CASE NO: 310/98

In the matter between :

ALIX JEAN CARMICHELE Appellant

and

THE MINISTER OF SAFETY AND SECURITY First Respondent

THE MINISTER OF JUSTICE Second Respondent

Before: Van Heerden ACJ *et* Vivier, Howie, Schutz, Zulman JJA.

Heard: 22 September 2000

Delivered: 2 October 2000

Delictual action for damages.

J U D G M E N T

VIVIER JA:

[1] During the morning of 6 August 1995 the appellant, a 28 year old woman, was brutally assaulted with a pick handle and knife by one Coetzee at the home of Ms Julie Gösling at Noetzie, a small secluded seaside village near Knysna. The appellant sustained head injuries and a broken arm in the attack.

[2] Coetzee was a convicted criminal, having been found guilty on 6 September 1994 in the Regional Court at Knysna on charges of house-breaking and indecent assault for which he had been sentenced to a fine and suspended periods of imprisonment. These charges had arisen from an incident during the night of 3 January 1994 at the home of Ms Beverley Claassen in Hornlee, Knysna. At the time of the attack on the appellant Coetzee was, in addition, facing a charge of having raped a

young woman, Eurona Terblanche, at the Hornlee sports grounds on 4 March 1995. Coetzee had first appeared on this charge in the Knysna Magistrate's Court on 6 March 1995 when he had been released on his own recognizance. On 15 March 1995 he had been taken into custody and sent to Valkenberg Hospital for observation. On 18 April 1995, upon his return from Valkenberg Hospital, he had appeared in the Knysna Magistrate's Court when he had again been released on his own recognizance pending a decision by the Attorney-General on whether the case should be tried in the High Court or the Regional Court.

[3] On the Terblanche charge Coetzee was eventually convicted of attempted rape on 15 September 1995 and was sentenced to 7 years' imprisonment. For the attack on the appellant he was convicted of attempted murder on 13 December 1995 and sentenced to 10 years' imprisonment.

[4] Following the attack on her by Coetzee the appellant brought a delictual action for damages against the two respondents in the Cape Provincial Division in consequence of the injuries she had sustained at the hands of Coetzee. The appellant's case, as pleaded, was that the members of the South African Police as well as the public prosecutors at Knysna owed her a legal duty to act in order to prevent Coetzee causing her harm and that they had negligently failed to comply with such duty. It was common cause that the police and prosecutors at all relevant times acted in the course and scope of their employment as servants of the respective respondents.

[5] The trial came before **Chetty J** who was asked to decide only the issue of liability and to permit the question of the *quantum* of damages to stand over. At the conclusion of the appellant's case the learned Judge held that there was no evidence upon which a court, applying its

mind reasonably to such evidence, could find for the plaintiff that the said duty had existed and that the police and public prosecutors at Knysna had acted wrongfully. He accordingly granted an order of absolution from the instance with costs. With the leave of the Court *a quo* the appellant appeals to this Court. In the circumstances we are not concerned with the question whether negligence was proved or the further question whether any possible negligence could ever have been causally related to the appellant's loss.

[6] The legal duty contended for was one owed to the appellant to act positively in order to ensure that Coetzee was remanded in custody pending his trial on the rape charge and to ensure that he was re-arrested when complaints about his behaviour were made to the police and prosecuting authorities on 20 June 1995 and 2 August 1995. The duty to secure his re-arrest was limited to the prosecutors.

[7] The appropriate test for determining the wrongfulness of omissions in delictual actions for damages in our law has been settled in a number of decisions of this Court such as *Minister van Polisie v Ewels* 1975(3) SA 590 (A) at 597 A-C; *Minister of Law and Order v Kadir* 1995(1) SA 303 (A) at 317 C-318 I; *Knop v Johannesburg City Council* 1995(2) SA 1 (A) at 27 G-I and *Government of the Republic of South Africa v Basdeo and Another* 1996(1) 355 (A) at 367 E-H. The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court.

In *Minister of Law and Order v Kadir, supra*, **Hefer JA**, stated the nature of the enquiry thus at 318 E-H :

> "As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which 'shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people' (per M M Corbett in a lecture reported *sub nom* 'Aspects of the Role of Policy in the Evolution of the Common Law' in (1987) SALJ 52 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the court conceives to be society's notions of what justice demands."

