FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMTOWN

PARTIES**:** **MZWANDILE GALI obo S G & CAROLINE GALI VS MR KOK & MINISTER OF SAFETY & SECURITY**

CASE NO: CA115/2006

- Registrar:
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: 7 AUGUST 2009

DATE DELIVERED: 27th AUGUST 2009

JUDGE(S): KROON J., PILLAY J.

LEGAL REPRESENTATIVES: –

Appearances:

(3) for the Plaintiff(s)/ Applicant(s)/Appellant(s): ADV. B. DYKE

(4) for the Defendant(s) /Respondent(s): MR. SIMOYI, ADV. BEYLEVELD

Instructing attorneys:

(b) Plaintiff(s)/Applicant(s)Appellant(s): NETTELTONS ATTORNEYS, P O BOX 449, GRAHAMSTOWN (MR HART)

(c) Defendant(s) / Respondent(s): STATE ATTORNEY, 29 WESTERN ROAD, CENTRAL, PORT ELIZABETH, REF: 952/2003/

(d)

(e) E ; R/D 847780576 ZA

CASE INFORMATION -

(ii) *Nature of proceedings*: CIVIL

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: **CA115/2006**

In the matter between:

MZWANDILE GALI obo S G	First Appellant
CAROLINE GALI	Second Appellant

And

MR KOK	First Respondent
MINISTER OF SAFETY & SECURITY	Second Respondent

JUDGEMENT

Pillay J:

This is an appeal against the judgement of the magistrate's court in Port Elizabeth. The first appellant brought the action on behalf of his minor son, S G ("the minor"), who was 16 years old at the material time. The two appellants claimed damages from the two respondents arising from an alleged unlawful arrest and unlawful detention of the minor.

The merits and quantum had been separated by agreement. While confusion about this agreement was suggested during the argument on appeal (and such confusion is also apparent from the record), counsel in the end correctly argued the appeal on the basis that there had been a separation of the issues.

First appellant's case is that on the 31 March 2003, his wife, the second appellant, was at home with the minor son, S. About five members of the South African Police Services ('the police'), including the first respondent, arrived at the house seeking the first appellant. It was evident that the first appellant was not at home and second appellant informed the police that the first appellant was at work. She refused to go with them to show them where he worked though she had told the first respondent, who seemed to be in charge of the group, that he worked at Portnet, at the harbour. She was asked to go, presumably with them, and point her husband out. She refused to do so as it was not her duty to do so. The first respondent then took hold of the minor saying that he would then have to do so. They then left with the minor and returned him home after a period. They had proceeded to the harbour area with the minor in their motor vehicle. The minor was taken from his parents' home without his mother's permission and against his will.

The second appellant's case is based on an alleged trauma and effect of witnessing the arrest of the minor child as well as the concern she had as to his well being while in the custody of the police.

It is common cause that the minor did direct the police to his father's workplace while with them in the motor vehicle. It is also common cause that the first appellant was indeed arrested as a result.

At the end of the plaintiff's case, the respondents (defendants) applied for absolution from the instance. This was, in effect, granted.

The aforementioned facts are, in my view, germane to this appeal. Reference to other issues and evidence does not seem to be necessary in the light of my approach in coming to a decision.

I think it would be apt to quote the following parts of the magistrate's judgment to illustrate the reasoning he adopted in coming to his decision:

'Firstly it is common cause that members of the South African Police Services were at the home of second plaintiff. It is also common cause that those members took away first plaintiff with the aim of first plaintiff showing them the place of employment of his father. As a result of pointing out the place of employment of first plaintiff's father (sic), the latter was arrested. First plaintiff was then taken back to his home after finishing his 'duties'. From these facts one is entitled to think that second plaintiff was aware that first plaintiff was taken by the police in order to show them the place of his father's employment. It is therefore impossible for second plaintiff to think that first plaintiff was arrested. Mr Hornigold quoted section 39 of the Criminal Procedure Act 51 of 1979 where it is said the person is detained in custody. According to the evidence before court, the first plaintiff was in the police motor vehicle and never taken into custody. It follows therefore that first plaintiff was never arrested and detained as alleged by second plaintiff".

Further down in the judgment, the magistrate states:

“In fact first plaintiff went to Portnet with the police fully knowing that his father was going to be arrested. I do not see any reason why would the first plaintiff have bad dreams about the arrest of his father. As pointed out by Mr Modokhwe that (sic) no evidence was led regarding the trauma suffered by the two plaintiffs. The court is not in a position to know whether there is a connection between the trauma allegedly suffered by the two plaintiffs and the arrest of Mzwandile Gali and the taking away of the first plaintiff by first defendant and his colleagues. It follow that both plaintiffs case failed. “

In effect the magistrate granted absolution from the instance with costs.

I think it is necessary, in order to avoid any confusion, to point out that the magistrate and, it seems, the legal representatives also, referred to the minor child, on whose behalf his father Mzwandile Gali filed the claim, as the first plaintiff. It is in fact Mr Mzwandile Gali who should have been referred to as the first plaintiff. In so far as it is necessary, I have attempted to refer to the parties in correct context in this judgement.

In analysing the magistrate’s reasoning it is necessary to address the notion of arrest.

