

# DW v MINISTER OF POLICE AND ANOTHER

GAUTENG DIVISION, PRETORIA

PRINSLOO J

2016 NOVEMBER 11

CASE No 72485/2012

**Prinsloo J:**

## **Introduction**

[1] On 26 October 2011, in the privacy of her home, the plaintiff, then a 22-year-old student, and a virgin, was subjected to the most horrific attack by one Tsietsi Samuel Msiza (Msiza) during the course of which she was also raped.

[2] At the time of the attack, Msiza was out on bail of some R1000. Msiza had multiple previous convictions, including a number of convictions of rape, to his name.

[3] The plaintiff instituted a damages action against the two defendants on the basis of the failure by the relevant prosecutors and investigating officers, acting in the course and scope of their employment with the defendants, to ensure that Msiza was kept behind bars as he posed a clear threat to the community.

[4] Broadly speaking, the action was based on the, by now well-known, principles laid down in the case of *Carmichele v Minister of Safety and Security and Another* 2002 (1) SACR 79 (CC) (2001 (4) SA 938; 2001 (10) BCLR 995; [2001] ZACC 22), and later again after it was referred back to the trial court, reported at 2003 (2) SA 656 (C) (2002 (10) BCLR 1100).

[5] On 1 September 2014, the parties entered into a settlement in terms of which the defendants, jointly and severally, accepted liability for payment of the plaintiff's proven and/or agreed damages sustained as a result of the aforesaid attack on her.

[6] I am alive to the fact that the settlement agreement contains a clause to the effect that the agreement was to be regarded as confidential and the plaintiff would endeavour to maintain and uphold the confidentiality thereof. It was also provided that any party would be entitled to approach the court to make the agreement an order. Such an order was made on 4 September 2014.

[7] When the trial came before me, on 31 October 2016, the issue of confidentiality did not receive any attention. It is not practically possible to deal with this matter in a judgment, without disclosing the origin of the claim.

[8] Before me, Mr *Ferreira SC*, appeared for the plaintiff and Mr *De Jager SC*, assisted by Mr *Mohlamonyane*, appeared for the defendants.

**Brief references to the medico-legal evidence, as it appears from a number of expert reports**

[9] Exhibit A is a collection of medico-legal reports, obtained by both the plaintiff and the defendants.

[10] A204 to A231 are colour photographs taken shortly after the incident, and also at later stages, showing details of the knife wounds inflicted on the plaintiff by Msiza during the attack.

[11] Exhibit A contains medico-legal reports by the following experts:

- Doctor AF Coertze who was the doctor on duty in the emergency unit of Montana MED 24 on the night of 26/27 October 2011;
  - Ms L de Kock, counselling psychologist (on behalf of the plaintiff);
  - Doctor G Capitani, clinical psychologist (on behalf of the defendants);
  - Doctor Leon Roper, clinical psychologist (on behalf of the plaintiff);
  - Doctor SJ de V Rawlins, plastic and reconstructive surgeon (on behalf of the plaintiff);
  - Doctor Anton Potgieter, plastic and reconstruction surgeon (on behalf of the defendants);
  - Ms Louise Schubert, industrial psychologist (on behalf of the plaintiff);
  - Ms Janene White, industrial psychologist (on behalf of the defendants);
- and
- Gerard Jacobson, consulting actuary (on behalf of the plaintiff).

[12] There is a joint minute recording a meeting between the plastic surgeons as well as a joint minute recording a meeting between the industrial psychologists.

[13] At the commencement of the proceedings I was informed that the parties, through their experts, are in agreement about the details of the injuries and the sequelae and other related aspects. No evidence was led. I was informed that I

could treat the contents of all the medico-legal reports as correct and counsel for both parties addressed me on the contents of the reports.

[14] Doctor Coertze, on duty in the trauma unit when the plaintiff was admitted during the early hours of 27 October 2011, describes her as:

‘A young female patient, well dressed, covered in blood. She was awake and orientated. Big, gaping, open wounds (some still bleeding actively) on the visible parts of the body. Her clothes and hair were soaked in blood.’

