**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 701/2012

In the matter between:

**MURRAY JOHN MARTYN BRIDGMAN N.O.** **Plaintiff**

and

**WITZENBERG MUNICIPALITY** **Defendant**

**JACK JACOBUS NICHOLAAS LOUW** **First Third Party**

**ELSABÉ CORNELIA ELIZABETH LOUW** **Second Third Party**

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**JUDGMENT**

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**DONEN AJ**

[1.] Human dignity, the achievement of equality, the advancement of human rights and freedoms, and non-sexism are values that found the Republic

of South Africa as a democratic state.[1] Nevertheless, sexual and gender based violence, particularly rape, is endemic within South Africa. This undermines each of the founding values above. It enfeebles "*defensible civilisation*", as well as our democratic enterprise. It has its origins in and remains a legacy of the domination and patriarchy that characterised slavery, colonialism and apartheid. It has not been attenuated by the legal transition to democracy. Rape culture, incorporating culture of masculinity, male entitlement and immunity from the consequences of gender based violence, permeates South African society.

[2.] It is the duty of the state, as well as the courts, to address the conditions that enable and continue to underlie this violence, and to prevent its repetition.[2] This duty arises from the constitutional obligation upon the state to respect, protect, promote, and fulfil the rights in the Bill of Rights[3]; from the binding nature of the Bill on the legislature, executive, judiciary and all organs of state[4]; and from the duty upon courts to promote the spirit, purport and objects of the Bill when developing the common law.[5] The Constitutional Court has held that the Constitution and international law oblige the state to prevent gender based discrimination and to protect

[1] See s1 of the Constitution
[2] See *Andrea Durbach; Toward Repatative Transformation. Revisiting the Impact of Violence against Women in a Post-TRC South Africa: International Journal of Transitional Justice, 2016, 0, 1-22 doi: 10. 1093/ijtj 017*
[3] See s 7(2) of the Constitution
[4] See s8(1)
[5] See s39(2)

the dignity, freedom, and security of women[6]. Such constitutional obligations do not only fall on the South African Police Service. They must be respected and fulfilled by all organs of state. [7]

[3.] The same may be said about sexual abuse of women with mental disability. That problem is an international phenomenon. The United Nations Convention on the Rights of Persons with Disabilities ("the Disability Convention") obliges states to protect the dignity, as well as the physical and mental integrity of every person with mental impairment on an equal basis with others. In recognition of this obligation, Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007,[8] criminalises sexual exploitation and grooming of persons with mental disability and imposes heavy prison sentences.

[4.] During the late afternoon of 20 January 2009, Ms L, a young woman aged 18 who suffered from a mild mental disability, was raped on the premises of Pine Forest Holiday Resort, Ceres, Western Cape. The resort was owned, managed and controlled by the Witzenberg Municipality. A municipality is an organ of state within the local sphere of government[9]. As such it is bound to respect, protect, promote and fulfil

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[6] See, *Carmichele v Minister of Safety & Security & Another (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC) at 964E – 965B;* the reference therein to the import of South Africa's ratification of the *Convention on the Elimination of All Forms of Discrimination Against Women; and see paragraphs [44];[45] and [49]*.

[7] See *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others 2005 (2) SA 359 (CC)*.

[8] For convenience this is referred to below as the Sexual Offences Amendment Act

[9] See s. 2 of the Local Government: Municipal Systems Act No. 32 of 2000

the aforementioned rights in the Bill of Rights. The Municipality failed to protect Ms L from being raped. The wrongfulness of this omission is tested by reference to the legal convictions of the community, which by necessity are underpinned and informed by the norms and values of our society embodied in the Constitution.[10]Because of its constitutional duties, and because it owned, managed and controlled the resort in the circumstances described further below, the failure on the part of the Municipality to prevent the rape was unlawful.[11]

[5.] The plaintiff has sued the Municipality for damages in his capacity as the *curator ad litem* of Ms L. The issue that remains is whether the rape was caused by the lack of ordinary care and diligence on the part of the Municipality and its servants acting in the course and scope of their employment. The Municipality denies being liable for negligence. It further denies that any negligence on its part caused or contributed causally to the injury suffered by Ms L.

**THE ALTERNATIVE PLEA**

[10] See *Oppelt v Department of Health* 2016 (1) SA 325 (CC) para 344

[11] See too the principles set out in *Ewels v Minister of Police (1975) (3) 590 AD at 597A-H*; *Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 317 C – 318I; Knop Johannesburg City Council 1995 (2) SA 1 (AD) at 27D/E to H/I; The Republic of South Africa v Basdeo and Another 1996 (1) SA 355 (A) at 367E-H*

[6.] The Municipality pleads in the alternative that if negligence on its part did exist, the rape was caused partly through its own negligence and partly through the negligence of Ms L's adoptive parents and guardians (Mr and Mrs Louw). Accordingly they were joined as third parties by the Municipality pursuant to section 2(2)(b) of the Apportionment of Damages Act, 34 of 1956. It is alleged that they were "*acutely aware that Ms L was intellectually impaired, vulnerable to exploitation and not possessed with the necessary skills, judgment and defence mechanisms to be left without supervision and to play independently in the environment which may be harmful to her; and knew or should have known that Ms L was emotionally vulnerable and socially inept.*"

[7.] The Municipality pleads further that Ms L's adoptive parents breached a duty of care in that they failed to properly supervise Ms L while she was playing alone in the resort; they failed to exercise reasonable care and/or take adequate steps to prevent harm to her when they could and/or should have done so; they failed adequately to monitor her movements at all relevant times prior to, during and subsequent to the rape; they allowed Ms L to stray from their control and/or area of supervision whilst being acutely aware of her mental disability and consequential vulnerability and/or exploitability; and they failed to avoid the rape when by the exercise of reasonable care and measures they could and should

have done so. In the circumstances the Municipality contends that Ms L's adoptive parents are jointly and severally liable with the Municipality to the plaintiff.[12]

[8.] The fact that Ms L may have been vulnerable to exploitation, lacking in social skills, judgment and defence mechanisms, as well as emotionally vulnerable and socially inept, are not grounds which allow the Court to limit her rights and freedoms as a woman. Both as a woman and a disabled person Ms L enjoyed entrenched rights to her dignity and security, control over her body, her freedom of movement, and equality before law. She may not be discriminated against on the basis of her gender, sex and disability.[13] A duty rests upon the Court to afford Ms L, both as a woman and a disabled person, the full and equal enjoyment of all her rights and freedoms under the Constitution.[14] Insofar as the alternative plea seeks to rely on the fact that Ms L is a disabled woman, the placing of any limitations on her freedom (which is implicit in the alternative plea) is anathema to the Constitution.

[9.] Ms L's right to dignity is not only of special importance, but it is to be exercised independently of her parents.[15] Although this right is a

[12] The Municipality also pleaded that it had employed an independent contractor, Ceres Alarms, to provide access control and security at the resorts; and that Ceres Alarms, and not the Municipality, owed Ms L a duty of care; and that and its negligence contributed to the damages suffered by Ms L. This plea was not persisted with during the trial.
[13] See section 9(3) of the Constitution
[14] See Section 9(2) of the Constitution
[15] Compare *Teddy Bear Clinic v Minister of Justice 2014 (2) SA 148 (CC)*

cornerstone of our Constitution it is not easily defined.[16] The impairment of her dignity would turn differentiation into discrimination.[17] There is also a strong correlation between her right to dignity and individual freedom.[18] Both as a woman and a disabled person she is entitled to her independence.

[10.] When interpreting the rights of Ms L the Court must consider international law.[19] South Africa has signed and ratified the Disability Convention. It was adopted by the U.N. General Assembly on 13 December 2006. It came into force on 3 May 2008. One hundred and fifty six states have ratified and acceded to the Convention[20], and eighty six states have ratified the Optional Protocol.[21] Only four African states have not signed the Convention. In December 2012 a vote in the United States Senate fell six votes short of the two thirds majority required for ratification. Apart from this particular lack of support the Convention remains one of the most critically supported human rights instruments in history. One hundred and sixty states signed upon its opening in 2007. The rights protected by the Disability Convention have normative value and provide evidence establishing the existence of a rule adopted by state practice in

[16] See *Teddy Bear Clinic v Minister of Justice 2014 (2) SA 148 CC para [52].*
[17] See *Constitutional Law of South Africa: Woolman et al: 2nd Ed Vol 13 36-20(b)*
[18] Per Ackermann J in *Ferreira v Levin 1996 (1) SA 984 (CC) para [49]*
[19] See section 39(1)(b) of the Constitution.
[20] http://www.un.org/disability/documents/maps/enable map.jpg
[21] This allows parties to recognise the competence of the Committee and the rights of persons with disabilities to consider complaints from individuals.

accordance with the views of states *opinion iuris*.[22] It would therefore appear that, according to international custom as evidence of a general practice accepted as law by all states,[23] the Disability Convention forms part of international customary law. As such it is law in South Africa,[24] although it has not been enacted into South African legislation.

[11.] The Convention evinces the existence of customary rules intended to ensure the full and equal enjoyment of all human rights and fundamental freedoms (contained in other UN Conventions such as the International Covenant on Civil and Political Rights) by persons with disabilities;[25] and in particular the rights against discrimination on the basis of disability,[26] equality before the law,[27] as well as the right to live independently.[28] This accords with the equality provisions contained in sections 9(1) and 9(2) of the Constitution.

[12.] To attribute delictual liability to Ms L's adoptive parents ("as wrongdoers") because they allowed her to exercise independence, freedom of movement and control over her body, would conflict with the aforementioned constitutional principles. The grounds advanced in the

[22] See Advisory Opinion of the International Court of Justice on the Legality of the Threat of Nuclear Weapons ICJ Reports 1996 p.226 at [70].
[23] See Article 38.1(b) of the Statute of the International Court of Justice
[24] See s.232 of the Constitution
[25] See Article 1 of the Convention
[26] See Article 8 of the Convention
[27] See Article 12 of the Convention
[28] See Article 19 of the Convention

alternative plea for limiting the rights and freedoms of Mrs Ms L are pithy. The evidence presented to the Court does not support the Municipality at all. Negligence on the part of her parents was not established. The rights of Ms L may be limited only in terms of the limitation clause contained in the Constitution.[29] There would have to be a legitimate reason for limiting her freedom to exercise her fundamental rights in the particular circumstances of the case due to the stage of her development and in order to protect her. This determination must be made when deciding whether the particular limitation is reasonable and justifiable in our constitutional democracy**.**[30]

[13.] The only relevant consideration in this case is whether Ms L was possessed of capacity to deny consent to sexual intercourse to the perpetrators. In my view this is a separate question to whether she had the capacity to consent to intercourse. According to the report of a psychologist, Jeanine Hundermark (which was admitted by agreement), Ms L was legally unable to consent to intercourse because of her level of intellectual disability and her level of understanding of sexual intercourse. The question of whether she could appropriately express her lack of consent, however, was resolved by unchallenged evidence described further below.

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[29] See *Teddy Bear Clinic Case 2014 (2) SA 168 para [41]; and see* section 36(1) of the Constitution and the relevant factors mentioned there viz: (a) the nature of the rights; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

[30] See the Teddy Bear Clinic Case para [39]

[14.] The material element of rape,[31] as defined in common law and the Sexual Offences Amendment Act, is lack of consent by the victim. Mere submission is not consent.[32] As Ms L had the capacity to convey such absence of consent to the perpetrators any limits on her freedom of movement and control over her own body cannot be justified. If consent to sexual intercourse did not exist and the perpetrator knew of the lack of consent criminal liability would arise.[33] On the facts before this court Ms L neither consented to sexual intercourse nor led the perpetrators to think that she had done so. It is clear that she was abducted against her will and then sexually assaulted.

[15.] Mrs Louw had been advised by Ms L's special needs teacher that it was important for her to become independent. As a result the Louws were working full-time on doing so. On the day that Ms L was raped they had made a decision that she would do something on her own. The evidence of a psychologist, Dr Dickman[34] establishes that this was an appropriate decision having regard to Ms L's development. She in fact asked to do so. In the circumstances Mr and Mrs Louw allowed Ms L to exercise her aforementioned rights and freedoms and to develop by playing alone at the play park. Their decision to encourage her development was taken

[31] See *R v K* 1958 (3) SA 420 (A) at 423 B-C
[32] See *R v Z 1960(1) SA 73 9(A) 745E*

[33] See *R v K* supra at 421
[34] Dr Dickman's evidence is dealt with further below.

on expert advice. The play park was located in a resort that was fenced, apparently subject to access control and secured by guards who were required to patrol it and regularly patrolled the play area where Ms L was abducted. Mrs Louw testified that because of Ms L's disabilities her parents had set boundaries for her that she would listen to and obey. This evidence was not disputed in cross-examination. Certain evidence of Dr Dickman who had consulted with Ms L, to the effect that she had been taught by her parents that no one other than her family should touch her body in an intimate way, was also not challenged. To this Mrs Louw added that Ms L would never hug a stranger because she had issues about touching. This evidence too was not challenged.

[16.] The circumstantial evidence given by Mrs Louw gave rise to the inferences that Ms L was abducted from the playground where she was playing on a trampoline; and that force was used to move her from there up some stairs and then down to the privacy of a squash court, where she was violently sexually assaulted by two young males. Her pants and panties were left blood stained. Her blood spread onto the floor of the squash court. Her blood was found on the underpants of one of the perpetrators. As a result of the rape Ms L required surgery to her vagina. A stitch had to be inserted under general anaesthetic. When the rape had been interrupted by the arrival of Ms L's mother Ms L was screaming "*Stop!*". She was terrified and crying. Nothing in the circumstances hints

at consent on the part of Ms L. Neither action nor words on Ms L's part could have given the impression of consent. Indeed it was put to Mrs Louw under cross-examination at the trial of the perpetrators by one of their legal representatives that Ms L had withheld consent, and had therefore been raped.

[17.] It is common cause that the two perpetrators, a 15 year old and a 14 year old (duly assisted by a legal representative and their parents) pleaded guilty to raping Ms L. The presiding magistrate was then vested with a discretion in terms of section 112 of the Criminal Procedure Act. He was required by the Act; firstly, to question the accused with reference to the alleged facts of the case in order to ascertain whether they had admitted the allegations in the charge to which they had pleaded guilty; and secondly, to satisfy himself that the accused were guilty. The section was designed to protect an accused from the consequences of an unjustified plea of guilty. Accordingly, a duty rested on the magistrate to apply the section with care and circumspection, bearing in mind the principles above. Had the accused's responses to the questioning suggested a possible defence, or left room for a reasonable explanation other than the accuseds' guilt, a plea of not guilty would have had to be entered.[35] Nevertheless the perpetrators were duly convicted. No evidence was placed before this court to suggest that the magistrate failed to carry out

[35] See *S v Williams 2008 (1) SA SACR 65 (CPD) paragraphs [4] and [6]*

his duty; or that the convictions were wrong; or that they had been disputed in an appeal, or that the process was queried on review.

[18.] The Municipality did not call either of the perpetrators as a witness although its legal representatives consulted with one of them. Nor did it call any other witness to suggest that consent or belief in such consent existed at the time of the sexual assault. Nor did the account of her rape, that Ms L, was eventually able to give to her mother, exclude the inferences based on the circumstantial evidence before the court; namely, that Ms L did not consent to sexual intercourse and that the perpetrators of her rape never entertained such a belief. To hold that any friendliness which Ms L may have shown towards the perpetrators could lead to an opposite conclusion would minimise the responsibility of the perpetrators. It would trivialise Ms L's fundamental rights and freedoms as well as the barbarism that was perpetrated upon her. Such a finding would amount to rape culture. It has no part in a state founded on non-sexism and the advance of human rights and freedoms.

[19.] The decision of Ms L's parents to allow her to play in the park alone was reasonable and justified. The evidence of Mrs Louw established that a reasonable person in their position would not have foreseen that Ms L could suffer rape at the playpark where she was allowed to play. Nor would a *bonus paterfamilias* have taken any more measures to monitor

Ms L than the Louws did, given the security measures that they had seen in place at the resort. A problem arose because these measures were withdrawn. The evidence shows that her parents did supervise Ms L, and appropriately so.[36] The Municipality's plea in the alternative must therefore fail.

**INSPECTION IN LOCO**

[20.] The squash court where the rape occurred lies on an east-west axis. It is adjacent to a recreation hall on its western side, from which it is separated by two doors on the ground floor. On the southern side of the squash court there is an outside staircase leading up to a first floor entrance. It is made of metal and its treads are fairly widely spaced. At the time of an inspection, on 16 February 2016, there was a wooden door at the top of the stair case which opened outwards and could be locked from the outside. Upon entering the top floor of the squash court area the squash courts situated at the lower level can be viewed from above. A viewing area is separated by a railing from the two courts below. An internal staircase opposite the top floor entrance door leads down to the lower floor from where the two squash courts can be entered each by its own door. The rape occurred on the court on the southern side. The play park lies to the west of the recreation hall a few meters away. There are

[36] This supervision is dealt with below

trampolines in the area. A portion of a putt-putt course separates the trampolines from the hall. A pool area lies to the east of the recreation hall a few meters away. A chalet where the Louws and Ms L stayed lies about 66 meters to the south of the play area and was visible from there.

**MRS LOUW'S EVIDENCE OF THE RAPE AND ITS CONSEQUENCES**

[21.] Plaintiff was put to the proof of showing that Ms L was raped. She did not testify. (The probable reasons are contained in the report of Ms Hundermark.) It was therefore incumbent on Mrs Louw to establish the rape in her testimony. She provided the necessary circumstantial evidence to discharge this onus. A hearsay statement about her rape by Ms L was admitted but not for its testimonial value. The reasons are dealt with below.

[22.] The aim Ms Hundermark's assessment was to evaluate Ms L 's level of intellectual functioning, her ability to consent to sexual intercourse, as well as her competence to act as a witness in the criminal proceedings against three youths who had been charged with raping her. The assessment was made on 19 October 2010 in relation to criminal proceedings. Ms Hundermark stated that Ms L did not have words to describe her experience. She had a good understanding of truth, falsehood and perjury. She had the potential to be a competent witness

in court; but Ms Hundermark emphasised that she should not be subjected to secondary traumatisation that a court appearance would illicit. She stated that Ms L "*is a fragile little girl who has had to endure a great deal in her short life. She is able to function within her protected and loving environment. (Ms L ) should not be called on to testify. She would not be able to speak about the alleged rape and the experience would be too traumatising for her*."

[23.] In her testimony Mrs Louw confirmed certain content of the report of an occupational therapist, Annetjie van Niekerk, which had been admitted by the Municipality, more particularly regarding the first years of the life of Ms L. Mrs Louw amplified the content of the report. Ms L suffered from a very serious case of sensory neglect. Because she had never been touched in the hospital, where she spent her early years, and had always lain only on her back, had never been turned on her stomach, and had never touched anything, she became – and remained – acutely sensitive to touch. Mrs Louw explained that because Ms L never carried any weight on her feet or on her knees, she had never learnt to crawl like a normal baby. She had developed this condition of sensitivity to touch.

[24.] Mr and Mrs Louw had previously visited the resort in 1974. Thereafter they visited on about fourteen or fifteen occasions until 1990. They then visited in 2008; and again in 2009 together with Ms L, their daughter,

Karin, and her daughter. They arrived on 16 January 2009 and stayed in chalet G27. During their visit in 2008 and on the days before she was raped Ms L played at the park many times. Her parents or Karin were always present. On 20 January 2009 Mr Louw, Ms L, Karin and Emily visited the swimming pool. When Ms L returned she asked to go and play at the park on her own.

