

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO. 1110/2013

In the matter between:

PEACE HASSAN MTOLA

PLAINTIFF

AND

THE MINISTER OF POLICE

DEFENDANT

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JUDGMENT

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DAWOOD J:

1. The Plaintiff herein sued the Defendant for damages arising out of his alleged unlawful arrest and detention. The Defendant admitted that the Plaintiff was arrested without a warrant but pleaded that the arrest was lawful.

2. The Defendant led evidence in support of his contention that the arrest was lawful.

a) The Defendant called **Constable Sinethemba Sigodi** as it's first witness. His testimony was briefly as follows:-

- (i) He was employed as a Constable at the Community Services Centre at the Mandela Police Station.
- (ii) On the 8<sup>th</sup> of November 2012, Mr Simon Banda laid a charge of robbery against the Plaintiff alleging that the Plaintiff had come to his room in the company of Simon's ex-girlfriend and threatened him saying that there was going to be some spilling of blood here today and the Plaintiff showed Banda a knife that was on the Plaintiff's waist.
- (iii) Banda further alleged that the Plaintiff had taken all his clothing and other listed items.
- (iv) Banda confirmed that the Plaintiff was known to him and had lent Banda monies.
- (v) Banda upon being requested furnished him with the Plaintiff's telephone number.
- (vi) The Plaintiff was called by him and requested to come to the charge office which the Plaintiff duly did.
- (vii) He asked the Plaintiff a few questions and the Plaintiff admitted taking the items and stated that he was not going to return them to Banda since he had taken them because Banda owed him monies and he was not going to return them until he was paid his monies.
- (viii) It was at that stage that he arrested the Plaintiff and put him into the cells on a charge of common robbery.
- (ix) He detained the Plaintiff because robbery is a serious offence that warrants further investigation.

- (x) He opened the case docket and the matter was to be taken to the detective unit and he was at that stage unaware of who the detective of the case was.
- (xi) Under cross examination he confirmed that the crime was not committed in his presence nor did he see the Plaintiff in possession of a knife.
- (xii) The Plaintiff's version was put to him as follows:-
  - aa) That the Plaintiff went to the complainant's home in the company of Phumeza and goods were taken without any knife being shown or any threats of violence.
  - bb) The Plaintiff upon discovering from Phumeza that Banda was leaving had gone to Banda's homestead in the company of Phumeza and asked him how he was going to pay his loan if he was leaving.
  - cc) It was at that stage that **the Plaintiff told Banda, "let me keep your goods and when you give me my money I will give you your goods" and Banda agreed. (My highlighting).**
  - dd) It was put to him that the Plaintiff had told him about this discussion and agreement.
  - ee) He denied that the Plaintiff told him about any agreement.
  - ff) He stated that he merely asked the Plaintiff whether he had Banda's items and the Plaintiff said that they were in his possession.
  - gg) According to him Mr Banda further had complained that his goods were taken without his consent and he was threatened. He further stated that if the Plaintiff and

Banda had reached an agreement why would Banda come to lay a charge.

- hh) It was put to him that when the Plaintiff explained to him that there was an agreement his response was that he does not enter anywhere on their loan but was concerned about the goods that have been taken away and that the loan was not written. He denied saying that to the Plaintiff.
- ii) He denied that the Plaintiff mentioned the presence of Phumeza. According to him he only questioned the Plaintiff about the goods and the Plaintiff stated that he had taken the goods and was not going to return it.
- jj) He stated that the Plaintiff was informed of his constitutional rights prior to the arrest and detention.
- kk) He conceded that he did not consult with the witnesses mentioned because he was satisfied with regard to all the elements of the crime from Mr Banda's statement and it was for the investigator to interview witnesses and consider the issue of the knife during the course of further investigations.
- ll) This was sufficient for him at that stage since the Plaintiff himself had also admitted taking the goods and was refusing to return it.
- mm) Aside from the knife, he considered the issue of the threat of spilling of blood and the taking of goods without the owner's consent or agreement as serious issues.

