Reportable
Case No 533/02

In the matter between:

THE MINISTER OF SAFETY AND SECURITY **First Appellant**

THE MINISTER OF JUSTICE **Second Appellant**

and

ALIX JEAN CARMICHELE **Respondent**

Coram: HARMS, STREICHER, FARLAM, NAVSA AND LEWIS JJA
Heard: 3 NOVEMBER 2003
Delivered: 14 NOVEMBER 2003

Subject: Delict – liability of State for negligence of police and prosecutors for a failure to oppose bail – accused thereafter attempted to murder plaintiff

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J U D G M E N T

HARMS JA/

HARMS JA:

[1] This appeal concerns the delictual liability of the State for damages suffered by the respondent, Ms Carmichele, as a result of a vicious assault perpetrated on her by one Coetzee. It is not the case that the State is vicariously liable for what Coetzee did but it is sought to be held liable for damages where the damage was inflicted by a party unrelated to the State.[1]

[2] Five months before the assault on the plaintiff Coetzee was released on his own recognisances pending his trial on a charge of rape of Ms Eurana Terblanche,[2] a seventeen-year old schoolgirl. The police and the prosecutor had recommended to the court that he could be released with a warning to appear at a later date and the Magistrate, who was not apprised of any further facts, accepted the recommendation and ordered his release accordingly.[3] Since the decision to release Coetzee was that of the Magistrate, the plaintiff's allegations for the basis of her claim are – broadly stated – that the police officers concerned and the prosecutor should have realised that Coetzee was a danger to society; they were in duty bound to oppose Coetzee's application for release pending his trial; in this regard they owed, amongst others, Ms Carmichele (to whom I shall refer as 'the

[1] Cf *K v The Secretary of State for the Home Department* 2002 EWCA Civ 775 para 17.
[2] The identity of the respective persons involved has been disclosed in previous law reports and it would serve no purpose at this stage by not referring to them by name.
[3] If an accused is in custody in respect of any offence a court may in lieu of bail release the accused from custody and warn him to appear before a specified court at a specified time on a specified date in connection with such offence: s 72(1) of the Criminal Procedure Act 51 of 1977.

plaintiff') a legal duty; they were negligent in not having opposed his release; had they done so, he would not have been released by the court; had he been kept in detention he would not have assaulted the plaintiff.

[3] The case has followed a circuitous route. The assault on the plaintiff occurred already on 6 August 1995 and the case against the appellants came to trial during September 1997 before Chetty J, sitting in the Cape Provincial Division. At the conclusion of the plaintiff's case he granted absolution from the instance, finding that the plaintiff had failed to make out a prima facie case of wrongfulness, which is the primary element for delictual liability. An appeal to this Court was dismissed on the same ground on 2 October 2000. That judgment will be referred to as '*Carmichele (SCA)*'.[4] However, the plaintiff had a measure of success when a further appeal to the Constitutional Court was upheld, the order of absolution from the instance aside and the matter referred back to the trial court to proceed with the trial. The judgment of the Constitutional Court will be referred to as '*Carmichele (CC)*'.[5] During March 2002, the trial recommenced and at its conclusion Chetty J found in favour of the plaintiff, holding the appellants, the Ministers of Safety and Security and of Justice (in fact of Justice and

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[4] *Carmichele v Minister of Safety and Security and another* [2000] 4 All SA 537 (A); 2001 (1) SA 489 (SCA).

[5] *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC); 2001 (4) SA 938 (CC).

Constitutional Development) liable; quantum stood over for later adjudication. His judgment,[6] delivered on 14 May 2002, will be referred to as '*Carmichele (CPD)*' and it is the judgment presently on appeal.[7] Most of the facts relevant to the appeal have been stated in one or more of these judgments and since they are not really in contention, I intend to make copious use of those expositions. In *Carmichele (CC)* there is a chronology of events; however for purposes of this judgment I shall not make use of a chronology since it may be misleading: the elements of delictual liability cannot be assessed on an *ex post facto* basis. Only the facts known or available at any given time are relevant.

