes could point out the plaintiff to him. Upon arrival at the house Claassen was told by Friedland that the plaintiff was not home: he had apparently gone to his doctor to collect a prescription for medication that he was taking for rehabilitation of a drug problem. It was common cause that at the time the plaintiff was a recovering heroin addict.

[8] Claassen then drove with de Pontes to a shopping centre in Table View which the parties referred to as "the Pick 'n Pay Centre". The court was informed that the police station was just around the corner from the shopping centre and it seems that the plaintiff's doctor's surgery was in the centre. As Claassen and de Pontes walked into the shopping centre the plaintiff passed them on his way out. The complainant identified him to Claassen who turned around to confront the plaintiff. At that stage the plaintiff was standing outside the entrance smoking a cigarette. What

happened next is in dispute. On the police version Claassen informed the plaintiff that he had come to arrest him for the assault on de Pontes and asked the plaintiff to put out his cigarette. Having repeated his request twice, and the plaintiff having refused to extinguish his cigarette, Claassen grabbed the cigarette from the plaintiff's mouth. As he did so, the plaintiff lashed out at Claassen striking him on the upper body.

[9] A scuffle broke out involving the plaintiff, Claassen and two other police officers who were in attendance to provide backup. Eventually, the plaintiff was brought under control, handcuffed and put in the back of a police van which was driven on the day by one Bjorn Africa, then a constable the Table View police station.

[10] Africa (who by then had left police force) gave evidence that after returning to his vehicle he had received an emergency radio call to attend to an alleged housebreaking in progress nearby. With the plaintiff in the back of his van, and no doubt with blue lights flashing and sirens wailing, he hastened to the scene of the alleged housebreaking. Upon arrival there, said Africa, he discovered that matters were under the control of another police contingent that had arrived shortly before him. Africa claimed that at that stage he did not know that the plaintiff was in the back of his patrol van but when he heard someone moving around in the back he climbed out to look and, to his surprise, found the plaintiff there. He turned his vehicle around and headed back to the police station where the plaintiff was booked in.

[11] The plaintiff's version, as I have said, was different. He said that at the shopping centre Claassen came up to him and informed him that he wished to arrest him. The plaintiff says that he told Claassen he needed to inform his father of this development, and walked to where Mr Taylor snr was talking to someone at an estate

agency close to the entrance to the shopping centre. He said that Claassen followed him into the office, grabbed him by the arm, twisting it behind his back in the so-called “Half Nelson” grip and frogmarched him outside. The plaintiff said that he was then assaulted by a constable Maharaj who was a passenger in Africa’s vehicle. The plaintiff claimed that he had been punched, thrown to the ground and kicked and was also sprayed in the face with pepper spray.

[12] The plaintiff said that after being loaded into the back of a police van Africa set off at high speed through the side streets of Table View. The van was brought to a sudden halt and Africa climbed out. He opened the rear of the van, grabbed hold of the plaintiff and began assaulting him. The plaintiff said that he was berated by Africa for having assaulted a woman and was, as it were, given a lesson in that regard by Africa. The plaintiff was thereafter taken to the police station where he was booked in and placed in the cells. Two days later he appeared in the Magistrate’s Court, Cape Town, where he was released on bail. The plaintiff was later charged in the district court with the assault of de Pontes. The case against the plaintiff seems to have dragged on interminably and was ultimately unresolved because the magistrate hearing the matter resigned before judgment had been delivered, no fresh prosecution having been instituted thereafter.

WAS THE ARREST LAWFUL ?

[13] I turn then to consider whether the arrest of the plaintiff by Claassen was lawful. Section 40 of the Criminal Procedure Act, 51 of 1977, (‘the CPA’) governs the arrest of persons for purposes of securing their attendance at court for prosecution under the CPA where no warrant of arrest is required. Generally, that section permits

such an arrest to take place where any offence is committed in the presence of the arresting officer (who must be a “peace officer” as defined under the CPA), or in circumstances where the arresting officer holds a reasonable suspicion that a specific set of circumstances exists which render that person liable to prosecution for a specified offence.