[25.] In Sofia she was allowed to play outside with the neighbourhood children. She played football with them and was a good player. There were many parks in Sofia and she would play in them on her own. Mrs Louw had been advised by Ms Wattel, who had been working on the development of Ms L, that the most important thing for a child like her was to become independent. She could not always remain an appendage of her parents or some other person. The Louw's had therefore started full time therapy aimed at making Ms L independent.

[26.] Mrs Louw main concern at Ms L's request was that she could fall off the tractor in the play park. This was off limits for her. Ms L knew this. Mrs Louw believed that she would behave accordingly. The other concern which Mrs Louw had was that Ms L might be injured in "*rough and tumble*". She therefore checked to see how many children were playing at then park. She saw nobody. She told Ms L that it was fine to go and

play and that the adults would keep an eye on her. Mr and Mrs Louw were preparing food in the house. They would go outside to check Ms L.

[27.] When Karin returned from the swimming pool a little later she asked Mrs Louw where Ms L was. Mrs Louw booked towards the park. She could neither see Ms L from inside nor outside the chalet, nor with binoculars. She, Karin and Emily then walked over the bridge to the park. They called Ms L and looked all around. Mrs Louw saw that Ms L's shoes were lying next to a backpack in the vicinity of the trampoline. That concerned Mrs Louw enormously. She knew that Ms L would never go anywhere without her shoes, especially if the terrain was not flat. She could walk on grass. However, because of her sensory deprivation, Ms L would never go anywhere without wearing shoes. Mrs Louw became frightened and feared that Ms L might have been raped. She then walked in the direction of the swimming pool. As she passed the squash court she saw a boy running down the stairs outside the building. He ran in her direction. When he saw her he turned and ran back quickly up the stairs. He shut the wooden door at the top of the stairs.

[28.] Mrs Louw found this behaviour curious. She walked to the foot of the stairs. When she got there she heard Ms L's voice pleading "*Please! Please stop! Don't try again.*" She was crying. She was clearly terrified. Mrs Louw could hear the fear in her voice. She ran up the stairs. She

heard footsteps running on the wooden floor below towards the hall which adjoined the squash court. As she was descending towards the squash court Mrs Louw saw Ms L coming out. She was pulling up her pants and her panties. She just said "*Its very bad! Its very bad!*" When she saw Mrs Louw she walked towards her. Ms L was crying and said "*They hurt me.!*" The first thing that Ms L asked was "*Where are my shoes?*" Mrs Louw had to fetch them from the trampoline in order for Ms L to walk. By that stage the rucksack had gone. When they walked away Ms L said "*Goodbye friends! Never come back! Never come back!*" She then used the Bulgarian word meaning "*Goodnight*!" Mrs Louw explained that to Ms L these words meant "*Go to sleep*". Ms L did not want to speak and was visibly in shock. She did not want Mrs Louw to touch her at all. This was extra-ordinary behaviour on her part. All of this had happened between 16h00 and 17h00.

[29.] Mrs Louw took Ms L back to the chalet. Ms L would not let her mother examine the place on her body where she was hurt. She still did not want Mrs Louw to touch her. She was lying on the bed. Mrs Louw noticed that there was blood on the bed. She asked Ms L if she could come and lie down next to her and cry with her. Ms L agreed. They lay down and cried together. After that Ms L allowed Mrs Louw to take off her pants. She saw a lot of blood. She concluded that Ms L had been raped.

[30.] Mrs Louw also testified that after the incident the Louws had looked around the resort grounds for help. There was nobody around. Therefore they had taken Ms L to the resort office. They wanted to take her to the hospital immediately. They were told that she first had to go to the police station to report the rape. They did so. There were many people there and a delay occurred. Before they could go to the hospital they had to be given a rape kit at the police station. Then they went to the hospital. They had to wait outside. After 20h00 Ms L was examined at Out-Patients by Dr Buckle. His report noted Ms L's blood stained pants and panties. He did not note what Mrs Louw had observed at the hospital; namely, visible abrasions on Ms L's lower legs and shoulders. These are visible in a photograph which was taken two days later.

[31.] During the further examination of Mrs Louw counsel for the Municipality admitted the chain of events that led to certain forensic and DNA analysis. This included an admission, relating to the DNA of a 15 year old youth (Mr P), whose DNA was proved to have been found in Ms L's vulva. It was also admitted that Ms L's blood was found on the underpants of the 13 year old male (Mr O), as well as on the squash court floor where it was photographed. These admissions established conclusively that Ms L was raped by Mr P (as a perpetrator) and Mr O (as either a co-perpetrator or accomplice). Rape had been in issue at the trial up to this point.

[32.] When the Louw's and Ms L returned to their chalet from the hospital a man and a woman visited. They appeared to be security guards. They made certain reports to the Louws. The woman reported that "*this was not the first time that something like this happened.*" This statement is admitted in the interests of justice. The Municipality elected to put up no direct evidence by any of its officials who would have had personal knowledge of criminal activity at the resort. Relevant documentation that must have been in its possession allegedly disappeared and was not made available to plaintiff. A document that was discovered by the Municipality indicated that an assault had occurred at the resort before Ms L was raped. This statement was not challenged when it was put up by plaintiff's expert for purposes of drawing that inference. It is common cause that any previous incident of violent crime was relevant to determine the security measures required at the resort when Ms L was raped.

[33.] Ms Louw had asked Mrs Theron to come to the resort and help, because Ms L knew her well, felt comfortable with her, and because there were a lot of things that the Louws had to attend to because of the rape. Mrs Louw confirmed that whilst Mrs Theron was there a delegation from the Municipality arrived. It included the Mayor. He was very apologetic. He not only said that he was sorry that the rape had happened, but admitted "*that he knew that there were problems with the security in the resort.*"

[37]Mrs Theron had then challenged the Mayor by asking him what kind of boys or young men there were in Ceres that were doing such things. He replied that he wanted to set up a programme to teach the children proper ways. The first-mentioned utterance by the Mayor amounted to an extra-curial admission. The fact that it was made does not depend on the credibility of the Mayor, but on the credibility of Mrs Louw (and Mrs Theron). The content of the admission was hearsay. However, documents discovered by the Municipality and introduced as evidence by plaintiff's expert witness demonstrated that the "problems" to which he referred had been drawn to the Mayor's attention. Whether there were in fact problems with security in the resort is an issue to be decided with the benefit of the expert evidence below.

[34.] When Mrs Louw was asked whether security guards were ever in the vicinity of the squash courts and the play park before the rape she replied that she had seen them. They were usually there in the morning. There were two security guards in the play area. They were also at the swimming pool. The Louws were conscious of the fact that security guards were patrolling the resort "*continuously*". There had also been security guards during 2008.

[37] For the Plaintiff to call the executive head of the Municipality would be manifestly unhelpful to its case. See *Maize Board v Hart 2005 (5) SA 480 (Mr O)*

[35.] Mrs Louw confirmed that, on 3 February 2009, two weeks after the rape, the Louws contacted Dr Schneider, a gynaecologist in Somerset West, about complaints that Ms L was making about vaginal pain and discomfort. She could not walk. It was painful when she sat. Mrs Louw observed that she was still bleeding. When they visited Dr Schneider he could not carry out a gynaecological examination on Ms L. She did not want him to touch her. She was crying. She did not want her clothes to be removed. Eventually she had to be placed under anaesthetic. Dr Schneider found three small tears in her vagina. Two of them had begun to heal. The largest had continued to bleed. A stitch was inserted in order to help the healing.

[36.] After the rape Ms L had said to her mother that "*the boys crossed me*." Mrs Louw thought Ms L meant that they made her angry. However, around Easter 2013, Ms L told Mrs Louw that she did not want to go to heaven. When Mrs Louw asked her why she replied that she did not want to be crossed again. Mrs Louw asked her what happened when she was crossed, Ms L replied "*then we die like Jesus was crossed.*" Mrs Louw then realised that when Ms L said she had been crossed, she meant crucified. When Mrs Louw asked her she said: "*Yes, because there were nails put into my body and my hands were held like that and my legs were stretched.*"

[37.] This statement is admitted in the interests of justice. The undisputed expert evidence is that Ms L did not have the capacity to appreciate the nature of the sexual act perpetrated upon her. Her perception of the experience is crucial in assessing her pain and suffering as well as the necessary therapy required to heal her psychological damage. In the absence of any challenge to whether the statements were actually made, they should be admitted for purposes of assessing the quantum of plaintiff's claim, as opposed to its merits. No weight is given to the statements in deciding the merits.

[38.] Ms L had been unable to give a statement to the police about what had happened. Eventually, after they returned to Sofia at the end of March 2009, and over a period of a few days, she did tell Mrs Louw what had happened. It took a long time because she would become very upset when she tried to relate the events. Before Mrs Louw could repeat what she had been told, counsel for the Municipality reserved its rights in relation to this hearsay. He did not object to the evidence being given. Plaintiff's counsel stated that the evidence was to be presented "*for another reason*". By this stage of the trial there was no longer any dispute about whether Ms L had been raped. Allowing her report of how the rape occurred could not prejudice the Municipality. Had the report contradicted the inference I have drawn above from all the other proved facts, then those facts would not have excluded every reasonable

inference save for the one drawn from them.[38] This would have been of advantage to the Municipality. Furthermore, as Ms L could not testify, her report to Mrs Louw would be of assistance in establishing how Ms L perceived her experience. This was necessary to determine any potential damages. The report is therefore admitted in the interests of justice.

[39.] Ms L reported that while she was on the trampoline in the park, friends came. (Mrs Louw pointed out that at the time Ms L called everyone "friends".) One of them was on the swings and others jumped with her a few times on the trampoline. Then they took her by the arms and pulled her from the trampoline. She struggled to get away from them and said "*No! I don't want to go with you!*". She said one of the boys then walked behind her and held her hands behind her back with one hand. With the other he shut her mouth. They moved her towards the squash court and up the stairs on the outside. She fell a few times on the stairs on the way up, and then down on the other side. They put her down on the floor in the squash court. One boy held her mouth and two hands. The other boy spread her legs. He pushed something into her "*that felt like nails*". It was very very painful. When he was finished he closed her mouth and held her hands. The other boy got onto her. While he was busy a third boy called to the other two from the stairs saying "*Don't try again! Run!*" They ran. Then Mrs Louw arrived.

[38] See *Rex v Blom 1939 AD 188 at 202 – 203*

[40.] The inferences that this report might have rebutted were the probability that Ms L was removed from the play area against her will (without her shoes); and that force causing bruises was used on her arms; and that her legs were injured during the abduction. With reference to the events described by Ms L, Mrs Louw was asked about the significance of her shoes lying next to the trampoline. She emphasised that because of Ms L's sensory deprivation she could not walk without her shoes. As a result one of the first things she said after the rape was "*Where are my shoes?*". When asked whether Ms L would willingly have walked from trampoline to the stairs without her shoes, Mrs Louw replied: "*No! She was definitely forced, because she wouldn't do that willingly.*" Mrs Louw had concluded that Ms L had obtained the bruises on her shin when she fell on the stairs; and on her shoulder during the struggle. There is nothing in Ms L's report or any other evidence before the Court to exclude the inferences drawn by Mrs Louw from the facts. On the probabilities Ms L was forcibly abducted and raped.

[41.] Mrs Louw also testified as to how Ms L had changed when she got back to Bulgaria. She was a different girl. She was afraid of teenage boys. She did not want to leave the apartment. She only felt safe in her own room. When she became stressed she would not speak the way she had before she was raped. She spoke in a baby language. She would press

her clenched fingers against her cheeks, tap them and then chatter. She suffered from nightmares. When the Louws had to work outside of the City, Ms L would go with them and sleep in their room. She would wake up about three times in the night screaming. When Mrs Louw woke her and asked what the problem was she replied that these hands wanted to hurt her. Ms L only felt comfortable with the toddlers (3 – 6 year olds) at the orphanages they visited. She was apprehensive about boys above that age. Though previously she loved to play football with bigger boys she suddenly did not want to play at all. She stopped playing outside the house. She did not want to go and play in the park. The Louws were unable to go on with the home education programme that had been provided for Ms L because of her lack of concentration. She had previously been interested in photography. She deleted photos of the swimming pool and the play park from her collection, but she kept pictures from the chalet.

[42.] Ms L's home education programme continued after 2009. Mrs Louw also contacted a speech therapist in South Africa who suggested that they work on her vocabulary in both English and Afrikaans, using her sight and words. Mrs Louw explained how many volunteers from all over the world had come to Bulgaria to help the Louws with their projects in orphanages and summer camps. Many of them were qualified teachers and therapists. They stayed with the Louws. They had helped with Ms L. A

British occupational therapist who had worked with children with disability had helped Ms L. By the time of the trial Ms L had a tablet. She was using it to do home school programmes from the American Christian School. This included mathematics, reading and science. Ms L enjoyed these. She also did arts and crafts. She continued her interest in photography and did well at it. She knew how to take good moment pictures; how to download them on computer; and to decide which were good and which were not good. She also assisted as a Sunday school teacher for young children. She helped the teacher with everything that was needed. This had been going on for approximately three years.

[43.] By the time of the trial Ms L was doing much better. She could go to a shop on her own. She was starting to make her own meals. She was becoming independent. She was also much better in the company of boys. Her sleep patterns were better and her nightmares were inconsistent. She was doing well at her home education programme and showed interest. If she was stressed she became quiet. However, she was only 80% of her previous self. She was still very careful about people. She was not as she had been. This might have been attributable to the fact that she was older. However, there were some areas where she had lost her spontaneity.

[44.] After the rape Mrs Louw was depressed. She stated that she had "*rescued this child from hell and then something like this happened to her. How was it possible that this would happen to her.?* Mrs Louw had problems with sleep and concentration. She was on medication. Eventually it got better. At the time of her testimony she was no longer on medication.

[45.] Mrs Louw also testified about two further statements that are hearsay. They are admitted for the reasons further below. The male security guard who visited their chalet told the Louws that two of the boys involved in the rape had legal tickets but a third did not. He had apparently entered the resort with somebody else's ticket. A day or two after that a senior clerk at the resort, Ralda du Plessis, told the Louws that she had typed the numbers of three tickets into the computer and that two of the boys had legal tickets giving them access to the resort, but the third one (Mr P) used somebody else's tickets. The ticket was not in his name. He did not have a ticket. Once again counsel for the Municipality pointed to the fact that this evidence was hearsay and reserved his rights.

[46.] Prior to the trial plaintiff had requested copies of tickets used by the three youths to gain access to the resort. In a Rule 35(3) affidavit the Municipal Manager, Mr David Nasson, alleged that it did not have them. All it possessed were the applications for season tickets for the "*plaaslike*

*seuns*" en "*persone*". Plaintiff was then informed that the Municipality was not certain who the holder of the season ticket used by Mr P was. When plaintiff's attorney informed Mrs Du Plessis, on 19 December 2011, of Plaintiff's information to the effect that Mr P did not have an access card she replied that, if she remembered correctly, Mr P had used another child's ticket to gain access. Defendant's expert witness, Mr Kasaval, had never seen any tickets. He admitted that the Municipality might not have done everything that they ought to have done on the day in regard to the access of the three youths. In the light of these admissions by its own witness the Municipality would suffer no prejudice from the admission of the hearsay evidence.

[47.] The cross-examination of Mrs Louw in no way attenuated the facts and circumstances from which the inferences have been drawn above. Counsel for the Municipality introduced an occurrence report, which Ms Du Plessis had produced on 20 January 2009, referring to the incident. She had recorded that investigation by the police had established that the local youths involved in the event had all been in possession of lawful access cards. The report also recorded (next to the portion indicated as details of the event) that the event occurred while all personnel were at a compulsory session in the City Hall. The event was reported to Ms Du Plessis at about 17h00. The police had been called. Inspector Mostert

conducted the investigation. The Municipality's responsible official was Mr A Bosman (the resort manager).

[48.] Mrs Louw testified under cross-examination that many changes had happened at the resort since she had first been there. She believed that there was a designated area for visitors. This included the braai areas. She was not sure about the play park. She was aware that there were no signs prohibiting visitors from visiting the playpark. However, she added that when she had received day visitors, they had needed a special permit and would have had to ask before the time when they could visit. She admitted that people from Ceres could use the facilities at the resort if they bought tickets. This included the swimming pool, the squash courts and the playground equipment. There was also a big hall where youngsters could play and use the facilities. Counsel then introduced the general information and rules of the resort. These recorded that the use of the swimming pool, playpark for children and squash and entertainment programme were free during December holidays. Use of the trampoline involved an extra cost. The document also recorded that day visitors could only be admitted by prior appointment. Day visitors were not allowed access to the living units. Mrs Louw confirmed that the family had spent a weekend at the resort before the rape. She had seen more people in the area where the chalets were during the weekend than

after it. She had also seen children in the playpark who were staying in the chalets.

[49.] Counsel then introduced a letter written directed by Ceres Alarms to the Witzenberg Herald, dated 20 January 2009, and relating to security at the resort. The letter was a response to an article that had appeared in the newspaper regarding the rape. The letter recorded that a Ceres Alarms team provided a security service at the resort every day. It was undermanned for purposes of effectively securing the whole property. There were always two officials on duty. One had to man the guard's post and the other had to patrol the property which was somewhat large. Ceres Alarms could not carry out their function effectively if there was not sufficient manpower to do the work. They did everything in their ability to keep the property safe. Their personnel were trained to impose security. They did regular patrols by vehicle during December. They put extra personnel on the property.

[50.] Mrs Louw confirmed that the Municipal Manager had accompanied the Mayor on his visit. They were sympathetic. Furthermore two of the perpetrators' mothers had visited the Louws. They did not really sympathise. They asked Mrs Louw what had happened. They wanted detail. She told them that they should ask their sons. They replied that they had been told that they were not supposed to speak to them. A

policemen then told the mothers that they should visit the Louws again. Counsel then put to Mrs Louw that his instructions were that they had come to sympathise and apologise. Mrs Louw was emphatic that all they said was that they needed to speak to her and wanted to know what had happened. Mrs Louw confirmed that two of the boys had written letters of apology on the instruction of the Magistrate. However, they had not apologised for what they had done during the hearing. There they had laughed at Ms L and the Louws.

[51.] It was pointed out to Mrs Louw that her daughter Karin had stated in an affidavit that prior to the rape she had noticed three youths at the swimming pool staring at her and her daughter and Ms L in the water. Mr Louw had made a statement that he too had observed the youths. It was put to Mrs Louw that the security guards also saw the youths there. She replied that her husband had not seen the youths as a threat. Mrs Louw had not see them at all as she was not at the pool. Nor did she know anything about them.

[52.] Counsel then put certain content of the report of Ms Hundermark, namely: "*On interview, (Ms L) was a small, neatly dressed, short haired little girl wearing spectacles and walked with a slight limp. She looked about 12 years old. She easily engaged with people and was highly sensitive to everything going on around her, to the point of being overly distractible.*

*She appeared generally happy and smiled a great deal. However it is extremely important to note that she displayed all the behaviour patterns of a child who has been 'insecurely attached' in childhood. Such children have not developed the necessary discernment and are either highly suspicious and uncomfortable with people, or are overly trusting and friendly, as in (Ms L's) case.*"

[53.] Mrs Louw admitted that she knew all of this. She also knew that Ms L treated everybody as her "friends". Even after she was raped she had called the perpetrators friends; but only because she did not have the capacity to use any other word. Mrs Louw, however, disagreed with counsel's proposition that she should have kept better watch over Ms L because the park was open to the public. She and Mr Louw had been watching Ms L from outside the chalet. At one stage Mrs Louw had gone to the bank of the river just to call to Ms L and to speak to her. They had done the best they could to supervise. However, they had made a decision that she should do something on her own. She was 18 years old and she did need to learn to be independent. On the basis of the content of the report made by Ms L it was put to Mrs Louw that a long time had passed between her last check on Ms L and realisation that she was no longer at the park. Mrs Louw answered that it was several minutes.

