

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5037/2012

In the matter between:

LIZELLE JOLENE BERGMAN

Applicant

And

MINISTER VAN VEILIGHEID EN SEKURITEIT

Respondent

HEARD ON: 6 AUGUST 2015

JUDGMENT BY: RAMPAL. J

DELIVERED ON: 17 SEPTEMBER 2015

- [1] These were action proceedings. The plaintiff sued the defendant for payment of R500 000 delictual damages. The action was defended. The hearing endured for a number of days, the first of which was on 22 April 2014 and the last on 6 August 2015. On that day I heard closing argument and reserved judgment.
- [2] By agreement between the parties I made an order whereby the merits and the quantum were separated. I made the order on 22

April 2014. The evidence as regards the merits was then presented for adjudication.

[3] The version of the plaintiff was narrated by five witnesses, namely:

- Ms Lizelle Joleen Bergman, the plaintiff;
- Ms Bonja Charlotte Marina Gysman, the former wife of the property owner;
- Mr Mohau “Shorty” Ratilo, a private security guard;
- Mr Antony Gysman, the property owner and
- Mr Quinton Griffen Matthews, the property owner’s friend.

[4] There were eight witnesses who testified for the defendant, namely:

- Captain Krisjan Johannes van Wyk;
- Constable Moipone Elizabeth Moea;
- Captain Nomsa Gladys Jimlonywe;
- Constable Lesego Aaron Pudumo;
- Warrant Officer Nkopane Chalres Masia;
- Constable Solomon Mjoni Ntuli;
- Constable Sipho Gift du Toit and
- Mr Eric Deysel.

[5] The following facts were common cause or facts which, though denied, were not seriously disputed:

Ms Bergman and her friends visited Mr Gysman on Saturday 25 February 2012. By midday they were already on the plot. Mr Gysman left the plot later that evening. He went to watch a rugby match on tv at a friend’s house. Not long after his departure Mr

Ratilo saw a group of intruders jumping the house security wall onto the courtyard. He rushed to the house, and warned the three ladies about the imminent danger. On his way back two members of the group aggressively confronted him outside the kitchen door. X, the gunman, struck him with the butt of the gun and threatened to kill him.

[6] Mr Ratilo broke loose and ran to an adjacent plot number 1.... where he sought help. He reported to Sylvia, a neighbour's domestic worker, that Mr Gysman's house was under attack. The incident was then reported to Sylvia's employer Gayle. The latter sent an sms to Ms Gysman's daughter, Antonia. Through those three intermediaries Mr Ratilo's report was brought to the attention of Ms Gysman at plot 1.... S..... B..... Gayle's plot number 1.... was situated between plot 1.... Ms Gysman's residence and plot 1..... Mr Gysman's residence. By then Mr Ratilo had gone into hiding.

[7] Ms Gysman called Mr Anthony Gysman, Mr Piet Gysman, the former's brother, Mr Egan Gysman, her son and Bloemspruit Police to inform them about the housebreaking on the plot known as 1.... S..... B..... and stressed that the plot was not in Statsiestraat – (see exi c). She could not remember the name of the police officer to whom she reported the matter. She had no independent recollection of the exact time she called the police. She explained to the police woman that the housebreakers had already assaulted the plot security guard and that there were fears that they would also assault the visitors in the house. Her request was that the police must immediately go to the scene to

prevent further harm. She told the police woman that the housebreakers were still on the plot. Her successful call to Bloemspruit Police was at 20:02 the number she used was telephone 051 503 4000.

- [8] Mr Anthony Gysman was at Grasland where he was watching rugby with Mr Matthews and others when he received a call from Ms Gysman about the burglary. He called the police number 10111 at 19:56. He also received a call from his brother Mr Freddie Gysman who also lived on the same plot. The brother's cellphone number was 082 3..... The brother enquired about the burglary seeing that he was not on the plot at the time. The rugby match under the auspices of the Super 15 Series would have started at 19:20 and ended at 20:45. He could not say the exact time he left Grasland. He estimated that he probably left at any time between 20:30 and 20:45. The distance between his plot and that of Mr Matthews was approximately 4km. He drove home to ascertain what was going on.
- [9] On his arrival he beamed his house and saw two strangers in the passage. He hooted and Ms Bergman and her two friends escaped from the house, through the bedroom window, jumped over the wall and jumped into his car. Ms Bergman was completely naked and she was bleeding. She told him the housebreakers had raped them. He immediately rushed them to Bloemspruit Police Station. He complained to W/O Masia about the police failure to respond to Ms Gysmans earlier telephone report. He angrily demanded that the police rush to his plot because the suspects were still on the scene when he left. The

police accompanied him to the plot. When the police came to the plot the intruders or housebreakers or rapists were gone.

- [10] Mr Matthews also drove from his plot at Grasland to Mr Gysman's plot at Bloemspruit later that same evening after he had received a call from Mr Gysman. Before he drove off he called his nephew, Mr Hendrik van Wyk, a police officer stationed at Navalsig Police Station and asked him to investigate Mr Gysman's complaint that the intruders were still in the house; that the police had still not arrived and that he was driving out to fetch them. He arrived there at more or less the same time with the police. He could not recall the exact time he and the police arrived at the scene. He took the 3 young ladies back to Bloemspruit Police Station so that they could make their statements. He noticed that they were injured.

- [11] Ms LJ Bergman resided at 20 Franklin Joshua street, Heidedal in Bloemfontein. Mr Anthony Gysman resided at plot 171 Stasieweg Bloemspruit also in Bloemfontein. The two were relatives. On Saturday 25 February 2012 Ms Bergman and her friends, Ms Deidre van der Byl and Ms Zaneva Confidence van Schalkwyk paid Mr Gysman a visit. At about 19:30 Mr Gysman left the plot. The three young ladies remained behind with Mr Ratilo. They were watching a movie on DStv when Mr Ratilo rushed in and warned them that there were intruders outside on the plot. They locked the doors save for the door of the lounge because they could not find its key. Ms Bergman saw two armed men outside the house in the hallway trying to break the window. She and her friends ran away from the lounge to hide in the main bedroom.

