IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **4194/2006**

In the matter between:

F Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY First Defendant

ALLISTER CLAUDE VAN WYK Second Defendant

JUDGMENT : 11 APRIL 2014

MEER J.

[1] This judgment seeks to determine the quantum of damages to which the plaintiff is entitled as a consequence of her having been raped by the second defendant, an off-duty policeman, in October 1999 when she was 13 years and

10 months old. The plaintiff is currently aged 29. The first defendant, the Minister of Safety and Security, has already been found to be vicariously liable for the conduct of the second defendant. On 26 June 2009 this Court found in the plaintiff's favour on the merits. Its judgment was however over-turned in an appeal brought by the first defendant to the Supreme Court of Appeal in June 2009. A further appeal by the plaintiff to the Constitutional Court succeeded in December 2011, when an order was granted declaring that the first defendant was liable for the plaintiff's damages.

[2] The plaintiff's civil claim for damages commenced in April 2006. That same year, in October, the second defendant's criminal trial for her rape was concluded. He was convicted and sentenced to 12 years imprisonment of which 5 years were suspended. He was subsequently released from prison just over 2 years later in November 2008. It therefore falls upon this Court, some 15 years after the rape, eight years post-conviction, and commencement of this action, to resolve the plaintiff's claim for damages. The plaintiff has in the interim received an award from the first defendant in the sum of R250 000 as a contribution towards her damages.

[3] The matter resumed before me on 3 March 2014. In contrast to the sum of R7 730 700.00 originally claimed in her summons, at the conclusion of the hearing the plaintiff reduced her claim to R5 million. This comprised R1 million in respect of general damages, R3 520 000.00 in respect of loss of earnings and

R528 600.00 for future medical expenses, rounded off to a lump sum of R5 million, with allowances for contingencies.

[4] The plaintiff annexed to her amended particulars of claim the medico legal reports of clinical psychologist Professor Dave Edwards[1], dated 2 April 2006 who has since passed away, clinical psychologist Mr Ian Meyer[2] dated 15 March 2013, industrial psychologist Mr Donovan Shaw[3] dated 24 March 2006, industrial psychologist Dr H Van Daalen[4] dated 27 March 2013 and the report of actuary Mr Simon Kroon[5] dated 12 April 2013. At the hearing Messrs Meyer, Kroon and Van Daalen testified as experts for the plaintiff. The plaintiff also testified.

[5] The first defendant relied on the medico legal reports of clinical psychologist Mr Larry Loebenstein[6] and industrial psychologist Dr H Swart[7]

1 MA, PhD Psychology, Professor of Psychology Rhodes University appointed in 1985, Founding Fellow of the Academy of Cognitive Therapy (USA). Professor Edwards has researched and published extensively on post-traumatic stress disorder and cognitive therapy. Professor Edwards has passed away since preparing his report.

2 Mr Meyer is a Clinical Psychologist with an MA in Clinical Psychology (UPE). He testified to being in practice for 34 years and is based in Port Elizabeth.

3 BA (HONS) IR MA (cum laude) Psychology Rhodes.

4 Bcom Hons (Stell) Mcom (UPE) B Com (Pret). Formerly professor at Fort Hare and Dean of Faculty of Economic Sciences. Dr Van Daalen testified to practicing as an Industrial Psychologist for 34 years.

5 BSc (HONS) PGCE, Fellow of the Actuarial Society of South Africa. Has had nineteen years' experience as an actuary working with Old Mutual. Currently an actuary in Grahamstown.

6 BSC (UCT) BSC Hons (UNISA)MA Clinical Psychology (UCT); 1972 to 1980 Psychologist in Medical Faculty UCT; 1980 to present in private practice. Mr Loebenstein has testified in many cases since 1982.

7 MCom (UNISA) PhD (Potchefstroom). In private practice since 1988. Dr Swart has been engaged in medico legal work since 1995 and has testified on several occasions.

both of whom testified as experts. No actuary testified for the first defendant. After argument the first defendant submitted an actuarial report of Munro Forensic Actuaries. The actuarial computations of the plaintiff's actuary, Mr Kroon were not contested by the first defendant.

Background and common cause facts

[6] The plaintiff's personal and family background as well as her current circumstances appears from the well documented and extensively considered reports of the psychologists, as well as from her testimony. The plaintiff was born on 15 December 1984, the eldest of the 5 children of her parents' marriage, there being 3 younger sisters and a brother. It is common cause that her early development was coloured by considerable trauma and disruption. The plaintiff's father was a heavy drinker and her parents' relationship was turbulent. Her mother recalled to industrial psychologist Dr Swart that her husband physically and mentally abused her and that the plaintiff would attempt to come between her parents when they were fighting. The family was poor and moved around extensively, as her father searched for work opportunities. This resulted in the plaintiff attending 5 different schools during her primary education. Her father did building work and her mother was a house-wife. When the plaintiff was 5 years old her mother gave birth to a seriously disabled daughter.