The attack on the plaintiff

[4] The detail of the attack at this stage of the case is relevant only in so far as it establishes the motive for and nature of the attack. Why that is of moment will become apparent at a later stage of the judgment. The attack took place at the home of Ms Julie Gösling at Noetzie, a secluded seaside hamlet some 12 kilometres from Knysna. On Sunday 6 August 1995 the plaintiff went to Gösling's home where they had arranged to meet. Gösling had not yet arrived. The plaintiff went into the house and was confronted by

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[6] *Carmichele v Minister of Safety and Security and Another* 2002 (10) BCLR 1100 (C); 2003 (2) SA 656 (C).

[7] Chetty J refused leave to appeal but it was subsequently granted by this Court.

Coetzee who apparently had broken in. When she saw him he immediately attacked her with a pick handle. His blows were directed at her head and face. When she lifted her arm to protect herself, one of the blows struck and broke her arm. He threatened her and dragged her around the house. He repeatedly ordered her to turn around. She refused to do so. He discarded the pick handle and lunged at her with a knife. He stabbed her left breast and the blade of the knife buckled as it hit her breastbone. He lunged at her again and she kicked him. He lost his balance and she managed to escape through a door. He left the scene with a number of valuables.[8]

[5] This summary of the attack was based on the evidence of the plaintiff which was before the Constitutional Court. No further evidence was led in this regard and the trial Court adopted the summary as its finding of fact.[9] Neither court found that Coetzee attempted to rape the plaintiff, something alleged by her in the particulars of claim. There was also no finding that the assault had been indecent or committed with an indecent intent.

[6] In her fairly extensive statement to the police, too, there was no suggestion of an attempted rape.[10] That is the reason, one assumes, why Coetzee was charged with attempted murder and housebreaking and theft but not rape. During her evidence in chief in the criminal trial she also did

[8] *Carmichele (CC)* para 21.
[9] *Carmichele (CPD)* para 7.
[10] The date stamp on the statement indicates that it was made later the same day but the content indicates that it must have been made at the earliest later the next day.

not refer to an attempted rape. The closest she came to the subject of rape was when she dealt with the events that preceded the stabbing. She said:

'. . . well he had a knife in his mouth most of the time and then he kept threatening me with, by saying that I must turn around [she was on her knees] and he is going to count to three otherwise he is going to hit me with the stick. And then he threw the stick aside and pulled, took the knife out of his mouth and stood over me and stabbed me [in the chest].'

During cross-examination she stated that Coetzee had not said what he intended doing after she had turned around but she added

'I kind of felt that he wanted to rape me.'

At the criminal trial Coetzee's plea explanation, namely that the motive for the attack was because she had caught him burgling the home of Gösling, was put to the plaintiff and she did not suggest otherwise. Coetzee, it might be mentioned, had been suspected previously, at least by Gösling, of being a petty burglar and thief. Immediately after this event he broke into another home, which was unoccupied, and stole some insignificant items. He was convicted not only of attempting to murder the plaintiff, but on two counts of housebreaking and theft as well.

[7] At the trial in the Court below, the plaintiff explained that Coetzee wanted her to turn around and lie down on the floor facing the ground. She recalled, she said, 'thinking' at the time that he wanted to rape her. When cross-examined on the proceedings in the criminal court, she said that since she was there she knew that he wanted to rape her. She conceded, however,

that Coetzee never said or suggested that he was going to rape her and that, apart from the request to lie on her stomach, there was nothing else on which her inference was based.

[8] The thought of rape had, no doubt, crossed the plaintiff's mind because she knew Coetzee, she had been told that he had a previous conviction for rape, she believed that he had raped Ms Eurana Terblanche and she and, especially, Gösling believed that he was a menace to society who should be behind bars. But all this does not mean that any indecent intention on the part of Coetzee was established on a balance of probability.

The case of Eurana Terblanche

[9] On Monday 6 March 1995, Coetzee appeared before a magistrate at Knysna on a charge of rape. It was his first appearance on the charge, the crime having been committed during the preceding Friday night. The State was not ready to proceed and applied for a postponement, which was granted. Coetzee presumably applied for bail but in the event, as mentioned, the prosecutor did not oppose his release and in fact recommended that he be released on warning.