Broadly speaking, it appears that the plaintiff saw off some visitors at about 23h00 on 26 October 2011 and escorted them outside leaving the front door open. She went back into the house, had a shower, and when she emerged from the bathroom she was confronted by Msiza. He first attacked her with a knife, then dragged her to the bedroom where he raped her and then took several articles which included a laptop computer, money and jewellery which he put in a plastic bag and left. The plaintiff crawled outside and shouted for help where she was found by a fellow resident in the complex who came to her aid.

[15] Doctor Rawlins, plastic and reconstructive surgeon, received a call from Dr Coertze at about 05h30 on 27 October 2011. He visited the traumatised patient in the intensive care unit of the Montana hospital and started treating her in the operating theatre at about 09h00.

[16] In a very comprehensive medico-legal report, Dr Rawlins describes, at A104–A106, some 22 knife wounds which he identified and treated. The wounds were found on the face of the plaintiff, as well as her neck, left leg, right leg, left

forearm, left thumb (semi-traumatic amputation) and right fingers. There were also bruises and contusions on the right upper leg and buttock area.

[17] A gynaecological examination revealed evidence indicating that the plaintiff had been raped as well as semen which was found in the vagina. Specimens were taken for purposes of the police investigation.

[18] In one of the head wounds, the metal tip of the knife which was used during the assault was found embedded in the skull bone. A neurosurgeon had to be called to assist with the removal of this metal segment by drilling away portions of the skull bone.

[19] The degloving nature of some of the head wounds led to the displacement of the hair-line of the plaintiff.

[20] I was informed from the Bar that the attacker had been arrested and that he was still serving a prison sentence.

[21] I find it useful to quote the following summary which Dr Rawlins wrote in his report:

**‘Opsommend**

Die pasiënt het veelvuldige diep en ernstige laserasies opgedoen in aanranding wat dui op 'n skerp voorwerp soos 'n mes.

Kneuswonde van die onderste ledemaat dui op stomp trauma.

Ginekologiese ondersoek dui op verkragting.

Bloedverlies was lewensbedreigend.

Longkollaps was gedeeltelik en ook lewensbedreigend.

Die afgebreekte metaalpunt in the skedel dui op buitengewone gewelddadigheid.

Die agt kop- en nek wonde dui ook op die gebruik van maksimale geweld deur die aanvaller en een so 'n wond in die nek op die vitale strukture sou die dood veroorsaak het.

Chirurgie het byna 5 ure geduur deur dokters S Rawlins en J L Pretorius, Rekonstruktiewe Chirurgie, dokters P Coertze en J Botha, Ortopediese Chirurgie asook dokter J Joubert, 'n Neurochirurg.

### **Post-operatiewe verloop**

Me Duné Welgemoed het baie goed herstel van haar fisiese wonde, beide hande en voorarms moes intensiewe terapie ontvang vir twee maande.

Gesigswonde het goed genees maar blywende littekens sal permanent teenwoordig wees op die voorkop, neus, lip en wang.

Sielkundig het sy post-traumatiese stres en angsversteuring oorgehou, en ook 8 kilogram in gewig verloor.

Medies is sy op profilaktiese behandeling geplaas vir seksueel oordraagbare siektes.

Bell's verlamming (gesigspierverlamming) het plaasgevind in die eerste week post-operatief as gevolg van die stres insident, dokter Jacques Viljoen, 'n Oor, Neus en Keel arts, is daarvoor gekonsulteer.

### **Toekomstige verloop**

Soos gemeld sal alle littekens permanent wees en moontlike litteken revisie van veral die neus en wang mag nodig wees.

Revisie chirurgie mag ook nodig wees aan beide hande.

Sielkundig mag jare se psigoterapie asook psigotrope medikasie benodig word.

Koste aan chirurgie teen huidige tariewe word beraam op R150 000,00 tot R200 000,00. Psigiatriese (behandeling) kan ook soveel beloop en dit selfs oorskry.’\*

[23] According to the report of the industrial psychologist, Ms Louise Schubert, the plaintiff was in her third year as a BSc (quantity surveyor) student at the University of Pretoria when the incident occurred in October 2011. To her credit, she completed the degree in quantity surveying. She did not experience an immediate delay in her studies after the incident. However, due to the sequelae of the injuries, to which I will refer hereunder, she could only complete the standard two year honours degree in three years. This happened because she failed two subjects in 2012 and two subjects in 2013. She was therefore required to repeat the particular subjects in 2013 and in 2014. The incident contributed to a one year delay in her theoretical/academic studies, which has resulted in a one year penalty with reference to recognition of years' experience as a quantity surveyor. This loss has been taken into account by actuary Jacobson in his report. I add that, after some negotiations about an appropriate contingency percentage deduction in respect of the post-trauma career path, the parties agreed on the correctness of the actuarial report. The percentage deduction agreed upon was incorporated in the actuarial calculation.