[7] The plaintiff's father died suddenly in 1996 from a gunshot. The plaintiff was uncertain if this was due to an accident or whether he shot himself

deliberately. The plaintiff, who according to her mother was her father's favourite child, was deeply saddened by his death.

[8] Two weeks after her father's death, the plaintiff's disabled sister Angelique, aged 7, choked to death while being fed. The plaintiff was present in her mother's bedroom and witnessed the death. This, too, was a significant loss to the plaintiff who loved her sister very much.

[9] The plaintiff's mother during interviews with the first defendant's psychologists Dr Swart and Mr Loebenstein in September 2013, said that after the death of her husband she experienced extensive problems with the plaintiff who became uncontrollable and disobedient. This, she said, was in response to the death of her father and sister. The plaintiff's mother, herself, started drinking after her husband's death.

[10] The family now comprising of the mother and 4 children, the plaintiff aged 13, Pamela aged 12, Catherine aged 7 and Wayne aged 3, moved from George to Fort-Beaufort at the beginning of 1997 on invitation from the plaintiff's father's family who was to help financially.

[11] The plaintiff adjusted to school in Fort-Beaufort where she began Grade 6. The plaintiff reported to Professor Shaw that she made friends and did well academically. However, a few months later her mother moved the family back to George where the plaintiff completed Grade 6, reportedly with good marks.

According to Professor Shaw although the plaintiff was subjected to bullying and teasing at school the next year, she made friends and continued to do well. It was towards the end of that year, 1998, that the plaintiff was raped.

The rape and its *sequelae*

[12] On the night of 15 October 1998 the plaintiff, aged 13, was raped in George by the second defendant , a policeman who was on stand-by duty at the time, after he offered her a lift in a police vehicle. The plaintiff had been at a club with two older women prior to the event. She was a virgin at the time. The rape was preceded by repeated assaults to her person. The various medical reports indicated the following injuries:

An open wound to her lips;

multiple contusions to her arm;

multiple swellings to her face and head;

swelling of her nose;

multiple contusions to her legs and torso;

tearing of the vagina, vaginal bleeding, torn hymen and loss of virginity.

[13] After the rape the plaintiff received no counselling or any form of psychological support. She was raped on a Wednesday and went back to school the following Monday. She coped by acting as if the rape had not happened and attempted to block it out.

[14] Family life continued to be unsettled. Her mother's response to the rape was to move the family back to Fort-Beaufort before the end of the school year. This meant that the plaintiff did not complete the standard, although the school passed her on the basis of her satisfactory academic performance during the year. The next year, 1999, the plaintiff's mother became involved with a new partner, Wayne, whom she married. Their son Gerhard was born. Wayne was dependant on alcohol, drank regularly and freely during the day and was in constant conflict with the plaintiff and her siblings. The relationship between Wayne and the plaintiff's mother was also volatile and there were frequent separations. The plaintiff felt very protective of her mother who seemed to be unable to stand up to Wayne and at times the plaintiff attacked him physically.

[15] It is reported by clinical psychologist Meyer that the relationship between the plaintiff and her mother changed after the rape incident, that her mother had limited capacity to offer support and the plaintiff's behaviour deteriorated.

[16] Her mother approached Child Welfare. It was arranged for the plaintiff to be placed at the King Williamstown Child and Youth Care Centre and she was enrolled at high school there. Her behaviour did not improve and she could not focus on her school work, most probably according to Professor Edwards because she was clinically depressed. She was involved in frequent arguments and physical fights. In November 1999 she and two others ran away to Port Elizabeth where they lived as street children until taken in by a family.

[17] The plaintiff was subsequently sent to an industrial school in Bloemfontein which caters for children with behavioural problems. Here, her overall adjustment was unsatisfactory and her behaviour became increasingly decontrolled. On one of her visits home, Professor Edwards's records, she quarrelled with her mother and swallowed some medication in an attempt to kill herself. The plaintiff did not complete the school year and discontinued her education in September 2000 a few months short of her sixteenth birthday.

[18] In 2001, the year after leaving school, the plaintiff stayed at home as, according to the report of Professor Edwards, she did not feel like doing anything. She later secured a position at the Spar in Fort-Beaufort for two weeks and thereafter at the Spar in Queenstown for three months. Her work record has been erratic. According to Swart, she would lose interest in her work, become irritated, aggressive and leave. During 2003 she worked at a fruit and vegetable store for between two weeks to a month, leaving because of alleged sexual harassment. At these jobs she earned on average R1 200,00 per month. Thereafter she worked at a bottle store in Fort-Beaufort for a month but left due to conflict with her manager. From October 2005 to February 2006 she was employed in an administrative capacity at D & A Build-It in Fort-Beaufort. She left when the company closed down. She then went for an interview at a doctor's office but left before being interviewed as she felt uncomfortable.