[54.] Ms L's recovery was then addressed in cross-examination. Mrs Louw confirmed that Mrs Theron had helped to console her after the event. The Louws had then stayed in the resort for another five days because Ms L felt safe in the chalet. They then returned to Somerset West. Mrs Theron organised a destressing massage for Ms L and Mrs Louw. After that Ms L had attended Ms Wattel for play therapy. They then went to a camp at Volmoed. From there they went to Pretoria, and then back to Bulgaria. The Louw's had a friend in Pretoria who was a therapist and had spent a lot of time with Ms L. So too did Mrs Louw's daughter in law who was a teacher of small children. All of this was directed at treating Ms L for the ordeal she had suffered.

[55.] During this cross-examination counsel for the Municipality conceded that all the parties were *ad idem* that the rape had set Ms L back approximately a year. Mrs Louw stated that by the year 2011 Ms L had made progress. However, she was only her old self when she was in a safe environment. She had issues with another environment. Counsel conceded that the Municipaliy's expert witness, the psychologist Mr Larry Loebenstein, agreed with her. What Mrs Louw described were residual symptoms of post-traumatic stress disorder ("PTSD") that had to be addressed.

[56.] Mrs Louw confirmed that the therapists who visited the Louws in Bulgaria and attended to Ms L were qualified. There was a physiotherapist and an occupational therapist, as well as a speech therapist. Nevertheless at the time of Mrs Louw's testimony, Ms L was not as spontaneous as she had been. She was still very careful. She was very much aware of possible danger although she lived in a very safe country where there is no street crime, murders and rapes. She felt particularly unsafe in South Africa. She remembered the incident. The whole family had not recovered. This was not disputed in cross-examination.

[57.] Under re-examination Counsel for the plaintiff referred Mrs Louw to the examination by the legal representative of the youths at their trial. Mrs Louw had been asked with reference to Ms L:

"*As sy nou saam speel, speel saam op die trampoline en daar is maar hier en daar 'n woord wat gewissel word, sou u dink 'n kind soos beskuldigde 2, hy was op daai stadium 13 jaar oud, sal dadelik geweet, of moes geweet het dat hierdie meisietjie is besonders anders as ander meisies?*"

Mrs Louw had replied in the affirmative. She added that it was very obvious from the way that Ms L walked that there was something different about her. Mrs Louw also confirmed the views she had expressed at the

trial, namely that Ms L would not have given one of the boys a hug at their request. Ms L had problems with "*touch issues*". At the time she would not have given hugs to people she did not know.

[58.] Mrs Louw furthermore confirmed that the photographs taken two days after Ms L was raped still showed the blue marks on her legs. Mrs Louw explained that her daughter was afraid of going up stairs. She would not have done that voluntarily. She would also not have left the park. Mrs Louw inferred that Ms L fell on the steps because was forced up them. Because she had a disability Ms L had been given boundaries without which she could not live. When she was told that she could not go on the tractor, or go out of the park, she would not do so. Mrs Louw knew that. Finally, Mrs Louw emphasised that Ms L would always remember the rape. She would not recover from the incident.

[59.] Under examination by the Court, Mrs Louw said that Ms L had played in the park with her parents or with Karin almost every day. The day that she was raped was the first time that she had played alone. Previously she had played at different times. Karin or Mr or Mrs Louw were always present. Mrs Louw was aware that there were security personnel who worked at the park. She usually saw them in the afternoon. They would sit on the bench at the playground. There were usually two of them. She saw them on more than one occasion. They would remain sitting there.

She presumed that they moved off when Ms L and her parents were no longer there. They sat on a bench in or near the park facing the trampolines. They could see the whole park. Prior to 20 January other children had been playing at the park as well. On the day on which the rape occurred Mrs Louw had seen two guards patrolling. They had walked past the chalet. Sometimes Mrs Louw saw the cleaning personnel sitting near the park during their breaks.

[60.] Under further cross-examination Mrs Louw said that the Louws had not been informed that all the people who worked in the resort would be going to the municipal offices for a meeting on the afternoon of the rape. She confirmed she had seen two guards patrolling on the morning of the rape, a man and a lady. She could not confirm how long the guards would sit at the park. Sometimes they were there in the afternoon, and sometimes in the morning. Under further re-examination Mrs Louw stated that Ms L did not have to buy a ticket to play in the park. Nor did Mrs Louw see anyone buying tickets.

**MS L's PERCEPTION OF HER EXPERIENCE**

[61.] Elmarie Jansen van Vuuren has been a registered social worker for the past 23 years. During 1993 she was appointed as the director of the Cheré Botha Centre, Downs Syndrome Association. As such she was

involved in an early intervention programme with children up to the age of 7 years old. She also trained the staff. From the year 2000 she was registered as a private practitioner. She received training in play therapy (Gestalt therapy) at the University of Pretoria in January 2015. She consulted with Ms L for the first time on 12 March 2009. She drafted a play therapy report after a referral by Ms Wattel. This consultation occurred about six weeks after Ms L was raped. At that stage it was very difficult for Ms L to verbalise her experience. This was because of her disability in cognitive functioning. The only way to measure the degree of trauma she had suffered was to use the process that Ms Janse van Vuuren usually employed with young children.

[62.] She saw Ms L on four occasions. On the first occasion she asked Ms L to make a drawing of herself. Ms L portrayed herself with a sad face. It was impossible for her to elaborate on why she was sad or had depicted herself as such. Ms Jansen van Vuuren had to determine whether Ms L understood what the emotions of happiness, sadness, anger and fear were. These very abstract concepts for a child with limited cognitive capacity. Therefore Ms Jansen van Vuuren drew faces with the different emotions and allowed Ms L to choose colours for each. She chose red for happy, orange for sad, green for rage, and blue for fear. They then proceeded with the gingerbread man technique. Ms L was requested to indicate on the gingerbread man, in the colours that she chose, how much

of each emotion was in her own body. She indicated her head area as being sad. Her chest and arms were happy. Her lower body was fearful. Her feet were angry. It was difficult for Ms L to explain what caused each emotion.

[63.] Ms Jansen van Vuuren also employed the house in the tree technique. This allows young children with limited understanding, who sometimes struggle to identify the emotions within them, to concretise their feelings, Ms L managed this. She was able to say that the house was angry, the cloud was sad, the sun was happy and the tree was frightened. She was able to say she felt happy like the sun whenever she was with her mother, her father and Ms Wattel, and also when it was her birthday. She was frightened and sad whenever she thought about Ceres. She did not elaborate.

[64.] Ms Jansen van Vuuren then employed the monster technique, which had been used for many years in play therapy. Because Ms L could not draw properly (because her pencil grip was very weak), Ms Jansen van Vuuren drew on Ms L's instruction. Nevertheless, Ms L did draw a lower body consisting of only one big leg. At first Ms L did not want Ms Jansen van Vuuren to draw hands on the monster. Later Ms L asked her to do so. When this happened Ms L said "*He had big hands, oh so big hands*." Ms L appeared to be seriously tense when she spoke about this. She folded

her hands into each other and held them in front of her mouth. She began to make rocking movements and groaning noises. At that stage she was sitting upright and rocking her upper body backwards and forwards. This went on for a while.

[65.] Ms L coloured in the monster's shirt in red (happy) and trousers in blue (fear). She then said to Ms Janse van Vuuren "*He pulled off his trousers and he pulled off my trousers and my panties and he hurt me so much here.*" Ms L then indicated the place between her legs with her hands. She then showed Ms Jansen van Vuuren the movements that the monster made. These were "*humping*" movements. She kept repeating the words " *He hurt me so much, He hurt me so much.*" Part of the prescribed monster technique is to make the monster out of clay and to allow the child an opportunity to show how she feels. Ms L refused to touch the monster's hands. At that stage she began to press the monster flat with her hands. She destroyed all of it except the hands. Ms L then asked Ms Jansen van Vuuren to break the monster's hands. She carried out this request and placed the remains in the dish which she covered with a lid (so that they could not come out again.)

[66.] Ms Jansen van Vuuren concluded that Ms L had experienced events as severely traumatic. Young children, whose cognitive functioning was at Ms L's level, found it very difficult to verbalise their feelings. Although

they could not do so it did not mean that the feelings were not present. Mrs Jansen van Vuuren's report had been used as an exhibit in the criminal rape case. It was not intended to constitute a formal assessment. She had prepared it after Ms Wattel had observed that Ms L was severely traumatised and had asked Ms Jansen van Vuuren to help her to share those feelings. The object of the contact sessions was not to assess Ms L.

[67.] Under cross-examination Ms Jansen van Vuuren stated that she had a very clear recollection of her consultations with Ms L because the situation was unique and it affected her deeply. She confirmed that Ms L's functioning was the same as that of a young child. It was not Ms Janse van Vuuren's role to assess her level of functioning. Ms Wattel had given a very clear indication of Ms L's level; that is, between 6 and 8 year old. In the Gestalt approach rather than looking for information about Ms L's past, one examined what was in her foreground, "*her here and now*". No conversation with Ms L had occurred.

[68.] Ms Jansen van Vuuren found that Ms L was in a position to distinguish and identify the happy and the sad faces after it was explained to her what each of the faces was. In regard to the self-drawing Ms Jansen van Vuuren confirmed that she had drawn the outline of the face, which Ms L had then coloured in. Ms Jansen van Vuuren had first built up some

confidence in Ms L by showing her the different pictures of happy, sad and angry faces. Ms L was then asked which of these she felt. She then told Ms Jansen van Vuuren which face to draw. Ms Jansen van Vuuren stated that she was surprised that Ms L was able to respond appropriately when she was asked how much happiness there was in her body, how much fear, heartache and anger. When Ms Jansen van Vuuren was cross-examined on the statement in her report that it was difficult for Ms L to express herself about the events, she explained that this related to the connected facts such as where Ms L was when it happened, what the time was, and what she was wearing. Because she was aware of Ms L's level of functioning, Ms Jansen van Vuuren avoided such questions, or asking what had happened in the resort. Instead she tried to build up a relationship of trust by discussing everyday things that were within Ms L's framework. From this Ms Jansen van Vuuren concluded that it was generally hard for Ms L to put the events into words.

[69.] From her professional experience with young children it was easy for Ms Jansen van Vuuren to establish that Ms L would not give her certain information. The information gleaned was limited to that given by Ms L during the play therapy. The focus was on information that was in the foreground of her mind. Because Ms L was already traumatised and Ms Janse van Vuuren did not want to traumatise her further she did not directly ask Ms L about the rape. Ms Jansen van Vuuren usually dealt

with children shortly after they had suffered trauma. She was providing treatment. Play therapy did not require much verbalisation. Play and drawing were a much easier and more natural language for Ms L to speak. The focus was on getting Ms L to speak through drawings and stories. Ms Jansen van Vuuren did what she could in the time that was available. She was very surprised that she managed to get Ms L to express her feelings in this short time. There was no cross-examination on the statements that Ms L had made or her reaction to the clay figure.

**THE QUESTION OF NEGLIGENCE**

[70.] The Municipality elected not to put up any witnesses in their employ who had personal knowledge of security arrangements and failures at the resort. Instead it relied on the evidence of a security expert. In the circumstances the evidential material upon which the court must rely to determine the question of negligence is discovered documentation mainly introduced by plaintiff's expert witness or by counsel for the Municipality in cross-examination. The parties agreed that these documents were what they purported to be. I accept the expertise of both witnesses. However, the subject on which they testify is largely one in

which the court is able to draw its own conclusions without relying on the expert's opinions.

[71.] Wouter Kuun testified on behalf of the plaintiff. He inspected the resort on 11 February 2016. He testified as to how the security industry operates and what basic considerations are relevant to the provision of security services. He presented certain general security principles that should have been applied at the resort. One of these is the need for dominance of the terrain and the creation of a secure perception. Mr Kuun regarded this as essential in any environment requiring security measures. This involves creating an environment where an opportunist or deliberate criminal would be inclined to go and look for opportunities outside the environment in front of him. That is, if the criminal thought Pine Forest to be a hard target he would move on to easier prey. The desired outcome is that the users of the resort should feel free to carry on with their business. The management of the entity should play a role in accommodating this. Security personnel would have to show vigilance, presence and involvement in maintaining rules, regulations and technical specifications made by the Municipality.

[72.] Mr Kuun emphasised that the provision of a security service needs to be a partnership between a customer and the service provider. Cooperation is necessary because security can never be outsourced in full. Mr Kuun

emphasised the importance of a positive partnership between a security service provider and the employer. A breakdown in such relationship would often result in poor security performance. From the documentation before the court it appears that a proper relationship in terms of contract and contractual specifications and duties was never established between the Municipality and Ceres Alarms. From there the relationship became worse.

[73.] At the outset a security risk assessment should be done. For a resort such as Pine Forest the focus would be on perimeter and protection, access and egress, and activities that take place within the perimeter, such as the residential component, swimming pool, squash court, activity hall and conference hall. The dominant security considerations are access control and terrain security. The Municipality do not appear to have had a security risk assessment before they hired Ceres alarms. This would have involved a careful consideration of the security infrastructure, and threats that the Municipality was exposed to as well as its vulnerability. Mr Kuun emphasised that site procedures were also an essential component of any security service, yet the Municipality could not provide them.

[74.] Mr Kuun drew attention to the Municipality's relevant technical specifications for the provision of security services in the Witzenberg

Municipal area as contained in their security service contract and bid numbered 8/2/5/31. These specifications required service delivery *inter alia*, a closed circuit camera monitoring the entrance and exit gate at the resort; access control; patrolling in the resort, patrolling at the swimming pool and crowd control; and access at the main office. The following personnel were required from 1 December to 31 January and during the summer school holidays, namely; two guards per shift at the gate, and two patrolling the resort including the swimming pool. Access would include control of the entrance and exit, communication with visitors, enforcement of rules and regulations at the entrance gate, frisking and disarming, and compiling an incident logbook. Patrolling required the guards to be fully conversant with rules and regulations; to conduct at least hourly patrols of the resort with a view to the prevention of irregularities; the immediate response to and control of any infraction of the rules; communications with visitors with a view to prevention rather than reaction; compiling an appropriate incident logbook; daily terrain patrols at the swimming pool between 09h00 and 11h00 during the swimming season; patrols of periphery as well as along the fence; monitoring of swimming pool use in terms of specific swimming regulations and times; crowd control and continuous monitoring of the general situation; and noting of all incidents. It is apparent from these specifications that the Municipality had accepted a duty to secure the resort.

[75.] Putting the standard of care of a reasonable person no higher than their own specifications for security services the Municipality would have required four security guards to be on duty at the time of the rape, two of them patrolling the resort including the swimming pool (at least on an hourly basis with a view to preventing irregularities and continuous monitoring of the general situation) as well as the compiling of an appropriate incident logbook. There is no suggestion in the evidence before the Court that such patrol or any patrol took place during the period 16h00 to 17h00 on the afternoon that Ms L was raped. At the time the resort staff, save for a cashier, were at the town hall. The security guards were neither seen by Mrs Louw nor could they be found by the Louws after the rape. Further evidence presented by Mr Kuun established that in fact the Municipality hired the security service it employed on the day of the rape without a tender. They had meant to employ security in terms of a tender and specificaitons but had overlooked to do so. The Municipality's own standards were not required in terms of the makeshift contract that did apply at that time. The logbook required by the specifications is lacking for the day of the rape. Mr Kuun confirmed that compiling an appropriate incident logbook is a standard practice in the industry.

[76.] Mr Kuun drew attention to the affidavit of the Municipal Manager in reply to plaintiff's Rule 35(3) request. The Municipality could not provide a security risk assessment of the resort as requested by plaintiff; nor the contract or letter of appointment for the security services that were to be provided by Ceres Alarms at the resort on 20 January 2009; nor a service level agreement between the Municipality and Ceres Alarms; nor any security risk survey conducted by Ceres Alarms and presented to the Municipality; nor assessments by the Municipality of the security services provided by Ceres Alarm at the resort from the inception of the contract to 20 January 2009. Such documents could apparently not be found.

[77.] The Municipal Manager confirmed that Ceres Alarms were appointed by the Municipality as follows. During 2007 the Municipality launched tender proceedings for the appointment of a security firm at the resort. A number of companies tendered including Iliswe Security and Ceres Alarms. The latter was unsuccessful. The tender was awarded to Iliswe Security. At the end of 2007, as a result of numerous issues with this firm, their contract was terminated with immediate effect. The Municipality then requested quotations from alternative security companies in order to fill the void. Ceres Alarms provided a quote and were appointed on the basis of the quotation alone. The Municipal Manager also referred to a memorandum directed to the acting Municipal Manager on 30 January 2008 which stated that the urgency of the situation made it impossible for

the Municipality to make any appointment in terms of the formal process. Ceres Alarms were the cheapest and were appointed from 13 December 2007 until 31 January 2008. It was hoped that a proper (tender) award would be made by the end of April 2008.

[78.] The quotation by Ceres Alarm's quotation directed to Mr Andre Bosman, the manager of the resort, provided for four day shift security officials from Monday to Sunday and four nightshift security officials at R36 600,00 per month excluding VAT. The quote stated that the price included security personnel selected, recruited, appointed and trained according to the standard of SIRA, and who then obtained on-site training. The tasks carried out by them included the handling of visitors, access control, patrols and proper conduct during emergencies. The security officials would be properly equipped, *inter alia*, with handcuffs, batons, pepper spray and two way radio contact with the control room. Hourly patrols, enforcement of rules and regulations, and the compiling of an incident logbook were not required in terms of the quote as they would have been by tender specification.

[79.] Even though the Municipality advertised another tender in 2008, no security firm was appointed as a result. Ceres Alarms remained in employment up until March 2009 when their appointment was terminated as from May 2009. Mr Nasson went on to say that it was only after

receiving additional documentation from Ceres Alarms that he became aware of the fact that they had not been appointed in terms of a tender procedure, but rather on the basis of their quotation. Therefore previously he had incorrectly made reference to documents indicating what he had presumed indicated the duties of the security company. Those documents were included in a tender that needed to be submitted by the party applying for an appointment. However, as Ceres had not tendered, the specifications would not have been applicable to their appointment. He went on to say that no service level agreement was ever concluded with Ceres Alarms. If one was concluded it was neither in the possession of the Municipality nor Ceres Alarms.

[80.] Mr Kuun then drew attention to another document attached and referred to in Mr Nasson's affidavit. It was directed to the Municipality's Community Services on 12 May 2008 (about seven months before the rape). It dealt with defective security at public resorts. It suggested that securing property in Pine Forest and Kliprivier Park had to receive priority because of the negative publicity surrounding the events. The lack of safety was no longer a rumour. It was supported by fact. Accordingly the resort manager asked for official notice to be taken that the situation was out of control as a result of certain factors, namely; a sub-standard security fence surrounding the property that was easily cut; defective security patrols (as a result of under-manning due to lack of funds); and

lack of follow-up by SAPS, as well as the security contractor. As support for these conclusions it was recorded that more than 20 break-ins had occurred in the previous month. The author called for an urgent gathering of the role players, including the Mayor, Municipal Management, SAPS, the Pine Forest Home Owner's Association and the security contractor. No evidence has been presented to the Court to show that these concerns were ever addressed by the Municipality. This would have required the necessary cooperation and partnership between the client and its security contractor that Mr Kuun described in his evidence.

