

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 25376/2007

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED: NO

In the matter between :

CHRISTINA FUNDISWA KHUMALO

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

STRYDOM J :

[1] This is an action in which the Plaintiff claims from the Minister of Police (the defendant), delictual damages on two grounds. First, a claim for wrongful and unlawful assault, humiliation and degradation. It is alleged that the plaintiff sustained injuries, suffered pain, depression and suffered trauma as a consequence of this. It is further alleged that as a consequence of this plaintiff had a miscarriage, she lost amenities of life and was disfigured. In her amended particulars of claim she claims the amount of R59 575 000-00 as per claim 1. Secondly, she claims for loss of earnings as she was an attorney and suffered loss as a result of her arrest, humiliation and degradation. In claim 2 she claims the amount of R16 000 000.

[2] Both these claims are for general damages as no case for specific damages suffered was pleaded. Patrimonial damages could have been claimed, if suffered, but must be particularised. (See: Brown v Hoffman 1977 (2) SA 556 (NC))

[3] At the outset the court ordered a separation of the merits and quantum.

[4] When the matter proceeded, initially on a virtual link, the counsel for the defendant indicated that the two main witnesses of the defendant had passed away and that the defendant intended to bring an application in terms of section 3 of the Law of Evidence Amendment Act, Act 45 of 1988 ("the Act") for these witnesses' written statements to be received in evidence. The court directed that this application should stand over when the defendant had to present its case. The trial, now in open court, proceeded.

[5] The plaintiff was called as a witness and testified that she is a qualified attorney admitted on 19 September 2002. She started her own practice under the name and style of Khumalo Attorneys with offices situated in Malibongwe Drive, Randburg.

[6] On Saturday the 30th of June 2007 she visited a hair salon situated at 170 Hendrik Verwoerd Drive, Randburg. She went there with her husband with whom she married four (4) days earlier.

[7] As she was busy being treated under a hair dryer two policemen came into the salon at about 15h30. It became common cause that these policemen were Sgt Ndlovu and Sgt Mbuyisa. Her husband was standing at the counter. They said Chinedu you are under arrest. He said he was not Chinedu. One of the police, identified as Sgt Mbuyisa slapped her husband and wanted to handcuff him. Plaintiff asked why was her husband arrested and they told her to get a lawyer. She said that she was a lawyer. There were about twenty people in the salon. The other policeman, Sgt Ndlovu came to her and slapped her whilst she was still under the dryer. She fell to the ground. She was kicked on her body, legs and stomach about five times. She was pulled up by her hair and clothes. She then found her balance and stood up. She was told that she was the girlfriend of Chinedu and that she was working at Investec Bank. She and her husband were dragged across the road to a police vehicle and was forcibly pushed into it. There was a commotion and people were looking at what was happening to them. The keys of her Jeep vehicle was obtained from her. They drove off in the police vehicle but Sgt Ndlovu who was

driving the vehicle slammed of the brakes and they came to a standstill. Sgt Ndlovu pointed them with a firearm asking what was wrong with the Jeep as apparently it could not start. She said maybe the seat belt was not worn by Sgt Mbuyisa when he was trying to drive their vehicle to the police station. She was told that if something should happen to Sgt Mbuyisa he will shoot them.

[8] They were taken to Hillbrow Police station. She was told that she was detained for interfering with police work. At the police station she was interrogated and threatened to tell the truth. At about 16h00 plaintiff and her husband were told that they will be taken to Kameeldrift Police Station situated in Pretoria. On arrival at Kameeldrift Police Station her husband was taken from the vehicle but she remained seated. Later she was taken back to Hillbrow Police Station where they arrived at 20h00. Her husband remained at this police station. She again told the police that she was an attorney and was released. She was warned and threatened not to open a case against them as they knew where she was living. She drove off in her Jeep to her home.