[10] At the time the police docket indicated that Coetzee had, apparently ('blykbaar'), been involved in a prior rape case. The information came from the complainant's mother. There was a statement by the complainant, taken

on the Saturday morning, describing an attempted murder (he told her that he was going to kill her and he throttled her until she lost consciousness) and a rape (or at least an attempted rape) by Coetzee whom she knew quite well. The police officer who took her statement completed a form setting out the visible injuries to her face and leg. This and an investigation at the scene of the crime corroborated her version. Importantly, there was a warning statement by Coetzee to the investigating officer in which he said that he thought that he might have throttled the complainant;[11] that he had been under the influence of liquor but knew what he was doing; that he could not dispute that he had raped her or had sexual relations with her; and that he had, after the event, contacted the police. Although not reflected in the docket at the time, Coetzee, after having left an hotel in the company of the complainant that Friday night, returned and alleged that he had killed someone and asked that the police be called. That was done but in the absence of any further information relating to the murder Coetzee was arrested for being drunk in public.

[11] Primary responsibility for the contents of a docket rests with the investigating officer, in this case one Klein who, at the time, was an experienced detective sergeant of fifteen years' standing. Klein had to hand the docket to a superior officer, the then Captain Hugo, whose task it was to inspect the contents of the docket and give instructions in relation to the

[11] The sentence reads: 'Ek weet nie ek dink ek het die klaagster verwurg.'

further investigation or its disposal. The docket provides for a recommendation by the investigating officer in relation to bail and, as said, Klein recommended that Coetzee be released on his own recognisance. The Court below rejected his explanation for this since it found that Klein had falsified his diary.[12] There can be no doubt that he did, unfortunately a not uncommon occurrence,[13] but in the light of my approach to the case not much turns on this.

[12] Captain Hugo inspected the docket on the Sunday evening preceding Coetzee's first court appearance, not only as a matter of routine but also for the purpose of that appearance where the release of the accused on bail or otherwise would have arisen. He read through the docket, noted what still had to be done, and, significantly, endorsed Klein's recommendation that Coetzee be released with a warning. I say 'significantly' because he conceded, quite rightly, that there was nothing in the docket which justified the recommendation. In spite of this he did not contact Klein to establish the basis for Klein's recommendation.

[13] On the Monday morning the docket went to the court prosecutor (one Olivier) who drafted a charge sheet and from there to the control prosecutor, Ms Louw. She, too, went through the docket in order to instruct Olivier how to deal with the matter and to report to the (then) Attorney General – since

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[12] *Carmichele (CPD)* para 16.
[13] Also in other jurisdictions: *Kent v Griffiths & Others* [2000] 2 WLR 1158 (CA); [2000] EWCA Civ 25.

the charge indicated was one of rape – who had to decide whether to prosecute in the High Court or in a regional court. Both she and Olivier failed to note that the facts in the docket disclosed an attempted murder. She endorsed the recommendation which had emanated from Klein without ado. What followed is already known.

Plaintiff's case based on the events until 6 March 1995

[14] The facts concerning the case of Eurana Terblanche gave rise to the plaintiff's principal cause of action against the two Ministers.[14] She contends that Coetzee should have remained in detention and that he was released by the Magistrate due to the negligence of Klein, Hugo and Louw. *Carmichele (SCA)* para 12 disposed of this issue on a simple ground:

'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.'

Carmichele (CC) para 67 overruled this finding in these terms:

'The SCA did not consider the conduct of Klein on 5 March 1995 and dealt with the case on the basis only of the failure by the prosecutor to oppose bail on 18 April 1995 after Coetzee's return from Valkenberg. But once Coetzee was released on warning in March, the pattern was set. When he returned from Valkenberg that release order was likely to remain in place unless there were grounds on which he could be denied bail at that stage.'

[14] The vicarious liability of the Ministers is not in issue.

