

SOUTH AFRICA / JUDGMENT

Malan v Minister of Defence (691/2011) [2014] ZANCHC 10 (5 September 2014) [2014] ZANCHC 10

COURT

Northern Cape High Court, Kimberley

BEFORE

BM Pakati

CASE / FILE NUMBER

691/2011

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IN THE HIGH COURT
OF SOUTH AFRICA
NORTHERN CAPE
DIVISION, KIMBERLEY
Case
No: 691/2011

DATE:

05 SEPTEMBER 2014
In the matter
between
ADRIAAN JACOBUS
MALAN.....Plaintiff
V
MINISTER OF
DEFENCE.....Defendant
Heard: 13 May
2014
Delivered on: 05
September 2014

JUDGMENT**PAKATI J**

- [1] The plaintiff, Mr Adriaan Jacobus Malan, is a Warrant Officer in the South African Defence Force (SANDF) and attached to the Human Resources (HR) Division, Department of Labour and Service Relations. He is based at Lohatla, Northern Cape. The defendant is the Minister of Defence of the Republic of South Africa (“the Minister”). The plaintiff instituted action against the Minister for damages he suffered when the military police, the Minister’s employees namely, Sgt Modisa Patrick Sehoru, Corporal Edward Godi and Major Emmanuel Kagisho Kgokong in the SANDF based at Lohatla, arrested and detained him on 31 March 2010.

CLAIM 1

- [2] The plaintiff claims that the aforementioned members of the SANDF, at Postmasburg Sehoru and Godi assisted by Maj Kgokong, acting within the course and scope of their duties as military police officials, arrested and detained him without a warrant on 31 March 2010 at approximately 18h10 until 08h00 on 01 April 2010. He was later released without being charged. He was distressed and inconvenienced and as a warrant officer was severely humiliated and his dignity impaired. He claims damages in the amount of R90 000-00 for the alleged unlawful arrest and detention.

CLAIM 2

- [3] During the arrest, it is alleged, the plaintiff was assaulted by the said military police officials by being strangled and his arms twisted behind his back as a result of which his left arm (the ulna bone) was cracked. In the process of handcuffing him his two bottom vertebrae in his neck went into spasm. The assault took place in full view of the members of the public. He was later taken to a doctor at the Lohatla Medical Hospital for medical treatment. He claims damages in the amount of R80 000-00 in this regard.

CLAIM 3

- [4] Whilst Dr Rademan of the Lohatla Medical Hospital examined the plaintiff on 31 March 2010 for the injuries sustained during the arrest Brig Gen Nontobeko Mpxa of the South African Army Combat Centre (“SAAC”), Lohatla, without the permission of the doctor or the plaintiff entered, or more appropriately, burst into the examination room. She allegedly took photos of him without his permission, and insulted him in the presence of Dr Rademan and other medical personnel. She is reported to have uttered the following words:

"I am taking pictures of you so that I can contact your friend Erica Gibson to show her what her friend, the Lohatla Labour Relations Officer, looks like when he is drunk and I am going to send the pictures to the papers that they can say Lohatla Labour Relations Officer caught for drunken driving." She is said to have added: "You are the person that tells all the people in Lohatla to write letters against me." That she also made racist remarks by saying: "You are wasting the doctor's time, ag shame, you must remember South Africa is a tough country and a country for Africans."