- [12] The intruders broke into the house through the main door of the lounge, proceeded to the main bedroom, forced their way into the main bedroom where the gunmen demanded money from them. The intruders then ransacked the house but found no money. During the course of the search for money, she and her friends were now and then assaulted. Ultimately the gunman raped her. His companion raped Ms D van der Byl.
- [13] After the two rape incidents the three ladies were taken to one of the bedrooms. At that moment Mr Gysman arrived. The housebreakers ran out of the bedroom. The three ladies ran out of the house to Mr Gysman who took them to Bloemspruit Police. Soon after their arrival at the police station they returned to the scene accompanied by the police. During the course of the evening they were taken back to the police station by Mr Matthews for interviews by the police.
- [14] Captain Jimlongwe interviewed Ms LJ Bergman. She took a witness statement. The statement was signed and attested on Saturday 25 February 2012 at 22:30. There was no mention in the statement of the fact that the plaintiff in other words the victim was raped (vide 7 exi b). There was no indication *ex facie* the statement, of the time the interview commence.
- [15] Constable Moea interviewed Ms D van der Byl. She took her witness statement. The statement was signed and attested on Saturday 25 February 2012 at 21:30. The statement contained an averment that the victim was raped as was Ms Bergman.

Again the time at which the interview commenced was not indicated.

- [16] Student Constable Polumo interviewed Ms ZC van Schalkwyk. He took down her witness statement. She stated that she was assaulted and undressed but that an imminent attempt to rape her was foiled by the arrival of Mr Gysman seconds before she was sexually penetrated like Ms Bergman and Ms Van der Byl. Her statement was signed and attested at 22:06 on Saturday 25 February 2012. There was no implication of the time the interview started.
- [17] Among the police on the scene were W/O Masia, Constable Ntuli and Constable Du Toit. There were no less than ten police officers all in all and no less than three police vehicles. Two of the vehicles were identified as BSC220B and BNV360B. The South African Police Service is a client of a company called Digicore Fleet Management (Pty) Ltd. Each of the aforesaid two police vehicles was fitted with a tracking device called c-track. The device was designed to record movements, time and location of a vehicle at any given moment with the aid of a GPS (Global Positioning System) information. Mr Eric Deysel, a representative of the aforesaid company presented a movement report in respect of each of the two vehicles. As regard the movement report in respect of police vehicle BSC220B, see page 33 exi b. As regard the movement report in respect of police vehicle BNV360B, see exi e.

- [18] Captain CJ Van Wyk was responsible for the upkeep of the crime administration system at Park Road Police Station. The police radio communication system was functional on Saturday 25 February 2012. The incident was reported to the Park Road Flying Squad at 10111 in the evening by Mr Anthony Gysman. The flying squad transmitted the incident report to Bloemspruit Police that same evening. The incident was then broadcast on the police radio channel. All the police stations and all the police vehicles equipped with the radio voice channels would have received the incident report. According to the report the suspects were still on the scene at the time the flying squad unit received the incident report. The police drove to the scene. This concludes my summary of the common cause or undisputed facts.
- [19] The issue in the matter was twofold. The first leg of the issue concerned the time the police received the incident report. The second leg thereof concerned the time the police arrived on the scene.
- [20] On behalf of the plaintiff Mr Maree argued that the Bloemspruit Police received the incident report from Ms Gysman while the suspects were still on the scene but that they failed to rush to the scene immediately. He, therefore, submitted that had the police promptly reacted to the telephonic report the suspect could possibly have been arrested and rape of the plaintiff could possibly have been prevented.

- [21] Ms Van Rhyn, counsel for the defendant differed. She argued that the police drove out to the scene without any undue delay after they had received the incident report by Mr Gysman in person and not the alleged earlier incident report by Ms Gysman over the telephone. Accordingly she submitted that, notwithstanding the quick response of the police, the suspects had already fled from the scene by the time the police arrived and that the police could not have done anything to prevent the raping of the victim.
- [22] The plaintiff's claim is founded in delict. She was a victim of sexual violence. She was raped by an unidentified criminal. The sexual assault violated her dignity, her freedom and security of her person. Her rape by the unidentified man was the direct cause of the delictual damages she suffered. However, the plaintiff asserts that the police were the indirect cause of the delictual damages she suffered. She contended that the Minister of Safety and Security was responsible for her suffering and therefore, delictually liable on account of the alleged wrongful omissions of the Bloemspruit Police who, at all times material to the incident complained of, were acting within the course and scope of their employment as servants of the state as represented by the responsible minister. She averred that the police officers concerned were executing their official duties at the time unknown criminals sexually and violently impaired her enjoyment of her fundamental rights and freedoms.

[23] At the trial before me, the plaintiff had to establish the following in order to succeed:

- 23.1 that the police, in particular those stationed at Bloemspruit Police Station, owed her a legal duty to protect her;
- 23.2 that captain Jimlongwe and W/O Mosia acted in breach of such duty and did so negligently;
- 23.3 that there was a casual connection between such negligent breach of legal duty and the delictual damages she ultimately suffered.

[24] In her particulars of claim the plaintiff pleaded:

“8.2.3 Dat hul nie binne ‘n redelike tydperk hul statutêre plig uitgeoefen het om misdaad te voorkom nie.”

There was no specific allegation that the police owed her a legal duty to ensure that she enjoyed her fundamental rights such as her right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy as well as the right to freedom of movement.

[25] The core powers and functions of the South African Police are:

- 25.1 the prevention of crime;
- 25.2 the investigation of any offence or alleged offence;
- 25.3 the maintenance of law and order; and
- 25.4 the preservation of the internal security of the RSA.

Section 205 of the constitution provides, in addition to the spherical structure of the national police service (vide ss(1)) and the establishment of its powers and functions through national legislation (vide ss(2)), as follows as regards its objects:

“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.” (vide ss(3))

- [26] The legal duty imposed on the state by the constitution may be negative or positive in character. The negative component of such duty, on the one hand can be encountered where the state and its organs are obliged not to perform any act that infringes fundamental rights. The positive component, on the other hand, can be encountered where the state and its organs are obliged to provide appropriate protection to everyone through laws and structures designed to afford such protection.
- [27] The law imposes a particular duty on the state to protect women against all forms of violent crime in general and sexual abuse in particular. The police are the primary agencies of the state responsible for the protection of the public in general and women

in particular against violent crimes. The prevention of crime, just like the investigation of any alleged offence, is a constitutional imperative of the state. Once an on-going crime is reported to the police a legal duty to act arises, a duty owed by members of the police to members of the public concerned.

- [28] The existence of such a duty was never disputed or questioned in the instant matter. In view of this tacit admission by the defendant, I am satisfied that the plaintiff established on a balance of probabilities that the police in general and the Bloemspruit Police in particular - owed her a legal duty to protect her against all forms of violent crimes in general and sexual abuse in particular. The first leg of the test is, therefore, determined in favour of the plaintiff.
- [29] The second leg of the enquiry requires me to determine whether the aforesaid Bloemspruit Police acted in breach of such legal duty and did so negligently.
- [30] The police are the primary agency of the state responsible for the protection of the public in general and women in particular against violent crimes. Sometimes the police discharge the duty to the satisfaction of victims of crime. At times they fail to do so. It does not follow, however, that each and every breach of that legal duty entitles a crime victim to delictual damages. Whether or not a victim, in any given case, is entitled to damages in delict depends on the particular facts of each case.