[14] As our courts have often said, application of the section requires the balancing of competing interests. In Glisson¹ Jones J (with Pickering J concurring) discussed the relevant authorities and offered the following guidance –

“[6] I am aware of the need in cases such as this to find a balance between the protection of the individual liberty on the one hand and avoidance of unnecessary restriction on the police in the execution of their duties on the other. Where the two are evenly balanced, the scales in a modern constitutional state will fall on the side of individual liberty. The police should not lightly make arrests without a warrant. At times - and I think this is such a case - it may be difficult for a policeman to know where to draw the line. If he does not witness criminal conduct himself, he should always be alive to the need for a warrant, which, he knows, would neither be sought nor granted except where there is a sworn statement of the commission of criminal conduct.”

¹ Minister of Safety and Security v Glisson 2007(1) SACR 131 (E) at 134F

[15] In Sekhoto² Harms DP, while pointing out that it was trite that the onus rested on the police to justify an arrest, reviewed in detail a number of other issues relevant to an arrest by a peace officer in the constitutional era. The Learned Deputy President set out the 4 jurisdictional facts required to be established by the police for a lawful arrest for the offence allegedly committed in that matter³ as follows:

“(T)he jurisdictional facts for a s 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. For purposes of para (g), the suspicion must be that the arrestee was or is in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce. The jurisdictional facts for the other paragraphs of s 40(1) differ in some respects.....”

The court expressly dismissed a fifth criterion which it said had emerged over the previous number of years in various Provincial Divisions to the effect that the import of the Constitution in such matters rendered it incumbent on the arresting officer to consider whether the proposed arrest as such was necessary to bring a suspect before the court or whether there were other less invasive options available, such as the issuing of a notice to appear.

² Minister of Safety and Security v Sekhoto and Another 2011(1) SACR 315 (SCA)

³ The case involved the arrest of 2 suspects on allegations of stock theft

[16] In his particulars of claim issued in March 2010 the plaintiff alleged, firstly an arrest at the shopping centre on a charge of “assault”. He then went on to allege an assault during the arrest, a further assault en route to the police station, a detention which exceeded the stipulated statutory maximum of 48 hours and a violation of his right to medical and legal assistance while in custody. These factual allegations were followed by a generalised allegation of wrongfulness:

“11. The conduct of the members of SAPS as set out above was unlawful and/or wrongful.”

[17] In the paragraph dealing with the categorisation of his damages totalling R450 000 the plaintiff claimed R40 000 for “*unlawful detention and medical costs*”, R20 000 for “*the assault*” and R390 000 for “*general damages for pain, suffering, shock, psychological and emotional damage and loss of earnings.*” It will be observed that there was no claim for wrongful arrest *per se*.

[18] The police filed their initial plea in July 2010 and admitted the arrest but pointed out that it was in relation to charges of “*Assault GBH*” and “*Assault common*”. In para 5 thereof the police version of the circumstances surrounding the arrest and subsequent incarceration are detailed, and in response to the allegations in the plaintiff’s para 11, the police plead a denial of “*each allegation in this paragraph*” and a repetition of “*the contents of paragraph 5 above.*”

[19] In October 2010 the plaintiff filed a request for trial particulars in which the following questions and answers thereto are relevant:

“1.1. Who is it alleged was assaulted by the Plaintiff in respect of this charge of assault GBH?”

Defendants reply: *“Ms Bronwyn(sic) de Pontes.”*

“1.2. Who is it alleged was assaulted by the Plaintiff in respect of the charge of assault common?”

Defendant’s reply: *“Constable Henfred Danville Claassen”*

“1.3 Did the arresting officer personally witness the assault?”

Defendant’s reply: *“The arresting officer did not personally observe the assault GBH but personally observed and experienced the assault common.”*

“1.4 If not what was the source and content of the arresting officer’s knowledge of both assaults?”

Defendant’s reply: *“4.1. The source of the arresting officer’s knowledge of the assault GBH was the complainant, Ms De Pontes, who told him that: the Plaintiff had assaulted her; she was very scared; the Plaintiff had further threatened her; and she feared for her life. Ms De Pontes also told the arresting officer that she had laid a charge of assault GBH against the Plaintiff. The arresting officer further observed that Ms de Pontes had bruises on her face.*

4.2. The arresting officer's knowledge of the assault common was personal in that the plaintiff assaulted him."

"1.5. Was the arrest with or without a warrant?

Defendant's reply: *"Without a warrant."*

"1.6 If arrest (sic) was without a warrant in term (sic) of which section of the Criminal Procedure Act 51 of 1977 (as amended) was defendant arrested?"