- nn) He stated that the issue of the witness would be an issue for the court to assess in conducting the trial and was not necessary for the purpose of arrest.
- oo) It was put to him that the Plaintiff was released on the 12<sup>th</sup> of September 2012 without appearing in court and when the Plaintiff was released the statements from the Plaintiff and Phumeza were available and it turned out that the statement by Banda was false.
- pp) He stated he had no knowledge of what transpired after he had arrested and detained the Plaintiff or why Banda would lie to him that he had been robbed.
- qq) He stated that he was satisfied that the elements of the crime were clear and it was alleged by Mr Banda that the person had a weapon, he was not going to conduct a trial at the charge office by questioning witnesses.
- rr) It was put to him that Phumeza was visited by the police at **14H30 on the same day of the arrest of the Plaintiff** and she told the Police that no violence or threats were used and that the goods were handed over by consent.  
(my emphasis)
- ss) It was put to him that the police acting reasonably would have phoned the ex-girlfriend to verify the truthfulness of the statement.
- tt) His response was that there was a list of stolen items and Banda's explanation was sufficient. The rest would be the duty of the investigating officer to investigate.
- uu) It was put to him that the Plaintiff should have been brought before court at 11am on Monday at the latest and that did not happen.

vv) He stated that he is unaware of this as this was the duty of the investigating officer as he last saw the Plaintiff when he arrested him and he usually takes persons to court the following day with matters that he deals with like shoplifters, he does not know how robberies are investigated but that they should be brought to court within 48 hours and re-iterated that his arrest was lawful since he was satisfied that the complainant was honest.

b) The next witness was **Mhangabezi Mbarhane** who was the investigating officer in the matter.

- (i) According to him he received the docket on a Monday afternoon and he consulted with the Plaintiff and obtained his statement and discovered that there were other statements that needed to be obtained. He then perused the docket and decided to release the Plaintiff on warning with the intention of obtaining all the documents and he then sent the docket for decision by the public prosecutor for decision and the prosecutor declined to prosecute.
- (ii) It was put to him that the Plaintiff made a written statement on the 8<sup>th</sup> of November 2012 wherein he stated that he did not have a knife in his possession on the 7<sup>th</sup> of November 2012 and that no violence was used.
- (iii) He got the goods on the understanding that he would keep it until the money he had loaned was repaid to him.
- (iv) His response was that he did not dispute that and as the investigating officer he sometimes makes a decision to first collect the evidence **before charging a person.** (my emphasis)

- (v) He stated that he would have arrested an accused person on the basis of the statement of the complainant only without obtaining a statement from a witness.
- (vi) It was put to him that Phumeza would state that the Plaintiff did not have a knife when they went to the complainant's premises and no violence was used. There was an agreement between the Plaintiff and the complainant that the goods would be kept until the loan was repaid.
- (vii) He stated that he could not dispute that and he had taken her statement after he received the docket on the Monday.
- (viii) It was put to him that he must have already been in possession of her statement that is why he made the recording "*it appears that the complainant lied to the police that he was robbed.*"
- (ix) His response was that he took her statement on the 14<sup>th</sup> of November 2012 and the entry he made on the 12<sup>th</sup> of November 2012 is something he thought about himself.
- (x) It was put to him that Phumeza was visited on the 8<sup>th</sup> of November 2012 by the police in connection with this matter. He stated that he could not dispute that but he was not the person who visited her.
- (xi) It was put to him that the complainant had told Phumeza that he was coming with the police to identify her.
- (xii) He stated that she may have made a statement but it may not have been in writing and it was not in the docket. It was only the complainant's statement and the stolen items that were in the docket. He only obtained her statement on the 14<sup>th</sup> of November 2012. The Plaintiff had told him his version prior to him releasing him.

