IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 19 February 2024

SIGNATURE
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Case no. 6467/2020

In the matter between:

WSL	First Plaintiff
(Case no. 6467/20)	
BCL	Second Plaintiff
(Case no. 6468/20)	

and

THE MINISTER OF POLICE	First Defendant
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Second Defendant
THE PROVINCIAL COMMISSIONER OF POLICE GAUTENG	Third Defendant
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Defendant
THE STATE ATTORNEY	Interested party

JUDGMENT

The judgment and order are published and distributed electronically.

P A VAN NIEKERK, AJ

INTRODUCTION:

[1] On 4 August 2021, Moosa AJ granted an order in terms whereof actions instituted under case numbers 6467/2020 and 6468/2020 were consolidated under case no. 6467/2020. In the consolidated actions the same Defendants were joined and the *causae* of action were based on essentially the same facts. The two Plaintiffs are respectively husband and wife as will be set out more fully *infra*.

[2] The application to consolidate the two actions were launched by the Defendants in those actions and based on the considerations that the underlying issues of fact and law, the witnesses that would have had to testify and the documents that had to be used at trial are common in both actions. The action for consolidation was not opposed by the two Plaintiffs and on that basis the two consolidated actions were enrolled for hearing before this court.

THE PARTIES:

[3] Considering the evidence that was led during the trial and more specifically the fact that the interests of minor children involved may be prejudiced by the identification of the parties involved, this judgment will not disclose facts which may assist in the identification of the Plaintiffs or the minor children to whom reference will be made in this judgment.

[4] In matter no. 6467/2020 the Plaintiff is an adult male who was working and residing in the greater Johannesburg area during the events which led to institution of the action referred to *infra*. For sake of convenience, reference to the Plaintiff in the

action under case no. 6467/2020 will be “the First Plaintiff” and reference to the Plaintiff under case no. 6468/2020 will be “the Second Plaintiff”.

[5] The Second Plaintiff is an adult female and is married to the First Plaintiff. Second Plaintiff is the natural mother of two boys presently respectively approximately 12 years old and 8 years old and is also the mother of two children born of the marriage between the First Plaintiff and the Second Plaintiff. The child who is presently 12 years old was born from a relationship between Second Plaintiff and a male whose identity will not be disclosed. The child who is presently 8 years old was born of a relationship between the Second Plaintiff and another male whose identity will similarly not be disclosed.

[6] Whereas the Four Defendants cited in the heading of this judgment were initially joined, only the First Defendant and Fourth Defendant were represented during the trial and at the commencement of the trial counsel who acted for both Plaintiffs abandoned the *causae* of action framed against the Fourth Defendant and proceeded with claims based on the alleged unlawful arrest and detention of both Plaintiffs against First Defendant.

[7] First Defendant is the Minister of Police in his official capacity.

THE PLEADINGS AND ISSUES IN DISPUTE:

[8] In the particulars of claim in the consolidated actions referred to *supra* the Plaintiffs instituted claims for damages following unlawful arrests and detention of the Plaintiffs as well as claims for damages following alleged malicious prosecution. As referred to *supra* the claims for malicious prosecutions were abandoned at the commencement of the trial.

[9] In the particulars of claim of both the Plaintiffs it was pleaded that the Plaintiffs were arrested on or about 21 October 2017 and detained until 23 October 2017 whereafter the Plaintiffs were released on bail. It was further pleaded in the

particulars of claim that such arrests and subsequent detention were unlawful as a result of which the Plaintiffs suffered damages.

[10] In amended pleas filed on behalf of the Defendants it was admitted that the Plaintiffs were arrested and detained as pleaded but it was denied that such arrests were unlawful because the arrests of Plaintiffs were effected in terms of duly authorised warrants of arrest. At the commencement of the trail and during argument the legal representatives acting on behalf of the parties agreed that the only issue for determination was namely whether or not the arrests of the two Plaintiffs on 21 October 2017 and their subsequent detention following such arrests were unlawful. The court was therefore not called on to decide whether the warrants of arrest were issued lawfully as all claims against Fourth Defendant were withdrawn.

