

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MAKHANDA]

CASE NO: CA165/2021

Heard on: 18/03/2022

Delivered on: 03/05/2022

In the matter between:

NOMBONISO PLAATJIES

Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

NHLANGULELA DJP

[1] This is an appeal arising from the judgment of the magistrate of Grahamstown (now Makhanda) dismissing the appellant's claim for damages. The claim pertained to an alleged assault by the members of the respondent upon the appellant whilst the members were performing police duties within the cause and scope of employment with the Department of Safety and Security, for which the respondent is vicariously liable in terms of s 2 of State Liability Act 20 of 1957.

[2] The appeal is predicated on numerous aspects of misdirection on the part of the magistrate with regard to approach to evidence and discovery of documents for the purposes of trial. The legal representative for the respondent placed focus on the issue that the magistrate was correct in finding that since the appellant's evidence was out of

synch with the pleaded material facts, on which the cause of action is based, the dismissal of the appellant's claim was correct.

[3] In terms of Rule 6 (3) of the Magistrate's Court rules the appellant had to plead the cause of action, and in the manner as is provided for in Rule 6 (4) which reads as follows:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

[4] In turn, the respondent had to submit a plea that complies with the provisions of the Rule 6 (5), read with the provisions of Rule 6 (4). I quote the provisions of Rule 6 (5) below for the purposes of convenience:

"When in any pleadings a party denies an allegation of fact in the previous pleading of the opposite party, he or she shall not do so evasively, but shall answer the point of substance".

[5] The provisions of Rule 6 (4) correspond to Rule 18 (4) of the uniform rules of the Superior Courts. In the commentary by Herbstein & Van Winsen: *THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA, 5th Edition* at 565 adopt the definition of the term "material fact" with reference to the case of *North West Salt Co Ltd v Electrolytic Alkali Co Ltd* (1913) 3 KB 422 at 425, CA where the following was stated:

"If a party relies on a fact, and will fail in his claim or defence unless at the trial that fact is proved, that fact will be a 'material fact' or '*factum probandum*.' However, where the fact relied on is such that if the party fails to prove it at the trial he may nevertheless succeed on his claim or defence, that fact will in general not be a material fact, but only evidence of a material fact. Facts of this kind are known as '*facta probantia*', and should not be pleaded."

[6] In our jurisdiction the definition of the term “material fact” as stated in the *North Western Salt* case was adopted in the case of *McKenzie v Farmer’s Co-operative Meat Industries Ltd* 1922 AD 16 at 22 in the following terms:

“... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

[7] The purpose of the pleadings was stated in the case of *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 108D-E as follows:

“In support of this contention counsel referred to inter alia Shill v Milner **1937 AD 101** at 105 and Marine & Trade Insurance Co Ltd v Van der Schyff 1972(1) SA 26(A) at 44D - 45E. Both these decisions cite an earlier one of this court, *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 in which at 198 it was said:

‘The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.”

Also see: *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433.

[8] It is common cause that the cause of action as pleaded in the appellant’s particulars of claim is assault, which is recognized in the law of delict as *actio iniuriarum* in which assault is defined as an infringement of the right to bodily integrity (physical and

psychological) – see: *JC Van der Walt and JR Midgley: Principles of Delict*, 3rd Edition at p. 111, para 78; and the case of *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A) at 145J-146A where the court stated:

“One of an individual’s absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in *corpus*, but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element. For present purposes a convenient summary of the position is to be found in W A Joubert’s *Grondslae van die Persoonlikheidsreg* (1953) at 131:

‘(1) *Die reg op fisiese integriteit*

Die geobjektiveerde regsgoed is hier nie die liggaam in die gewone konkrete sin van die woord nie, maar *die hele fisies-psigiese kant van die persoonlikheid*. Die mens het onder hierdie hoof 'n persoonlikheidsreg t a v : die *liggaam*, waardeur hy beskerm word teen enige fisiese aantasting daarvan, hetsy deur gewelddadige besering, hetsy op meer indirekte wyse soos deur die toediening van gif, die veroorsaking van fisiese skokke, ens.; onafskeibaar van die voorgaande, die *gesondheid* in volle omvang, insluitende die verstandelike welstand; die *liggaamlike vryheid*, sodat hy beskerm word nie net teen gevangenhouding nie maar ook teen enige belemmering van die bewegings-en handelingsvryheid;....”