- [31] The appropriate common law test for determining the wrongfulness of omissions in delictual actions for damages in our law as it applied prior to the dawn of democracy was refashioned in the decision of **Carmichele v Minister of Safety and Security & Another** 2001 (10) BCLR 995 (CC).
- [32] I now proceed to examine the facts in order to determine whether the police acted in breach of the legal duty and did so negligently. W/O Masia and Constable Ntuli patrolled the neighbourhood of Bloemspruit for two hours that evening. Constable Ntuli corroborated the evidence of W/O Masia. It would appear that Bloemspruit was a high crime spot at the time. The defendant was well aware of the situation. According to the evidence of Constable Du Toit, a special police unit was dispatched from Welkom to Bloemspruit. The unit was deployed for the purpose of reinforcing the strategy of crime prevention in that neighbourhood.
- [33] Constable Du Toit was ordinarily attached to a police unit based in Welkom. However, on Saturday 25 February 2012 he was in Bloemfontein. His unit was deployed at Bloemspruit. He reported for duty at 19:00. His unit was specifically deployed to carry on a crime prevention operation in that neighbourhood. They were using relatively new police vehicles which were not yet equipped with tracking devices. The vehicles did not even have the customary blue lights at that stage. In order to determine whether the police committed any breach of legal duty. The first question requires me to ascertain the time the police received an incident report.

[34] Ms Bergman testified about the time factor as follows:

At 18:30 Mr Bergman drove away from the plot.

At 19:45 she saw the perpetrators in the hallway.

At ±21:00 the perpetrators fled from the scene more or less at the same time she and her friends escaped from the house. Mr Gysman rushed them to Bloemspruit Police Station. They travelled for approximately 5 minutes at least or 8 minutes at most to get to the police station. Based on her evidence and deductions drawn from it, the police must have received the verbal incident report from Mr Gysman at or about 21:08.

[35] Ms Gysman testified about the time factor as follows with the aid of her cellular data ex MTN:

- At 19:50:05 she (user of cell 083 560 7197) called Mr Gysman the (user of cell 082 444 9755) but he didn't answer.
- At 19:55:52 she called him, reached him and told him about the burglary.
- At 20:00:21 she called her ex brother in law Mr Piet Gysman the (user of 082 386 5809) and informed him about the burglary incident
- At 20:01:51 she called her son Mr Egan Gysman (user of 082.....) and informed him about the burglary incident.
- At 20:02:49 she called Bloemspruit Police at +2751 503 4000 and reported the incident. Vide 12 exi b.

[36] Mr Ratilo could not testify about the time factor save that the incident took place at dusk. However, if the testimony of Ms Bergman is correct as regards the time she first saw the perpetrators, one can take an informed guess that Mr Ratilo must have seen the perpetrators shortly before 19:45. Ms Gysman received Mr Ratilo's report via Sylvia, Gayle and Antonia. There was no evidence as to the time Gayle actually sent the sms to Antonia. Similarly there was no evidence as to the time Antonia received such cellular text. Notwithstanding those two gaps, we know that by 19:50:05 Ms Gysman was already busy trying to call Mr Anthony Gysman in order to inform about the burglary and the assault. From all this it can reasonably be inferred that Mr Ratilo indirectly reported the incident to Ms Gysman shortly before 19:50. But Mr Ratilo had no personal knowledge as to the time the incident was reported to the police.

[37] Mr Gysman testified about the time factor with the aid of cellular data ex Vodacom (vide 7 exi b).

- At about 19:20 the rugby match would usually have started.
- At 19:30 he left the plot.
- At 19:55:50 he received a call from Ms Gysman and heard about the burglary.
- At 19:56:59 he called the Police Flying Squad at 10111 and reported the burglary and that the suspects were still on the scene.
- At 20:45 the rugby match would usually have ended.
At 20:13:32 he received another call from Ms Gysman that the police were still not yet on the scene. Sometime after

the rugby match had ended he decided whether to go and investigate what was going on. He then drove home at ±20:45.

- [38] Mr Matthews testified about the time factor. In the evening of the day in question he had a few friends on his plot at Grasland. Among them was Mr Anthony Gysman. They spent the evening watching a rugby match. He could not recall whether Mr Gysman was already there when the match started or not. He could not, in fact recall at what time the kick-off was or at what time the referee blew the final whistle. His recollection of the match as a whole was very poor.
- [39] Mr Matthews corroborate the evidence of Mr Gysman that he did not immediately leave after the first call he received from Ms Gysman; that he continued to watch the match and that he left sometime after he had received a further call from her. By then the match had already ended. The cellular data supplied by Vodacom showed that Mr Gysman received a second call from Ms Gysman at 20:13:32 on 25 February 2012 and the third and last call from her on that day at 22:46:17.
- [40] Captain Van Wyk testified that the Police Flying Squad received the incident report at 19:57. At 20:03 the information about the incident was transmitted to Bloemspruit Police Station where it was received by W/O Masia. The warrant officer attended to the message relayed to him at 20:04. The report was transmitted by way of a radio announcement and heard by all the members of the South African Police Service in Bloemspruit area. (see 40 exi

– b). The incident was reported as house breaking. It was indicated in the report that the suspects were still on the scene at the time the report was made. It was common cause, therefore, that the Police Flying Squad received the incident report for the very first time at 19:57. However it was in dispute as to whether the Bloemspruit Police received the incident report from the Parkroad Flying Squad at 20:03.

[41] The next question I have to determine concerns the time the police arrived on the scene. The question is closed related to the time Mr Gysman visited Bloemspruit Police. Constable Nduli confirmed that Mr Gysman was in the charge office that particular evening. However, he was not in a position to give evidence of the precise time Mr Gysman personally reported the incident.

[42] The rest of the police witnesses, namely:

Constable Jimlongwe, Constable Moea and student Constable Polumo could throw no light on the matter relating to Mr Gysman personal visit to Bloemfontein Police Station. As regards Constable Du Toit, he had no personal knowledge of Mr Gysman personal report of the incident to Bloemspruit Police.

