

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 14/41567

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
..... DATE SIGNATURE

In the matter between:

ELAINE AFRIKA

First Plaintiff

**ELAINE AFRIKA obo
NK (I.D. ...)**

Second Plaintiff

**ELAINE AFRIKA obo
AK (I.D. ...)**

Third Plaintiff

**ELAINE AFRIKA obo
LA (I.D. ...)**

Fourth Plaintiff

**ELAINE AFRIKA obo
KA (I.D. ...)**

Fifth Plaintiff

**ELAINE AFRIKA obo
AA (I.D. ...)**

Sixth Plaintiff

and

THE MINISTER OF POLICE

Defendant

J U D G M E N T

MABESELE, J:

[1] The plaintiffs instituted claims against the defendant for general damages arising from the (i) unlawful and malicious arrest and detention of the first plaintiff; (ii) unlawful and unconstitutional detention of the second and third plaintiffs and (iii) violation of the constitutional rights to parental care of the fourth to sixth plaintiffs. The total amount claimed is R1 950 000,00.

[2] The first plaintiff is the mother of the second to sixth plaintiffs. She is acting both in her capacity and on behalf of the second to sixth plaintiffs. The second and third plaintiffs are twins. They were one year and six months old on 14 August 2014 when the first plaintiff was arrested and detained. The fourth and fifth plaintiffs were twelve years and seven years old, respectively, on the said date and the sixth plaintiff was six years old.

[3] It is common cause that on 14 August 2014, at about 20:00, and at Kliptown, Johannesburg, the first plaintiff and her husband were arrested for theft by the police, without a warrant. The second and third plaintiffs, due to their ages, were taken together with their mother to prison. According to the first plaintiff, the fourth to sixth plaintiffs were left home alone following her detention and the detention of her husband. The first plaintiff was released

from detention on 15 August 2014 at the Kliptown Magistrate's Court cells at about 12:30.

[4] At the commencement of the trial counsel for the defendant conceded that the arrest and detention of the first plaintiff were unlawful. It was denied, however, that the arrest and detention were without probable cause or malicious.

[5] The case for the second and third plaintiffs is that their detention with their mother was unlawful and unconstitutional as it violated their rights:

- (i) not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;
- (ii) to be treated in a manner and kept in conditions that take into account the child's age;
- (iii) to be kept separately from adults;
- (iv) to be protected from maltreatment, abuse or degradation.

[6] The case for the fourth to sixth plaintiffs is that the actions of the police in arresting their parents violated their constitutional rights to:

- (i) parental, family or appropriate alternative care;

(ii) be protected from maltreatment, neglect, abuse or degradation;
and

(iii) not to be subjected to practices that could endanger their well-being, physical or mental health.

[7] Three witnesses, including the first and fourth plaintiffs, testified in the plaintiffs' case and three witnesses testified on behalf of the defendant.

[8] LA is the fourth plaintiff. She is the daughter of the first plaintiff. She is currently 14 years old. She was twelve years old in 2014. In the same year she was staying together with her parents, namely; first plaintiff and her husband.

[9] Her evidence is that on 14 August 2014 she found her father home when she came back from school. It was around 15:00. She expected the first plaintiff back home from work at 18:00. The first plaintiff was supposed to bring them food but never showed up. At around 19:00 she had a knock at the door whilst she was watching a television with her siblings in the dining room. After her father had opened the door she heard the police accuse him of stealing a shack. Thereafter the police left the house with him. She remained behind with four siblings. Since they were alone in the house after the arrest of her father she locked the doors for their safety. Later that night two men unknown to her arrived at the house to fetch the twins. She was not told where the twins were taken to. After the departure of the men with the twins

she sat with her siblings in one room. The children were crying due to hunger. They never slept that night. She was frightened. None of them went to school the following day. On the same day, at 14:00, her grandmother and aunt visited them. After they had realised that she and her siblings were left alone they took them to their aunt's residence to get food. Later on her siblings were taken back home and she remained behind. She disputed the version of the police that the first plaintiff was arrested at home and took the twins with her when the police left the house with her.