[9] The definition of assault is the same under both civil law and criminal law. In criminal law, CR Snyman: *Criminal Law 4th Edition* (Lexis Nexis publication) in Chapter XVI defines assault as the offence consisting of unlawful and intentional applying force, directly or indirectly, to the person of another; or inspiring a belief in another person that force is immediately to be applied to her. In support of this definition the author makes reference, in footnote 4, to the cases of *Jack* 1908 TS 131 at 132-133; and *Marx* 1962 (1) SA 848 (N) at 853.

[10] The pleaded case of the appellant together with the material facts on which it is based were set out in the particulars of claim, the relevant sections of which read in the following terms:

“WRONGFUL AND UNLAWFUL ASSAULT:

...

6. On or about the **13 NOVEMBER 2012** at approximately 02h15, unknown members of the South African Police Service more specifically members of the Tactical Response Team, 3 African males and two white males, wrongfully, unlawfully and forcibly, whilst pointing firearms at Plaintiff and her family, entered and searched Plaintiff's house situated at 31221 Joe Slovo Street, Joe Slovo, Port Elizabeth.

7. At the time of the unlawful entry and search, Plaintiff was dressed in a short pyjamas and Plaintiff was recovering from a caesarian operation.

8. When Plaintiff asked the police officers permission to fully clad herself she was told that she could not and one of the officer pulled the Plaintiff on by arm and threw Plaintiff down onto the cold floor.

9. Plaintiff sustained injuries when she was pulled by the officer by her arm and thrown to the floor.

10. The said members should and could have foreseen, when pulling the Plaintiff on her arm and throwing her down onto the floor that the Plaintiff could and would sustain injuries as a result of their unlawful actions.

11. As a result of the wrongful, unlawful and intentional assault Plaintiff sustained injuries and was seen by Dr Shaun January on 19 November 2012 **(See annexure marked NP1).**

12. As a result of the unlawful assault the Plaintiff suffered damages in the sum of R50 000,00 as and for general damages, pain and suffering, shock and emotional trauma and *contumelia*.

13. In the premises, Defendant is liable to Plaintiff in the sum of **R50 000,00**, but notwithstanding demand, fails, refuses or neglects to pay this amount or any portion thereof to Plaintiff...”

[11] It is plain from the averments in paragraphs 6 to 13 of the particulars of claims, *supra*, that the appellant relied on numerous material facts pertaining to the unlawful conduct of the police, of which pulling and throwing the appellant to the floor are a part.

[12] Saddled with a duty to tender a plea that complies with subrules 6 (4) and 6 (5), the respondent merely denied all the material facts alleged in the particulars of claim without setting out the material facts upon which the denial of the material facts on the particulars of claim was based. Rather, the respondent merely called upon the appellant to prove her case. In delictual claims based on assault the *onus* of proving that assault did take place rests on the claimant, the appellant in this instance. Once the commission of assault is proved at the trial, the defendant, the respondent in this case, is saddled with a duty to satisfy the court that the assault upon the appellant was justified. In this regard, the case of *Mabaso v Felix* 1981 (3) SA 865 (A) at 874 is apposite.

[13] Pursuant to filing of pleadings as described, the trial commenced whereupon the appellant testified together with Mr B.R. Mbeyu, her husband. Two witnesses testified on behalf of the respondent, namely: Ms Mamb and Mr Fourie, the members of the SAPS.

[14] It remains necessary for this Court to recount the evidence in order to reflect on the salient facts that have a bearing on the issue(s) raised in these appeal proceedings.