[24] In his neuro-psychological report of December 2014, Dr Leon Roper, clinical psychologist, lists the following current complaints experienced by the plaintiff as relating to the incident in question:

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\* Paragraph [22] numbering removed from where it appeared in quote—Eds.

- Concentration difficulties. She has been struggling to concentrate since the incident. She would forget her train of thought and would struggle to express herself and to give directions. I add that while the plaintiff was still busy with her post graduate studies, she was employed as a student quantity surveyor from April 2012 to December 2013 and thereafter, with another employer, as a junior quantity surveyor from January 2014 to May 2014 and, lastly, as a junior quantity surveyor with the firm of quantity surveyors in Pretoria until she was retrenched, very recently, with effect from 30 November 2016.
- Forgetfulness. The plaintiff has been forgetful of completing certain checks in her work since the incident. She had been a more thorough person prior to the incident. Colleagues and superiors have needed to repeat instructions to her.
- Problems with mental alertness. The plaintiff reported problems with mental alertness and indicated that it has been taking her longer to understand instructions.
- Decreased energy. She has suffered from decreased energy levels since the incident. She has reportedly needed to sleep more than before.
- Learning difficulties. She reported that she had experienced learning difficulties after the incident which meant that she took longer to complete her studies, as I have described.
- Depression. She had suffered from depression following the incident and reported increased tearfulness and feelings of sadness related to thoughts about the incident. She also experiences sadness nearly every day when she would see the scarring to her body.
- Self-esteem difficulties. She had been taking good care of her body prior to the incident. She indicated that she has been feeling self-conscious about the scarring to her body.



- Concerns for the future. The plaintiff reported that she has been worried about whether anyone would want to marry her after the rape. She is unsure whether she would experience a normal marriage under these circumstances. As mentioned, she was a virgin at the time of the attack and it had been important to her to 'save herself' for the marriage.
- She experienced feelings of detachment from her religion, despite her deep religious feelings prior to the incident.
- Irritability. She has been more irritable since the incident and has been lashing out at people verbally. She was also rude to people at times as a result of her irritability.
- Decreased effectiveness at work. She indicated that she has not been as effective at work as others due to her cognitive difficulties and that she has needed to assume more junior responsibilities in comparison to her colleagues.
- Nightmares. She suffered from regular nightmares after the incident and was still suffering from occasional nightmares.
- Increased anxiety. After the incident she has been more nervous and has been experiencing a decreased capacity to manage pressure. She had been unable to live alone since the incident and has moved in with her mother. She has been unable to go to places alone since the incident. She has experienced an increased sense of vulnerability.
- Social withdrawal. The plaintiff reported that she had withdrawn socially initially following the incident. She lost some friends in the process.
- Decreased effectiveness at work. She indicated that she has been feeling afraid when she would visit construction sites for her work. She reported that she has been feeling afraid to walk alone at the construction site and this has been affecting her effectiveness at work.

[25] In assessing the plaintiff's psychological functioning, Dr Roper identified the following psychological symptoms:

- At the time of the assessment the plaintiff was suffering from a post-traumatic stress disorder related to her involvement in the incident. This is evidenced by some of the symptoms which I have already mentioned and will not repeat.
- In addition to the above, the plaintiff was found to be suffering from a major depressive disorder as evidenced by some 13 symptoms listed by Dr Roper which I deem unnecessary to repeat.
- Doctor Roper performed a neuro-psychological assessment to establish the nature and severity of any cognitive impairment and how this may have impacted on the plaintiff's ability to function interpersonally and occupationally. Given her educational background, the plaintiff's results were expected to fall within about the above average range but, surprisingly, the majority of the results were average. The results demonstrated a number of neuro-psychological deficits.
- The doctor came to the conclusion that the plaintiff has been rendered psychologically more vulnerable as a result of her involvement in the incident. Some of the factors which need to be considered included possible pre-morbid psychological vulnerability which, presumably, would have been aggravated by the incident; the presence of the post-traumatic stress disorder, the presence of a major depressive disorder; significant self-esteem difficulties in the wake of the traumatic event; reduced cognitive functioning with particular reference to attention and concentration abilities.