Defendant's reply: *"Section 40(1)(a),(j) and (q) of the Criminal Procedure Act, 51 of 1977..."*

No detail is given of any of the facts relied upon, or the requisite suspicion harboured, for these grounds of justification.

[20] In June 2012 the plaintiff made certain minor amendments to his particulars of claim relating to his incarceration at Table View police station. In regard to the claim for damages, the amendment was more significant. The claim for general damages, still in an amount of R390 000, was now more accurately described as follows:

"12.1.1 General damages in respect of deprivation of plaintiff's liberty, security of person and privacy, injury to his reputation and dignitas, discomfort, psychological trauma towards plaintiff and his family, stress and contumelia.

12.1.2 The aforesaid amount of general damages is an estimation and it is not practicable to furnish further particulars in regard thereto.”

From this amendment it is clear that the plaintiff included as a component of his claim, damages for wrongful arrest. In any event, if regard be had to the defendant's trial particulars it is clear that the police already understood the claim to include this component.

[21] In August 2012, the police filed a plea containing consequential amendments which are not material at this stage. That plea introduced an alternate ground of defence to the allegations that the police assaulted the plaintiff by contending that such force as was used was necessary and reasonable in the circumstances. The general denial made in para 11 of the plea (as set out above) was repeated in this pleading.

[22] In May 2013 the plaintiff effected further amendments to his particulars of claim by introducing the following allegations which pertinently set out a claim for wrongful arrest:

“4. The arrest was unlawful in that the arresting officer did not have and did not produce any warrant authorising the arrest and he was not present when, and at the place where, the assault which the plaintiff was alleged to have committed took place.

5. The arresting officer had no reason at the time when the arrest was effected to reasonably suspect or to form an opinion that the plaintiff

was committing or had committed an offence at the place and at the time when the arrest was made.”

[23] There was some further tinkering with the formulation of the damages claim, in which the sum of R450 000 was said to comprise the following –

“14.1 R40 000 for the unlawful arrest and medical costs;

14.2 R20 000 for the assault;

14.3 R390 000 for general damages for pain, suffering, shock, psychological and emotional damage and loss of earnings.”

For the rest the material allegations remained the same.

[24] A final amended plea was filed in September 2013. In that pleading the defendant dealt with the allegations made in para’s 4 and 5 of the further amended particulars of claim as follows:

“4.1 Save to admit that the arresting officer did not have and did not produce any warrant authorising the arrest, Defendant denies that the arrest was unlawful and pleads that both the arrest and subsequent detention were lawful in terms of section 40 (1)(a), (j) and (q) of the Criminal Procedure Act, 51 of 1977 (“the CPA”) in that:

4.1.1 the arresting officer, Mr Henfred Claassen ("Claassen"), was a peace officer as defined in the CPA;

4.1.2 plaintiff committed the offence of assault on Claassen on 28 October 2008 at the Pick 'n Pay Centre, Table View, in other words - in the presence of the peace officer;

4.1.3 plaintiff wilfully obstructed Claassen and the other police officers in the execution of their duties;

4.1.4 the plaintiff was reasonably suspected of having committed an act of domestic violence as contemplated by s1 of the Domestic Violence Act 1988, which constitutes an offence in respect of which violence is an element in that plaintiff on 24 October 2008 assaulted Ms Bronwen de Pontes ('De Pontes') for which she had to receive medical treatment. Plaintiff had thereafter threatened de Pontes, her sister and her two children (of whom plaintiff is the father) with violence."

[25] It is not in dispute that Claassen required a warrant if he wished to arrest the plaintiff for assaulting de Pontes on the Friday night. It was common cause that the assault on de Pontes did not occur in the presence of the sergeant and so the police could not rely on section 40(1)(a) of the CPA to justify the arrest for that assault. Nor could the police rely on section 40(1) (b) as it was conceded in argument

that during the alleged assault on de Pontes the plaintiff did not inflict any dangerous wound on her.⁴

[26] The reliance by the police on section 40(1)(j)⁵ as further justifying an arrest without a warrant is based on the fact that the plaintiff became involved in a scuffle with Claassen and other policemen immediately after his arrest in respect of the de Ponte's complaint. That ground of justification is only available to the police if they can show that the initial arrest of Taylor was lawful. If the arrest was not lawful the plaintiff was fully within his rights, and entitled, to resist arrest or even take flight if he so wished, and that would have entitled him to use such reasonable force **against** the police as may have been reasonable to secure his departure from the scene. This ground, too, was abandoned in argument.