[15] The matter has therefore to be considered afresh. In this regard the Constitutional Court said:[15]

'The applicant's [the plaintiff's] claim is founded in delict. The direct cause of the damages she suffered was the assault by Coetzee. However, the applicant wishes to hold the respondents [the present appellants] liable because of the alleged wrongful acts or omissions of the police officer (Klein) or the prosecutors (Louw and Olivier) at times when they were acting in the course and scope of their employment with the State. In order to succeed, the applicant would have to establish at the trial that:

(1) Klein or the prosecutors respectively owed a legal duty to the applicant to protect her;

(2) Klein or the prosecutors respectively acted in breach of such a duty and did so negligently;

(3) there was a causal connection between such negligent breach of the duty and the damage suffered by the applicant.'

[16] At least now the plaintiff's case is somewhat different. She had never restricted her case against the police to the negligence of Klein and during the course of the defendants' case Hugo's negligence was fully canvassed. Olivier's role in the case was minimal and can be discounted in the larger scheme of things. However, before assessing the validity of the plaintiff's claim in relation to the events that terminated on 6 March, I wish briefly to deal with the other legs of her case for the sake of completeness.

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[15] *Carmichele (CC)* para 25.

The events culminating on 18 April 1995[16]

[17] On 13 March 1995, Coetzee's mother informed a family member, Detective Sergeant Grootboom, who was also stationed at the Knysna police station that she was concerned about Coetzee, who was withdrawn, and she feared he might attempt suicide or 'get up to something'. When they arrived at her home they found that Coetzee had indeed attempted suicide. Grootboom took him to hospital where he was treated. On the following day, 14 March 1995, Grootboom took Coetzee to Louw. She interviewed him and he told her that he did not know why he committed the offence and that at the time was not aware of what he was doing. He told her that he had suffered from deviant sexual behaviour since he was about 10 years old. He said that it was as if a 'superhuman, unnatural force' overcame him and he then committed an act of which he had no knowledge.

[18] As a result of this interview, Louw decided that Coetzee should be referred for psychiatric observation. He was brought before the court on 15 March 1995. At the request of the prosecutor and with his consent, Coetzee was referred in custody to Valkenberg Hospital in Cape Town for 30 days' observation in terms of section 77(1) of the Criminal Procedure Act. The purpose of a referral under that provision is to ascertain whether an accused person is by reason of mental illness or mental defect incapable of understanding trial proceedings so as to make a proper defence.

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[16] *Carmichele (CC)* para 17-21.

[19] On 18 April 1995, on his return from Valkenberg Hospital, Coetzee again appeared in the Knysna magistrate's court. According to the report from Valkenberg Hospital Coetzee was mentally capable of understanding the proceedings and able to make a proper defence, and was also found to have been mentally capable at the time of his attack on Eurana Terblanche. The report also mentioned that his initial amnesia of the events spontaneously resolved itself. Coetzee was warned to appear on a later date.

[20] The case of the plaintiff in this regard is that Louw, in the light of the additional knowledge she now had of the deviant behaviour of Coetzee, should have opposed his release on 18 April 1995 by using 'the available machinery in the Criminal Procedure Act'. These words were not considered by this Court in *Carmichele (SCA)*. The Constitutional Court, in footnote 71 of *Carmichele (CC)*, noted guardedly:

'Whether, as the Criminal Procedure Act then read, it was open to the magistrate in the circumstances of the present case to review or reconsider the release of Coetzee, is a matter on which we do not express an opinion.'

The caveat went unheeded in the Court below and it simply proceeded on the basis that there must have been some such provision in the Act. To the contrary, there was none and counsel for the plaintiff did not suggest otherwise in this Court. When Louw, confronted by Gösling at the time, said that her hands were tied, she was right and the scorn poured on her not justified.

The snooping incident[17]

[21] The plaintiff frequently stayed at Gösling's home at Noetzie. On one such occasion towards the end of June 1995, Gösling left for work in the morning. Shortly after she had left, the plaintiff noticed Coetzee snooping around the house, looking in at a window and 'trying to open it'. The plaintiff called and asked what he was doing there. He replied that he was looking for Gösling and he then left. She telephoned Gösling and reported the incident. Gösling informed her that Coetzee's excuse was false as he must have seen her driving away in her motor vehicle.