[43] The testimony of Mr Deysel was that the police vehicles with registration number B..... was parked at Bloemspruit Police Station immediately before 20:06. He testified that at 20:06:34 the vehicle left the police station and proceeded to Stasie Street. The vehicle reached Stasie Street at 20:09:10. The exact location of the vehicle at 20:10 was indicated on the Google map

– (vide 11 exi e). The vehicle kept on moving in that street until it stopped and started idling at 20:15:00. At 20:39:59 the vehicle was still at the location or spot-defined by the coordinates longitude-26,2756 and latitude-29,1295 (vide 35 exi b). The evidence of W/O Masia was that he drove the vehicle. That then was the movement report of the vehicle.

[44] Mr Deysel also testified about the movement of another police vehicle with registration B..... He said the vehicle moved from the vicinity of Thaba-Nchu Road, in other words N8, through a few streets and finally stopped in Stasie Street at 20:17. It was agreed between the parties that it was not necessary for the defendant to call witnesses who were in the vehicle. The plaintiff admitted, through her legal representative, that the specific vehicle attended the scene at plot 171. (vide exi f).

[45] The evidence needs to be critically analysed. The two versions were poles apart. The version presented on behalf of the plaintiff was that the police arrived on the scene more than 60 minutes after the incident was reported to them. The version presented on the defendant was that the police arrived on the scene less than 15 minutes after the incident was reported to them.

[46] Ms Bergman testified that the incident took place at 19:45. However, her testimony of 22 April 2014 was inconsistent with her statement of 25 February 2012. According to her statement, the incident occurred at 19:15 (vide 8 exi a). Although her friends did not testify, their statements were exhibited in court. According to Ms Van der Byl the time of the offence was 19:50 (vide 3 exi a).

According to Ms Van Schalkwyk the time of the offence was 19:00 (vide 14 exi a). Timewise the discrepancy between Ms Bergman's testimony and her statement was 36 minutes. The magnitude of the disparity was greatly diminished, if not completely erased, by Captain Jimlongwe's concession during cross examination. She reluctantly conceded that it was possible that Ms Bergman told her that the time of the offence was 19:50 and not 19:15 as stated in her statement.

[47] By 19:50:05 Ms Gysman already knew about the burglary segment of the incident. She made an unsuccessful attempt to inform Mr Gysman about it. About five minutes later, at 19:55:52 to be precise, she managed to reach him. (vide 12 exi a). Also (see 7 exi a). The cellular data relative to Ms Gysman's cellphone +2783 56 7197 and to Mr Gysman's cellphone +2782 444 9755 provided reliable evidence which indicated the approximate time at which the offence started. In the light of such objective evidence, Ms Bergman's estimation that the trouble started at about 19:45 must be accepted as reasonably reliable. It was more or less in line with Ms Van der Byl's estimation. Therefore, the testimony of Mr Bergman must prevail over her statement on that point.

[48] Mr Gysman left his place of residence at 19:30. The incident occurred shortly after his departure from home. The incident commenced at 19:45. At 19:55 he received a call about the incident from Ms Gysman. At that time he was already at Grasland where he was visiting his friend, Mr Matthews. He was taken aback. The whole report concerning burglary at his house

initially made no sense to him. He initially reckoned that it was a trivial incident which the security guard and the 3 visitors would easily deal with. Notwithstanding his total surprise or disbelief, he nonetheless made a call. The very first call he made was to the police emergency number 10111. He made that urgent call at 19:57 – 19:56:59 to be precise (vide 7 exi a).

[49] At 19:57 the defendant's police, in other words the flying Squad unit, received the first report of the incident. About six minutes later at 20:02:49 ($\pm$ 20:03) the defendant's police, on that occasion the Bloemspruit Police, received the second incident report. At that second time around, the incident report was given by Ms Gysman (vide 12 exi a). The two incident reports were undisputed. The defendant admitted that the police received the two reports.

[50] It was also common cause that Mr Gysman visited Bloemspruit Police before the police set out to investigate the matter. Prior to Mr Gysman's personal report they did not have any knowledge of the incident. At the heart of the dispute was the question as to what time the police arrived on the scene. But even before an attempt is made to find an answer to that question, it is imperative, first and foremost, to ascertain the time of Mr Gysman's arrival at the Bloemspruit Police Station.

[51] The following randomly selected snippets from Mr Gysman's direct evidence elucidated the plaintiff's contention that the police failed to react promptly to the incident report(s) they received:

- 51.1 “... Ja, toe ek arriveer het ek uiteraard by die aanklag kantoor aangedoen, ek het vir hulle gevra, hoor hier wat het julle nou omtrent Stasie Weg 171, Bloemspruit gedoen. Hulle het mekaar in verbasing aangestaar, in hierdie verband kan ek spesifiek Adjutant Offisier Masia (sic) meld want ek het sy naam spesifiek geneem, omdat ek ook vroeër betrokke was by gevalle by Bloemspruit polisie stasie, was dit vir my baie noodsaaklik dat ek seker maak met wie praat ek en waarom het die gesprek gegaan.”
- 51.2 “Ja? ... Gepleeg is het ek van die plot af gery na die polisie stasie toe en toe het ek daar gaan verneem wat het hulle gedoen omtrent die **oproepe wat myns insiens omtrent al u uur terug al gemaak**, met ander woorde, die polisie het glad nie gereageer op die oproep wat Bonja aanvanklik gemaak het nie en ook die een na 10111 wat uiteraard deur gegee is na Bloemspruit polisie stasie toe.”
- 51.3 “... Met daai spesifieke persoon gehad het, ja. So my aanwesigheid by die polisie stasie het **hulle eers beweeg omtrent ‘n uur later** om, want ek het hulle vergesel van die polisie stasie af na die plot toe, nadat alles klaar gebeur het.”
- 51.4 “MNR MARAIS: Goed, u sê u het onmiddellik die beamptes, insluitend Adjutant Masea, (sic) gekonfronteer om daar, **die misdaad is meer as ‘n uur terug gerapporteer** en hulle het nie reageer nie. ... Dit is inderdaad so, intendeel miskien moet ... [tussenbeide]”
- 51.5 “En u indruk was dat hulle by u vir die eerste keer verneem het van die misdaad? ... Dit is inderdaad so, ek het vroeër genoem dat toe ek daar opdaag by die aanklag kantoor het hulle mekaar in verbasing aangekyk, op daardie stadium het niemand geweet van enige van die twee oproepe wat gemaak is, soos ek reeds vroeër gesê het, **omtrent ‘n uur tevore nie.**”

51.6 “Nou soos ek reeds nou vantevore genoem het, wat my aanbetref kon ‘n mens die polisie gelyk gegee het as daar ‘n kort tydsverloop was, vandat die oproepe gemaak is totdat hulle uiteindelik gereageer het en ek is steeds tot vandag van oordeel, ons kon selfs ‘n jaar ook gegee het, was dit nie vir my teenwoordigheid, fisiese teenwoordigheid by die polisie stasie nie, sou hulle nog nooit gereageer het op die oproepe wat gemaak is nie. Ek het vroeër ook vir die Hof genoem, my fisiese teenwoordigheid **na twee oproep, ‘n uur later**, het hulle eers beweeg om by die plot op te daag.”