[27] The third ground of justification relied upon in the defendant's plea as finally amended (S 40(1)(q)) raises somewhat of a conundrum. Claassen was instructed by his superior to go and arrest the plaintiff for the Friday night assault on de Pontes, and the latter confirmed in her testimony that she accompanied Claassen to number 165 so that she could point out the plaintiff. The evidence thus unequivocally shows that when he left on his mission that Tuesday morning, Claassen was ordered to arrest the plaintiff without any mention being made of the necessity to first obtain a warrant. At that stage there had been no mention either to the police of

⁴ The ground of justification for an arrest without a warrant afforded by sec 40(1)(b) is as follows – *“whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”*

Schedule 1 to the CPA contains a list of serious offences and includes *“assault, [only] when a dangerous wound is inflicted.”*

⁵ *“(j) who wilfully obstructs him in the execution of his duty”*

an alleged incident of domestic violence at number 165 earlier that day. It follows that Claassen went to number 165 to effect an arrest in respect of the attack on de Pontes without a warrant – an arrest that was therefore unlawful from its inception.

[28] When Claassen left number 165 on the Tuesday morning he went in search of the plaintiff at the shopping centre, still accompanied by de Pontes who confirmed in her evidence that when they headed there she was under the impression that Claassen still intended to arrest the plaintiff for the Friday night assault and for that purpose she was required to accompany him further to do the necessary pointing out. And, when she and Claassen walked past the plaintiff at the shopping centre, de Pontes said that she pointed him out to the constable who then walked up to the plaintiff to effect the arrest. De Pontes testified that she understood that the plaintiff was being arrested in relation to the Friday night assault, as did Africa who was close by when Claassen performed the arrest. The plaintiff said that he was not told why he was being arrested but assumed that it was in relation to the Friday night incident since de Pontes had told him she intended to lay a charge against him. On his version there was no mention of domestic violence by Claassen.

[29] In his docket statement under CAS 636/10/2008 Africa also confirmed that the arrest of the plaintiff was in respect of the Friday night assault and in evidence in court he went on to say that “minimum force” was necessary to perform that arrest. But, if one has regard to para 4.1 of the defendant’s trial particulars and para 4.1 of its finally amended plea, both of which are set out above, it is apparent that Claassen thought that the arrest of the plaintiff without a warrant was justified because the assault on de Pontes on the Friday night constituted an act of domestic violence: the response in para 4.1 of the plea is expressly limited to the 24th October 2008.

[30] The Friday night assault did most certainly not constitute an act of domestic violence since the plaintiff and de Pontes were never involved in a domestic relationship, and counsel for the police, Ms Erasmus, did not seek to advance any argument on that score either⁶. In fact, Ms Erasmus, having abandoned any reliance on the grounds of justification afforded by sections 40(1)(a) and (j), focussed only on (q). The factual basis for the argument was that Friedland had allegedly told Claassen of the plaintiff's abusive conduct at the house on the Tuesday morning. It was argued that this and this alone, entitled Claassen to arrest the plaintiff at the shopping centre without a warrant.

[31] Against that background the ground of justification put up by the police under section 40(1)(q) implies that Claassen changed his mind at number 165 on the Tuesday morning after Friedland mentioned the alleged events to him. If that was in fact so, it is strange that he did not mention anything in that regard to de Pontes particularly since it was she who testified that she had told Claassen while at number 165 that there had been an altercation involving the plaintiff and Friedland at the house earlier that day.

[32] Claassen testified that he knew nothing of the matter until ordered by his superior on the Tuesday morning to collect de Pontes. He could see that she had been injured in the alleged assault on her previously and in light of his concern that the plaintiff might respond violently, he asked for back-up. This arrived in the form of Africa and the passenger on his vehicle, Maharaj, who waited outside number 165.