[19] Thereafter the plaintiff remained unemployed for nearly 4 years until 2009 when she was able to secure a job at Kings Kidz as a child minder caring for toddlers. However, after approximately a year and a half she left following a disagreement with her employer. She was unemployed for approximately 6 months until January 2011 when her cousin employed her as a child minder at Kidio Preparatory in Fort-Beaufort. Her contract ended at the end of 2013.

[20] The plaintiff informed Dr Van Daalen that she cannot handle working with children anymore as she has become tired of the noise and business. She has no alternative employment in mind. Given her problems and history she is concerned that she will not be able to find another job for a while. She said to Dr Van Daalen *"Fort-Beaufort is a small town and people ask about your background. Unfortunately I don't have a good record I used to drink a lot and have bad friends."* Her career vision prior to the incident was to become a police woman.

The rape trial

[21] In June and July of 2004 the trial of the plaintiff's rapist triggered all the memories of the rape. The plaintiff spent 7 days in George waiting for her turn to give evidence. According to Professor Edwards she recalls being so upset that she did not want to testify. She recalls also that it was immensely distressing to have to stand in Court near her rapist and she tried to avoid looking at him. The plaintiff testified about being retraumatised each time she has had to attend Court and relive the experience.

The plaintiff's relationships

[22] The plaintiff has had 2 serious heterosexual relationships. Firstly with Colin, a man 12 years her senior and secondly with her husband, Christopher, whom she married in May 2011. Clinical psychologist Meyer's report states that the plaintiff has a chronic history of an-orgasmia and dyspareunia (pain due to sexual intercourse), although, more recently she has frequently been orgasmic and her dyspareunia has become intermittent. Meyer records that the plaintiff compels herself to participate in sexual intercourse because this is demanded from her although she confided that she would prefer to be sexually abstinent for the remainder of her life. Nevertheless, she acknowledged that this would result in such significant marital problems, that it is best to consent when absolutely necessary, although she does not initiate any sexual activity.

[23] When the plaintiff was approximately 18 years of age she was impregnated by her former partner, Colin and pressurised into having an abortion. Subsequently, reports Meyer, she has experienced 2 spontaneous abortions and the death of a child during birth in 2010, which she believes is punishment for having had an abortion. Towards the end of her relationship with Colin, whom she looked upon as a father figure, the plaintiff discovered he was still married with children.

[24] The plaintiff's husband Christopher works as a mechanic. Chrisopher, in an interview with Meyer described his wife as being frequently moody and

enraged, followed by tearfulness and misery. She experiences problems with socialising. In the earlier period of her relationship with Christopher they drank excessively. The plaintiff reported to Meyer that she recently informed Christopher she had reached the point where she does not enjoy sexual intercourse and no longer wants to engage in a sexual relationship.

[25] The plaintiff gave birth to her son Eben on 15 September 2011 whom she regards as a blessing. Nevertheless, records Meyer, owing to the plaintiff's pervasive and consistent feeling of fatigue and chronic depression, caring for her son is a challenge. Fortunately, because she and her husband live with her mother and 2 brothers, she has assistance.

The plaintiff's siblings

[26] Of the plaintiff's siblings only 1 has a matric education. This is her sister Catherine, born in 1990 who is employed as a receiving manager at the University of Fort Hare in Alice. She is married without any dependants. The plaintiff's other sister Pamela, born in 1985, has a Gr. 9 education. She left school because she became pregnant and is currently a housewife. The plaintiff's brother Wayne, born in 1995, dropped out of school in 2012, reportedly due to persistent bullying and has not returned. The plaintiff's half-brother Gerhard born in July 2000 is currently at school in Grade 7.

[27] In 2006 Professor Edwards performed a psychometric assessment of the plaintiff. She obtained a full scale IQ of 117, a verbal IQ of 112 and a performance IQ of 119. He considered from these scores that her intelligence was average to above average. Loebenstein stated that this together with evidence from the social worker suggested that the plaintiff would have had the intellectual capabilities to pass matric.

[28] Professor Edwards in his report notes that the plaintiff has been subjected to other stresses in her life, bar the rape : her parent's quarrels, her father's and sister's death, her mother's limited capacity to offer her psychological support and her mother's involvement with an alcohol- dependent second husband. However, it seems improbable, opines Professor Edwards, that the plaintiff would have suffered such prolonged and intense distress or been so dysfunctional occupationally and socially, had she not been raped. Professor Edwards states further that although the plaintiff's family had been poor and unsettled, and she had had to deal with bullying and teasing, there is evidence that she was resilient and remained engaged with her school work prior to the incident.