- [5] It is claimed that as the general uttered these words attributed to her she pointed to her skin indicating her black colour. As she escorted the plaintiff out of the consulting room she insulted him continually. They drove to the officer's quarters at Lohatla. The general threatened to assault him and waved her fist at him. She told him that she hates whites especially the plaintiff. As she said so she spit on the ground. This took place in full view of other military personnel including junior officers. According to the plaintiff Gen Mpaxa's conduct was degrading of him and caused a commotion. As a result of her conduct the military police intervened. As a senior warrant officer the plaintiff felt humiliated and his right to privacy was invaded in the doctor's consulting room. Consequently the plaintiff claims damages in the amount of R350 000-00 in this respect.
- [6] In her plea the Minister admitted that the plaintiff was arrested and detained by the aforementioned officials without a warrant on 31 March 2010. She contended, however, that the plaintiff was arrested on reasonable suspicion of having committed an offence of driving a motor vehicle whilst he was under the influence of intoxicating liquor or a drug having a narcotic effect. The plaintiff was also accused of assault or ill-treating a subordinate, the said Sehoró. The Minister denied that the plaintiff was distressed and inconvenienced or that his dignity was impaired. However, the Minister admitted that there were members of the public who watched the plaintiff's arrest. According to her (the Minister) the plaintiff resisted arrest. As a result the arresting officers were constrained to use the necessary force to carry out the apprehension. The Minister further admitted that Gen Mpaxa entered the consultation room uninvited and/or without consent but claimed that such entry was lawful and justified in terms of the military discipline or Code of Conduct. Gen Mpaxa expressed her disappointment with the plaintiff's poor behaviour. From the consultation room she got into her vehicle and left. The defendant denied the rest of the allegations and adduced the evidence of Sehoró, Maj Kgokong and Gen Mpaxa.
- [7] Sehoró is and has been a sergeant in the military police for 25 years and states in his evidence-in-chief that he was on standby duty. It was after 17h30 when he drove to Postmasburg on patrol duty using a marked military vehicle. He was in military uniform. When he turned towards Five Star Restaurant he noticed a Ford Bantam bakkie driven at a high speed by the plaintiff. The plaintiff was also in military uniform. The Bantam nearly collided with his vehicle. Sehoró swerved to avoid an accident. The plaintiff first stopped behind him and then reversed and parked next to Sehoró's vehicle. He accused Sehoró of being drunk and grabbed his car keys and went to his bakkie. Sehoró followed him and grabbed the plaintiff's military beret from the dashboard of the Bantam. The plaintiff

grabbed him by his shoulders and head-butted him, causing him to bleed from his mouth. The plaintiff demanded and was given back his beret. In return he handed back Sehoró's car keys. The plaintiff's breath had a smell of alcohol

.

- [8] The plaintiff phoned Col Buys and handed the phone over to Sehoró who refused to speak to Col Buys. The plaintiff parked his bakkie in front of Five Star Restaurant. In the process he almost knocked down Ms Ester Gaborone, a female soldier and her child. Sehoró parked his vehicle next to the plaintiff's. He approached the plaintiff and asked him what his problem was. The plaintiff grabbed him by his shoulders and threatened to assault him again. Maj Kgokong intervened and instructed Godi and Tlhako to arrest the plaintiff for driving a motor vehicle whilst under the influence of alcohol and for assault. The plaintiff tried to escape but they caught up with him. He resisted arrest and insulted them. He was aggressive but they managed to restrain and handcuffed him. The plaintiff suddenly became co-operative and asked them to remove the handcuffs because they were too tight, which they did.
- [9] The plaintiff admitted having consumed a double-tot of whisky. Maj Kgokong, Sehoró and Tlhako drove to Postmasburg Hospital with the plaintiff for his blood to be drawn. The latter was done. The concentration of alcohol in his blood specimen was 0,06g per 100ml which was condonable (Exh "L"). The plaintiff was taken to the police station for incarceration. He advised the military police that he uses an electric breathing machine due to his asthmatic condition. The machine was brought from his home.
- [10] At the police station there was no private cell to isolate the plaintiff with the machine. He was therefore taken to Lohatla Military Base. On arrival at Lohatla the plaintiff requested to consult a doctor for his injuries. They obliged. A little while later Gen Mpaxa arrived. She and Maj Kgokong went inside the hospital whilst Sehoró remained in the car. About 20 to 30 minutes later Maj Kgokong returned with the plaintiff. At that stage Gen Mpaxa was still inside the hospital. Maj Kgokong, Sehoró and Tlhako looked for W/O Fortuin, who is of the same rank as the plaintiff to leave him with for the night, but did not find him. They drove to the duty room where the plaintiff remained for the night. Maj Kgokong corroborated the evidence of Sehoró as to how they arrested the plaintiff.
- [11] For 31 March 2010 the occurrence register (Exh "B") recorded that Sehoró was off duty at 15h30 and not 16h00 as he testified in-chief. He was also not on standby duty in terms of Part 1 Unit Order. (Part 1 Unit Order was described as an official document that manages the day to day and other tasks of the unit for a period of a month). Sehoró conceded under cross-examination that he did not have a valid trip authority when he went to Postmasburg that afternoon, nor did he have a stabling authority. (A stabling authority was described as a form that one completes which specifies that one has a State car at home and should not be misused but kept under lock and key). An inspection gets done at home to confirm that the vehicle is safe. Sehoró confirmed that the plaintiff asked him what he wanted at