Hefer JA also stressed the difference between morally reprehensible and legally actionable omissions and warned that a legal duty is not

determined by the mere recognition of social attitudes and public and legal policy (at 320 A-B). The question must always be whether the defendant ought reasonably and practically to have prevented harm to the plaintiff: in other words, is it reasonable to expect of the defendant to have taken positive measures to prevent the harm (Prof J C van der Walt in **Lawsa**, First Reissue, Vol 8, Part 1 para 56).

[8] With this approach in mind I turn to deal more fully with the facts of the present case.

When Coetzee first appeared in the Magistrate's Court on 6 March 1995 in connection with the alleged rape of Eurona Terblanche, the investigating officer, Sergeant Kleyn, recommended that he be released on his own recognizance. A note in the file to the effect that Coetzee had a previous conviction for rape arising from the events at Claassen's house (this was incorrect as his previous conviction was for indecent

assault) was not brought to the attention of the magistrate, Mr K J Von Bratt, who ordered that Coetzee be released on his own recognizance. Von Bratt's evidence was to the effect that in the period between the coming into force of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution") on 27 April 1994 and the commencement of the Criminal Procedure Second Amendment Act 75 of 1995 on 21 September 1995 (which extensively revised the bail provisions of the Criminal Procedure Act 51 of 1977), awaiting trial accused were allowed out on bail or own recognizance far more readily than was previously the case. He said that at the relevant time the State had to produce substantial grounds before an awaiting trial accused would be remanded in custody. At the relevant time sec 25 (2)(d) of the interim Constitution provided that every person arrested for the alleged commission of an offence had, in addition to rights as a detained

person, the right to be released with or without bail, unless the interests of justice required otherwise. Sec 35 (1)(f) of the present Constitution of the Republic of South Africa Act 108 of 1996 provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Von Bratt was not prepared to say that, if properly informed, he would have remanded Coetzee in custody.

[9] After his release from custody on 6 March 1995 Coetzee returned to Noetzie, where he had been living with his mother, Ms Annie Coetzee, since the end of 1994. Annie Coetzee was employed by Gösling in her business at Knysna and also did domestic work for her in her house at Noetzie where Gösling lived permanently. Gösling had arranged with the owner of one of the few other houses at Noetzie that Annie Coetzee could occupy the house and look after it.

[10] A few days after Coetzee's release from custody Eurona Terblanche's mother approached Gösling and told her about the attack on her daughter and about Coetzee's previous conviction for indecent assault. As a result Gösling spoke to Captain Lawrence Oliver of the Knysna police and asked him to see to it that Coetzee was kept in custody pending his trial. Captain Oliver told Gösling to discuss the matter with the senior public prosecutrix, Dian Louw, which she did. Gösling testified that she told Louw that Coetzee would hurt her or one of her friends as she feared that he would repeat his previous crime. Louw told her that there was nothing she could do until he committed another offence.

[11] On 13 March 1995 Coetzee attempted to commit suicide. Annie Coetzee's evidence was that Coetzee had sexually abused girls in the family from an early age and that she wanted him to be sent to an

institution for treatment as she was afraid that he would commit another sexual offence. With the assistance of a family member, Sergeant Grootboom of the Knysna Police, she took Coetzee to see Louw the day after the attempted suicide. The latter's notes of what Coetzee told her were produced at the trial and include the following :

> "Vlgs besk. kom probleem aan sedert hy 10 jaar oud is. Neigings bv. kry ereksies en om 'n vrou te sien of foto's.
> My niggie gemolesteer in die aand as sy slaap
> haar bevoel
> ma het my uitgevind.
> Dr toe geneem
> Dr my gewaarsku 13/14 jaar.
> Masturbeer baie
> onsedelike aanrandings - by 'n huis ingegaan en die meisie onsedelik aangerand - bevoel + panty afgetrek.
> Van 1½ jaar opgeskort 1994
> Verkragting.
> .....
> Sien meisies moet my keer hardloop huis toe masturbeer."

In view of what Coetzee told Louw he was rearrested, brought

before court on 15 March 1995 and was referred to Valkenberg Hospital for observation. The referral documents prepared by Louw included her abovementioned notes as well as details of the sexual attack on Eurona Terblanche. Copies of the referral documents were sent to the Attorney-General.