⁶ The definition of "*complainant*" in the Domestic Violence Act is limited to "*any person who is or who has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant*"

Claassen said that when he arrived at the house he spoke to Friedland who related to him an alleged incident of assault on her by the plaintiff earlier that day. On the strength of that, said Claassen, he resolved to arrest the plaintiff for the assault on the Friday night on de Pontes as well for the potential threat which he posed to Friedland arising out of his conduct that very morning. He did not testify about any complaint by Friedland which suggested that she wished to lay a charge of assault or malicious damage to property against the plaintiff, or apply for a domestic violence interdict arising out of the alleged incident.

[33] I should point out that the allegation of suspected violent conduct by the plaintiff is not a recent fabrication: in a statement made at 13h45 on that Tuesday for inclusion in the police docket in CAS 636/10/08 Claassen said the following –

“3. We then spoke to Bronwyn’s(sic) sister who informed us that the suspect left after he again tried to assault her and damaged (sic) her property....

4. We then went to look for him at the Table View Centre.... Bronwyn pointed out a white male who was busy smoking outside the centre. I then went up to him, introduced myself and informed him of the case against him. I then informed him that I’m gonna detain him for the case against him as he started to become a threat to Bronwyn and her family....’

Importantly, Claassen’s contemporaneous statement did not allege an act of violence on the part of the plaintiff which was distinguishable from the assault on de Pontes.

[34] When he was detained by Claassen the plaintiff was charged on two counts - the aggravated assault on de Pontes relating to the events of Friday night and a charge of common assault relating to his alleged interference with Claassen during his arrest at the shopping centre, when Claassen arrested him on the former charge. The second charge was logged with the Table View police station under a separate CAS number (704/10/08). There was no charge relating to any statutory contravention of interfering with the police in the execution of their duties. The plaintiff was not charged with any contravention of the Domestic Violence Act, 1998 either, nor was he informed at the time of his arrest of any such contravention or that he was suspected of having committed any act of domestic violence of which violence was a component. Indeed, when the matter went to trial the only charge the plaintiff faced related to the attack on de Pontes on the Friday night.

[35] In answer to a question by the court at the end of his evidence Claassen confirmed, yet again, that he when he went to number 165 on the Tuesday morning his intention was to arrest the suspect for the events of the Friday evening and said that if the suspect had been at the premises he would have arrested him there and then for that alleged offence.

[36] In the first version of the defendant's plea no ground of justification in terms of section 40(1) (q) was relied upon. It was only mentioned in the reply to the request for trial particulars and then without any contextual explanation. In the absence of any contemporaneous documentation or recordal suggesting that consideration was given to an arrest at the time under that sub-section, and having regard to the late introduction of the allegation into the pleadings, I am driven to conclude that the ground of justification is an afterthought arrived at when the case

was being prepared for court. All the evidence placed before the court goes the other way and suggests that Claassen's intention was to effect a warrantless arrest for an offence which did not occur in his presence. That evidence manifestly demonstrates that neither Claassen, nor his superior who sent him out to arrest the plaintiff on the day in question, gave any consideration to the necessity for a warrant for his arrest.

[37] In my view, when that arrest was ultimately effected, there was no ground under section 40 (1) which cloaked it with any legality. At best for the defendant it appears that the reliance based on section 40(1)(q) was predicated on the incorrect factual assumption that the attack on de Pontes constituted an incident of domestic violence but unfortunately for the police that does not constitute a reasonable suspicion as required by the section in question , and consequently it does not cure the illegality.

[38] In argument Ms Erasmus referred the court to the judgment of Lewis JA in Kitase⁷ , a case in which reliance was placed by the police on section 40(1)(q), and submitted that the court should not place form over substance by limiting the police to their pleadings in circumstances where the evidence demonstrated that Claassen had genuinely held the belief that an act of domestic violence had been committed towards Friedland that day ⁸ and that his arrest of the plaintiff was accordingly justified by the fact which had been fully traversed.

⁷ Minister of Safety and Security v Kitase 2015(1) SACR 181 (SCA) at para [15]

⁸ There is little room for doubt that her cohabitation with the plaintiff constituted a domestic relationship as defined

[39] In my view Kitase does not assist the defendant in this matter. In the first place, the facts of Kitase differ from this matter on one very significant point. The arresting officer in that matter arrived on the scene and personally witnessed the husband's acts of domestic violence towards the wife – he was chasing her with a spade, shouting profanities at her and both were covered in blood.⁹ The suspicion on the part of the arresting officer justifying an arrest without a warrant under (q) was therefore manifestly established on the evidence. With reference to that court's earlier judgment in Slabbert¹⁰ the Learned Judge of Appeal observed that

“(T)his court has repeatedly said that if the evidence adduced at the trial covers the particular issue then the court is not bound by the pleadings.....In my view the evidence clearly demonstrated that Katise(sic) was guilty of committing acts of domestic violence. That was enough to make the arrest without warrant lawful under s 40(1)(q)...”