As far as occupational functioning is concerned the doctor lists a number of factors which are considered to have the potential to impact negatively on the

plaintiff's occupational functioning and career progression. These include: increased levels of irritability, increased anxiety, concentration and memory difficulties, decreased motivation and energy, self-esteem difficulties and social withdrawal. I add that Dr Roper consulted with the plaintiff's supervisor who was concerned about the plaintiff's confidence at work and worried about her 'performance not being up to scratch' at work. The supervisor told the doctor that her employers have not allowed her to run her own projects and other people have been progressing more quickly than the plaintiff.

[26] The specific and specialised tests to which the plaintiff was subjected, with specific regard to the mood and behavioural disorders, yielded a result of a whole person impairment of 10 %. This impairment rating of 10 % should be combined with those ratings as calculated by the relevant medical experts.

[27] Doctor Capitani, clinical psychologist specialising in neuro-psychology, says the following about the plaintiff in a very comprehensive report:

'She is considered an emotionally and psychologically vulnerable employee who is expected to continue to experience in some work situations some insecurity, uncertainty or sense of inadequacy with insufficient self-confidence and somewhat withdrawn or timid, but at other times some irritability, impatience and abrupt, and defensive or dismissive. This appeared associated with her changed or scarred and negative self-image of herself, no longer her original, innocent and whole self, and forced to be someone different or not quite herself. She appears to dislike this immensely, and which colours and affects or influences her current interactions in all spheres of life, ie career, family, personal and social relationships. Furthermore, at some

periods this seems to escalate and result in moderate to severe depression with suicidal thoughts, it would appear approximately twice per annum. This is considered likely to interfere with her progression in her career as well as her various relationships in her work, family, personal and social environments . . . .'

[28] Doctor Capitani recommends that the plaintiff requires supportive psychotherapy, and in the future as well, and allowances should be made for at least twelve sessions per annum for a period of 15 years. The projected costs are also supplied. With regard to quantifying the plaintiff's pre- and post-accident career path, the doctor defers to the opinion of the industrial psychologists.

[29] In their joint minute, the two industrial psychologists referred to, after some debate it seems, agreed on the projected pre-trauma and post-trauma career paths of the plaintiff:

- They agreed on the plaintiff's educational history as set out in the respective reports, and that she was a third year BSc quantity surveyor, University of Pretoria student when the incident occurred. With regard to the plaintiff's expected earnings growth as a registered quantity surveyor (pre-trauma) the two experts agreed on the postulated annual income (in 2016 terms) as well as postulated increases in earnings until age 45. They agreed on the indicated earnings level which is commensurate to a Paterson D3 median and other statistics. The plaintiff would likely have reached the indicated level by the age of approximately 50 years with inflationary increases thereafter until normal retirement which was pitched, by agreement, at 65.
- Post-incident, the experts agreed that the plaintiff missed one year's experience due to the sequelae of the incident so that she was subjected to

a delay in earnings progression as explained in the reports. They also agreed on the likely pre-incident earnings, as mentioned, and the actual earnings for the period May 2013 to April 2014. They also agreed that a higher than normal post-incident contingency deduction should be applied when calculating the post-trauma career path. The experts agreed that the plaintiff's future employment prospects will be affected because she is psychologically considerably more vulnerable and she will 'likely have a lifelong path to recovery'. Her resilience (a key competency on senior levels of work) is likely one of her most affected aspects and would have a profound impact on her endurance/perseverance and emotional stability in her career. There will be an ongoing sense of inadequacy, insecurity and uncertainty. The experts agree on a whole list of factors and symptoms which will affect the ability of the plaintiff in the workplace, most of which I have already mentioned. It was agreed that the plaintiff will not be an equal competitor in the open labour market. These psychological deficits will impact negatively on her occupational proficiency and will continue to have a direct impact on her performance, productivity, career progress and earnings potential.