[9] At 08h00 the next morning she received a call from Sgt Ndlovu who apologised to her for assaulting her. She was told her husband was still at Kameeldrift Police Station. She said she was not going to open a case. Although she experienced abdominal pain she told Sgt Ndlovu that she accepted his apology. On Monday the 2nd of July 2007 she still experienced pain all over her body.

[10] On Wednesday the 4th July 2007 she went to see her gynaecologist Doctor Barrow. He then established that she was pregnant. She was not aware of this. Blood was drawn and a vaginal ultrasound sonar was conducted. She was found to be four weeks pregnant. She asked the doctor to note her injuries but he said he is not going to do that as he does not attend courts. She was given pain tablets.

[11] On 11 July 2007 she went to see her general practitioner Doctor Morafo. He concluded an abdominal ultrasound and established that she was six weeks pregnant. He noted her injuries which were still visible. He noted bruises on her right and left upper limbs, a bruise on her left thigh, a bruised and swollen left ankle and a

bruised left index finger. He noted that these injuries were consistent with an assault. He could not see any injuries to her stomach.

[12] On 18 July 2007 she went back to Doctor Burrow who examined her. No heartbeat of the foetus was detected, her progesterone levels were low and declined from 11 July 2007. This was an indication of a pregnancy loss and she was advised that the foetus should be removed but she refused. She was given progesterone supplements for two weeks. She remained in pain.

[13] On 12 August 2007 the Plaintiff was admitted to hospital and the embryo was removed from her womb.

[14] She then opened a case against the police despite the earlier threats by Sgt Ndlovu not to do so.

[15] She testified that she sustained the injuries as noted by Doctor Morafo. She testified that after the loss of the embryo she became depressed.

[16] On 25 August 2007 she went to the police station to depose to her statement. The criminal case she opened against the policemen was later withdrawn by the state. She said after the incident she could not practice as an attorney any longer. She tried to assist her husband in his criminal case. She took down her attorney's notice board. She was scared of the police for laying charges against them.

[17] During cross-examination she said that the medico-legal report of Doctor Morafo was wrong and he never assisted her to conceive. She said it must be a typing error.

[18] She said Sgt Mbuyisa never assaulted her. He assaulted her husband. He helped to push her into the police vehicle. She was kicked by Sgt Ndlovu all over her body more than five times. She was told by the police that she interfered with their duties and that they will come up with a case against her. She denied interference. She testified that she was slapped twice and kicked all over her body.

[19] She was cross examined on the contents of her statement in a default application which differed in some respects from her evidence in court. In this statement she stated for instance that when the police came into the salon their firearms were “*cocked out*”. This statement she did not repeat during her evidence in court.

[20] In a further affidavit she made to the police on 5 September 2007 she never mentioned that a firearm was pointed at her face in the motor vehicle. In one statement she said: “*they*” assaulted me instead of “*he*” assaulted me. She said it was a typing error. In one of her statements she left out the allegation of the pointing of the firearm by Sgt Ndlovu which took place in the police vehicle on their way to Hillbrow Police Station. Some differences between the statement and the statement of her husband was pointed out to her. For instance, he said Vusi slapped him not Sgt Ndlovu.

[21] When asked why she did not go to the doctor the day after the assault she said her focus was on her husband. She said she was traumatised about her husband. This was her biggest concern. She was adamant that the assault caused her miscarriage.

[22] She denied that she interfered with the arrest of her husband. The policeman said she was the girlfriend of the person they arrested.

[23] Mr Kingsley Omuzo was called by the plaintiff. He is of Nigerian nationality and confirmed that he is married to the plaintiff. He confirmed the evidence of the plaintiff and his evidence is not repeated herein in any detail. He testified how he was arrested with his wife and how they were assaulted. He testified that after the foetus was removed his wife took it badly. She behaved like a mad person.

[24] He confirmed that he never laid criminal charges against the police. He was confronted for stating that “*Vusi*” assaulted his wife and that he never mentioned that she was kicked. He also did not mention the pointing of the firearm in the police vehicle. He confirmed that his wife did his bail application.

