

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 30689/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
17.03.2018	
DATE	SIGNATURE

20/3/18

In the matter between:

NUNDKISSOON LATCHMAN1st Plaintiff**AADIT KUMAR (JASON) LATCHMAN**2nd Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

HATTINGH AJ**EVIDENCE PRESENTED**

- [1]. At the start of the hearing the defendant admitted the identity of both the plaintiffs as the persons that was detained on the 24th December 2008 at 14h00.
- [2]. It was also admitted that the 1st plaintiff remained in custody until the 26th December 2008 and was released at 13h45.
- [3]. The 2nd plaintiff was released to his father on the 25th December 2008 at 9h20.
- [4]. At the start of the trial the plaintiffs abandoned claim 2 of their particulars of claim and only proceeded with claim 1 in terms of unlawful arrest.
- [5]. The defendant carried the *onus* to begin, but for practical reasons the plaintiffs testified first.
- [6]. The 1st plaintiff testified under oath. He testified that he was from Newcastle and was invited by a close friend, Mr Feng Chu Yeh, to accompany him and three Chinese ladies to Cape Town. The 1st plaintiff and another driver drove the vehicle down to Cape Town. In the Combi were seven people. It was Mr Yeh, three ladies, a driver and the 1st and 2nd plaintiffs.

- [7]. The 1st plaintiff took the 2nd plaintiff with him because it would be a holiday for his nephew and it would be all paid for.
- [8]. On the 24th December 2008 the whole group drove to Hout Bay. The reason why they went to Hout Bay was to go shopping. Whilst there Mr Yeh purchased fresh fish. Mr Yeh told the 1st plaintiff that someone told him about another place where there is fresh fish.
- [9]. At a specific house, Mr Yeh went in and bought seafood there and they brought ice and we were just touring through Hout Bay.
- [10]. At some point they were pulled over by the police. The police asked the 1st plaintiff for his Identity Document and drivers license. They were all requested to step out of the vehicle. There were two security vans and a police vehicle.
- [11]. The police searched the vehicle but gave no reasons for the search and they also did not have a search warrant. They opened a few packets/bags and asked the 1st plaintiff to identify the items. 1st plaintiff told the police that he was only the driver of the vehicle.
- [12]. The 1st plaintiff testified that he trusted Mr Yeh. He testified that there was 1 (one) bag with frozen seafood. He only realised on opening the bag that it was abalone.

He said he told the police that the seafood belongs to Mr Yeh but the policeman said they have to arrest everyone. Mr Yeh then told the police that he bought the abalone but the police did not want to listen and arrested them all.

- [13]. He testified that they were taken to the police station where the Combi was confiscated. All their belongings were taken, luggage, food, cellphones and wallets. The items were all entered into a SAP13 register.
- [14]. Mr Yeh again pleaded with the police that the seafood belonged to him. They were all arrested. The 1st plaintiff told the police that he would take them to the place where the seafood was purchased.
- [15]. He testified that they all went back to the place where the seafood was purchased. The police followed them there. They drove past the shop and stopped at a remote place. The police spoke to other police over the radio and told them it is too dangerous to arrest those people. After that they were all taken back to the police station. They were all detained.
- [16]. He testified how all seven of them were kept in the same holding cell. In the cell was also other detained people. He testified they were arrested before their rights were explained. He testified that another policeman arrived and told Mr Buchler, the person that arrested them, to take the little boy (2nd plaintiff) out of the cell. Buchler told the other policeman that he was still busy with the documentation. The

policeman argued about why they were arrested. Mr Buchler called them individually to the glass to sign papers.