[22] At the request of the plaintiff, Gösling again went to the Knysna police station and reported the incident to Captain Oliver who referred her to Louw. According to Gösling's evidence

'I said Dian you've got to do something about this guy, there must be some law to protect society, not necessarily me or people at Noetzie and she said to me that there was nothing she could do.'

[23] The plaintiff's case, based on these facts, is based on the failure of Louw – and not of the police – for not having used 'the available machinery' in the Act to either 'keep' Coetzee in custody or 'add sufficient suitable conditions to restrict him' (presumably to his release warning). The short answer to the case as pleaded is that, first, he could not have been kept in

[17] *Carmichele (CC)* para 21-22.

custody since he was not in custody and, second, as the Act then stood, conditions could not have been added to his release warning at that stage.

[24] The argument before us differed from that foreshadowed in the pleadings. The case is now that a complaint had been laid that Coetzee had attempted to burgle the house and had trespassed on Gösling's property; Louw should have given Gösling the advice to lay charges against him; he would then have been arrested; all the facts concerning his deviant behaviour should then have been placed before the court had he applied for bail; bail would have been refused; and there would not have been the possibility of an attack on the plaintiff. *Carmichele (CPD)* para 26 found the argument attractive. I find that it fails at the outset because it is based on false premises.

[25] As far as the trespassing is concerned, this Court in *Carmichele (SCA)* para 13 said:

'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.'

And (at para 19):

'It is, moreover, highly questionable whether a later charge of trespass would have resulted in Coetzee's incarceration in any event.'

No new facts bearing on these findings were placed before the Court below. Having reconsidered the evidence I respectfully wish to adopt the views of *Carmichele (SCA)* in this regard.

[26] It is not without significance that *Carmichele (SCA)* did not have regard to the question of an attempted housebreaking. *Carmichele (CC)* referred to the fact that Coetzee was 'trying to open' the window without suggesting that it amounted to an attempted housebreaking. The only witness to the event was the plaintiff. In her words, the following happened:

'. . . later I saw Francois Coetzee snooping around the house and looking at the window. He <u>seemed</u> to be pushing – trying to push the window open.'

What she reported to Gösling, she said, was that Coetzee

'had been looking in at the windows of the house . . .'.

That is the sum total of the admissible evidence concerning the event. Gösling, on a fair conspectus of her evidence, was rather inconsistent about what she had conveyed to either Oliver or Louw in this regard. On occasion her complaint was that Coetzee 'was hanging around' her house; then that 'he appeared to be trying to get into the window'; later that he 'looked in through the window'; and also that it 'looked as though he was trying to get in through the window'.

[27] Oliver, who testified for the plaintiff, did not appear to appreciate that a criminal complaint was being laid. He was dealing with her unhappiness about the fact that Coetzee had been released on bail. Gösling knew that if a crime had been committed she could lay a charge, which she never did. She herself drew a distinction between a charge and a complaint. Hers was a complaint, she said, because of the fact that someone who committed a serious offence had been released and she feared that he might commit another. She thought that he had to be removed from society because she knew from her experience as a nurse that someone who had committed two serious crimes would do so again.

[28] This summary, I believe, establishes conclusively that there was no justification for any steps being taken under the Criminal Procedure Act against Coetzee and that there is no merit in the suggestion that Coetzee should or even could have been arrested on this ‘evidence’.

Wrongfulness

[29] What then has to be determined is whether the facts surrounding the release of Coetzee on 6 March 1995 gave rise to delictual liability on the part of the State. It is appropriate to recap at this juncture the history of this case in relation to this aspect. As mentioned, at the absolution stage Chetty J found that a prima facie case of wrongfulness was not established. This

finding was upheld by *Carmichele (SCA)*. The Constitutional Court, whilst upholding the appeal, did not find that this element had been established.[18] Instead, it found that, in spite of the fact that the plaintiff had previously specifically disavowed any reliance on the Constitution, superior courts still have a duty to consider in every appropriate case whether the common law deviates from the spirit, purport and objects of the Bill of Rights. If it does, courts have an obligation to remove the deviation.[19] The court of first instance and this Court

'assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied. In our respectful opinion, they overlooked the demands of section 39(2) [of the Constitution].'[20]

[30] The possibility was mooted that the existing test for wrongfulness

'might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.'[21]