Postmasburg. When Sehoró was confronted during cross-examination with the contradictory versions of the Minister's witnesses he said he could not remember all what was said as the incidents of the late afternoon unfolded. He blamed the contradictions on the military Judge not having recorded the evidence correctly during the Military tribunal.

- [12] Sehoró testified further that he enquired from the plaintiff why he phoned Col Buys instead of Gen Mpaxa. The plaintiff responded that he would not phone the general because she always spoke ill of Ms Erica Gibson, a journalist. The plaintiff phoned Col Buys again and handed the phone over to Maj Kgokong. Col Buys instructed the major telephonically to tell Sehoró to release the plaintiff but the major arrested him instead. The basis of the arrest was (a) a suspicion of driving a motor vehicle being under the influence of alcohol, (b) insulting Maj Kgokong and Gen Mpaxa and (c) for insubordination. According to Maj Kgokong the plaintiff could not stand straight, he swayed from side-to-side, his eyes were blood-shot and his speech was slurred.
- [13] Gen Mpaxa testified that she occupied the substantive rank of a general and was the Commandant in the South African Army Combat Training Centre at Lohatla Military Base at the time. On 31 March 2010 Maj Kgokong telephonically reported to her concerning the incident that took place between Sehoró and the plaintiff and the inappropriate conduct exhibited by the plaintiff which resulted in the latter's arrest.
- [14] Upon receiving the report Gen Mpaxa proceeded to Lohatla Military Hospital from Kathu. She found Maj Kgokong at the hospital who allowed her to enter the examination room, whose door was open. She found the doctor, the plaintiff and two other SANDF members (a driver and a female administrative officer) inside. The plaintiff's examination was in progress. The plaintiff did not object to her and Maj Kgokong's presence in the examination room. The plaintiff was still in full uniform.
- [15] Gen Mpaxa confronted the plaintiff concerning the reported incident and reminded him of his position as Labour Relations Officer. She expressed her disappointment in his conduct. The plaintiff apologised to her, she states. She then left for Kathu. The general disputed that she took photos of the plaintiff to display them to his friend, Ms Gibson. She disputed further that she uttered the following words: "You are wasting the doctor's time; ag shame you must remember South Africa is a tough country and a country for Africans."

That concluded the defendant's case.

- [16] Dr D Calitz testified on behalf of the plaintiff. According to the doctor he examined the plaintiff on 01 April 2010 and completed the J88 (Exh "A"). The plaintiff informed him that he had been assaulted. The following were his clinical findings:

16.1 A bruising on the left upper arm, on the biceps (the front muscle) area;

16.2 The spraining of the right wrist;

16.3 A neck muscle spasm and bruising of the skin around the neck area. The neck muscle spasm was confirmed through x-rays;

16.4 Bruising and scratch wounds on the left wrist. The x-rays showed a small hairline fracture in the distal radius area. (The radius is the thicker bone of the two bones in the forearm).

Dr Calitz gave the plaintiff anti-inflammatories for the injuries to relieve pain. According to Dr Calitz the injuries were consistent with assault as described by the plaintiff. In his opinion as a professional and qualified doctor with vast experience he testified that no one may enter the consulting room while a doctor examines a patient except with the patient's authorisation. Maj Kgokong and Sehoru confirmed that they took the plaintiff for medical treatment at his request. The major in particular specifically confirmed the injury sustained by the plaintiff to his wrist during the handcuffing struggle.