‘ARREST’ has been discussed on many occasions in a number of academic works and in authoritative case law. All of them have consistently defined it in terms of the restriction of an individual’s freedom.

In their work 'Commentary on the Criminal Procedure Act', Du Toit *et al* define arrest as constituting "a serious restriction of the individual's freedom of movement, and can also affect his dignity and privacy'. The New Shorter Oxford dictionary (1993 edition) defines arrest in this context as the 'act of catching and holding, seizure'.

The Collins Thesaurus, published in 1995, defines arrest as, *inter alia, '*apprehend, capture, seize, take into custody, take prisoner'. Prisoner in turn is contextually defined as 'captive, detainee, hostage, internee'.

Clearly, from these definitions, one is arrested from the time one is taken by and falls under the control of one's arrestor.

Section 39 reads as follows:

> "(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody……. by forcibly confining his body.
>
> (2) The person effecting the arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest, or in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

(3) The effect of the arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody".

In referring to section 39 of the Criminal Procedure Act, the magistrate reasoned that the minor was told why he was being taken away by the police and that he was never detained but was in a motor vehicle with the police and therefore he was never arrested and detained.

The magistrate clearly regarded sub-sections (2) and (3) as postulating essential formalities which are necessary to complete the arrest.

In Tsose v Minister of Justice and Others 1951 (3) SA 10 (A) at 17 C-D, Schreiner JA, in following the reasoning in MacDonald v Kumalo 1927 EDL 293 at 311 stated as follows:

"*If the object of the arrest, though professedly to bring the arrested person before court, but is really not such, but to frighten or harass him and so induce him to act in a way desired by the arrestor, without appearing in court, the arrest is, no doubt, unlawful".*

Implicit in this remark is that an arrest is the deprivation of the liberty of the arrestee. This clearly stands alone. This is made clear in Rex v Mazema 1948(2) SA 152 EDLD.

The procedures referred to in subsection (2) and (3) are not essential for effecting a factual arrest. However, the failure to comply with them might render an otherwise lawful arrest invalid.

The magistrate clearly misconstrued the section and adopted the approach that the minor knew all he had to do, when taken, was to fulfil the 'duty' of pointing out his father's workplace, and was therefore not deprived of his liberty.

Furthermore, he seems to have adopted the approach that the detention referred to in section 39 could not have occurred in a motor vehicle. (Presumably he thought it should have been within the confines of a prison or the cells at a police station). Detention is the confinement of a person. It does not have to be in a prison, cell or even a motor-vehicle.

He seems to have overlooked the fact that the act of actually arresting a person can occur without compliance with the attendant formalities. He therefore misconstrued the import of the section and in so doing misdirected himself in concluding that there was no arrest at all. It follows therefore that the consequent detention albeit in the motor-vehicle, would also be unlawful if the arrest was unlawful.

See: Minister of Law and Order, KwaNdebele and Others v Mathebe and another 1990 (1) SA 114 (AD)

It is perhaps also necessary to deal briefly with one other aspect.
The magistrate took the view that the plaintiffs did not lead evidence about the trauma they allegedly suffered and therefore he was not in a position to assess if there was a nexus between the arrest of the appellant and the trauma complained of.

In reasoning that way, the magistrate erred and again misdirected himself because this is an aspect which relates to quantum. It does not play any part in determining whether an arrest occurred or not and whether it was unlawful or not.

The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights SA LTD v Daniel 1976 (4) SA 403(A) and referred to with approval in Gordon Lloyd Page & Associates v Rivera and Another 2001(1)SA 88 (SCA) at 92 (para 2).

In Claude Neon Lights, at 409 G-H, it was stated as follows:
'….(w)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might, (not should, nor ought to) find for the plaintiff.

In Gordon Lloyd Page, at 92J-93A, it was explained that in the ordinary course of events, absolution after the plaintiff's case will be granted sparingly unless it would be in the interests of justice.

In *casu*, it is clear, in the light of the evidence, that the magistrate erred in granting absolution. It seems that when he misconstrued the notion of arrest, the test was destined to be improperly applied.

In the circumstances the appeal falls to succeed and the appropriate step would then be to remit the matter to the magistrate for the further conduct of the case.

It is common cause that only the first appellant appealed against the magistrate's decision. It is not clear why Caroline Gali (second plaintiff) did not appeal.

During the argument of the appeal however, counsel for both parties agreed that it would be fair and just, to regard the second plaintiff as an appellant as well and if this court were disposed to uphold the appeal, to grant an order in favour of both appellants (plaintiffs) along the lines set out in the order at the end of this judgement.

Nothing in this appeal suggests that the usual costs order, that costs follow the event, should not be made.

It is apparent from the record that a substantive application for absolution was made and which was resisted. It would seem fair then to award the costs in regard to that application to the appellants.

In the result,

(a) The appeal succeeds and the magistrate's order is hereby set aside and replaced with the following-

"The application for absolution from the instance is refused with costs, such costs to be borne jointly and severally by the defendants, the one paying, the other to be absolved".

(b) The matter is remitted to the magistrate's court for further conduct thereof.

(c) The respondents are ordered to pay the costs of this appeal, jointly and severally, the one paying, the other to be absolved.

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R. PILLAY

JUDGE OF THE HIGH COURT

I agree

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F. KROON

JUDGE OF THE HIGH COURT