- (xiii) According to him if the Plaintiff had given him his version and the complainant his, he would have released the Plaintiff on warning and did his investigations.
- (xiv) He sometimes prefers getting an opinion from the prosecutor prior to charging a person but that an arrest is dealt with differently from investigations or dealing with the docket.
- (xv) It was put to him that the Plaintiff was arrested at 11am on the 8<sup>th</sup> of November 2012 and released at 18H00 on the 12<sup>th</sup> of November 2012.
- (xvi) He stated that he did not dispute that and that the occurrence book would confirm the times.
- (xvii) He stated that he does not know why the Plaintiff was not brought before court on Friday, he only received the docket on Monday afternoon and was told that someone had been arrested.
- (xviii) He did not have an explanation as to why it was not attended to from the Friday until the Monday.
- (xix) According to him all the dockets are taken by the members on a Friday to Savoy and allocated to persons.
- (xx) **He conceded that the 48 hours within which an accused person had to be brought to court had expired. (My emphasis).**
- (xxi) He conceded that the Plaintiff was not brought before a court of law and that this purpose of arrest was not attained.
- (xxii) According to him the investigation is done by the investigating officer, the arresting officer arrested on the basis of the allegation by the complainant that the Plaintiff had robbed and the allegations on the statement was sufficient to arrest for robbery because the person was threatened verbally

that there would be shedding of blood and the pointing of the knife.

- (xxiii) He confirmed that it was his duty to bring the Plaintiff before a court of law and he failed to do so because he only received the docket on the Monday afternoon and central police also had a responsibility to ensure that a person is charged because they know when a person arrives there and they failed to do so.
- (xxiv) According to him he would have arrested the plaintiff but not detained him, he would have warned him and released him because the explanation on the statement was not adequate he would want more statements.
- (xxv) It was put to him that Phumeza was visited by the police on the 8<sup>th</sup> of November 2012 and that she was told on the 9<sup>th</sup> of November 2012 that she must visit the investigating officer at Savoy but when she went there she was told that the investigating officer was in Elliotdale.
- (xxvi) It was put to him that Phumeza would say that she and the complainant were still in a love relationship but it was not a strong relationship as she had her own boyfriend other than the complainant. He stated that he could not dispute that.
- (xxvii) It was put to him that at the time of his arrest the Plaintiff was married with 4 (four) children and this was the first time he was arrested and detained. That the blankets in the cells were dirty and smelly and the toilet is in the same area where they sleep and eat and was smelly and he had asked him to give him something to confirm that he had been arrested and detained in the police cells. The Plaintiff felt belittled and was

unable to earn a living due to his arrest and detention since he was self-employed.

(xxviii) He did not dispute any of the Plaintiff's versions.

(xxix) He confirmed that he did not obtain a statement from the girlfriend referred to in Mr Banda's statement, he thinks it is because she was not around prior to him taking the docket for decision.

(xxx) He cannot recall what he spoke to Mr Banda about although he is sure that he did call him.

(xxxi) That concluded the Defendant's case.

3. The Plaintiff thereafter called it's first witness:

a) **Phumeza Gladile** who testified as follows:-

- (i) She stated that she was 28 years of age and worked at the spar in Northcrest (Mthatha) in 2012.
- (ii) Banda was her boyfriend and the Plaintiff was his cousin brother.
- (iii) Banda told her that he was leaving for his home and she should come to take her belongings from his place.
- (iv) She asked the Plaintiff if he had heard that Banda was leaving back to Malawi.
- (v) She arranged for a van to collect her fridge and the **Plaintiff asked if he could accompany her because he was owed monies by Banda and wanted to establish when he would be paid back that money. (My emphasis).**
- (vi) According to her it was Banda who suggested that the Plaintiff should take items and keep them until Banda paid for them,

when the Plaintiff questioned Banda about the money owed by him to the Plaintiff.