Dr Rademan was not called to testify.

[17] At the close of the case for the defendant Mr Van Niekerk, for the plaintiff, argued that the defendant has failed to discharge the onus which rested on it on a balance of probabilities with regards to Claim 1 (unlawful arrest and detention) and Claim 3 (the infringement of personality rights). He closed the plaintiff's case without leading evidence in respect of claim 1. With regards to the assault (Claim 2) he argued that sequelae flow from the unlawful arrest (Claim 1) and also closed the plaintiff's case without leading further evidence.

[18] Mr Ramawele, for the Minister, in response conceded that the arrest and detention (Claim 1) of the plaintiff by the employees of the defendant were unlawful.

[19] The onus of proving the lawfulness of the plaintiff's arrest and detention rests upon the defendant to be discharged on a balance of probabilities. In *ZEALAND v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER* [2008] ZACC 3; 2008 (2) SACR 1 (CC) at paras 24 and 25 Langa CJ stated:

"[24] The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.

[25] This is not something new in our law. It has long been firmly 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 that interference to establish a ground of justification."

[20] Kriegler J had this to say in *EX PARTE MINISTER OF SAFETY AND SECURITY AND OTHERS: IN RE S V WALTERS* 2002 (2) SACR 105 (CC) at 123e-f para 30:

“[30] ...The arrest of a person by definition entails deprivation of liberty and some impairment of dignity and bodily integrity.”

See further MINISTER OF LAW AND ORDER AND ANOTHER v DEMPSEY 1988 (3) SA 19 (A) at 38B-C.

In my view it will therefore be a futile exercise to deal in any more detail with Claim 1 having regard to the cases referred to and the concession fairly and correctly made by Mr Ramaweale.

[21] With regards to Claim 2 (the assault) Mr Van Niekerk submitted that the physical apprehension of the plaintiff constituted assault in itself and when it is not underpinned by any justification constitutes unlawful arrest. The Minister in her plea denied that her employees assaulted the plaintiff and pleaded that the plaintiff resisted arrest. In the premise it was contended that the arresting officers used reasonable or the necessary force to carry out the arrest. It was in fact conceded that ‘the necessary force’ used resulted in the plaintiff sustaining the injuries that the doctor described in the J88 medical form.

[22] Dr Calitz’s evidence was uncontested. It was common cause or not disputed that the plaintiff did not carry any injuries prior to his arrest. The assault on the plaintiff can therefore not be said to be lawful when it was occasioned by the unlawful arrest and detention.

[23] HOFFMAN AND ZEFFERT IN THE SOUTH AFRICAN LAW OF EVIDENCE 4th Ed at 508 state:

“If at the end of the plaintiff’s case there is not sufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution. Or, as it has been expressed on more than one occasion by the Appellate Division, “the only question” is “whether, at the close of the plaintiff’s case, there was such evidence before it upon which a reasonable court might, not should, give evidence against the defendant.” Trengove JA has said in OOSTHUIZEN v STANDARD GENERAL VERSEKERINGS MAATSKAPPY BPK 1981 (1) SA 1032 (A) at 1035H-36A that this is the usual measure used to determine, at this stage, whether the plaintiff’s evidence is sufficient to avoid absolution. It is submitted that the use of the qualification “gewoonlik” (usually) does not signify that there is, unusually, some other yardstick. The same rule applies in cases in which the defendant begins but fails to discharge the

duty to adduce evidence, except that in such a case the proper order would be the judgment for the plaintiff.”

[24] The third claim relates to the infringement of the plaintiff’s rights to privacy and dignity in that Gen Mpaxa, without invitation or consent by the plaintiff, or even the doctor, barged into the examination room whilst the examination was in progress. The plaintiff alleged further that Gen Mpaxa insulted her, hurled racist remarks at him and threatened to assault him; that this conduct humiliated and severely traumatised him.