Absolution at the end of the plaintiff's case or an exception is not necessarily the appropriate manner of dealing with matters such as this and, although this Court adopted the correct test for absolution,[22] it was wrongly applied.[23]

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[18] *Carmichele (CC)* para 81.
[19] *Carmichele (CC)* para 33.
[20] *Carmichele (CC)* para 37.
[21] *Carmichele (CC)* para 56.
[22] *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) 92E-93A.
[23] *Carmichele (CC)* para 80. As to the dangers of applications for absolution from the instance: *De Klerk v Absa Bank Ltd and Others* 2003 (4) SA 315 (SCA) para 1 and 43. The English cases that are usually cited in matters such as this have, invariably, been decided on an exception basis and are consequently of limited value.

[31] *Carmichele (CC)* para 44 held that the Constitution imposes a duty on the State and all of its organs not to perform any act that infringes the entrenched rights such as the right to life, human dignity, and freedom and security of the person.

'In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.'

[32] Since it is not the case that the State was in breach of the obligation to provide 'laws and structures', *Carmichele (CC)* para 45 quoted *Osman v United Kingdom*,[24] a judgment of the European Court of Human Rights ('ECHR'), with apparent approval:

'. . . the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 [which deals with the protection of the right to life] of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.' [25] (My insert and emphasis.)

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[24] 29 EHHR 245 at 305; [1998] 5 BHRC 293 para 115.

[25] In this case the complaints were directed at the failure of the authorities to appreciate and act on what they claim was a series of clear warning signs that one P represented a serious threat to the physical safety of A and his family. P killed A's father and wounded A in a shooting incident. The Court found that there was no breach of art 2 of the Convention.

[33] The subsequent paragraph 116 from *Osman*, which was not quoted, is also significant:

'For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice . . ..

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. . . . For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.' (Emphasis added.)

[34] Since *Carmichele (CC)* this Court, in a number of matters, has had to reconsider the test for wrongfulness in the light of constitutional demands. Counsel did not criticise the 'new' approach as set out in these cases.[26] I do not wish to reformulate the principles.

[35] In order to assess whether Hugo and Louw had a public law duty to oppose bail, one has to consider the information at their disposal as it appeared from the docket. In this case, the departmental instructions to both the police and to prosecutors made it clear that they had a duty to oppose any bail application in a case such as that of Coetzee. That they should have opposed Coetzee's release Hugo and Louw admitted – albeit in retrospect.

[36] Their public duty must be assessed in the light of the dicta in *Carmichele (CC)* where it was said, that the police service

'is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime' (para 62)

and that prosecutors

'have always owed a duty to carry out their public functions independently and in the interests of the public. Although the consideration of bail is pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer can but come from the prosecutor. He or she has a duty to place before the court any information

[26] Especially relevant to the present case are *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA).

relevant to the exercise of the discretion with regard to the grant or refusal of bail and, if granted, any appropriate conditions attaching thereto.'(Para 72.)

At least as far as the police are concerned, this is nothing new.[27] The vicarious liability of the State for those of its employees who have to exercise discretions is also well established.[28] It follows that there can be little doubt that in the light of the particular facts of this case both Hugo and Louw had a public law duty to either oppose bail or to place all relevant and readily available facts before the Court, and that they failed in their duty.

[37] The next inquiry is whether this public law breach of duty can be transposed into a private law breach leading to an award of damages. The answer, I believe, has already been provided in *Van Duivenboden*[29] and in *Van Eeden*[30] and applied more recently in *Hamilton.*[31] I quote at length from what was said in *Van Duivenboden* para 21-22 because most, if not all, the considerations there mentioned apply here:

'Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights the norm of accountability assumes an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action

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[27] Cf *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Minister of Police v Skosana* 1977 (1) SA 31 (A).
[28] *Minister van Polisie an 'n ander v Gamble en 'n ander* 1979 (4) SA 759 (A).
[29] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).
[30] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA).
[31] *Minister of Safety and Security v Hamilton* an unreported judgment of this Court delivered on 26 September 2003.

for damages, for there will be cases in which other appropriate remedies are available for holding the state to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting. . . . There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm. . . ..'

'Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life, and to security of the person, are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them. It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed . . . but I can see none that do so in the present circumstances. We are not concerned in this case with the duties of the police generally in the investigation of crime. I accept (without deciding) that there might be particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence, but it does not follow that an action should be denied where those considerations do not arise. . . . There was no suggestion by the appellant that the recognition of a legal duty in such circumstances would have the potential to disrupt the

efficient functioning of the police, or would necessarily require the provision of additional resources, and I see no reason why it should otherwise impede the efficient functioning of the police – on the contrary the evidence in the present case suggests that it would only enhance it. There is no effective way to hold the State to account in the present case other than by way of an action for damages, and in the absence of any norm or consideration of public policy that outweighs it the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of police officers in those circumstances is thus actionable and the state is vicariously liable for the consequences of any such negligence.'

[38] From this it follows that where, as in circumstances such as the present described in more detail in para 44, someone in the position of the plaintiff has no other effective remedy against the State, an action for damages is the norm unless public policy considerations point in the other direction.

[39] The position of prosecutors can in principle be no different from that of the police and this accords with what *Carmichele (CC)* para 74 had to say about their possible liability:

'That said, each case must ultimately depend on its own facts. There seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court. If such negligence results in the release of the accused on bail who then proceeds to implement

the threat made, a strong case could be made out for holding the prosecutor liable for the damages suffered by the complainant.'

[40] The question is then whether, in the circumstances of this case, there are public policy considerations that point in another direction. The appellants submitted that Hugo and Louw were merely guilty of a reasonable error of judgment and that, for that reason, a duty of care should not be imputed to them. Recently this Court held that:

'In determining the accountability of an official or member of government towards a plaintiff, it is necessary to have regard to his or her specific statutory duties, and to the nature of the function involved. It will seldom be that the merely incorrect exercise of a discretion will be considered to be wrongful.'[32]

The validity of the point may be illustrated by a case where, in exercise of its discretion, a parole board orders the release of a prisoner.[33] In this case the discretion was different, at least qualitatively, but apart from that, I am satisfied that on their own evidence neither Hugo nor Louw in fact exercised any discretion. They simply rubber-stamped a recommendation that had no foundation.

[41] Another argument raised by the appellants in submitting that there should be a departure from the norm of State accountability is the absence of

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[32] *Premier of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] 2 All SA 465 (SCA) para 37.

[33] Cf the facts in *K v The Secretary of State for the Home Department* 2002 EWCA Civ 775 in which the Secretary for State did not deport a dangerous criminal who, subsequently raped the plaintiff. An action was denied to the plaintiff but not on the ground now under discussion.

any proximity between the plaintiff on the one hand and the police and prosecutors on the other. Proximity is a requirement for establishing a duty of care in English law[34] in order to ground liability under the tort of negligence and was adopted by Scots law.[35] But proximity, in our law, is not a self-standing requirement for wrongfulness. [36] Likewise, the requirement of a special relationship (which is in my view just another label for proximity) is not essential for wrongfulness.[37] However, if there is in fact some connecting factor between the plaintiff and the defendant, it is more likely that in the case where the defendant is an individual the breach of a duty might arise; and in the case where the defendant is the State it is less likely that there will be any deviation from the norm of accountability that the Constitution imposes.

[42] This aspect may have a bearing on some remarks made in *Carmichele (CC)* para 29 and 62 and in *Carmichele (CPD)* para 30. Both emphasised, quite rightly, the special constitutional duty of the State to protect women against violent crime in general and sexual abuse in particular. But this

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[34] *Caparo plc v Dickman* [1990] 2 AC 605.
[35] *Gibson v Orr* [1999] Scot CS 61.
[36] See also *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 20. *Carmichele (CC)* para 49 referred to it in a discussion of the attitude of the ECHR to the perceived English law doctrine of immunity. I suspect that the understanding of *Carmichele (CC)* para 48 of the judgment of the ECHR in *Z and Others v United Kingdom* [2001] 10 BHRC 384 may be wrong. It did not hold that the immunity approach of the English law meant that the applicant s did not have available appropriate means of obtaining a determination of their allegations. On the contrary, the ECHR conceded (at para 100) that it had erred in *Osman v United Kingdom* 29 EHHR 245; [1998] 5 BHRC 293 para 115 in holding that a doctrine of immunity existed in English law. What it held was since the matter had been decided in a procedure similar to our exception procedure, and without a full trial, the applicants had been denied an appropriate means to establish whether a duty of care in fact existed.
[37] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 22.

should not be seen as implying that the State's liability in a case such as this is necessarily determined by or dependent on the sex of the victim or the nature of or motive behind the assault.