- (vii) Banda even assisted them in loading it onto the van and they greeted each other as they left, according to her.
- (viii) Banda's girlfriend was also present during their visit.
- (ix) According to her she was called by the Plaintiff **the following day** and he told her that he had been arrested as Banda had told the police that the Plaintiff had broken in carrying a knife. Banda thereafter called her saying he was coming with the police. **(My emphasis)**.
- (x) The police thereafter visited her at her place of work.
- (xi) According to her she asked Banda why he had gone to the police when he had spoken to the Plaintiff and said that he could have his items; and when he has the money he would pay the Plaintiff back and take his items.
- (xii) According to her Banda further told the police that he did not want her to be arrested he only wanted the Plaintiff arrested. The police asked him what would the reason be if they had talked it over. The police were harsh with him and said he was making them work on something that they should not be working on since there had been an agreement.
- (xiii) They left Banda and she went back to work after she told them that there was no break-in and it was all by consent.
- (xiv) According to her she went to Savoy on two occasions after being called by the investigating officer and did not find the investigating officer there.
- (xv) She made a statement to the police after the Plaintiff was released.

- (xvi) She denied Banda's version of events and stated that he agreed most and even assisted them. The goods were handed over peacefully and nicely by consent.
- (xvii) According to her she had no issues with Banda having another girlfriend and she in fact had another boyfriend. He was still her friend and he visited her at work and she had no reason to be aggrieved by his departure.
- (xviii) Under cross-examination she confirmed that she had made a statement to the police and it was read back to her before she signed it.
- (xix) It was put to her that in the statement she referred to Banda being her boyfriend in the past tense using the words "**he was my boyfriend**" despite saying in court that they were still in a relationship despite the fact that she had moved out because he was involved with someone else. According to her she and Banda were last in an intimate relationship in October 2012. Whereas in her statement she said that she left him in September 2012.
- (xx) It was put to her that in her statement she said she had heard rumours that Banda was leaving whereas in court she stated that he told her. She stated that he told her and the police recorded it in incorrectly.
- (xxi) It was put to her that even the Plaintiff had also stated that he had heard rumours. She stated that the Plaintiff had heard it from her but he also did not say that in his statement.
- (xxii) It was put to her that in her statement she had told the police that she was going to collect her belongings and the Plaintiff was going to take property until Banda pays for it.

- (xxiii) She stated that they did go to Banda but it was taken after they talked and agreed. The Plaintiff did not go there to fetch Banda's goods but to fetch his money in the absence of which they agreed that he would take Banda's goods despite it not being recorded in the statement that he was going there to get his monies. Her response was that the Plaintiff was not going there to take, he was going there to talk and the statement is incorrect.
- (xxiv) It was put to her that in the statement it was recorded that after some days she received a report that the Plaintiff had been arrested for robbery.
- (xxv) She initially said yes that is what was said and then said not after some days when she was questioned as to why she did not mention that she was visited by Banda and the police in her statement her response was that she was not asked.
- (xxvi) It was put to her that it was never put to the 1<sup>st</sup> or 2<sup>nd</sup> witness that the Plaintiff had called her on the day of his arrest and her response was that both the Plaintiff and Banda called her and that Banda had gone with the police to her work place.
- (xxvii) In chief she stated that it was only the fridge that belonged to her that was taken by her and under cross-examination she stated that it was the fridge and kitchen utensils, pots etc that belonged to her and stated her reason for not mentioning the pots etc was that she was asked what of importance she had gone to fetch.
- (xxviii) She was adamant that the Plaintiff did not have a knife stating  
*"of course he did not have one he was going with me from his place of work, I don't think he could go to work with a knife."*

- (xxix) She eventually conceded that she did not search him but stated that she knew that he does not carry such things and she never saw him carrying them and that a person carrying a sharp object is visible and he had none. She said that the Plaintiff was wearing a T shirt and she knew him not to be carrying knives.
- (xxx) She was not able to explain why the complainant listed the fridge as one of the items that had been stolen. She was adamant that she was on good terms with Mr Banda and there was no fight or revenge and she was giving him space to be happy.
- (xxxi) Under re-examination she stated that the statement was read back to her in English and that she does not know English despite not mentioning this when she was questioned specifically with regard to the statement and despite the fact that it was evident to the court during the course of her testimony that she responded to questions that were posed in English even before it was interpreted and she appeared to comprehend English quite well.

b) The Plaintiff thereafter testified as follows:-

- (i) That he is 41 years of age residing at Bizana with his wife and has four children aged 3, 8, 11 and 14.
- (ii) According to him he was informed by Simon's girlfriend that he was leaving and **she asked him to accompany her to Simon's house to collect her belongings. (My emphasis).**
- (iii) He was surprised that Simon Banda was leaving without informing him and he took the opportunity to investigate and Simon upon being questioned admitted that he was leaving.