[25] Mr Ramaweale submitted that the defendant did not bear the onus to prove the invasion of privacy. According to him the defendant admitted the entrance into the examination room but disputed the infringement of privacy. He argued that the plaintiff should therefore have led evidence to prove the infringement of privacy. The Minister's plea states in para 12. 2 that "Gen Mpaxa's aforesaid entry into the consultation room was lawful and justified." This was in response to para 13 of the plaintiff's Particulars of Claim which runs as follows:

"13. CLAIM 3

On or about 31 March 2010 and at the Lohatla military medical facility whilst receiving [treatment] for his injuries sustained during the illegal arrest the Plaintiff's right to privacy between doctor and patient was infringed by Brig Gen Mpaxa of the South African Army Combat Centre, Lohatla, in that she:

13.1 Intruded the consultation room [uninvited] where the Plaintiff was "under medical examination;"

13.2 Further infringed his privacy and dignity by starting to take photos of him without any permission whatsoever from the Plaintiff."

[26] NEETHLING POTGIETER VISSER in the LAW OF DELICT 3rd Ed p 354 state as follows:

"The right to privacy is recognised as an independent personality right which the courts have included within the concept of dignitas. Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state. Accordingly, privacy may only be infringed by unauthorised acquaintance by outsiders with the individual or his personal affairs."

See JANSEN VAN VUUREN v KRUGER [1993] ZASCA 145; 1993 (4) SA 842 (A) at 849E-H.

[27] If wrongfulness has been established, as in the case of an insult, a presumption of animus iniuriandi arises which may be rebutted by the defendant. If he fails to do this, the actio iniuriarum is available to the plaintiff. See Neethling Potgieter Visser supra at 356. See also JANSEN VAN VUUREN AND ANOTHER NNO v KRUGER [1993] ZASCA 145; 1993 (4) SA 842 (A) at 849C-D. Harms JA in MEDIA LTD AND ANOTHER v JOOSTE [1996] ZASCA 24; 1996 (3) SA 262 (A) at 271J stated that a person is entitled to decide when and under what conditions private facts may be made public. NEETHLING POTGIETER VISSER states further at 354:

"If the plaintiff proves that he feels insulted in circumstances where the reasonable man would have also felt insulted, a presumption of wrongfulness arises which the defendant may rebut by proving the existence of a ground of justification for his conduct."

If he does not succeed in doing this, wrongfulness is certain and a presumption of animus iniuriandi arises. The onus is then on the defendant to rebut this presumption by proving a ground excluding intent. If he fails to do this, an iniuria is proved."

See MINISTER OF POLICE v MBILINI 1983 (3) SA 705 (A) at 716A-E.

[28] Hoexter JA in MINISTER OF JUSTICE v HOFMEYR [1993] ZASCA 40; 1993 (3) SA 131 (A) at 153D-E stated:

“The plain and fundamental rule is that every individual’s person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are prima facie illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.”

[29] Chapter 2 (s

10) of the Bill of Rights guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The question is whether the intrusion by Gen Mpaxa in the examination room without the plaintiff’s consent was lawful and justified and whether the evidence adduced by the defendant passed muster.

[30] Mr Van Niekerk, for the plaintiff, argued that the alleged degrading and racist remarks made by Gen Mpaxa in the presence of Dr Rademan and other medical personnel and taking of photos, the threats to assault the plaintiff, shouting at him in the presence of his subordinates serve as aggravating features of the infringement of the plaintiff’s personality rights and will be dealt with when quantum is argued. This approach was endorsed by Mr Ramaweale.

[31] When Gen Mpaxa was asked why she asked Maj Kgokong for permission to enter the examination room she replied:

“The reason why I asked, because he was in hospital, it is because he might be with doctors and they might be consulting with him and I know that I cannot go in when someone is still going through medical or a doctor is busy with the person. Kgokong’s answer was that “general, you may go in because I have also been in there and there are other people in there who are not doctors or medical practitioners. I asked Kgokong to accompany me so we could go in together. I did not go in there alone.”

