



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

In the application between:

CASE NUMBER: 5542/24

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED **YES/NO**

DATE 28 July 2026

SIGNATURE H.F. FOURIE

N[...] M[...]

FIRST PLAINTIFF

N[...] M[...]

SECOND PLAINTIFF

obo S[...] N[...] T[...]

And

THE MINISTER OF POLICE

FIRST RESPONDENT

JUDGMENT

FOURIE AJ

INTRODUCTION:

- [1] The First Plaintiff instituted action in the current matter both in her personal capacity as well as in her representative capacity of her minor child, resulting, as the Plaintiff alleges, from an unlawful arrest and detention by members of the South African Police Service.

BACKGROUND:

- [2] After service of the Summons, an electronic Notice of Intention to Defend was served by the Defendant's legal representatives on 31 January 2025, which was subsequently set aside by an application under Rule 30 of the Uniform Rules of Court, after which the Plaintiff proceeded in the current action on an undefended basis.
- [3] It is important to highlight that, at the hearing of the matter and after evidence was led and argument presented by counsel appearing on behalf of the Plaintiff, Advocate Makhubele, a note was passed to him from the gallery by one Mr. Matsane who the Court is informed is a candidate attorney employed by the State Attorney and which note indicates simply that the State Attorney has not gotten hold of the Plaintiff's attorneys telephonically as the Plaintiff's attorneys' phone, seemingly resultant from being in Court was switched off, and similarity that the Defendant has not got access to the matter on Case Lines.

[4] The Court was not confronted with any approach by the Defendants themselves in respect of the matter; the Defendants were not present when the matter was heard, nor was an application for postponement brought. The Defendant's legal representatives knew exactly where the Plaintiff's legal representatives were, as it is in the Courtroom, in the presence of myself, that the Plaintiff's legal representatives were approached. The approach by the Defendant's legal representatives was brought to my attention, I considered same, and I do not believe it has any influence on the outcome of the matter, as the matter remains undefended.

FACTS:

[5] The only witness testifying in the matter was the First Plaintiff.

[6] Me M[...] testified that around 23h00 on 8 March 2024, she was arrested due to a domestic violence dispute with the father of the minor child in question, the Second Plaintiff.

[7] After being arrested by members of the SAPS, she was detained by the members of the SAPS, who instructed her to gather the belongings of her minor child, who at that stage was 6 months old, including clothes and blankets, for the 6-month-old baby to be taken with Me M[...] to the Police station to be arrested.

[8] The evidence presented is indicative that, when she was arrested Me M[...] was with friends and family.

- [9] The evidence led indicates that Me M[...] was detained in the police cells at least from 02h00 on 9 March 2024 until she was taken to Court on 11 March 2024, where, without a trial, she was released with no charges brought against her, at around 14h00 on the stated date. During the detention of Me M[...], the minor child was at all stages with her.
- [10] During the detention, Me M[...] testified that the cell they were kept in was filthy, the conditions were unhygienic, and the blankets being utilised were full of dirt.
- [11] During their detention, Me M[...] and the minor were kept in a cell together with another parent and her child, and at a certain stage two other individuals.
- [12] The Court accepts the evidence of Me M[...] to be truthful and uncontradicting.
- [13] The testimony of the Plaintiff, however, made no mention of any distress the minor child experienced during the detention other than the obvious uncomfortable position that the minor child would have been confronted with given the nature of the detention.
- [14] Although there are several portions of evidence which the Court would have expected to receive in respect of the matter, the Court cannot disregard the testimony of the Plaintiff herself, which evidence stands uncontested when the matter was ultimately heard.

[15] The evidence presented by the Plaintiff has met the threshold for all the relevant elements for Judgment to be granted against the Defendant and in favour of the Plaintiff in respect of the merits.