[25] Plaintiff then called Doctor Lesley Morafo to testify. He confirmed that he consulted with the plaintiff on 11 July 2007. He established that she was 6 weeks pregnant. He completed the J88 form and noted that she told him that she was assaulted by members of the South African Police and that she experienced severe body pains. He examined plaintiff and noted her injuries which he could observe. He noted that plaintiff was distressed and depressed. He noted the following injuries which he found to demonstrate an event of recent physical trauma most likely due to physical assault.

25.1 She had bruises on the right and left upper limbs.

25.2 She had a bruised left thigh.

25.3 She had a bruised and swollen left ankle.

25.4 She had a bruised left index finger.

[26] Dr Marafo's conclusion was that the physical trauma as well as emotional (psychological) trauma thereafter, "*were the definite main contributing factors that led to the patient's miscarriage.*"

[27] He filed a further medico-legal report some 11 years later which differed to some extent from his first report. In his further report he added that there was no fetal heartbeat detected.

[28] He changed his report eleven years later without having the file available. He said that the miscarriage could have been caused by the assault and by psychological factors but withdrew the word "*definite*" used in his report.

[29] Mr Kingsley Omuso was recalled to explain his statement to the police.

[30] Plaintiff then called Michael Akgbo he worked in the salon on the day of the incident. He explained what was said when the people came into the salon and how the plaintiff was assaulted. He saw two people with guns and they were looking for Chinedu. He confirmed that the plaintiff was kicked.

[31] His statement which he made to the police was put to him. To explain discrepancies, he said things happened a long time ago.

[32] Doctor Lubbe was called by the plaintiff as an expert witness. He is a Gynaecologist, Obstetrician and Endoscopic Surgeon. His professional experience was not in dispute. He filed an expert report dated 31 October 2018. He prepared and signed a joint minute of a discussion held between himself and defendant's expert Prof. Buchmann dated 10 February 2020. Also a supplementary expert joint minute which added further commentary made by Prof Buchmann, dated 13 November 2020.

[33] Dr Lubbe initially testified that in his opinion the assault and the psychological stress suffered by the plaintiff contributed to her miscarriage. He came to this conclusion on the basis of the timing of the alleged assault and the subsequent loss of the pregnancy. He later, after a further meeting with Prof Buchmann changed his views. In his evidence he agreed to the contents of the second supplementary joint minute dated 16 January 2022. This minute was then, by consent between the parties, accepted in evidence. This joint minute settled the evidence and expert opinions relating to the probable cause of plaintiff's miscarriage. Considering the consensus reached by the experts on behalf of the parties as to the probable cause of the plaintiff's loss of pregnancy there is no need to refer to the evidence of Dr Lubbe further in any detail. The cause of the plaintiff's pregnancy loss will be referred to later on in this judgment.

[34] This concluded the evidence on behalf of the plaintiff.

[35] On behalf of the defendant no witnesses were called besides Prof. Buchmann who basically confirmed the contents of the second supplementary joint minute. He further explained his views as agreed with Dr Lubbe.

[36] Mr Joubert on behalf of the defendant then asked for the expert report of Professor Botha to be admitted in evidence without calling this witness. Mr Malema on behalf of the plaintiff submitted that the need to call Professor Botha has fallen away as it has now become common cause that the miscarriage was not causally

linked to the alleged assault of the plaintiff. The report of Professor Botha was not received in evidence by consent.

[37] During the course of the trial Plaintiff accepted that the two policemen who were responsible for the alleged arrest, assault and detention of her both passed away prior to this trial. During the course of the trial the court allowed reference to be made to the contents of statements these policemen made by Mr Joubert during cross examination of the plaintiff and her witnesses. These statements were however, not admitted in evidence at that stage.