Without doubt the arresting officer's personal observations underpinned the court of appeal's view of the case.

[40] In Slabbert, which concerned an arrest and detention for public drunkenness, Mhlantla JA was required to decide whether the pleaded case covered an assertion made in argument by the plaintiff. The Learned Judge of Appeal said the following:

⁹ In such circumstances the officer could also have relied on section 3 of the Domestic Violence Act which permits an arrest without a warrant where the arresting officer is present at a scene of an incident of domestic violence.

¹⁰ Minister of Safety and Security v Slabbert [2010] 2 All SA 474 (SCA)

“[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. It is equally not permissible for the trial court to have recourse to the 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 issues in question has been canvassed fully by both sides at the trial. ”

[41] I am not satisfied that the alleged incident of domestic violence on the Tuesday morning was sufficiently canvassed by both parties in evidence before me. Had that been done, a different picture may have emerged. I say so because in his evidence the plaintiff testified, in reply to questions by the court, that he was then serving time for an offence of dishonesty and went on to say that during that time he had been regularly visited in prison by Friedland. She seems to have been fairly well disposed to the plaintiff and it is just possible that Friedland may have put a different version of events regarding the Tuesday morning before the court.

[42] In all the circumstances I am of the view that the defendant has failed to discharge the onus of establishing that the arrest of the plaintiff on that day without a warrant was lawful.

THE ASSAULTS

[43] In the finally amended plea of September 2013 the police admit that they scuffled with the plaintiff outside the shopping centre and that Africa sprayed pepper gas in his face. This assault on the plaintiff is justified by the police on the basis that he had been lawfully arrested and that it was necessary to subdue him since his conduct was riotous in a public place, and generally to maintain law and order in a public place. The mantra resorted to by the police in evidence in this regard is that “*the necessary force*” was resorted to but neither witness could give substance to the phrase. In any event, in the absence of a lawful arrest, this conduct of the police was wrongful and an unlawful interference with the plaintiff’s bodily integrity.

[44] The plaintiff’s allegations of a further, and more serious, assault on him by Africa in the back of the van are disputed by the police. That requires an evaluation of the testimony of these witnesses. As a witness I found Africa arrogant and hard-nosed, almost to the extent of aggressive under cross examination. He said that he left the police force of his own volition in December 2009 and is now self-employed as a taxi operator.¹¹ Africa’s evidence regarding circumstances of the arrest itself was not properly corroborated by Claassen. Africa, whose testimony is riddled with assertions of poor memory due to the lapse of time, was able to testify that the plaintiff was placed in one of 3 police vehicles parked at the shopping centre but was unable to say whose. Claassen pertinently testified that he saw the plaintiff being loaded into Africa’s van but thought nothing of it.

¹¹ Newspaper articles attached to the plaintiff’s pleadings suggested that Africa had been involved in other acts of violence while still in the SAPS and was facing internal discipline, but none of this was verified through evidence.

[45] Claassen was the arresting officer that day and it is fair to assume that he would have been the person who would have transported the plaintiff to the police station and processed him prior to detention. After all , it was he who had driven around looking for the plaintiff that morning. It is difficult, too, to understand how Africa was unable to recall into which van the plaintiff was loaded. In his contemporaneous statement contained in the police docket Claassen did not mention that the plaintiff was loaded into a van other than his, but he did state somewhat equivocally that the *“suspect was taken to the Table View cells where he was detained.”*

[46] On the whole I regard Claassen as a reliable witness who made a favourable impression on the court, but his failure to provide a satisfactory explanation as to why Africa transported the plaintiff to the police station lends credence to the plaintiff's version that he was placed in Africa's vehicle for purposes of unauthorised and unlawful punishment. Africa's evidence that he was unaware of the fact that the plaintiff had been placed in the back of his patrol van at the shopping centre beggars belief. Similarly, Africa's evidence that he only became aware of the presence of the plaintiff in the back of his van after he had stopped at the scene of the alleged housebreaking in is similarly not worthy of credence. After all, he was driving a police van equipped with a window between the rear of the cab and the metal enclosure in which the plaintiff had been detained. Common sense tells one that if he had looked in the rearview mirror in the cab of his vehicle he ought to have seen the plaintiff who was evidently the only person in the back of the van. It is most curious that he only noticed the plaintiff in the back as he was about to return to the police station.