LEGAL PRINCIPLES:

[16] The legal principles pertaining to arrest and detention are settled in that an arrest is *prima facie* unlawful and an invasion of a person's constitutional rights to freedom and liberty, and once an arrest is proven, the onus is on the Defendant to justify the lawfulness of the arrest [1].

[17] Similarly, the Constitutional Court in ***Zealand v Minister of Justice and Constitutional Development and Another*** [2], held that:

"It has long been 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 the interference to establish a ground of justification."

[18] The Constitutional Court in ***Mahlangu and Another v Minister of Police*** held that

“[t]he prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity, are fundamental rights entrenched in the Bill of Rights. The state is required to respect, protect, promote and fulfil these rights, as well as all other fundamental rights. They are also part of the founding values upon which the South African constitutional state is built.” [3]

- [19] Section 12(1) of the Constitution of the Republic of South Africa, 1996 ('Constitution'), provides that

‘Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial’.

- [20] The Constitutional Court in ***De Klerk v Minister of Police*** held that

‘The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. ... What matters is whether, substantively, there was

just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made'. [4]

[21] In the current matter, the Court is not only confronted with the arrest and detention of the Plaintiff in her personal capacity but also that of a minor child.[5]

“Section 28(1) of the Constitution provides that every child has the right-

- (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.”*

[22] The Constitutional Court in the matter of **Raduvha v Minister of Safety and Security and Another** [6] has confirmed that:

“The detention of a child should be a measure of last resort.”

EVALUATION:

[23] Nothing before this Court indicates that the Defendants acted lawfully when the Plaintiff was arrested, and the Plaintiff together with the minor child was detained. As such, an order in favour of the Plaintiff is warranted.

[24] All that remains is the quantification of the Plaintiff's damages.

[25] When evaluating the damages sustained by the Plaintiff, the Court is guided by what was stated in ***Minister of Safety and Security v Tyulu*** [7] where the Court stated 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 ...'

[26] I align myself with what was stated by Newgent AJ in ***Minister of Safety and Security v Seymour*** [8] where the Court stated that:

“Money can never be more than a crude selatium for the deprivation of what in truth can never be restored, and there is no empirical measure for the loss.”

- [27] It remains the prerogative of every Presiding Judge in every matter to make a ruling on what would be just and equitable under the circumstances to compensate a Plaintiff for the loss suffered due to the actions of being unlawfully arrested and detained. Although the Court may be guided by previous legal precedent, it would still be determined on a case-by-case basis of what would be appropriate to be ordered, having regard to the facts of each specific matter, and the trials the Plaintiff would have endured in respect of such matter. In evaluating previous cases, however, the Court finds some guidance in what was stated when Mocumie JA stated in *Van der Nest N.O v Minister of Police* [9] that:

“From a survey of cases it is reasonable to conclude, without setting a bar, that the Court has ordered damages ranging from R 15 000 – R 30 000 per night with awards varying in light of the circumstances of each case. The award must be just, reflecting the importance of the fundamental constitutional right infringed, the right of freedom of movement and residence, and in this instance the right to dignity and privacy.”

- [28] The case the Court could find that resembles most closely the current facts was the matter of ***EA and Others v Minister of Police*** [10], which dealt with

the incarceration of a mother together with twins, then being one-and-a-half years old.

[29] In that matter, the evidence presented, however, indicated horrific circumstances under which the Plaintiff and the minor children were kept, and unthinkable ordeals that they encountered during their stay of detention.

[30] In the current matter, luckily, although the detention was in undesirable circumstances, several of the ordeals as in the previous matter were not present.

[31] In the matter referenced, the Court awarded R 250 000.00 to the Plaintiff in her personal capacity, and R 100 000.00 to each of the minor children.

[32] In the current matter, the Court finds no justification for the detention of a 6-month-old baby under circumstances where it is evident that other arrangements in respect of this young child could have been made. The detention of this young child was not a last resort but seems to have been standard practice if regard is had to the fact that the current Plaintiff was detained in a cell with another detainee facing a similar situation.