[38] This prompted an application to receive the written statements of Sgt Ndlovu and Sgt Mbuyisa as evidence in this matter in terms of the Law of Evidence Amendment Act, Act 45 of 1988 ("the Act"). This application was argued and dismissed by this court. The reasons for the dismissal were provided on record and is not repeated in this judgment suffice to state that the court found that it would have been prejudicial to the plaintiff to receive statements of a witnesses, without the veracity of the versions being subjected to cross-examination. Also of importance was that these statements were not made routinely after an arrest but were by the policemen stating their defences after a criminal case was laid against them by the plaintiff.

[39] In the heads of argument filed on behalf of the defendant at the end of the matter it was submitted as follows: *"(I)n an extraordinary turn of events, the trial court permitted and allowed the defendant to rely on the two arresting/warning statements of the two police officers for purposes of cross-examination but ruled that the two statements would not be accepted as evidence in support of the case of the defendant under the hearsay Act...."* It was submitted that the court should reconsider its ruling as it was of interlocutory nature.

[40] On the acceptance of the submission that the court can now at the conclusion of the matter revisit its ruling in this regard the view of the court remains the same. The problem for the defendant remains that the probative value of these statements are so limited that it is virtually non-existent. Even if these statements were admitted as part of the evidence in this matter, the court still would have been face with the

same question what probative value could be attached to the contents of these statements. Almost nothing. The situation might have been different if these statements were deposed to shortly after the alleged assault on detention of the plaintiff and her husband as part of the docket in the case against the plaintiff's husband. But this was not the case. These statements were made in defence of the two policemen after criminal charges were laid against them. In these circumstances suspect will defend their behaviour and the contents thereof will not necessarily be unbiased.

The failed pregnancy of the plaintiff

[41] The court will deal with this issue upfront as this issue has, in my view, become moot.

[42] It was the case of the plaintiff that the alleged assault and the consequential emotional shock caused her failed pregnancy. It was required of her to prove this on a balance of probabilities. During the initial evidence of Dr Lubbe and in his expert report he formed the opinion that the assault of the plaintiff, coupled with emotional shock, caused the failed pregnancy. Whilst still under cross-examination the court asked that Dr Lubbe and Prof. Buchmann have a further meeting to see if they could not find common ground. This took place and a minute of this further meeting was handed in to court by consent. The previously stated view of Dr Lubbe was now qualified and he agreed with the view of Professor Buchmann that the most probable cause of the plaintiff's pregnancy loss was chromosomal abnormalities although no tests were conducted to prove that such abnormalities were present. Prof Buchmann also adjusted his view as a result of further and more recent academic writing on the issue whether psychological stress can be a cause of pregnancy loss. He was now prepared to agree with Dr Lubbe that psychological stress could have contributed to the loss of the plaintiff's pregnancy.

[43] Considering the second supplementary minute the following aspects, agreed between the experts of the plaintiff and the defendant became common cause between the parties:

43.1 That on 30 June 2007 the date of the alleged assault the plaintiff was pregnant;

43.2 On 4 July 2007 that there was evidence of a healthy gestation sack and embryo but no cardiac activity. The ultrasound scan does not show any evidence of a live embryo;

43.3 That after 4 July 2007 the embryo never developed further. On 18 July 2018 there was no fetal heartbeat recorded and the blood progesterone level had declined. This was a clear indication of a failed pregnancy and an early pregnancy loss;

43.4 The plaintiff's early pregnancy loss could not have been caused by physical trauma inflicted at the time of the alleged assault.

43.5 Psychological stress could have contributed to the loss of the pregnancy.

43.6 Whilst it is possible that psychological stress resulted in the plaintiff's pregnancy loss, it is not possible to state that a specific stressor, for example stress caused by physical assault, was causal. If the plaintiff suffered other episodes of psychological stress in the period around the time of conception, such episodes could also have been causal, either alone or in combination with a physical assault.