- In conclusion, the experts agreed that the plaintiff will be restricted with regards to potential fields of work and will be reliant on a sympathetic employer. They referred to the retrenchment process which, as I indicated, has now become a reality, and that the plaintiff has been retrenched with effect from the end of November 2016. It was agreed that post-incident the plaintiff would in all likelihood reach a Paterson D2 median level of earnings by approximately age 50 and thereafter she will experience inflationary increases until normal retirement age. As I mentioned, the experts agreed that a higher post-incident contingency percentage deduction should be

applied to the projected post-trauma earnings. The possibility of early retirement was also mentioned. In the latter regard, actuary Jacobson, however, assumed the same retirement age of 65 for pre- and post-morbid career paths. This will result in a lower award than would be the case if early retirement is assumed. The actuary applied all the figures agreed on by the two industrial psychologists and he also applied the 40 % contingency deduction in the post-trauma career calculation agreed upon by counsel after some debate. In addition, actuary Jacobson also calculated the projected future medical expenses on the strength of the various reports.

### **Special damages agreed upon**

[30] Counsel pointed out to me that the following items of special damages were settled between the parties:

Past medical expenses	R172 549,25
Extra university fees incurred because of lost time and failed subjects	R 27 480
Estimated future medical expenses (as per actuarial calculation)	R308 633

### **Loss of earnings agreed upon**

[31] The parties agreed to adopt the calculation reflected under basis II of actuary Jacobson's report. This reflects the 20 % differential post-morbid contingency deduction.

[32] The result comes to an amount of R5 221 715.

[33] I now turn to the question of general damages.

## General damages

[34] It seems to me to be appropriate, and convenient, to observe that, in a case of this nature, a plaintiff has three separate actions available to her in respect of which she can claim compensation for the damages sustained.

In particular, it seems that two of those actions come into play, in a case such as the present, where compensation falls to be considered under the broad heading of 'general damages'.

[35] I make brief remarks about the three actions:

### **(i) *Actio legis aquiliae***

[36] In Neethling et al *Law of Delict* 7 ed, the learned authors say the following at 10:

'Whatever the end result was in Roman-Dutch law, the abovementioned decisions nevertheless give the impression that, in modern South African law, aquilian liability results from every culpable and wrongful act which causes patrimonial damage.'

For the sake of brevity, I refrain from referring to any of the authorities relied upon by the learned authors.

In Neethling *Persoonlikheidsreg* 4 ed the learned author says the following at 135 where he deals with the *actio legis aquiliae*:

'Indien 'n persoon ook vermoënskade as gevolg van die krenking van sy *corpus* oloop, soos mediese koste of verlies aan verdienste of

verdienvermoë, kan dit met die *actio legis aquiliae*, waarvoor nalatigheid 'n voldoende skuldverwyt is, verhaal word.'

[37] It is obvious that this action is available to the plaintiff to claim compensation for the patrimonial loss, already dealt with, in the form of loss of income as well as special heads of damage such as past medical expenses, future medical expenses and university expenses.

**(ii) *Actio iniuriarum***

[38] The authors Neethling op cit say the following when discussing this action at 14:

'In short then, an *iniuria* is the wrongful, intentional infringement of or contempt for a person's *corpus, fama* or *dignitas*.'

On 15 they state:

'On the other hand, one encounters decisions that correctly interpret the concept of *dignitas* in its broad common law meaning and refuse to restrict its application to the personality interest of 'dignity'. The leading decision in this regard is *O'Keeffe v Argus Printing and Publishing Co Ltd* (the reference is 1954 3 SA 244 (C)). Watermeyer AJ (at 247–248) accepted that the *actio iniuriarum* is available for “an intentional wrongful act which constitutes an aggression upon [a plaintiff's] person, dignity or reputation”. . . . It is evident from the judgment that the Judge interpreted *dignitas* so widely that it encompasses all aspects of the legally protected personality, . . . as such, *dignitas* cannot be considered as a single interest of personality;



it is rather a concept encompassing all 'those rights relating to . . . dignity".'