[15] The appellant, her husband and two children were sleeping in their house, situated in Joe Slovo squatter camps, Port Elizabeth, when on 13 November 2012, and at approximately 02h15, the members of the SAPS attached to the Tactical Response Unit (the TRU) ransacked the premises of the appellant. She heard a dog barking outside, which alerted her to the presence of the police in the premises. At the same time that the dog was barking, the appellant heard the voices: "We are police, police, open the door, open the door". The police threatened to shoot the door open if she and her husband did not open the door. The appellant's husband opened the door. Upon entering, the police pointed firearms at them. The appellant's husband was ordered to "get down" whereafter he was tramped-on. Their daughter, also pointed with a firearm, was the next to be so ordered. The appellant too was ordered to "lie down", which she had to do. That order caused her to lie down onto the floor next to her husband, and she lay down on the side of her body (abdomen) on which she had a recent caesarian operation. In describing how she got to lie down to the floor she said (at page 7 of the record): "It is due to their force because their guns were on me [indistinct] shoot me if I do not [indistinct]". When asked if such lying down did cause injuries she said: "I felt [indistinct] lay down because I was being forced and I also lie on this arm... It (*sic*) was in pain... There is fully (*sic*) a mark on the left elbow, it is a mark that is still there and it is also in pain. And also the abdomen, the stomach [indistinct]. It is now spreading to the leg also." She alerted the police to the fact that lying down was causing her injuries in this manner: "When I said to them (*sic*) about the operation they said: just lie (*sic*) down or we will shoot you. Those were the words they uttered to me... They did not care."

[16] The appellant also testified that the police forcefully searched her house for firearms that were unknown to her. As the searching of the house was unfolding, a two months old baby of the appellant, who she had been caused to leave on the bed, and later trapped under suitcases that were placed on the bed and searched by the police, started to cry loud enough for the police to hear. But the police just ignored the cry until the appellant herself cried, whereupon she was allowed to take care of the baby.

According to the appellant the presence of the police at her place attracted the presence of the neighbours. She mentioned two of the neighbours, Manyau and Ntuki.

[17] When testifying under cross-examination, the appellant denied that the police pulled her arm and threw her to the floor. She repeated the manner in which she was forced to lie down as testified in chief. She was also confronted with the version of the police witnesses, which was not pleaded, that they did not visit the appellant's house on 13 November 2012; to which she replied that other police officials whom she described as the TRU members, and conveyed on a police vehicle having green stripes, did visit her place of resident. It also emerged that the appellant reported the incident to Kwa-Dwesi Police Station immediately after the members of the TRU had left her house, but the status of the criminal case that had been registered remains shrouded in mystery as the police have demonstrated lack of appetite to refer the matter to court for prosecution.

[18] In chief, Mr Mbeyu did not contradict the material evidence of the appellant. He confirmed the events that unfolded in his house and in particular, that the police who visited him and the appellant were those belonging to the TRU, not the two police witnesses who testified on behalf of the respondent, who they could identify had the members of Kwa-Desi police investigation unit cared to investigate their complaint. He also testified that he was pointed with a firearm and forced to open the door and to lie down, but he did not see how the appellant was caused to lie down as his attention was focussed on the policeman who was pointing a firearm at him.

[19] The evidence of Ms Mamb and Mr Fourie did not shake the case of the appellant in any way. The thrust of the evidence of these witnesses is that although they were involved in police patrols in Kwa-Zakhele Township and the Northern areas of Port Elizabeth they did not reach Joe Slovo squatter camps. However, it emerged from the evidence of the police witnesses that certain TRU members did conduct patrols in the area of Uitenhage, Despatch and Joe Slovo squatter camps during the time at which the appellant's house was ransacked and her bodily integrity violated.

[20] The evidence of police pocket books was adduced. Significantly it transpired that the AVL records which would indicate the location of police vehicles at the material time relevant to the appellant's complaint did not appear in their pocket books. The police witnesses testified that they did not have AVL records in their possession at any stage.

[21] In dismissing the appellant's claim the magistrate gave a set of reasons, which he regarded as being relevant to unlawful searching of the appellant's house, as follows:

