



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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N Jacobs v The Minister of Justice and Correctional Services (431/2020) [2021] ZASCA 151 (SCA) (27 October 2021)

The Supreme Court of Appeal (SCA) today upheld an appeal brought by Ms Jacobs against the decision of the Gauteng Division of the High Court, Pretoria (Mavundla J, sitting as court of first instance) (the high court). The appeal was upheld with costs. The decision of the high court was thereby set aside.

The issue before the SCA was whether absolution from the instance was correctly granted by the high court. The standard that was of application to decide whether the trial court should have granted absolution from the instance was ‘whether a court, applying its mind reasonably to the evidence, could or might (not should or ought to)’ find for the plaintiff. The SCA found that the high court had correctly formulated the standard. The question before the SCA was whether the high court correctly applied this standard to the evidence before it.

The facts of the matter were as follows. The appellant, Ms Jacobs, instituted an action against the respondent, the Minister of Justice and Correctional Services (The Minister). Ms Jacob claimed R 2 040 000 from the Minister for pain and suffering. Ms Jacobs alleged that on 1 April 2012, Ivan Botha had attacked her and attempted to assault, rape and rob her. Mr Botha was a convicted criminal who had committed, among other offences, rape and indecent assault. Mr Botha was placed on parole on 1 November 2010. The attack took place during the period of Mr Botha’s parole. Ms Jacobs’ cause of action was predicated upon the failure by the Minister to discharge his duty to protect Ms Jacobs. Ms Jacobs’ case rested upon two central claims. First, given Mr Botha’s criminal record and the information that served before the Parole Board, he should not have been released on parole. Second, Mr Botha violated his parole conditions, but was not returned to prison. This left Mr Botha at large to attack Ms Jacobs. The Department of Correctional Services should, in the circumstances, have foreseen that by permitting Mr Botha to be released on parole, the public may be endangered. That risk materialised when Mr Botha attacked Ms Jacobs. As a result, the Minister was liable for the pain and suffering caused to Ms Jacobs. The Minister defended the action. Ms Jacobs testified. After which, she closed her case. The Minister applied for absolution from the instance. The high court granted absolution from the instance, together with the costs of two counsel. With the leave of the high court, Ms Jacobs appealed to the SCA.

The SCA found that an issue that arose on the pleaded case of Ms Jacobs was whether, even if the Parole Board failed to discharge its statutory functions, did the Correctional Services Act 111 of 1998 confer or exclude a claim for damages against the Minister? If the statute did neither, did the common law nevertheless found a cause of action? And in answering this question, how was the reasoning in *Carmichelle v Minister of Safety and Security and Another* 2001 (10) BCLR 995; 2001 (4) SA 938 (CC) (*Carmichelle*), which recognised that a delictual action may lie against a police officer and prosecutors who failed in their duty to protect the plaintiff from attack, to be reconciled with the precautionary *dicta* in the *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300; 2007 (3) SA 121 (CC) appeals?

The SCA declined to consider these issues in deciding the appeal for these reasons. First, while certain of these issues may have been usefully considered had an exception been taken at the outset, it was of less utility to do so when some of the evidence at trial had been heard. Second, should the enquiry reach the question of unlawfulness at common law, this was an issue of public policy that may yet be elucidated by evidence that the Minister would wish to call, in the event that the appeal succeeded and absolution was not granted. Third, the parties did not address full argument to the SCA as to the correct interpretation of the Correctional Services Act and whether a common law delictual claim was supportable. Fourth, no reconciliation had been attempted in explanation of the Minister's recognition at the pre-trial conference of Ms Jacobs' constitutional rights, as pleaded, but the denial of the Minister's duty to act and protect Ms Jacobs.

Rather, the issue of law as to whether a cause of action was cognisable on the basis of a duty by the Parole Board to protect Ms Jacobs should have provided the high court with a compelling basis to decline the application for absolution from the instance. In *Carmichelle*, the Constitutional Court recognised that where a substantial issue of law arose, the interests of justice ought to incline a trial court to refuse absolution. That was the position here. Whether Ms Jacobs enjoyed a cause of action, and if she did, its basis, were matters of some difficulty. They were best dealt with once all the evidence had been heard. For this reason, the SCA found that the high court should not have granted absolution from the instance.

Accordingly, for purposes of determining whether the high court correctly granted absolution from the instance, the SCA assumed, without deciding, that the decision of the Parole Board to release Mr Botha on parole, and thereafter its failure to send him back to prison upon the violation of his parole conditions, may give rise to a common law claim in delict. The key issue was then whether the high court, reasonably applying its mind to the evidence, correctly granted absolution from the instance because it could not find for Ms Jacobs.

The SCA found that on the documentary evidence placed before the high court, a court could have found that the Parole Board acted wrongfully and negligently in releasing Mr Botha on parole. Convicted of three sexual offences, the superficial commentary offered in the social worker's report, the vagueness of what was said by the case management committee, and the lack of a psychologist's report, made out a case on the basis of which it could be said that the Parole Board decided to release Mr Botha on parole when there was significant risk attached to their decision. Until such time as those who made the parole decision came to give evidence and explained what they did, there was sufficient evidence that could permit of a finding that the Parole Board acted wrongfully and negligently. Once that was so, the evidence could also suffice to establish causation, since a proper appreciation of the risk could have led to a denial of parole and the continued imprisonment of Mr Botha.

The SCA found further that there was a further aspect of the evidence to which the high court did not have proper regard. Mr Botha, once released on parole, was subject to supervision. Those responsible for his supervision categorised Mr Botha as 'high risk', having been convicted of rape and indecent assault. Yet his violations of his parole conditions resulted in verbal warnings. Whether that was a defensible sanction was a further matter that could permit of a finding that there was a failure on the part of the Supervision Committee to recommend that appropriate action be taken against Mr Botha.

The SCA therefore held that under the deferential standard applicable to an application for absolution, there was evidence before the high court that could permit of the finding that the discretion of the Parole Board was not lawfully exercised.

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