[39] The author, Neethling, op cit says the following at 133 when discussing this particular action:

'Staan dit vas dat die dader die fisies-psigiese integriteit van die benadeelde op onregmatige en opsetlike wyse aangetas het, kan laasgenoemde genoegdoening met die *actio iniuriarum* verhaal. . . . Hoe dit ook al sy, omdat *solatium* primêr vir gekwetste gevoelens toegeken word, is die *quantum* daarvan uiteraard in die eerste plek afhanklik van die intensiteit of omvang van die affektiewe of gevoelskrenking ('sentimental loss') wat die eiser weens die *contumelia* of die minagting van sy liggaam ervaar het. *Contumelia* moet hier nie as *sinoniem vir belediging* opgevat word nie, maar eerder in die sin van 'n gevoel van verontregting wat uit die minagting van die liggaam resorteer.'

**(iii) Action for pain and suffering**

[40] Neethling op cit say the following at 16:

'The action for pain and suffering has been adopted by South African law and is considered by the courts, just as in Roman-Dutch law, to be a unique action that cannot be classified with the *actio legis aquiliae* or with the *actio iniuriarum*. The courts, however, continued to develop the action, with English law playing an important role, to the extent that it now protects the physical-mental integrity of a person in its entirety. In addition to pain, suffering and disfigurement, which had

already been identified at common law, this protection is particularly apparent insofar as psychological or mental injury is equated with physical (bodily) injury in the area of emotional shock, and loss of (or shortened) life expectancy, amenities of life and health are recognised as injuries to personality for which compensation may be claimed.'

[41] Neethling op cit when discussing the 'aksie weens pyn en lyding', says the following at 134:

'Soos gestel, is die aksie weens pyn en lyding gerig op die verhaal van (onvolmaakte) kompensasië vir pyn, lyding, skok, liggaamlike ontsiering, verlies aan lewensgenieting en verkorte lewensverwagting as gevolg van 'n skuldige (opsetlike of nalatige) aantasting van 'n persoon se fisies-psigiese integriteit. . . . Uit bostaande behoort reeds duidelik te wees dat in die geval van 'n opsetlike aantasting van die liggaam, die aksie weens pyn en lyding vir kompensasië naas die *actio iniuriarum* vir genoegdoening ingestel kan word. By aanranding loop die twee aksies dus saam. . . . Aangesien die doel of funksie van die *actio iniuriarum* (*genoegdoeningsfunksie*) van die aksie weens pyn en lyding (*kompensasiefunksie*) verskil, kan hulle wat aanranding betref nie oor dieselfde kam geskeer word nie. *Beide aksies is dus in beginsel by 'n onregmatige en opsetlike liggaamsaantasting beskikbaar. Hierdie posisie blyk by implikasie ook reeds uit die regspraak waar onderskei word tussen genoegdoening vir contumelia en kompensasië vir fisiese pyn en lyding.*' [Emphasis added.]

The learned author then mentions a few judgments, to illustrate his observation that the courts have been distinguishing between compensation for contumelia and compensation for pain and suffering, generally making separate awards in the same judgment on the strength of these two actions. I find it convenient to mention some of these judgments:

- In *Radebe v Hough* 1949 (1) SA 380 (A) at 384–385, the learned judge of appeal mentioned that there was no separate claim for damages for contumelia by the plaintiff (appellant) who had been assaulted. An award was therefore made for ‘pain and suffering’ and the compensation granted by the lower court was increased. It is, however, quite clear, that the learned judge of appeal recognised that separate awards could be made under the two heads of damage.
- In *Magqabi v Mafundityala and Another* 1979 (4) SA 106 (E) a court orderly forcibly pushed the appellant, who was attending the court session, back into her seat after she attempted to get up to leave the court. She particularised her claim as being R100 in respect of the pain and suffering ensuing from the assault and R1 400 in respect of contumelia. At 110D–F the learned judge stated:

‘His conduct towards her amounted to an abuse of his authority and constituted an assault on her person which was calculated to insult her and which, in addition to causing her physical injury, also infringed those rights of dignity to which she is in law entitled. The appellant was therefore in my view entitled to succeed in her claim for damages both in respect of her physical pain and suffering and in respect of the *contumelia* to which she was subjected.’

Separate awards were made in respect of the physical injury and the contumelia.

- In *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) the appellant had been assaulted and separate awards were made in respect of shock, pain and suffering and some measure of disability, on the one hand and contumelia on the other hand—at 664F–H.
- In *N v T* 1994 (1) SA 862 (C) a lump sum was awarded to a child who had been raped for ‘shock, pain and suffering and *contumelia*’—at 864H–J.
- In *GQ v Yedwa and Others* 1996 (2) SA 437 (Tk) the appellant was injured while he was forcibly circumcised. Separate awards were made for ‘shock, pain and suffering’ on the one hand and ‘*contumelia* (insult)’ on the other hand—at 439F–G.