- (iv) When he questioned him about the loan Simon told him that he did not have money but that he would leave his goods with the Plaintiff and collect it when he paid him the money when he came back from Malawi.
- (v) There was no argument between them, the goods were handed over by mutual consent and he took it home.
- (vi) He denied being armed or making any threats to Simon.
- (vii) He was called to the police station and saw Simon there. Simon was alleging that he had used force despite the fact that the night before he had handed over the goods voluntarily and with a good heart.
- (viii) He told the police that it was by mutual agreement but the police did not listen to him and simply said that there was a charge.
- (ix) He told the police that there were four persons present at the scene. Simon, his girlfriend, Phumeza and him and they had reached an agreement that he should keep the goods as security for the money Simon owed him.
- (x) Simon went to his house to collect his goods from the Plaintiff's wife saying that he would withdraw charges if the goods were returned but the Plaintiff's wife refused to give the goods until the court proceedings were concluded.
- (xi) He was arrested on Thursday at about 11am and he was released at about 6pm on Monday after spending the entire weekend in jail without appearing in court.
- (xii) The conditions in prison were traumatic were terrible, with stinking blankets and toilets and he was forced to be incarcerated with persons alleged to be robbers and rapists.

- (xiii) This was the first time that he was kept in custody. He is a self-employed hawker and he also sells traditional medication.
- (xiv) He denied committing any robbery. He lost respect and was defamed and humiliated in the process.
- (xv) He told the police that there were other people that were present to establish whether or not there was violence. They instead just apprehended him and placed him in custody.
- (xvi) Under-cross examination he initially stated that he was told by Phumeza that Banda was leaving and he must accompany her to fetch goods, but thereafter said she told him this the previous day and when his statement was put to him said that he had heard rumours but it had not been confirmed until he asked Banda.
- (xvii) He stated that when he went to the premises Banda asked him in their language why he had brought Phumeza there and he apologised and said that she had requested him to accompany her but he did not know that there was someone in the house.
- (xviii) Banda gave Phumeza her items and there was no altercation.
- (xix) He confirmed his statement when it was read to him by the defendant's representative after stating that it was not read to him by the police.
- (xx) His explanation as to why he did not say that he had accompanied Phumeza was that she was not at the police station and he had also gone there for his money.
- (xxi) He denied that Phumeza told him that she had broken up with Banda saying she kept the break up secret.
- (xxii) He denied that he had the intention of taking Banda's goods before they went to Banda's place despite this being contained in Phumeza's statement to the police. He stated that it might

be true because according to Phumeza she was going there to collect her goods.

- (xxiii) He stated however that he went there with the intention to ask for his money not take the goods. Phumeza is lying according to him, when she states that he was going there to collect the goods.
- (xxiv) He created a long elaborate story as to why Banda would give him the bed and say that he would go and stay with his girlfriend in Ngangalezwe and he could take the goods until he returned and that Banda would have nonetheless left the bed with him for safekeeping so that he would not pay rental whilst he was gone since he was Banda's closest relative.
- (xxv) He was unable to explain why Banda would say that he was robbed or go to his wife asking her to release the goods.
- (xxvi) He admitted that the police asked him to return the goods but he refused as he was not sure that he would get the money that is why he held onto the goods.
- (xxvii) He decided to keep the goods because he would not recover the money and that Banda was using the police wrongfully.
- (xxviii) The police were concentrating on the goods and not about his money according to him. He confirmed that he refused to release the goods.
- (xxix) He admitted that he refused to release the goods and confirmed that the possibility existed that he would have been released had he returned the goods.
- (xxx) He confirmed that they told him that if he did not give back the goods he would be arrested and he elected to state his version in court.
- (xxxi) That concluded the Plaintiff's case.