THE EVIDENCE:

[11] Both Plaintiffs testified and they were the only witnesses called in support of the Plaintiffs *causae* of action. On behalf of the Defendants the arresting officer who effected the arrests on 21 October 2017 was called as a witness and the prosecutor who applied for the warrant of arrest also testified. The evidence of the arresting officer who effected an arrest on both Plaintiffs during 2014 was also called and I remark that his evidence did not contribute at all to the issues that needs to be determined, save to confirm the arrests of the Plaintiffs during 2014 to which reference will be made *infra*.

[12] During the evidence of both Plaintiffs they provided a factual account of events which were initiated during or about 2012 when allegations were made against them by one of the paternal grandmothers which implicated the Plaintiffs to have committed the offences of child abuse and assault and which culminated into criminal charges being laid against both Plaintiffs, them being arrested on certain occasions and eventually be found not guilty of all such charges on 19 July 2019. The respective testimony of the two Plaintiffs were materially the same except for

the instances when they were separately arrested or detained, in the sense that they then testified about the specific circumstances effecting each of them individually on those occasions.

[13] During the cross-examination of both Plaintiffs it was never put to them what the evidence of any of the witnesses called on behalf of the Defendants would be, nor did counsel who acted on behalf of the Defendants challenge their respective factual accounts relating to the events from 2012 until 2019 referred to *supra* during cross-examination. Considering the issue in question, namely whether or not the arrests effected on 21 October 2017 on both Plaintiffs and their subsequent detention were unlawful, and considering the fact that this evidence was not challenged save as referred to *infra*, in my view it is not necessary to analyse the evidence in detail, but the following concise summary of the relevant evidence for purposes of the issue in question can be stated as follows:

[i] During 2012 one of the paternal grandmothers of the two children born from previous relationships of the Second Plaintiff, prior to her marriage with the First Plaintiff, made allegations against the Plaintiffs which can generically be referred to as child abuse and assault. The allegations escalated and different authorities became involved, and the complaints were investigated at the request of a state prosecutor by an institution known as “The Teddy Bear Clinic” which assists abused children. The aforesaid allegations led to the two children born of previous relationships of the Second Plaintiff being removed from the care of the Second Plaintiff on 19 May 2014, who at that time was residing with the First Plaintiff, in terms of an order of the Children’s Court and placed under the care of their respective paternal grandmothers. During September 2014 both Plaintiffs were arrested, the First Plaintiff being released on bail a day later without appearing in court and the Second Plaintiff being held in custody for a weekend before she was granted bail by

the court. First Plaintiff was thereafter again arrested at his place of employment on approximately 30 October 2014, which resulted in the First Plaintiff being detained for 13 days at the Johannesburg Correctional Services Centre ("Sun City") whereafter he was then granted bail;

[ii] Following the aforesaid arrests and detention of the Plaintiffs during September/October 2014, they were formally charged with charges in relation to child abuse and assault, and had to appear in court on regular occasions until the 3rd of July 2015, when the criminal charges against them were provisionally withdrawn;

[iii] The Children's Court proceedings continued and are not yet finalized. To date hereof the two children affected by these allegations reside with their respective paternal grandmothers. However, as far as one of the children is concerned, with the assistance of the Office of the Family Advocate, there was a process initiated for reintegration of the child back to the Second Plaintiff, after that child's father and paternal grandmother stated that they never had grounds to allege abuse or other misconduct allegedly perpetrated by either of the Plaintiffs, and confirmed were that they were informed what to say in that regard by the other paternal grandmother. However, the *de facto* situation presently is that both these children are still not residing with their natural mother, the Second Plaintiff;

[iv] During the investigation of the charges against the Plaintiffs the State Prosecutor utilized a report obtained from an institution known as "The Teddy Bear Clinic" which specializes in assisting abused children. This report indicated physical abuse and assault perpetrated upon one of the children but this report was contradicted by a report obtained on behalf of the Plaintiffs from a medical practitioner who opined that he could find no signs of such physical abuse, and discredited the report obtained through the

"Teddy Bear Clinic". During the period after the charges were provisionally withdrawn against the two Plaintiffs, the children's Court proceedings were pending, but they were not informed of any further developments regarding the criminal charges which were provisionally withdrawn, until 21 October 2017 when they were again unexpectedly arrested.