**Considering appropriate awards for the plaintiff in respect of the lastmentioned two actions**

[42] Counsel referred me to two judgments in which compensation was awarded after the plaintiff had been raped. Both these judgments were reported in the well-known work of Corbett and Buchanan on *Quantum of Damages*.

[43] In *M v Minister of Safety and Security* 2015 (7K9) QOD 18 (ECG) the plaintiff was arrested without a warrant on a charge of being drunk and disorderly. She was on her way home from a tavern and crossing a street when a police vehicle approached her. She was placed in the police vehicle and taken to a police station. Whilst being detained in the police cell, the plaintiff was pointed with a firearm and vaginally raped and sodomised by the cell commander. She was also detained unlawfully and only taken to a doctor some hours later. Subsequently she was also diagnosed with post-traumatic stress disorder (PTSD). There were some doubts about the diagnosis of PTSD—at paras 137–139.

[44] The learned judge, in a comprehensive judgment, analysed a number of judgments in terms of which awards were made under comparable circumstances. He referred to *Afrika v Minister of Safety and Security and Another*, unreported, ECG 1714/2008, dealing with the rape of a detainee in the police cells by a policeman. In referring to this case, the learned judge, in para 154, pointed out that Afrika was awarded R200 000 for contumelia and R125 000 for 'general damages'. I could not find a reference to this case in the *Quantum Yearbook* by Robert J Koch (2016) so that I could not make out what the updated award would be in present terms. Given the date of the judgment, some eight years ago, the updated award could be substantially more.

[45] In *M*, now under consideration, the learned judge awarded the plaintiff an amount of R100 000 for unlawful arrest and detention and R425 000 for 'contumelia and general damages for assault'. Counsel before me informed me that the updated award in respect of the amount of R425 000 now comes to some R467 500. I could not find the reference in the *Quantum Yearbook*.

[46] In *F v Minister of Safety and Security and Another* 2014 (6) SA 44 (WCC) (2015 (7K9) QOD 1) the injured plaintiff was a 13-year-old female scholar. She was assaulted and raped by an off-duty police official after he offered her a lift home in a police vehicle. The rape was preceded by repeated assaults resulting in an open wound to her lips, multiple contusions to her arm, multiple swellings to her face and head, swelling of her nose and multiple contusions to her legs and torso. The plaintiff was a virgin prior to the incident. The rape caused tearing of the vagina, vaginal bleeding, a torn hymen and loss of her virginity. The incident had far-reaching implications on her sense of self, dignity, normal sexual development and enjoyment of life. The plaintiff still suffered from untreated

chronic post-traumatic stress and co-morbid major depressive disorders that required ongoing medical treatment and life-long medication. Behavioural problems caused the plaintiff to be moved to several schools including an industrial school where she ultimately only completed grade 10. Her work record after leaving school was erratic. A claim for loss of income was calculated based on the employment record of her most successful sibling. A separate award was made for estimated future loss of earnings.

[47] In respect of the attack on her, the child was awarded an amount of R300 000 in respect of contumelia and R200 000,00 'for pain and suffering'. The judgment dates back to April 2014. According to the *Quantum Yearbook*, the updated award would now come to R551 000. In his comprehensive judgment, the learned judge, in *F*, also referred to the case of *Nogqala v Minister of Safety and Security* ECG 676/2011 (18 June 2012) in which a 22-year old woman was raped by a policeman in his office. She was 'not assaulted'. She also suffered from post-traumatic stress disorder and depression as a consequence of the rape. She was awarded R225 000 for contumelia and R150 000 for general damages.

[48] Although it is convenient, and, indeed, in most cases helpful, to compare earlier comparable awards before coming to a decision as to the appropriate compensation for a particular case under consideration, I have come to the conclusion that the matters I have mentioned are of such a nature that, by comparison, an award in respect of the matter now under consideration should be substantially higher. In the present case, the life of the 22-year-old virgin was irretrievably changed forever. She was the victim of the most horrific attack. She sustained more than 20 serious stab-wounds, some of them life threatening. The amount of blood that she lost was also life threatening. She spent a considerable

period in the intensive care unit. The young lady was disfigured for life. The psychological and cognitive sequelae are of a serious and permanent nature. She can no longer compete on the open labour market. She may never be able to get involved in a normal marriage relationship. These symptoms and sequelae are, to a large extent, either absent or considerably less serious in the other matters I have referred to.