- [17]. Mr Buchler then explained to us that we were arrested for abalone and that we have a right to an attorney and to apply for bail.
- [18]. The 1st plaintiff testified that he was allowed to phone his brother, the father of the 2nd plaintiff. His brother informed him that he was on his way to Cape Town to fetch his son.
- [19]. He testified that he was placed in a cell with the 2nd plaintiff that was at that stage only 8 (eight) years old and physically handicapped. They were given blankets but the blankets were infested with fleas and bugs. He testified how he kept the child the whole night on his lap.
- [20]. The next morning a policewoman arrived and asked what a boy was doing in the cell. She fetched the key, took the 2nd plaintiff out and kept him with her. The father of the 2nd plaintiff arrived and left with the 2nd plaintiff.
- [21]. On the 26th December 2008 the rest of them were still in the cells and the 1st plaintiff's brother was looking for an attorney to represent them in court. An attorney was found and they were all released on police bail. The Combi was released to them and they went back to the hotel. The next day (Monday) they went to

Wineberg Magistrate's Court. They did not go into court but was only informed by their attorney that all the charges were withdrawn against them.

- [22]. The 1st plaintiff further testified about his nephew's physical impairment and having a deformed right leg and how he made a prosthesis for his nephew to assist him to walk.
- [23]. The 1st plaintiff further testified about the filthy state of the toilet and that it was clogged. They received no mattress. He testified about how scared the 2nd plaintiff was about being arrested and locked up. He cried in the cell. He further testified that it was the first time the 2nd plaintiff was alone with him without his parents being present.
- [24]. Under cross examination the 1st plaintiff testified that Mr Yeh was conversant in English. The 1st plaintiff denied that he acted as a translator for Mr Yeh in all the negotiations. He further testified that he never saw abalone before and he knows it as perlemoen. He further testified that Mr Yeh did not tell him what he was going to buy. He again confirmed that Mr Yeh told the police during the search and at the police station that the abalone belonged to him.
- [25]. It was stated to the 1st plaintiff that Buchler will come and testify that when the Combi was pulled over Mr Buchler told the 1st plaintiff that he believe there was perlemoen in the vehicle. This was denied by the 1st plaintiff. He further testified that

Buchler told him that he was responsible and he must be present during the search. He further stated that he was called into the Combi and the bag containing the abalone was shown to him and he told the police that Mr Yeh was the owner and Buchler opened the bags. He further told Buchler that he did not know that it was illegal to process abalone.

- [26]. It was put to the 1st plaintiff that it is Buchler's version that the 2nd plaintiff was kept in the victims support room. It was a carpeted room with toys. 1st Plaintiff again confirmed that the 2nd plaintiff was in the cell with him and only the next morning a policewoman saw the 2nd plaintiff in the cells and said the child is not allowed to be there. The 1st plaintiff stated that Buchler lied and that the 2nd plaintiff was only taken Christmas morning by a female policewoman.
- [27]. The 1st plaintiff confirmed that the 2nd plaintiff was released to his father on Christmas day at approximately 9h00.
- [28]. Thereafter the 2nd plaintiff testified. He testified about the trip to Cape Town. How they were stopped by the police. How the police scolded his uncle (1st plaintiff). He further testified how he had to write his name on a piece of paper. He was shown a Notice of Rights in terms of the Constitution (section 35 of Act 108 of 1996). On the form it is stated: *"You are detained for the following reason: possession of abalone"*. This form clearly on numerous places state that it relates to people detained. At the

bottom of the document above the inscription: "*Signature/thumbprint of detainee*", is the name Jason. The 2nd plaintiff confirmed that it was his signature.

- [29]. He confirmed that the blankets were dirty and full of bugs. He testified about the bites and itches and how he sat on his uncle's lap. He further testified that as a consequence of the arrest and detention he has a fear of bugs and public toilets. He also doesn't want to be near policeman. He can still remember that Christmas and a policeman saying to him: "*Enjoy your night in jail with bugs*".
- [30]. Mr Buchler testified how he and two other policeman pulled over the Combi and he found frozen abalone in a bag under the back seat of the Combi. He further testified how Mr Yeh told him that it was his abalone. He further testified how they went to the house of the smuggler but did not go in. Strangely enough Mr Buchler testified that the 2nd plaintiff was never arrested. He testified that he decided not to take the 2nd plaintiff to Jameshouse, a place of safety, because the kids there were rough. He kept the 2nd plaintiff in the victims support room where there was a carpet, bed duvet and a proper toilet. He further denied that the cells were dirty. He testified that the cells are cleaned every morning and on the day in question there was nobody before them in the cells. He testified that he was not sure if there were mattresses.
- [31]. Mr Buchler denied that the 1st plaintiff was arrested and stated that he was only in safekeeping. He further confirmed under cross-examination that possession of abalone is a Schedule 1 offence. Mr Buchler further admitted that he knows the

person from whom Mr Yeh purchased the said abalone. He is Jerome Solomon and a well-known smuggler.