[v] Just after 07h00 on Saturday 21 October 2017, both Plaintiffs were arrested at their residence. A large contingent of police vehicles with a large number of policemen, some in uniform and some in plain clothes, arrived at the residence of the Plaintiffs in a show of force, whereafter both Plaintiffs were handcuffed in the presence of their neighbours who witnessed this event, and transported to the Mondeor Police Station;

[vi] Both Plaintiffs described this arrest as an extremely traumatic experience. They were still in bed with their one child who was then approximately 2 years old when the contingent of police arrived. They offered no resistance and co-operated fully. First Plaintiff opened the door when requested to do so by the Investigating Officer, and Second Plaintiff had to literally plead to be allowed to change from her sleeping atire into suitable clothing and had to plead to be allowed to make arrangements that her mother fetch the young child before they were handcuffed, placed in unmarked police vehicles, and taken to the Mondeor Police Station;

[vii] Both Plaintiffs confirmed that they were never presented with a warrant of arrest and both confirmed that they never asked to be shown a warrant of arrest because they were traumatised. Both Plaintiffs testified that they were not informed about the reasons for the arrests and the reasons for the arrests were only disclosed to them at the police station.

[viii] Both Plaintiffs testified about the inhumane conditions of their detention in their respective holding cells at the Mondeor Police Station. The First

Plaintiff was detained together with a number of other arrested suspects in a small cell with no shower facility, despicable ablution facilities, and had to sleep on a cement floor with old dirty blankets which were lying in the cell when he was put in there. Second Plaintiff testified in a similar vein, with the exception that she shared the holding cell with one other female. Second Plaintiff testified that the dirty blankets lying on the floor were lice infested, and when she requested clean blankets she was denied access to same. Second Plaintiff testified that she was not able to clean herself while she was in this holding cell and the conditions which she described are abhorrent;

[ix] Both Plaintiffs were transported from the Mondeor Police Station to the Magistrates Court on the following morning, and after spending a substantial period of time in the holding cells, were taken into court where a bail application launched on their behalf by their lawyer was immediately granted without having been opposed by either the State Prosecutor or the Investigating Officer;

[x] They were again charged on the original complaint and charges which were provisionally withdrawn in 2015, and the matter was again postponed on a number of occasions until the criminal trial proceeded during July 2019;

[xi] On 19 July 2019 the Magistrate who presided over the criminal trial found that the report relied on by the State Prosecutor obtained from “The Teddy Bear Clinic” was unreliable, expressed his view that the child who testified was influenced by his paternal grandmother and found the Plaintiffs not guilty on all charges.

[14] The Investigating Officer, called to testify on behalf of the First Defendant, testified that he applied for an arrest warrant on the instructions of the State Prosecutor. He testified that he was the Investigating Officer since approximately 2015, was aware of the history of the investigation, and when a report was obtained from a social

worker that one the the children was old enough and able to testify, he was instructed by the State Prosecutor to arrest the Plaintiffs whereupon he applied for an arrest warrant. Upon questioning by counsel acting on behalf of the Defendants, he denied that the arrests were effected in a high handed manner, he denied that the Plaintiffs were handcuffed, and he denied that there were a number of police vehicles and suggested that there were approximately two police vehicles. This evidence was never put to the Plaintiffs during cross examination. During cross-examination of the Investigating Officer it was pointed out to him that it was in fact not he who applied for the arrest warrant but that it was in fact the Senior State Prosecutor who applied for an arrest warrant to be issued by a Magistrate, which he then conceded, explaining that he was involved in a substantial number of cases and cannot remember the specifics of each case. Essentially, through the evidence in chief of the Investigating Officer as well as his cross-examination it was established that he effected an arrest of the two Plaintiffs on warrants of arrest issued by a Magistrate at the request of the State Prosecutor and not in terms of a warrant that he applied for.

[15] The State Prosecutor, called by the Defendants, confirmed that she was the State Prosecutor tasked with the prosecution of the Plaintiffs. She confirmed that she applied for a warrant for the arrest of the two Plaintiffs on 9 October 2017, with the intention to procure their attendance at court for the criminal trial to be prosecuted. She confirmed that the decision to reinstate the charges against the Plaintiffs followed on the report of the social worker who advised that the relevant child was then found to be able and competent to testify, albeit under protected circumstances.