She also said: “I did not ask for permission from him,” meaning the plaintiff. From the above statements it is clear that Gen Mpaxa was aware that she was violating the plaintiff’s right to privacy. She later admitted that she was fully aware of the doctor-patient privilege and conceded that she should have respected it.

[32] The mere entrance by Gen Mpaxa and Maj Kgokong in the examination room as described and conceded to, was unlawful and constituted an infringement of the plaintiff’s right to privacy and impugned his dignity. The onus therefore rests on the defendant to dispel this prima facie case. In HARDAKER v PHILLIPS 2005 (4) SA 515 (SCA) at 524E-I para 14 Scott JA held:

“It is now firmly established that publication of a defamatory statement (or other defamatory material) gives rise to two presumptions: first, that the publication was unlawful, and second, that the statement was made animus injuriandi, ie with a deliberate intention to inflict injury. (See eg Joubert and Others v Venter 1985 (1) SA 564 (A) at 696A.) While the two presumptions arise from the same event, they are essentially different in character. The presumption of animus injuriandi relates to the defendant’s

subjective state of mind; the presumption of unlawfulness relates to objective matters of fact and law. (Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others [1993] ZASCA 203; 1994 (1) SA 708 (A) 768I-769A.) Until comparatively recent times, there was doubt as to the nature of the onus of rebuttal. It is now settled that the onus on the defendant to rebut one or other presumption is a full onus, ie it must be discharged on a preponderance of probabilities. (Mahomed and Another v Jassiem [1995] ZASCA 115; 1996

(1) SA 673

(A) at 709H-I.) A bare denial on the part of the defendant will therefore not suffice. Facts must be pleaded by the defendant that will legally justify the denial of unlawfulness. (National Media Ltd v Bogoshi [1998] ZASCA 94; 1998 (4) SA 1196 (SCA) 1999 (1) BCLR 1) at 1202H (SA).)”

[33] Mr Ramaweale argued that the Hardaker-case is distinguishable from the instant case because it deals with the publication of defamatory articles published in a newspaper. Counsel intimated that in Hardaker-case the elements of defamation were admitted unlike in the instant case where the defendant only admits entrance in the examination room and not the infringement; That the principles set out in Hardaker favour the defendant’s case that no onus rests on it; and further that the onus instead rested on the plaintiff to show that he was indeed assaulted and that his right to privacy was infringed. In response Mr Van Niekerk submitted that there was no duty on the plaintiff to testify and supplement the defendant’s case if the plaintiff’s

case has already been established.

[34] The following is stated at p353 of Neetling Potgieter Visser supra:

“A person’s dignity embraces his subjective feelings of dignity or self-respect. Infringement of a person’s dignity accordingly consists in insulting that person. There are an infinite number of ways in which a person may be insulted. Any insulting words or belittling or contemptuous behaviour may be included here.” See the Mbilini case at 715G-716A supra.

[35] Maj Kgokong was very evasive in answering questions and committed several self-contradictions. In his evidence-in-chief he testified that he was already in the consultation room when Gen Mpaxa phoned that she was at the parking bays. He then went out to meet her. In his statement (typed version), Annexure “P” he testified differently by stating that:

“On our arrival at the duty room, Warrant Officer Malan requested to consult with the doctor for the alleged injuries sustained during his arrest. We then took him to Lohatla Sickbay and duty personnel called the sister-on-call. A moment after the arrival of the sister-on-call, Brig Gen N Mpaxa also arrived. We followed the sister-on-call and Warrant Officer Malan, Brig Gen N Mpaxa, the Commandant, told Warrant Officer Malan that she, the Commandant, is disappointed in what Warrant Officer Malan has done.”

[36] When it was put to the major by Mr Van Niekerk that he never phoned Gen Mpaxa after he had been in the examination room but in fact he and the general followed the plaintiff and the doctor to the examination room. The major conceded: "I agree with that, it's written here". He and Gen Mpaxa conceded that the examination was still in progress when they entered the examination room. Gen Mpaxa confessed: "The doctor was holding the patient on his arm near the neck but on his arm." This statement served to advance the plaintiff's case even further.