[10] Mrs Ethel Afrika, the mother of the first plaintiff, was on her way home from work when she received a message regarding the arrest of the first plaintiff. It was in the morning. When she reached home she phoned her other daughter, Teboho, to fetch her and take her to the residence of the first plaintiff to see what was happening there. Teboho arrived at 12:50. Thereafter both of them drove to Klipspruit. On arrival at 14:00 they found the children of the first plaintiff crying. When asked about the whereabouts of the twins, LA informed them that men unknown to her came and took them.

The children were complaining of hunger. Since there were no adults present she and Teboho decided to take the children to the residence of Teboho. On arrival at the said residence they prepared food for the children. They took the children back home late that afternoon after they had received information that the first plaintiff was home. She did not spent much time with the first plaintiff or ask her anything because she was rushing to work.

[11] The first plaintiff testified that in the year 2014 she was staying in Klipspruit with her husband and five children, including twins. Her father died in 2009, followed by her husband who died after 2014. In 2014 she was employed as a casual worker by an organisation known as Maphelo Skills Development. Her working hours stretched from 11:00 to 18:00.

[12] On 14 August 2014 she left home to work at about 10:00. When she knocked off at 18:00 she went to the shop to buy bread and chips for the family because she had already told her husband not to cook for supper. She received her salary on that day in an amount of R400,00. After buying food she walked home. Whilst on her way home she was stopped by a police vehicle. Two police officers came out and informed her that they were arresting her for theft. The police did not identify themselves. After she was informed about the purpose of the arrest she was handcuffed and put inside the police vehicle wherein she found her husband and a man who it was said was a complainant. The police ignored her plea to take her home to breastfeed her twins.

[13] When they arrived at the Kliptown police station she explained to the police that she did not steal a shack as alleged and that it was bought by her husband. She was locked in the holding cell at about 21:00. Whilst in the cells she requested to see the station commander to inform him or her about her twins who were left home without food. She wanted to breastfeed them. After she had made a request the twins were fetched from home to enable her to breastfeed them. The twins did not have extra clothes or napkins when they

were brought to her in the cell. She sat on the bench holding the twins on her arms the whole night since she was not provided with the bed for the twins to sleep on. The twins were restless and cried the whole night. She confirmed that she was released from detention on 15 August 2014.

[14] Mr Ngwenya testified that on 14 August 2014, at about 20:00, he arrested the first plaintiff and her husband at their residence for theft after they were identified by the complainant who was in his company. Present also, during the arrest, was the police “*informer*”. Besides the first plaintiff and her husband in the house, there was an adult female who introduced herself as Larna Afrika as well as the first plaintiff’s father. After he had informed the suspects of the reasons for arrest he handcuffed the first plaintiff’s husband and put both of them in the police vehicle. Due to the first plaintiff’s insistence to take the twins with her he asked the informer to help the first plaintiff carry the twins. Thereafter he drove the suspects and the twins to the police station. He did not see other children in the house on that day. He testified that in the event that there were children present, they were under the care of Larna Afrika and the father of the first plaintiff. On arrival at the police station he left the suspects and the twins under the care of two police officers in the guardroom. He testified under cross-examination that he arrested the first plaintiff and her husband after he had read the statement made by the complainant.

[15] Mr Gerald Feldman is a member of the Crime Prevention Forum ("*CPF*"). He was still a member of this forum in 2014. Members of this forum assist the police with curbing crime in the various communities.

[16] On 14 August 2014, in the afternoon, he accompanied police officer Ngwenya to the residence of the complainant in Klipspruit. The complainant had opened a case of theft of his shack. On arrival at the complainant's residence the complainant took them to the residence of the first plaintiff and identified the first plaintiff and her husband as suspects. The first plaintiff's aunt and father by the name of "*Zakes*" were present and the father greeted him. He was sick in bed. He testified that when the first plaintiff and her husband were placed under arrest the first plaintiff insisted on taking her twins with her to the police station despite a plea by her aunt, Larna, to leave the children with her. He disputed the version of the first plaintiff that she was arrested in the street. He did not see other children in the house. He testified that he knows the first plaintiff's father and the whole family well. He did not dispute LA's version which was that she and her two siblings were present in the house when her father was arrested.

