IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: 963/2012
Date heard: 4 – 8 August 2014
Date delivered: 18 August 2014

In the matter between

ASANDILE MRASI **Plaintiff**

vs

THE MINISTER OF SAFETY AND SECURITY **Defendant**

JUDGMENT

PICKERING J:

[1] This is an action for damages arising out of the alleged wrongful and unlawful arrest and detention of the plaintiff, Asandile Mrasi, on 28 May 2011 by two police officials in Motherwell, Port Elizabeth, and, further, for damages in consequence of certain alleged assaults committed upon her, including vaginal and anal rapes, allegedly committed by a male police officer on the same day in the Motherwell police station cells.

[2] Plaintiff claims damages for the wrongful and unlawful arrest and detention in the sum of R120 000,00 and for the assaults in the sum of R800 000,00. She alleges further that in consequence of the assaults upon her she suffers from post traumatic stress disorder ("PTSD") and will incur future medical expenses in this regard in the sum of R13 113,00.

[3] In the plea defendant admits that plaintiff was arrested without a warrant and subsequently detained at the time and place alleged, by one Constable Fiona Kayser, but denies that the arrest and detention were unlawful. Defendant pleads that plaintiff was arrested on a charge of being drunk and disorderly in contravention of section 59(1)(d) of the Eastern Cape

Liquor Act no 10 of 2003 read with the provisions of s 40(1)(a) of the Criminal Procedure Act no 51 of 1977.

[4] Whilst admitting that plaintiff lodged a complaint of having been raped by a police officer, defendant denies that plaintiff was in fact so raped and denies that she was assaulted in any manner whatsoever.

[5] In defendant's particulars for trial defendant avers that plaintiff's complaint of rape was made to one student Constable Manyane who informed a certain Sergeant Bester thereof at approximately 16h50.

[6] It is now common cause that the alleged perpetrator of the alleged rape was one Sergeant Terence Franks. It is further common cause that in consequence of plaintiff's allegations the Independent Complaints Directorate undertook an investigation and that a disciplinary enquiry was in due course conducted by the defendant against Franks, at the conclusion of which he was found not guilty. Defendant avers that the recording or transcript of the proceedings of the disciplinary enquiry cannot now be located.

[7] It is also common cause that the Director of Public Prosecutions, Grahamstown, declined to prosecute Franks in relation to plaintiff's allegations of rape and the pointing of a firearm.

[8] Plaintiff, a 25 year old woman with one child, left school without completing grade 10. Thereafter she was variously employed in a tavern; as a painter; and in a bakery business. She has been unemployed throughout 2014. She resides in Motherwell.

[9] She stated that on Friday night, 27 May 2011, she had been at a tavern in Motherwell known as Khusta's tavern. She left there at approximately 20h30 and went home. She said that she was to some extent under the influence of alcohol on her arrival at home at approximately 21h00 but was, in her words, "not heavily drunk."

[10] The following morning, Saturday 28 May, she proceeded back to Khusta's tavern at approximately 09h00. The tavern opened at 10h00. She and her friend shared three quart bottles of beer. Although she did not have a watch she estimated that she left the tavern to go home at some time between 13h00 and 13h30. She stated that she was not under the influence of alcohol and her gait was not in any way affected. She stated that it took between 5 – 10 minutes to walk home from the tavern.

[11] As she was proceeding along the pavement she crossed the street. A police van was approaching along the road from her front. It stopped next to her on the same side of the road. She stated under cross-examination that a private motor vehicle was in front of the police vehicle, proceeding in the same direction. This motor vehicle passed by. It was put to her that she had had her arm out, as if hitchhiking and that she had stumbled into the road in front of the private motor vehicle causing it to swerve so as to avoid a collision with her. She denied this. The two occupants of the police van alighted therefrom. The driver was a coloured male and the passenger was a coloured female. The male police officer said that she was drunk. She denied this but he ordered her to get into the back of the van, which she did. The police officials then drove around Motherwell for a while. Eventually they arrived at the Motherwell police station. She was taken into the police station and, at a table, was told to empty her pockets. Her belt and cell phone were taken from her. Her personal particulars were written down. There were a number of police officials present, including the two occupants of the police van.

[12] Plaintiff's name was recorded as being "*Sisanda Gas*". Although there was, initially, some suggestion that she had given the police a false name it became clear, and is common cause, that she did not do so and that the police official taking down her particulars must have misheard what she was told.

[13] Whilst plaintiff was standing at the table she heard a coloured policeman singing in Afrikaans. He approached her and carried on singing, in

her ear. She complained that he was making a noise, whereupon he slapped her with an open hand on the chest between her left breast and her shoulder. She stated that she did not previously know this policeman. It is, however, common cause that the policeman who she alleged assaulted her is Constable Terence Franks.

[14] Plaintiff stated that she was then taken by Franks and a female police officer to collect blankets and a mattress and thereafter taken to the cells. Although she did not know the number of the cell in which she was placed it is not in dispute that this was cell number 2.

[15] She stated that there were two doors to the cell, as indeed appears on certain photographs contained in an album of photographs, Exhibit B. The outer door of the cell is a solid metal door and the inner door a grille or burglar bar type door, which I shall refer to as the "*security gate*" as it was referred to as such by certain of the witnesses.

[16] After she was put in the cell the security gate was closed and locked. She was left alone. According to her she had not, up to that point, been told that she was under arrest for having committed an offence.

[17] Thereafter a young black policeman, together with Franks, came to the cells, looked at her, and left without saying anything. After a while Franks returned. At that stage plaintiff was sitting on the mattress on the floor near the security gate. Franks opened the security gate and entered the cell. He locked the security gate as well as the solid door. He was smoking a cigarette which he put out on the floor. It was put to her under cross-examination that Franks did not smoke. She insisted that he had been smoking in the cell. In this regard she referred to photograph B, image 46, in which is depicted a burnt match lying on the floor of her cell. It would be convenient to mention at this stage that none of the police witnesses who were called to testify in this matter were able to throw any light as to how the match should have come to be there.

[18] Franks instructed plaintiff to stand up from where she was sitting. She told him that she did not want to do so. He repeated this order a second and a third time. When she still refused to stand up he grabbed the front of her clothing, pulled her up and threw her onto the cement bed which appears in the photographs of the cell which are contained in the photograph album, Exhibit B. She struggled with him and managed to get up and push him away. He succeeded, however, in pushing her onto the bed. He ordered her to undress. When she refused he took out his firearm and pointed it at her. Because she was terrified she took off her jeans and panties. He undid his belt and pulled his trousers down to below his knees. She saw that he was already wearing a condom on his penis.

[19] She was lying across the cement bed with her legs hanging over the side thereof. He stood between her legs and pulled her by the thighs towards him. He then raped her vaginally before also inserting his penis into her anus. When he was finished he pulled up his "*bikini*" and his trousers. He told her that if she mentioned the rape he would kill her. He left the cell and she did not see him again on that day.

[20] She stated that after he left she cried, shouted for help and shook the security gate. A policeman brought another female suspect to her cell. He asked her what was wrong. She told him. He left saying that he was coming back but he did not return. Another policeman arrived. Plaintiff was still crying and she reported to him that she had been raped. He left, but returned with a white man in civilian clothes and a black policeman. She told them what had happened and they also said that they would come back. They did not return but another white man, accompanied by two black men, came to the cell and questioned her. After they left two other policemen came and took her to two female police officers who minuted a statement from her. It is common cause that this statement, Exhibit C, page 3-5, was sworn to at 22h10.

[21] Plaintiff was then taken to Dora Nginza Hospital where she was examined by a Dr. Moodley. After the examination she was taken to a room

and asked to make a statement to another police officer which she did. This statement, Exhibit C6-10, was attested to at 01h30. She was then taken home.