[52] I have earlier found that the police received the first incident report at 19:57 and the second at 20:03. Let me simply say that the defendant received the incident report at 20:00 for the sake of argument. The golden thread which runs through all the snippets quoted above is the implicit allegation by Mr Gysman that he was at Bloemspruit Police Station at ±21:00, about an hour after the incident was reported.

[53] The evidence of Mr Gysman that at 21:00 the police still had not done anything about the incident report was hotly disputed. According to W/O Masia’s evidence, he attended to Mr Gysman in the charge office of Bloemspruit Police Station. He admitted that he first heard about the incident from Mr Gysman and that Mr Gysman was very unhappy; that he complained that the police did not react to the earlier calls and that he demanded that the police should urgently drive to the scene to apprehend the suspects. While they were still talking about the incident, he received a radio message from the flying squad unit about the same incident. He ordered his colleague, Constable Moea, to make a request for back-up. She did so over the radio. He immediately set out at

20:06. He drove a police vehicle with registration number BSC220B and followed Mr Gysman to the plot. It took him about 9 minutes to get there. He left the scene at 21:00 and returned to the police station.

[54] The evidence of W/O Masia was materially corroborated by a senior police officer. Captain Van Wyk's evidence was that an incident report was compiled to record the offence reported at 19:57 to the flying squad unit. The report was transmitted by radio to Bloemspruit Police Station at 19:59. At 20:04 W/O Masia attended to the report (vide 40 exi b). That particular timeline was very important. According to W/O Masia's evidence, Mr Gysman was already at Bloemspruit Police Station at the time the incident report was transmitted from the flying squad unit.

[55] Mr Deysel's evidence also materially corroborated the evidence of W/O Masia. He impressed me as a knowledgeable in the field of his expertise. His independent evidence concerning the movements of the police vehicle B..... was very persuasive. The movement report he used in support of his testimony was very detailed and reliable. The movement report indicated that the police vehicle, undeniably driven by W/O Masia, arrived on the scene at 20:15, departed at 21:01 and returned to the police station afterwards (vide 18 exi e).

[56] The movement report given by Mr Deysel in connection with the second police vehicle B..... strongly fortified the evidence of warrant officer Masia. It was patrolling the Maxley Small Holdings near the N8 Highway. From there it made its way towards the

scene. At 20:17 it stopped on the scene – (vide 14 exi e). It left the scene at 20:48 – (vide 15 exi e). See also “exi f”.

This particular vehicle was not attached to Bloemspruit Police.

The timeline of 20:17 was also very important. By then police vehicle B..... was already on the scene. Unlike vehicle B..... which was spurred into action by Mr Gysman’s personal enquiry, the movement of BNV360 to the scene was seemingly activated by a radio announcement about an emergency at Bloemspruit.

[57] Constable Du Toit was among the police officers who arrived on the scene. Although he could not precisely testify about the exact time of his arrival, his estimation that it was after 19:00 was not totally insignificant. He did not estimate that he arrived after 20:00 let alone after 21:00. He would probably have repudiated any suggestion that he arrived on the scene after 21:00. If there was any conspiracy to fabricate their evidence as regards the time of their arrival on the scene, the police could easily have schooled the constable instead of presenting detailed and elaborate documentary evidence concerning the movements of their vehicles. His further evidence was that when he arrived on the scene some police vehicles were already there. His evidence was important because, among others, it indicated that the police did not conspire to destroy the plaintiff’s case.

[58] Notwithstanding all sorts of criticisms levelled at Mr Deyssel, W/O Masia and Captain Van Wyk, my belief in them remained unshaken. In my view the evidence given by each one of those witnesses was reasonably accurate, credible and reliable.

- [59] It must be borne in mind that the testimonies of Captain Van Wyk and Mr Deyssel were backed up by documentary evidence. Their evidence strongly militated against Mr Gysman's evidence that the police arrived on the scene at 21:00, an hour after they had received the incident report. On the contrary, objectively reliable documentary evidence tendered on behalf of the defendant indicated that Bloemspruit Police departed from the scene at 21:00 and returned to the police station. It could not be convincingly disputed that they had earlier arrived on the scene at 20:15, some 45 minutes earlier than the plaintiff's witness alleged.
- [60] Indeed the evidence showed that Mr Gysman was angry on his arrival at the police station. On behalf of the plaintiff, Mr Maree submitted that such emotional state fortified the plaintiff's contention that the police had failed to react to the incident reports within a reasonable time. At a first glance the submission appeared to be persuasive.
- [61] Perhaps the evidence of Ms Gysman became important in order to understand Mr Gysman's anger. Her direct evidence was that after reading Gayle's sms to Antonia: she first called Bloemspruit Police but she could not get through. She then called Mr Gysman and informed him about the burglary. She called the Bloemspruit Police for the second time but again she did not go through. She called the Bloemspruit Police for the third time but still she could not go through. Her fourth call to Bloemspruit Police went through.

[62] Ms Gysman's cellphone record (vide 12 exi a) revealed that there were five contacts between her and Mr Gysman on 25 February 2012 of which 4 were successful.

- The first but unsuccessful attempt was at 19:50
- The second and successful call at 19:55
- The third and successful call at 20:07
- The fourth and successful call at 20:13
- The last and successful call at 22:46

I noted, with interest, that the fourth contact was at 20:13, only two minutes before the time at which the police contended they arrived on the scene. The next contact was at 22:46, some 153 minutes (approximately 2 and half hours) later. There was no contact between them from 20:13 to 21:00. Those timelines encompassed the time spell during which the police maintained they were on the scene together with Mr Gysman. The evidence of Ms Gysman was that she saw Mr Gysman's car and the police vehicle when they arrived on the scene. Therefore, it was probable that Ms Gysman did not find it necessary to contact Mr Gysman during that time because it was obvious to her that he was busy with the police. The probability strongly favoured the defendant's version on the particular point.

[63] The cellphone record of Ms Gysman did not support her testimony that she made 3 unsuccessful attempts to report the incident to Bloemspruit Police because, as she said, they did not answer the phone. According to her cellular record, she made only one and not four calls to Bloemspruit Police. That one call at

20:02:49 was successful. The police number she dialled was +2751 503 4000. It was common cause that the number belonged to Bloemspruit Police (vide 12 exi a).

