IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No. 2004/9388

In the matter between:

MENI PILLAY Plaintiff

and

MINISTER OF SAFETY AND SECURITY Defendant

JUDGMENT

[1] The plaintiff claims general and special damages from the defendant arising from the execution by the defendant's servants on the evening of 6 November 2002 of an authorisation issued in terms of section 13(7) of Act No 68 of 1995 when they entered and searched the plaintiff's residence at No. 89 Tenth Avenue, Mayfair ('the police action").

[2] A separation of issues was previously ordered, and my brother Lamont decided the questions whether the issue of the authorisation was proper, whether it was valid, and whether it was executed lawfully, in favour of the plaintiff. Lamont AJ found the authorisation to be void and unenforceable, and the execution thereof in any event to

have been excessive. The matter was postponed *sine die* for the subsequent determination of the other issues.

[3] The plaintiff claims general damages in the sum of R600 000.00, special damages in the sum of R21 049.00 for damages allegedly caused to the plaintiff's premises during the police action, and special damages in the sums of R367 520.00, R60 000.00 and US$ 4 000.00 in respect of items of jewelry and cash allegedly removed from the plaintiff's residence at the time of the police action or on the basis that the defendant's servants left the premises in an unsafe and unsecured state without having made arrangements to ensure that third parties could not gain access to the premises and remove items therefrom. The other claims set out in her particulars of claim were not persisted with by the plaintiff.

[4] The plaintiff, who is presently 67 years of age, testified whereafter Dr. Sebolelo Seape, who is a registered medical practitioner and specialist psychiatrist, Mr Andries Botha, who testified on the reasonable and necessary costs of repair of the damages caused to the plaintiff's home during the search and entering thereof, and Mr Brian Winterstein, who is a sworn appraiser and who testified on the market value of the items of jewelry that disappeared from the plaintiff's residence, were called to testify on the plaintiff's behalf. The defendant called Superintendent Moodley and Captain Adriaanse as witnesses. A psychiatric medico-legal report (*exhibit C37*) from a specialist psychiatrist engaged by the defendant for the purpose of these proceedings, Dr Leon

Fine, was handed in by agreement between the parties and they agreed on the truth of its content and the findings therein contained were admitted.

[5] The plaintiff's evidence on certain issues is not free from criticism, but Dr Seape testified that the post traumatic stress syndrome from which the plaintiff is suffering negatively impacts upon her memory and recollection of events. I am of the view that all the other witnesses who testified were credible witnesses and reliable evidence was in the main given by each one of them.

[6] It is common cause that the police officers gained access to the plaintiff's premises by breaking open a security gate and door in the perimeter wall of the property as well as a security gate and door at the main entrance to the house. Internal doors, door frames, door locks, and cupboard door locks were damaged, cupboards were emptied, clothes and household items were scattered everywhere, and the premises were left in a state of immense disorder after the search. The plaintiff was scared. She called the flying squad of the SAPS for assistance. She was ordered to undergo a body search. The plaintiff's evidence and that of Superintendent Moodley are contradictory on the nature of the body search, by whom it was ordered and conducted, where it occurred in the house, and whether or not it was executed under the eyes of certain laughing male police officers. The plaintiff's undisputed evidence, however, was that she was severely traumatized by all the events, her privacy was invaded, and she felt immensely degraded and humiliated. What should also be borne in mind is that the plaintiff is presently 67 years of age, and she was about 62 years old at the time of the police action. Mr Botha,

who met the plaintiff and commenced with the repair work at the plaintiff's residence the day after the police action, testified that the plaintiff was visibly suffering from severe shock when he met her.

[7] The plaintiff has been treated by Dr. Seape since about April 2007. She diagnosed the plaintiff as suffering from *post traumatic stress syndrome* as a result of the police action. The plaintiff, in the opinion of Dr. Seape, presents with symptoms typically associated with *post traumatic stress syndrome*, such as flash-backs and reliving the traumatic event, anxiety, mood disturbances, upsetting dreams, persistent avoidance, sleep disturbances, impaired concentration, memory deficiencies, depression, feelings of guilt, rejection and humiliation. Dr Seape's treatment of the plaintiff's condition included counselling and medication, and she is of the view that the plaintiff will require further treatment. She further expressed the view that the plaintiff's symptoms have deteriorated over time. She explained that generally the young and the old have more difficulty in coping with traumatic events. The plaintiff's prognosis, in her opinion, is not positive.

[8] Dr Fine's view is that the plaintiff, as a result of the police action, suffers from chronic and ongoing *post traumatic stress disorder* and *major depressive disorder* causing her intense emotional distress and the loss of her enjoyment of the normal amenities of her life. Her behaviour and mood are dysfunctional. Dr Fine has listed her current symptoms in his report and he expressed the view that they remain severe despite the lapse of approximately six years after the causative incident and despite the plaintiff

having received ongoing optimal treatment. He recommends that the plaintiff continues receiving psychiatric treatment, including appropriate medication and psychotherapy, and he expressed the view that she would probably require psychiatric treatment intermittently for the rest of her life. The plaintiff's prognosis, even with optimal treatment, is, in the opinion of Dr. Fine, poor.

[9] I have been referred to awards that have been made in earlier cases. No purpose will be served in analysing such previous awards in this judgment. They are not directly comparable, and merely served as a useful guide to what other courts have considered appropriate awards. Adv. Hitchings, who appeared for the plaintiff, contended for an award of R250 000.00 for general damages, and Adv. Mpanza, who appeared for the defendant, contended for an award of R120 000.00.