[16] In summary, the witnesses for the Defendants confirmed the factual background leading to the re-arrest of the Plaintiffs on 21 October 2017 and reasons for such arrests. The only relevant factual discrepancy between the evidence of the

Investigating Officer and the Plaintiffs relates to whether or not the Plaintiffs were handcuffed when they were arrested on 21 October 2017, and whether or not a substantial contingent police officers and police vehicles arrived at the residence of the Plaintiffs when they were arrested on 21 October 2017. I have no hesitation to accept the version of the Plaintiffs in this regard over the version of the Investigating Officer. Both Plaintiffs were consistent in their narration of the factual background, and they were not cross-examined on any of these issues. The Investigating Officer on the other hand was clearly not able to recall all the facts correctly, as evidenced by the fact that he believed that it was him who applied for the arrest warrant. Considering the evidence as a whole and the fact that I cannot summarily dismiss the version of the Plaintiffs, I find it more probable than not that a large contingent of police and vehicles arrived at the residence of the Plaintiffs and that they were in fact handcuffed as they testified.

WERE THE ARRESTS UNLAWFUL?

[17] In *Zealand v Minister of Justice and Constitutional Development & Another* [1] it was held as follows:

> *"[24] There is another, more important reason why this court should rule in the applicant's favour. The constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.*
>
> *[25] This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In*

[1] *2008 (4) SA 458 (CC), par. [24] – [25]*

> *Minister van Wet & Orde v Matshoba the Supreme Court of Appeal again affirmed that principle, and then went on to clarify exactly what must be averred by an applicant complaining of unlawful detention."*

[18] *In casu* both Plaintiffs pleaded and testified that they were arrested on 21 October 2017 and detained until 23 October 2017, whereafter they were released on bail. In the particulars of claim both Plaintiffs alleged that the arrests and detention were unlawful. The *onus* is therefore on the First Defendant to plead and prove that such arrests and detention were justified and must establish a ground of justification.

[19] In the Defendants' pleas in both the consolidated actions it was pleaded on behalf of First and Fourth Defendants that the Plaintiffs were arrested pursuant to a "duly issued judicial warrant of arrest" and those were the totality of averments pleaded in both matters in defence of the Plaintiff's claims. During argument of the matter Defendants' counsel relied on the judgment of *Grooves*[2] where it was held that Section 43(2) of the Criminal Procedure Act, by using the word "shall", places a positive duty on an arresting officer to arrest the person identified in the warrant.[3] The Constitutional Court in the Grooves matter therefore held that an arresting officer is not afforded a discretion whether to arrest or not, and is therefore obliged to execute a warrant for arrest in terms of the provisions of Section 43(2) of the Criminal Procedure Act.

[20] Relying on the aforesaid judgment, it was argued on behalf of the Defendants that the Investigating Officer was instructed to arrest the Plaintiffs with warrants duly executed and signed by a Magistrate, that the Investigating Officer therefore was not afforded a discretion whether or not to arrest the Plaintiffs, and that the arrests were therefore lawful.

[21] However, the aforesaid argument in defence disregards the contents of paragraph 60 of the *Grooves* judgment which reads:

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[2] *Bianca Stepheney Grooves NO. v Minister of Police [2023] ZACC 36*

[3] *Grooves (supra), par. [56]*

> "*[60] Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgement. Police Officers exercise public powers in the execution of their duties and "[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries"*. *An arresting officer only has the power to make a value judgment where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be effected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may the only caregiver of minor children and removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest*".

[22] Public power is not ultimate power. Public power is bestowed in terms of empowering legislation, derived from the Constitution and subject to the Constitution. Public power should be exercised in accordance with the law, and not arbitrarily or unlawfully. In *Pharmaceutical Manufacturers Association of SA & Another; in re: Ex parte President of the Republic of South Africa & Others*[4] it was held:

> "*It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our constitution for such action.*"

[23] In *Affordable Medicines Trust & Others v Minister of Health & Others*[5] it was held as follows:

> "*The exercise of public power must therefore comply with the constitution, which is the supreme law, and the doctrine of legality, which is part of that law*."

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[4] *[2000] ZACC 1; 2000 (2) SA 674 (CC)*

[5] *2006 (3) SA 247 (CC) at par. [94]*

[24] It is clear from the *Grooves* judgment that while the Investigating Officer is not afforded a discretion whether or not to effect the arrest, it is afforded a discretion in relation to the manner of the arrest which therefore follows that the decision as to the date, time and place of the arrest falls within the discretion of the arresting officer. *In casu* the warrant of arrest directed the Investigating Officer to arrest the two Plaintiffs, but did not specify a date, time or place for such arrest which was therefore left to the discretion of the Investigating Officer.