[64] Mr Maree asked Ms Gysman:

“U het nie onafhanklike geheue van die tyd nie? ... Nee, nee, nee.”

Her answer was emphatic. Since she had no independent recollection of timelines, she could not corroborate Mr Gysman’s testimony that the police arrived on the scene more than an hour after they had received an incident report. Moreover, and this aspect is of paramount importance, she could not, for the same reason, honestly deny the defendant’s averment that the police arrived on the scene at 20:15 and not at 21:00.

[65] At this juncture it must be clear why Mr Gysman was in such a ballistic mood when he arrived at the police station. He had probably heard, as I did, from Ms Gysman that she made a few desperate calls to Bloemspruit Police but that the police simply ignored her calls. It appeared to me that Mr Gysman was probably angered by the misinformation which was aggravated by the appalling report he subsequently heard from Ms Bergman:

“Hulle het ons verkrag.”

[66] The burglary incident was not something new to Mr Gysman. His house was previously burgled on a few occasions. It was that persistent criminal menace which compelled him to employ a private security guard. He believed he had found a lasting

solution to the problem. Great was his disbelief when he heard about the latest incident. He believed that the would be housebreakers would be deterred by the mere presence of the security guard. He was mistaken. They were not. When he arrived home that evening and saw two suspects in his house, he became a frustrated man. The sight fuelled his anger. His anger got the better of him.

[67] I suppose that one or two or all of the aforesaid factors had an adverse impact on Mr Gysman emotional state. They angered him very much – hence he lambasted the police so much on his arrival at the police station and in his testimony. It must also be kept in mind that he previously got no joy from his previous dealings with his local police station. All those negative factors and experiences over-clouded his mind and made him very angry.

[68] The armed housebreakers knew all too well that the security guard would, after his narrow escape, do everything he could to have the burglary reported to the police. It was highly improbable, given their knowledge and those circumstances, that they would have spent such a considerably long period of time in the house: ± 75 minutes according to Ms Bergman and ± 60 minutes according to Mr Gysman. Seeing from this angle, the evidence of those two witnesses was highly suspect and improbable.

[69] The following timelines were given by Mr Gysman concerning his movements of the evening in question:

- At ± 19:30 he departed from his plot at Bloemspruit;
- At ± 19:50 he arrived at Mr Matthews plot at Grasland;
- At 19:55 he received a call from Ms Bergman while he was still at Grasland;
- At 19:56 he called flying squad unit and reported the incident while he was still there;
- At 20:13 he received a call from Ms Gysman while he was still at the same place;
- At 20:14 he received a call from Mr Freddie Gysman while he was still there;
- At 20:20 he made a call to Claudine while he was still at Grasland.

According to him that was the last call he made while he was still at Grasland. The question was: Was he?

[70] After the call he made to his lady at 20:20, he made and received no further calls until 20:59. The first call he received after those 39 minutes came from Claudine. During that period of 39 minutes four unsuccessful attempts were made to contact him by cellphones. In addition to the calls three sms messages were sent to him. No caller was able to reach him because his cellphone was off.

[71] When he called the flying squad unit 10111 at 19:56 he was near Ooseinde tower of Vodacom. The identity number of that tower was cell id 64871. But when he called Claudine +2774..... at 20:20 a Vodacom tower cell id 11345 picked up his call. The common name of the tower was not specified in his cellphone

records – (vide 7 exi a). His testimony was that ay 19:56 and at 20:20 he was still at Grasland. Now if he was still at his friend's at Grasland at 20:20 when he called Claudine, then Vodacom tower 64871 and not Vodacom tower 11345 would have picked up is call. That discrepancy is telling.

[72] Claudine first called Mr Gysman at 19:59 and her call was registered by the Bloem Airport 3 tower of Vodacom. The cell id thereof was 23603. She called him again at 20:59. On that second occasion an undefined cellular tower with cell id 11345 picked up her call. It will be noted that it was the same tower which had earlier picked up Mr Gysman's call to her. This indicated that the two were getting closer together. Mr Gysman had been in the vicinity of cellular tower 11345 before 20:20.

[73] It can be seen, therefore, that Mr Gysman had moved between 19:56 and 20:20. At 20:20 he was no longer at Grasland. He was within the spotlight radius of cellular tower 11345. Similarly Cladudine had in the meantime moved between 19:59 and 20:59. At 20:59 she was no longer near Bloem Airport 3 tower. She was in the vicinity of cellular tower 11345. She and Mr Gysman were near the same tower. All these cellular data cast some serious shadow of doubt on Mr Gysman testimony that he was still at Grasland at 20:20. The shadow of doubt thickens when one considers his testimony that he left Grasland after the rugby match had ended at 20:45.

[74] Mr Maree pertinently asked Mr Gysman to say at what time he left Mr Matthew's plot at Grasland.

“Goed, nou om 20:20 was die laaste oproep, wat het u, kan u, het u toe daar gebly tot die rugby klaar is of, verduidelik net vir die Hof wanneer is u toe, **wanneer is u weg by die vriend?** ... Ek kan nie met sekerheid sê die presiese tyd nie, waarna ek wel kan verwys is dat hierdie wedstryde begin normal weg 19:20 en dan maak dit enige iets tussen 20:30 en 20:45 klaar. So by benadering sal dit dan wees, dit kan **enige tyd gewees tussen 20:30 en 20:45 wat ek dan my vriend se huis verlaat het.** Ek het ook vroeër genoem dat ek die rugby klaar gekyk het daar.”

- [75] The timelines the witness assigned to his supposed time of departure from Grasland were inherently speculative, uncertain and unreliable. His answer was loaded with uncertainty. I find it difficult to reconcile his evidence with his cellular data. His evidence that he left Grasland at 20:30 let alone at 20:45 did not tally with the cellular records the plaintiff relied upon. I would, therefore, reject his evidence as untrue and unreliable.
- [76] Mr Matthews testified that he received a call from Mr Gysman during the course of the evening after he had driven away from Grasland. Mr Gysman, he said, told him that he was on his way to the police station. The timeline pertaining to the alleged call would have provided a very decisive cutting edge in the current dispute. I carefully perused Mr Gysman’s cellular record (7-8 exi a) but, lamentably, I could not find any cellular contact between Mr Gysman (+2782.....) and Mr Matthews (+2779.....) on 25 February 2012. Ms Gysman identified cellphone number +2779..... as Mr Matthew’s cell number and that she called him on that number at 20:05 – (vide 12 exi a). It follows, therefore, that Mr Matthews credibility was materially tarnished.