[10] In assessing the appropriate award to make in relation to the plaintiff's claim for general damages, I take into account the excessive execution of their authorisation by members of the South African Police Service, that the plaintiff was 62 years old at the time, that she was severely traumatized by the events, that her privacy was grossly invaded, and that she felt immensely degraded and humiliated. I also take into account the continuing depression and post traumatic stress syndrome from which she has been suffering for almost the past six years solely as a result of the incident, the severity of her ongoing symptoms, her poor prognosis of recovery, and the fact that she would probably require psychiatric treatment intermittently for the rest of her life. On the other hand, I take into account that our courts are not *'extravagant'* in awards for general damages

[see: Minister of Safety and Security v. Seymour 2006 (6) SA 320 (SCA), para 20]. There should also be fairness towards a defendant [see: De Jongh v Du Pisanie NO 2005 (5) SA 457 (SCA), para 60].

[11] I am of the view that an appropriate award for the plaintiff's general damages is the sum of R150 000.00.

[12] The plaintiff's evidence relating to the nature and extent of the damages caused to her premises by the police officers during the police action was not disputed when she was cross-examined. Mr Botha's evidence relating to the nature of the repairs required and the reasonable and necessary costs thereof was also not seriously challenged under cross-examination. The defendant also lead no evidence to gainsay the evidence of the plaintiff or of Mr Botha on such issues. Adv. Mpanza, correctly in my view, conceded that the plaintiff had discharged the *onus* of proving the special damages claimed by her in the sum of R21 049.00 in respect of damages caused to her premises. Such an award will accordingly be made.

[13] Adv. Hitchings submitted that the circumstantial evidence supports the drawing of an inference that the items of jewelry and cash were removed and unlawfully taken by police officials at the time of the police action. An alternative inference contended for on behalf of the plaintiff was that the unsecured state in which the plaintiff's premises were left by the police officials enabled a third party subsequently to have gained access to the premises and to have removed the items and cash from the safe.

[14] The plaintiff testified that there was a safe in the cupboard of her main bedroom. She kept various items of jewelry in the safe, and also cash in the amounts of R60 000.00 and US$ 4 000.00. The key to the safe was attached to a key holder – a plastic resemblance of a key and approximately eight centimeters long - and kept above the safe underneath a pile of clothing. The plaintiff could not say when last before the police action she had opened the safe or inspected its contents, and she was also unable to say how long after the police action it was opened and ascertained by her that its contents had disappeared. When the plaintiff gave her evidence in chief, she testified that while they were straightening out the house approximately two weeks after the police action, she could not find the key to the safe. She and her son toppled over the safe and they could not hear anything inside. They then cut open the safe with an angle grinder and noticed that it was empty. Under cross-examination the plaintiff said that she only realised that the safe was emptied two or three weeks after the incident, and thereafter that she cannot say when she and her son opened the safe. It could have been ten days, 14 days, or a month after the incident. Other persons also had access to the plaintiff's house before and after the incident, such as two Pakistani males who resided in the house with the plaintiff and her son. They disappeared after the police action.

[15] There is, in my view, insufficient facts for the drawing of the inferences contended for by the plaintiff's counsel. But even if I am wrong in this view, in balancing the probabilities I am unable to find that either inference contended for is '... *the more natural, or plausible conclusion from amongst several conceivable ones, ...*'

[see: Govan v. Skidmore 1952 (1) SA 732 (N) at p 734A-D; South British Insurance Co. Ltd. V Unicorn Shipping Lines Ltd. 1976 (1) SA 708 (A), at p 713E – G] or *'...die mees voor-die-hand-liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings.'* [see: AA Onderlinge Assuransie Assosiasie Bpk v De Beer 1982 (2) SA 603 (A) at p 614 G – A].

[16] Also the reasonable market value of the items of jewelry at the time of the alleged commission of the delict has not been established. Mr Brian Winterstein determined the value of the items of jewelry as at 4 May 2007. He did not wish to commit himself as to their values as at 6 November 2002, since the gold price had been erratic. He merely suggested a value equivalent to 60% of the 2007 globular value determined by him, but he offered to undertake a proper recalculation. Plaintiff's counsel did not take up the offer made. There is, in my view, an inadequate factual basis for an assessment of the *quantum* of damages insofar as the items of jewelry are concerned *'...and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made.'* [Monumental Art Co. v. Kenston Pharmacy (Pty.) Ltd. 1976 (2) SA 111 (CPD), at p 118C – F].

[17] Adv. Hitchings submitted that a punitive costs order should be granted against the defendant on the basis of the defendant's failure to have made a settlement offer in respect of the general damages suffered by the plaintiff notwithstanding various invitations made to it to make such an offer. Reliance was also placed on the diagnosis

and opinion of Dr. Fine as stated in his psychiatric medico-legal report. I am not inclined to grant a punitive costs order against the defendant. In her amended particulars of claim the plaintiff claims an amount of R600 000.00 in respect of general damages, which is substantially more than the amount that I consider appropriate. It is impossible to say whether the issue of the *quantum* of the plaintiff's general damages would have been capable of settlement. Dr. Fine's psychiatric medico-legal report is dated the 22nd August 2008, which was only a few days before the trial. The trial commenced on the 27th August 2008. The plaintiff has only given the defendant written notice of her intention to apply for a punitive costs order on the aforestated grounds on the second day of the trial.

[18] In the result the defendant is ordered to:

1. Pay to the plaintiff the sum of R171 049.00.
2. Pay to the plaintiff interest on the said sum of R171 049.00 at the rate of 15.5 % per annum *a tempore morae* from 4 November 2004, being the date of service of the summons, until the date of payment.
3. Pay the plaintiff's costs of suit, such costs to include the qualifying expenses of Dr. Sebolelo Seape.

P.A. MEYER
Judge of the High Court

2 September 2008