[47] The plaintiff was a good witness. He faced the indignity of having to testify in prison clothes and came across as a retiring, soft-spoken individual. Indeed,

it was difficult to see in him the violent, drug-fuelled person described by de Pontes. But, perhaps, he has managed to shake off his drug habit, and it may be that de Pontes was correct that it affected him on the night in question. Be that as it may, the plaintiff did not attempt to embellish his version and certainly handled the cross examination of Ms Erasmus fairly well. In addition, he made concessions to his detriment where required and readily conceded his chequered past. The plaintiff's evidence about the events at the shopping centre was corroborated, in the main, by that of his father. However, Mr Taylor snr tended towards over-exaggeration and appeared rather blinkered in his assessment of his son's behaviour. I accordingly approach his evidence with some caution. Mr Taylor snr confirmed the substance of the plaintiff's evidence as regards the attack on him by the police outside the shopping centre.

[48] When the plaintiff was booked into the cells at the police station on the Tuesday the police were required to make the necessary endorsement in the "*Cells' Occurrence Book*". The entry at 12h25 on that day records this but makes no mention of the fact that the plaintiff was "*free of injuries*", as is the usual practice. Claassen, however, testified that the plaintiff was free of injuries when he booked him in on the Tuesday. Later that day (at 17h50 it seems) the plaintiff was interviewed by a detective at Table View (also by name of Africa) in relation to the charge of common assault on Claassen. The interview form records that the plaintiff had a bruise on his left forearm and that he made an allegation that he had been slapped and kicked while he was on the ground – the detective did not record where this occurred.

[49] After his release on bail by the magistrate on 30 October 2008, the plaintiff was taken by his father to his GP for a physical examination. Dr D.L.Bailly

completed the J88 form at 16h30 on that day and recorded 4 observations – (i) a contusion on the left eyebrow and left side of the face; (ii) a superficial abrasion on the left cheek; (iii) a superficial abrasion on the right cheek, and (iv) a superficial abrasion on the left forehead. The doctor remarked on the form that the plaintiff complained of a headache and was sleepy. He diagnosed mild concussion and opined that the injuries were consistent with blunt trauma sustained on 28 October 2008. The J88 form was accompanied by an affidavit deposed to in terms of section 213 of the CPA, was admitted into evidence by agreement and so it became unnecessary for the doctor to testify.

[50] The injuries described by the doctor are consistent with both assaults allegedly perpetrated on the plaintiff by the police on the Tuesday. In cross examination Ms Erasmus suggested to the plaintiff that the injuries found by Dr Bailly might just have well been sustained in a fight in the cells with a fellow prisoner. It appears from the cell register that a certain “Angel Babe” had been arrested for robbery on the Wednesday at around 08h00 and that he had thereafter shared a cell with the plaintiff. The point raised seems to me to be no more than idle speculation since there are no entries in the cell register after Babe’s detention of any complaint of fighting involving him and the plaintiff and nothing to suggest how the bruise observed on the Tuesday afternoon was sustained.

[51] I accept the plaintiff’s evidence that he was assaulted by the police, both during the arrest and shortly thereafter at the hands of Africa. In so doing I take cognizance of the fact that the plaintiff has previous convictions involving dishonesty and the possibility that he may have given false testimony. But, I am satisfied that there is sufficient corroboration for his evidence in the testimony of his father, the

evidence of Claassen and Africa and the medical report. In assessing the quantum of damages for these assaults I intend considering a globular sum, given the proximity in time and the similarity of the incidents. I will have regard also to the fact that the *sequalae* of the injuries were not serious, or long lasting.

THE DETENTION

[52] The plaintiff was detained for about 48 hours before being released on bail. During that time he was obviously deprived of his liberty, but the plaintiff did not relate any incidents which might be considered to be startling or alarming. There was some evidence led that the plaintiff had clashed with the law before and, upon questioning by the court, it appeared that this had occurred on a number of prior occasions. In some instances the plaintiff had been subpoenaed to appear at court and in others he had been arrested and detained. The point is that the incarceration in this case was not the plaintiff's first detention at the hands of the police and the incarceration as such does not seem to have had any particularly traumatic effect on him. Certainly, the plaintiff did not testify about any such consequences.