[81.] In a memorandum directed to the Mayor by the resort manager on 22 May 2008 it was pointed out that besides 20 housebreakings in the previous two months, in the immediately preceding two weeks six caravans and two chalets had also been broken into. Visitors were in the chalets at the time of the break-ins. It was recorded that the situation had to be regarded as very urgent. The only solution was to make sufficient funds available to secure the surrounding fence and entrance, as well as deploying sufficient manpower to keep the situation under control. Again no evidence was presented by the Municipality to show that they responded to this warning. Mr Kuun expressed the view that the R36 000,00 per month paid to Ceres Alarms was not enough to provide for four day security officers and four night security officers (as set out in the specification), together with operational support and profit.

[82.] Mr Kuun then introduced a copy of the minutes of a meeting of the Community Development Committee on 26 June 2008 (seven months before the rape). It recorded that Councillor Adams, with reference to the negative reports about the security situation inside the resort, had requested that the Manager of Resorts report to the committee. His report had indicated that good results had been achieved around the security situation at Dennebos. Police had made certain arrests and it was hoped that this would be a permanent solution. However, the report of the Municipal Manager was never produced.

[83.] On 9 September 2008 the resort manager wrote to Ceres Alarms complaining that the security guards at the two resorts were not performing in terms of the regulations and access conditions. Mr Kuun introduced the monthly report of the Municipality's Committee for Community Development, dated 18 October 2008. It described another problematic situation for the Municipality, namely a shortage of chlorine gas. The remedy it followed was to close the swimming pool to ensure safety. Extending that to the bigger picture – where the Municipality were not securing the resort and were putting people at risk – the answer, according to Mr Kuun, was that the resort should have been closed. This report also stated that a letter had been directed to the security company in relation to their poor patrolling. A request was made for the Acting

Municipal Manager to investigate and file a detailed report by the Committee's next meeting.

[84.] Mr Kuun made further reference to the Municipality's reply to the Plaintiff's Rule 35(3) request. After plaintiff had asked for a job description of the security personnel on duty at the resort on 20 January 2009, the answer was that their duties included patrolling the entry to the resort and patrolling the grounds of the resort, including the swimming pool. It was admitted that these duties were more specifically indicated in the document known as "*Pligte van Sekuriteit: Dennebos Vakansieoord*." This provided, *inter alia*, that all pedestrians entering the resort had to be in possession of a valid season ticket or "knipkaart".

[85.] Mr Kuun then referred to an e-mail from Mr Bosman, to Mr Mzwandile Jacobs, a week after Ms L was raped. It was copied to Mr Nasson. It recorded, *inter alia*, that due to alcohol abuse there had been uncontrolled behaviour at the swimming pool, total disregard for rules and other people's safety and that at least five serious incidents had occurred. There had been incidents of vandalism. The trampoline mats had been cut, recreation hall equipment damaged, and its walls and ceiling defaced (burnt). Fences had been broken. Theft from the caravans and permanent dwellings had occurred. Two cases of assault had been reported. The sexual assault of Ms L was the last and most horrific

incident. It was suggested that there should be more control of the numbers, behaviour, and even restrictions on the use of facilities and movement within the resort. A competent security section was needed on site. It was expressly recorded that "*through the past eighteen months it has been realised that a private company cannot deliver the service needed for control of various facets of a local, public resort.*[39]

[86.] In answer to a Rule 35(3) request the Municipality was unable to provide any documentation relating to the five serious incidents and assault referred to by the resort manager. Mr Kuun expressed the opinion that this indicated a failure of data management, necessary in order to review the past and improve the future. Mr Kuun explained that manpower and technology have to work together through a proper process, procedures and policies in order to achieve secure management. No answer to this was presented to the Court by the Municipality.

[87.] At least three security officers should have been on duty at the entrance of the resort during peak season according to Mr Kuun. A total compliment of six was necessary. In fact according to an affidavit deposed to by Mr Nasson on behalf of the Municipality (in a Rule 21(4) application), during a consultation held by its legal representatives with a security guard (Mr Geldenhuys) who worked the day shift on 20 January

[39] This e-mail constituted an admission not only that the security service at the resort was incompetent but also that Ms Bosman at least had been aware of serious inadequacy for eighteen month before Ms L was raped.

2009 (working access control and patrolling) there had only been two security guards on duty. Sometime previously, when he began to work for Ceres Alarms, there had been six. This was reduced to five and eventually to two. All six were employees of Ceres Alarms. Mr Geldenhuys did not know why the numbers had been reduced. This statement by Mr Geldenhuys accords with the opinion of Mr Kuun as to the number of guards required to secure the resort. It also indicates that by the day of the rape Ceres Alarms had ceased to provide the number of security guards they had quoted for.

[88.] In the circumstances it would appear that six security guards per shift were the desirable number necessary at the resort. The Municipality accepted a standard of four in its specifications. Only two were on duty of the day Ms L was raped. They could not be found on the terrain after the rape. The affidavit of Mr Geldenhuys suggested that there were no patrols at all between 15h00 and 17h00 on that day. The Municipality therefore did not provide for dominance of the terrain as required for reasonable provision of security according to their own specifications.

[89.] In amplification of the question of terrain dominance, activity control and presence of security on the resort, Mr Kuun said that for one person to conduct the security patrol of the resort would be quite a lengthy time process if done properly. There is no record of any patrol monitoring or

patrol management at the time of the rape. Nor was there an incident logbook. Properly managed a patrol logbook describing the patrols that took place on the afternoon that Ms L was raped should have been available from the Municipality. This would have been relied on for purposes of filing a report in the incident logbook.

[90.] Regarding the staff meeting held at the time Ms L was raped, and the absence of all personnel from the resort, save for the cashier and two security guards, Ms Kuun stated that the resort should have requested an additional security officer or two to be placed at the resort at the time. Sufficient notice of the meeting to be held should have been given to affected persons such as the Louws. The resort should have been closed to day visitors at a reasonable time prior to the departure of all the staff at the resort. It is apparent from this evidence that the Municipality abandoned the protection that it was duty bound to provide on the afternoon that Ms L was raped.

[91.] On 3 February 2009 Leon Scholtz of Ceres Alarms wrote to Mr Nasson assuring the latter that their events books were 98% accurate. Between March and May 2008 there were approximately 19 break-in per month on the resort. In July there were three. In August three. In September three. In October, one. In November, two (for the first of these three youths were caught; and for the second, two persons were apprehended.)

During December 2008, a dwelling was broken into for the second time that year. In dealing with solutions from a security view point Mr Scholtz stated that at the time there were two guards per shift. (This included the day Ms L was raped.) Ceres Alarms had since then financed another guard and the Municipality had budgeted for another. In other words on 3 February 2009 some two weeks after Ms L was raped four guards per shift were being proposed. On that basis Mr Scholtz guaranteed better results in the future. Furthermore, Mr Scholtz noted that Ceres Alarms were using armed response personnel to work out of the resort. This cost the Municipality nothing. The visibility of the vehicles were of great help. Ceres Alarms also promised that if they obtained a long term contract they would install cameras which would physically observe housebreakers. Cameras would be financed by Ceres Alarms at a cost of R80 000,00. Ceres Alarms could then put in place the infrastructure to secure the resort. They needed one extra guard per shift and a long term contract in order to lay out the capital to put the infrastructure in place. Mr Scholtz would personally manage security at the resort and positive results would be achieved.

[92.] It follows from all of this that security at the resort on the day of the rape was felt to be inadequate because the Municipality had failed to conclude a proper contractual relationship. A contract was being proposed in accordance with the Municipality's usual specifications. It has never been

suggested by the Municipality that the aforementioned proposal by Ceres Alarms was beyond the means of the Municipality in terms of a proper contract. In fact the correspondence indicated that the resort was making an annual profit of R700 000,00. The content of Mr Scholtz's letter was indicative of the security shortfall at the resort when Ms L was raped there two weeks earlier. Mr Kuun expressed the view that if the resort was being patrolled by only one officer on that day it was totally insufficient. It allowed opportunistic crime to occur. When the swimming pool supervisor went to the meeting at the Municipality at 16h00, area dominance of the pool area was lost. This would have facilitated opportunity for crime. The absence of municipal staff in the whole resort, whether there had been a rape or a fire or a heart attack, amounted to a lack of preparedness to deal with an incident in their absence.

[93.] Mr Kuun then listed the further history of criticisms of Ceres Alarms by the Municipality. On 1 September 2008 Mr Bosman had written to Ceres Alarms complaining that security guards in the two resorts were not enforcing the Municipality's regulations and access requirements. On another occasion Mr Bosman had complained that two dwellings in the Pine Forest caravan park had again been broken into while security personnel were on the property. Mr Bosman concluded that the performance of the security services was below average and a sharp improvement of service delivery was necessary, particularly in light of the

approaching holiday season. Similarly, three weeks after the rape, Ms Du Plessis had written to Mr Jacobs emphasising that Ceres Alarms exercised no access control. People came and went without permits or proof of right of access. On 24 February 2009 Ms Du Plessis again wrote to Mr Jacobs and Mr Nasson emphasising the defective deliveyr of a security service. She stated that there was no direct communication between the office and security; and there was weak to no access control. Security was often confined to a “hokkie” with no persons on patrol. Patrolling of the resort was defective. This had repeatedly been taken up with Ceres Alarms, but to no effect. Visitors were admitted without paying. Access permits were not controlled. Guests moved in and out of the resort without access tickets. Mr Kuun could find no indication that Ms Bosman’s complaints had ever been attended to by the Municipality. Mr Kuun also noted that there was no mention of risk management in any of the minutes of the Municipality’s committee meetings.

[94.] All of the above must be considered in the light of general rules of the Municipality which Ceres Alarms were never contracted to enforce. These provided that a limited number of day visitors were allowed and were restricted to the allocated area. Mr Kuun emphasised that the rules were not applied at all. People walked around wherever they wished to go in the resort. No rules were enforced on day visitors. In Mr Kuun’s

experience squash courts in resorts and sports clubs are locked and access is controlled. In his view open squash courts are a favourable place for mischief to occur.

[95.] Mr Kuun referred to the Municipality's reply to plaintiff's enquiry in terms of Rule 37(4)(b). It was stated that any person who that had access to the resort would be entitled to make use of the playground equipment. During peak season a person would need a ticket to make use of the trampoline which could be obtained at the resort's reception. A person tasked with collecting the tickets at each activity would be supervising this activity. The technical specifications for the resort stated that peak season was between 1 December and 31 January and that it encompassed the summer school holidays. (It is common cause that Ms L was raped within these periods.) However, the Municipality stated that, as the new school term was due to start on 21 January 2009 (the day after the rape) most of the visitors had already left and it was therefore no longer regarded (by the Municipality) as being peak season. In contrast to the specifications the peak season was terminated on Sunday, 18 January 2009. In the Municipality's reply it also admitted that Mr P, a primary school pupil aged 15 years at the time, had sexual intercourse with Ms L. The Municipality was not prepared to make any further admissions in relation to the rape. The Municipality's case was that perpetrators Mr P, Mr O and K were regular visitors to the resort who

were known to the security personnel. On 20 January 2009 they gained access to the resort via the main entrance on production of season tickets. Mr P gained access using a season ticket, whose holder the Municipality was uncertain of.

[96.] From all of the above Mr Kuun concluded that on the day that Ms L was raped the number of security guards at the resort was insufficient. The quality of security service rendered was insufficient, irrespective of any efforts by Ceres Alarms to increase the number at its own costs. The Municipality failed to act decisively to mitigate known risks of crime at the resort prior to the day of the rape. Mr Kuun's view was that there was a long history of incidents and on the day of the rape the security function did not contribute to the prevention of crime.

[97.] Finally, Mr Kuun dealt with expert reports of a Mr Kasaval and a Mr Moodley, the experts relied on by the Municipality. They had concluded that Dennebos was a holiday resort and random instances of theft and disturbances occurred. This comparison ignored five serious incidents and assaults reported by Mr Bosman and of which the Municipality were aware. Mr Kuun disputed that the instances of crime were random. The resort had a long history of break-in and theft (as well as violence). The Municipality's experts also concluded that a high security presence would have created difficulties with the privacy of

guests. Mr Kuun replied that having security in a resort requires emphasis being placed on how security measures of personnel impact on the tourist environment. Showing a security presence and dominating an area was invariably appreciated by almost all guests. Proper management and training of competent security officers would eliminate any difficulty with privacy. Furthermore, the Municipality's experts disagreed with the statement that the security personnel were incompetent. They contended that there was no standard to determine competence. However, the documentation referred to by Mr Kuun established unequivocally that security fell below the standard which the Municipality regarded as reasonable. Furthermore, there was a PSIRA (Private Security Industry Regulatory Authority) course in existence during 2009 which dealt with security for hotels and leisure This would refer to the application of the principles of security management and security operations identified by Mr Kuun at the beginning of his evidence.

[98.] Cross-examination of Mr Kuun did not affect the standard principles of reasonable security referred to by him, nor the statements made by the Municipality against its interests that he identified. Mr Kuun stated that his mandate was to assess the security services provided by Ceres Alarms at the resort. He had before him the documentation referred to in his report and evidence. He had visited the resort on two occasions (25

October and 23 November 2011). Each time he visited the resort he had walked the perimeter. He went through the access control process and examined the security measures in place at the time. The fence was inadequate to address unauthorised access. The resort was an easy target for the criminally minded as its users tended to relax in that environment. Mr Kuun also familiarised himself with the terrain where the rape occurred; namely, the pool environment, the distance to the recreation hall, the squash court, and the distance from where the Louws stayed to the park. He had been provided with the pleadings. He did not consult with Ceres Alarms. It was suggested to him that because he was acting on a *pro bono* basis he had a bias in favour of plaintiff. He denied this. He stated that he was neutral. He admitted that he could not refer to a handbook or written work that had prescribed an industry norm. What he testified to was the best practice according to the majority in the professional security industry.

[99.] The norm for retaining documentation in the industry was five years. If there was a potential claim documentation would be kept until the matter was disposed of. This applied to occurrence books. The present matter had been coming up for a long time. Mr Kuun would have expected the Municipality to have kept every possible document in order to secure it for purposes of the litigation. He therefore criticised the Municipality because it could not find the incident logbook for 20 January 2009, or the

resort's risk plan, site procedures and risks profile, Ceres Alarms' letter of appointment or a service level agreement. Mr Kuun found it curious that an occurrence book did exist for 2009 for the period shortly after the incident occurred, as well as communication prior to the rape. To Mr Kuun's knowledge the security services of Ceres Alarms were terminated due to lack of performance.

[100.] In explaining the basic principles relevant to the provision of security services he had relied upon accredited documentation that was used by major companies such as Chubb, ADT, Omega, G4S Group and Falck. Documentation is accredited by international standards organisation. It is also evaluated by the South African Bureau of Standards. The process also forms part of courses for a Security Management Diploma and B.Tech. which is available from UNISA.

[101.] Mr Kuun had established that on 20 January the municipal staff were not at the resort during their working hours. They were supposed to work until 19h00. They left earlier for a municipal meeting in the town. There were few guests at the resort at that time. Mr Kuun did not agree with counsel's proposition that the more guests there were the more security personnel were needed on the premises. During peak season more staff would be needed because higher access control would be required as well as supervision of activities. The staff would play a critical role in the

security environment because they were all contributors to security. Besides the rape in question most of the crimes committed in the resort were break-ins and theft. There was also an assault. Mr Kuun stressed that the concern was not the break-ins but that the break-ins could become violent. When Mr Kuun was asked for a reason why the resort had to guard against anything other than the crimes that had occurred over previous years he replied that it was essential to create an environment of control.

[102.] He would have secured the perimeter against break-ins. He would have warned the Municipality, and emphasised the necessity for upgrading security. The approach was about being prepared. The issue was not one of over provision. There was a lack of provision in the past that had to be addressed. Security had to be properly managed and operated with the necessary tools, including manpower and technology. The statistics which existed were important. A security risk assessment for the resort would not have been particularly complicated. A dominant common security consideration for access control and terrain security existed in the Municipality's technical specifications. Ceres Alarms were not appointed in terms of these specifications, but as a stand-by company.

[103.] Mr Kuun was criticised under cross-examination for introducing a court judgment into his report. It was put that he was biased. It was suggested

that he did not draft his own report. He replied that he wrote the reports himself on computer. He then gave it to counsel to paragraph. At the request of counsel for the Municipality, Mr Kuun provided his previous drafts. These was admitted in order to test whether Mr Kuun's final report was his own or whether the content was suggested to him. In further cross-examination Mr Kuun admitted that counsel had changed the formatting of the previous document. In his view the sting in the first report was lost. Insofar as there may have been any differences between the reports Mr Kuun attributed this to progress and development in creating a final report.

[104.] Mr Kuun was examined on the introduction of the chlorine gas issue at the pool. He replied that he used this as an analogy: If the swimming pool could not be provided with chlorine to keep it healthy then people were not allowed to swim in it; and if the resort was not safe – as on 20 January 2009 when the staff evacuated it – it should not have been open to the public. He stated that in saying this both inadequacies may have been based on lack of financial resources. His knowledge of the financial situation was disputed, however. I conclude from this line of cross-examination that lack of finance was not a consideration which inhibited the Municipality in its security arrangements on the day of the rape.

[105.] Mr Kuun was asked what more Ceres Alarms could have done to secure the resort. He replied that they should have informed the Municipality that they could not provide security services with two guards, or in the situation that existed at the relevant times, unless the Municipality signed a waiver of responsibility, i.e. that they would not hold Ceres Alarms accountable. Ceres Alarms should have informed the Municipality that there were many risks, that they would provide some guards, but that they could not provide a real security solution. In Mr Kuun's "*world of security*" he would have expected no less from Ceres Alarms as a small security operator. Mr Kuun added that from the documents he had seen there were clear indications that the performance of Ceres Alarms was unsatisfactory. Guards were sleeping and people were allowed to act outside protocols and procedures. Mr Kuun's criticism was founded on the documentation to which he testified leading up to the rape. Mr Kuun expressed the view that Ceres Alarms were grossly negligent.

[106.] Mr Kuun testified that although correspondence by Municipal officials had made him aware that Ceres Alarms were adding people to deploy that was not the full solution. This lay in making sure that those people were performing according to the desired outcome. They had failed in this respect particularly in relation to access control. It was put to Mr Kuun that a substation was manned on the resort during peak season and that a letter in his report, dated 9 December 2008, had referred to the sub-

station; but he did not mention it in his report. He admitted this was so and that it was an oversight.

[107.] Mr Kuun explained that the intention of his report based on documents emanating from the Municipality was to highlight all the complaints that had occurred; and all the referrals to inadequacy in security. These reflected on the supervision and management of the security service being delivered on site. There was a lack of supervision by the Municipality. It had a duty to make sure, whether the number of security guards were adequate or not, that they were properly supervised by management, and where necessary disciplined. The supervision had to come not only from the security company but also from the Municipality. According to Mr Kuun's report management and supervision involved constant evaluation of the service provided to steer security in the right direction. There was no record of adequate management. The correspondence shows nothing more than dissatisfaction by Municipal officials.

[108.] Counsel's sterile riposte was to refer to events after the rape had occurred eg Mrs Du Plessis' letter to Mr Jacobs on 24 February 2009 and to Mr Bosman's letter to Ceres Alarms on 1 September 2008. Counsel then questioned Mr Kuun on Mr Nasson's letter to the Mayor, Mr Bosman and the Acting Director (Community Services) on 23 May 2008. This

states that at a meeting in the Mayor's office on 22 May 2008 it had been concluded that the staff deployed in terms of the contract between the Municipality and the security company was totally inadequate. It was recommended *inter alia* that the Municipality should go into further talks with the security company. It noted that only when Mr Nasson had engaged Ceres Alarms did he discover that it did not submit a tender. This would have serious implications on the safety and security situation at the resort. There was a "major defect" in the technical specs of the tender.