[17] Mrs Sylvia Bham is a police captain in the South African Police Services. She is stationed at Diepkloof police station. In 2014 she was stationed at Kliptown police station. On 14 August of the same year, and at 23:00 she visited the cells. In the cells she found five women and a child. She never saw the twins in any of the cells. However, she agreed that the cell register which she signed that night had the names of the first plaintiff's twins.

Since it is common cause from the evidence of the arresting officers and the plaintiff that the latter and her twins were at the police station together on the night of 14 August 2014, although they differ on how the plaintiffs got there, it is beyond dispute that the first plaintiff was locked in the cell with her twins. Mrs Bham testified that prison regulations prohibit detention of minor children in the cells.

[18] In closing arguments counsel for the plaintiffs argued that the plaintiffs have made out their case as stated in the particulars of claim. He argued that even though the defendant admitted that the arrest and detention of the first plaintiff was unlawful, the arrest was without probable cause in that the arresting officer went to arrest the first plaintiff despite the fact that the complainant mentioned in his statement which the arresting officer had read, that his shack, which it was alleged was stolen by the first plaintiff and her husband, was found by the complainant on someone else's property.

[19] According to the plaintiffs' counsel the arresting officer should have proceeded to house 85 Judia road, Klipspruit West, where the shack was erected and made enquiries instead of arresting the first plaintiff who was not in possession of the said shack and had denied stealing the shack. I agree and conclude that in addition to the unlawful arrest and detention of the first plaintiff the arrest and detention were malicious. This brings me to the issue of the rights of the second the sixth plaintiffs, alleged to have been violated by the actions of the police.

[20] Section 28(1) of the Constitution¹ provides that every child has the right

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- (i) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (ii) to be protected from maltreatment, neglect, abuse or degradation;
- (iii) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may have be detained only for the shortest appropriate period of time, and has a right to be kept separately from detained persons over the age of 18 years and treated in a manner, and kept in conditions that take account of the child's age. Subsection (2) provides that a child's best interests are of paramount importance in every matter concerning the child.

[21] Detention of a child as a measure of last resort was emphasised in *Raduvha v Minister of Safety and Security and Another*² wherein the Constitutional Court upheld the appeal declaring the arrest and detention of the child who was an applicant, unlawful, in that they were in violation of her constitutional rights in section 28(1)(g) and section 28(2) of the Constitution.

¹ 108 of 1996. See also the provisions of sections 6 and 7 of the Children's Act, 38 of 2005.

² [2016] ZACC 24.

[22] Counsel for the defendant argued that although the detention of the first plaintiff was unlawful same cannot be said about the second and third plaintiffs because they were in custody of the first plaintiff who insisted to be with them so that she could be able to breastfeed them. Counsel acknowledges the fact that the first plaintiff has the right not to be detained unlawfully and her unlawful detention violated her rights, including rights to dignity and freedom, and is accordingly entitled to claim damages. Counsel argue, however, that the second and third plaintiffs, whose rights to dignity were equally violated due to the conduct of the police in unlawfully arresting their mother, are not entitled to damages. This argument is misplaced. Where the detention of the mother or guardian of the child is in violation of her constitutional rights and unlawful it follows that the rights³ of the minor children who are detained with her or are in her custody are equally violated and their detention is unlawful. Therefore they are entitled to claim damages that may be proved. Even if the detention of the mother or guardian may be lawful, the detention of the minor children with her shall be unconstitutional, if is in violation of certain provisions of section 28(1) of the Constitution, as in the present case where the second and third plaintiffs were kept in the same holding cell with their mother and other persons over the age of 18 years, as per the cell register dated 14 August 2014.

[23] There are two mutually destructive versions in so far as they relate to the positions of the fourth to sixth plaintiffs after the arrest of their parents. On the one hand the plaintiffs testified that the fourth to sixth plaintiffs were left

³ e.g. right to dignity

alone in the house after their father was arrested at home and their mother in the street not far from home. On the other hand the version of the police officers is that both the suspects were arrested at home and there were other elderly people present during the arrest.