4. It is necessary to briefly evaluate the testimony of the witnesses called on behalf of the Defendant and the Plaintiff, in order to make credibility findings.

a) The arresting officer impressed me as a credible and reliable witness. He created a very good impression on the court both with regard to his demeanour and his actual testimony. His testimony revealed that he had satisfied himself from the available evidence that an arrest on a charge of robbery was warranted, that is, that the complainant's statement revealed the presence of all the elements of the offence and in addition the Plaintiff admitted that the goods were in his possession. He conceded that he did not obtain statements from the other persons named in the complainant's statement but stated that that was for the investigators. He was satisfied that an offence was committed justifying the arrest and detention of the Plaintiff. He emphatically denied that the Plaintiff told him about any agreement between the complainant and the Plaintiff regarding the goods and stated that he only questioned the Plaintiff about where the goods were and the Plaintiff admitted that the goods were with him and that he refused to return them to the complainant. I accept his version of what transpired between him and the Plaintiff and with regard to what he questioned the Plaintiff on and what the Plaintiff's responses were. He was forthright and honest and did not appear to be attempting to mislead the court.

b) The investigating officer willingly made concessions and stated what he would have done if he was faced with the Plaintiff's version as told to him with regard to what had transpired between the complainant

and the Plaintiff. He would have arrested the Plaintiff but released him on warning until he had concluded his investigations, but that there was sufficient evidence to arrest the Plaintiff on. He would not have charged the Plaintiff prior to concluding his investigations. The Investigating Officer conceded that the Plaintiff was detained in excess of the 48 hours and was released without being brought to court. He was a credible witness.

- c) Phumeza, the Plaintiff's witness was an unsatisfactory witness. There were discrepancies between her evidence in chief and under cross examination as well as between her evidence and the statement she made to the police as well as between her testimony and the version put to the witnesses on her behalf and between her testimony and that of the Plaintiff. Her version that she and Banda were on good terms and were still lovers is clearly a fabrication if one has regard to the fact that she deliberately went to the Plaintiff and informed him that Banda was leaving and went with him to Banda's premises. She was aware that he and Banda worked at the same premises. There would accordingly be no need for her to give him this information knowing that Banda owed the Plaintiff money, unless she intended causing problems. The Plaintiff himself stated that Banda was not expecting Phumeza and even asked him why he had brought her there. That conduct is clearly not in keeping with an individual who has invited someone to come and take her goods and informed her that he is leaving.

Even her version that Banda was the one who agreed to hand over the goods voluntarily is contrary to the version put on behalf of the Plaintiff that it was the Plaintiff's suggestion and accepted by Banda

and not that this was a suggestion by Banda and an acceptance by the Plaintiff as indicated by her and as subsequently testified to by the Plaintiff. This was also contrary to what she had stated in her statement to the police.

I was most unimpressed with her as a witness; she clearly appeared to be fabricating her testimony. She even attempted to distance herself from her statement under re-examination claiming that she did not understand English whereas it was evident during the course of the proceedings that she responded to the questions posed in English even before it was interpreted. This again was an attempt on her part to explain away the discrepancies between her statement and her testimony upon realising that it did not support the version she was attempting to present to court.

I have no hesitation whatsoever in rejecting her testimony and finding her to be an untruthful and unreliable witness who fabricated her version as she went along.

- d) The Plaintiff likewise was an unimpressive witness whose testimony in chief differed from his evidence under cross examination and between the version put on his behalf and his actual testimony and that of his witness.

It was evident that he was tailoring his evidence to deal with the questions posed. He was a pathetic witness and his version regarding Banda voluntarily handing over the goods in circumstances where Banda not only reported the matter to the police but also went to obtain the return of the goods from the Plaintiff's wife is highly improbable. Further if one has regard to the Plaintiff's testimony that he was not going to return the goods because his money was not secured despite this being a circumstance that would have prevented

him from being arrested and detained. Favours the findings of a forced removal by means of self-help of goods rather than a voluntary handing over because it is evident that he went there wanting his money or security and if we have regard to Phumeza's statement he went there intending to remove the goods in lieu of repayment of the loan.