[22] Plaintiff stated that she was emotionally affected by the incident. When Franks pointed the gun at her she thought that he could kill her and no-one would hear the shot because of the closed solid metal door. She stated that she experiences difficulty sleeping on occasion when, as she put it, "*the incident crosses my mind*." She said that she was frightened by the sight of police officers.

[23] It is common cause that Franks appeared before a disciplinary enquiry but was acquitted. It was put to plaintiff under cross examination by Mr. Bloem S.C. who, with Mr. Rugunanan, appeared for defendant, that plaintiff had testified at the disciplinary enquiry to the effect that she had in fact been at a party at a friend's house on Friday night where she had been drinking and dancing all night and that whilst there she had had sexual intercourse. She denied having said any such thing.

[24] It was also put to her that she had gone to Khusta's tavern on Saturday morning for a so-called "*babbalas drink*". She stated that she had indeed gone to the tavern for a "*babbalas drink*" but not because she herself had a hangover. On Saturday morning a friend had told her that she had a hangover and had asked plaintiff to accompany her to the tavern for that drink.

[25] She denied that she was falsely accusing Franks of having raped her.

[26] Dr. Moodley testified that he has been employed for the past five years by the East Cape Department of Health at Thuthuzela Care Centre, Dora Nginza Hospital, Port Elizabeth. The care centre was formerly known as the Rape Crisis Centre. He is also in part-time private practice as a medical practitioner.

[27] He testified that he qualified as a medical practitioner in 1979 and that he had extensive experience in gender violence cases going back to the date of his qualification. Over the five years of his employment with Thutuzela Care Centre he has dealt with an average of 150 – 180 new cases involving sexual violence per month, with the victims ranging from infants to very old women, and including males.

[28] On the night of 28/29 May 2011 he was on call. He received a call in the present case just before midnight on 28 May. Plaintiff was brought to the centre by the police. He met and examined plaintiff at 00h15 on 29 May. Immediately after his examination he completed the requisite form J88 (Exhibit A).

[29] He obtained a general history from complainant and recorded it as follows:

> "*Allegedly raped and sodomised by male at ±16h00 on 28/05/2011.*"

[30] Plaintiff had no visible external injuries but she was "*traumatised and distressed*". She smelt of alcohol and her eyes were bloodshot. In this regard Dr. Moodley stated that the smell of alcohol and the bloodshot eyes could be symptomatic of the effects of alcohol. With regard to the smell of alcohol he stated that it was not unusual that, if plaintiff had consumed alcohol some eleven hours priors to his examination, she would still smell thereof. He had examined patients where the time lapse between the consumption of alcohol and his examination was much longer and yet the smell of alcohol was present. In this regard he said there were many variables.

[31] It was put to him under cross-examination that the arresting officer would testify that plaintiff was stumbling and her speech was slurred. She was in a light, cheerful and conversant mood. Dr. Moodley replied that these allegations were not in accordance with his observations of plaintiff at the time of his examination of her. I should mention that his description of plaintiff as being "*traumatised and distressed*" was not challenged at all.

[32] With regard to his gynaecological examination of plaintiff he stated that he had found nothing abnormal. He said, however, that plaintiff was a sexually active woman who had borne a child and that, in 60% of woman victims who had previously been sexually active and had borne a child, no injuries were occasioned, because of the elasticity of the vaginal tissues. There was also the fact that in many instances the victims were threatened with violence and therefore did not resist.

[33] Turning to section G of Exhibit A relating to his anal examination of plaintiff Dr. Moodley stated that he had found certain injuries which he recorded on the form as follows:

> "*Abrasions: Yes*
> *Swelling/thickening: Yes*
> *Redness/Erythema: Yes*
> *Bruising/Hematoma: Yes*
> *Tears ...: Yes ±0,5cm*"

[34] He had also indicated the injuries in diagrammatic form on the form J88 recording those injuries as follows:

> "*Bruising and tears at 7 o'clock and 8 o'clock. Abrasions at 2 o'clock.*"

[35] He concluded therefore as follows:

> "*Findings consistent with sodomy.*"

[36] He stated that in his opinion these injuries had been occasioned within a 24 hour period prior to his examination. He stated that the timing of the injuries occasioned to the anal/rectal area was based on their appearance. Within the 24 hour period after such injuries were occasioned they would have a particular colour and appearance. After 24 hours up to 72 hours there would be a change in their colour and appearance. A further change would occur after the lapse of 72 hours. Although Dr. Moodley could not state the

exact time as to when the plaintiff's injuries were inflicted he was satisfied that they had been sustained within the 24 hour period before his examination. He concluded that the appearance of the injuries was consistent with the history given to him by plaintiff as to when they were inflicted.

[37] Constable Kayser, a member of the Police Service since 2004, testified that on Saturday, 28 May 2011, she was on patrol duty in a police van driven by Warrant Officer Finnis. They were driving down Tynira road in Motherwell at approximately 13h00 when she noticed the plaintiff on the elevated pavement walking in the same direction in which they were proceeding. Her attention was drawn in particular to plaintiff because plaintiff was staggering and appeared to be under the influence of alcohol. There was a private motor vehicle proceeding along the road in front of and in the same direction as the police van. Plaintiff stumbled from the pavement into the road, forcing the private motor vehicle to swerve in order to avoid a collision with her. Kayser accordingly asked Finnis to stop the van.

[38] It had been put to plaintiff under cross-examination that she had been walking with her arm outstretched and her thumb pointing upwards in a so-called "*hiking position*". She had denied this. During her evidence in chief Kayser was asked a somewhat leading question as to whether plaintiff had done anything with her arms prior to the police van stopping. She replied that plaintiff had not done anything. Under cross-examination, however, she stated that plaintiff had indeed had her arm outstretched in the hiking position. Taxed with why she had not said so in her evidence in chief she was unable to answer.

[39] She stated that the police van stopped alongside the pavement and she disembarked and confronted plaintiff. She could see that plaintiff was heavily under the influence of alcohol. She not only smelled of alcohol but was unsteady on her feet, her eyes were bloodshot, her speech was impaired and her clothing was in disarray, with her belt unfastened and the zip of her jeans half open.

[40] Kayser asked plaintiff where she had come from and to where she was going. Plaintiff gestured blindly in a direction which, according to Kayser, made no sense. She was mumbling and slurring so badly that Kayser could not make out what she was saying. Her speech was in fact entirely unintelligible.

[41] Kayser then told plaintiff that she was going to arrest her for being drunk and disorderly because she was a danger to herself and the public. Asked what was *disorderly* about plaintiff's conduct Kayser replied that it was the fact that plaintiff had stumbled drunkenly into the road in front of the private motor vehicle. She was a danger to herself and the public.

[42] Kayser then assisted plaintiff to climb into the back of the police van. She initially estimated that this entire incident had taken no more than one minute. She said that the police van proceeded directly to the Motherwell police station which is also situate in Tynira road. She stated that it took approximately 3 – 5 minutes to reach the police station and denied that they had driven around Motherwell for a time. Asked why, in that case, they had only arrived at the police station at 13h20 as recorded in the Occurrence Book, Exhibit E, against entry no 1690, she now stated that in fact it had taken approximately 5 minutes before plaintiff was placed in the back of the van because plaintiff was so inebriated that she could not climb into the van on her own. Kayser in fact had had to support her on her arm.

[43] She stated that at the police station plaintiff was asked her personal particulars which she was now able to furnish. She confirmed that she had completed form J534 (Exhibit E15) on which appears plaintiff's name, address, age, nationality, as well as the fact that she was unemployed. She stated that she had obtained these details from plaintiff herself despite plaintiff, some 20 minutes earlier, having been unable to speak intelligibly. She said that plaintiff also told her that she had been on the way to a friend when she was detained. In the course of obtaining plaintiff's details Kayser told her that she was very drunk and that the smell of alcohol was too strong for her. Plaintiff, who was in a cheerful mood, laughed at this. According to

Kayser the atmosphere in the reception area was "*vrolik*". She stated that plaintiff was standing alongside her and said, in English, that she understood Afrikaans but could not speak it.