- (i) The evidence of appellant and her husband did not differ;
- (ii) Ms Namb and Mr Fourie were not present at a Joe Slovo squatter settlement on 13 November 2012;
- (iii) It is possible that other members of the Police who were deployed into the Northern areas of Port Elizabeth to conduct patrols could have reached the appellant's place of residence at Joe Slovo squatter camps;
- (iv) The entries on the pocket books of Ms Namb and Mr Fourie did not place them in Jose Slovo squatter camps;
- (v) The AVL records which could shed light on whether police vehicles did reach the appellant's place of residence were not discovered in terms of the rules of court due to the fact that the appellant did not ask for them. Therefore, the inference to be drawn from the failure to make AVL records available and to call the evidence of Ms Eric is that the appellant avoided exposure to facts that are unfavourable to her;
- (vi) The appellant failed to call the evidence of Manyau and Ntuki with the result that the presence of the police and their vehicles at her place of residence could not be ascertained;
- (vii) There are two mutually destructive stories of both parties, which on the application of the principles stated in the case of *National Employers General Insurance Co. Ltd v Jagers* 1984 (4) SA 43 (E) at 440H, requires the assessment of credibility of the appellant's evidence against the *onus* that is thrust upon her. Having said that, the magistrate opined that appellant's evidence was false and that of the respondent cannot

be said to be false. As a result, the appellant's burden of proof in respect of wrongful arrest and forcefully entry was not discharged.

[22] Further, in respect of wrongful, unlawful and intentional assault, the magistrate penned another set of reasons, which read:

“The Plaintiff's amended particulars of claim reads as follows:

8. When Plaintiff asked the police officers permission to fully clad herself she was told that she could not and one of the officers pulled the Plaintiff on her arm and threw Plaintiff down onto the floor.

9. Plaintiff sustained injuries when she was pulled by the officer by her arm and thrown to the floor.

10. The said members should and could have foreseen when pulling the Plaintiff on her arm and throwing her down onto the floor that the Plaintiff could and would sustain injuries as a result of such unlawful actions.

11. As a result of the wrongful and intentional assault the Plaintiff sustained injuries and was seen by Dr Shaun January on the 19th November 2012 (see annexure NP1).

12. As a result of the unlawful assault the Plaintiff suffered damages in the sum of R50 000,00 as and for general damages, pain and suffering, shock and emotional trauma.

The Plaintiff gave evidence that her lying down was informed by the police forcing her whilst their guns were pointed at her in other words she was told to lie down or they will shoot her. (**“I did. When I said to them about the operation they said just lay down or we will shoot you”**). Her husband confirmed this that the Plaintiff was told to lie down and that is how she fell to

the right. It is patently clear that what was said by the Plaintiff and her husband is contrary to what is stated in her papers. In **Kali v Incorporated General Insurances Limited** 1976 (2) SA 179(D) at 182A it was said:

“... a pleader cannot be allowed to direct the attention of the party to the issue and then at the trial attempt to canvass another.”

In **Minister of Safety & Security v Slabbers** (668/2009) [2009] ZASCA 163 (30 November 2009) it was said:

“The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for the plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issue falling outside the pleadings when deciding a case.

Plaintiff's evidence and that of her husband clearly shows that she was not pulled and was not thrown to the floor by the members of the South African Police Services as suggested in her papers. The said incident was denied by the Defendant and Plaintiff was put to the proof thereof. It is trite that one stands and falls by his or her pleadings. In my view and based on the reasons stated above the Plaintiff cannot succeed in her claim for wrongful, unlawful and intentional assault.”

[23] The upshot of the judgment of the magistrate is that the appellant's pleaded claim for assault was dismissed for two reasons. The first reason was that the appellant's version is untrue because she failed to cause AVL records to be discovered and to call Manyau and Ntuki to give corroborating evidence that would place the police at the scene of crime. The second reason is that the appellant's pleading that she was pulled and thrown down [to the floor] by a policeman was not proved by her oral evidence. *Mr*

Petersen, counsel for the respondent, pinned his faith on the second reason, arguing strenuously that the dismissal of the appellant's case based on the disavowal of the fact that she was pulled by the arm and thrown to the floor puts paid to the appeal. I disagree with the magistrate for the reason that the approach that he adopted towards both the evaluation of evidence application of the principles of pleadings was wrong.