- [77] In the light of the evidence as a whole, I could find no credible and reliable evidence to establish, on a balance of probabilities, that the defendant's police arrived on the scene long after the incident was reported to them. The contention of the plaintiff that the police arrived on the scene more than an hour after Mr Gysman had reported the incident had no substance in my view. There was no credible and reliable evidence, call it a factually solid foundation, to sustain the argument that the police had committed any omission actionable in law.
- [78] In **Stock v Stock** 1981 (3) SA 1280 (A) of 1296 E-F Diemont JA said that an expert witness must be made to understand that she or he is there to assist the court; that she must be neutral if she or he is to be helpful to the court; that his or her evidence would be of little value when she or he is partisan and that a partisan expert witness unlike a neutral expert witness consistently asserts the cause of the party who calls him or her. Where a court is faced with conflicting expert opinions on a crucial issue, it has to consider the merits and demerits of each expert opinion. In such cases, reasons have to be advanced especially for the rejection of one expert's opinion and also for the acceptance of the other expert's opinion. See **Jacobs & Another v Transnet Ltd t/a Metrorail & Another** 2015 (1) SA 139 (SCA) para 14.
- [79] The ultimate determination of the court must depend on an analysis of the cogency of the underlying reasoning which led to the divergent opinions of the experts. **Buthelezi v Ndaba** 2013 (5) SA 437 (SCA) para 14 which decision was followed in Jacobs

case *supra*. A finding has to be made, one way or the other, as to the credibility and reliability of expert opinions Jacobs *supra*.

[80] In the instant matter, however, there were no conflicting expert opinions. There was only one expert called by the defendant. The expertise of Mr Deysel was questioned by the plaintiff.

“16.1 Dit word submitteer dat getuie Deysel se “deskundigheid” slegs behels dat hy data wat ontvang word deur die vlootbestuurstelsel administreer.

16.2 Hy is nie ‘n inligtingstegnologie spesialis nie.

16.3 Hy gee toe da thy nie betrokke was in die ontwerp van die betrokke stelsel wat die monitoring doen nie en bygevolg geen kennis hieromtrent het nie.”

Mr Deysel was non-partisan in my view. He was neutral. He understood the aforesaid principles. He resisted the temptation to persistently assert the cause of the defendant, the party that called him. He made concessions where they were due. For instance, he conceded that he merely extracted data as set out in the movement report of the two police vehicles and that he did not verify whether there were error reports concerning the efficacy of the system on the day of the incident. On the strength of the aforesaid concession it was submitted as follows on behalf of the plaintiff:

“Dit word bygevolg submitteer dat die Hof nie kan bevind dat **die tyd wat aangeteken is waar en hoe die onderskeie twee Polisievoertuie beweeg het korrek kan wees nie.**”

- [81] There was no cogent expert opinion to suggest that the c-track system which Digicore used to constantly monitor the defendant's vehicles was, as a fact, dysfunctional on Saturday 25 February 2012 especially in the evening when the crime was committed. The plaintiff's contention concerning possible errors was based on a remote and speculative supposition. It was not verified by proven evidence placed before me by an expert opinion opined by a specialist in the field of information technology after conducting an extensive investigation which culminated in a detailed and well motivated expert assessment report.
- [82] Mr Deysel conceded that he was not directly involved in the original invention of the system. But the argument that he was disqualified was hollow. The law does not require such high standard of inventive expertise before a person can be appropriately qualified as an expert in any given field of human endeavour. Consider the following. The plaintiff herself relied on cellular data records extracted from a cellular system by Ms Petronela Heynecke. Certainly the lady was not the original inventor of the cellular communication system. However, she is respected and recognised countrywide as an expert in that specialised field.
- [83] It would be absurd and ridiculous for anyone to suggest that because she was not the original inventor, she was, therefore, not qualified to express expert opinion regarding the way the system functions. The crux of the matter is not whether or not she was

the original inventor of the cellular communication system but whether she has specialised knowledge about the intricate way the cellular communication system functions. Her ability to understand and to interpret the intricacies of the system to a lay person is a vital ingredient of her rare expertise or knowledge.

[84] The critique levelled against Mr Deysel had no substance. In my view he acquitted himself very well as an expert. As I have already found, he displayed a high degree of knowledge in the field he testified about. He understood how the tracking device functioned. He was at pains to explain the accuracy of the timelines as indicated in the movement reports. He's opinion was entirely independent of anyone designated to capture the data. He stressed that such timelines were entirely derived from GPS generated data used all over the world and disseminated and received through satellites. Since the movement reports so generated cannot be altered by any person authorised to access the information so generated, the independence, accuracy cogency and integrity of the information cannot be doubted by any reasonably objective person. Mr Deysel gave evidence of good quality. On the proven objective facts his expert opinion immensely impressed me. He was a good witness.

[85] There remains one more aspect relevant to the time factor. The initial report Mr Gysman received was not about rape. It was about burglary. Little did he know that the reported burglary was but a drop in the ocean. The volcano was about to erupt. He did not initially regard the incident as a serious matter. All the same he drove home first instead of driving to the police station. On his

arrival there he stopped, beamed the house and blew the horn of his car. As a result of his actions the suspects obviously took to flight.

[86] Given those circumstances it was unrealistic for him or anyone to entertain the hope that the suspects would still be on the scene on his return with the police. The probable chances were that the suspects might probably have been surprised on the scene and arrested, there and then, if the witness had, first of all, driven to the police station. By the look of things, it would appear that the witness own untimely visit to the scene coupled with his unwise actions there frustrated the possible arrest of the suspects.

[87] There were two irreconcilable and mutually destructive versions placed before me. The plaintiff's version was that the police did not respond, in good time, to the crime reported to them. She contended that their forced response, approximately an hour and a half later after they were given an urgent report of the incident, was hopelessly belated. The defendant's version was that the police did not fail to respond in good time to the crime incident reported to them as the plaintiff alleged. The defendant's contention was that the police promptly responded within a quarter of an hour after they had received the crime incident report. But when they arrived the horse had bolted.

[88] The proper approach to evidence by a court called upon to determine which of the two mutually destructive versions should be accepted was restated in **Stellenbosch Farmers Whinery Group Ltd & Another Martell & Others** 2003 (1) SA 11 (SCA) at

14J – 15E. It was held that the technique generally employed by the courts in resolving such factual disputes requires a court to make findings on: firstly, the credibility of factual witnesses; secondly, the reliability of such witnesses and, thirdly, the probabilities or improbabilities of each party's version.