[24] The correct approach to be adopted when dealing with mutually destructive versions was briefly set out in *National Employers General Insurance Co Ltd v Jagers*⁴ wherein the following was said:

'... Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[25] This approach was approved in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others*⁵ wherein the following was said:

'The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows: To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities ... As to (c) this necessitates an analysis and evaluation of the

⁴ 1984 (4) SA 437 (E) at 440E-G

⁵ 2003 91) SA 11 (SCA) at 14I-15C

probability or improbabilities of each party's version on each of the disputed issues ...'

[26] When one consider and analyse the evidence of the plaintiffs and their witness, entirely, in so far as it relates to the arrest of the first plaintiff and the positions of the fourth and sixth plaintiffs after the arrest of their parents (first plaintiff and her husband) it becomes apparent that the evidence was carefully planned to create a believable story that the events took place as told by the witnesses. The witnesses sought to achieve, without success, corroboration in their evidence in order to demonstrate that their evidence is true and accurate and therefore acceptable, and that the evidence advanced by the police is therefore false or mistaken and false to be rejected. What follows below demonstrates this point.

[27] According to LA the first plaintiff was not arrested at home and the second and third plaintiffs were taken away from home by men unknown to her after her father was arrested. She and her two siblings spent the whole night without parental care and food. Her version with regard to the arrest of the first plaintiff and removal of the second and third plaintiffs from home is corroborated by the first plaintiff who testified that she was arrested in the street and taken to the police station. After she was locked up in the holding cell she requested that the police fetch the second and third plaintiffs from home in order for her to breastfeed them. Sadly, though, the evidence of these witnesses is contradicted by the unquestionable documentary evidence in the form of a cell register which was presented by the plaintiffs' own

counsel to the police officer Bham during cross-examination. The register clearly shows that the first, second and third plaintiffs and their father were all admitted into the police holding cell at 20:45, which corroborates the evidence of the police that the first plaintiff was arrested at home and taken to the police station together with the second and third plaintiffs. That documentary evidence remained unchallenged. In fact the plaintiffs' counsel relied on it to show that the second and third plaintiffs were locked in the same cell with the first plaintiff and not as testified by Mrs Bham, that there were no baby twins in the cells. Therefore, the evidence of the first plaintiff and her daughter LA, is unreliable. Moreover, it is improbable that the police would handcuff, from the back, a defenceless woman in public as alleged by the first plaintiff, on a mere suspicion of theft of a shack. In view of the unreliability of the evidence of these witnesses I am unable to accept the evidence of the first plaintiff that her father died before 2014 and could not have been around on 14 August 2014. In the same breathe, I reject the evidence of Lesego that she and her siblings were left home alone after her parents were arrested.

[28] The evidence of Mrs Ethel Afrika is not persuasive and creates doubt as to whether she ever visited the house of the first plaintiff in the morning of 15 August 2014. The reasons are as follows: She testified that after she had heard the news about the arrest of the first plaintiff she rushed to the latter's house because she was worried about the children. On arrival she was informed about the missing baby twins. Interestingly, she never took any steps to look for them. Surely, any reasonable person in the position of Mrs Afrika would have reported the incident to the police. After she had offered

other children food, according to her, she went back to the first plaintiff's house and found the plaintiff home with the babies. Again, she never enquired from the first plaintiff about the reason for her arrest and how it came about and whether she had got hold of the babies who were reported to her to be missing. Therefore, I am unable to accept her evidence as reliable, that she visited the house of the first plaintiff on 15 August 2014.

[29] On the other hand the police, in particular Mr Feldman, were impressive witnesses. As stated earlier, their evidence that the first plaintiff was arrested at her house and took the baby twins with her to the police station is corroborated by the prison cell register which shows that the three of them were admitted into the holding cell at the same time. For this reason, I find no reason not to accept their evidence, that although they did not see other children in the house save the baby twins, there were two elderly persons present in the house when the first plaintiff was arrested. The said persons are known to Mr Feldman as the first plaintiff's aunt called Larna and her father "Zakes". Therefore, the first plaintiff has failed to establish that the police violated the rights of the fourth to sixth plaintiffs when arresting the first plaintiff and her husband.