[37] Gen Mpaxa went on to say:

"So even in this whole South African Defence Force, I have never experienced such a Commander would then be sending a message perhaps to request permission to enter [the examination room] from a patient himself. It would be the first time it would transpire with Malan."

This clearly shows that Gen Mpaxa was never going to ask for permission from the plaintiff. She insisted that she had a right to enter as Commander and Chaplain. In the same breadth she said she knows that the Constitution guarantees the right to privacy for everyone. The two views are irreconcilable.

[38] There is no evidence that Gen Mpaxa enquired about the condition of the plaintiff. She expressed her disappointment in the plaintiff on matters reported to her and never sought an explanation from the plaintiff. She did not dispute this. She insisted that there were also other people in the room and stated that the plaintiff was not naked but fully clothed. The general's whole demeanour displays anger at the plaintiff. One does not sweet-talk anyone in anger.

[39] Even though Gen Mpaxa testified that there was nothing wrong with Col Buys to have attended to the problem she nevertheless expressed her unhappiness that the plaintiff phoned Col Buys and not her. I cannot see the necessity for the general to travel from Kathu to Lohatla as Col Buys was in the vicinity. Her excuse for the trip was that she wanted to ensure that the plaintiff's breathing machine was correctly dealt with. Strangely enough she never even saw the machine nor did she see where it was installed. When pressed she adjusted her evidence and said her concern was not really to see to the correct manipulation of the machine but to establish where it would be installed. When asked if she identified a room where it could be done she was very evasive. I had to urge her to appropriately answer the question. She then conceded that she did not identify any room for that purpose.

[40] Maj Kgokong also could not justify his intrusion into the examination room. His explanation was that he merely was accompanied Gen Mpaxa. He is not credible on this aspect. He has given several versions on it. He disputed that he gave Gen Mpaxa permission to enter the examination room. He testified that Gen Mpaxa did not ask for permission from him but asked whether she was allowed to enter. When it was put to him that his response to Gen Mpaxa as testified to by Gen Mpaxa was as follows: "General you may go in", he said: "I believe that the General didn't finish up my response. I don't know, maybe she forgot something there, but that is not what I told her."

- [41] The argument by Mr Ramaweale that the mere entrance in the examination room did not constitute an infringement of the plaintiff's right to privacy and dignity cannot be upheld, especially in the face of Gen Mpaxa's concession regarding the doctor-patient privilege. It does not make a difference whether the plaintiff was fully clothed or not. No justifiable explanation therefore was given for their unlawful conduct. On their own admission they infringed the plaintiff's right to privacy. The general was at the apex of the Defence Force in the Northern Cape. She should have known better. Her assertion that she sought authority from her subordinate to enter the doctor's consulting room lacks conviction, as the permission would still have been invalid. The general did not enter the consulting room, but she intruded.
- [42] The defendant therefore failed to discharge the onus that she was settled with. In my view the principle in the Hardarker-case (supra) is in point and is followed. The plaintiff's claim in respect of Claim 3 must therefore also succeed.
- [43] What remains is for the plaintiff to prove the extent of damages he suffered in respect of all three claims.

In the circumstances the following order is made.

1. The plaintiff, Mr Adriaan Jacobus Malan, succeeds in all three claims, namely Unlawful Arrest and Detention (Claim 1); Assault (Claim 2) and Invasion of the Plaintiff's Privacy (Claim 3).
2. The defendant, the Minister of Defence, is ordered to pay the costs of suit on a party and party scale.

BM PAKATI

JUDGE

On Behalf of the Plaintiff: ADV GJ VAN NIEKERK

Instructed by: JOHAN KOTZE ATTORNEYS

ENGELSMAN MAGABANE INC

On Behalf of the Defendant: ADV RPA RAMAWELE

Instructed by: OFFICE OF THE STATE ATTORNEY

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