[109.] Counsel then introduced a letter, dated 30 May 2008, directed by Mr Nasson to the Senior Public Prosecutor in Ceres in which he stated *inter alia* that security cost the Municipality about R80 000,00 per month. This did not produce the desired outcome, particularly because of the size of Pine Forest. Offenders were aware of the security, provisions and the set-up there. "*Die Dennebos wat eens ook bekend was vir sy rustigheid het skielik 'n onveilige toeristebestemming geword wat nog meer druk op die vakansieoord plaas.*"

[110.] The letter shows that by May 2008 Municipality was aware that Ceres Alarms were not tied in to a contract that bound them to comply with the Municipality's tender specifications. The Municipality was aware that this was necessary for proper security to be provided at the resort. Mr Kuun

considered that the lack of a tender (and contract) would leave the actual security service and its scope in a state of uncertainty.

[111.] The minutes of a meeting of Committee for Community Development, dated 28 June 2008, refer to the fact that the resort had a profit of R700 000,00. Financial limitation should therefore not have stood in the way of the Municipality rectifying the security situation at least seven months before Ms L was raped.

[112.] Counsel then referred to an incident report by Ms Du Plessis on 20 January 2009, and the report of Mr Bosman to Mr Jacobs and copied to Mr Nasson on 27 January 2009 "*five serious incidents*" and "*two assaults*". It was suggested to Mr Kuun that in the light of these documents that there was no need for the Municipality or Ceres Alarms to cater for an extra-ordinary threat. His answer was that the purpose of security was to mitigate threats that exist. While one could not predict that a woman of 18 was going to be raped in the squash court, if the security effort had been better it would have been far less likely to occur. If there are break-in, particularly if occupiers are in a house or chalet, there is a dramatic potential for assault. If there had been a proper security plan and execution the general threats would have been eliminated. There was a causal connection between circumstances and security measures and eventual incidents. If a proper environment was

not created the risk increased. Had there been a proper security environment there would have been less risk overall.

[113.] Mr Kuun conceded that the housebreakings statistics given by Ceres Alarms to Mr Nasson for 2008 referred to occurences that were not in the immediate vicinity of the playpark, the dam and pool. However, the location of the five serious incidents that had been referred to by the resort manager were never identified by the Municipality. Nor were the two cases of assault referred to. Mr Kuun found it curious that the Municipality seemed to have records for trees falling over during 2008 but no reports about the serious incidents.

[114.] Mr Kuun emphasised that more guards, who were competent and did their work properly, would obviously have contributed to better security. The risk of Ms L being raped would have been significantly reduced if there had been two more security guards on duty creating a safe and secure environment. Significant change would have been made if there had been two guards at the gate, two patrolling and one to relieve them. It was then put that because of the size of the resort each patrol would have taken a number of hours. However, this conflicted with the content of the Municipality's specifications referred to above. Mr Kuun conceded that each patrol would have taken a minimum of an hour. Mr Kuun said, however, that if he had been in control of four security guards and it had

become quiet the senior guard would have remained at the gate and the second one would have been instructed to withdrew and focus on the pool, the recreation area and non-compliance with the rules. That would have been particularly so on the day of the rape because there was no other staff. He would have directed the guards to dominate the last-mentioned area and would have utilised the other two on patrols for the rest. Opportunity was created because there was a lack of dominance in the security system.

[115.] When asked what the chances were of the security guard being present at the trampoline and squash court when Ms L and the youths were there, Mr Kuun replied that these were definitely areas where he would have utilised his tools. The pool and play area were prominent functional areas in the resort. Activities needed to be considered. Had the tools been available that is where he would have deployed his resources. He would have utilised his guards in these areas. He was not saying that he would have posted a permanent guard to watch the children playing.

[116.] Certain content of the affidavit of the security guard, Mr Geldenhuys was quoted to Mr Kuun. He stated, *inter alia*, that during the course of the day he performed regular foot patrol. During one of these patrols he noticed three young boys at the swimming pool. One of them was Mr K. He was known to Mr Geldenhuys as a season ticket holder. Between 14h00 and

15h00 when he was again on foot patrol he noticed Ms L and her mother at the pool. The content of another security officer, Rea Cupido was also quoted. She stated that during the course of the day she was on duty at the gate. Mr K came into the resort alone with his season ticket. Later in the day she saw him swimming at the pool with two boys. Their identity was unknown to her. When asked why more security guards were required in the circumstances, Mr Kuun replied that security was not as simple as identifying boys as posing a threat. The security system had to prevent any opportunity from being exploited.

[117.] Mr Kuun emphasised that the environment created makes transgressors refrain from their conduct when the security is strict and efficient in general. Although there would always be an opportunity waiting to be exploited it is considerably reduced by dominance of the terrain. If there had been a proper security system and effort at the resort the rape would probably not have happened. The poor security and the absence of staff on the resort created an opportunity which was exploited. An environment was created which was undesirable from a security point of view. It was not only the lack of one extra security guard but also the absence of any staff on the resort. Counsel and Mr Kuun agreed that a normal working day for the workers, cleaners and gardeners at the resort was until 17h00.

[118.] Counsel put to Mr Kuun that Mr Geldenhuys had also said in his affidavit that at about 17h00 he was again on patrol and he received a report from Ms Cupido on the radio. He proceeded to the main gate quickly. Ms Cupido said to him that he should apprehend the boys that were standing at Mr Bosman's house on the corner. He left the camp to do so. There just two boys. He had seen them at the swimming pool. When he approached they ran away and jumped over the fence of the resort. He went to the resort and fetched a bicycle and then chased them. He apprehended two boys near the hospital. While they were talking Mr P arrived and handed himself over. It was put to Mr Kuun that the security guard and Ceres Alarms were was effective under the circumstances, even though there were only two guards. Mr Kuun replied that his criticism went to the security process at the resort. There was a lack of normal emergency and incident response procedures. The arrest was an informal process. In general Ceres Alarms were not prepared for incidents. No criticism was directed at Mr Geldenhuys and Ms Cupido. It was the security effort at the resort which was being criticised.

[119.] Finally Mr Kuun reaffirmed that he disagreed with the reports of the experts filed by the Municipality. Firstly, with the use of the words "random incidents and theft and disturbance" which he would have replaced with "*a history of reoccurring incidents.*" Secondly, he disagreed with their conclusion that the resort cannot be deemed to be a high

security zone. These words were misleading. Security is a relative concept. Thirdly, he disagreed with their conclusion that the offences and incidents did not warrant a high security presence, because there had been no contact crimes except a single incident of assault. Fourthly, he disagreed with their conclusions that a high security presence would have imposed on privacy of guests and that a permanent high security presence does not guarantee a reduction of crime. Mr Kuun stated that in a security environment there is no guarantee at all. There are only levels of mitigation of risk. He also challenged their disagreement with his statement that the security personnel were incompetent. They had stated there is no standard to determine competence. Mr Kuun insisted that there were such standards. They would be established when the service provider delivered a service with manpower, technology, and an expected outcome that was measured and achieved. In his view the security effort at the resort was incompetent. Standards existed against which competence could be measured.

[120.] Mr Kuun agreed that a security officer would not simply look at a park and watch the children, regarding them as highly suspicious, and wait for them to commit a crime. However, the presence of a security officer makes it unlikely that rules will be disobeyed because there is somebody watching. The opportunity gap is closed. The Municipality's experts had opined that the circumstances on the day were exceptional due to the

staff attending a meeting. Mr Kuun viewed this as being "*the last bottom that fell out and created the opportunity which led to the rape.*" It further emerged during the cross-examination that the legal representatives of the Municipality had consulted with the accused in the rape.

[121.] At an advanced stage of cross-examination of Mr Kuun, counsel for the Municipality handed in certain documents on which he intended to rely. It then emerged that the documents had not been discovered. Formal discovery was made together with an explanation on affidavit. Counsel for the plaintiff then re-examined with reference to these documents. At the outset Mr Kuun again emphasised his concern that the incident logbook for 20 January 2009 could not be found. It was hard to understand this because entries shortly after that day were found and discovered. Ceres Alarms informed Mr Nasson, apparently on 3 February 2009, that they had found all information in their occurrence book, which was guaranteed to be 98% correct. Occurrence books were available for any investigations.

[122.] After being referred to the evidence of Mrs Theron, that she had read about two or three rapes in the Ceres area in the newspaper, Mr Kuun was then referred to a letter written by the State Prosecutor in Paarl to the Director of Public Prosecutions. After mentioning the rape of Ms L reference was made to her parents concern about rape being perpetrated

by youths in Ceres. The Prosecutor noted that from January 2009 the prosecutor's office worked on at least five cases where youth were involved and that it appeared that there really was a problem in Ceres. From this Mr Kuun concluded that rape by youths appeared to be a problem. A further letter from the Public Prosecutor to the Department of Social Work emphasised the media coverage concerning such problems in Ceres.

[123.] On 30 May 2008 Mr Nasson wrote to the Senior Public Prosecutor at Ceres. He stated that at a recent meeting between management and the owners at the resort the latter had expressed their misgivings about security. This cost the municipality R80 000,00 per month and did not have the desired effect. Plunderers and criminals were causing great damage in the region. The resort which once was known for its tranquillity had suddenly become an unsafe tourist destination. Mr Kuun stated that this letter confirmed the threat about which he had previously testified.

[124.] It would appear that after a meeting of stakeholders at the Council, Mr Chris Kemp, a resident of the resort, wrote an open letter to the Mayor of Ceres, which was published in the Witzenberg Herald on June 6, 2008. It stated that between 25 April 2008 and 4 May 2008 there had been an abnormal number of break-ins at the resort; at least nine on two particular days. He stated further that "*that the security at the camp has been*

*pathetic to say the least since July 2007, when private security firms took over.*" Certain people were frightened to visit the camp. Many of them were elderly and single. He prophetically then wrote in bold "*WHEN WILL ACTION BE TAKEN, WHEN SOMEBODY IS ATTACKED IN THE CAMP !!!*". He concluded by saying "*that the time is now to react before somebody is attacked or murdered …*". Mr Kuun stated that this letter was relevant because it too reflected the threat at Pine Forest and confirmed its vulnerability (to violent crime). In the Mayor's reply on June 20, 2008 he stated that the Municipal Manager had made proposals to amend the tender specifications in order to minimise further criminal activities being encountered. From these exchanges in the Herald during June 2008 it is apparent that the Mayor had been warned of the danger of violent crime and that he recognised that the absence of appropriate tender specifications was part of the security problem.

[125.] During further cross-examination counsel for the Municipality suggested to Mr Kuun that Mr Geldenhuys was on patrol and Ms Cupido at the gate when the rape occurred. However, under re-examination it was pointed out that in Mr Geldenhuys' affidavit he had stated that he had patrolled between 14h00 and 15h00, and again at 17h00; that is, well before and after the rape occurred. Had Ceres Alarms been bound by the standard tender specifications there should have been at least hourly patrols of the resort with the view to the prevention of irregularities and the immediate

response to the control of any infractions of the rules. In the absence of the occurrence book for the day in question the only conclusion to be drawn is that there was no patrol of the resort during the time that Ms L was abducted and raped.

[126.] When he was questioned by the Court in relation to the absence of the municipal employees on the afternoon in question Mr Kuun said that no security effort at the resort could have been complete unless the Municipality was part and parcel of the security solution. The employees would have been moving on the resort conducting their normal day to day duties. They would therefore have been a higher physical presence as well as eyes looking out for breaches of the rules. He would have expected anyone, from a maintenance worker to an employee at the pool area and the playpark to have played a role in relation to any irregularity that occurred in the play area and at the squash court.

[127.] Mr Kuun would have expected Ceres Alarms to have foreseen the possibility that someone could be raped around the playground and squash courts. The expectation expressed in the open letter to the Mayor was representative of such foresight. He would have also expected the Municipality to have foresight of an incident, whether it turned out to be a serious assault, rape or murder. A security practitioner should have had a higher sense of security concern and should have foreseen the

possibility of a serious incident where a person or a person's body was harmed. That was the next step after the numerous break-ins.

[128.] A reasonable security company would be expected reduce the risk. The possible processes that should have been involved included the patrols that were designed for the resort in the specification. Process should determine where their presence was and how often they should reach a point, as well as their duties at a specific point or en-route. Such patrols should have been monitored as to when they took place and where they went. They should have stopped off at the squash courts and the recreation hall. They should have checked for unauthorised activities and potential vandalism. This should have been part of those duties. The play area should have been patrolled because it was a focal point of the resort, as much as the swimming pool. The perimeter was a focal point, but only required patrol in the morning or evening to examine for breaches. Ordinary people should have been observed to establish whether the rules were being broken. That infrastructure could have been prevented the rape.

[129.] The squash court should have been kept closed and controlled for access. Although access to the squash courts was available, it could only be used for its legitimate purpose by feeding the meter and turning on the lights, Mr Kuun also pointed out that after the event the door at the top of

the stairs adjoining the squash court, which had been opened at the time of the rape, was replaced by a grid door which could be locked, and a wooden door could be locked. That would be a typical measure to improve security Mr Kuun said. He also stated that in his experience of resorts and hotels squash courts are usually kept locked. They are a place which people would use for purposes other than those intended. The same applied to the recreation hall which could be vandalised. The play area should have been covered by one camera monitored from the access control point. Coordination of security would have been effective if it was emphasised by the employer through formal weekly meetings with staff together with the security. This would be a money saver. It would advance the security environment against events that were not necessarily foreseen. If such reasonably achievable measures had been taken, Mr Kuun doubted whether the opportunity would have been available for the rape to have occurred Instead an opportunity was created.

[130.] In final cross-examination Mr Kuun stated that he would have left his 8 year old child alone at the pool. He might have gone back to see if everything was still in order, but not with a concern that the child would be molested in the particular environment in which she was supposed to be playing. Mr Kuun agreed that once access to the resort was obtained a person could use the swimming pool and the squash courts. However,

he pointed out that the general rules for resorts and swimming pools in the Municipality expressly provides that "*a limited number of day visitors are allowed and is restricted to the allocated area."*

[131.] Mr Kuun stated that Mr Kasaval's report ignored the fact that security was an issue of an environment that security measures should create so as to eliminate the opportunity to exploit. He agreed that there were no circumstances around the commission of the rape that would have enabled the security personnel to become suspicious of the perpetrators, or take special measures. In answer to Mr Kasaval's proposition that the resort was not a high security facility Mr Kuun replied that his experience of holiday resorts and residential estates was that children left on their own caused numerous problems. He expressed the view that he would allow a six or seven year old child to play at the park if he was staying in the Louw's chalet. That he said was the whole idea of a resort, "*for kids to play and relax.*" He might have considered Ms L playing with the three youths as a security risk, depending on the circumstances. However, he would have been fine with the situation because he had control of it. He could see the trampoline.

[132.] The Municipality's expert witness, Mr Kasaval, confirmed the content of a joint report he had prepared together with Mr Devendran Moodley. They had visited the premises on 15 January 2016. They read the contents of

the SAPS record, and were present during a consultation with one of the accused perpetrators. The starting point for the opinions of both Mr Moodley and Mr Kasaval was that they agreed with the opinion of the Municipality, to the effect that the primary responsibility for taking care of Ms L was that of her parents. As stated above I have reached a different conclusion. One consequence is that both the Municipality and Kasaval start by under-estimating the responsibility of the Municipality for security at the resort. In relation to statement that Pine Forest was a holiday resort with random incidents of theft and disturbance he explained that "*random*" would be the period of occurrences (as and when and where they occurred). They assessed that incidents at the resort did not all take place consistently over time and were predominantly within semi-permanent structures, where different structures were broken into. By security zone he meant an area where one would create a high visibility or a high security presence in terms of guards and cameras for example like a court building.

[133.] Mr Kasaval stated that a routine patrol in the resort would not necessarily have detected a crime that took place inside a building. In his view the security guard (Mr Geldenhuys) performed over and above the call of duty in that he rode out of the premises and apprehended the suspects.

[134.] Mr Kasaval conceded that the rape had occurred on an exceptional day because 18 members of staff had attended a meeting during their normal working hours and had all left the premises at the same time. He acknowledged that an incident of vandalism (that required security attention) was perpetrated when the trampoline was cut. He conceded too that proper security would have had to consider such a risk, and an attempt should have had to be made "*to deter as much human involvement*" there.

[135.] His opinion was that a security officer should dominate an area within secured premises in order to establish the dominance of security. This would create the impression that it was not worth trying anything untoward in the area. However, he added that this did not apply to the resort; but only to events such as rugby matches, where there were a fair number of people or loud crowds gathering. Because there were virtually no people in the resort on the day of the rape he would not have expected a security officer to "*stand in front of someone to create that dominance, alternatively to show a presence.*" In fact he said "*having security at the forefront was undesirable.*" He would want them to be in the background to assist when required. He speculated that a high security presence gave an indication that there was something wrong with the place. On this basis he concluded that there was no threat at the trampolines to warrant a guard or a "*security feature*" being there. His

view of dominance was a guard standing and staring at "*a young female jumping on a trampoline.* Mr Kasaval's notion of dominance of terrain therefore differed from Mr Kuun's. He regarded dominance as guards standing in front of people. He suggested that it was undesirable to make visitors to the resort aware of the security presence, and that the security should only be called upon when required. Mr Kasaval did not seem to appreciate the more subtle form of dominance described by Mr Kuun.

[136.] Mr Kasaval's conclusion was that the offences and incidents that had taken place at the resort did not warrant a high security presence. This would have imposed on the privacy of guests. It would not have guaranteed a reduction of crime. Mr Kasaval says nothing about the effective use of the security resources that were available to the Municipality at the time, or those which it required in terms of its tender specifications. The basis upon which these experts absolve the Municipality from responsibility was that the perpetrators were "*young children*" (not teenage youths); they were known to the security personnel; this was not their first visit to the premises; the security personnel saw them at various parts of the premises; and there was no indication of any misdemeanour of suspicious behaviour on their part. They were not deemed to be threats of any nature. The unfortunate incident occurred within a building.

[137.] In contrast to the facts that this Court has found, Mr Kasaval proceeded from the understanding that no force was used to get Ms L from the trampoline to the squash court. In the circumstances he concludes that additional security personnel would not have prevented the incident from taking place. However, he does not address the question of whether the incident would have been precipitated at all had there been security dominance exercised on behalf of the Municipality on its terrain.

[138.] Mr Kasaval conceded that a security presence was necessary for access control to regulate people entering and leaving the resort; and that the object was to determine whether a person was authorised or not to enter the resort. Another security guard he said should have been on site to perform regular patrols through the resort. He believed that the aforegoing would have been sufficient for this facility. His *raison dêtre* for concluding that the rape could not have been prevented was that whatever security was put in place it did not guarantee that crime would not take place.

[139.] Mr Kasaval assumed that there were two security guards on duty on the day and time of the rape. He regarded this as sufficient. He believed that the absence of 18 staff members from the resort was irrelevant because he did not know where they were supposed to be located. However, had the Municipality been forthright with Mr Kasaval and with the court this

would probably have been known. A question arises as to why they hid these facts. Mr Kasaval regarded the rape of Ms L as a "*once-off incident*". His insouciance is staggering.

[140.] Under cross-examination he confirmed that Ceres Alarms were initially appointed from 13 December 2007 until 31 January 2008. The Municipality hoped that by the end of April 2008 a tender award would be made. He conceded that initially Ceres Alarms had deployed six security guards at the resort during school holidays but that by the day of the rape this had been reduced to two. Mr Kasaval could not explain why there was a reduction to two. He conceded that it was very difficult for one person to patrol the resort.