[24] The concession made by the police witnesses that although they and members of their group did not conduct patrol at Joe Slovo squatter camps, there would have been other members of the SAPS belonging to another group who conducted patrols in the area of Joe Slovo squatter camps as the deployment of police patrols covered the entire Port Elizabeth and the surrounding areas which included the Northern area in which Joe Slovo squatter camps is situated. That concession coincides with the version of the appellant that the members of the police with discernible identification features, not Ms Namb and Mr Fourie did conduct patrol in her place of residence. Further, in so far as the respondent did not plead any version, weight ought not to be accorded to the police evidence concerning AVL records that were not even part of the record, let alone the fact that the appellant never relied on the AVL records in both her pleadings and oral evidence. And a need for the appellant to discover AVL records should not have arisen. The appellant was not shown at the time when she was testifying that she had concealed AVL records that contradict her assertion that she was assaulted by policemen whilst she was in the tranquility of her house. In light of the fact that Manyau and Ntuki were not present in the house at time when the appellant was being assaulted by the police it would not have been necessary for the appellant to call them to support her version, and the expectation that those neighbours of the appellant would testify against her is, for lack of a better expression, a wild dream. In any event the evidence of the appellant is an unshaken edifice in my view. In the circumstances the appellant's evidence of identity features of the policemen that she saw, and corroborated by her husband, ought to have been regarded as probable. It being so a dispute of material fact(s) did not arise. The magistrate himself accepted that the evidence of the appellant was not contradicted by the police witnesses; in as much as the respondent did not proffer a contradicting version in the plea. The issue of identification of those policemen

that assaulted the appellant, and her husband, also did not arise as the trial court was given the description of the perpetrators of assault, with the appellant having reported the crimes of assault to the Kwa-Dwesi Police Station immediately after the incident that gave rise to the claim. In brief the magistrate disregarded the proven material evidence of this case.

[25] I now turn to the pleadings issue. To underscore the definition of assault it must be said that the pleaded assault is the same in both civil law of delict and criminal law. I must re-state the elements of assault to dispel the notion that the evidence of the appellant established a case that was not pleaded. It is trite law that since the appellant's claim is classified as *actio iniuriarum*, the appellant did not have to allege and prove that the police who assaulted her had the intention to do so. By definition of assault, the force applied by the police to inspire a belief in the mind of the appellant that she would be killed if she did not adhere to the instruction that she must lie down to the floor constitute assault. The evidence of the appellant was that force, in the nature of pointing with a firearm at her coupled with issuance of verbal death threats that forced her to lie down to the floor with the result that she got injured. Those are the material facts that were pleaded in the appellant's particulars of claim. The appellant was, as a fact, forced at gun point to lie down and she did so. In addition thereto, pulling and throwing [to the floor] were also the material facts. On the one hand, pointing with a firearm and the issuance of death threats and, on the other hand, pulling and throwing constitute separate and independent material facts. Each of those classes of material facts coupled with going down to the floor would did inexorably cause physical and/or psychological injuries. And either of those classes of material facts as averred in the particulars of claim would, if proved, entitle the appellant to the relief sought. Therefore, the exclusion of "pulling" and "throwing" from the list of material facts would have informed the respondent well before trial that the real issue for adjudication is whether, or not, the appellant was assaulted by the members of the SAPS. The oral evidence that clarified the manner in which assault took place that occasioned her bodily injuries did not establish a different case of assault in this matter. The same conclusion would certainly not obtain had pointing with a firearm and death threats, the material facts, not

been pleaded as being the reasons that caused the appellant to lie on the floor where she was again injured physically; the injuries of shock and trauma having commenced at the time when the police made a demand that the door must be opened. Differently put, the respondent's failure to plead material facts for her denials and testify in support thereto was not caused by the evidence of lying to the floor due to pointing with a firearm and verbal threats that if the appellant did not lie down she would be shot at and killed. The real issue of assault never escaped the attention of the respondent in this matter. Even in a worse-case scenario of unpleaded issues that has emerged during trial but which falls well within the ambit of the plaintiff's case the courts have not shied away from determining the real issue in litigation. In this regard, in the case of *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433 the following was said:

“This court ... has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of trial.”