- [32]. Mr Buchler admitted under re-examination that Mr Yeh admitted to possession of the abalone. He testified that a warrant officer and higher in rank can grant police bail. He further stated that he had to do all the paperwork before anyone can be released on police bail. He had to investigate the addresses, take fingerprints and do warning statements.
- [33]. A policewoman by the name of Tania Lesch testified on behalf of the defendant. She primarily testified about how children should be treated in a police station. She testified about the implementation of the new Children's Act of 2017 and how that changed procedures.
- [34]. the court posed a question to her asking if it would be required to take a warning statement from a minor child that is not detained. Her answer was no. The only reasonable conclusion that the court can reach is that the 2nd plaintiff was therefor arrested.

**THE ARRESTING OFFICER'S AVERMENT THAT THE 2ND PLAINTIFF WAS NEVER
DETAINED AND/OR ARRESTED.**

[35]. During the *viva voce* evidence of Mr Stefanus Petrus Buchler (previously an inspector with force number 0805603-0 and stationed at SAPS Hout Bay) he testified that the 2nd plaintiff was never arrested. This contention must be corroborated by all the evidence as a whole, including documentary evidence.

[36]. Mr Buchler was under cross-examination confronted with his A1 statement, deposed to on the 24th December 2008 at 16h20. He confirmed to the correctness of the affidavit including the contents thereof. It is of significance that paragraph 5 of the said statement reads as follows:

"I then arrested all the passangers for possession of abalone and took them to SAPS Hout Bay to be detained. They were 3X adult females, 3X adult men and 1X minor child."

and paragraph 6:

"The abalone was handed in the SAP 13/723/08, and the V W Combi SAP 13/724/08. Sea Fisheries was contacted to seal the abalone bag nr 001184."

and paragraph 7:

"The one suspect told me that he bought the abalone from a man in harbour. I took him to show me the address. At the address I recognise the house as

Jerome Solomon's house and it is 4 Duiker Str, Hout Bay. The house is known as a smuggling house."

- [37]. It is clear from the above passage that even the minor child, 2nd plaintiff, was indeed arrested. It is furthermore clear that one male person accepted responsibility for the possession of the abalone. This is furthermore consistent with the evidence of the 1st plaintiff, and that the said person was Mr Feng Chu Yeh. It is furthermore consistent with the fact that he even showed, Mr Buchler where the abalone was purchased.
- [38]. It is clear that from the moment that Mr Feng Chu Yeh admitted to the said possession of the abalone there existed no legitimate basis for the continued detention of the other occupants of the vehicle. The court inquired from Mr Buchler why Mr Feng Chu Yeh was not taken for a confession and he only said that there was no police officer with the required rank at the police station. The court finds this excuse baseless. The least Mr Buchler could have done at that stage was to grant police bail to the rest of the occupants of the Combi and made such bail subject to the condition that they remain at the hotel. He however opted to detain all of them over Christmas. His further excuse was that there was nobody which could grant police bail. It is my understanding that there must be at all relevant times an officer in charge of any station with the rank of at least a captain.

[39]. The following document that was accepted by the court as evidence was a Notice of Rights in terms of the Constitution (section 35 of Act 108 of 1996). This document clearly demonstrate that the person is detained for possession of abalone. It furthermore explain all the constitutional rights afforded to arrested and/or detained persons. It is clear from the standard form that paragraph 1 & 2 refers to detained persons and paragraph 3 refers to arrested persons. The certificate by detainee contains the following information:

"Jason Latchman (8 years). He was warned in English by Insp Buchler on 2008-12-24 at 14:30."

[40]. The document was clearly signed by the 2nd plaintiff.