43.7 The pregnancy (conception) shown on the ultrasound scan done on 4 July 2007 may have been viable (capable of normal growth and development) or non-viable. It was too early in the pregnancy to pronounce on viability. It was only when a fetal heartbeat is observed that life can be determined with a high degree of probability.

43.8 The most frequent cause of early pregnancy loss is chromosomal abnormalities of the conceptus.

43.9 No tests were conducted at any stage to establish whether chromosomal abnormalities were present during the pregnancy or after the loss.

43.10 The probability that psychological stress was causal in the plaintiff's early pregnancy loss is low (well below 50%).

43.11 Chromosomal abnormality is by far the most probable cause of the plaintiff's early pregnancy loss, even more so given her individual risk factor profile.

[44] Considering these minutes, the experts agreed that psychological stress could possibly have contributed to the pregnancy loss of the plaintiff but there was no evidence whether the pregnancy was viable or not. Moreover, even if the pregnancy was viable, it was not proven that the psychological stress was the probable cause of the loss of pregnancy, as it was more probable that the pregnancy loss of the plaintiff was caused by chromosomal abnormalities. A Possibility cannot be elevated to a probability.

[45] In *Minister of Safety and Security v Van Duivenboden*,¹ Nugent JA found as follows:

"A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics."

[46] Applying this *ratio* to the facts of the plaintiff's matter, the plaintiff had to prove on a balance of probabilities that she at the time of the alleged assault had a viable pregnancy. She then had to prove that as a result of psychological stress caused by the assault and her detention, she lost her pregnancy.

¹ 2002 (6) SA 431 (SCA).

[47] On behalf of the plaintiff it was argued that in the absence of chromosomal tests and considering the probabilities agreed upon between the experts that emotional stress may have caused the early expulsion of the plaintiff's pregnancy and that the court "*has no alternative than to accept that emotional stress may have probably led to the expulsion of the plaintiff's pregnancy*". It was argued that this submission was based on the fact that emotional stress cannot be excluded as a contributing factor and the fact that no evidence was led to show that the plaintiff had other emotional stresses before 30 June 2007.

[48] In my view, the experts agreed that there was a possibility but not a probability that emotional stress could have contributed to the loss of pregnancy. The plaintiff had to establish a case on a balance of probabilities. This the plaintiff failed to do, as the experts agreed, that it was only a possibility that psychological stress, caused by the wrongful acts of the policemen, caused her pregnancy loss. As agreed between the experts it was more probable that she lost her pregnancy as a result of chromosomal abnormalities.

[49] Moreover, the plaintiff had to show that the wrongful acts of the police caused her stress which ultimately caused her failed pregnancy. On the plaintiff's own version, the most stressful event for her was the arrest and detention of her husband. It was never the case of the plaintiff that his arrest and detention was unlawful.

[50] Moreover, the argument on behalf of the plaintiff also ignores the agreement between the experts that there was no evidence of a viable pregnancy in the first place around the time when the traumatic event took place.

[51] I am in agreement with the arguments advanced on behalf of the defendant that there is no reliable evidence that could sway the probabilities in favour of the plaintiff that there was indeed a causal link between her alleged stress and the loss of her pregnancy. The court was referred to the matter of *AN v MEC of Health Eastern Cape* (585/2018) [2019] ZASCA 102 (15 August 2019) where the following was stated at paragraph 4:

“The test for factual causation is whether the act or omission of the defendant has been proved to have caused or materially contributed to the harm suffered. Where the defendant has negligently breached a legal duty and the plaintiff has suffered harm, it must still be proved that the breach is what caused the harm suffered.”

[52] Accordingly, this court finds that the plaintiff has failed to prove that her alleged assault and short detention of approximately six hours and consequences thereof caused her pregnancy loss.

The assault, arrest and detention

[53] As far as the alleged assault is concerned, the onus was on the plaintiff to prove this allegation. As it was common cause that the plaintiff was taken to Hillbrow Police Station at approximately 15h00 and kept in custody until approximately 20h00, the onus would be on the defendant to prove the legality of the deprivation of freedom for this period of about 5 hours.