[12] On 18 April 1995, upon his return from Valkenberg Hospital, Coetzee again appeared in the Knysna Magistrate's Court, this time before Mr L Goosen. The prosecutor handed in a report by Dr A Jedaar, a specialist psychiatrist at Valkenberg Hospital, to the effect that Coetzee had criminal capacity at the time of the attack on Eurona Terblanche and that he was fit to stand trial. The magistrate accepted the findings in the report. Coetzee was thereupon charged with rape and pleaded not guilty. The case was postponed to 2 May 1995 awaiting the Attorney-General's decision as to whether Coetzee should be tried

in the High Court. Coetzee was once again released on his own recognizance. His release was not opposed by the prosecutor who again did not inform the magistrate of the previous conviction.

Goosen did not testify and there is no evidence to suggest that had he been fully informed he would have ordered that Coetzee be detained in custody pending his trial. Nothing appears from the record about the proceedings on 2 May 1995 when Coetzee was again released on his own recognizance. The Attorney-General decided that Coetzee should be tried before a Regional Court and, again, did not suggest his detention awaiting trial.

[13] The evidence for the appellant was that in the period between 18 April l995 and the attack on the appellant on 6 August 1995 Gösling, the appellant and Annie Coetzee on various occasions all requested the police and/or Louw to have Coetzee re-arrested and to ensure that he

was detained in custody pending his trial. Gösling testified that one morning towards the end of June 1995 while she was at work she received a telephone call from the appellant who had stayed overnight at her home in Noetzie. The appellant informed her that she had seen Coetzee prowling around the house apparently trying to get in through the window of Gösling's bedroom. Gösling testified that she went into the Knysna charge office and spoke to Captain Oliver who said that the police could do nothing unless Coetzee committed a crime. He again told her to speak to Louw, who told her the same. Neither the appellant nor Gösling laid any charge against Coetzee resulting from this incident. In fact, according to Gösling, she never told the police or the prosecutor that Coetzee had trespassed. This was probably because she was aware of the fact that he was doing chores for his mother at Gösling's home at Noetzie and was therefore allowed on to the

property. It is clear from her evidence that her main reason for talking to the police and Louw was that Coetzee had been released in the first place. On 2 August 1995, i e only four days before the attack, Gösling again raised her fear of Coetzee with Louw who repeated that there was nothing she could do.

[14] In view of the fact that Coetzee was taken into custody after his first release on 6 March 1995 and that he was then again released on 18 April 1995 the court proceedings on 6 March 1995 are irrelevant and need not be considered. The essential enquiry is, first, whether the alleged legal duty was owed by the police and prosecutors with regard to Coetzee's release on 18 April 1995 and, secondly, whether the prosecutors owed the appellant a legal duty to secure his re-arrest following the complaints on 20 June 1995 and 2 August 1995.

[15] With regard to Coetzee's release on 18 April 1995 it was

obviously the magistrate's decision whether to release him or not, so that the legal duty contended for must be confined to a duty, on the part of the police, to provide the prosecutor with full information and a duty, on the part of the prosecutor, to oppose bail and to give the court full information relevant to Coetzee being remanded in custody or released.

[16] On 18 April l995 the prosecutor was in possession of all the information relevant to Coetzee's detention or release. This consisted of Coetzee's one previous conviction for housebreaking and indecent assault (which appeared from the referral documents), the nature of the crime he was then charged with, the referral documents and Dr Jedaan's psychiatric report. There was accordingly nothing further required of the police and consequently no legal duty was owed by them relative to Coetzee's release on 18 April 1995. I have pointed out already that it was not alleged that the police owed any legal duty relative to

Coetzee's possible re-arrest thereafter.

[17] That leaves the question whether the prosecutors at Knysna owed a legal duty to the appellant to oppose Coetzee's release on 18 April 1995 and to secure his re-arrest. I shall assume in favour of the appellant that the State may be vicariously liable for an omission by a prosecutor in exercising a discretion.

There is obviously no absolute duty resting on a prosecutor to oppose bail in all cases. The prosecutor has a public duty to oppose bail in appropriate cases but a breach of this duty does not necessarily constitute a legally actionable omission at the instance of any individual member of the public. Whether a legal duty is owed in that situation to any individual member of the public depends on what is reasonable, having regard to all the facts and circumstances of the particular case and the interplay of the factors mentioned by the authorities to which I

have referred. It also depends on whether the claimant stands in a special relationship to the defendant such as distinguishes the claimant from any other member of the public.