[89] As regards credibility on the disputed issue of time, the version of the plaintiff depended on four factual witnesses, namely: Ms Bergman, Ms Gysman, Mr Gysman and Mr Matthews. Along the way I made some unfavourable findings about each of those witnesses. At this stage I deem it unnecessary to repeat myself save to say that I found the evidence of each one of them materially wanting and suspect. They all gave poor accounts as to time. Ms Bergman's estimates of time were highly exaggerated. Mr Gysman's evidence as to his time of departure from Grasland to Bloemspruit was loaded with uncertainties and was highly questionable. He was argumentative and openly hostile to counsel for the defence so much so that counsel for the plaintiff had to intervene and calm him down. I did not believe them.

[90] The version of the defendant on the disputed issue of time largely dependent on the following factual witnesses, W/O Masia, Constable Nthuli, Constable Du Toit and Captain van Wyk. Those witnesses displayed confident and relaxed candour and demeanour in the witness box. I detected no bias, blatant or latent, on their part towards the plaintiff's cause of action. I did not get any feeling, real or perceived, that their evidence was corroboratively tailored to cover up any acts of neglect on their

part at the expense of the plaintiff's genuine case. There were no material internal contradictions in the testimonies of any of them. Similarly there were no material external contradictions between the defendant's one factual witness and another. It was never contended on behalf of the plaintiff that anyone of them contradicted what was pleaded or what was put on behalf of the defendant to the plaintiff's witness. It was never insinuated that the evidence given by any of them was inconsistent with any previous extracurial statement or conduct or established fact.

[91] Although none of them gave a perfect account of the time the police arrived on the scene, the quality of the evidence given by each of them was comparatively better than that of the evidence given in support of the plaintiff's case. They impressed me as reasonably truthful and trustworthy witnesses in spite of certain unfavourable aspects of their testimonies. About the veracity of the defendant's factual witnesses, I was impressed. The same could not be said about the plaintiff's.

[92] As regards reliability of the conflicting versions, the plaintiff's version on the disputed issue of time was riddled with some unfavourable features. For instance Ms Bergman's estimates of events taken together suggested that the police arrived on the scene 90 minutes after they had received the incident report from Mr Gysman. There was no positive evidence, however, from her which showed that she actually ascertained the exact time according to any clock, wristwatch, cellphone, television or radio when Mr Gysman rescued them from the scene.

- [93] The same unfavourable feature applied to Mr Gysman. On his arrival at the police station he did not specifically point out to W/O Masia what the actual time was, according to his wristwatch or cellphone or clock on the wall in the charge office. Neither Ms Bergman nor Mr Gysman appeared to have had opportunities to reliably experience or observe the time of the disputed event. Their evidence was not in harmony with some of the crucial timelines as evidenced by the cellular data records of the plaintiff's own witnesses. The evidence as to the time estimates made by those two witnesses was exceedingly exaggerated, in my view.
- [94] Moreover, Mr Gysman appeared to harbour resentment against Bloemspruit Police. On account of his past unhappy experiences there, he had a motive to be biased. He appeared to be actuated by a past personal grudge against them rather than the real facts of the current incident. In coming to that conclusion I was fortified by his candid admission that he was the driving force behind this civil action.
- [95] On the contrary, the calibre and cogency of the performance of the defendant's factual witnesses, namely Captain van Wyk, W/O Masia, Constable Nthuli and Constable Du Toit was significantly high and reliable compared to that of the plaintiff's witnesses. The quality and integrity of their testimonies and the ease with which they recalled the event enhanced the reliability of their evidence as to the time the police arrived on the scene. The evidence of those witnesses was supported by Mr Deysel. In this

regard, his documentary evidence materially bolstered the substantive reliability of the defendant's witnesses – (vide exi e).

[96] As regards probabilities and improbabilities, I think no further analysis and evaluation is still necessary. I have already done so before we got here. Therefore, the third leg of the general technique must not detain us any longer. Most of the findings I made on probabilities and improbabilities favoured the version of the defendant. However, I want to add that Ms Bergman's version that the police arrived on the scene at 21:30 was improvable for the next reason. At 21:30 Ms van der Byl signed a statement at the police station. Certainly it would not have been possible for her to do so if, at that time, she and the police were still on the scene.

[97] Now I turn to the question of onus. As a final step, I am required to determine whether the party burdened with the onus of proof has succeeded in discharging it. In the instant matter the onus rested on the plaintiff. She can only discharge the onus by satisfying me, on a balance of probabilities, that her version as to the time the police arrived on the scene, is true and accurate - thus acceptable. The corollary of this norm is that she must satisfy me that the version advanced by the defendant is, therefore, inaccurate and untrue or mistaken - and thus falls to be rejected. **National Employer's General Insurance Co Ltd v Jagers** 1984 (4) SA 437 (E) at 440D – H. I am persuaded that she failed to do so.

- [98] In the circumstances I have come to the conclusion that the issue has to be determined in favour of the defendant. The version of the plaintiff that the police arrived on the scene approximately an hour and a half after they had received the incident report was inaccurate and untrue. I am, thus inclined to reject it, as I hereby do. In my view the contrary version advanced by the defendant that the police arrived on the scene within 15 minutes after the incident was reported to the flying squad unit was reasonably accurate, true and unmistaken.
- [99] I would, therefore accept the defendant's contention that the police actually reacted to the report within a reasonable time. There being no breach of their legal duty to protect the plaintiff, there can be no conceivable degree of negligence attributable to the police. The plaintiff has, therefore, failed to establish the second leg of the test.
- [100] In view of the conclusion I have reached in connection with the second requisite of the test, it becomes unnecessary to deal with the third requisite. Doing so will serve no practically useful purpose.

In the instant matter, unlike in the case of **Carmichele v Minister of Safety and Security & Another** 2001 (4) SA 938 (CC), there were no proven facts which compelled the conclusion that the defendant's police had indeed committed wrongful omission. As I see it, there was no wrongful omission by the defendant's police to render the defendant delictually liable on the grounds of the alleged actionable omission. Therefore, the action fails.

[101] Accordingly I make the following order:

101.1 The action is dismissed.

101.2 The defendant is not liable for any damages the plaintiff may prove to have suffered during the course of the criminal attack, assault and rape which was committed at a plot commonly known as 171 Stasie Weg at Bloemspruit in Bloemfontein on Saturday 25 February 2012.

101.3 The costs of the action shall be borne and paid by the plaintiff.

M.H. RAMPAL, J

On behalf of the plaintiff: Attorney J.J. Maree
Instructed by:
Schoeman Maree Inc.
BLOEMFONTEIN

On behalf of the defendant: Adv. I van Rhyn
Instructed by:
State Attorney
BLOEMFONTEIN

/PC