The Plaintiff's testimony

[29] In her testimony the plaintiff by and large corroborated the accounts of her family circumstances, life and difficulties as contained in the various expert reports. She stated that she had wanted to be a police woman but because of

what has happened to her she has changed her mind as she no longer trusts the police. She spoke of how difficult it has been for her each time she has had to testify in Court and relive the rape. She stated she would like to complete her matric and thereafter do administrative work.

The Plaintiff's claim for future medical expenses

Inpatient Psychotherapy

[30] In a joint minute clinical psychologists Mr Meyer for the plaintiff and Mr Loebenstein for the first defendant, agreed that the plaintiff was psychologically vulnerable prior to the rape. Meyer elaborated that this was owing, *inter alia* to her age, familial and socio-economic factors. They also agreed that subsequent to the rape the plaintiff suffered from chronic post-traumatic stress disorder and a co-morbid major depressive disorder which to date have not been treated. Meyer elaborates further that the plaintiff has sustained "deficits in the domains of cognitive functioning and academic achievement, underpinned by compromised socio-motional and personality development, which have affected her vocational, marital, sexual, parental and physical functioning".

[31] Mr Loebenstein expressed the opinion that the plaintiff would respond to inpatient treatment at a facility that offers multi-disciplinary interventions and that a combination of appropriate medication and cognitive behaviour therapy, followed up by out-patient sessions of cognitive behaviour therapy would be

effective in treating her post-traumatic stress disorder and major depressive disorder.

[32] Meyer expressed the opinion that chronic, multi-model therapy, primarily in the field of psychiatry and psychology is required. This will probably ameliorate the plaintiff's suffering, but will probably not result in a full or long term remission. Although Meyer expressed reservations regarding the suitability of cognitive behavioural therapy for the plaintiff considering her education, he conceded that cognitive behavioural therapy may be a good start.

[33] There was some disagreement between the experts about the extent of medical treatment that the plaintiff would need to undergo. While both experts agreed that inpatient treatment at a psychiatric unit to initiate targeted psychotherapy was necessary, Mr Loebenstein recommended that this should be for a 3 week period as opposed to the 6 week inpatient treatment suggested by Mr Meyer. During argument the parties agreed to a formulation of inpatient treatment of 4½ weeks, being the average time as suggested by Meyer and Loebenstein. This in my view would appear to be a pragmatic and sensible resolution of their differences. The only costing of medical expenses was that of the plaintiff's actuary Simon Kroon, which, as aforementioned was uncontested. The value of initial inpatient treatment of 6 weeks as of 3 March 2014 determined by Mr Kroon is R123 700.00 An adjustment thereto would

have to be made to determine the cost of 4½ weeks treatment as at the date the plaintiff commences inpatient treatment.

Outpatient psychotherapy sessions

[34] The experts were in agreement that following inpatient treatment the plaintiff would need a number of sessions of psycho-therapy. Meyer was of the view that she should be awarded 100 sessions of psycho-therapy to be used over the remainder of her life for individual, marital or family therapy. In contrast Loebenstein, calling into aid a report published by the British Psychological Society on the management of post-traumatic stress disorder, said that the number of sessions reported as being efficacious, was 12 sessions. In this regard he referred to the treatment of post-traumatic stress disorder in soldiers returning from combat. The origin of post-traumatic stress disorder, he said, is irrelevant when treating the symptoms or its condition. The treatment favoured by him, being cognitive behavioural therapy, required *inter alia* the patient to re-live the trauma. Mr Loebenstein however conceded that there was no hard and fast rule and each case had to be determined on its facts. With regard to the plaintiff, due to her pre-existing dysfunctional status, the prognosis for her post-traumatic stress disorder and major depressive disorder would be enhanced by additional sessions. He suggested that a further 16 sessions be afforded to her.

[35] During argument Mr Olivier for the plaintiff indicated that the plaintiff was prepared to reduce the 100 sessions of psycho-therapy initially proposed by

Mr Meyer to the 28 sessions envisaged by Mr Loebenstein, and a further 36 sessions. This, he said, was arrived at by applying a 50 % contingency to the difference between 100 and 28 sessions. The plaintiff accordingly ultimately called for a total of 64 sessions of psycho-therapy as opposed to 28 sessions agreed to by the first defendant.

[36] It is undesirable to adopt a thumb suck or arbitrary gestimate of the plaintiff's psychotherapy treatment. To avoid this it is my view that an initial award of 28 sessions of psychotherapy, which according to the experts is so clearly needed, should be awarded. This should be costed in accordance with the actuarial valuation ascribed by Mr Kroon, adjusted to the date that treatment commences, if necessary. On completion of the 28 sessions of psychotherapy, the number of further sessions of treatment required, if any, should I believe be determined on psychiatric advice.