[41]. The A2 statement by Inspector Jacobus Barthlomeus Lourens also corroborates the statement of Mr Buchler that the chinese male admitted that it was his abalone.

[42]. It is furthermore clear that everyone exclude the 2nd plaintiff, that was already released to his father, received police bail as per J398. The said bail was granted on the 25th December 2008. The court fails to understand, based on the information contained in these documents, why everyone could not have been released on police bail on the first day being 24 December 2008. All the information contained in these documents were readily available on the 24th December 2008.

[43]. Another document of importance was an extract from the Investigation Diary of Mr Buchler. There is an entry dated 08-12-24 @ 16:30 that reads as follows:

"1) FIC as per A1

- | | |
|--------------------|--|
| 2) Suspects | 1) Feng-Chu Yeh
2) Yuge Ding
3) Guoxian Zhang
4) Chun-Khei Wu
5) Lucas Zakhele Shabalala
6) Nandkissoo Latchman
7) <u>Jason Latchman (8yrs)</u>" (emphasis added) |
|--------------------|--|

This entry clearly indicate that the child was also a suspect.

[44]. There was also the following entry in an Occurrence Book dated Wednesday 2008-12-24 under number 1317. The time is illegible, but entry number 7) reads as follows:

"7 Jason Latchman (8), SAP 14/73/12/2008 SAP 14 A/ copy minor child, special arrangements being made to 'place in social care'."

[45]. It is clear from the evidence presented that nothing further was done to place the 2nd plaintiff in social care.

- [46]. It is clear from the evidence *viva voce*, statements and other documentary evidence that the only logical conclusion to which this court can come to is that the 2nd plaintiff was arrested.

LEGAL PRINCIPLES PERTAINING TO UNLAWFUL ARREST AND DETENTION

- [47]. It is clear in law that the defendant bears the onus to establish the lawfulness of both the arrest and the detention on a balance of probabilities. Under common law, see **Minister of Law and Order & Others v Hurley & Another, 1986 (3) SA 568 (A) 589 E – F** and **Minister van Wet & Orde v Mtshoba, 1990 (1) SA 280 (A) 284 E – H and 286 B – C**. Both cases confirm that the action is based on an interference with the liberty of the individual. In relation to the constitutional infraction of Section 12(1)(a) see **Zeeland v Minister of Justice and Constitutional Development & Another, 2008 (4) SA 458 (CC)**, at paragraphs 24 and 25 and 35, which identifies the claims as based on the unreasonable and unjustifiable infringement of an individual's right not to be arbitrary deprived of freedom or to be so deprived without just cause. In Zeeland the court also stated that the defendant bears the burden to justify the deprivation of liberty, whatever form it might have taken.
- [48]. In order to escape liability from wrongful arrest and detention a peace officer effecting an arrest without a warrant must fall squarely within the provisions of

Section 40(1) of the Criminal Procedure Act 51 of 1977. The relevant provisions of the section for the purposes of this act are:

"(1) A peace officer may without a warrant arrest any person –

- (a) who commits or attempts to commit any offence in his presence;***
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."***

[49]. From the moment that Mr Feng Chu Yeh accepted guilt in terms of the abalone found in a plastic bag frozen and +/- 5 (five) kg the defendant had his culprit. There was no explanation that made any sense why Mr Feng Chu Yeh was not there and then taken to make a formal confession. It is furthermore clear that statements should have been obtained from other occupants as witnesses. None of this was done and during the trial it became clear, that up to the date of the hearing of this matter, even Mr Feng Chu Yeh came scot-free.

[50]. Police bail could have been readily obtained on the first day before a duty station commander. The witness, Mr Buchler's argument that there was no person at the

police station to grant police bail does not hold true as there must at all times be such a person at the police station.