[141.] He conceded too that, according to Witzenberg Municipality Public Amenities By-Law, no person was authorised to play or sit on the playpark equipment except if that person was a child under the age of 13 years. When faced with the inference that the by-law needed policing he explained that there was no requirement that a security guard had to be there. He conceded, however, that proper security required consistent control and application of the rules and regulations, in particular at the swimming pool. He conceded too that if the perpetrator (Mr P) had been jumping on the trampoline he ought to have been reprimanded and asked to move.

[142.] Mr Kasaval was confronted with Mr Nasson's memorandum to the Mayor and others, on 23 May 2008, recording that the stakeholders had concluded at the previous meeting at the Mayor's office that the staff deployed in terms of the contract between the Municipality and Ceres Alarms was totally inadequate, and that Mr Nasson had discovered that the latter did not submit a tender and believed this had serious implications for the safety and security of the resort. Mr Kasaval commented that he was never asked to investigate this. He could not explain why Mr Nasson had stated that there was a major defect in the technical specifications required by the tender. He agreed that these specifications required two guards at the gate from 1 December to 31 January and two guards patrolling the resort. He was asked to comment on why, two weeks after the rape, Ceres Alarms had stated that they needed an extra guard. He could not explain why the Municipality's specifications and Ceres Alarms required more guards to patrol at the time of the rape than he considered necessary.

[143.] Mr Kasaval conceded that the Say Stop diversion programme, which focuses on psycho-social life skill and development of education, was the programme that the Mayor spoke about to Mrs Theron. He did not disagree that the letter written by the Public Prosecutor to the DPP on 3 April 2009 confirmed that there was a problem with rapes in the Ceres

area at the time Ms L was raped. Mr Kasaval could not dispute Mrs Louw's unchallenged evidence that on the days prior to the rape there had been two security guards at the park sitting on the bench; and that there had been at least four security guards on duty on Sunday, 18 January 2008. Nor could he explain why the Louws were not informed that the number of guards was reduced on the following Monday and Tuesday. Nor could he dispute that on the day of the rape Mrs Louw had seen two guards, a man and a woman patrolling near the chalet. Mr Kasaval stated that he did not investigate where the 18 absent staff members would have been located had they been on duty. He admitted however, that there should be a partnership between the client (represented by the staff) and Ceres Alarms. He and Mr Moodley had considered the number of personnel to be on site in order to cover the known risks in the resort. He conceded that they did not investigate the effect on security of the absence of the staff.

[144.] Mr Kasaval was confronted with Mr Kemp's letter to the Mayor, on 13 December 2007, stating that security at the camp was pathetic and asking whether action would be taken before someone was attacked. He admitted that this was damning criticism of the Municipality. He did not dispute that three months before Ms L was raped, a committee of the Municipality had considered a letter written to Ceres Alarms in regard to its "bad patrolling", and the committee had asked Mr Nasson to

investigate and provide a report at the next meeting. Nor did he dispute that, on 1 September 2008, the resort manager Mr Bosman had written to Ceres Alarms stating that security guards at two resorts were not acting in terms of regulations and access requirements. He admitted that this was a serious concern.

[145.] He understood the duties of security at the resort to include a requirement that all pedestrians that entered the resort had to be in possession of a valid season ticket or "*knipkaart*". Mr Kasaval stated that he had asked to see the tickets of the three perpetrators. He had seen one application for a season ticket, but he had not seen the other two. His attention was drawn to a letter written by plaintiff's attorney to Ms Du Plessis, asking for confirmation that the perpetrator Mr P did not have an admission card. She had replied that two perpetrators had legal cards and Mr P came in on another child's card, Mr Kasaval said that he had taken that up with the Municipality. He was told that because they were children from the area that access control was not strictly adhered to. They could not explain, however, why the security personnel did not ensure that each of the perpetrators had a legitimate access card or season ticket. Mr Kasaval conceded that when it came to access control regarding the three perpetrators, the Municipality might not have done everything that they ought to have done on the day. The guard ought to have verified

who the perpetrator's tickets belonged to. She therefore did not carry out her duties as she ought to have.

[146.] Mr Kasaval was confronted with the resort manager's letter to Ms Du Plessis, one week after the rape, stating that a competent security section should be on site that and during the past eighteen months it had been realised that a private company could not deliver the service needed. He evaded the issue by contending that the security company was not incompetent because the guards were certified, having attended classes and written the exam. He did not dispute that on 1 September 2008 the resort manager had written a complaint that the security guards were still using their own discretion. This could not be accepted. The rule was "*no official permit, no entry*". Nor did Mr Kasaval ever establish why seven days after the rape the manager had said that Ceres Alarms could not deliver the service needed for control. Nor could Mr Kasaval assist the Court in identifying the five serious incidents or the two assaults referred to by the resort manager. Mr Kasaval acknowledged that residents were doubting the safety of women and children in the resort according Mr Kemp's to the Mayor during dated June 2008.

[147.] When confronted with the Resort and Swimming Pool's General Rules of the Municipality and its provision that "*a limited number of day visitors are allowed and (are) restricted to the allocated area*," Mr Kasaval stated that

the allocated area was around the pool. The rule existed at the time of the rape but was no longer enforced because the resort had games and other facilities in which day visitors were allowed to partake in the recreation hall. He admitted that save for the main entrance to the pool area, the pool area was fenced, and had two gates for which locks existed. When he was referred to the technical specification for the Municipality's security tenders, to the effect that patrols at the resort had to take place at least hourly with a view to the prevention of irregularities and the immediate response to and control of any infraction of the rules, Mr Kasaval said that the specification was standard. He did not dispute the requirement, however. He did not dispute that the specifications required four guards at the resort during peak season.

[148.] His only explanation for the fact that the Municipality was able to provide the occurrence book for 5 February 2009, but not one for 20 January 2016, was that the book for 20 January might have been fully written up and replaced with a new one. Mr Kasaval was then taken through certain documentation aimed at establishing that up to 20 January 2009, and thereafter, there were many criticisms and concerns by the Municipality about the service provided by Ceres Alarms. On 12 May 2008 the resort manager had written to Mr Stuurman at the Municipality officially informing the latter that the security situation was out of control as a result of a number of factors including defective security patrols as a result of

undermanning due to lack of funds. Mr Bosman had asked for more funds to be made available. On the following day Mr Nasson confirmed that the stakeholders agreed that the staff deployed in terms of the contract was totally inadequate. Mr Kasaval did not say whether this request was responded to in any way.

[149.] He confirmed that he never established during a consultation with the perpetrator how Ms L was lured from the play area to the squash court. He also never asked the Municipality for any comprehensive security proposal made by Ceres Alarms. He did not dispute the conclusion reached by the investigating officer in the criminal case which stated that "*it looks as if the suspect saw that the victim was not normal and took advantage of the situation.*" Mr Kasaval had "no qualms" about that conclusion. He was unaware that prior to the day of the rape tickets had to be bought for the trampoline. He did not dispute that by simply locking the doors at the top of the staircase and at the back of the hall the squash court could have been secured. He agreed to some extent with the proposition that the Municipality and Ceres Alarms could have established potential threats at the resort by looking at past incidents and current trends within the local community. He could not dispute that there appeared to be a problem in Ceres as far as juveniles and sexual assaults were concerned. He agreed that the rape of Ms L was an opportunistic

crime and that the point of security was to minimise the opportunities for opportunistic crime.

[150.] Mr Kasaval's report and evidence failed to address the substantial proposition put up by Mr Kuun; namely, that dominance of the resort terrain would have operated to prevent the opportunity for Ms L to be raped; and that the effective use of resources available to the Municipality at the level set out in their tender specifications would have prevented the rape; but instead the Municipality facilitated and/or allowed a complete absence of security to exist at the resort at the time when the rape occurred. Mr Kasaval conceded that it would have been ideal to have regular patrols through the area as a deterrent. Although the resort was 26 hectares in extent the security patrols should have focused on the playgrounds and swimming pool (including the recreation hall and trampolines), as well as the living areas. He conceded further that additional security personnel on the premises would have created a more secure visibility and a strong security presence and could have resulted in a reduction of crime. He also conceded that 20 January 2009 was an exceptional day due to the staff meeting. He further conceded that so much time had elapsed between the incident and his assessment that it created difficulty for him to establish the facts. This was not helped by the lack of security company records. Like Mr Kuun he did not have copies of posting sheets or occurrence register entries.

[151.] I reject Mr Kasval's conclusion that the number of security personnel on duty that day was adequate for the intended purpose. Even if I am wrong in this conclusion there is no evidence that Mr Geldenhuys was deployed after 15h00 in order to ensure security. Mr Kasaval's conclusion completely fails to address the absence of resort personnel at the time of the rape, including the swimming pool supervisor; or the opportunity that the Municipality presented to potential wrongdoers. I therefore reject his conclusion that the rape was not due to any lack of security on the part of the Municipality.

[152.] By agreement between the parties statistics provided by SAPS relating to the number of juveniles involved in rapes in the greater Witzenberg Municipality area were admitted as evidence. During 2007 there were 26 relevant sexual offences. During 2008 there were 30. During 2009 there were 23. During 2007 seventy eight sex related offences were reported of which 16 perpetrators were juveniles. During 2008 seventy six cases were reported in which 16 perpetrators were juveniles. In 2009 seventy three cases were reported in which 7 perpetrators were juveniles.

[153.] Negligence on the part of the parties must be tested according to the principles laid down in *Kruger v Coetzee*[40] which were formulated as follows:

"*For the purposes of liability culpa arises if –*

*(a) a diligens paterfamilias, in the position of the defendant -,*

*(i) would foresee the reasonable possibility of his conduct injuring another in (her) person or property and causing (her) patrimonial loss; and*

*(ii) would take reasonable steps to guard against such occurrence; and*

*(b) the defendant failed to take such steps.*"

[154.] During the year before Ms L was raped a plethora of criminal incidents had occurred at the resort. On 12 May 2008 the Municipality's Community Services Committee had been informed by the resort manager that the security situation was out of control due, *inter alia*, to defective security patrols. An urgent request was made for the Mayor

[40] 1966 (2) SA 428 (AD) at p. 430

and Municipal Manager to meet to resolve the problem. On 22 May 2008 the resort manager warned the Mayor that sufficient funds should be made available to deploy sufficient manpower. On 30 May 2008 the Acting Municipal Manager informed the Senior Public Prosecutor that the resort was unsafe. Tens of break-ins, five serious incidents and assaults had occurred. A reasonable executive in the control of the Municipality, which had assumed responsibility for the security of the resort, would have foreseen the very real risk of a very violent incident taking place there. Indeed the Mayor was warned of this possibility in a letter from one of the residents. Mr Kuun testified that an escalation from housebreaking to violent crime was reasonably foreseeable. Incidents of rape were not unknown in Ceres before Ms L was raped. The rape of a resident at the resort was therefore reasonably foreseeable.

[155.] The four basic considerations which influence the reaction of the reasonable person in a situation posing a reasonable risk of harm to another are the degree or extent of the risk posed by the actor's conduct; the gravity of the possible consequences if the risk of harm materialises; the utility of the actor's conduct; and the burden of eliminating the risk of harm.[41]

[41] See *Ngubane v South African Transport Services 1991 (1) SA 756 (AD) at 776 H-J*

[156.] Upon being alerted to the risk of violent crime at the resort the Mayor acknowledged that security had to be addressed by requiring security to be conducted in accordance with the Municipality's tender specifications. These included the deployment of four security guards per shift, with two patrolling and patrols to be conducted on an hourly basis, as well as proper access control. The resort manager and a senior official (Mrs Du Plessis) were aware of the fact that security in both these areas was failing. The acting Municipal Manager directed the attention of Ceres Alarms to these defects. The resort manager informed the Acting Town Manager that for eighteen months prior to the rape a private company could not deliver the service needed to control the resort. Despite the warnings by Mr Nasson to the Mayor, his Deputy, and the Chief Financial Officer, that staff deployed by Ceres Alarms was totally inadequate, and that there was a major defect in the relationship between them and the Municipality (due to the lack of a contract in terms of tender specifications), nothing was done to remedy the situation between 23 May 2008 and the day of the rape. Even though it was the Municipality's intention to put out a tender by April 2008 no tender was advertised.

[157.] No attempt has been made by the Municipality to explain this failure. They had failed to provide security measures which they knew and believed were necessary. They failed to ensure that such security as was in place was properly utilised. Ceres Alarms expressed the view that on

the day of the rape they were undermanned in that there were only two guards on duty; one at the gate and one patrolling. The solution proposed accorded with what the Municipality had intended to do; namely, conclude a formal contract. The Municipality failed to present any evidence or to establishthat it did not have the means to put out a formal tender and to contract on the basis of its normal tender specifications, and enforce such contractual provisions. It was unreasonable of the Municipality not to take steps to guard against violent crime by putting the security at the resort up for tender in terms of its normal specifications. A reasonable person in their position would have done so.

[158.] The degree or extent of the risk of a serious crime being committed was apparent from the concerns addressed in the documentation referred to by Mr Kuun. The gravity of possible consequences if serious crime materialised was immense. The burden of eliminating the risk of harm was no greater than simply putting into force the Municipality's usual tender specifications as it in fact intended to do. The Municipality not only failed to take such steps, but it furthermore abandoned any dominance of the terrain on the afternoon of the rape. No reasonable person concerned about security at the best resort would have done so. The Municipality was therefore negligent in relation to the consequences suffered by Ms L.

[159.] The question then arises as to whether the rape would have occurred had the Municipality taken the reasonable steps above to guard against it. The "*but for*" test determines whether the omission by the Municipality to provide proper security at the resort caused harm to Ms L. This involves an inquiry into whether, but for this omission, the loss probably would not have occurred. Reasonable steps would have involved the deployment on the day of the rape of two security guards per shift at the entrance of the resort and two on patrol; proper access control, and hourly patrols focusing on the risk areas, including the play park, recreation hall and squash court as identified by Mr Kuun, and taking place on an hourly basis. Access control would have had to be maintained at the level suggested in documents before the Court, notably the requirement of a valid season ticket or "knipkaart". The resort personnel would not have been evacuated from the resort without giving notice to the residents and/or closing the resort to day visitors during the period that the personnel were not on site. Had valid tickets been required Mr P may not have been on the resort at the time when Ms L played at the park. Had the resort been closed to day visitors during the absence of resort staff none of the perpetrators would have been there.

[160.] Application of the "*but for*" test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experience.[42] Had the resort communicated the complete absence of staff and security between 16h00 and 17h00 Ms L would probably not have been allowed to play in the park.

[161.] In *Minister of Safety & Security v Van Duivenboden* Nugent[43] JA said the following:

"*A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for the sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.*"

The Constitutional Court has held that this approach does not overlook the importance of applying common sense standards to the fact of the case.[44]

[42] See *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) para [33]
[43] 2002 (6 SA 431 (SCA) para [25]
[44] See *Lee v Minister for Correctional Services 2013 (2) SA 144 (CC) paras [46] and [47]*

[162.] The question posed by counsel for the plaintiff in these circumstances is "*Why was Ms L abducted and raped at that particular time and that particular place on that particular day?*" On the facts proved Ms L was abducted from the trampoline area and physically forced to proceed some distance over part of a putt-putt course and along the length of the outside of the recreation hall. She was then forcibly moved up the staircase outside the squash court and fell in the process. Had two security guards been patrolling the grounds, in accordance with the specifications and the appropriate patrol measures described by Mr Kuun, it is possible that such activity by youths may have drawn their attention. If resort personnel who had left were present on the premises at the time they may have seen the abduction (or even the rape) and may have interrupted the crime, or informed the guards on patrol of what they had seen.

[163.] It was open to the Municipality to lead direct evidence to exclude the last conclusions. They elected not to inform the court where these employees should have been at the time of the rape. In failing to call these witnesses the Municipality ran the risk of plaintiff's burden of proof being relieved. Mrs Louw testified about the regular presence of security guards at the playpark or within eyesight of her chalet. She showed that resort personnel would also visit the park. The specifications required hourly patrols by two guards. All of this was enough to cast an evidential burden

on the Municipality to show that resort personnel would not have observed the abduction. The election not to present any evidence, even evidence which must have been within the knowledge of the employees of the Municipality does not shift the burden of proof. Nevertheless, in the absence of evidence from the Municipality, particularly as to the whereabouts of its own staff, the court is entitled to select – out of two alternative explanations as to whether or not the abduction would have been seen – the one that favours the plaintiff.

[164.] However, for purposes of this judgment it is not necessary for me to go so far. It is probable that had the supervisor of the swimming pool been present the perpetrators would have felt eyes upon them from the outset. The same applies to the other absent personnel. Similarly, the fact that two guards would have been on hourly patrols after 15h00, as the specifications would require them to do, would have given the impression of policing to the perpetrators. This would have discouraged them from risking an abduction and rape. The risk of being seen and apprehended would have been present on their minds.

[165.] Applying common sense the answer to counsel's question is that the Muncipality caused the rape of Ms L. It created a complete security vacuum at the time. Firstly, it failed to provide for security presence required by its own tender specifications. Secondly, it failed to supervise

and enforce the terms of Ceres Alarms quotation; that is, four security guards should have been on duty for the day shift. Thirdly, it failed to ensure that its own access regulations were enforced. Fourthly, it withdrew all but one of the resort staff at the critical time. This situation was created and allowed to exist by the Municipality without informing persons likely to be affected such as the Louws. The perpetrators seized this opportunity to abduct and rape of Ms L. The act and omissions on the part of the Municipality were the probable cause of the rape. Accordingly there is a probable chain of causation between the negligent omissions (and one act) by the Municipality and the rape of Ms L. The Municipality owned, managed and controlled the resort. It failed to appoint a competent security firm to secure the resort in accordance with a contract embodying its usual technical specifications. There is no room for a defence relying on Ceres Alarms status as an independent contractor because the Municipal executive and management were aware that their failure to put out a tender and to contract posed a threat to users of the resort.[45]

[166.] I would therefore uphold plaintiff's claim. Plaintiff is entitled to be awarded such damages as arise from the rape.

[45] See *Langley Fox Building Partnership (Pty) Ltd v De Valence 1991 (1) SA (AD) at p. 197 FG*

**SEQUELAE OF THE RAPE**

[167.] The facts and circumstances surrounding Ms L's disability are not in dispute. The story of Ms L is set out in the report of Annetjie van Niekerk. Ms Van Niekerk met Ms L in February 2000 and worked with her for ten months. Very little is known about Ms L's birth and her early history. According to records she was the third unwanted child of an unmarried mother who quickly wrote her off. When Ms Van Niekerk met Ms L she thought her to be 7 years old. Until January 1996 she lived in an orphanage in Bulgaria. She was then transferred to an institution for retarded children. According to a medical summary her psycho-motor development was slow from birth. At the age of five months she was diagnosed with spastic hemi-paresis in her lower limbs. She was regarded as completely incapable of education.

[168.] Her adoptive parents were two missionaries working in Sofia. They saw Ms L for the first time in March 1998 when they visited the place where she was institutionalised. She was naked and lying under a blanket. She wept when she was touched. The medical staff were expecting her imminent death. Of the 80 children that had been cared for in the institution, very few reached the age of 16 years. Her diet consisted of watered-down yoghurt which she drank out of a steel bowl. It was presumed that she was never allowed to touch the bowl. She spent her

days in a cot with bars which was barely larger than she was. There was no physical space for her to roll over or develop motor function. Her contact with nursing staff was limited to basic care. Because she was the only child who waived the flies away the Louws assumed that she was not as mentally retarded as was generally accepted. They began to visit Ms L regularly.