[37] I called upon the parties to agree to a formulation for the determination of the number of further sessions, if any. They were unable to do so. In the event I propose the following as a fair formulation : On completion of 28 sessions of psychotherapy, the plaintiff's treating psychiatrist shall furnish a report on the number of necessary further sessions the plaintiff requires. In the event of this being disputed by the first defendant, the number of further sessions shall be decided by an independent psychiatrist to be appointed by the parties. The cost thereof shall be computed by an actuary at the first defendant’s cost.

On-going medication

[38] Mr Meyer testified that the plaintiff would need on-going medication until her death. Mr Loebenstein agreed that the need for on-going medication until death was likely and did not contest that provision therefor should be allowed. Meyer made provision for this item at a cost of R500 to R1000 per month, calculated in the actuarial report of Kroon to be R252 300 as of 3 March 2014. Mr Meyer however concedes in his report that it is not his area of expertise to assess the nature, extent or cost of psycho-pharmacotherapy and states that details of this should be obtained from a psychiatrist. In testimony Meyer however qualified that he was competent to express a view on the cost of medication given his long experience of working with psychiatrists.

[39] I am satisfied that provision should be made for on-going medication until the plaintiff's death given the opinion of both experts. The reasonable costs of such medication must however be determined upon psychiatric and pharmacological advice. I requested the parties to furnish me with an agreed formulation for the determining of such costs. They were unable to do so. In the event I propose the following to be a fair formulation : The plaintiff's treating psychiatrist shall furnish the parties with a report which specifies the necessary on-going medication that the plaintiff shall require for the rest of her life. In the event of a dispute, an independent psychiatrist appointed by the parties shall

determine the necessary on-going medication for the rest of the plaintiff's life. The cost thereof shall be computed by an actuary.

The plaintiff's claim for loss of earnings

[40] The plaintiff ultimately claimed a total sum of R3 520 000.00 for loss of earnings as calculated in the actuarial report by Mr Kroon, (annexure "HF2" to the plaintiff's principal submissions), the computation of which was also not contested. This calculation reflected the position that the plaintiff would have been in had she followed the career path of her most successful sibling, Catherine. She is the only one of the siblings born of the plaintiff's parents' marriage to have matriculated, and is currently employed in an administrative position at the University of Fort-Hare. In support of this scenario Dr Van Daalen testified it was likely that the plaintiff would have matriculated, given her IQ level of 117 which placed her in the top 12% of the population, as well as the favourable schooling regime in Fort Beaufort.

[41] Industrial psychologist Dr Swart for the first defendant noted that there were significantly adverse circumstances that might have prevented the plaintiff from finishing Grade 12, the equivalent of matriculating. He cited the pre-incident trauma of the death of her father and sister, the difficulties in the family and the plaintiff's alleged rebellious and deviant behaviour before the rape. The levels of educational and occupational achievements of the plaintiff's siblings and extended family, he pointed out, did not suggest completion of Grade 12 as

fact. The sibling that completed Grade 12 appears to have been the exception, he said. In addition, economic circumstances in the country and Fort-Beaufort in particular had to be considered in proposing a career path for the plaintiff.

[42] Dr Swart however ultimately conceded that he was prepared to give plaintiff the benefit of the doubt that she would have been capable of matriculating. In this eventuality, he too agreed that a reference for her career path and remuneration should be that of her sister Catherine.

[43] With regard to the plaintiff's post-incident career scenario, both Van Daalen and Swart in their joint minute expressed concern that given the plaintiff's advanced age, and after being out of school for about 17 years, it would be very speculative to assume that with financial means and successful treatment, she would be able to complete her schooling. They agreed also that if she does not improve her level of education, the plaintiff's future career progress will be "a repetition of her erratic historical career of low-level employment interspersed with periods of unemployment". Generally, they agreed she would probably be employed for about 40% to 60% of the time and her salary would be likely to remain between R2 500 and R4 500 per month with very little chance of upward mobility.

[44] The pre-incident earnings in Kroon's report, based on the aforementioned career path of the plaintiff's sister Catherine, proposes the plaintiff entering the job market at the age of 19 when she would have left school, had the rape not

occurred. It places her at an entry salary level of R40 778.00 per annum, which indexed at 2014 levels, it calculates, to R72 000.00. It envisages that she would stay at this level for a period of 5 years. Thereafter she would enter the job market in 2009 in the formal sector at Peromnes level 15 with an annual salary in 2009 terms of R77 170.00. Mr Kroon has reduced this amount by 22.5%. This is to allow for a 50% probability of employment in the non-corporate sector at salaries 40 to 50% lower than in the corporate sector.

[45] For a further 5 years Kroon's report places the plaintiff at Peromnes 15, thereafter for 5 years at Peromnes 13 and finally at Perommes 12 for the rest of her career up to the age of 65. The total figure of pre-incident earnings arrived at is R4 147 100. 00

[46] The post-incident earnings have been calculated as per the joint minute of the industrial psychologists with the plaintiff working in the future intermittently with a salary of R3 500 per month. The total value thereof as of 3 March 2014 was calculated at R627 100.

[47] On the basis of these calculations the plaintiff’s total loss of earnings, being the difference between the envisaged pre-incident and post-incident earnings, was fixed at R3 520 000.00.

[48] Arguing against such an award, Mr Van der Schyff for the first defendant contended that Swart's perceived concession that the plaintiff would have

achieved matric, was irrelevant as the Court had a duty to properly consider the experts' reasoning. He submitted that Scenario 1 in Dr Swart's report which did not have the plaintiff matriculating but completing Grade 10, should be accepted. Mr Van der Schyff's heads of argument had not been typed when he argued in Court. In written submissions handed in a day after argument he was able to elaborate. Relying on Scenario 1, he referred to Swart's opinion that given plaintiff's childhood proclivities, she would not have progressed beyond Grade 8 in her pre-morbid state and that she in all likelihood would have commenced employment in about 2004 where after she would have gradually progressed to R47 300 per month in about 2010. But Swart's Scenario 1 which appears at page 179 of the record is based on the plaintiff completing Gr. 10 as opposed to Gr. 8 ,as stated in the submissions on behalf of the first defendant.

[49] Mr Van der Schyff submitted moreover that Swart's opinion that the plaintiff would have progressed no further than Grade 8 derives from the interview with the plaintiff's mother who sketched a bleak picture of her scholastic performance and general behaviour at the time. But in her interview, as recorded in the report of Swart, the plaintiff's mother did not say anything about the plaintiff's scholastic performance.

[50] Mr Van der Schyff initially annexed an illegible actuarial report by Munro Forensic Actuaries to his written submissions handed in after oral argument. The replacement actuarial report though legible, is regrettably in compressed

and very small font which does not make for easy reading. Plaintiff's past loss of earnings on Swart's scenario, submitted Mr Van der Schyff, actuarially amounts to R271 890.00, which is the past loss of earnings less contingencies of 10 % as per the actuarial calculation of Munro. The plaintiff's future loss of earnings, was estimated at R394 000. This was based on her commencing employment in 2016 at the rate of R1 750 per month, being 50% of the estimated amount of R3 500 derived from the joint minute of Van Daalen and Swart. As the first defendant did not elect to call actuary Munro to testify, his/her computations were not able to be tested.

[51] In written submissions in response to Munro's computation Mr Olivier pointed out *inter alia* that the computation by Munro does not comply with Scenario 1 as sketched by Dr Swart in the following manner :

(i) the age of retirement given in Swart's report for uninjured earnings is 60 to 65 years whereas Munro worked on a retirement age of 60;

(ii) retirement age in the injured scenario given by Swart is 65 whilst Munro worked on a retirement age of 60;

(iii) Mr Van der Schyff advocated applying a 25% general contingency whilst Munro used a 10 % deduction on past earnings and 20 % on future earnings.

(v) No motivation for the contingency deductions is made by Mr van der Schyff.

I am of the view that the permutations and discrepancies alluded to above as well as the fact that it was untested in evidence, render reliance on the Swart/ Munro formulation argued for by Mr Van der Schyff, as problematic.

[52] Dr Swart's Scenario 1 was in any event brought into question by Swart himself when he made the concession in his testimony that he was prepared to give the plaintiff the benefit of the doubt that she would have passed Gr. 12. That, together with the reports of Edwards, Meyer and Van Daalen that the plaintiff had the capacity to matriculate, her premorbid scholastic performance, and the uncontested evidence of her favourable IQ, leads me to favour as a useful yardstick for her loss of earnings, the trajectory of her sister Catherine with appropriate contingency deductions. This, the plaintiff's best case scenario would have her passing Grade 12 and thereafter following the career path of her sister Catherine, the path agreed to by both industrial psychologists in the event of her matriculating, and as portrayed in the actuarial report of Mr Kroon. To this I would apply a necessary contingency deduction which I go on to explain.

[53] I have accepted the scenario of the plaintiff completing Gr. 12 and following the career path of her sister Catherine as a yardstick for the determination of her loss of earnings. However, I am of the view that regard being had to the educational and occupational achievements of all plaintiff's siblings who were subjected to the same turbulent familial and socio-economic circumstances as her, bar the rape, there would have been a 50% chance that

the plaintiff would have followed the trajectory of her most successful sibling, Catherine. Equally it can be said there would have been a 50% chance that the plaintiff would have followed the trajectory of her less successful siblings. I am in agreement with Dr Swart that the sister who achieved Grade 12 was the exception. It would therefore in my view be appropriate in all of the circumstances to allow for a 50% contingency deduction resulting in an award to the plaintiff of /50% of the amount calculated in respect of loss of earnings by Mr Kroon, being R1 760 000.00.

The plaintiff's claim for general damages

[54] The bodily injuries sustained by plaintiff are not denied by the defendant. It is clear that the trauma suffered by the plaintiff on a physical level was severe. Professor Edwards describes the injuries and assault as follows:

"He started to assault her repeatedly. He pulled her hair and hit her head against the car several times from different angles. He hit her in the face on both cheeks. She recalls seeing stars when he did this. He threw her to the ground and kicked her in the stomach. He held her throat and throttled her several times. However, she does not recall losing consciousness at all. Then he raped her. She estimated the assault and rape lasted about a half an hour altogether. Her head and face were swollen and there was a tear at the right side of her lip, although it did not need to be stitched. There were bruises on her arms and body where he had hit and kicked her and tearing and bleeding in the genital area from the rape."

The physical trauma suffered by the plaintiff merits an equitable award for pain and suffering in terms of the *lex aquilia* and also for contumelia under the *actio iniuriarum* as a result of the infringement of her personality rights.

[55] Mr Olivier submitted that the defendant was in a position to determine the plaintiff's loss for pain and suffering upon receipt of the summons in 2006 when the reports of Professor Edwards and Mr Shaw were annexed to the particulars of claim. He called for interest from October 2006 until March 2014 to be factored into the award for pain and suffering . This, he set at R300 000, which with interest at 15.5%, he calculated to be R648 750. The sum of R700 000, he argued would be reasonable as *solatium* for the lasting damage to the plaintiff.

[56] There would appear to be a dearth of cases in which damages have been claimed flowing from rape, something of an anomaly as it were, given the disquietingly high incidence of rape in our society. Both counsel referred me to the unreported matter of *Babalwa Nogqala v Minister of Safety and Security* (Case No. 676/2011 – Eastern Cape Division, Grahamstown, delivered on 18 June 2012) in which a 22 year old woman who was raped by a policeman in his office, was awarded R225 000 in respect of damages for *contumelia* (approximately R252,722.00 in today's terms[8]) and R150 000 for general damages (approximatelyR168 481.00 in today's terms)[9] The total award of R375 000.00 for general damages in today's terms amounts to R421 203.00[10] The plaintiff in Noqgala was not assaulted. She too suffered post-traumatic

8 As adjusted in the Quantum Year Book, Robert J Koch; Van Zyl, Rudd and Associates 2014, page 2.

9 Ibid

10 Ibid

stress disorder and depression as a consequence of the rape. Mr Olivier referred me to *Grobeler v Naspers* 2004 (4) SA 220 (C) , a sexual harassment as opposed to rape case, in which the adult plaintiff who was not physically harmed, but suffered from post-traumatic stress disorder, was awarded general damages of R150 000 in 2004, being approximately R269 793.00 in today's terms.

[57] There is also the unreported judgment of *Philander v Minister of Safety and Security* (Case No 473/2011, 6 June 2013, North West High Court, Mafikeng) where a woman of 36 who was assaulted by members of the police force and twice raped by a policeman was awarded the comparatively lesser amount of R180 000.00 for general damages. No separate amount was awarded for conumelia. Her injuries were nowhere as severe as that of the plaintiff before me. She too suffered from post-traumatic stress disorder. The judgment does not refer to the relatively higher award in *Nogqala* a year earlier.

[58] These cases provide some guidance. It would, however, I believe, be equitable for a comparatively higher award to be made to the plaintiff in view of the excessive violence, brutality and assaults she was subjected to at the youthful age of 13. The plaintiff's pain and suffering and the extent to which she has been traumatised and re-traumatised over the many years since her rape, were evident during her testimony. The rape occurred when she was no more than a child, young and vulnerable and has impacted negatively and severely on

her sense of self, dignity, normal sexual development and enjoyment of life. The scars thereof will live with her for a long time to come if not forever. The fact that the rape was perpetrated by an adult in a position of trust, moreover a policeman who had duty to protect citizens and uphold their safety and dignity, is an aggravating factor. She was subjected to the most heinous invasion of her chastity and privacy and an aggression on her person and reputation. Her constitutionally protected rights to dignity, privacy, freedom and security and her right as a child to be protected from abuse and degradation were trampled upon in an utterly inhumane manner, and the effects thereof will be with her always as aforementioned.

[59] Regard being had to the above, I come to the view that an amount of R300 000 in respect of contumelia and R200 000 for pain and suffering would be reasonable and appropriate. This would constitute just and equitable compensation regard being had to all of the circumstances, and the question of factoring in an amount for interest does not therefore arise. I am mindful however that no amount in pecuniary terms can eradicate the events of that fateful night and the devastation it has wrought on the plaintiff.