- [51]. In this regard, I endorse the sentiment expressed by Borchers AJ in **Van Rensburg v City of Johannesburg 2009 (1) SACR (W) 34** who referred to the irony that exists where the very persons who are engaged to protect citizens actually invade their rights.
- [52]. It is clear that Mr Buchler, the arresting officer, did not exercise his discretion rationally. If a discretion was indeed exercised, then it was not rational in the case of both the plaintiffs.
- [53]. It is clear from the conspectus of the evidence before the court that Mr Buchler did not exercise his discretion rationally and that if he did exercise it rationally both the plaintiffs would have received police bail shortly after their arrests. The court finds further, that from the totality of all the evidence, that the minor child, 2nd plaintiff, was indeed arrested.
- [54]. The court now turns to damages. The approach to the assessment of damages for wrongful arrest was summarized in **Ntshingana v Minister of safety and Security, Unreported case no 1639/01, ECD, 14.10.2013** as follows:

"The satisfaction in damages to which a plaintiff is entitled falls to be considered on the basis of the extent and nature of the violation of his personality. As no fixed or sliding scale exists for the computation of such damages, the court is required to make an estimate ex aequo et bono. The authors of Visser and Potgieter's Law of damages 2nd Edition, 475 have extracted from our case law factors which can play a role in the exercise:

'The circumstances under which the deprivation of liberty took place, the presence or absence of improper motive or (malice) on the part of the defendant, the harsh conduct of the defendant, the duration and nature of the confinement of the deprivation of liberty, the status, standing, age and health of the plaintiff, the extent of the publicity given to the deprivation of liberty; The presence or absence of an apology or satisfactory explanation of the events by the defendant, awards in previous comparable cases, the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed, the high value of the right to physical liberty; the effect of inflation, and the fact that the actual inuriarem also has a punitive function'."

[55]. This court takes all the abovementioned factors in consideration but more specifically the tender age of the 2nd plaintiff in this matter coupled with his physical impairment as well as the fact that he was detained in a general cell with other

detainees and had to endure that for one night without a mattress and only having a blanket sitting on his uncle's lap. It is furthermore clear from the evidence that he is still affected by his arrest to this day.

[56]. It is furthermore clear that the 1st plaintiff was detained on 24 December 2008 at 14h00 and remained in custody until 26th December 2008 at 13h45. This is +/- 2 (two) days. The 2nd plaintiff was detained on 24 December 2008 at 14h00 and remained in custody until 25th December 2008 at 9h30. This constitutes 18½ (Eighteen and a Half) hours.

[57]. Having regard to the aforesaid this court is of the view that an award of damages in the sum of R200,000.00 (Two Hundred Thousand Rand) is appropriate in terms of the 1st plaintiff, made up as follows:

- | | | |
|-----|-----------------------------|-------------|
| (a) | Unlawful arrest | R80,000.00 |
| (b) | Unlawful detention (2 days) | R120,000.00 |

and the sum of R170,000.00 (One Hundred and Seventy Thousand Rand) in terms of the 2nd plaintiff made up as follows:

- | | | |
|-----|-----------------|-------------|
| (a) | Unlawful arrest | R100,000.00 |
|-----|-----------------|-------------|

(b) Unlawful detention

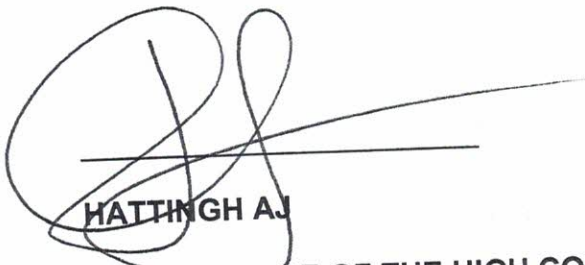
R70,000.00

[58]. I accordingly make the following order:

58.1. The defendant is directed to pay to the 1st plaintiff the sum of R200,000.00 (Two Hundred Thousand Rand) together with interest thereon determined according to the current mora interest rate calculated from the date of judgment to date of payment.

58.2. The defendant is directed to pay to the 2nd plaintiff the sum of R170,000.00 (One Hundred and Seventy Thousand Rand) together with interest thereon determined according to the current mora interest rate calculated from the date of judgment to the date of payment.

58.3. The defendant is directed to pay the plaintiffs' costs of suit.



HATTINGH AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA