Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 7953/2004

In the matter between:

TANIA MEGAN JACOBS	**Plaintiff**
and	
THE CHAIRMAN OF THE GOVERNING BODY OF RHODES HIGH SCHOOL	**First Defendant**
KEITH LONG	**Second Defendant**
THE MEMBER OF THE EXECUTIVE COMMITTEE FOR EDUCATION, WESTERN CAPE	**Third Defendant**
MAKHOZASANA KUNENE	**Fourth Defendant**

JUDGMENT DELIVERED : 4 NOVEMBER 2010

MOOSA, J:

Introduction

[1] The incident which formed the basis of the cause of action in this matter had tragic, devastating and unfortunate consequences for the learner, the educator, the school principal and the school as a whole. On the fateful day of the incident, the learner bludgeoned the educator with a hammer in the class in the presence of other learners. Pandemonium and panic broke out amongst the shocked learners. Some of the learners rushed to the assistance of the educator and prevented the learner from attacking the educator further. The incident seriously set back the efforts of the school to heal the *"divisions of the past and improve the quality of life of the learners"*. The efforts were found

to be wanting. The question on the lips of every concerned person was: What went wrong? In an attempt to answer that question, I will examine the facts.

The Facts

[2] Rhodes High School (Rhodes High), which, through the Chairman of the Governing Body, is cited as First Defendant and against whom the action has been withdrawn, is a formerly "white" school. Before the advent of the new democratic dispensation, the school became what was commonly known as a model "C" School and opened its doors to learners of other racial groups. After the advent of democracy, the school became a fully fledged non-racial school in accordance with the prescripts of the democratic Constitution. The school is located on the borders of what is known as the Cape Flats. The Cape Flats houses a large section of the previously disadvantaged communities. The school, because of its location, was a feeder school drawing learners from areas in the Cape Flats like Langa, Athlone, Guguletu, Mitchell's Plain, Khayalithsha, Mowbray etc. The learners came from diverse cultural, racial, religious and economic backgrounds. The most common problem amongst the learners was the single parent or *"absent dad syndrome"*.

[3] The learner, Bheki Kunene (Kunene), whose mother was cited as the Fourth Defendant and against whom the action has been withdrawn, comes from Langa. He grew up in a single-parent home. His father was in prison. As a 13 year old learner, he showed great promise and potential. He was bright and intelligent. He was popular at school. He had acting abilities and modelled on a part-time basis. He was in grade 8. There was evidence that he had social problems at home and associated with friends who had a negative influence on him. As a result of the incident, he was charged with and convicted of attempted murder and in terms of section 290(1)(d) of the Criminal Procedure Act, 51 of 1977, he was referred to a Youth Centre as defined in the Child Care Act of 1983. There is no evidence what happened to the learner after he was sentenced. I can safely assume that his future had adversely been affected by the incident.

[4] The educator, Tania Jacobs, who is the Plaintiff in this matter, completed a BA degree and a Higher Diploma in Education. She was described, *inter alia*, as young, forceful, vibrant, energetic, creative, committed, confident and full of ambition. Others described her as brash, abrasive, lacking power of discernment and struggling with

interpersonal relations and dramatically fluctuating moods. It appears that as a result of her personality and youthfulness, she attracted resistance from other conservative teachers who were set in their ways and practices. It also appears that the interaction between them was adversely influenced by the age gap, new ideas and different teaching methods. The incident left her permanently scarred emotionally and psychologically. She could no longer continue with her teaching career.

[5] The principal, Keith Long, was cited as the Second Defendant. He started his teaching career in 1980 and was appointed as the principal of Rhodes High in 1999. He encountered personal problems during 2001. He was severely traumatised during the middle of 2001 and was receiving counselling for the trauma. On the morning of the incident on the 27th September 2001 he was in his office when Leslie Hutchings (Hutchings) brought Kunene to his office. She told him that Kunene had made some threats in his journal against the Plaintiff and had refused to hand over the journal to her. He told Hutchings to leave Kunene with him. He then asked him to hand the journal over to him, but he refused. He them forcibly wrested the journal from Kunene. The Second Defendant observed certain *"serious things"* in the journal. He placed Kunene in a chair outside his office and asked him to remain there while he instructed his secretary to call the police and Kunene's mother. When he returned to where he had left Kunene, he was gone. He saw learners running down the stairs shouting that Kunene was attacking the Plaintiff. He ran to her class where he wrested the hammer from Kunene.

[6] On the morning of 27 September 2001, the Plaintiff was invigilating her Grade 8D class which was writing a class test. She noticed that Kunene was not writing the test but was instead drawing in his journal. She approached him, asked him to stop drawing, put the journal away and start writing the test. He said that it was too difficult to write the test and continued drawing in the journal. She noticed a death certificate in the journal, made out to her. She went to report the incident to Hutchings, who was the Head of Department (HOD). She, together with Hutchings, returned to her class and called Kunene out of the class into the corridor. He came out with the journal. The Plaintiff tried to show Hutchings the death certificate in Kunene's journal, but he grabbed the journal from her hand. Hutchings said she must go into her class and she will deal with the matter. Hutchings took Kunene with the journal to the Second Defendant and reported the matter to him. The Second Defendant told Hutchings that he would deal with the matter and she should leave

Kunene with him. She left Kunene with him at his office and returned to her class.

[7] About 15 minutes later Kunene returned to class and retrieved his schoolbag from the pigeonhole. At the time the Plaintiff was sitting at her desk in the class. She noticed him going to the door with his bag. She saw him suddenly turning around and taking something out of his bag. The next thing she felt a blow to the back of her head on the left-hand side. She felt a second blow to the back of her head. The third and fourth blows she deflected with her hand. At that stage, some of the learners came to her assistance and pushed her out of Kunene's way. Kunene tried to get another blow in, that landed on her left knee. The learners managed to get him out of the class. There was absolute pandemonium in the class. After calming the class, she was on the way to the staff room to attend to her injuries when she saw Kunene lunge at her with a hammer while he was being restrained by some teachers. She sustained head wounds which required five stitches, two fractured bones in her wrist, a fracture of the bone that stretches from the wrist to the elbow and a swollen left knee. She received medical treatment for these injuries and spent three days in hospital.

[8] The incident was a traumatic experience for the Plaintiff. Besides suffering physical injuries, she also suffered from depression, fear and anxiety and experienced personality changes. She no longer displayed the personality traits of self-confidence, self-assurance and self-discipline. She was afraid to face the outside world alone. She lost pride in herself. She returned to work soon after the incident, but she was not able to cope emotionally and psychologically in the school or in a social environment. She was diagnosed with depressive disorder and a delayed onset of post-traumatic stress disorder (PTSD), which was directly precipitated by the incident of 27 September 2001. She eventually gave up her teaching career and took a job as an administrative clerk where she functioned reasonably well. There is no doubt that the incident had a marked effect on her physical and mental health, her well-being and personality and on her teaching career.

[9] In and during 2001 before the incident, Kunene was found guilty of a series of contraventions of the Code of Conduct. The incidents giving rise to such contraventions stretched from 7 March 2001 to 27 September 2001 when he was expelled from Rhodes High. The incidents involved fighting, defiance and misbehaviour, defacing exam scripts, leaving school premises without permission and the final incident of assault with a

dangerous weapon for which he was expelled from Rhodes High. For the other infractions he received various periods of detention. On 4 September 2001, Hutchings had had a meeting with Kunene's mother and grandmother because of him leaving the school premises without permission the previous day. Hutchings, with the agreement of the family, devised a plan of action for Kunene which included daily reporting, entering into a formal contract and counselling with Mandy Turner (Turner), the School Counsellor. A formal contract was concluded between Hutchings on behalf of Rhodes High, on the one hand, and Kunene and his family, on the other hand, in terms of which various remedial measures were put in place. Turner met with Kunene on at least five occasions for counselling. It appears that matters had improved and the counselling had stopped.

The Action

[10] Arising from the incident, the Plaintiff instituted action for damages against The Chairman of the Governing Body of Rhodes High School (the First Defendant), the Principal of Rhodes High, (the Second Defendant), the Member of the Executive Committee for Education, Western Cape (the Third Defendant) and Makhozana Kunene, the mother of Kunene (the Fourth Defendant). Before the commencement of the trial, the proceedings against the First and the Fourth Defendants were withdrawn. The claim is confined to the Second and Third Defendants and, for the sake of convenience, they will be referred to jointly as the Defendants. The claim is based on delict arising firstly, from the conduct of Second Defendant which, on 27 September 2001, allegedly resulted in the assault on the Plaintiff by Kunene and arising secondly, from the conduct of various staff members of Rhodes High, prior to 27 September 2001, in connection with their dealings with Kunene and, more particularly, during the course of various disciplinary proceedings and their failure to deal effectively with his social, domestic, and personal problems. The former is confined to the incident on the day in question and the latter occurred in the context of a systemic failure over a period of time. During the course of the hearing, the Plaintiff abandoned the complaint relating to the conduct of the educators arising from the implementation of disciplinary proceedings against Kunene.

[11] On the basis of the pleadings, the following are the issues that have to be determined by me:

(a) Whether there was a legal duty to take reasonable steps to ensure that the Plaintiff was not harmed by Kunene and if so, whether the Defendants and/or

their servants breached that duty;

(b) Whether the conduct of the Defendants or their servants was culpable, that is, whether they were negligent and whether there was a causal connection between such negligent breach of duty and the loss or damage suffered by the Plaintiff;

(c) Whether the Plaintiff suffered any loss or damage in consequence of any wrongful and negligent breach of duty and if so, what the quantum of such damages is.

I will deal with each of these issues *in seriatim*

The Legal Duty

[12] I will evaluate the facts of this case to determine whether there was a legal duty on the Defendants to prevent the harm which befell the Plaintiff. It is well established in our law that negligent conduct giving rise to damages will only be actionable if it is "wrongful". With reference to liability for negligent omissions, wrongfulness is dependent on the existence of a legal duty to prevent the harm suffered by the Plaintiff **(Van Eeden v Minister of Safety and Security 2003** (1) SA 389 (SCA) at 395H). In assessing whether or not a legal duty exists in a particular case, all the circumstances and relevant factors of the case are taken into consideration. The court then determines whether it is reasonable to have expected the defendant to take positive steps to prevent the harm by making a value judgment based, *inter alia,* upon its perceptions of the legal convictions of the community and positive policy considerations (**Van Eeden v Minister of Safety and Security** *(supra)* at 395H-397C). Reasonableness in the context of wrongfulness is different from the reasonableness of the conduct itself. The former concerns the reasonableness of imposing liability, whereas the latter concerns the question of negligence. In the context of wrongfulness it would be better to qualify the legal duty *"as the legal duty not to be negligent*" or put differently, whether *"the negligent conduct is actionable"* (**Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd** 2006 (3) SA 138 (SCA) 144C – 145B).

[13] It is a well established rule in our law that liability does not usually arise from an omission in the strict sense of the word. There are, however, exceptions to the general rule. Liability can attach to omissions where there is a legal duty on a person to act positively and he or she fails do so. In terms of the common law, such legal duty arises

when the omission invokes moral indignation and the legal conviction of the community demands that such omission be regarded as unlawful and requires that the person who omitted to act positively be held liable to make good the loss suffered by the victim (**Minister of Law and Order v Kadir** 1995 (1) SA 303 (A) at 320).

[14] In **Minister van Polisie v Ewels** 1975 (3) SA 590 (A) at 597 **Rumpff CJ,** lays down the test as follows:

> *"Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree. Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruiklike 'nalatigheid' van die bonus paterfamilias nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om redelik op te tree."*

[15] Policy considerations play an important role in determining the legal convictions of the community**.** In respect of the standard of conduct and of safety required in the school environment, since the advent of our constitutional democracy, the legal convictions of the community are reflected firstly, in the Constitution of our country, secondly, in the policy documents of the Department of Education and thirdly, in the Constitution and Code of Conduct of Rhodes High. A public authority or a public functionary has a positive constitutional duty to act in the protection of the constitutional rights that are enshrined in the Constitution. This duty is in line with the principle that Government and State actors must be accountable for their conduct. The conduct of a State functionary which is at variance with the State's duty to protect the rights in the Bill of Rights, would be an important factor to be considered in determining whether a legal duty ought to be recognised in a particular case (**Carmichele v Safety and Security and Another (Centre for Applied Legal Studies intervening)** 2001 (4) SA 938 (CC) 957A-958C and **Minister of Safety and Security v Van Duivenboden** 2002 (6) SA 431 (SCA) at 445B-D and 446F-G.)

[16] The Constitutional Court in **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC) at para [76] p 400H, says the following in this regard:

> *"The principle that government and organs of state are accountable for their conduct is an important principle that bears on the construction of constitutional and statutory obligations, as well as on the question of the development of delictual liability."*

The Constitutional court went on to say at para [78] as follows:

> "*In determining whether a legal duty exists whether in private or public law, careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take account of their constitutional norms, important and relevant ones being the principle of effectiveness and the need to be responsive to the people's needs."*

[17] Counsel for the Plaintiff, Mr **Sher**, submitted that the facts and circumstances of this case justify the finding that the Defendants owed the Plaintiff a legal duty to prevent her from suffering harm or damage at the hands of Kunene. Counsel for the Defendants, Mr **Heunis** SC, argued that there are no policy considerations that favour an extension of the Acquilian action in the present case but, submits that policy considerations all point the other way. He said that the imposition of a legal duty in this case will have a chilling effect on the ability of the Department of Education to carry out these constitutional duties and will potentially expose the State to limitless liability. In the case of **Minister of Safety and Security v Van Duivenboden** *(supra)* the same argument regarding this "chilling" effect and "floodgates" was advanced but the court rejected such argument.

[18] In the determination of whether a legal duty exists on the facts of this case, I will examine firstly, the relevant constitutional and statutory provisions; secondly, the policy documents of the Department of Education and policy issues which impact on such legal duty; thirdly, the accountability of the Defendants as State functionaries exercising public power; fourthly, the special relationship that existed between the various *personae dramatis* and lastly, the reasonableness or otherwise of imposing liability on the Defendants.

[19] The particulars of the incident giving rise to this action are that the Plaintiff was assaulted with a hammer in her class in the presence of her learners by Kunene, who was one of the learners. Kunene was subsequently charged and convicted of attempted murder. In the circumstances her dignity was assailed, her life was threatened and her freedom and security of person were undermined. In terms of the Constitution, the fundamental human rights of the Plaintiff that were infringed are: the right to life (sec 11), the right to dignity (section 10) and the right to freedom and security of the person (sec 12) (**Carmichele v Minister of Safety and Security** (supra)).

[20] Rhodes High was a model "C" public school, which was operated in terms of the South African Schools Act, No 84 of 1996 (SASA) and the Western Cape Provincial School Education Act, No 12 of 1997 (WCPSEA). SASA makes a distinction between the governance of public schools, which is vested in the governing bodies, and their management, which is vested in the Principal under authority of the Head of the Education Department. Similar provisions are contained in the WCPSEA. The WCPSEA also provides that education at schools in the province shall vest in the member of the Executive Council responsible for education and in this case in the Third Defendant. At all material times, the Second Defendant functioned, for all intents and purposes, as a public school Principal in the employ and service of the Third Defendant. The Plaintiff was appointed at Rhodes High in terms of section 20(4) of SASA, pursuant to a written contract concluded between her, on the one hand and the First and the Second Defendants on the other, and, for all intents and purposes and at all material times she functioned as an educator at Rhodes High in the employ and subject to the control and authorities of the Defendants.

[21] Rhodes High, as a public school offering public education to the community, is an organ of State. The educators of such school, and in particular the Defendants in charge of such school, as functionaries of the State, were exercising public power and were accountable for the implementation of the rights enshrined in the Constitution and, more particularly, "*the right to freedom and safety of the person to be free from all forms of violence from either public or private sources in terms of section 12 (1) (c) of the Constitution"*.

[22] In terms of section 60 (1) of SASA, the State is liable for any damage or loss

caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such school would otherwise have been liable. In terms of section 60 (3), such claim must be instituted against the Third Defendant. Similar provisions exist in WCPSEA, namely sections 19 (1) and (2). There is a number of provisions in SASA and in the regulations promulgated in terms thereof which speak to the issue of safety and security at public schools. There is also a number of policy documents of the Defendants that speak to the issue of safety and security at public schools, for example, the *Procedural Manual for Managing Safety and Security within WCED Institutions*. The *Constitution and Code of Conduct of Rhodes,* also provide for the safety and security of educators and learners alike. It must be noted that the Principal is specifically given various powers of enforcement, and various responsibilities, by the Act and Regulations to ensure the safety of a school's teachers and students. It is therefore clear, given the range of powers and duties that fall in the hands of the Principal, and the fact that management is vested in the Principal, it is he or she who carries the primary responsibility in ensuring the safety of the members of the school community.

[23] There was a special relationship between the Defendants and the educators on the one hand, and the Defendants and the learners on the hand, and such relationships constitute one of the several factors to be considered in determining the reasonableness or otherwise of an omission to prevent violence (**Van Eeden v Minister of Safety and Security** *(supra)* at para [23]). In my view the relationship between the Second Defendant and the Plaintiff was sufficiently close to give rise to a duty of care on the part of the Second Defendant towards the Plaintiff. After Hutchings brought Kunene to the Second Defendant on the day in question following the complaint of the Plaintiff, the Second Defendant assumed responsibility of and control over Kunene. The complaint related to death threats that were made by Kunene against the Plaintiff. After the Second Defendant accepted responsibility of and control over Kunene, he had to take reasonable measures to prevent harm to the Plaintiff. It must furthermore be noted that it has been expressly recognised that where one is in control of a potentially dangerous situation, thing or person, one would normally be under a duty to take care to prevent the risk from materializing. This is one of the further specific circumstances that courts have accepted as influencing a decision as to the existence of a legal duty to act (**Administrateur, Transvaal v Van der Merwe** 1994 (4) SA 347 (A) 360, 361, 364).

[24] I am of the view that it is reasonable and in the interests of justice, equity and fairness, that the Acquilian action be extended to include liability for any omission on the part of the Defendants arising from the circumstances of the present case. I come to this decision in the light of the following circumstances: the Constitutional imperatives, the various statutory provisions and regulations; the policy considerations, especially the policy decision of the Department of Education to accept liability for acts or omission; the special relationship that existed between the Defendants and the Plaintiff on the one hand and that between the Defendants and Kunene on the other, and finally, the responsibility for and control over Kunene which the Second Defendant assumed at the time of the incident. I accordingly conclude that there was a legal duty on the part of the Defendants and their servants, to act positively in order to ensure the security and safety of the Plaintiff at the hands of Kunene and the culpable breach of such duty amounts to negligence, which is actionable in law.

The Breach of the Legal Duty

[25] I have found the existence of a legal duty. I now have to examine the facts to determine whether the Defendants and/or their servants, were negligent. The criterion for establishing negligence is whether, on the particular facts of the case, the conduct complained of falls short of the standard of a reasonable person. **Holmes JA** in **Kruger v Coetzee** 1966 (2) SA 428 (A) at 430E-F held that negligence arises for the purpose of liability if:

> *"(a) a **diligens paterfamilias** in the position of the defendant –*
>
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
>
> *(ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b) the defendant failed to take such steps."*

[26] Applying the facts to the law, it may be convenient to divide the grounds of negligence pleaded into two categories. The one relates to the acts and/or omissions of the staff of Rhodes High with regard to Kunene's conduct prior to 27 September 2001. The other relates to the acts and/or omissions of the staff of Rhodes High with regard to Kunene's conduct on the day of the incident. I will evaluate the pre-incident conduct of the

staff relating to Kunene before evaluating the conduct of the staff on the day of the incident. In evaluating both sets of conduct, I will have to measure the conduct of the respective *personae dramatis* against the reasonable person in the same situation.

[27] It is perhaps appropriate at this stage to make the observation that the witnesses, other than the expert witnesses, were broadly divided into two camps: the ones that supported the Second Defendant and were generally partisan towards him and those that supported the Plaintiff and were generally partisan towards her. Although they generally gave credible evidence, I could not but help observe that they were, to some extent, biased towards the party that called them as witnesses. This is obviously understandable in respect of lay witnesses. I did not get the impression that they were trying to mislead the court, but I got the distinct impression that some of the witnesses were trying to colour their version through their perceptions. In the circumstances of the case, I do not think that I have to make a credibility finding in respect of the witnesses, as there are sufficient objective facts, documentary evidence and probabilities to enable me to reach my factual findings.

[28] I was particularly impressed with the demeanour of two witnesses. The one is Mogamat Arnold (Arnold). He was called as an expert witness. He was the headmaster of Belgravia High School (Belgravia High), which is situated on the Cape Flats. He had more than 40 years experience in the teaching profession and had held various positions in the teaching hierarchy until he retired in 2007. He said that both Belgravia High and Rhodes High are not located far apart and draw their learners from more or less the same 60 feeder schools. He was an independent witness and it is clear from his evidence that he was not batting for either camp. He readily made concessions to both sides, where such concessions needed to be made. The other is Mr Jacobs, the father of the Plaintiff. Although he was emotionally affected by what had happened to his daughter, he tried to be as objective as possible. As a witness he acquitted himself reasonably well under the circumstances.

[29] From Kunene's disciplinary record and his personal journal, it is clear that he had disciplinary, behavioural, social and personal problems. These are also apparent from the Behavioural Contract concluded between Hutchings and Kunene on 4 September 2001. It is common cause that, in disciplinary proceedings, the choice and level of sanction to be

imposed according to the Code of Conduct, could vary depending on the circumstances. It could depend on the particular view the educator takes of the infringement in question. Counsel for the Plaintiff, in my view, correctly conceded that the educators were exercising a discretion.

[30] Mr **Sher** in his argument conceded and, in my view correctly so, that on a conspectus of the evidence as a whole, there was no proof that the manner in which Kunene was disciplined for his various infractions, was of such a nature that it led to the assault on the Plaintiff. He essentially accepted that there was no causal link between the manner in which Kunene was disciplined and the harm caused to the Plaintiff. However, he said that Kunene had a host of domestic and personal problems which manifested themselves. If Kunene was referred to Turner timeously and subjected to counselling for his personal and social problems, the incident could have been avoided. He accordingly submitted that the Defendants are vicariously liable for the negligent failure of their servants namely, Hutchings and Gallie, in failing to obtain such assistance. Mr **Heunis**, on the other hand, submitted that the Defendants, and certain of the staff members, had taken reasonable measures and they could not reasonably have foreseen the possibility of Kunene's conduct harming the Plaintiff. The way I understand Mr **Sher**'s argument is that Kunene's social and personal problems at home contributed to the cause of the assault on the Plaintiff and if those problems were addressed timeously by Hutchings and/or Gallie, the attack on the Plaintiff could have been avoided. Let us examine that proposition.

The Conduct Prior to the Incident

[31] The criterion for determining negligence is, whether in the particular circumstances, the conduct complained of falls short of the standard of the reasonable person. On the facts of this case, the criterion is whether Hutchings and/or Gallie could have reasonably foreseen harm befalling the Plaintiff at the hands of Kunene as a result of them failing to refer him to Turner or any other agencies for purpose of counselling in connection with his social and personal problems at home (**Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd and Another** 2000 (1) SA 827 (SCA) at para [21]).

[32] Hutchings testified that she was involved with Kunene in the context of pastoral care for addressing his behavioural problem. During an informal discussion with him, in or about May 2001, Kunene "*opened his heart to her and confided in her".* He told her how

unhappy he was at home. His father was in jail. She recalled him saying that he wanted to be a gangster like his dad. He said his mother did not love him and he slept in the same bed with his mother. He told her that he was the breadwinner in the family. This revelation concerned her. Gallie confirmed that, as far as she could recall, this issue was raised in one of the GET Band meetings. Mary Debrick (Debrick), a former educator at Rhodes High, testified that had she been given such information about a learner, she would have immediately referred him to Turner. In my view these revelations should have flashed red lights and urgent intervention should have been considered as a reasonable measure.

[33] On 19 June 2001, Kunene was referred to Hutchings by the Plaintiff because he was uncooperative. It is not disputed that at this meeting Hutchings learnt of the extent of the social and personal problems of Kunene. It emerged that the mother was unemployed. He earned money as an actor and was the breadwinner at home. As an educator, this was not acceptable to her. She regarded it as a social issue. She tried to set up three meetings with his mother, but on each occasion the mother did not turn up for the meeting. Due to the lack of concern, Hutchings concluded that there was doubt on the ability of the mother to care for Kunene. She noted in her records that Social Services be involved to investigate Kunene's role as breadwinner.

[34] From those facts at her disposal, the only plausible inference one could have drawn, is that Kunene had a serious social problem and was aspiring to become a gangster, like his father, with all its attendant consequences. Hutchings as a reasonable person should have realised that urgent intervention was required and should have, at least, in June 2001, if not in May 2001, have referred Kunene for evaluation and/or counselling to Turner and/or Social Services and/or other agencies. Her failure to do so fell short of the standard of a reasonable person in her position.

[35] I am strengthened in the conclusion by the evidence of the Second Defendant in respect of the notes made by the Plaintiff in Kunene's journal. He testified that while the Plaintiff's comments in Kunene's journal showed that she cared, what was required was deeper intervention, such as professional help and the least that should have happened was for him to be referred to Turner. However, substantially the same information that was contained in the journal, to which the Plaintiff responded in the form of the note, was at the disposal of Hutchings on 19 June 2001. Surely then, she too, on the Second Defendants

own logic, should also at least have referred Kunene to Turner to deal with these serious personal and social problems as revealed in the diary and made aware to Hutchings.

[36] Hutchings only acted when she received a further complaint in or about 4 September 2001 from the Plaintiff that Kunene had destroyed an exam script and when she confronted him about it, he left the school premises at 11:30 without permission. Hutchings then concluded a Behavioural Contract with the mother, grandmother and Kunene. It is not clear why, the Plaintiff, as the class teacher, was not involved in such meeting and why she was not consulted in the matter. It appears that she was not even aware that a Contract was concluded between them. Arnold testified that the class teacher should have been involved in the negotiation of such a contract. The contract covers some of the concerns that she had expressed earlier in 19 June 2001. Various remedial measures were agreed to in order to improve his social and personal issues at home. They were, amongst others, that the mother and grandmother find work; that Kunene ceases his role as breadwinner until his life is more structured; that a family meeting will take place to address the social and personal issues; that Kunene possibly be moved to stay with his grandmother; that he possibly be moved to the grade 8A class if the situation did not improve. One of the other terms of the Contract is that Kunene attends counselling sessions with Turner. But where the Contract fell short, was in the implementation of Kunene's referral to Turner and/or the Social Services for investigation and/or counselling in connection with his personal and social problems and, more particularly, that he was the family's breadwinner. The counselling sessions were ultimately confined to Kunene's problems within the ambit of the school and his relationship with the Plaintiff, and as such did not cover the most pressing social and personal issues.

[37] Hutchings maintains that Kunene was indeed referred to Turner for his personal and social problems at home as she, as an educator, was concerned about the fact that he was the family breadwinner. If Turner had explored his role as a breadwinner, it is in all probability that he would have disclosed to her the other social problems that Hutchings was privy to. Turner however disavows that Kunene was referred to her for his personal and social problems. As far as she was concerned Hutchings was dealing with such issues.

[38] It is my finding that the balance of the evidence supports the view that when

Hutchings referred Kunene to Turner, she did not instruct Turner to counsel for a specific purpose, i.e. to deal with his personal and social problems, or his role as the breadwinner of the family. I come to this conclusion especially in the light of the note Hutchings gave to Turner regarding the counselling sessions in which Turner is told merely to "chat" with Kunene:

> "*Mandy, Please meet with Bheki (8D) Kunene and chat x1 or x2 a week – can you arrange a definite time with him please!! See how it goes. P.S. get back to me. Thanks. Lesley."*

[39] The evidence is that Turner had five sessions with Kunene when they were terminated at the instance of Kunene. There is no evidence that Hutchings enquired from Turner about these sessions. If she had done so, it is probable that she would have discovered that Kunene was not being counselled for the purpose for which he had been referred to Turner by her. The lack of proper instructions and communication by Hutchings to Turner concerning Kunene, in my view, fell far short of that of a reasonable person in Hutchings' position, and had serious implications and impact on the reasonable measures that had to be instituted to address the social problems that Kunene was inflicted with.

[40] There was evidence that, at the time, there were resource constraints in the Department of Education to obtain psychological and social services for learners at schools. It could have taken up to six months before Social Services or a school psychologist made contact for counselling after having been requested to do so. Arnold testified that in serious cases one could call upon a Mr Enfield from the Department of Education, who would come to the school and interview the learner and even visit the parents at home to address the problem. He said that, if a learner was experiencing serious social problems, it was the school's duty to inform the Department of Social Services for intervention in the case. However, he qualified the statement by saying that the State's capacity to deal with children with social problems was alarmingly inadequate and in 2001 it was more limited.

[41] Turner testified that she and the Second Defendant had set up a network of non-governmental organisations and other support services in the school environment that Rhodes High could count on for assistance. She was usually the go-between. She said that she had achieved success with the network system and many learners who had been

involved in the network had their lives turned around. There is no reason why Kunene could not have benefited from a similar referral with timeous and effective intervention. She said that, in hindsight, after reading the journal, it was clear to her that Kunene was a disturbed boy in that he felt hatred towards his parents and was clearly mistreated at home. In June 2001, Kunene had told Hutchings about those problems. Turner said that the first thing she would have done was to contact a Mr Johan Greeff, who is the psychologist at the Newland's School clinic and would have had Kunene psychologically evaluated. She said that she had another more difficult learner in the Plaintiff's class namely, Marce Louis, referred to Greeff with relative success.

[42] **Nugent JA** in **Minister of Safety and Security v Van Duivenboden** *(supra)* at 445I held as follows:

> *"Action to avert reasonably foreseeable harm is required only if in the particular circumstances the person concerned ought reasonably to have acted. When applied in relation to public authorities, matters such as the extent of their available resources and the ordering of priorities will need to be taken account of in determining whether the failure to act was negligent."*

The Constitutional Court in **Rail Commuters Action Group v Transnet Ltd** *(supra)* echoed the statement but added that an organ of State will not be held to have reasonably performed a duty simply on the basis of an assertion that it had resource constraints but satisfactory and sufficient details thereof will need to be given.

[43] The undisputed evidence is that Hutchings was aware: that on 13 February 2001, Kunene was given a white slip for disrespecting the teacher; that on 7 March 2001, he was given a pink slip for fighting with Bencil; that on 12 June 2001, he was given a green slip for fighting with Marche; that on 13 June 2001, he displayed repeated defiance and misbehaved at the MTN Science Centre; that in or about 19 June 2001 Kunene had serious social problems and that he aspired to be a gangster like his father and that it is a well known fact that children who misbehave at school may frequently be doing so because of other underlying social problems.

[44] With such awareness and knowledge, Hutchings should reasonably have foreseen that Kunene constituted a threat to educators and learners alike, and more particularly the Plaintiff, and should have taken reasonable measures to refer him immediately to Turner

for assessment and/or counselling in connection with his social problems. Turner could have in turn called on the services of Johan Greeff for psychological evaluation and/or treatment of Kunene. She could also have turned to Mr Enfield from the Department of Education, and/or the Department of Social Services for urgent intervention. In that regard, the conduct of Hutchings, in my view, fell short of the standard of a reasonable person in her position and was accordingly negligent.

[45] Before I move on to the issue of causation, I wish to briefly deal with the matter of Plaintiff's allegation that Gallie acted negligently. I do not believe this is the case. At all material times, Hutchings dealt with the problems involving Kunene. On the occasions when Gallie was confronted with a problem involving Kunene, she referred him to Hutchings. I am of the opinion that no more was required of Gallie. On the evidence I cannot find any negligence on the part of Gallie.

Causation of the Conduct Prior to the Incident

[46] The next question to answer is whether the failure on the part of Hutchings to act positively was the causal connection of the harm suffered by the Plaintiff at the hands of Kunene. In the law of delict, causation involves two distinct inquiries. The first leg is a factual inquiry, namely, to determine whether the Defendants' wrongful conduct was the cause, or contributed materially, to the Plaintiff's loss. If it did not, no legal liability ensues. If it did, the second leg is a legal inquiry, namely, to determine whether the wrongful conduct is linked sufficiently closely to the harm for legal liability to ensue or whether it is too remote for legal liability to ensue (**International Shipping Co (Pty) Ltd v Bentley** 1990 (1) SA 680 (A) at 700E-J and **Minister of Police v Skosana** 1977 (1) SA 31 (A) at p 34).

[47] In the determination of the factual inquiry, the usual test that is applied is the *conditio sine qua non* test which is also known as the *"but for"* test which is postulated as follows: "*whether the wrongful conduct of the defendant is a necessary condition such that, but for such conduct, the incident would not have happened*". However, the commonsense approach has not been excluded. Our Courts have differed whether such test is to be objectively or subjectively assessed. The Constitutional Court has preferred the objective test (**Carmichele v Minister of Safety and Security** *(supra)* at 969) whereas the Supreme Court of Appeal was of the view that the test should be both objective and subjective (**Minister of Safety and Security v Carmichele** 2004 (3) SA 305 (SCA) at 329).

Neethling, Potgieter & Visser in **Law of Delict,** 5th Edition (2006) at page 130 *et seq* has formulated the approach to the determination of factual causation as follows:

> *"It entails a retrospective analysis of what would probably have happened if the alleged wrongdoer had acted positively in light of the available evidence and the probabilities originating from human behaviour and related circumstances."*

[48] Mr **Heunis** submitted that as far as the events before 27 September 2001 are concerned, there was no factual causation and therefore there could be no legal causation. Even if the court were to find that factual causation was present, he submitted that the harm was not reasonably connected to the consequences of the omission nor was it reasonably foreseeable and policy considerations militated against the finding that there was a legal link. I disagree.

[49] In the first place, if Hutchings had acted positively in or about 19 June 2001 when Kunene's social problems first manifested themselves by referring him to Turner, it is probable that psychological intervention could have timeously been secured from Johan Greeff to evaluate and assess Kunene psychologically and, if necessary, Social Services could have been involved, as a matter of urgency, to evaluate and assess his socio-economic circumstances. It is probable that, despite constraint on resources, Turner, with her professional and social network, could have instituted reasonable measures to evaluate, counsel and treat Kunene for his psychological and/or social problems. While it cannot be said with certitude that such intervention would have ensured that the incident did not occur, it is probable that such intervention would have at least mitigated the harm suffered by the Plaintiff at the instance of Kunene on 27th September 2001.

[50] In the second place, if Hutchings had acted positively in or about 4 September 2001 in approaching Turner personally and informing her of the socio-economic problems of Kunene and asked her to evaluate and counsel him in connection with such problems instead of sending her a note to *"chat"* with him, it is probable that Turner could have mitigated the previous omission by urgent intervention. It is probable that even such late intervention could have at least mitigated the harm suffered by the Plaintiff at the instance of Kunene on 27 September 2001.

[51] In the third place, Arnold testified that on the basis of Kunene's disciplinary record and the intervention at the level of the school, there *"would be red lights flashing all the way"* and were an indication that Kunene was facing serious social problems and *"was crying out for help*". He concluded that from looking at the journal and the two death certificates that Kunene was *"a seriously troubled boy".* He said formal contracts were applied in serious cases of misconduct.

[52] In the circumstance, I conclude that the Plaintiff has established the requirements for factual causation linking Hutchings' omission to the harm suffered by her at the hands of Kunene, in respect of the pre-incident conduct of the Defendants.

[53] I now turn to the second leg of the enquiry namely, the legal causation. For liability to ensue, there must be a reasonable connection between the act and/or omission and the harm done. The question of legal causation involves a value judgement which is based on policy considerations, reasonableness, fairness and justice and which is described as the flexible criterion and is aimed at limiting the boundaries of liability. In **Smit v Abrahams** 1994 (4) SA (A) at 18, **Botha JA**, in emphasising the flexibility of the test for legal causation, said the following:

> *"Daar is net een 'beginsel': om te bepaal of die eiser se skade te ver verwyderd is van die verweerder se handeling om laasgenoemde dit toe te reken, moet oorwegings van beleid, redelikheid, billikheid en regverdigheid toegepas word op die besondere feite van hierdie saak."*

[54] In making a value judgment on the facts of this case, I bear in mind that Hutchings had the opportunity to act on 19 June 2001 and she failed to do so. The opportunity presented itself once more on 4 September 2001 and although she acted, she did not act effectively. If she had acted effectively, it is probable that her previous omission could have been mitigated to some extent. The harm occurred on 27 September 2001. In my view, the harm was not so remote in time, place and cause that the Defendants could reasonably escape liability for Hutchings not acting positively to prevent the harm. Taking into consideration the criterion of reasonableness, fairness and justice as well as policy considerations impacting on the convictions of the community, I conclude that the Defendants ought to be held liable for the pre-incident conduct of Hutchings and such conduct does not fall outside the boundaries of legal causation for the Defendants to

escape liability. In the circumstances, I find that the Plaintiff has established the requirements of legal causation in respect of the pre-incident conduct of Hutchings in her capacity as a servant of the Defendants.

The Conduct on the Day of the Incident

[55] I now turn to discuss the conduct of the Second Defendant on the day of the incident. The question to be answered is whether he acted as a reasonable person would have done when Hutchings brought Kunene to him with his journal following a complaint by the Plaintiff, or did his conduct fall short of that of a reasonable person in his shoes? There is some uncertainty firstly, as to what he was told by Hutchings when she brought Kunene to him and secondly, whether he looked into the journal before or after he had put Kunene in the chair outside his office. The Second Defendant was somewhat ambivalent about the first issue. In his evidence in chief he merely testified that he was informed that *"threats*" were made, but under cross-examination conceded that Hutchings had told him that "*death threats"* were made. I therefore find that at the time Hutchings handed Kunene over to him, he was aware of the fact that death threats had been made by Kunene against the Plaintiff.

[56] With regard to the second issue, the Second Defendant testified that he placed Kunene on the chair outside his office before he looked inside the journal. When asked whether he thought about the need to protect the Plaintiff against Kunene, he replied that he did not deem him to be an immediate threat to her, otherwise he would not have placed him on the chair outside his office. He conceded that children placed on that chair would on occasion get up and walk away. At that stage he was also aware of the fact that Kunene, after some altercation with the Plaintiff because of the destruction of an exam script, walked off the school premises. It is because of this incident that Hutchings, on 4 September 2001, concluded a Behavioural Contract with Kunene and his family.

[57] The unchallenged evidence of the witness, Mr Jacobs, was to the effect that in a discussion with the Second Defendant at the disciplinary hearing, the Second Defendant had told him that he (the Second Defendant) had wrested the journal from Kunene and looked in the journal and saw a death certificate. Because of this he told Kunene to sit down and he asked someone to call the police. It did not cross his mind that Kunene might go back to the classroom and attack the Plaintiff. If he had thought of this, his actions

would have been different. In my view, the probabilities favour the version that after Hutchings brought Kunene to the Second Defendant and told him about the death threats, he wrested the journal from Kunene, looked at it, saw the death certificate, and told Kunene to sit in a chair outside his office as he did not want Kunene to know that he was calling the police and his mother.

[58] With that backdrop, I will evaluate the conduct of the Second Defendant on the day of the incident which must be measured against the notional reasonable person in his place in order to determine whether he was negligent or not. If his conduct fell short of what a reasonable person would have done in his circumstances then he would be held to be negligent. At the time the Second Defendant decided to place Kunene, unsupervised, in a chair outside his office, he was aware firstly, that on 3 September 2001 the Plaintiff had complained to him that Kunene had destroyed an exam script and when she confronted him, he walked off the school premises without permission; secondly, that following the complaint, Hutchings on 4 September 2001 called a meeting between herself, Kunene and his family at which the behaviour of Kunene the previous day was raised and discussed and a Behavioural Contract was concluded between them; thirdly, that Hutchings on the day of the incident, following a complaint from the Plaintiff, brought Kunene to him and told him that Kunene had made death threats against the Plaintiff, which he (the Second Defendant) in his evidence conceded were serious allegations and does not happen every day; fourthly, that when he tried to remove the journal from his possession, Kunene resisted such move and he (the Second Defendant) had to use force to dispossess Kunene of the journal and fifthly, that he saw the death certificates and the image of blood running down the pathway in Kunene's journal and in his own words described what he saw in the journal as *"absolutely horrifying stuff - stuff of nightmares".*

[59] Arnold testified that on the day the Plaintiff was attacked, if he had been in the Second Defendant's position, he would not have told Hutchings to leave, but asked her to be present while he questioned Kunene about the death threats in the journal; because of the seriousness of the threat made against the teacher and a whole history of disruptive behaviour on the part of Kunene, he would not have told him to sit outside his office and let him out of his sight and control as he was in a rage and could have attacked anyone; he would not have looked into the journal without the presence of the learner and preferably another senior educator; that if he had opened the journal and discovered that the death

threat was to be executed at 10:30 with a hammer and a knife, he would immediately have alerted the teacher that her life was in danger; that he would have questioned the learner about the contents of the journal and the weapons in question; that he would have searched his bag in his presence and that of a senior educator and if he found the weapons, he would have confiscated them.

[60] In my view, the Second Defendant, by placing Kunene on a chair outside his office unsupervised and by letting him out of his sight and control, should reasonably have foreseen the probability that Kunene would slip away to his class and carry out the imminent death threats. The Second Defendant should have taken reasonable measures to ensure that it did not happen by asking him to wait in his office in his presence or get a senior educator or any other person, like Mr Cooper, the caretaker, to supervise him and warn the Plaintiff that her life is in danger and instituted measures to secure her safety, while he arranged to call the police and Kunene's mother. The failure to take these measures in order to avoid the harm, in my view, constitutes negligence on the part of the Second Defendant.

Causation of the Conduct on the Day of the Incident.

[61] Mr **Heunis**, in my view, correctly argued on the basis that there was factual causation in the nature of an omission inasmuch as the Second Defendant's action should have gone further than it did .i.e. by arresting and detaining Kunene. He submitted, however, that policy considerations, reasonableness, fairness and justice militate against the court holding that there was legal causation.

[62] Mr **Sher** submitted that, but for the Second Defendant's negligent omission and breach of his legal duty, the assault on the Plaintiff would not have happened. In the circumstances both Second Defendant (as the servant) and Third Defendant (as the master), are liable jointly and severally to the Plaintiff in such damages as the Court may determine, the one paying the other to be absolved.

[63] Unlike the conduct of Hutchings, that had indirectly led to the harm suffered by the Plaintiff, but not sufficiently remote for the Defendants to escape liability, the conduct of the Second Defendant, on the day of the incident, had a direct and proximate cause to the harm suffered by the Plaintiff. At the same time, it could not be argued that it would have

been too burdensome in the particular circumstances for the Second Defendant to have acted and take steps, i.e. to ensure Kunene was under a watchful eye once he had himself taken control of the situation on the day of the incident. Applying the principles enunciated above in connection with both the factual and legal causation, I conclude that the Plaintiff has established the requirements of both factual and legal causation on the part of the Second Defendant for Defendants to be held jointly and severally liable for the harm suffered by her, the one paying the other to be absolved.

Contributory Fault

[64] The Defendants pleaded in the alternative that should the court find that the assault on the Plaintiff was caused by the negligence of Second Defendant, then in that event the assault was caused partly by the fault of Second Defendant and partly by the fault of Plaintiff in that she:

(a) paid insufficient attention to Kunene, particularly after having read his journal, a fact which should reasonably have caused her to realise that he required more attention than she was giving;

(b) failed to inform the Second Defendant and/or Hutchings and/or others in authority of the contents of the journal upon learning thereof and in particular of the death certificate when in the exercise of reasonable care, she should and ought to have done so and

(c) failed to inform the Second Defendant and/or other persons in authority that she had confiscated a hammer from Kunene prior to the assault as alleged in her particulars of claim.

[65] In terms of Section 1(1)(a) of the Apportionment of Damages Act 34 of 1956:

"Where any person has suffered damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant, but the damages recoverable in respect thereof shall be reduced by the Court to such extent as the Court may deem just and equitable having regard to the degree in which the claimant was in fault in relation to the damage."

[66] In the case of **South British Insurance Co Ltd v Smit** 1962 (3) SA 826 (A), with

regard to the meaning of section 1(1) of the Apportionment of Damages Act, the following is stated, at 836C:

> *"What the Court is required to do is to determine, having regard to the circumstances of the particular case, the respective degrees of negligence of the parties. In assessing 'the degree' in which the claimant was at fault in relation to the damage' the Court must determine in how far the claimant's acts or omissions, causally linked with the damage in issue, deviated from the norm of the bonus paterfamilias . In thus assessing the position, the Court will, as explained above, determine the respective degrees of negligence, as reflected by the acts and omissions of the parties, which have together combined to bring about the damage in issue."*

In the case of **Jones NO v Santam Bpk** 1965 (2) SA 542 (A), the learned Judge largely followed the approach as taken in the **Southern British Insurance Co Ltd** case and added, at 554G-555D, as follows:

> *"A determination of the degree of fault on the part of the claimant does not by itself 'automatically determine the degree in which the defendant was at fault in relation to the damage'; the Court must first also determine in how far the defendant's 'acts or omissions, causally linked with the damage in issue, deviated from the norm of the bonus paterfamilias'. It is on the basis of comparison between the respective degrees of negligence of the two parties (or several parties if there be more than one claimant or defendant) that the Court can determine in how far the fault or negligence of each combined with the other to bring about the damage in issue."*

From the above two cases, to decide on an apportionment, it appears the courts have to compare the respective degrees of fault of the Plaintiff and the Defendants. However, the relative degrees of the causal significances of the parties' acts would not play a direct role (see **Harrington NO and Another v Transnet Ltd and Others** 2007(2) SA 228 (C) at 253 and see also LAWSA Vol 8 (1) at para. 169).

[67] However, according to Midgley and Van der Walt in LAWSA Vol 8 (1) at para 169:

> *"The correct approach when evaluating apportionment is for a court to make a just and equitable decision, having regard to, but not being bound by, the plaintiff's fault in relation to the loss."*

[68] Before dealing with the two other grounds of contributory negligence on the part of the Plaintiff as alleged by the Defendants, I will deal with the allegations surrounding the hammer that was allegedly confiscated. The Plaintiff's evidence was that she had confiscated a hammer from Kunene in or about August/September 2001. According to her, she showed it to Hutchings, Elixir, Gallie and the Second Defendant and was told to give it to the caretaker. She handed it to the caretaker. Hutchings, Elixir and the Second Defendant either did not recall such a report or denied such report. Mr **Heunis**, while accepting that a hammer may have been confiscated by the Plaintiff, submitted that the incident was not reported to senior management, and claimed that this failure amounted to negligence.

[69] It is common cause that the Defendants disavow any knowledge of this incident. The Plaintiff volunteered this information. I will assume for now that the Plaintiff did not report the hammer to management. Her conduct in confiscating the hammer and handing it to the caretaker, must be seen in the light of, firstly, her experience and maturity at the time of the incident; secondly, that the hammer in question was found in Kunene's possession, but was not used for any unlawful purpose, nor was there any evidence that it was going to be used for such purpose and, thirdly, that the hammer was confiscated and any possible threat to the safety and security of the school community was eliminated. It is all very well now, in hindsight, to say that she should have done more than simply confiscating and handing the hammer to the caretaker. It has been said by our courts that what is reasonably possible cannot be tested with the benefit of hindsight and the temptation to draw a conclusion from *post ex facto* knowledge, must be avoided (see **Harves Corporation (Pty) Ltd v Duncan Dock Cold Storage** *(supra)* in part [27] at 842F-H). Her conduct must be judged in light of the situation prevailing at the time and taking into consideration the situation then, I do not think that her conduct in confiscating the hammer and handing it to the caretaker, was unreasonable and inconsistent with a reasonable person in her position. Mr Arnold testified that is he had found any weapons in the possession of a learner, he would likewise have confiscated the weapon.

[70] It is common cause that the learners at Rhodes High kept a journal in which they recorded their personal day to day experiences. The contents of the journal were confidential, but the learner could share the contents with the educator if he or she so

wished. Plaintiff testified that she had read the journal with Kunene's consent. She was concerned about his personal problems and suggested that he make a note in the journal of the issues that worried him. She would read it and give him the necessary advice. Kunene then addressed a note to the Plaintiff in a question and answer format to which Plaintiff responded with compassion and empathy. She said that it appeared to her that he was a troubled child. It does not appear that she shared and discussed this with any of her peers nor did she refer him for counselling to Turner. Furthermore, as a State functionary, she had a duty to ensure the safety of the school community and, more particularly, in her classroom. In these respects, I am of the view that she did not act as a reasonable person in her position and as such was partly negligent.

[71] I am of the opinion that there is a link between Plaintiff's omission and the harm that she ultimately suffered. If Plaintiff had referred Kunene directly to Turner when she initially learnt of his personal problems from his diary, or at least discussed these matters with her peers, or Hutchings, there is a reasonable possibility that Turner could have instituted reasonable measures to treat Kunene, and it is probable that such intervention would at least have mitigated the harm ultimately suffered by Plaintiff.

[72] The Plaintiff testified that she saw a death certificate in the journal on the afternoon before the day she was attacked. She saw the certificate at the time when Kunene and a classmate, Sibulelo, were cleaning the classroom as punishment for things having been thrown around in the class. She asked both of them whether she should be concerned about it. They both assured her that it was merely a joke and there was nothing to worry about. She accepted their assurances. There was some uncertainty whether she saw the abridged death certificate or the unabridged death certificate on that day. She testified that she saw the abridged certificate. Kunene in his evidence at his criminal trial confirmed that on 26 September 2001, she only saw the abridged death certificate. However, Mr **Heunis** submitted that on the basis of her admission to Brigadier G J Burger in respect of his analysis of the contents of both the abridged and unabridged death certificates, it conclusively established, on the Plaintiff's own version, that she saw the unabridged certificate on the day before the incident. In the light of the evidence as a whole, I do not think that evidence is conclusive. The probabilities favour the conclusion that the she saw the abridged certificate on 26 September 2001 and the unabridged certificate on 27 September 2001. What is clear is that she saw one of the certificates on the day before

the incident. It is also clear that the Plaintiff reported the fact that she saw the death certificate on 27 September 2001, ie the following morning.

[73] Arnold regarded the fact that the Plaintiff did not bring the death certificate immediately to the attention of anyone, as serious. It must however be stated that the conduct of the Plaintiff must be measured against a reasonable person in her position, with her age, experience and maturity and not that of Second Defendant, Hutchings or Arnold. It is common cause that the Plaintiff was a young and inexperienced teacher and fresh out of University. She was in her early 20's and it was the second year of her teaching career. Gallie testified that the Plaintiff's problems could not be classified as major or serious problems and were of the kind that was experienced by most first year teachers. Such problems that the Plaintiff had experienced would be overcome in time with guidance and mentorship.

[74] In my view, she did not act unreasonably when she saw the death certificate on the afternoon of 26 September 2001 and reported the matter on the morning of the next day. The reason for that conclusion is twofold; firstly, she was assured by Kunene and Sibulelo that it was only a joke and she had nothing to worry about and secondly, taking into consideration her level of experience and maturity, reporting the matter the following morning, in my view, was not unreasonable.

[75] Counsel for Plaintiff submitted that should I find that the Plaintiff was also to be blamed for the harm that she suffered, then the degree of fault should be heavily weighted against the Defendants. Counsel for the Defendants, on the other hand, submitted that the Plaintiff's degree of negligence ought to be assessed at 90% and that of the Defendants at 10%. Taking all the circumstances into consideration, I am of the view that the major share of the blame must be directly attributed to the Defendants, who, by the exercise of reasonable care, could have avoided the attack.

[76] In respect of the extent of the Plaintiff's negligence in failing to inform her peers of the contents of Kunene's diary, or to report it directly to Turner, I believe that one must take into account the Plaintiff's relative inexperience, the details of which I have set out previously above. Furthermore, it must be considered that Plaintiff did attempt to assist once she had found out about Kunene's personal problems. She tried to reach him through

the confidential journal in the form of questions and answers. It is quite clear from the contents that she tried to gain his confidence. Subsequently, when it appeared to her that he was taking advantage of her empathy, she adopted a sterner approach. This led to him becoming obstinate and refusing to do his school work. She also eventually did refer him to Hutchings who had regular afternoon counselling sessions with him to address his problem, but that did not help. Her failure to report the contents of the journal, is understandable in the light of her testimony that she was reluctant to reveal the contents of the diary as she honestly believed that it was confidential.

[77] As far as the Second Defendant's conduct on the day of the incident is concerned, it must be noted that, in contrast to the Plaintiff, he was an experienced educator with at least 21 years of service. He started teaching in 1980 and was appointed as Head of Department (HOD) at the Settlers High School in 1983. He held various posts as Deputy Principal between 1987 and 1994. Between 1994 and 1999 he was Senior Deputy Principal at Camps Bay High School where he dealt with discipline at the school, social problems and substance abuse. In 1999 he was appointed as the principal of Rhodes High. It also cannot be ignored, as I have previously stated, that the conduct of the Second Defendant was a direct and proximate cause of the harm suffered by the Plaintiff, unlike the pre-incident conduct, which only had an indirect link with the harm ultimately suffered.

[78] As far as the conduct of Hutchings is concerned, I am further of the view that she must take a greater proportion of the blame compared to the Plaintiff. Hutchings was an experienced educator with at least 18 years' service. She commenced teaching at the Plumstead High School and then moved to Rhodes High, where she taught for 17 years. As the Head of the GET band at Rhodes High she was responsible for discipline at the school, while Second Defendant bore overall responsibility for such discipline.. While the Plaintiff did fail to inform Hutchings of the contents of the diary, it is common cause that it had been made available to Hutchings when Kunene "opened his heart and confided in her" earlier that year about his personal and social problems.

[79] Taking all the circumstances into consideration, I conclude that a fair and equitable apportionment of fault is 80% in respect of the Defendants and 20% in respect of the Plaintiff. The proven damages of the Plaintiff will accordingly be reduced by 20% in terms of the Apportionment of Damages Act No 34 of 1956.

Co-operation of organs of State

[80] Before I finally consider the issue of quantum, I wish to briefly deal with the argument raised by the Defendants' counsel during the course of proceedings and as contained in the Second and Third Defendants' Note in respect of section 41 of the Constitution of the Republic of South Africa, 1996. It was argued that the Plaintiff has failed to comply with section 41 (1) (h) (vi) of the Constitution, which provides that all organs of State within each sphere of government

"must –

(h) co-operate with one another in mutual trust and good faith by - . . .

(vi) avoiding legal proceedings against one another."

[81] The short answer to this argument is that the Plaintiff brought the proceedings in her personal capacity and not in the capacity as an organ of State. As such, I am of the opinion that there is no question of the application of section 41 (1) (h) (vi) of the Constitution and the argument must therefore fail.

Quantum

[82] I now turn to deal with the question of quantum. There appears to be broad agreement with many of the elements of the quantum. The difference is essentially attributed to differences in assumptions made by the experts of the Plaintiff and the Defendants. To assist the court in determining the quantum, the parties agreed to:

(a) Joint Minutes of the medical experts, namely Martin Yodaiken (Yodaiken), Larry Loebenstein (Loebenstein) and Tuviah Zabow (Zabow) for purpose of determining the future medical expences.

(b) A joint Minute between Ms Liza Hofmeyr (Hofmeyr), a consulting psychologist and Human Resources Consultant and Hannes Swart (Swart), an Industrial Psychologist, for the purpose of determining the future loss of earnings.

(c) Actuarial Reports by Alex Munro (Munro) in which he projects three scenarios, the one is based on the information given and assumptions made by Hofmeyr and the other two are based on the information given and assumptions made by Swart. The actuarial reports were accepted and handed in by consent of both parties.

Past Medical Expenses

[83] The amount of R36 276.69 in respect of past medical expenses is agreed upon between the parties and no further discussion need to detain us in respect of this item.

Future Medical Expenses

[84] There is a difference of R39 960 which is in respect of insight therapy and life-coaching therapy. The amount in respect of insight therapy is R27 360 and the amount in respect of life-coaching is R12 600. It is not disputed that as a result of the attack the Plaintiff suffered certain bodily injuries for which she received treatment. In addition thereto she suffered from depression, fear, anxiety and personality changes. She was diagnosed with Major Depressive Disorder, Post-Traumatic Stress Disorder ("PTSD") and Panic Disorder with Agoraphobia, following the trauma induced by the attack on her with a hammer.

[85] In a joint minute the medical experts agreed on the future medical treatment except insofar as the insight therapy and life-coaching were concerned. Both Loebenstein and Zabow agreed that such therapy was not necessary whereas Yodaiken was of the opinion that such therapy was necessary and beneficial. Loebenstein, in his two reports, initially agreed with Yodaiken that the Plaintiff should have coaching and insight therapy, but had a change of heart at the time of the preparation of the joint minute. His reason for having a change of heart is not very convincing. He conceded that Yodaiken was better qualified to express an opinion on these issues than he was. Yodaiken conceded that life-coaching is in many ways similar to Cognitive Behaviour Therapy (CBT), but it goes further and provides the patient with exercises and practices which allow her to discover her resources and how to apply these resources. Yodaiken testified that the Plaintiff has been *"through a range of different experiences all of which I think have accumulated in her condition and the insight [therapy] would allow her to reflect on these and to put them in a perspective in terms of her future".*

[86] From an industrial psychologist's point of view, Swart who is qualified to express a view on life-coaching, is of the opinion that it is not necessary for the Plaintiff to undergo life- coaching. In this respect, he agrees with Loebenstein and Zabow. I agree with them that to provide life-coaching would be tantamount to an *"over-kill".* I am of the view that, should the Plaintiff receive insight therapy, it would be unnecessary also to get life-

coaching therapy. I would therefore allow for insight therapy but not for life-coaching therapy. In the circumstances the amount of R27 360.00 in respect of insight therapy is allowed, but the amount of R12 600.00 in respect of life-coaching therapy is disallowed.

Loss of Earnings

[87] In a joint minute dated 17 November 2009 prepared by Hofmeyr, the expert of the Plaintiff, and Swart, the expert of the Defendants, they set out the pre-morbid scenario and the post-traumatic scenario. In respect of the two scenarios, the minute reflects their points of agreement and their points of disagreement. With regard to the pre-morbid scenario, both experts are in agreement that, taking into consideration the Plaintiff's achievement, orientation and dedication to teaching, it would be reasonable to allow for both progression and promotion. I agree. For calculation purposes, both agreed to a retirement age of 65 years. For the uninjured state in my view a reasonable retirement age is 65 years, but for the injured state I would regard 60 years as a reasonable age to retire. I am supported in this regard by Swart. However, for the injured state allowance can be made in the contingencies.

[88] Taking into consideration the opinion of Mr Henry Wyngaard (Wyngaard) from the Department of Education, the number of national vacancies and shortage of educators, Hofmeyr is of the view that it would be reasonable to allow for career progression of approximately 12 years. However, if suitable positions in the teaching profession are not readily available, it could take up to 14 years. Swart, on the other hand, deferring to the views of Wyngaard, is of the opinion that it is reasonable to allow for career progression inclusive of promotion of at least 18 years. Having regard to the fact that the Plaintiff is a woman and she is black for purposes of affirmation, and the Department of Education is committed to the career progression of educators of historically disadvantaged background, especially women, I think a career progression of 14 years as suggested by Hofmeyr is fair and reasonable. The difference can be factored into the contingencies. At the time of the incident, the Plaintiff was functioning as a teacher (Level 1); it is reasonable to assume that in her uninjured state with her ambition, drive and dedication she would have secured permanent employment as a teacher (Level 7) and after five years she could have progressed to senior teacher (Level 8), Head of Department (Level 8) or master teacher (Level 9).

[89] With regard to the post-traumatic scenario, both parties are in agreement that (i) the Plaintiff should not return to teaching and, because of her view of the Department of Education, it is not envisaged that she would consider employment with the Department; (ii) treatment should be implemented as soon as possible and such treatment should focus on optimal treatment for six months, which should enable her thereafter to re-enter the labour market whilst continuing with treatment; (iii) she would have to opt for initial employment in a position where she would rely on her formal qualification and experience as an educator namely, positions such as assistant publisher, supportive roles within an editorial environment, consultant with a distance learning institution or roles focussed on curriculum development; (iv) it would be reasonable to assume that she would earn R10 000 per month for the first six to twelve months; and (v) she would have entered the labour market on C1 level and progress to C2.

[90] However, both experts expressed certain reservations. Hofmeyr is of the opinion that with optimal treatment the Plaintiff may be able to sustain employment on the C1/C2 levels, but would remain vulnerable in her injured state. Because of emotional and psychological vulnerability, as well as pre-existing personality traits, further career progression is deemed unlikely. She pegs the salary range from R120 000 to R180 000 per annum. She is of the opinion that some allowance should be made for future setbacks and if Koch's values are used, provision should be made for a caveat, as suggested by Swart, of 40% to reflect market trends. She also suggests that some compensation for reduced career scope should be factored into the equation. Swart is of the opinion that in the event of significant amelioration of the psychiatric concerns and the acquisition of further tertiary education, she would be able to progress from level C1 to level C4, but expresses caution if Koch's values are used. In that event he suggests the application of a caveat of 40%. I agree with Hofmeyr that because of the Plaintiff's emotional and psychological vulnerability, it is highly unlikely that she would be able to progress to level C4 in her injured state. This could be factored into the contingencies if any one of Swart's scenarios is used.

Past Loss of Earnings

[91] The difference in the past loss of earnings between that of the Plaintiff and the Defendants is R26 120.38 as presented in their Heads of Argument. The difference between scenario 1 (Hofmeyr) on the one hand and scenario 2 (Swart) and scenario 3

(Swart) on the other hand, as presented in the Plaintiff's Actuarial Report of MC Consulting dated 18 November 2009 (MC Report), is R34 400. The first scenario is based on the version of Hofmeyr, whereas the second and third scenarios, which are identical, is based on the version of Swart. In the interest of fairness to both the Defendants and the Plaintiff, I will, for the purpose of my calculation, assume the correctness of the figures of the second and third scenario. The calculation in respect of the past loss of income is the sum of R414 500. This amount is made up of the sum of R702 900 in respect of the uninjured state less 7,5% in respect of contingencies, which equals R650 200 from which is deducted the amount in respect of the injured state in the sum of R235 700 and leaves a balance of R414 500. I will, therefore accept, for our present purposes, that the Plaintiff's past loss of earnings amounts to R414 500.

Future Loss of Earnings

[92] For the purpose of calculating the future loss of earnings, Hofmeyr projected one scenario and Swart projected two scenarios. They are reflected in the MC Report. For the purpose of my calculation, I will accept the median between that of scenario 1 (Hofmeyr) and scenario 3 (Swart), namely scenario 2 (Swart) as reflected in the MC Report. Hofmeyr and Swart in the joint minute agreed on a number of issues for the purpose of calculating the loss of earnings but also differed on a few issues. The differences in all probability account for the final figures of the two scenarios. In view of the Plaintiff's prospect of promotion and progression in her uninjured state, I do not think that the postulated amount of R3 285 700, in respect of her earnings in the uninjured state as reflected in scenario 2 (Swart) of the MC Report, is unrealistic. The amount of R2 996 200 postulated in respect of her earnings in her injured state for the same scenario as reflected in the MC Report, is likewise not unrealistic. While Scenario 2 employs a projected career progression of 18 years, and I have already concluded a progression of 14 years is fair and reasonable, this difference may be factored into the contingencies.

[93] Before commenting on the final figures, I must evaluate the contingencies. The Plaintiff made provision for 15% in respect of the uninjured state whereas the Defendants made an allowance for 7,5%. It must be noted that both the Plaintiff and the Defendants made an allowance of 7,5% in respect of the past loss of earnings. It must also be borne in mind that the future loss of earnings stretches over a much longer period and the vagaries and vicissitudes of life impacting on such future period are much greater. In view

thereof, I do not think that making allowance for contingencies at the rate of 15% for the uninjured state is unreasonable. It is basically twice the allowance made in respect of contingencies for the past loss of earnings.

[94] For the injured state, the Plaintiff made an allowance of 25% for contingencies, whereas the Defendants made an allowance of 10%. Hofmeyr in her report recommended that a number of factors should be taken into account when the court exercises its discretion to impose a suitable contingency allowance. In taking into consideration the contingencies, it is reasonable to assume: (a) that the Plaintiff's future emotional setbacks can impact on her work performance and productivity within her work environment; (b) that the Plaintiff will remain emotionally and psychologically vulnerable in her injured state and emotional and psychological setbacks can impact on her ability to sustain employment in any environment; (c) that she can relapse and suffer once more from Post Traumatic Stress Disorder and/or Depressive Disorder which could adversely affect her ability to generate an income; (d) that the possibility of psychosomatic factors aggravating her physical condition cannot be excluded; (e) that the Plaintiff will not be able to return to teaching; (f) that career progression within any work environment will be dependent on the availability of opportunities as well as performance criteria and progression to a more demanding role is less likely within her injured state and (g) that in the injured state it is anticipated that an appropriate retirement age would be 60 years instead of 65 years.

[95] Taking into consideration the above assumptions as well as the nature, extent and duration of her emotional and psychological *sequelae*, I think that a contingency allowance of 25% for the injured state is eminently fair and reasonable. The 10% contingency proposed by the Defendants in respect of the future injured state, in my view, is extremely unreasonable. In the light of all circumstances, I conclude that the loss of future earnings of R545 750, making allowance for 25% instead of 30%, as reflected in Scenario 2 (Swart) of the MC Report, is eminently fair and reasonable.

General Damages

[96] On the morning of 27 September 2001, the Plaintiff was attacked with a hammer by a learner in her class in the presence of other learners. As a result of the attack she sustained blunt trauma to her head, wrist and knee. She was hit three times on her head, once on her left wrist and once on her left knee. She was treated at the scene by para-

medics before being admitted to hospital for treatment for her injuries. She sustained head wounds for which she required five stitches, two fractured bones in her wrist, fractured bone between her wrist and elbow and a swollen knee. She spent three days at the hospital before being discharged. According to Dr R K Marks the use of the wrist and forearm would have been painful for a few months and pain in cold and rainy weather might take up to two years to abate. She also suffered from regular chronic headaches. In addition to sustaining the physical injuries, she also developed emotional and psychological *sequelae* which were precipitated by the attack. She suffered from Post Traumatic Stress Disorder (PTSD), Major Depressive Disorder and Panic Disorder with Agoraphobia. These ailments had a crippling effect on her functioning in the school as well as the social environment.

[97] Yodaiken in his report dated 10 October 2007 found that the attack on the Plaintiff was serious and life-threatening to the extent that it left her emotionally and psychologically debilitated. He noted that at the time of the attack she appears to have been a fully functioning, creative and enthusiastic teacher who enjoyed her school and was fully engaged with the learners. Her emotional and psychological conditions were aggravated in December 2002 when she was subpoenaed to give evidence at the criminal trial of Kunene. She developed panic attacks in anticipation of the trial. She required constant attention from mental health professionals to keep these conditions under control. She developed similar symptoms in anticipation of the present trial and her emotional and psychological conditions were once more aggravated when she was subjected to robust cross-examination by Mr **Heunis** in this matter.

[98] The experts are in agreement that in her emotional, psychological and psychiatric condition it is highly improbable that she would be able to return to work as a teacher. Dr Gardiner was of the opinion that the Plaintiff's prognosis in the long term remained poor and that her employability in the open market has certainly been negatively affected. Dr Ambrosano, a psychiatrist, was of the opinion that the attack had a marked affect on her functionality and personality and her entire demeanour and interaction with others had changed adversely. Hofmeyr was of the view that the Plaintiff suffered significant loss of quality of life as a result of the attack and will remain an emotionally and psychologically vulnerable person despite treatment. She was of the opinion that the Plaintiff should be compensated for significant past and future loss of quality of life. She emphasised that the

impact of the attack on her self-esteem, motivation, confidence, emotional well being, social and occupational functioning should not be underestimated.

[99] Yodaiken in a subsequent report dated 30 March 2009, concluded that the attack has had a far-reaching and chronic effect on her personality and in her ability to function in life. According to him, the degree of change that has taken place between the evaluation in October 2007 and the one in March 2009 indicates that it is unlikely the Plaintiff will easily return to her pre-morbid level of functioning. Loebenstein, a clinical psychologist, confirmed that the Plaintiff's emotional functioning was significantly impaired at the time of their consultation in November 2007, i.e. six years after the attack. The Plaintiff is a professional person and has strived to achieve a professional identity. She dedicated herself with passion to the teaching profession. Her inability to return to teaching will deprive her of an amenity for which she strived for in life.

[100] By their very nature, general damages are not capable of being accurately measured in monetary terms. However, the court has a wide discretion to make an award in respect of non-patrimonial damages. In exercising such discretion a court must determine a compensation which is fair and just in the particular circumstances of the case. **Watermeyer, JA** in **Sandler v Wholesale Coal Suppliers Ltd** 1941 (AD) 194 at 199 expressed the following dictum:

> *". . . it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."*

(See also **AA Mutual Insurance Association Ltd v Maqula** 1978 (1) SA 805 (A) AT 809B.)

[101] The court is not bound by one or more method of calculating general damages, but

has a wide discretion (see the headnote in **Southern Versekering v Carstens N O** 1987 (3) SA 577 (A)). While comparative awards in other cases might be a useful guide, they are not decisive. In **Protea Assurance Co Ltd v Lamb** 1971 (1) SA 530 (A) at 535H-536A, the following dictum is instructive:

> *"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters."*

It is settled law that damages can be recovered for psychological *sequelae*, provided that the plaintiff suffered a detectable psychological injury (**Road Accident Fund v Sauls** 2002 (2) SA 55 (SCA) at 61I-J).

[102] The Plaintiff has claimed R400 000 in respect of general damages whereas the Defendants are of the view that an award of R150 000 would be fair. Taking into consideration the nature, extent and duration of the physical injuries, the emotional, psychological and psychiatric *sequelae*, the pain, suffering and loss of amenities of life, I am of the view that an award of R350 000 would be eminently fair and equitable.

The Award

[103] In light of the findings, the total quantum of the award, before apportionment, is as follows:

(i) agreed past medical expenses:	R 36 276,69	
(ii) future medical expenses	: R 46 830,00	
(iii) past loss of earnings	: R414 500,00	
(iv) future loss of earnings	: R545 750,00	
(v) General Damages	: R350 000,00	R1 393 356,69
Less apportionment of 20%	:	R 278 671,00
Net Amount	:	R1 114 685,53

The Cost

[104] The Plaintiff was substantially successful and there is no reason why she should not be awarded her costs (**Griffiths v Mutual & Federal Insurance Co Ltd** 1994 (1) SA 535 (A) at 549). In this case there was apportionment of damages, in terms of section 1 of

the Apportionment of Damages Act, No 54 of 1956, for contributory negligence. In the absence of a counterclaim, the Plaintiff who recovered a substantial amount of damages is entitled to all the costs of the action irrespective of the reduction of such damages by virtue of the apportionment *(***Norwich Union Fire Insurance Society Ltd v Tutt** 1960 (4) SA 851 (A) at 854)*.*

The Order

[105] In the premises the court grants judgment against the Second and Third Defendants, jointly and severally, the one paying the other to be absolved for:

(i) Payment of the sum of R1 114 685,53 (one million one hundred and fourteen thousand six hundred and eighty five rand and fifty three cents);

(ii) Interest on the aforesaid amount at the prescribed rate from date of Summons to date of payment;

(iii) Defendants shall pay the Plaintiff's costs of suit, which costs shall include, but not be limited to:

(a) the costs upon the attendance of two counsel;

(b) the costs of the hearing of the special plea in 2007;

(c) the costs of obtaining a running transcript;

(d) the reasonable qualifying expenses and the costs of attendance at court, if any, of the following expert witnesses (i) Ursula Van Wyk; (ii) John Gardiner; (iii) Dr Ambrosano; (iv) Martin Yodaiken; (v) Liza Hofmeyr (vi) Alex Munro and (vii) Mogamat Arnold.

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