[44] After an overnight adjournment of the case Kayser was taxed with this evidence. She confirmed that plaintiff had made the statement about understanding Afrikaans at the police station. It was put to her by Mr. Cole, who appeared for plaintiff, that if plaintiff had in fact said this at the road it would be contradictory of Kayser's evidence. She agreed, saying that she "*het nie eers gedink om Afrikaans by die pad te praat*". It was again put to her that if the conversation had indeed occurred at the road it would mean that, contrary to her evidence, plaintiff was able to speak clearly at that time. She then confirmed having made a statement (Exhibit C23 – 24) on Sunday, 29 May 2011, for purposes of an investigation by the Independent Complaints Directorate (ICD) in which she had stated, *inter alia*, as follows, regarding her arrest of the plaintiff at the road:

> "*I joke with her regarding the state she was in and she was laughing and told me that she understand Afrikaans but can't speak it.*" (sic)

[45] She was asked how she could reconcile this statement with her evidence. She then embarked upon a confused, rambling explanation in the course of which she stated that when she had testified the previous day she had been frightened, had felt threatened, was not in full control of herself and her thoughts which had been "*all over the place*", and that at times she had become "*blank*". She stated that Mr. Cole had been "*streng*" with her. She conceded, however, that in the course of her ten years as a police officer she had testified in more than fifty court cases. She stated, with regard to plaintiff's alleged hitchhiking, that plaintiff had indeed had her arm outstretched in the hiking position and that, after the court had adjourned for the day, she had remembered that.

[46] She then stated that plaintiff had indeed said at the road that she could understand Afrikaans although she could not speak it. She said, however,

that plaintiff had said this with a "*sleeptong*". Asked how this could be reconciled with her previous day's testimony that she could not understand plaintiff at all at the road, she merely replied that she stood by her statement. She then insisted that plaintiff had said both at the street and at the police station, that she understood Afrikaans.

[47] She confirmed that the private motor vehicle had been proceeding in the same direction as was the police van. Once again her statement, Exhibit C23 – 24, was put to her wherein she had referred to the private motor vehicle as being "*oncoming*". She stated that this must have been a "*skrif fout*" on her part.

[48] It was put to her by Mr. Cole that she had deliberately exaggerated plaintiff's condition in order to justify plaintiff's arrest. She denied this. It was at this stage that she added, for the first time in her evidence, that she had had physically to support plaintiff at the road.

[49] She denied that plaintiff could have been walking home because she was in fact walking in the opposite direction to her house.

[50] It had been put by Mr. Rugunanan to Dr. Moodley that when plaintiff was arrested at the road she had been in a *"light, conversant mood*." Kayser confirmed this, stating that plaintiff had been in a "*vrolike luim*" although her speech had been unintelligible. She confirmed that she had said in her statement that "*during all the time from the time that I found her up till the time that she was placed in the cells we did make jokes and have a good conversation...*" Kayser stated, however, that she was referring to jokes with other police officers. She was asked about the "*good conversation*" which she had allegedly had with plaintiff. She replied that she could not remember any conversation at the police station apart from the obtaining of plaintiff's particulars.

[51] It was put to her that if the "*good conversation*" did not take place at the police station it must have occurred at the road. She replied that plaintiff's

attitude at the road had been "*vrolik*" but that there was no conversation there. Asked why she had then put this in her statement she replied, enigmatically, that she had made her statement according to the guidelines of the ICD. She then agreed that she and plaintiff had had a good conversation from the time she was picked up until she was placed in the cells but immediately reiterated that plaintiff was extremely drunk. She then said that although plaintiff spoke slowly she spoke reasonably well. It was put to her that if plaintiff had been hopelessly drunk as alleged then she could never have engaged in a good conversation. To this she replied that the atmosphere was light without any arguments. She stated that she saw Sergeant Franks at the police cells. He was a cell commander. He was in control of the one set of cell keys. She denied that Franks had been singing or that he had slapped plaintiff as alleged.

[52] According to her she took plaintiff to fetch blankets and a mattress and locked her in cell number two. After locking the security gate she saw Franks in the passage near cell number one with the prisoners' food trolley. She assisted Franks by giving plaintiff her food. She then gave Franks the set of keys. At the time that she locked plaintiff in the cells plaintiff was in a "*light mood*" and smiled at her. She was not traumatised or distressed in any way and she had no injuries or complaints.

[52] She stated that plaintiff was locked in the cells before 13h30 because she gave her her food at 13h25. With reference to entry number 1705 in the Occurrence Book she confirmed that one Ntombizodwa Klaas, who had also been arrested for drunk and disorderly conduct, was placed in cell number 2 at 15h25.

[53] She stated that in terms of the regulations the cell police officers were obliged to inspect the cells every hour and, in the case of drunk detainees, every half hour. She confirmed that according to entry 1708 in the Occurrence Book the cells had been visited by Sergeant Bester and trainee Manyane at 16h00 and confirmed that this was the last entry in the Book recording any cell visits until 20h20.

[54] She confirmed that entry 1709 recorded that the prisoners were fed at 17h05 by Sergeant Bester and trainee Manyane and that there were no complaints. She confirmed further that entry 1718 at 20h20 recorded that:

> "*Sergeant Jozi was visited the cells then she heard noise on cell 2. I went to listen what is the story she said there is a coloured guy who raped me on cells. I went to report to Lt. Col. Arends. He come to investigate. That is all. The victim is Sisanda Mgas and the witness is Ntombizodwa Klaas.*" (sic)

Kayser was unable to explain why no cell visits had been recorded between 16h00 and 20h20. She said that after she had detained plaintiff she had resumed her patrol duties with Warrant Officer Finnis.

[55] She confirmed that according to Occurrence Book entry number 1723 plaintiff had been released at 22h15.

[56] Constable Schultz testified that on Saturday, 28 May 2011, she was a student constable performing duties as a so-called "*cell reserve*" from 06h00 until 15h30. Franks was the cell commander. She confirmed that plaintiff was brought into the police station by Kayser at 13h20. She herself had nothing to do with plaintiff personally in the course of her duties but she had, however, filled in the requisite entries in the Occurrence Book, as well as the prisoner register and the prisoner property register, after Kayser had searched plaintiff.

[57] She stated that she was at that stage in possession of the bunch of keys for the cells. She gave the keys to Kayser and asked her to detain plaintiff in the cells. Kayser then left with the plaintiff. The keys were later brought back to her by Franks.

[58] She stated that all cell visits had to be performed every hour save that in cases involving drunk persons they had to be performed every half hour. In this regard she confirmed the entries in the Occurrence Book which recorded

that cell visits had been performed at 13h30, 14h00, 14h30, 15h00, and 15h30 and that there had been no complaints.

[59] Sometime after plaintiff had been detained, which she estimated as being approximately an hour, Schultz heard someone banging a security gate in the cells. She and Franks went down the passage to investigate. It transpired that it was plaintiff who was making the noise. She was still heavily under the influence of alcohol. According to Schultz plaintiff was "*so besope*" that she had to hold onto the bars of the security gate with both hands and lean against the wall in order to balance herself. She was crying.

[60] Franks opened the security gate and Schultz entered and asked plaintiff what the problem was. Plaintiff replied that her time was up and that she wanted to go home. She was speaking in a slurred manner. Franks, who was standing behind Schultz, told her to tell plaintiff that her time was not up and that she was still under the influence of alcohol. Schultz did so but plaintiff would not listen.

[61] According to Schultz she was with Franks the entire afternoon up to 15h30. At that time Franks visited the cells with Constable Manyane. In this regard she was referred to the entry in the Occurrence Book at 15h30 against number 1706 which reads:

> "*Cell visited. Sergeant Franks and Cst. Schultz visited 22 units in cells. No complaints.*"

[62] She confirmed that she had written the entry. She denied, however, that the entry was correct. She said that she had made a mistake in recording that she had accompanied Franks instead of writing that Manyane had done so. She was unable to explain how she could have made such a mistake.

[63] She denied that she was scared of Franks because he was her senior or that she was concerned that he might give her an adverse report if she in any way implicated him in the assault against plaintiff.

[64] Constable Manyane confirmed that he had been on duty as a student constable at Motherwell police cells on 28 May 2011. He had been posted to the cells at 15h30 together with Sergeant Bester. On arrival there they met Franks who was the cell commander. There was a woman suspect in the reception area, Ntombizodwa Klaas, to whom Occurrence Book entry 1704 at 15h25 relates.

[65] Manyane stated that he and Franks took Klaas to cell number 2. He stated that Schultz's entry at number 1706 in the Occurrence Book to the effect that she had gone to the cells with Franks at 15h30 was wrong. He had gone with Franks because Franks was handing over the cells to him.

[66] Klaas was placed in cell number 2 together with plaintiff. There were no complaints from any of the detainees in any of the cells, including cell number 2. Thereafter Franks left the premises with Schultz, leaving Bester in charge.

[67] At 15h40 Manyane visited the cells again because he was concerned about a detainee who was considered a suicide risk. He visited all the cells. On his way back he was called by plaintiff who asked him where the chief commander was. He asked why and she said that she had been raped by the policeman who had been in his company when Klaas was placed in cell number 2. Manyane understood from this that she was referring to Franks. When plaintiff made this complaint she was not crying but looked "*very serious*". He then said that he did not get the impression that plaintiff was upset. Asked if she had looked normal he replied that he could not answer as he was not good at analysing a person.

[68] He went to call Bester to inform him of the complaint. Bester returned to cell number 2 with him. Plaintiff repeated to Bester what she had told Manyane. Bester then called the Chief Commander, Lieutenant Colonel Magwentshu. Magwentshu arrived at the cell reception area and spoke to

Bester. The two of them then went to the cells. On their return they merely went to their respective offices.

[69] According to Manyane he did not contact Franks about the allegation against him because it did not "strike" his mind to do so. Nor did it strike his mind to record the plaintiff's complaint in the Occurrence Book. He conceded in this regard that the complaint was extremely serious and that it should have been recorded in the Occurrence Book. He then stated that because he was a trainee at the time he was not allowed to write in the Occurrence Book. He said that although he had not been told this, he knew it to be standard procedure.

[70] He stated that he was not sure when he made his next cell visit after plaintiff's complaint but he confirmed entry 1708 at 16h00 in the Occurrence Book to the effect that "*Sergeant Bester and trainee Manyane visited 22 units – no complaints.*" This was despite plaintiff having made her complaint 20 minutes previously at 15h40.

[71] After 15h40 he had made more than two visits to the cells. Asked to explain why the Occurrence Book contained no reference thereto he stated that Bester was in charge of the book. He denied that the complaint had been reported to Bester at 16h50 as was contained in a statement made by Bester after the incident on 30 May 2011, and as was pleaded by defendant.

[72] He was unable to explain, in the light of plaintiff's complaint having been made at 15h40, how Bester could have written in the Occurrence Book at 16h00 that there were no complaints. He confirmed that at 17h05 he had fed the prisoners (entry 1709) and that it had been recorded there were no complaints. He did not discuss the complaint further with plaintiff. Surprisingly, neither Bester nor Magwentshu were called by the defendant as witnesses.

[73] It is common cause, as was testified by Warrant Officer Victor, that the dog unit was called in and that a dog trained in the identification of blood and

semen was brought to the cell but did not find anything. Victor also searched the rubbish bins at the cells for any incriminating evidence such as a condom or tissue paper but found nothing.

[74] Sergeant Franks testified that he has been a member of the South African Police Service since 2002. He confirmed that on 28 May 2011 he was on duty as the cell commander at the Motherwell police cells. He commenced duty at 05h45 and went home at 15h30. Student Constable Schultz was working with him.

[75] He stated that he remembered plaintiff being brought into the cells by Kayser and Finnis. She was not crying or upset and was able to furnish her particulars. Those particulars were recorded by Kayser whilst Schultz completed the Occurrence Book and cell register. Kayser then took plaintiff to the cells with the cell keys. He denied that he had been singing in the cell reception area and denied that he had assaulted plaintiff on the chest.

[76] Thereafter Franks was told that the prisoners' food was ready. He took the food into the passage where he waited for Kayser to come out of cell number 2 where plaintiff had been detained. He then asked Kayser to give plaintiff her food, which she did. After that Kayser locked cell number 2 and gave the keys back to him.

[77] Kayser and Finnis then left the building. Franks confirmed that the cells had to be visited every hour and, in the case of a drunk prisoner, every half hour. He confirmed too, with reference to the Occurrence Book entry 1705, that Ntombizodwa Klaas was at the cells at 15h25.

[78] He confirmed also the evidence of Schultz and Manyane to the effect that entry 1706 at 15h30 was incorrect insofar as it reflected that Schultz, and not Manyane, had visited the cell with him. He stated that he had visited the cells at 15h30 with Manyane as part of the handing over procedure. Thereafter he had left for home.

[79] He denied that he had had his firearm with him during his cell visit. He stated that when he reported for duty in the morning he put his firearm in the safe. He denied that he smoked. He could furnish no explanation as to how the burnt matchstick had come to be in plaintiff's cell. He denied all of plaintiff's allegations concerning his conduct towards her on 28 May. He suggested that she had fabricated these allegations because she was upset with him for having told Schultz to tell her that she was still drunk and that her time for release was not yet up.

[80] It was put to him that his physical description matched that given by plaintiff of her alleged assailant and, further, that, according to Kayser, he was the only short, fat, coloured policeman on duty at the cells on 28 May. He replied that there was also a short, fat coloured police detective who had been at the cells in the morning in order to charge certain suspects. He said that he did not know when this man had left but, under further questioning, stated that he had left in the afternoon. He then conceded that he had in fact not seen him at the cells during the afternoon but added that it was possible that that policeman had been there. He eventually conceded that the man had not been present in the afternoon.

[81] It is common cause that he had been approached to make a statement on 30 May 2011 but had declined to do so.

[82] He confirmed that he had been charged by the ICD with the unlawful pointing of a firearm and with rape. He conceded that he had made no mention in his statements that he had not been in possession of a firearm nor had any such mention been made in the statements which were attested to by various other policemen whereas they all stated that that he did not smoke. In this regard he said that he had concentrated on the charge of rape which was much more disturbing. He also denied that he had ever smoked.

[83] With regard to his disciplinary enquiry, which he said was presided over by one Colonel Mashara, he stated that he was waiting outside the venue at Kwazakele police station, dressed in plain clothes, when plaintiff

approached him, stood in front of him, and asked him where the enquiry was to be held. At that time he did not know who she was and he believed that she had no idea who he was.

[84] He stated that at the enquiry plaintiff was the first witness called by the prosecutor to testify. Franks, as the accused, was allowed to listen to her testimony. According to him plaintiff stated that she had been at a friend's party for the whole of the previous Friday night and had been dancing and drinking all night. She also mentioned that she had engaged in sexual activities. Franks could not remember if plaintiff had been asked about the sexual activities or if she had volunteered this information. She had also said that on Saturday morning she had been drinking in order to cure her "*babbalas*".

[85] That then was the evidence led before me.

WRONGFUL ARREST AND DETENTION

[85] As appears from the evidence set out above, it is common cause that plaintiff was arrested without a warrant for being drunk and disorderly in contravention of section 59(1)(d)(i) of the Eastern Cape Liquor Act 10 of 2003. That section provides:

> "*59(1) No person may –*
> - *....*
> - *(d) be drunk and disorderly in or on*
>
> (i) *any road, street, lane, thoroughfare, square, park or market; ...*"

[86] In Scheepers v Minister of Safety and Security, unreported Eastern Cape, Grahamstown case no CA434/2012, a matter also dealing with the lawfulness of an arrest without a warrant on a charge of being drunk and disorderly in contravention of section 59(1)(d)(i) of Act 10 of 2003, Van Zyl ADJP, with whom Mjali J concurred, stated at paragraph 2 as follows:

> *"[2] It is trite that where an arrest without a warrant is admitted, the onus rests upon the defendant to allege and prove facts which provide legal justification for the arrest. (See inter alia Zealand v Minister of Justice and Constitutional Development and Another 2008(4) SA 458 (CC)). Accordingly, in order to discharge the onus of proving that the appellant's arrest in terms of section 40(1)(a) of the Criminal Procedure Act was lawful, the respondent was required to prove that the arrest was carried out by a* "peace officer", *that the appellant had committed or attempted to commit an offence, and that the commission of the offence, or the attempted commission thereof, occurred in the presence of the arresting officer. It is not in dispute that the arresting officer was a peace officer as defined in section 1 of the Criminal Procedure Act. The lawfulness of the appellant's arrest is confined to the second requirement, namely, whether she committed the offence of drunk and disorderly as envisaged in section 59(1)(d)(i) of the Eastern Cape Liquor Act*."

[87] Similarly, in the present matter, the lawfulness of plaintiff's arrest is confined to the issue as to whether she committed the offence of being drunk and disorderly as envisaged in section 59(1)(d)(i) *supra*.

[88] In the Scheepers judgment, *supra*, Van Zyl ADJP disapproved of certain dicta in Minister of Safety and Security v Glisson 2007 (1) SACR 131 (E). I should mention that the Glisson matter *supra* was a decision of a two Judge bench which could therefore only be departed from by Van Zyl ADJP and Mjali J if they were satisfied that it was clearly wrong. It would appear, with respect to the learned Judges, that they overlooked the fact that Glisson was in fact the decision of two Judges, as reference is made in the Scheepers judgment to the court having been comprised only of Jones J and not of myself as well, I having concurred in that judgment.

[89] In the Scheepers case, *supra*, Van Zyl ADJP, after referring to the everyday use of the term "*drunk*", continued to state as follows at par 14:

> "*However, where the word* "drunk" *is used in a legal sense, that is in the context of determining whether the extent of a person's intoxication is such that the law regards it as constituting conduct of an unlawful nature, it is characterized as the condition where someone is intoxicated to the extent that he is incapable of comporting himself, or 'of performing any act in which he is engaged with safety to himself or with regard to the rights of others which the law commands.' (Landsdown's definition* supra*). While the physical manifestations of the excessive consumption of alcohol are indicative of, and provide evidence of intoxication and the level of intoxication of the person charged with the offence of being drunk and disorderly, for the level of intoxication to constitute unlawful conduct in the legal sense referred to above, the extent of his intoxication is measured against his ability to behave himself in an acceptable manner (comport himself), or where he is engaged in a certain act, his ability to do so with the required safety or skill. The level of intoxication for purposes of determining the commission of the offence of drunk and disorderly is accordingly assessed with reference to the ability or inability of the person concerned to act or refrain from acting in a certain manner. Put differently, the enquiry is not aimed at determining the extent of the physical manifestations of intoxication, but rather the extent of the effect of intoxication on the ability to act in accordance with the required legal standard, that is the standard set by the law. In a legal sense therefore, the term drunk is applied to that degree of intoxication where the person concerned is unable to act in accordance with the legal standard.*"

[90] Be that as it may it is, in the view which I take of the evidence, not necessary to deal with the different approaches set out in the Glisson and Scheepers cases respectively. This is so because the evidence adduced by the defendant in an attempt to discharge the onus upon it, falls woefully short of establishing that plaintiff was drunk in any sense of the word and certainly not in the legal sense referred to by Van Zyl ADJP.

[91] As will have been seen above the versions of plaintiff and of the defendant are irreconcilable and mutually destructive. The approach to be adopted in such circumstances appears from a number of cases such as National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E), (referred to with approval in Baring Eiendomme Bpk v Roux [2001] 1 All SA 399 (SCA); Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA) at 14J – 15D; and Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) where the following is stated at 589G:

"*It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of the proven facts and the probabilities of the matter under consideration.*"

[92] Plaintiff was, in my view, an exceptionally good witness. Her evidence on this aspect of the case was given calmly, sincerely and consistently.

[93] As against plaintiff's evidence, Constable Kayser was, in my view, nothing short of being a pathetic witness. Mr. Cole submitted, with considerable justification, that her evidence provided a new high watermark of inconsistencies, contradictions and garrulousness. Indeed, I have seldom seen a witness indulge in such histrionics in the witness box as did Kayser. Her performance included a demonstration of how she had slapped her forehead in frustration on getting home and realising that she had failed to take up the cue concerning what plaintiff had been doing with her arms at the road. It also included a request that she be allowed to start her evidence all over again, presumably some sort of equivalent to a supplementary examination in chief. In justification of her contradictory evidence she stated that, despite having testified in many trials, more than fifty, she was frightened, not in control of herself, her mind had gone blank and was all over the place. She then fell back on an assertion that Mr. Cole, during his cross-examination, had been "*streng*" with her. I should state at this juncture that Mr. Cole was at all times courteous towards her. Had he been guilty of badgering her in any way I would have intervened and had I not done so, I am

sure that Mr. Bloem would have objected thereto. The problem with her evidence lay, not with Mr. Cole, but with her inability to answer his straight-forward questions and to explain the glaring contradictions in her version.

[94] Her evidence that plaintiff was so drunk at the road to the extent that she could not speak intelligibly and that she had to be physically supported, is utterly improbable when viewed against her evidence as to what happened at the police station. Within the space of less than twenty minutes the almost paralytically drunk plaintiff had miraculously sobered up to the extent that, far from staggering along in the wrong direction and not knowing where her home was and pointing in a direction that made no sense, as had been alleged by Kayser, she was now able to furnish her full particulars, including her address. She was also now, as Kayser conceded, able to conduct a "*good conversation*". That concession obviously had to be made in the light of Kayser's statement to the effect that "*during all the time from the time that I found her up till the time that she was placed in the cells we did make jokes and have a good conversation...*" It was, however, only reluctantly extracted from her after a great deal of evasion on her part.

[95] Under cross-examination she completely contradicted her initial evidence to the effect that plaintiff's speech at the road was unintelligible, saying that plaintiff had told her at the road that she understood Afrikaans but could not speak it before stating that this had been said both at the road and at the police station.

[96] It furthermore became apparent that she was prepared to adapt her evidence in order to meet the exigencies of the situation. Her initial evidence was that it had taken no more than a minute to arrest plaintiff and put her in the police van and no more than a further three or four minutes to reach the police station. She denied plaintiff's assertion that they had driven around Motherwell for a while. When she was asked how it was then possible for them only to have reached the police station twenty minutes later she stated that in fact plaintiff had been so drunk that she had to be supported and that

accordingly the incident at the road had taken at least five minutes. She was patently lying in this regard.

[97] She was also unable to explain why she had referred in her statement to the private motor vehicle as having been "oncoming" beyond stating that this must have been a "*skrif fout*".

[98] What became clear by the end of Kayser's evidence was that she was grossly exaggerating plaintiff's alleged condition in order to justify the latter's arrest.

[99] Much was made by defendant of the fact that plaintiff smelt of liquor. That she did so, is hardly surprising, in view of her own evidence that she had consumed beer shortly before her arrest.

[100] Mr. Bloem sought to rely on the evidence of Student Constable Schultz as corroboration for Kayser's evidence. It is relevant at this point to remark on the failure by defendant to have called Warrant Officer Finnis as a witness. After all, plaintiff had alleged in her evidence that it was Finnis who had disembarked from the police van and told her that she was drunk. The failure to call Finnis is, in all the circumstances, surprising. Despite this, I do not believe that it would be appropriate to draw an inference adverse to the defendant from the failure to have called him. The consequence of such failure, however, is that Kayser's evidence as to the events at the road was entirely uncorroborated and defendant was forced to fall back on the evidence of Schultz as to plaintiff's condition at the police cells.

[101] Mr. Bloem referred in this regard to Schultz's evidence that when she went at some time, approximately an hour after plaintiff's detention, to investigate a noise in the cells, plaintiff was so drunk that she had to hold on to the bars of the security gate and lean against the wall in order to keep herself upright. In this regard Mr. Bloem submitted that she was an impressive witness. I regret to have to say that I entirely disagree with his assessment of her. In my view she was a most unimpressive witness and I

gained the impression that she was not being candid with the Court. For a start, her explanation as to why she had recorded in the Occurrence Book that she herself had visited the cells at 15h30, if in fact she had not done so, is explicable only on the basis that she was extremely incompetent or that she is lying. Secondly, her evidence concerning plaintiff's alleged state of intoxication in the cells is, in the light of Kayser's evidence, quite improbable. On Kayser's evidence plaintiff had in fact sobered up to the extent that, on arrival at the police station, she was able to furnish her particulars, conduct a good conversation, joke, and walk unaided to the cell. Approximately an hour later, on Schultz's estimation, plaintiff had reverted to such a state of intoxication that she had to cling to the bars of the security gate to remain upright and lean against the wall to balance herself. This evidence is in my view not only improbable but, in the light of Kayser's evidence, is clearly false and I reject it. Furthermore, no mention of plaintiff's complaint is made in the Occurrence Book. Schultz's explanation that the incident was not serious enough to warrant it being recorded cannot be accepted in the light of the admitted duty of the cell police officials to record the fact of any complaints.

[102] In my view, Defendant's evidence fails entirely to establish that plaintiff was unable to behave herself in an acceptable manner (comport herself) and was unable to walk along the road with the required safety or skill.

[103] In all the circumstances I accept the plaintiff's evidence as to the state of her sobriety and I reject the defence evidence to the contrary. I find therefore that plaintiff was not drunk and disorderly in contravention of section 59(1)(d)(i) of Act 10 of 2003 as alleged and that her arrest without a warrant and subsequent detention was not justified by s40(1)(a) of Act 51 of 1977 and was unlawful. This conclusion renders it unnecessary to decide whether, in arresting plaintiff, the police officers properly exercised their discretion.

[104] I turn then to consider the claim for assault.

ASSAULT

[105] On this issue the onus of proving the various assaults rests on the plaintiff. There are, again, two mutually destructive versions and the approach set out in the Jagers case, *supra*, is applicable.

[106] As stated above plaintiff was, in my view, a very good witness. There were certain discrepancies in her evidence as to when and to whom she had made the report of rape. In my view these are not, in the circumstances, material, nor do they reflect adversely on her credibility. If her report was not made at approximately 15h30 when Ntombizodwa Klaas was brought to the cell, as alleged by plaintiff, then it was made a mere ten minutes later at 15h40 as testified to by Manyane.

[107] Mr. Bloem submitted that plaintiff's evidence that Franks was singing in the reception area and sang in her ear was so bizarre that it fell to be rejected out of hand and was an indication that plaintiff's evidence implicating Franks was false. At first blush plaintiff's evidence did indeed seem improbable. It must be seen, however, in the context of the admitted facts that the atmosphere in the reception area was "*vrolik*" and that the policemen were joking amongst themselves. The environment was clearly not that of the usual dour charge office. This gives a somewhat different complexion to plaintiff's evidence.

[108] In my view the probabilities with regard to this issue are evenly balanced.

[109] Franks created a reasonably good impression in the witness box, his defence being a straightforward denial of plaintiff's allegations. At one point in his evidence, however, he burst into such a flood of tears that an adjournment was necessitated. Mr. Cole submitted that these were contrived crocodile tears, designed to gain the sympathy of the court and that there was no reason for Franks to have broken down in so theatrical a manner. I would prefer, however, not to draw any such conclusion but rather to deal with the merits of his evidence. There were certain occasions in the course of his testimony where it became clear that he was fabricating evidence in order to

distance himself as far as possible from plaintiff's identification of him as her alleged assailant. In this regard his evidence concerning the possible presence of another short, fat, coloured policeman at the cells in the afternoon of 28 May was clearly false.

[110] His evidence that he had spoken to plaintiff at the disciplinary enquiry and that she had not recognised him was obviously calculated to cast doubt on her identification of him. These allegations were never put to plaintiff and were also clearly a belated fabrication on his part.

[111] Plaintiff testified that in the cell he spoke both Xhosa and English to her. Franks stated that he knew no Xhosa at all and could therefore not have done so. His evidence in this regard was "*ek verstaan nie Xhosa nie. Glad nie. Ek ken nie eers 'n sin Xhosa nie.*" It was put to him by Mr. Cole that, having regard to the fact that he was a policeman of over ten years experience working in the Port Elizabeth townships and living in Booysens Park his evidence was completely improbable. To this he reiterated that "*ek ken niks.*" I agree with the submission by Mr. Cole that it is utterly improbable that Franks would know no Xhosa whatsoever.

[112] Manyane was also, in my view, a most unimpressive witness who appeared at times to be deliberately evasive in his replies to questions put to him by Mr. Cole. He experienced great difficulty in explaining why no entries had been made in the Occurrence Book concerning cell visits after 16h00. Nevertheless, much of his evidence was irrelevant as he only appeared on the scene at the cells at 15h30. What is of importance is his testimony that plaintiff reported the alleged rape to him at 15h40.

[113] I am further of the view that the probabilities with regard to the alleged sexual assaults are overwhelmingly in favour of plaintiff.

[114] Plaintiff, on her arrest, was recorded as being free of injuries. She was, according to Kayser, laughing and smiling. She even smiled at Kayser on being locked into the cell at approximately 13h20. Just over two and a half

hours later she complained of having been sexually assaulted. By the time she was eventually taken to Dr. Moodley she was recorded by him as being "*traumatised and distressed.*" She now also had physical injuries in the form of tears to the anal region which had been occasioned within twenty four hours of his examination of her. The state of those injuries was consistent with her history of having been occasioned during her detention in the cells at some time prior to 15h30. No explanation for her traumatised and distressed state exists other than that she was assaulted as she alleged.

[115] She gave a description of her assailant. Franks was the only police officer at the cells that afternoon who fitted that description. He was also the cell commander and in charge of the cell keys. By virtue thereof he had the time and opportunity to enter plaintiff's cell. Furthermore, plaintiff had no motive whatsoever falsely to accuse Franks of such a serious offence and the suggestion by Franks that she did so because he told Schultz to tell her that she was still drunk and that her time was not yet up can, in my view, safely be rejected. This alleged motive was in any event never put to plaintiff under cross-examination.

[116] It was put to plaintiff that she had told the disciplinary enquiry that she had had sexual intercourse at an all night party at her friend's house on the Friday 27 May. Although it was not put to her directly that she must have sustained the injuries to her anus at that time, this was the obvious implication thereof. Plaintiff denied ever having made such a statement to the enquiry. In all the circumstances, where she was testifying in support of her allegation that she had been raped, it is, in my view, quite improbable that she would have tendered such evidence. It becomes all the more improbable when it is remembered that at 00h15 on the night of 29 May, at a time when she was traumatised and distraught and with no reason to lie, she told Dr. Moodley that she had last had consensual sexual intercourse on 21 May 2011.

[117] In my view Franks' allegations in this regard can safely be rejected. Plaintiff's legal representatives requested a copy of the transcript of the proceedings of the disciplinary enquiry, only to be told that it could not be

located. In the event, no police official, such as the presiding officer, was called by defendant to explain how it was possible that the record should have disappeared in the relatively short period between the holding of the enquiry during November 2011 and the request therefor.

[118] In my view therefore the probabilities are overwhelmingly to the effect that plaintiff was indeed sexually assaulted whilst in detention at Motherwell police station. To reiterate, she stated that her assailant was a short, fat, coloured police officer. It is not in dispute that that description fits Franks perfectly. Despite his efforts to establish the presence of another police officer who fitted that description, it is clear beyond any doubt whatsoever that he was in fact the only coloured police officer of that build present in the Motherwell police cells on the afternoon of 28 May.

[119] It is so that Schultz testified that she was in the company of Franks all afternoon save for when he went to the toilet; when he and Kayser fed the inmates; and when he and Manyane placed Klaas in the cells. As I have said, Schultz was a poor witness whose evidence was false in certain respects. It is also relevant, as stressed by Mr. Cole that she was in a subservient position to Franks, being under his authority as a student constable. This may well have influenced her evidence. Whatever the position, however, her evidence that apart from the above mentioned occasions Franks was never out of her sight cannot in the light of the probabilities of the case be true.

[120] It is also relevant that Franks, as cell commander, had the ultimate control over the bunch of keys to the cells.

[121] In all the circumstances I am satisfied that the probabilities are overwhelmingly in favour of plaintiff's version and that such version should be accepted as true. The version tendered by defendant is, in my view, false and falls to be rejected. I find therefore that plaintiff has established on a balance of probabilities that she was raped vaginally and anally by Franks. The liability of the defendant to compensate plaintiff in such circumstances is not disputed.

QUANTUM FOR WRONGFUL ARREST AND DETENTION

[122] It is trite that in assessing an appropriate award for damages in respect of wrongful arrest and detention a number of factors enter the equation, not merely the length of the detention.

[123] In Thandani v Minister of Law and Order 1991(1) SA 702 (E) van Rensburg J stated as follows at 707 B:

> "*In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual. In the words of Broome JP in May v Union Government 1954 (3) SA 120 (N) at 130F:*
>
> > 'Our law has always regarded the deprivation of personal liberty as a serious injury.'"

[124] See too: Ochse v King William's Town Municipality 1990 (2) SA 855 (E) where the following was stated at 860F-G:

> "*The right of an individual to personal freedom is a right which has always been jealously guarded by our courts and our law has always regarded the deprivation of personal liberty as a serious injury. The unlawful arrest and detention of the plaintiff amounted to a serious invasion of this right.*"

[125] In Olgar v Minister of Safety and Security, unreported ECD case, number 608/07 Jones J stated as follows:

> "*In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to the individual's freedom and it should properly take into account the facts of the case, the personal circumstances of the victim, the nature and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money to avoid the notion of extravagant distribution of wealth from what Holmes J called* 'the horn of plenty' *at the expense of the defendant.*"

[126] Plaintiff is a 22 year old woman who was wrongfully arrested and detained. Whilst in detention she underwent what must have been a terrifying ordeal. She will be compensated in respect of the sexual assault upon her and I must be careful not to award such amount as may amount to a duplication of her damages. What does, however, exacerbate the matter, is the fact that, at the latest, plaintiff laid a complaint of rape at 15h40. Despite this, she was thereafter held unlawfully in a traumatised state for a further four and half hours before being taken out of the cells to make a statement and thereafter only taken to the doctor at midnight. She was eventually only released from police custody after her examination by Dr. Moodley at 00h15 on 29 May 2011. Counsel for defendant conceded therefore that for purposes of quantum it should be accepted that she was in custody for a period of 12 hours.

[127] I have had regard to awards in a number of other cases of wrongful arrest and detention such as Seria v Minister of Safety and Security and Others [2005] 2 All SA 614 (C) and Nqweniso v The Minister of Safety and Security, unreported ECD (Grahamstown) case number 2267/2010. What emerges from all the cases to which I have had regard is that the various awards for similar periods of detention differ widely. Obviously, however, each case must be decided on its own merits. Having regard to all the circumstances including the reprehensible conduct of the police, (as to which see also the remarks of Plasket J in Tommy Peterson v The Minister of Safety and Security, unreported Eastern Cape – Grahamstown case no 1173/2008) I

am of the view that a fair award in respect of this claim would be R100 000,00.

[128] It is convenient to reiterate at this stage that no evidence whatsoever was placed before me as to why Sergeant Bester and Lt. Col. Magwentshu failed to take any steps, immediately on being apprised of the complaint, to have plaintiff released and examined by a medical practitioner. Instead, it would appear that the police officers at the Motherwell police cells panicked and hoped that if they said and did nothing about it the matter would go away.

[129] Their conduct in so doing was reprehensible and inexcusable. So too was the manner in which the Occurrence Book was manipulated to create an entirely false impression that all was well and that no complaints had been made, until 20h20. I intend to order that a copy of this judgment be sent to the National and Provincial Commissioners of Police for their attention and investigation as it is clear that something was very rotten at the Motherwell Police Station. I should also add that in the light of the evidence adduced at this trial it is in my view surprising that the Director of Public Prosecutions declined to prosecute Franks.

DAMAGES FOR SEXUAL ASSAULT

[130] A joint minute, Exhibit D, was prepared by plaintiff's expert witness, Professor Young and defendant's expert witness, Mr. Moss. This minute reads as follows:

> "*We declare that we have had a telephone conversation on 30 July 2014 to discuss the points of agreement and disagreement between our respective psychological reports on Ms. Asandile Mrasi. We report the following points of agreement:*
>
> 1. *Ms. Mrasi, on her own account, meets the clinical criteria for PTSD according to the DSM-5 following her alleged rape while in police custody;*
> 2. *There is no evidence to suggest that Ms. Mrasi is malingering.*

The only point of disagreement is to do with the confidence in the validity of the diagnosis. Mr. Moss is concerned that evidence of affirming symptoms casts some doubt on the validity of the diagnosis whilst Professor Young is less concerned in this regard."

[131] When it was handed into Court I expressed my reservations therewith. As a result of this both Professor Young and Mr. Moss testified. It is not necessary to set out their evidence in any detail. As appears from the report of Professor Young, read together with his testimony, he was of the view, after having assessed plaintiff, that she met the clinical criteria for a diagnosis of post traumatic stress disorder ("PTSD") as defined by the current edition of the Diagnostic and Statistical Manual of Mental Disorders. He testified that he made this diagnosis with the assistance of the so-called CAPS instrument which he termed the "*gold-standard*" instrument for the assessment and diagnosis of PTSD.

[132] He stated that plaintiff had given "*detailed and coherent examples of psychological symptoms that are diagnostic of a PTSD. The coherence of her reported cognitions, emotions and behaviours that are implicated in her psychopathology would be almost impossible to fake, especially for a layperson without training in psychopathology.*"

[133] He concluded that "*the nature of the traumatic event, the pattern of psychological symptoms that have occurred in response to the events, specifically the intrusion symptoms and negative alterations in cognitions and mood, and her presentation during the interview all suggest that the most accurate diagnoses of Ms. Mrasi's psychological state is PTSD precipitated by her being raped on 28 May 2011*."