[169.] In January 1999 they succeeded in having Ms L admitted to the State University Hospital at Sofia. She was about six years old at the time. She weighed only 7.3 kg and was 86cm tall. X-rays placed her age at 2 years, 8 months. She was very neglected, pale, completely passive and apathetic. She suffered from severe malnutrition. A predominant clinical problem with her was acute swollen abdomen. Her hair had been shaved off and her teeth were all rotten. She had full movement in her joints, but limited flexion in her ankles. She was incapable of spontaneous movement. She could not turn her head. She could not make other movements spontaneously such as rolling over. A diagnosis of acute deprivation was made. A controlled feeding programme was commenced, and later movement therapy.

[170.] In November 1999 the Louws brought Ms L to South Africa for one year. Ms L was then investigated by professionals. No pathology was found. A general stimulation programme and physiotherapy began in November

2000. At that stage Ms L was about 7 years old. She could not bear to be on her stomach. She could not roll over. Her legs were usually fully extended. Although it was doubted at first, it was later established that Ms L had no spasticity. The hyper extension patterns of her lower limbs were typical of children with serious malnutrition.

[171.] When Ms Van Niekerk met Ms L she had to be carried into the consulting room and laid down on a mat. She was friendly, smiled and laughed. She communicated well by making “gagga” noises and pointing with her index finger. Some of the words she used were understandable (“look”). She reacted to simple instructions but her reaction required interpretation by her parents (for Ms Van Niekerk’s benefit). Ms L chose to lie on her back on a mat with her arms loose and her legs totally extended. She could only sit if her back was supported and her legs fully extended. If the back support was removed she fell backwards. If she was placed on her stomach she quickly moved to her back. She was still fed with a spoon. She made no attempt to feed herself. Because of her malnutrition her food had to be flattened with a fork. She could only eat a little bit at a time. She had no toilet control.

[172.] Ms L received physiotherapy once a week and occupational therapy twice a week. First there was a focus on sensory motor stimulation. Her hands were very sensitive. She only touched objects with her finger tips. By

April she was learning to crawl, but this made her very tired. Putting weight on her hands was still a problem. A speech therapist was employed. At this stage Ms L still made babbling sounds but also copied words. By the middle of April 2000 she began to crawl on her knees and elbows but she could not lift her head. By the middle of May she began to crawl normally. She could sit independently. By June she could move from her stomach to a sitting position to a crawl; and could carry her weight by kneeling. She found it difficult to stand. She could not bear weight on her hands. By August Ms L had decided to try eating by herself. By then she could dress and undress herself. By November she could move from a sitting position and stand if her hands were held. She spoke about 38 words and could indicate her needs with a babble. She could follow simple instructions. Her weight by then was 18kg. She was 103cm tall. Her year-long hospital permit then expired and she returned to Bulgaria with her parents.

[173.] Louise Frieda Theron testified that she has a BA degree in social work and a Master's degree in management. She is the CEO and manager of the non-profit organisation called "Helderberg Uitreik". It focuses on development, poverty relief and evangelism in various countries. Mr and Mrs Louw are Uitreik's missionaries in Bulgaria. She had known them since 2006. At that time Ms L was a very loving and caring girl, very friendly and well-adapted. Mrs Theron had visited the Louw's in Sofia,

Bulgaria, in 2008 and stayed in their apartment. The Louws returned to South Africa for about six weeks to two months every year. Mrs Theron's office was usually their first stop. After that they would often pop into the office.

[174.] On 20 January 2009 Mrs Theron received a call from Mrs Louw informing her that Ms L had been raped. Mrs Theron was asked to visit Ceres. She did so the next day. At that stage she was aware that there had been several rapes in Ceres which had been reported in the newspaper. On her arrival in Ceres Mrs Theron found that Ms L was no longer her spontaneous self. Usually she would run to Mrs Theron and give her a hug. On this occasion she just remained seated, bent over, moving backwards and forwards.

[175.] Mrs Theron took Ms L to town during the time that the Child Protection Unit visited the Louw. Ms L told Mrs Theron that she had been hurt by "*bad, bad friends*". When they returned to the chalets Ms L agreed to show Mrs Theron where it happened. They went to a play park close to the chalet. Ms L informed Mrs Theron that she had met them there. She said that they took her to a building close by. They walked to the building but when they got to the bottom of the outside stairs Ms L did not want to go up.

[176.] Later a delegation from Ceres Municipality arrived at the chalet. The delegation included the Mayor and others. They had come to sympathise, to give their condolences, and to apologise for what took place in their resort. Mrs Theron questioned the Mayor as to what was happening in Ceres with all the rapes. He replied that they were aware of it and were rolling out a programme to educate the young men and boys of Ceres to respect women. She also asked him why there was no one on the terrain to help the Louws when the event happened. He replied that there had been a meeting at 16h00 and he could not explain why there was no one on the terrain to help the Louws in their trauma. Mrs Theron spent the night in a room in the chalet which she shared with Ms L. She was woken up by noise and movement from Ms L's bed. Ms L was lying on her back. She had pulled her leg up towards her chest. She was crying and moaning and saying "*No! No! Moenie! no!*". Mrs Theron could not tell whether Ms L was awake or asleep. She managed to calm her down with her voice. Ms L turned on her side, but later repeated the same action once or twice.

[177.] Under cross-examination Mrs Theron stated that she had contact with Ms L at least three months out of each year after 2006. This was whenever the Louw's visited South Africa; and also during the two and half weeks that Mrs Theron spent in Sofia with them. When the Louw's were busy reporting back on their missionary work Ms L would sit in the meetings

and chat with Mrs Theron. She was very spontaneous and friendly. She was allowed to play outside with other staff members. During the three day retreat that the organisation usually had for its staff members at Volmoed Ms L was allowed to play at the camp site on her own and unsupervised.

[178.] Mrs Theron said that as a social worker she was very concerned about what was happening in Ceres. The rape of Ms L was about the fourth in a short period of time. After the incident Mrs Theron observed Ms L at the Volmoed retreat. She was not her old self. Whereas previously she had been a spontaneous friendly girl now, "*she was into herself and scared to move this far from her parents.*" She kept her distance from everybody. By the time Mrs Theron testified she was of the view that Ms L was gradually becoming the person she used to be before the rape. Mrs Theron observed that Ms L could dress, eat and feed herself, and also take care of her own ablutions. She could operate the TV, make basic food, and operate the lift to the Louw's apartment. She knew the people in the building.

[179.] Marise Wattel testified that she had been trained as a kindergarten teacher. She qualified in 1970. She had taught at the Cheré Botha School from 1987 till 2013 when she retired. The school dealt with children with special teaching needs. Ms Wattel had been contacted by

a therapist who had asked her to help Ms L. Although Ms L was 11 years old and Ms Wattel usually dealt with children under the age of 6 years she agreed to help. She would see Ms L for three session of two hours when the family were in South Africa every year. Mrs Louw would be present so that she could understand how to stimulate Ms L and help her develop. Ms Wattel was amazed to see how quickly Ms L developed despite the limited number of her lessons; that is, when she considered that Ms L had been confined to a baby bed for the first seven years of her life and had received no stimulation. After the first three sessions Mrs Louw was given work to do with Ms L at the Louw's home in Sofia, Bulgaria. After the sessions Ms L would play on the school grounds with other pupils. On one occasion, after Ms Wattel had stopped giving Ms L therapy, she had sat in a school class for four days. She easily and happily fitted in. By the fifth day she participated in the school's athletics gathering. Usually when Ms L came for therapy and she saw Ms Wattel she would jump up and run to her and give her a hug. Ms L was very spontaneous, friendly and outgoing.

[180.] During early February 2009 Mrs Louw and Ms L visited the school. When Ms Wattel approached she found Ms L sitting between her parents on a bench. She was leaning slightly forward and showed no reaction when Ms Wattel approached. Ms Wattel could get no reaction from Ms L when she attempted to begin her therapy. Ms Wattel bore no knowledge of the

rape at that stage. Ms L appeared to be a totally different child. As a result Ms Wattel stopped the therapy to find out what the problem was. Ms L refused to go to the playground. She went to stand by the window of the room. She looked out and said, "*daar is seuns*", and moved backwards from the window. Nothing like that had happened in the past. Ms L had always been very enthusiastic. As a result Ms Wattel had to call in the school nurse to accompany Ms L to the bathroom. When the Louws explained to Mrs Wattel what had happened to Ms L, she understood why Ms L had withdrawn into herself and could do nothing. She was traumatised. That was the last time that Ms L came to Ms Wattel for therapy. Prior to this meeting Ms L had reached a stage where Ms Wattel had recommended that they should work in the direction of teaching Ms L self-help skills to make her ready for working in a protected environment.

[181.] During October/November 2009 Ms Wattel had attended a conference in Bulgaria. It was arranged by lawyers who eventually brought a court case against the Bulgarian government to improve the treatment of children with disabilities in the country. During her visit Ms Wattel stayed in the Louw's apartment. She slept in Ms L's room. Ms L slept with her parents. Within this safe environment Ms L played well. However, her concentration was bad and she was easily distracted. Ms Wattel attempted to teach Ms L her homework and to provide Mrs Louw with a

programme for Ms L. At that stage it appeared that Ms L's development had been set back a year. It would take time for her to feel safe enough to start again. Ms Wattel noted, during this visit, that whenever Ms L experienced stress she made strange moves with her hands and mouth and baby noises, almost as if she was going back to years before.

[182.] Before Ms L was raped Ms Wattel had assessed her. Her school level was between that of a 7 or 8 year old. Before reaching this conclusion she had tested Ms L's motor, fine motor and cognitive skills, her communication receptiveness and expression, her sociability and self-help. Ms L had also begun with writing, numerals and reading. Ms Wattel concluded that Ms L needed maximum help from doctors and various therapists. She needed full-time play therapy urgently to work through the experience. Ms Wattel had therefore referred Ms L to Elmarie Janse Van Vuuren.

[183.] Under cross-examination Ms Wattel stated that she had agreed to treat Ms L because she had not been near the development of a 6 year old, or ready for a teaching class. Before the rape Ms Wattel had treated Ms L for over a period of three years from the age of 11. Then she had not seen Ms L until February 2009, after she had been raped. After 2009 Mrs Wattel investigated Ms L's reading, writing and performance of tasks in her home (such as gathering dirty washing, helping to make the food and

setting the table). At the time she testified Ms Wattel was of the opinion that Ms L's finer reasoning skill was impaired. The object of teaching Ms L was to enable her to live on her own, but under a measure of supervision. Ms Wattel did not feel she was competent to say whether Ms L had reached a level where she could perform under sheltered employment.

[184.] Before she was raped Ms L's fine motor development had been at a Grade 1 level. So too were her reading skills and numeracy. Her cognitive level was about 7 to 8 years. Insofar as her gross co-ordination was concerned she could play in the play park (on the swings and slide) and she could play outside comfortably. She had participated in an athletics tournament. When Ms Wattel saw Ms L in Bulgaria she seemed better than she had been in January 2009 after the rape, but she was still not her old self. There was a reasonable improvement when she was in her protected environment, far from where the event had happened. It was not a great improvement.

[185.] When questioned about her referral of Ms L to Ms Janse van Vuuren, Ms Wattel stated that children and mentally challenged persons did not have the capacity to give explanations in words. Adults might require psychological help. With children, play therapy was worth gold. They played with various things and through various techniques they were

helped to get rid of their problems. Ms Wattel was a qualified play therapist, but had no practical experience. Therefore she referred Ms L to an expert. Finally, under cross-examination, Ms Wattel stated that by the time of her testimony (when she had met Ms L for the first time since the visit to Bulgaria), she experienced Ms L as an attractive young woman, who had reached her level of cognitive development. She could use a camera perfectly, download the pictures onto a computer and work a computer.

[186.] Dr Beverley Joe Dickman, is a clinical psychologist. She interviewed Ms L on 21 February 2012 and 16 March 2012 and testified on behalf of the plaintiff. Another clinical psychologist Mr Larry Loebenstein testified on behalf of the Municipality. He interviewed Ms L and her parents on 12 March 2014. The expertise of both of them is not in doubt. There were few differences in their conclusions.

[187.] Dr Dickman had been requested to consider the psychological sequelae suffered by Ms L and her adoptive parent as a result of the rape. She had read the reports of Ms Van Niekerk, Ms Janse van Vuuren, Ms Wattel, Ms Hundermark, and a private psychologist, Ms Eloise Uys. The aim of Dr Dickman's report was to track Ms L's reactions and degree of recovery; and also to document the adverse effects of the rape on Mr and Mrs Louw, because their psychological status has a direct effect on

Ms L's well-being and recovery. At the age of 23 Ms L still has special needs and remains very dependent upon her adoptive parents.

[188.] By way of introduction to her report Dr Dickman set out a brief history of the family. Ms L's adoptive parents are missionaries. They worked in Bulgaria from October 1997. At the time when they adopted Ms L they were visiting State orphanages and institutions for disabled children and adults in Bulgaria. They documented conditions there and advocated improved care. They first saw Ms L in an orphanage in Dobromirci in 1998. She was an extremely ill and emaciated girl of about 7 years. She was not expected to survive. The Louw's were informed that she had brain damage and cerebral palsy. They arranged medical care for her. She was later admitted for a lengthy period to a paediatric hospital in Sofia. She was found to have no signs of brain damage. She was diagnosed as severely malnourished and under stimulated. Adoption proceedings were begun. Mrs Louw spent a year in South Africa with Ms L in 2000, primarily to obtain treatment for her, including physiotherapy, occupational therapy and speech therapy. This treatment is summarised in the report of Ms Van Niekerk.

[189.] Within a year, at the age of about 10, Ms L learnt to sit, crawl and walk, and develop speech. Her treatment was first provided at home. Ms L was formally adopted in March 2001. Mr and Mrs Louw established a

private foundation in Bulgaria named after Ms L, which has the mission of improving the lives of destitute children in Bulgaria. Prior to the rape Ms L had developed basic self-care skills such as feeding, washing and dressing herself, but she required some assistance. She learnt to assist with household chores and cooking, and took pride in keeping her own room neat. Ms L enjoyed photography and developed into a sociable and friendly person. She would play with neighbourhood children on her own. She was content to remain with friends when her parents needed to travel for their work. Prior to the rape she had not been exposed to any sex education.

[190.] In dealing with the effects of the rape on Ms L Dr Dickman first referred to the report of Ms Uys who had evaluated Ms L on 16 March 2010. This described Ms L's acute shock and distress. Dr Dickman's report described her reactions as falling into three groups; firstly, persistent re-experiencing of the traumatic event – such as recurrent and intrusive thoughts about the event, nightmares, or intense emotional and/or physiological reaction to reminders of the event; secondly, persistent avoidance of reminders of the trauma and numbing of general responsiveness, for example in diminished interest in activities previously enjoyed and social withdrawal; thirdly, persistent symptoms of increased arousal such as sleep difficulties, difficulty concentration and hyper vigilance. Dr Dickman found that without doubt that Ms L suffered from

chronic post-traumatic stress disorder (“PTSD”); The symptoms persisted beyond three months. These included nightmares, fearfulness of people, (especially teenage boys), social withdrawal, loss of interest in activities, poor tolerance of stress and hyper vigilance. Furthermore Ms L regressed in her language and soiled herself for a while. She was generally anxious and unable to easily separate from her parents. Due to severe concentration problems she was unable to engage with her home education programmes. Her reactions were consistent with international literature on the effects of sexual abuse on people with special needs. According to the diagnostic and statistical manual used by psychologists if symptoms persist beyond three months, then that is considered chronic PTSD. The fact that Ms L deteriorated by about 12 months was quite a significant regression.

[191.] Three years after the rape Ms L had recovered to some extent. She still had distressing symptoms, but these no longer met the threshold of PTSD. She was more able to separate from her parents. She remained afraid of teenage boys. Nightmares still occurred occasionally. Her parents experienced her to be different from the trusting, carefree, enthusiastic persons she had been. They were particularly concerned about her lack of progress with her home programme due to her poor concentration and sensitivity to any stress. They considered putting Ms

L onto Ritalin to improve her concentration, but were dissuaded by Dr Dickman.

[192.] From the early 90's Dr Dickman's job was exclusively to assess complainants with intellectual disability in rape cases. Ms Hundermark was one of her colleagues. At Dr Dickman's initiative the Louw family saw Mrs Susan Manson, a psychologist; because Mr and Mrs Louw required some assistance from a psychologist at that point (6 October 2013). Dr Dickman explained that when one has a dependent who has been traumatised in some way the context is particularly important. The role of the caregivers is vital. The family is offered treatment as well. Red Cross Hospital follows this worldwide standard practice. Therapy for Mr and Mrs Louw would aid Ms L's recovery.

[193.] Dr Dickman supplemented her report after interviewing Ms L again on 24 January 2014. The object of this report was to determine whether it had been appropriate for Ms L to be allowed to play alone in the playground on the afternoon she was raped. This supplementary report dealt with the issue of appropriate independent activity at Ms L's level of disability as well as the explanation by Mr and Mrs Louw as to why they permitted Ms L to play alone in the playground. Dr Dickman expressed the opinion that monitoring a mildly disabled young person is less constant than people who suffer profound intellectual disability. At the

highest level a mildly disabled young adult may be living largely independently at home or in a group home, and travelling independently on public transport to a place of work (with assistance available when needed). A parent or guardian would monitor more closely at times (e.g. when such a person talks about making a large purchase, or making a significant life change.) Constant visual monitoring of such a person's activities would be inappropriate and intrusive. In order to assist such a person to develop as much as possible, responsible parenting should include encouragement of independent activity. Over-protection can be a major block to development. At time of the rape Ms L was actually being encouraged to acquire new skills by her parents. She had made huge strides from the age of about 7 or 8. She was working actively on cognitive skills through a home programme, as well as life skills such as cooking. She was largely independent in terms of the abovementioned functions.

[194.] Ms L was secure in her understanding of the need for care when dealing with dangerous objects in the home (knives and the stove). She enjoyed spending time alone in her room, organising her belongings and occupying herself independently. She was familiar with playgrounds in her neighbourhood in Sofia, which are a popular gathering point for parents while their children play. She was appropriately careful on play

apparatus. She played unsupervised with neighbourhood children. She would sometimes go to the nearby shop independently.

[195.] Dr Dickman concluded that Ms L did not fall into the category of intellectual disability that requires almost constant visual monitoring. According to Ms Hundermark's report her everyday functioning fell into the range of mild intellectual disability. This is comparable in some ways to the age level of 8 to 10 years. Dr Dickman concluded that in her view allowing Ms L to walk to a designated playground, which her family expected to be controlled by a security firm at the resort, and which lay approximately 50 meters in front of the chalet and was visible from it, was an acceptable and appropriate extension of independent activities that Ms L had shown herself to be able to cope with.

[196.] Ms L's idea was that playing alone in the park was an exciting new step. It was undertaken with a sense of achievement. It was an important milestone; a new experience requiring skills Ms L had already mastered. She knew how to get to the playground and back again. She enjoyed periods of self-directed activity alone. She was appropriately careful on play apparatus. She knew how to share apparatus with other children. She had some education about inappropriate touching. Ms L had been taught that no one should interfere with her private parts. No one should touch her body in an intimate way.