[30] I now turn to the issue of damages for unlawful and malicious arrest and detention of the first plaintiff and unlawful detention of the second and

third plaintiffs, bearing in mind the primary purpose of damages as stated in *Minister of Safety and Security v Tyulu*⁶ as follows:

'In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law ...'

The court gave a warning that although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The suggested correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.

[31] The prisons or correctional centres are not homes. Even though our Constitution guarantees the rights of those in custody, nothing can substitute home even if the family life is worse than prison. Therefore, it stands to reason that whoever is detained unlawfully suffers unexplainable pain and psychological torture.

[32] The first plaintiff was locked in the holding cell for the whole night with her baby twins who had no extra clothes and napkins and were crying throughout the night. She was holding them in her arms and watched them

⁶ 2009 (5) SA 85 (SCA) at para [26]; see also *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at par [17]

cry but could not do anything because prison was not their home or her house where she could whisper into their ears in the usual manner which they are used to and plead with them to calm down and sleep. The children were restless. At times they stopped crying due to tiredness since they were not provided with a bed to sleep on. Their mother explained:

'they missed food they usually enjoyed at home and I noticed faeces in their napkins but I had no extra napkins. In the morning during breakfast I shared a slice of bread with them.'

That experience undoubtedly brought pain, emotions, *contumelia* and psychological torture to her. The concession made by the defendant that her arrest and detention were unlawful clearly demonstrates that the arresting officer had no respect for human dignity. The arrest and detention was malicious. On the other hand the baby twins were subjected to maltreatment, degradation and pain. The actions of the police are condemned.

[33] Having considered a concession made by the defendant with regard to the unlawful arrest and detention of the first plaintiff and a finding that they were also malicious, as well as the trauma and pain suffered by the first plaintiff, not only as a result of her unlawful and malicious detention for sixteen hours but also the pain of seeing her babies cry the whole night wearing wet napkins full of faeces, I am of the view that an award in an amount of R250 000,00 for her and R100 000,00 in respect of each baby is appropriate.

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

34.1 The defendant shall pay damages to the plaintiffs as follows:

34.1.1 R250 000,00 to the first plaintiff

34.1.2 R100 000,00 to the second plaintiff

34.1.3 R100 000,00 to the third plaintiff

34.2 The first plaintiff shall within three months of payment of the capital amount due to the minor plaintiffs in terms of this order do all things necessary to achieve the establishment of a trust (the trust) and the opening of a bank account of the trust by the trustees, and the plaintiffs' attorneys shall do all things necessary to assist in achieving this establishment of the trust.

34.3 Payment by the defendant shall be made only into a trust of the plaintiffs' attorneys, to be invested and held by them in a separate interest-bearing account in terms of Section 78(2A) of the Attorney Act 53 of 1979, pending the establishment of the trust and the opening by the trustees of a bank account.

34.4 On the establishment of the trust and the opening of a bank account of the trust the plaintiffs' attorneys shall pay the full amount invested in such account as aforesaid, including the accrued interest, into the trust's said bank account.

34.5 The number of the trustees for the purposes of transacting the business of the trust (save the appointment of the trustees) shall be two (2), and such number for such purpose shall not be exceeded or reduced.

34.6 The trustees shall be:

34.6.1 Elaine Afrika (the first plaintiff) and

34.6.2 Standard Bank of South Africa

34.7 The terms and provisions of the trust deed shall not be amended, save with the leave of the court.

34.8 The trustees shall provide security to the satisfaction of the master in terms of Section 9(2)(a) of the Trust Property Control Act of 1988.

34.9 The minor plaintiffs are exempted from furnishing security.

34.10 The trust beneficiaries shall be:

NK (I.D ...)

AK (I.D ...)

34.11 The defendant shall pay costs.

**M M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Heard on : 04 December 2018

Judgment delivered on : 12 February 2019

APPEARANCES:

On behalf of the plaintiffs : Adv F F Opperman

Instructed by : Madelaine Gowrie Attorneys, Johannesburg

On behalf of the defendant: Adv M J Maluleke

Instructed by : State Attorney Johannesburg