[33] Being subjected to the unlawful arrest and detention, an award in favour of both Plaintiffs is warranted.

[34] I am of the view that an award in the amount of R 150 000.00 (one hundred and fifty thousand rand) in respect of the Plaintiff in her personal capacity

and R 150 000.00 (one hundred and fifty thousand rand) in respect of her representative capacity is appropriate.

[35] During argument it was discussed with the Plaintiff's legal representatives that any award the Court might wish to make ought to be held in trust to the benefit of the Second Plaintiff, which submission was accepted by counsel appearing on behalf of the Plaintiff.

COSTS:

[36] Having found as aforesaid, the Court finds no reason to deviate from the normal principles pertaining to costs and, under the circumstances, a Cost Order on a party and party Scale B is justified.

ORDER:

[37] As a result, the following order is made:

[37.1] The Defendant shall pay damages to the Plaintiffs as follows:

[37.1.1] R 150 000.00 (one hundred and fifty thousand rand) to the First Plaintiff; and

[37.1.2] R 150 000.00 (one hundred and fifty thousand rand) to the Second Plaintiff.

[37.2] The First Plaintiff shall within 3 months of payment of the capital amount due to the Second Plaintiff in terms of this Order do all things necessary to achieve the establishment of a Trust and the opening of a bank account of the Trust by the Trustees, and the

Plaintiff's attorneys shall do all things necessary to assist in achieving this establishment of the Trust.

[37.3] Payment by the Defendant shall be made into a Trust of the Plaintiff's attorneys to be invested and held by them in a separate interest-bearing account pending the establishment of the Trust and the opening by the Trustees of a bank account.

[37.4] On the establishment of the Trust and the opening of a bank account of the Trust, the Plaintiff's attorneys shall pay the full amount invested in such account as aforesaid, including the accrued interest, into the Trust's said bank account.

[37.5] The number of Trustees for the purpose of transacting the business of the Trust (save for the appointment of the Trustees) shall be two and such number for such purpose shall not be exceeded or reduced.

[37.6] For purposes of the establishment of the Trust, the Trustees shall be:

[37.6.1] The Plaintiff

[37.6.2] Any attorney in the Plaintiff's attorneys' office who is in good standing with the Legal Practice Council.

[37.7] The terms and provisions of the Trust Deed shall not be amended save with leave of the Court.

[37.8] The Trustees shall provide security to the satisfaction of the Master in terms of Section 9(2) of the Trust Property Control Act, 1988.

[37.9] The minor Plaintiff is exempted from furnishing security.

[37.10] The Trust beneficiary shall be the Second Plaintiff only.

[37.11] In respect of the action, the Defendant shall pay the costs on a party and party Scale B.

H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

Counsel for the Plaintiff: Adv DF Makhubele

Instructed by: Mathebula & Mathebula Attorneys Incorporated

Matter heard on:	27 July 2026
Judgement delivered on:	29 July 2026

- [1]** Maritz v Minister of Police 661/2021 [2025] ZANWHC 8 (15 January 2025)

- [2]** Zealand v Minister of Justice and Constitutional Development and Another [2008] ZACC 3; 2008 (6) ZACC3; 2008 (6) DCLR 601 (CC) at paragraph 25

- [3]** Mahlangu and Another v Minister of Police 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC)

- [4]** De Klerk v Minister of Police 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) para 62.

- [5]** E A and Others v Minister of Police [2019] ZAGPJHC 9; 2019 (7K6) QOD 462 (GSJ) (12 February 2019)

- [6]** Raduvha v Minister of Safety and Security and Another [2016] ZACC 24

- [7]** Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) at para 26

- [8]** Minister of Safety and Security v Seymour [2007] 1 All SA 558 (SCA) at paragraph 12

- [9]** Van der Nest N.O v Minister of Police [2025] 2 All SA 655 (SCA) at paragraph 33

- [10]** E A and Others v Minister of Police supra