[134] Mr. Moss testified that he had applied the REY 15 Item Memorisation Test. This, he explained, is a test of memory. The questions contained therein, are on the face of it, very easy to answer but it affords a person who is uninitiated in psychology the opportunity, if he or she wishes, to pretend

that he or she is suffering from memory problems by doing poorly. A failure of the test immediately raises the suspicion that the person is malingering.

[135] Plaintiff, however, passed the test with a score of 12 out of 15 which suggested that she was not "*malingering symptoms*", symptoms in this context relating to memory problems.

[136] Mr. Moss stated further that, apart from the CAPS test also used by Professor Young, he had used the "*Atypical symptoms method*." This method is used routinely and entails the use of questions being put concerning symptoms which are very unlikely or not associated with the disorder under investigation. He concluded from this test that plaintiff "*may have an exaggerated tendency to respond in the affirmative when asked about symptoms*" and that she "*may be affirming symptoms*." (My emphasis). Because of this he was of the opinion, that, although according to the CAPS test plaintiff met the criteria for a diagnosis for PTSD, the security of that diagnosis was challenged by the "*suggestion*" that she "*might*" be affirming symptoms.

[137] Whereas Professor Young stated that on a scale 1 – 10 he had 100% confidence that the diagnosis of PTSD was correct, Mr. Moss put this at 40%.

[138] Under cross-examination Mr. Moss stated that he was satisfied that on her own account plaintiff did meet the criteria for PTSD according to the DSM – 5 criteria but that there must exist "*some doubt*" about this. He fairly conceded that his doubts about the validity of the diagnosis "*might be wrong*" and that there was "*always the possibility*" that he might be wrong in his suggestion that plaintiff might be affirming symptoms.

[139] Although in his submissions as to quantum Mr. Rugunanan criticised Professor Young for having in particular failed to conduct any tests in order to establish whether plaintiff was malingering, such as the Atypical Symptoms method he fairly conceded that, in the light of the evidence as a whole, and in

the event of the court finding that plaintiff was sexually assaulted, it could be accepted that plaintiff did indeed suffer from PTSD.

[140] In N v T 1994 (1) SA 862 (C) Williamson J stated at 864G:

> "*Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims.*"

[141] This is all the more so when the perpetrator is a policeman and his victim a helpless and vulnerable prisoner.

[142] In Grietjie Afrika v Minister of Safety and Security and Another unreported, Eastern Cape, Grahamstown case no 1714/2008, Grogan AJ, dealing with the rape of a detainee in the police cells by a policeman, stated as follows at para 4:

> "*Authority need not be cited to support the proposition that rape constitutes an egregious violation of the victim's right to bodily in integrity, dignity, personality and freedom of choice. Rape in circumstances such as those in which the plaintiff found herself on the night in question is, if anything, infinitely more serious....a police officer who rapes the very person involuntarily entrusted to his control is guilty of an abuse of power which can only be described as monstrous... Rape of incarcerated women by police officers is the very antithesis of the standard to be expected of a police force in a society governed by civilised values, respect for fundamental rights and the constitutional imperatives by which the first defendant is bound.*"

[143] In K v Minister of Safety and Security 2005 (6) SA 419 (CC) the following was stated at paragraph [18], 430A – B:

> "*... the protection of Ms. K's rights (to security of the person, dignity, privacy and substantive equality) are of profound constitutional*

importance... it was part of the three policemens' work to ensure the safety and security of all South Africans and to prevent crime. These arise from the Constitution and are obligations affirmed by the Police Act."

[144] At par 53 the Court stated that:

"*Thirdly, the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case.*"

[145] As was stated by Gutta J in Philander v Minister of Safety and Security unreported Northwest, Mafikeng case number 473/2011, a matter also involving the rape of a female detainee by police officers, the police "*abused their power and violated the plaintiff by assaulting and raping her. They behaved as if they were a law unto themselves. The police should lead by example and behave responsibly so that they are respected and not feared by ordinary citizens of this country.*"

[146] It is against that background that the issue of plaintiff's quantum of damages must be considered.

[147] The matter of F v The Minister of Safety and Security and Another unreported Western Cape Division, Cape Town, case number 4194/2006 delivered on 11 April 2014, dealt with the quantum of damages to which the 29 year old plaintiff was entitled in consequence of her having been raped by an off-duty policeman when she was 13 year and 10 months old.

[148] Meer J stated as follows in paras 56 and 57:

"*[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 Noggala 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) and R150 000 for general damages (approximately R168 481,00 in today's terms). The total award of R375 000,00 for general damages in today's terms amounts to R421 203,00. The plaintiff in Noqgala was not assaulted. She too suffered post-traumatic stress disorder and depression as a consequence of the rape. Mr. Olivier referred me to Grobler 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 contumelia. 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."

[149] In para 58 Meer J stated further as follows:

"*[58] The fact that the rape was perpetrated by an adult in the position of trust, moreover a policeman who had the 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 of 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."

[150] Although that matter dealt with the rape of a 13 year old girl what was stated by Meer J is also apposite to the present matter. In F's case *supra* the plaintiff was awarded an amount of R300 000,00 in respect of contumelia and R200 000,00 for pain and suffering.

[151] As set out above it is accepted that plaintiff suffers from PTSD. In his report Professor Young dealt with what are termed "*intrusion symptoms*", stating that plaintiff had distressing and intrusive memories of the incident while awake and distressing dreams that disturbed her sleep. When reminded of the incident she would become very angry and experience intense physiological reactivity, including a racing heart and hot flushes.

[152] Professor Young stated further that the PTSD has had "*a moderate impact on her social and occupational functioning in that while there is definite impairment, many aspects of her social and other important functioning as still intact.*"

[153] Plaintiff has claimed a globular amount in respect of "*shock, pain and suffering, emotional shock, psychological trauma and contumelia*.

[154] This matter is to an extent distinguishable from that of F *supra* in view of the fact that the plaintiff in that matter was, apart from being raped, severely assaulted as well. Furthermore, the plaintiff was, at the time of the rape, a 13 year old child. In my view, this matter is more akin to that of Grietjie Afrika, *supra* in which plaintiff was awarded the sum of R200 000,00 for contumelia and R125 000,00 for general damages.

[155] In my view, having regard to all the circumstances, including the fact that the plaintiff suffered the humiliation of not only being raped vaginally but

also sodomised, a fair award in respect of damages for contumelia would be R250 000,00 and in respect of general damages R175 000,00. The total award in respect of damages under this heading is accordingly R425 000,00.

[156] In addition, it is not in dispute that in consequence of her post traumatic stress disorder plaintiff will incur future medical expenses in the sum of R13 113,00.

[157] The following order will therefore issue:

1. The defendant shall pay the plaintiff the sum of R100 000,00 as and for damages for wrongful arrest and detention.
2. The defendant shall pay the plaintiff the sum of R425 000,00 in respect of contumelia and general damages for assault.
3. The defendant shall pay the plaintiff's future medical expenses in the sum of R13 113,00.
4. Defendant shall pay interest on the aforesaid damages calculated at the legal rate from the date 14 days after the date of this judgment to date of payment.
5. The defendant shall pay plaintiff's costs, including the qualifying expenses, if any, of Professor Young, together with interest on such costs calculated at the legal rate from the date 14 days after taxation to date of payment.
6. The Registrar is requested to send a copy of this judgment to the National and Provincial Commissioners of the South African Police Services.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. S. Cole
Instructed by: Coltman Attorneys, Mr. Coltman

Appearing on behalf of Defendant: Adv. G. Bloem S.C., together with Adv. Rugunanan
Instructed by: Netteltons Attorneys, Mr. Marabini