[26] Regard being had to the cases of *Collen* and *Imprefed (Pty) Ltd* which are referred to in paras. 24 and 6 above, it seems to me that the problem that confronted the magistrate was the failure to apply Rule 6 (4) of the rules of the Magistrates' Court against the well-established principle of pleadings that in considering the pleaded material facts on which the cause of action is based the trial court in which all the issues have been ventilated in the evidence it is vested with a wide discretion to determine those facts, together with any other that has emerged during the trial, in order to decide the real issue(s) in dispute between the parties as long as none of them is prejudiced thereby. That approach is illustrated in the case of *Kali* on which the magistrate placed reliance for his judgment. In *Kali*, the plaintiff claimed damages for defendant's failure to repair accident damage caused to his car in breach of the insurance contract; to which the defendant pleaded that since the plaintiff failed to give immediate notice of the car accident in writing, the condition of the contract, payment was not due and payable. In the course of argument on the merits the defendant sought to amend the plea by introducing an alternative defence that if oral notice was given, then it was not confirmed in writing and delivered to it as soon as possible. The court held that the new

defence cannot be allowed because it may result in prejudice to the plaintiff which cannot be cured by an adjournment and an appropriate order as to costs. In this case the magistrate did not canvass the issue of prejudice. The attitude of the courts towards pleadings in the Magistrates' Court has always been what Himstra J (as he was then) said in *Alphedie Investments (Pty) Ltd v Greentops Ltd* 1975 (1) SA 161 at 161H:

"The Court is declined to look benevolently at pleadings, especially in the magistrates' court, so that substantial justice need not yield to technicalities, such a view was expressed, *inter alia*, in *Odendaal v Van Oudtshroon*, 1968 (3) SA 433 (T) at p 436D. Nevertheless, the issues as defined by the pleadings must not be lost sight of and a party cannot rely on causes of action or on defences which were not put in issue and were consequently not fully investigated."

[27] On the foregoing, the magistrate *erred* in the manner in which he evaluated the evidence; and he misconstrued the pleadings on which the evidence was led. Therefore, the judgment of the magistrate falls to be set aside.

[28] The appellant's claim was founded on assault, not unlawful search. That much was conceded by counsel for both parties. This court having evaluated all the evidence that is relevant to the assessment of an amount of damages, referring the matter back to the magistrate for *quantum* will work an injustice to the parties. The amount of damages sought by the appellant is a sum of R50 000,00; which is not a huge amount of money if regard is had to the costs already incurred at the trial and on appeal. Since the claim is not founded on unlawful search of appellant's premises I will consider only the comparable cases listed in the appellant's heads, doing so subject to the requirements of fairness and justice. The cases of *Funde v Minister of Police* (905/2010) ZAE CPRHC 92 (11 December 2012) seems to be comparable to the present matter on the facts. An amount of R110 000,00 was awarded to a victim of severe assault, a woman, but which was not accompanied by physical injuries. In this case a sum of R50 000,00 is sought and in the circumstances where physical injuries coupled with shock and insult have been suffered. The injuries are in the nature of bruises on the firearm; scratch marks on the wrists; shock and pain in the thumb nail and back-pain.

The assault was an insulting breach of the appellant's integrity, a protected right under the Constitution. The police entered the appellant's house, and searched it without a warrant having obtained to do so. She was forced to wake up at 02h30, and to leave her 2 months old baby on the bed unattended. The plea of the appellant, made whilst lying on the floor to be allowed to save the baby from being buried under suitcases that the police had pulled onto the bed to conduct unlawful search was ignored until she cried in frustration. These factors must also be taken into account. The appellant was tormented by suffering caused to her husband and children, including the baby, at gun-point to lie down to the floor. But the award that the court can make is limited to R50 000,00 which is an extremely fair award to be made under the prevailing circumstances.

[29] In the result, the following order shall issue:

- 1. The appeal is upheld.**
- 2. The judgment of the magistrate is set aside, and is substituted with the following order:**
 - 2.1 The respondent to pay the amount of R50 000,00; with**
 - 2.2 Interest a *tempore morae* on the amount of R50 000,00 calculated at the prevailing prescribed *mora* interest rate of 15% per annum, from date of judgment in the Magistrates' Court, to date of final payment.**
- 3. The respondent to pay the costs incurred both in the Magistrates' Court and an appeal within 30 days after the date of taxation.**

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
MTHATHA

I agree:

N.M. MVUMBI

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant : Adv. M. Du Toit
Instructed by : CAROL GESWINT ATTORNEYS
MAKHANDA.

Counsel for the respondent : Adv. P. Petersen
Instructed by : STATE ATTORNEY
MAKHANDA.