His version in the circumstances of this case is improbable. He further was a most unsatisfactory witness. I have no hesitation in rejecting his version as being untrue both with regard to what transpired at Banda's place and at the time of his arrest.

5. Despite my finding that the Plaintiff and his witness were pathetic and unreliable witnesses. I nonetheless need to ascertain:-

- (a) Whether or not the Defendant discharged the onus resting upon it to establish that the arrest and detention was lawful; and
- (b) Whether or not the Plaintiff is entitled to damages for the period beyond the 48 hours detention even in the event of the initial arrest and detention being found to be lawful.

6.

- (a) The Plaintiff and his witness were as already indicated found to be pathetic witnesses. The arresting officer made an excellent impression on the court and his version of events is preferred to that of the Plaintiff where they differ from each other. The issue however is whether or not his arrest and detention of the Plaintiff was justified.

(b) Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 (The CPA) provides.

*“A peace officer may without a warrant arrest any person-*

*i) .....*

*ii) Whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody.”*

(c) The jurisdictional requirements that activate the discretion to arrest in terms of section 40 (1) (b) of the CPA are:-

i) The person effecting the arrest must be a peace officer;

ii) He or she must entertain a suspicion;

iii) That suspicion must be that the arrestee committed a schedule 1 offence; and

iv) The suspicion must rest on reasonable grounds<sup>1</sup>.

(d) There was no dispute with regard to the authority to arrest or that the offence the Plaintiff was charged with fell within the ambit of Schedule 1. It was evident from the argument presented and the nature of the cross-examination that what was in contention was whether or not the arresting officer had sufficient information before him which would constitute reasonable grounds to form a suspicion that justified an arrest. It was argued that considering that the investigating officer would not have charged and detained the Plaintiff that a reasonable officer would not have done so either. It was further argued that the other persons mentioned and being present during the incident ought to have been questioned and statements obtained from them prior to arresting the Plaintiff.

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<sup>1</sup> Duncan v Minister of Law and order 1986 (2) SA 805 A at 818 G – H; and Minister of Safety and Security v Sekhola and another 2011 (5) SA 367 (SCA) paragraph 6.

(e) The fact that the investigating officer would have acted differently does not mean that the actions of the arresting officer were unreasonable.

(f) The investigating officer based his hypothesis on the Plaintiff's version presented to him that an explanation was furnished that there was an agreement between the parties so there were two mutually destructive versions presented to the arresting officer whereas the arresting officer stated that nothing was told to him about any agreement and nor did he interrogate the Plaintiff in this regard but merely asked if he had the goods which was confirmed by the Plaintiff and the Plaintiff refused to return the goods, which version I accepted.

The arresting officer stated in fact that there was sufficient information to arrest and the investigating officer stated that on the complainant's statement he would have also arrested. The arresting officer merely had to form a suspicion based on reasonable grounds that an offence had been committed. The complainant's statement provided reasonable grounds to justify the arrest according to the arresting officer and the investigating officer confirmed this as well. The Plaintiff's conduct confirming that he indeed had the goods and his refusal to return the goods furthered the arresting officer's suspicion.

The requirements as set out in the authorities have been met in that his suspicion was based on reasonable grounds and he was justified in effecting the arrest without a warrant in the circumstances of this case.

(g) The Plaintiff's arrest and detention is accordingly found to be lawful.

7. It is common cause in this case that the Plaintiff remained in custody until 6pm on the Monday in excess of the 48 hour time period having been arrested at 11am on Thursday.

a) Section 50 (1) (d) (iii) of Act 51 of 1977 provides that: “at a time when the arrested person is outside the area of jurisdiction of the lower court to which he or she is being brought for the purposes of further detention and he or she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court.”

b) In **Geldenhuijs**<sup>2</sup> it is provided that, the 48- hours period is considerably extended by Section 50(1)(d)(i)-if the 48-hours period expires-