[25] When the Investigating Officer exercised public power to effect the arrests of the Plaintiffs, exercising his discretion as to the time, manner and place of the arrest, the arresting officer was obliged to exercise such public power complying with the constitution and the doctrine of legality. The means employed by the arresting officer should therefore be rationally connected to the object of the arrests, with reference to the empowering provisions in terms whereof the arrests were effected. Put otherwise, the exercise of the discretion of the investigating officer in relation to the date, time and place of the arrests should not have been arbitrary, but should have been rationally connected to the object of the arrest which was to procure the attendance of the Plaintiffs at court, and should have been exercised subject to any empowering legislation which bestowed such public power.

[26] Considering the aforesaid, it is therefore necessary to analyse the relevant legal matrix which applies to the Investigating Officer when exercising the discretion afforded to the Investigating Officer relating to the manner, date and time of the arrest.

LEGAL MATRIX:

[27] The Investigating Officer is a member of the South African Police Service and subject *inter alia* to the South African Police Service Act no. 68 of 1995. Section 13(1) of the South African Police Service Act 68 of 1995 reads:

> "*13* ***Members***
>
> *(1) Subject to the constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.*
>
> *(2) …*
>
> *(3) (a) A member who is obliged to perform an official duty shall with due regard to his/her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.*
>
> *(b) Where a member who performs an official duty is authorised by law to use force, he/she may use only the minimum force which is reasonable in the circumstances*".

[28] It therefore follows that a member of the South African Police Force, when performing a duty or function, is enjoined to act reasonable in the circumstances, use minimum force, and exercise any power bestowed to such member subject to the constitution and with due regard to the fundamental rights of every person.

[29] In terms of Section 7(2) of the Bill of Rights of the Constitution of the Republic of South Africa 1996, the State must respect, protect, promote and fulfil the rights in the Bill of Rights. In terms of Section 8(1) of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

[30] Section 10 of the Constitution guarantees every person's inherent dignity and right to have their dignity respected and protected. Section 12 of the Constitution guarantees the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, and not to be treated or punished in a cruel, inhuman or degrading way. It is thus a fundamental right of any person that any form of deprivation of freedom cannot be infringed arbitrarily or without just cause, and any treatment which amounts to inhuman or degrading treatment will not stand constitutional scrutiny.

[31] In terms of Section 36 of the Constitution, the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including, *inter alia* less restrictive means to achieve the purpose. [6] The limitation of any right in the Bill of Rights must thus be effected in such a manner that the least restrictive means necessary to achieve the purpose should be employed.

[32] The arrest and detention of a person is a serious infringement of the rights enshrined in Sections 10 and 12 of the Constitution referred to *supra*. From an analysis of the legal matrix referred to supra it follows that, when executing a warrant of arrest the Investigating Officer is enjoined to consider the rights of the arrestee as enshrined in the Bill of Rights, consider the obligation imposed on the arrestor as set out in Section 13 of the South African Police Service Act 69 of 1999 referred to *supra*, and consider whether or not there are less restrictive means available to achieve the purpose of the arrest namely to procure the attendance of the arrestee at trial. The exercise of the arresting officer's discretion as to the manner, date, time and place of the arrest cannot be arbitrary.

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[6] *Constitution of the Republic of South Africa 1996, Section 36 (1)(e)*

CONCLUSION ON THE ISSUE OF UNLAWFULNESS:

[33] To determine whether the arrests and resultant deprivation of the freedom of both Plaintiffs by the arresting officer were unlawful, the onus rests on First Defendant to provide justification for the manner in which the arrests were effected in relation to the date and time of the arrest and the fact that the arresting officer foresaw that it would have resulted in Plaintiffs having to spend the weekend in the holding cells, thereby depriving them of the rights as enshrined in section 12 of the Constitution. Considering the obligation imposed on the arresting officer to consider the legal imperatives imposed in terms of section 13(1) of the Police Services Act and the Constitution as referred to *supra* when exercising his discretion to arrest the Plaintiffs on a Saturday morning at 07h00, and the legal requirement that such decision should not have been arrived at arbitrarily, the objective facts should be considered to decide whether such decision was arrived at arbitrarily and whether the means employed were reasonable and the least restrictive means available. The relevant objective facts are:

[i] Both the arresting officer and the State Prosecutor confirmed that they did not regard either of the Plaintiffs as a flight risk and that there was no urgency in effecting the arrests. Their opinions in this regard are supported by the fact that, notwithstanding the arrests of the Plaintiffs early on a Saturday morning, resulting in them having to spend the weekend in holding cells, they were let out on bail on Monday following the arrests after an unopposed bail application.