[54] The defendant pleaded that the plaintiff was lawfully arrested for interfering with the duties and functions of members of the South African Police Services acting within the course and scope of their employment.

[55] The only evidence led by the parties pertaining to the allegations contained in the pleadings was led by the plaintiff. No evidence was led by the defendant in this regard despite the fact that during cross-examination a statement was put to the plaintiff that there was possibly a witness who saw the incident which could have contradicted her version.

[56] Although the only evidence which was led came from the plaintiff she still had to prove her case on all the issues, except for the lawfulness of her arrest and detention, on balance of probabilities, that she is entitled to the relief claimed. It was submitted, on behalf of the defendant, that the plaintiff failed in this regard and did not succeed to convince the court of the truthfulness of the various contradictory versions presented by herself and by her witnesses. It was also argued that there

are many probabilities that do not support the versions proffered by the plaintiff and the witnesses.

[57] The plaintiff's evidence was attacked on the basis that she only laid a criminal case against the two policemen on 24 August 2007 whilst the alleged assault took place on 30 June 2007.

[58] In my view, she properly explained the delay in laying the criminal charges. She testified that she was threatened not to lay such charges and only decided to lay charges when she lost her pregnancy. What she has done between these dates was to obtain a J88 from a police station which she took to her doctor to examine her and to stipulate the injuries she sustained. Why would she have done that if she was not in fact assaulted by Sgt Ndlovu?

[59] Her evidence was also attacked on the basis that she did not mention in previous statement her version that on her way to Hillbrow Police Station Sgt Ndlovu pointed a firearm at her and her husband threatening to kill them should something happened to Sgt Mbuyisa who was driving her Jeep to the police station. The plaintiff admitted that she left this out of her statement but averred that she did not provide all detail of what transpired on that date in her statement. This in my view is a plausible explanation as her evidence was much more detailed in court than what one will find in a statement.

[60] It was also argued that her injuries were superficial and more in line with a tight grip around her arms when she was arrested. In my view the evidence of her injuries are objective in nature and could be accepted by this court. It is highly improbable that Dr Morafo would at that time already noted injuries which did not exist. It was put to her that Prof Botha would testify that if she was dragged over rough terrain, one would have expected abrasions. Also marks on her body if she was kicked. She countered this by stating that her clothes protected her. In my view the probabilities favour her version as there is no other probable explanation why she went to the police station to obtain a J88 form and took it to Dr. Morafo on 11 July 2007 to examine her and to fill in the form.

[61] The court is of the view that the evidence of the plaintiff can be accepted as credible, reliable and truthful as far as what happened to her on the relevant day, subject to what is stated herein below. Her evidence was corroborated in material aspects by her husband, Mr KK Omuzo, Dr. Morafo and to a lesser extent, by Mr Akugbo.

[62] The evidence of the plaintiff pertaining to the closure or partial closure of her law firm after her arrest and more so the reasons therefore is one aspect in the evidence of the plaintiff which the court, considering the probabilities, cannot accept. The court is not convinced of the veracity thereof. It appears to be an over-reaction of the situation and a decision made by the plaintiff which was not only unreasonable in light of the circumstances but not casually connected to what happened to her on the relevant day. In my view, this consequence could not have been foreseen by the police when they acted unlawfully. The plaintiff testified that her assault in front of the public, close to the place where she practised as an attorney, caused her such embarrassment that she decided to take off her notice board and stop appearing in court for approximately 13 years. She said that her clients could have seen what happened to her. She, however, made no reference to any client who saw her or any other reason why clients would have decided not to support her practice any longer. She testified that she initially stopped practising all together but the main reason for that was that she wanted to assist her husband in his criminal matter. Later on she started to practice part-time but still decided not to appear in court as she remained scared of the two policemen, Sgt Ndlovu and Mbuyisa. Despite this she appeared in the bail application of her husband shortly after the incident and laid a criminal case against the policemen. On her own version, Sgt Ndlovu phoned her the day after the incident and apologised to her. She at that stage accepted his apology. From that day onwards there was no further contact between her and any one of the two policemen. Under such circumstances it is my view that it is improbable that what happened to her on that particular day, coupled with the alleged threat that she should not lay a criminal charge, caused the demise of her legal practice.