[18] In the present case the facts are that Coetzee was facing a charge of having raped and seriously injured a young woman. He had only one previous conviction for indecent assault (not involving physical harm) for which he had been given a suspended sentence. He had been sent for observation and the psychiatric report did not declare him to be any danger to society and made no recommendation that Coetzee be kept in custody, despite Louw's notes in the referral documents, which reflected the seriousness of the rape and Coetzee's sexual deviation. Copies of the referral documents had been sent to the Attorney-General, who had not seen fit to instruct the prosecutor to oppose bail. At the time a recently issued circular from the Attorney-General instructed prosecutors

in his area to assume for the time being that awaiting trial accused had the right to be released and that if the state wished to oppose such release it bore the *onus* of proving that it would be contrary to the interests of justice. Consequently the attitude of the magistrates was to grant bail despite the seriousness of the offence and despite the conflicting interests of the community that women should be protected from sexual assault.

[19] In all these circumstances, and particularly the psychiatric report, it cannot be said, in my view, that it was unreasonable for the prosecutor not to have opposed the release of Coetzee on his own recognizance. For this reason the prosecutor did not owe the appellant a legal duty either to oppose bail or to ensure his subsequent re-arrest. It is, moreover, highly questionable whether a later charge of trespass would have resulted in Coetzee's incarceration in any event.

[20] There is another reason why the circumstances of the present case are not capable of establishing the legal duty contended for. This is that there was no special relationship shown to exist between the prosecutors at Knysna and the appellant. That there must be some relationship between the person who owes the legal duty and the person to whom the duty is owed, the breach of which would expose the latter to a particular risk of harm in consequence of an omission, which risk is different in its incidence from the general risk of harm to all members of the public, is well-established in English law and is also in accordance with our law. See *Hill v Chief Constable of West Yorkshire* [1988] 2 ALL ER 238 (HL); *Alexandrou v Oxford* [1993] 4 ALL ER 328 (CA); *Osman and Another v Ferguson and Another* [1993] 4 All ER 344 (CA); *Kent v Griffiths and Others* [2000] 2 WLR 1158 (CA) LAWSA, first reissue, Vol 8, para 56.

[21] Counsel for the appellant did not challenge the requirement of a special relationship. Indeed, he submitted that a special relationship existed in view of the fact that the appellant was attacked at Noetzie where, because of its isolation, women were at greater risk. If women at Noetzie were more at risk than, say women in Knysna or elsewhere, this by itself is not sufficient to establish the special relationship required for imposing a legal duty. Coetzee was released on 18 April 1995 and the attack took place some three and a half months later on 6 August 1995, after he had been at large in the neighbourhood for most of that time and there was only the prowling incident to speak of. The assault was clearly committed in the further pursuance of Coetzee's general criminal career on one of a number of the female general public who were at risk from his criminal conduct. As was pointed out by Lord Keith in the *Hill* case (at 243 d-e), where the class of potential victims

of a particular criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of a habitual burglar and all females those of a habitual rapist. In the absence of evidence that the appellant was at any special distinctive risk the fact that the attack occurred at a secluded village where she was a visitor is insufficient to establish the special relationship contended for. The mere fact that complaints and requests for Coetzee's re-arrest were made to the prosecutors is also insufficient to establish a special relationship (cf *Alexandrou v Oxford, supra,* at 338 g-j).

[22] Counsel for the appellant finally submitted that the Court *a quo* erred in granting absolution from the instance at the close of the appellant's case. As was emphasised by **Harms JA** in the as yet unreported judgment of this Court in *Gordon Lloyd Page and Associates v Francesco Rivera and Tiber Projects (Pty) Ltd* (case no

384/98 in which judgment was delivered on 31 August 2000), the inference relied upon by the plaintiff at the close of his or her case must be a reasonable one, not the only reasonable one, and the test for absolution at that stage is not what another reasonable person or court might think but what the trial court's own judgment is (at p 2-4 of the judgment).

In my view there was in the present case insufficient evidence upon which the Court *a quo* could reasonably conclude that the duty contended for existed. The Court *a quo* accordingly correctly granted absolution from the instance.

The appeal is dismissed with costs, including the costs of two counsel.

W. VIVIER JA

Van Heerden ACJ)
Howie JA)
Schutz JA)
Zulman JA) Concur.