[ii] The arresting officer and the State Prosecutor confirmed that they were aware of the fact that both Plaintiffs were previously arrested, granted bail, and thereafter appeared in court on various occasions when the matter was set down and postponed again prior to the arrest which took place on 21

October 2017; There was therefore no reason to believe that the Plaintiffs would not have attended Court, had a less restrictive means been employed to procure their attendance.

[iii] The application for the warrant of arrest under Section 43 of Act 51 of 1977 was applied for by the State Prosecutor on 4 October 2017, and signed and issued by the Magistrate on 19 October 2017. There was no indication that it was urgent to effect the arrests and neither the State Prosecutor nor the Investigating Officer testified as such. It was therefore not imperative that the Plaintiffs had to be arrested on Saturday 21 October 2017 which resulted in an infringement of their rights protected by section 12 of the Constitution for a whole weekend. Had they been arrested during the week when they could have been arraigned and then granted bail on the same day would have caused a substantially reduced infringement of their respective rights under section 12 of the Constitution, and would have constituted an arrest which would have been more reasonable in the circumstances.

[iv] On direct questioning by the court why the arrests were effected early on a Saturday morning which resulted in the two Plaintiffs having to spend two nights in holding cells instead of arresting them during the following week or at any other time when their attendance at Court could be procured on the same day, the arresting officer insisted that the reason for such *modus operandi* was as a result of his “workload”. In essence, the only reason advanced by the Investigating Officer why the arrests were effected on a Saturday morning was namely that it was due to his “workload” and it was clear that no other consideration applied when he decided to have the two Plaintiffs arrested on the specific date and time; This evidence of the investigating officer clearly confirms that he failed to consider any less

restrictive means to procure the attendance of the Plaintiffs at court, failed to adhere to section 13 of the Police Service Act, and failed to consider the Plaintiffs rights under sections 10 and 12 of the Constitution. It thus confirms that the investigating officer exercised public power arbitrarily.

[v] Significantly, the State Prosecutor agreed during her evidence that there were no reasons to have the Plaintiffs arrested on a Saturday morning and that an arrest during the week when their attendance at court could be assured in an expedient and less restrictive manner would have been preferable. During her evidence the State Prosecutor attempted to justify the issue of an arrest warrant on the basis that the children concerned had to be protected from intimidation. This consideration is clearly irrelevant in relation to the date and time of the arrest and contradicted by the objective fact the Plaintiffs were granted unconditional bail on an unopposed basis on the same day that they were arraigned.

[34] Apart from the aforesaid, the arresting officer denied that the Plaintiffs were handcuffed which implies that he accepted that they posed no threat and did not require to be handcuffed.

[35] Considering the aforesaid, in my view it is clear that the Investigating Officer failed to adhere to the provisions of Section 13 of the South African Police Service Act 68 of 1996 and exercised his discretion as to the date and time of the arrest in a manner which unjustifiably infringed on the Plaintiffs' right enshrined in Sections 10 and 12 of the Constitution. The arresting officer failed to consider any means of arrest which would have limited the infringement on the rights of the Plaintiffs enshrined in Sections 10 and 13 of the Constitution and failed to consider the reasonableness of his conduct when effecting the arrest on the date and time that he did, or the manner in which the arrest were carried out.

[36] Where there was no justification pleaded or proven why the arrests of the Plaintiffs were effected in the manner that it was, it follows that their arrests and subsequent detention were unlawful. It is further clear that the arresting officer foresaw that the arrest on a Saturday morning early, accompanied by a proverbial show of force and the humiliating action of placing handcuffs on the Plaintiffs, would lead to an impairment of their dignity, their loss of freedom for more than two days, and that the First Defendant therefore should be liable for the damages suffered by Plaintiffs in this respect.