[63] Despite this over-exaggeration and/or over-reaction by the plaintiff, the court is satisfied that her version pertaining to her arrest, assault and detention for a period

of approximately 5 to 6 hours is truthful. There is no evidence to contradict this version.

[64] Further, there is no evidence to indicate that the detention of the plaintiff was lawful. There is also no evidence that the plaintiff unlawfully interfered with the lawful performance of the police of their duties when they arrested her husband. According to the excepted evidence of the plaintiff, Sgt Ndlovu thought that she was the girlfriend of her husband who allegedly assisted him to defraud Investec out of millions of rands. Only at a later stage when St Ndlovu realised that she was not the girlfriend they thought her to be, but was in fact an attorney and wife of Mr Onuzo, she was released.

[65] Consequently, the court finds that Sgt Ndlovu assaulted the plaintiff by slapping and kicking her, by dragging her by her hair and forcefully took her to the police vehicle where she was forcefully placed into the vehicle. A firearm was pointed at her and she was threatened, both in the police vehicle and later at the police station. This actions of the police humiliated and degraded the plaintiff. Her dignity was impaired. She was told not lay criminal charges against the police. The plaintiff was deprived of her freedom by taking her to Hillbrow Police Station and thereafter to Kameeldrift Police Station and back to Hillbrow. This detention lasted for approximately 5 - 6 hours. She suffered the injuries as was noted in the J88 medico legal report. The assault of the plaintiff on 30 June 2020⁷ by Sgt Ndlovu was wrongful and unlawful.

[66] In the plaintiff's particulars of claim she split her claims in two. The first claim referred to her unlawful assault, arrest and detention and damages suffered as a result of the *sequelae* to these unlawful actions. Her second claim referred to the same unlawful actions but a claim is made for loss of income suffered by her legal firm. As stated before in this judgment this claim is also for general damages and not claim for specific damages. This court will not distinguish between the two separate claims as the cause of action of each claim remains the unlawful assault, arrest, threats and detention.

Costs

[67] As far as costs are concerned, costs should follow the result but in my view the plaintiff should not be awarded all her costs. The defendant was partially successful to defend the claim for damages pertaining to the loss of plaintiff's pregnancy. A substantial portion of the time spent on trial was taken up by the evidence of Dr Lubbe through which witness the plaintiff wanted to prove that the loss of pregnancy was related to the assault and psychological stress suffered by the plaintiff. As stated, this could not be found and the defendant was successful in its defence in this regard. The plaintiff should be awarded 60% of her costs, such costs not to include the costs incurred by plaintiff pertaining to Dr Lubbe.

[68] The following order is made.

- (1) The merits and quantum was separated in this matter and the quantum of damages is postponed *sine die*.
- (2) The plaintiff was unlawfully assaulted, arrested, detained and deprive of her freedom a result of which she suffered such damages as she can prove.
- (3) The plaintiff's claim against the defendant that she suffered a loss of her pregnancy as a result of being assaulted, arrested, detained and deprived of her freedom is dismissed.
- (4) 60% of the cost of the merits portion of this matter is awarded to the plaintiff, such costs to exclude the costs of the expert Dr Lubbe.

R. STRYDOM
JUDGE OF THE HIGH COURT SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of Hearing: 17 January 2022
Receipt of Heads of Argument: 10 March 2022 and 04 May 2022
Date of Judgment: 17 May 2022

Counsel for the Applicant: Adv. J. M. V Malema
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