[60] The sum of R250 000 which the plaintiff has already received from the first defendant by agreement in terms of a court order of 5 September 2013, is to be deducted from the award of general damages of R500 000. In the

circumstances the plaintiff is awarded a sum of R 250 000 in respect of general damages.

Costs

[61] Mr Olivier argued for attorney and client costs, submitting that the matter ought to have been settled after the first defendant's liability was established by the Constitutional Court. The first defendant refused to do so and continued with its intransigent approach thereby causing plaintiff extra and unnecessary stress. Mr Van der Schyff in turn called for the costs of one counsel only to be awarded to the plaintiff.

[62] Whilst it would of course have been preferable had a settlement been reached, the very wide gap between the parties prevented this. A punitive cost order against the first defendant is not in the circumstances warranted. I am satisfied that the complexities of this matter, the nature of the issues, the inputs by the various experts consulted by the plaintiff and the preparation this entailed, warrants an award of costs for two counsel.

[63] I accordingly grant the following order:

1. The first defendant shall pay the plaintiff the sum of R250 000.00 in respect of general damages.
2. The first defendant shall pay the plaintiff's future medical expenses in respect of the items listed below:

2.1 4½ weeks inpatient treatment at a psychiatric unit. The costs thereof shall be computed with reference to the uncontested actuarial report of Mr S Kroon dated 3 March 2014, and shall be adjusted, if necessary to the cost as at the date treatment commences.

2.2 An initial 28 sessions of psycho-therapy to be costed in accordance with the actuarial report of Mr S Kroon dated 3 March 2014, as at the date of the commencement of such therapy.

2.2.1 Upon completion of the initial 28 sessions, the medical practitioner who administered the psychotherapy sessions shall furnish the parties with a report stating the number of necessary further psychotherapy sessions, if any, that the plaintiff requires. The first defendant shall pay the costs of such report. In the event of a dispute arising between the parties as to the number of further necessary sessions required, an independent psychiatrist, appointed by the parties shall determine and furnish a report at the first defendant's expense on the number of necessary further sessions required. The cost of such further sessions shall be computed by actuarial calculation at the first defendant's expense;

2.3 The first defendant shall pay the reasonable costs of necessary on-going medication for the rest of the plaintiff's life, such to be determined as set out in paragraph 2.3.1 below;

2.3.1 The plaintiff's treating psychiatrist shall furnish the parties with a report which specifies the necessary on-going medication that the plaintiff shall require for the rest of her

life. The first defendant shall bear the costs of such report. In the event of a dispute, an independent psychiatrist appointed by the parties shall determine and furnish a report at the first defendant's expense on the necessary on-going medication for the rest of the plaintiff's life. The cost thereof shall be computed by an actuary at the first defendant's expense.

2.4 Upon receipt of the actuarial calculations in respect of the sums in paragraphs 2.2.1 and 2.3.1 by the parties, and should the parties fail to agree as to the actuarial calculations, any party will be entitled within 5 working days of the receipt of such calculations, and on notice to the other party, to approach me in chambers to present oral argument as to the further conduct of the matter.

3. The first defendant shall pay to the plaintiff the sum of R1 760 000.00 in respect of loss of earning capacity. It is recorded that this is the actuarial calculation of the loss of earning capacity as per the actuarial report of Mr S Kroon dated 3 March 2014 and shall be adjusted if necessary to the value of R1 760 000.00 (one million seven hundred and sixty thousand rand) as at date of payment.

4. The first defendant shall pay plaintiff's costs on the High Court scale such costs to include the costs of two counsel and the qualifying expenses and attendance in Court, if any of the following experts:

4.1 Professor D Edwards;

4.2 Mr Shaw;

4.3 Mr Meyer;

4.4 Dr HJ van Daalen; and

4.5 Mr Simon Kroon.

5. Such costs shall moreover include the travelling costs and accommodation of the following experts:

5.1 Dr HJ van Daalen;

5.2 Mr I Meyer; and

5.3 Mr S Kroon.

6. The first defendant shall moreover pay the costs of plaintiff's examination by Mr Loebenstein and Dr Swart, including their travelling costs and accommodation where necessary.

7. The plaintiff is declared a necessary witness and the costs relating to her travel and accommodation shall be paid by the first defendant.

8. All amounts in respect of damages awarded to the plaintiff shall be paid into the Trust Account of the plaintiff's attorneys being Wheeldon Rushmere & Cole the details of which are:

WHEELDON RUSHMERE & COLE

TRUST ACCOUNT

ABSA Bank

Grahamstown

Account Number: 4……..

Branch Code: 4……..

9. The first defendant shall pay interest on all sums awarded as damages calculated at the rate of 15,5% per annum from date of judgment to date of payment.

10. The first defendant shall pay interest on the plaintiff's taxed costs at the legal rate from a date fourteen (14) days after taxation to date of payment.

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Y S MEER

Judge of the High Court