(i) On a day which is not a court day, or on any court day after 4pm(16:00), then the said period is deemed to expire at 4pm(16:00) on the court day (this means that if the person is arrested on a Wednesday evening, the 48 hour period is deemed to expire the next Monday at 4pm(16:00);

c) Section 50(1)(c) stipulates that an arrested person shall be brought before a lower court as soon as reasonably possible but not later than 48 hours after his arrest in those cases where he is not released as provided for in sub-s (1)(c). Where the 48-period expires outside ordinary court hours or on a day which is not an ordinary court day, the arrested person shall be brought before a lower court not later than the end of the first court day (1) (d).

d) In terms of Section 50(2) (a) and (b) of the Act 51 of 1977 it is provides that:

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<sup>2</sup> et al Criminal Procedure Handbook pages 127-128, 10<sup>th</sup> edition

*“For the purpose of this Section-*

*(i) “ a **Court day** “ means a day on which the court in question normally sits as the court and “ordinary court day” has the corresponding meaning; and*

*(ii) “**ordinary court hours**” means the hours from 09:00 until 16:00n on a court day”*

e) Moreover, **DUNCAN v MINISTER OF LAW AND ORDER**<sup>3</sup>  
provides that

*“although the period of 48 hours for which an arrested person could lawfully be held before he was brought to court has remained unchanged, that period has been extended in certain circumstances to cater for the inevitable administrative difficulties which arise because courts do not now sit on Saturdays and never did sit on Sundays and public holidays for the conduct of their normal business.”*

*Thus, I infer that the time limit must be adhered to except in the circumstances adumbrated in Section 50(1) (d) of the Act 51 of 1977 and this is confirmed in **Mtungwa 1931 TPD 466**, where an accused escaped from custody after having been arrested without a warrant and after he had been detained for more than 48 hours. The court held that the accused could not be convicted of the crime of escaping from custody.”*

f) In this case the Plaintiff was only released at 6pm and accordingly his detention beyond the statutory 48 hours detention is unlawful and he is entitled to damages for his incarceration beyond that period.

g) It is evident from the provisions of section 50 (1) (d) that it is the period from 4pm to 6pm on the Monday that is considered to be the period that exceeds the lawful period of his detention despite him having been arrested at 11am on the Thursday.

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<sup>3</sup> 1986 (2) SA 805 (A) at 808 B-D

- h) However in considering an appropriate amount to be awarded to the Plaintiff for damages I am alive to the dictum in **Mashilo and Another v Prinsloo**<sup>4</sup>

*“The matter could have been decided in the court below without resorting to a strained interpretation of s 50(1) (d). The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it could be done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hour expires before or during the weekend. Expedition, relative to circumstances, is what is dictated by the subsection and the Constitution”.*

- i) I am, despite the short period of unlawful detention and in the absence of a legitimate explanation for the failure to bring the Plaintiff before court at an earlier stage, inclined in the circumstances of this case to award the Plaintiff R10 000-00 as damages for the unlawful detention, beyond the lawful period of 48 hours detention.
- j) I am not persuaded that this matter warranted adjudication in the high court and there are no circumstances that have been presented that warrant my exercising my discretion in making an award of costs on a high court scale.

8. In the circumstances I make the following order:

- a) That the Plaintiff’s arrest is lawful and justified.
- b) The Plaintiff’s detention up until 4pm on Monday is found to be lawful and justified.
- c) The Plaintiff’s claim in respect of unlawful arrest and detention until 4pm on Monday is accordingly dismissed.

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<sup>4</sup> 2013 (2) SACR 648 (SCA).

- d) The Plaintiff's detention beyond the 48 hour period, that is, from 4pm to 6pm on Monday is unlawful and wrongful.
- e) The Plaintiff is awarded the sum of R10 000-00 as damages for the period of his detention that is found to be unlawful.
- f) The Defendant is directed to pay the Plaintiff's cost of suit on the appropriate magistrate's court scale.

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DAWOOD J

JUDGE OF THE HIGH COURT

EASTERN CAPE LOCAL DIVISION: MTHATHA

Date heard: 29 January 2015

Date delivered: 19 March 2015

FOR THE PLAINTIFF:

MR KUNJU

INSTRUCTED BY:

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