[53] As I have already indicated, the plaintiff was examined by his GP shortly after his release and the extent of the injuries sustained during his arrest by Claassen and the assault by Africa appear therefrom. There were no lacerations or open wounds – only bruises and abrasions. The plaintiff's evidence that his body was sore for a couple of weeks and that he suffered a mild concussion as a consequence of the assaults, was not challenged

[54] In one of the earlier versions of the particulars of claim, the damages claim included a component in respect of the plaintiff's deprivation of medical attention and access to legal representation while in custody. This fell by the wayside later, and, in any event, there was no evidence to sustain the allegation. The plaintiff's testimony that he was shocked by the whole event and particularly because of the fact that it occurred in public and in the presence of his father was not disputed. Further, he said that the matter enjoyed considerable coverage in the local neighbourhood newspaper. It must be said though that the plaintiff was a willing participant in that interview and did not seem to shy away from the consequent publicity.

[55] The plaintiff complained about a loss of earnings as a consequence of the incident. He testified that over the years he had been fairly regularly employed in the food industry (both locally and abroad) in a managerial capacity in restaurants. He said that as a consequence of his arrest he was listed on an electronic database called the KROLL system to which employers had access and from which his criminal background could be established. He suggested that this may have affected his employability after the incident. Certainly, the fact that he regularly attended court over the years while the assault case against de Pontes ran meant that he was unable to work on those days.

[56] Under cross examination by Ms Erasmus the veracity of the plaintiff's allegations regarding his earnings both before and after the incident were exposed. There can be no doubt about the fact that the plaintiff would have lost income if he was supposed to be working when required to attend court to answer the assault charges. However, the evidence presented in this regard was casual and patchy and is not sufficient to sustain a loss of income. In any event, that loss would not flow from

the wrongful arrest *per se* but rather from the fact that he had had been prosecuted for the alleged attack on de Pontes. It is not a consequential loss flowing from the delict in question (wrongful arrest and assault by the police) and is therefore not recoverable by the plaintiff as against the police. At best for the plaintiff, the award for general damages should include a minor component of loss of earning capacity.

[57] In calculating an award of damages a court exercises a wide discretion in making an award that is fair to both parties. All of the material facts need to be considered holistically, and it is acceptable to consider earlier awards in similar cases for purposes of guidance, but as Nugent JA pointed out in Seymour¹², courts must not slavishly apply actuarial calculations to such earlier awards in order to establish the current value thereof since the differentiation between the facts of each matter is critical to a fair estimation.

[58] In the instant case there are essentially 3 components to the damages claim – the assaults, the wrongful arrest and the unlawful detention. It is well nigh impossible to place a monetary value on each such component and the best I can do is to award a globular figure to cover all the components mentioned together with any others that I may have missed. In Seymour¹³ Nugent JA offered the following advice-

“Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss.

¹² Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 323-6

¹³ p 326 para [20]

It needs also to be kept in mind when making such awards that there are there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.”

[59] I have considered the various cases consulted by Nugent JA in Seymour, many of which were dealt with by Ms Erasmus in argument and in respect whereof the current values of such awards were furnished. I consider that a globular award of R120 000 will do justice to the plaintiff for all of the wrongs he suffered at the hands of the police pursuant to this unfortunate and unnecessary incident.

COSTS

[60] The award which I intend making currently falls within the monetary jurisdiction of the magistrates court (now set at R300 000). However at the time that summons in this matter was issued the jurisdiction was still R 100 000 and the plaintiff was accordingly obliged to commence action in this court. Ms Erasmus fairly conceded that in the event that the award exceeded R100 000, costs on High Court scale could be awarded.

ORDER OF COURT

IN THE CIRCUMSTANCES IT IS ORDERED THAT:

1. The defendant shall pay the plaintiff damages in the amount of R120 000;

2. The defendant shall pay interest on the said amount at the prescribed rate from date of judgment to date of payment;
3. The defendant shall pay the plaintiff's costs of suit in accordance with the High Court tariff.

GAMBLE J