[197.] Dr Dickman confirmed that what Mrs Theron had observed in Ms L's bedroom the night after the rape constituted acute trauma reaction. Perhaps partly asleep, partly awake, Ms L was reliving the trauma. That is a documented reaction to trauma in people with or without disability. The description given by Mrs Janse van Vuuren about Ms L's response to the monster man involved an evocative concrete technique, allowing Ms L to express herself and her anger and distress. She showed this, as well as her particular fear of the hands that had hurt her. It was consistent with the trauma reaction. Acute reaction in layman's terms means being overwhelmed with distress. When Ms L was taken to Dr Schneider for vaginal examination she was extremely frightened and overwhelmed.

[198.] Following e-mail correspondence with the Louws during 2013, Dr Dickman concluded that Ms L had regained a level of cognitive functioning similar to her previous highest level prior to the rape. Some factors still had to be dealt with, namely her fear of teenage boys being the main one. However she was enjoying learning again. From Mrs Louw's report on the issue of Ms L considering herself to have been crucified, Dr Dickman concluded that the family was still processing what had happened.

[199.] Dr Dickman believed that the Louws were an unusual family and lived in unusual circumstances. Mr and Mrs Louw experienced unusual levels of distress as a result of the rape. A lot of attention was drawn to the case in a negative way by the authorities in Bulgaria where they were public figures. Having exposed the appalling conditions in State orphanages they were publicly attacked. They also felt an unusual level of distress because, having saved Ms L from certain death, and having undertaken to her that no one would ever hurt her again, she had been raped when they brought her to South Africa.

[200.] The rape adversely affected Ms L's development. Firstly, her parents had to pull back on the ordinary process of encouraging her small steps in independence. As a result of the rape they became more protective in response to Ms L's vulnerability and PTSD. In Dr Dickman's opinion in the years following the rape Ms L would have been more vulnerable to ordinary adversity, illness of a parent or having to be absent from her parent for some reason. Ms L would have more difficulty gaining an understanding of sexuality and her own development as a result of the traumatic and violent way in which sexuality was introduced to her. It would be mixed up with trauma and distress. This is an enormous challenge which will continue for Mr and Mrs Louw. Sex education is always a challenge for caregivers of adults with disability. Sexual trauma makes this even more difficult. In the circumstances above, Dr Dickman

had provided for psychotherapy for both Mr and Mrs Louw as well as Ms L. By the time of her testimony the fee for hour long sessions ranged from R810,00 to about R850,00. Drugs were not necessary in order to treat Ms L. Nor was hospitalisation.

[201.] Dr Dickman confirmed that she and Mr Loebenstein had prepared a joint minute. They agreed that Ms L was in the mild category of mental disability and that she had developed PTSD. Her ordinary development had been set back a year. The experts also agreed that there had been considerable improvement in the symptoms over the years; but that the remaining symptoms required treatment. Dr Dickman disagreed with Mr Loebenstein's conclusion that Ms L's well-being would have been protected, had their been greater personal supervision of her by her adoptive parents on the day of the rape incident. Dr Dickman was of the view that the Louws did not make a mistake about thinking that Ms L could deal with any and all risks. They thought (mistakenly) that they knew what the risks were. However, they did not know about the risk that eventuated.

[202.] Dr Dickman's report suggested that Mr Loebenstein had interviewed Ms L and her parents with a view that establishing whether the parents were negligent. In his report Mr Loebenstein especially took exception to this. He did not expressly say they were negligent. Dr Dickman and Mr

Loebenstein have different theoretical orientations and therefore different approaches to therapy necessary for Ms L. Dr Dickman believed that either or both approaches could be helpful. Whilst they agreed that Ms L's social every day functioning was most important, and fell into a mild category, Dr Dickman pointed out that Ms L had only learnt to speak at the age of 10. By the time she was 18 she could communicate, albeit imperfectly, in two languages and had developed a functional understanding of a third (Bulgarian).

[203.] In cross-examination counsel conceded that there was not much disagreement. Dr Dickman had expressed the view that Ms L was intellectually capable of making a connection between the assault on her body and the crucifixion of Christ. It was put that Mr Loebenstein would disagree. Dr Dickman replied that unless one disbelieved Ms L's parents, Ms L in fact had made the connection. This accorded with Dr Dickman's experience of working with people with this level of disability. If Ms L could make that connection – so it was put – she would be receptive to more conventional psychotherapy than what the two experts had agreed upon. In response Dr Dickman stated that adapted psychotherapy had been applied to people with disabilities internationally since the 1980's. She disputed that she had at any stage denied that regular psychotherapy would be of assistance to Ms L when appropriately adapted. Ms L had grown up in a religious environment. She had heard

the story of the crucifixion repeatedly. She was a young woman trying to make sense of what happened to her. Her disability manifested in the fact that she could not differentiate her experience from that story. She used it to try and make sense of what happened to her. It showed her disability, and not the other way around.

[204.] Dr Dickman confirmed that Ms L had reached her previous level of highest intellectual ability. She seemed to have recovered from PTSD. She is significantly disabled, although this is mild. She has significant deficits. She is therefore going to be limited academically. However, one could not know what opportunities she was going to have to learn and develop and therefore no forecast can be made. Dr Dickman did not agree with Mr Loebenstein that Ms L had progressed from (PTSD) to a stage where she no longer suffered from a fully-fledged disorder, with little or no intervention required from professionals or treatment. What Ms L needed after her trauma was love and support, safety and reassurance. She had received plenty of that. Eventually it was necessary to make Ms L feel safe and secure, rather than rush in with treatment. The symptoms would be responded to as they develop. Once it became clear that Ms L suffered from a clinical syndrome, PTSD, therapy was required. Alerting Ms L's parents to the importance of their own states of mind and dealing with it via Susan Manson amounted to intervention.

[205.] Dr Dickman conceded that 7 years after the rape her initial recommendation of 104 sessions of psychotherapy was no longer necessary. Ms L had done very well. Dr Dickman felt that her parents would also benefit from ongoing support. However she conceded that they too seem to be better. In the circumstances Dr Dickman believed that less therapy was required for Ms L than was originally recommended, but that the family still needed support to deal, for example, with Ms L's sexual development. Dr Dickman, disputed Mr Loebenstein's conclusions with regard to the number of sessions required. She pointed out that the experts came from different theoretical orientations. Dr Dickman's approach would be to accompany the family through the challenges that will be coming with her ongoing development. Ms L is a young woman. She has to learn about her sexuality. It would be necessary to support her parents and make sure that their distress did not get in the way of Ms L's development when they had to talk about something that might be too painful for her parents to manage.

[206.] It was then put to Dr Dickman that facilities in Sofia are not readily available for the treatment that Dr Dickman had recommended. It would therefore have to take place during the limited periods that the Louws spent in South Africa Dr Dickman replied that Ms L would still need treatment for PTSD in two areas. Firstly, she remained cautious about

teenage boys. She needs help with identifying dangers; namely, that there are other kinds of dangers besides teenage boys. Secondly, they would need to work through what happened and find a way to do so that was appropriate to her. This could not necessarily be left to her parents because it was painful for them too. A way would have to be found to help Ms L in her own language, within her own conceptual limitations. She had not had that sort of therapy. Dr Dickman emphasised that the therapeutic exercise she was describing would be very painful for the parents to carry out. She conceded that Ms L had not received such therapy for a number of years.

[207.] The cross-examination then dealt with the points of agreement between Dr Dickman and Mr Loebenstein. Counsel referred to the latter's opinion that Ms L would not have had the social judgment to understand the question and intention of the boys who led her away from the play area. Dr Dickman agreed with part of Mr Loebenstein's statement, to the effect that Ms L's disability was mild. This did accord with the definition in the fifth edition of the DSM5; This was to the effect that compared with typically developing age mates, the person with mild intellectual disability could be immature in social interactions e.g. there may be difficulty in accurately perceiving peers social cues. Accordingly Mr Loebenstein had concluded that Ms L "*would not have had the social judgment to understand the question and intention of the boys who led her away from*

*the play area in the resort in Ceres.*" Dr Dickman agreed with this proposition in relation to what is set out in the DSM.

[208.] The key point of disagreement between the experts is that Mr Loebenstein went on to say "*and greater personal supervision would have vouched her safety"*. The basis of the Municipality's plea in the alternative was set out by their counsel in cross-examining Dr Dickman. Greater supervision in Mr Loebenstein's report did not mean constant supervision of Ms L physically. With constant supervision of the play area to see if other people entered it such people would not have interacted with her and exploited her disability. Dr Dickman replied that this was way outside her knowledge of expertise. It is a matter for the court to decide. Dr Dickman denied that she had said that Ms L was vulnerable to be exploited by other people. That was not Mrs Louw's concern. The concern was rough and tumble.

[209.] Dr Dickman did not dispute that the Louws were aware that Ms L had a limited understanding of social situations and social judgment and was immature for her age and at risk of being manipulated by others. However, Dr Dickman pointed out that this was not decisive of the question. In our our society vulnerable people are entrusted to situations all the time e.g. children to school. Those risks are accepted. The Louw's accepted the small risk that Ms L might fall off a piece of play equipment

in the park. They did not consider a predatory member of the public entering the resort, and posing a risk. Dr Dickman also pointed out that the Louws would not have let Ms L go to an ordinary public playground on her own. That is how they treated her differently from a non-disabled person. Only because they were at the resort and Mrs Louw had checked out possible dangers did they take the opportunity to allow her to play independently. Dr Dickman was of the opinion that the Louws had gone to resort so that there would be some freedom of movement with Ms L. They examined the risks there. They took her disability into account by making sure that she could have an independent play experience in what they saw as a protected place. The fact that Ms L may not have played independently the day before at the park did not alter Dr Dickman's conclusions. Playing in this park alone was a new thing for Ms L to do. Overall it was an extension of her independent activity.

[210.] Dr Dickman stated that it was professionally unpopular to draw an equivalence between an adult with a disability and a child. It was misleading because one had to be aware of what the particular deficit was. However an equivalence is sometimes drawn in a very general way between mild and intellectual disability and the age range from about 8 to 12. Dr Dickman admitted that the Louws would have to take the same precautions with Ms L as they would with a normal child between 8 and 10 years old. Ultimately Dr Dickman conceded that if Ms L had been

more closely supervised her chances of being raped would have been less.

[211.] In my view the conclusion that the greater supervision of Ms L would have vouched her safety is ambiguous for present purposes. The permanent presence of Ms L's parents at the play park might have done so. Anything less might not have vouched her safety. However, the proposition is unrelated to Ms L's mental condition. It amounts to a proposition that if Ms L was permanently supervised by a physical presence of her parents the opportunity for raping Ms L might not have presented itself. The same applies to the presence of security guards. Defendant's proposition does not address the issue pleaded, namely that some characteristic of Ms L rendered her vulnerable to rape in a manner which would attract liability to her parents for letting her play alone.

[212.] Under re-examination Dr Dickman explained that whereas Mr Loebenstein was of the opinion that conventional psychotherapy did not work with people with disabilities, her understanding from her own experience, collegial experience and literature was that since the 1980's conventional psychotherapy had been adapted. People at Ms L's level could engage in psychotherapy more similar to regular psychotherapy. Techniques are appropriate to someone who has a disability. In relation to the number of therapy session Ms L requires Dr Dickman stated that it

would depend on how much Ms L engaged with the process. As she moved more into her identity as a young woman, as Dr Dickman believed she was doing, she would benefit from 20 to 30 sessions over a period of time. Dr Dickman also advocates support for Mr and Mrs Louw.

[213.] Mr Loebenstein's testified as follows. His approach to future therapy for Ms L is that she requires a behaviourally orientated regime that will reduce her safety-seeking behaviour and give her greater functioning. He believes that Ms L does not have the cognitive resources for more conventional psychotherapy. He agreed with Dr Dickman, however, that adapted psychotherapy would be the treatment of choice. His proposed treatment would emphasise behavioural change which would influence her feelings and even her thinking of what had happened to her. She should be taught to trust her environment and so reduce her anxiety. Eight to ten sessions would constitute sufficient intervention.

[214.] Relying on the DSM Mr Loebenstein pointed out that mild mental disability may lead to limited understanding of risk in social situations. He opined that this could "*possibly have been a factor in the incident.*" Ms L would probably have been at risk from any person at the play park, according to the general proposition in the DSM. Mr Loebenstein therefore opined that Ms L's wellbeing would have been protected had there been greater personal supervision by her parents. However, Mr

Loebenstein agreed with Dr Dickman that encouraging Ms L to act independently was a good thing.

[215.] Under cross-examination Mr Loebenstein conceded that in the factual circumstances of Ms L's abduction, the fact that she suffered from mild mental disability played no role. Mr Loebenstein was then presented with a transcript of cross-examination of Mrs Louw conducted by the perpetrator Mr O at his trial. The gist of his proposition was that the perpetrators though that because Ms L was friendly she might have sex with them without protect. However, she did protest so they raped her. Mr Loebenstein also conceded that therapeutic support for Mr and Mrs Louw would be helpful for Ms L.

**DAMAGES**

[216.] Plaintiff has claimed certain future medical and psychotherapy expenses for Ms L. He has also claimed R250 000,00 in respect of *contumelia* and R750 000,00 for general damages for shock, pain and suffering and disability in respect of the enjoyment of amenities of life.

[217.] Dr Dickman and Mr Loebenstein agreed that Ms L would still need treatment for PTSD. Ms L needs to work through what has happened to her and find a way to go forward. She needs to be assisted in

understanding sexuality and her own development. This cannot be left to her parents. Mr Loebenstein conceded that she would benefit if her parents also undergo therapy. The order below will provide for this. It was not in dispute that the cost of hour long therapy sessions would range from R810,00 to R850,00. Dr Dickman's contention was that Ms L would benefit from 20 to 30 sessions over a period of time. Mr Loebenstein said that 10 was sufficient. If adapted psychotherapy would be the treatment of choice it should be tried. In the circumstances I conclude that it would be appropriate to provide for 26 sessions for Ms L and 12 sessions for Mr and Mrs Louw (possibly over two years when the family are in South Africa.) I would therefore award the sum of R30 780,00 for future medical costs.

[218.] Because the heads of damage, claimed for contumelia as well as shock, pain and suffering (etcetera), were the consequence of one and the same omission I shall attempt a holistic process and make a single award.[46] In *F v Minister of Safety & Security*[47] Meer J noted that there is a dearth of cases in which damages have been claimed flowing from rape, and that this is an "*anomaly, given the disquieting incidence of high incidents of rape in our society*". No precedent has been presented to me in relation to rape of a mentally disabled person. I place little reliance on awards made prior to South Africa's democracy because the entrenchment of

[46] Compare *April v Minister of Safety & Security [2008] 3 All SA 270 (SE) at para 18*
[47] *2014 (6) SA 44 WCC at para 56*

personality rights in the Bill of Rights has given these a higher status than previously existed. In my view there is constitutional justification for reassessing principles relating to quantum when a delict strikes the foundational constitutional values of our society as it does in this case.[48]

[219.] In *F v Minister of Safety & Security*[49] the Plaintiff, a 13 year old girl was assaulted and raped by a policeman after he offered her a lift home in a police vehicle. She suffered chronic post-traumatic stress and depression. Her hair had been pulled and her head was hit against the car several times. She was hit in the face and both cheeks. She was thrown on the ground and kicked in her stomach, held by the throat and throttled. Her head and face were swollen. There was a tear at the right side of her lip, although it did not need to be stitched. There were bruises on her arms and body and tearing and bleeding in the genital area from the rape. Damages for contumelia in the amount of R300 000,00 and R200 000,00 for pain and suffering were awarded.

[220.] I was also referred to the unreported matter of *Babalwa Nagqala v Minister of Safety & Security*[50] in which a 22 year old woman was raped by a policeman in his office. She was awarded R225 000,00 in respect of damages for contumelia and R150 000,00 pain and suffering. These

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[48] See **The Law of South Africa** 2nd Ed. Volume 8, Part 1: Delict at para 22 in relation to assault on constitutional values.
[49] Supra
[50] **(ECG Case Number: 676/2011**, delivered on 18 June 2012)

damages were significantly increased because the rape was committed by a police officer at the police station while the victim was in police custody. In *Mnasi v Minister of Safety & Security*[51] a plaintiff aged 25 was unlawfully arrested and detained by two police officials, and assaulted and raped by a police officer whilst she was in detention. A court awarded R425 000,00 in respect of contumelia in 2014. The present value of the award is R451 765,00.

[221.] In awarding a globular amount of damages I take into account that the act of rape was not perpetrated by the Municipality or its servants. Nor was intention attributable to any of them. However, as an organ of state, the Municipality is required to be accountable and responsive[52], and to take responsibility for its omissions. It had access to the police docket and the record of proceedings at the criminal trial of the perpetrators. These would have indicated that the genitalia of Ms L were torn and bloodied and that the DNA of a perpetrator was found there. The Municipality persisted nevertheless, until the fifth day of the trial (24 February 2016), in asserting the denial in its original plea that Ms L had been raped. When the Municipality had been requested, in a Rule 37 pre-trial conference (during January 2015) to admit the rape, it was only prepared to admit that the perpetrators were aged 15 and 13 respectively, that they pleaded guilty and were found guilty and convicted

[51] 2015 (7K9) QOD 18 (ECG)
[52] See S152 (1)(a) of the Constitution and see *Lee's* case (supra) para [70]

of rape. The Municipality therefore placed a burden on Ms L to prove that she was raped when it was apparent that she had been. This despite Ms Hundermark's caution that Ms L should not be called upon to testify and that the experience would traumatise her. The approach of the Municipality added insult to her injury and it further violated her dignity.[53] A remedy for injury should be given when words or conduct involve degradation or an element of insult.*[54]* This translates into damages.

[222.] A defendant in delict must take its victim as it finds her. The circumstances of Ms L differ considerably from the cases that the court has been referred to. The relevant facts are set out in the reports of Ms Van Niekerk, Ms Hundermark and Ms Wattel. The nurture of Ms L in Bulgaria was such that at the age of 6 or 7 she weighed 7.3kg. At that age she had to be taught to sit up, crawl, walk, talk and feed herself. She suffered from severe sensory motor deprivation because she had never been touched and had been confined to a cot so small that she could not turn over. During the next seven years with love, therapy and attention, she developed her faculties and reached the level of a grade 1 child. She could participate in athletics and play football. When she was raped her development was set back a year. She was reduced to her childhood babble and a trance like state. She was pushed into a pit of chronic post-traumatic stress disorder. She was afraid to venture out of doors or to be

[53]Compare *S v M (1999)) SACR 664 (CPD) at 673 f to h*
[54] See *Mhlongo v Bailey and Another* 1958 (1) SA 370 at 372.

in the company of older male children. At the time of trial she was still not her previous self. Ms L perceived her experience as crucifixion. She has never forgotten it.

[223.] While the therapy described above may assist her rehabilitation and provide a tolerable reconstruction of what she experienced she has nevertheless had to endure the confused traumatic burden of her experience until the present. The cases to which I have been referred did not have to address loss of amenities of the above nature or extent in the form of a retardation of development. They do not address the delicate situation of *injuria* by rape on a mentally disabled person. To follow the awards granted in previous cases without more would ignore this. Those awards did not deal with the appropriate value to be placed upon the loss of dignity of a victim such as Ms L. This court is bound to do so.

[224.] In the circumstances the appropriate award of damages for contumelia, shock, pain, suffering, and disability in respect of her enjoyment of amenities of life is R750 000,00.

[225.] Costs must follow the result.

[226.] In all the circumstances I make the following order:

[226.1] The Municipality shall pay damages to the plaintiff in the amount of R780 780,00, together with interest thereon from date of judgment;

[226.2] The Municipality shall also pay plaintiff's costs of suit, including the costs of the Rule 21(4) application which stood over for later determination; such costs to include the costs incurred in the employment of two counsel.

[226.3] The Municipality shall also pay the third parties costs of suit.

**DONEN AJ**