QUANTUM OF DAMAGES:

[37] Both Plaintiffs were detained unreasonably without justification for a weekend in abhorrent circumstances. The First Plaintiff testified that he still experiences trauma and significantly stated that he would not wish such an experience even on those persons who were ultimately responsible for the arrests. My observation of First Plaintiff during his testimony confirms such trauma.

[38] Second Plaintiff is a frail and soft-spoken woman who is clearly severely traumatised by the totality of the experience of having to proverbially lose two of her children, being accused of serious crimes against her own children, and having to be arrested on two occasions under the circumstances as set out *supra*. Insofar as the claim relates to her arrest effected on 21 October 2017, the trauma suffered as a result of such arrest was clearly exacerbated by the preceding events and this was reasonably foreseeable. When testifying about the incident on 21 October 2017, the Second Plaintiff was visibly traumatised by having to recall the event and was shaking in court. She testified that she has lost all confidence in institutions of authority, that she fears the South African Police Services, that she is traumatised when she sees blue lights, and while giving this evidence started to cry in the witness box. This is the result of an arbitrary and unrestraint exercise of public power

which was unreasonable in the circumstances and serves no purpose except to undermine the rule of law. It is in the interest of justice that such conduct, which undermines the Constitution and the trust of the general public in the rule of law, not be allowed to escape sanction and any functionary of any organ of state that is guilty of such conduct should be held accountable.

[39] The aforesaid is a direct result of the conduct of the Investigating Officer who executed the warrant in a most unreasonable and unjustified manner, paying no regard to the consequences of such arrest to either of the Plaintiffs, and which arrests were accompanied by a show of force which can only be described as a high handed approach.

[40] The amount of damages to be awarded is not susceptible to exact calculation and is arrived at in the exercise of a broad discretion.[7] I was referred to a number of authorities regarding comparative quantum of damages awarded for unlawful arrest in caselaw which can only provide a measure of guidance. In exercising my discretion on awarding damages which I deem fair and just in the circumstances, I have considered the following factors:

[i] The duration of the Plaintiffs' unjustifiable detention and the inhumane conditions under which they were detained;

[ii] The emotional trauma suffered by the respective Plaintiffs. In this regard the trauma suffered by the Second Plaintiff was clearly more severe than the trauma suffered by the First Plaintiff and Second Plaintiff would in all probability continue to suffer this trauma for a substantial period of time, if not permanently;

[7] *Minister of Safety & Security v Augustine ZASCA 59 (24 May 2017); 2017 (2) SA CR 332(SCA)*

[iii] The manner in which the writ was executed namely in full view of a number of neighbours and residents in the immediate vicinity of the residence where the Plaintiffs resided at the time of the arrest and the fact that spectators were drawn to the incident by the number of police vehicles and police officers present during the time of the arrest which in itself was an extremely degrading and humiliating experience for the Plaintiffs.

COSTS:

[41] Counsel acting on behalf of Defendants argued that, in the event that the Plaintiffs being successful in the action, costs should be awarded against the First Defendant on the Magistrates Court scale due to the fact that reasonably anticipated damages falls within the jurisdiction of the Magistrates Court.

[42] I am of the view that the Plaintiffs were not unreasonable to institute the action in the High Court, considering the legal principles involved. The Defendants were at liberty to make a reasonable offer in settlement of the Plaintiffs' claims which they did not do, contributing to this matter proceeding in the High Court.

[43] Consequently, I am not prepared to disallow the Plaintiffs costs on the High Court scale.

[44] In the result I make an order in the following terms:

1. It is declared that the arrests of the First Plaintiff and Second Plaintiff on 21 October 2017 resulting in their subsequent detention until 23 October 2017 were unlawfully effected and infringed the Plaintiffs' rights under Sections 10 and 12 of the Constitution

2. First Defendant is ordered to pay damages to the First Plaintiff in the amount of R150 000.00;

3. First Defendant is ordered to pay damages to the Second Plaintiff in the amount of R200 000.00;

4. First Defendant is ordered to pay the costs of the action.

P A VAN NIEKERK

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the Plaintiff:	Adv. C Zietsman Instructed by Spruyt, Lamprecht & Du Preez Attorneys
For the Defendant:	Adv. F Q Sathekge Instructed by State Attorney

Heard: 05, 06 and 07 February 2024

Delivered: 19 February 2024