In my opinion, the award for pain and suffering, in particular, should be substantially higher in the present case.

[49] After due reflection, I have come to the conclusion that an appropriate award, in respect of this portion of the plaintiff's claim, would be the following:

1. In respect of pain and suffering, disfigurement, psychological and mental injury, emotional shock and loss of amenities of life

R750 000

2. In respect of contumelia R350 000

TOTAL R1 100 000

#### **Tabulation of the total award**

[50] For all the reasons mentioned, the appropriate award, in my view, comes to R6 830 377,25 which is computed as follows:

Past medical expenses	R 172 549,25
Lost university costs	R 27 480,00
Future medical expenses	R 308 633,00
Loss of income	R5 221 715,00
Pain and suffering and contumelia	<u>R1 100 000,00</u>
TOTAL	R6 830 377,25

#### **Costs**

[51] The costs should follow the result. Provision should also be made for the costs flowing from the employment of senior counsel.

### **The order**

[52] Mr Ferreira for the plaintiff furnished me with a draft order, containing the usual provisions relating to the award, costs, interest, qualifying fees and related issues.

[53] The lengthy order that follows, is based on the draft referred to:

1. The defendants, jointly and severally, are ordered to pay the plaintiff the amount of R6 830 377,25.
2. The payment is to be deposited into the trust account of the plaintiff's attorneys of record with the following details:  
Bank: xxx  
Branch: xxx  
Branch code: xxx  
Account no: xxx  
Account holder: Klagsbrun Edelstein Bosman De Vries Inc  
Reference: xxx
3. The aforesaid capital amount will not bear interest unless the defendants fail to effect payment thereof within 30 calendar days of the date of this order, in which event the capital amount will bear interest at the mora rate of 10,5 % per annum (ie 3,5 % above the repo rate of 7 %, in accordance with the provisions of the Prescribed Rate of Interest Act 55 of 1975, as amended by the Judicial Matters Amendment Act 24 of 2015, and which rate of interest of 10,5 % per annum will be referred to hereafter as 'the mora rate'), calculated from and including the thirty-first calendar day after the date of this order to and including the date of payment thereof.



4. The defendants, jointly and severally, are ordered to pay the plaintiff's taxed or agreed party and party costs, which will include the following:
  - 4.1 The costs flowing from the employment of senior counsel;
  - 4.2 the costs of the obtaining by the plaintiff of the reports of the following experts:
    - 4.2.1 Doctor AF Coertze;
    - 4.2.2 Doctor SJ de V Rawlins;
    - 4.2.3 Ms Louise Schubert;
    - 4.2.4 Mr Leon Roper;
    - 4.2.5 Ms Lourentia de Kock; and
    - 4.2.6 Gerard Jacobson consulting actuaries.
  - 4.3 the reasonable preparation/qualifying and reservation fees (if any) of the experts referred to in para 4.2 above, including the costs of consultations (if any) with the legal team;
  - 4.4 the costs of obtaining the various joint minutes and the actuarial calculations, including the actuarial calculations based on the joint minutes;
  - 4.5 the reasonable travelling costs of attending the medico-legal examinations, subject to the discretion of the taxing master; and
  - 4.6 the costs attendant upon the obtaining of payment of the amounts referred to in this order.
5. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed party and party costs:
  - 5.1 The plaintiff's attorneys shall serve the notice of taxation on the defendants' attorneys of record;
  - 5.2 the defendants shall be allowed thirty calendar days from date of settlement or of taxation within which to effect payment of the agreed or taxed costs; and

- 5.3 should payment not be effected within the aforementioned period, the plaintiff will be entitled to recover interest on the taxed or agreed costs at the mora rate calculated from and including the thirty-first calendar day after the date of settlement of the costs or of taxation, to and including the date of final payment thereof.

Plaintiff's Attorneys: *Klagsbrun Edelstein Bosman De Vries Inc*, Pretoria.