[43] Did the State owe a duty to the plaintiff? The answer lies in the recognition of the general norm of accountability: the State is liable for the failure to perform the duties imposed upon it by the Constitution unless it can be shown that there is compelling reason to deviate from that norm. In *Van Eeden*[38] it is suggested that such a deviation might be warranted where it would not be in the public interest to inhibit the police (and by parity of reasoning the prosecution) in the proper performance of their duty. A deviation was not, however, considered to be necessary in that case.

[44] Nor is there reason in this case to depart from the general principle that the State will be liable for its failure to comply with its Constitutional duty to protect the plaintiff. On the contrary, the plaintiff is pre-eminently a person who required the State's protection. It was known by Klein, Hugo and Louw that Coetzee resided in Noetzie with his mother. Noetzie is a small hamlet with a few houses. Coetzee's mother worked for Gösling in the house where the attack on the plaintiff occurred. She regularly visited the house. She knew Coetzee. The attack took place within four months after his release after the attack on Eurana Terblanche. The plaintiff was thus not simply a member of the public whom the State had a duty to protect. She

[38] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA).

was a member of a class of people whom the State would have foreseen as being potential victims of another attack by Coetzee. Proximity, while not an independent requirement for wrongfulness, must surely reinforce the claim that the State should be held liable for a culpable failure to comply with its duties. And foreseeability of harm is another factor to be taken into account in determining wrongfulness. [39] The greater the foreseeability, the greater the possibility of a legal duty to prevent harm existing. This can be compared to the development in English law in relation to the tort known as misfeasance by a public officer. An element of this tort is, in our terms, *dolus directus* or *eventualis*: if a public officer knows that his unlawful conduct will probably injure another or a class of persons, the State may be liable for the consequences.[40] (The question of foreseeability arises also, of course, when determining negligence: but it may in appropriate cases play a role in determining whether the defendant should be held liable for failure to perform a duty.)

Negligence

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[39] *BoE Bank Ltd v Ries* [2002] 2 All SA 247 (A); 2002 (2) SA 39 (SCA) para 21: 'Such foreseeability is often an important, even a decisive factor in deciding whether wrongfulness has been established, but it is not in itself enough . . .'. *Premier of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] 2 All SA 465 (SCA) para 42

[40] *Akenzua and Another v Secretary of State for the Home Department* [2003] 1 All ER 35 (CA); [2002]EWCA Civ 1470.

[45] The test for determining negligence is that enunciated in *Kruger v Coetzee*: [41]

"For the purposes of liability culpa arises if –

(a) a diligens paterfamilias in the position of the defendant–

(i) would foresee the reasonable possibility of his conduct injuring another . . . and causing him . . . loss; and

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

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

But

'it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue.

It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case.'[42]

And

'it has been recognised that while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable'.[43]

Further

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[41] 1966 (2) SA 428 (A) at 430E–F.

[42] *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another* [2000] 1 All SA 128 (A); 2000 (1) SA 827 (SCA) para 21-22.

[43] *Ibid* para 22.

'In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called "the insidious subconscious influence of ex post facto knowledge" (in *S v Mini* 1963 (3) SA 188 (A) at 196E–F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have 'prophetic foresight'. (*S v Burger* (supra at 879D).) In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* 1961 AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414G – H (in All ER):

"After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility." '[44]

[46] For present purposes I intend first to inquire whether a reasonable police captain (in the position of Hugo) and a reasonable control prosecutor (in the position of Louw) would have recommended to a court, with the information at their disposal, that Coetzee should be released, whether on bail or with a warning.

[47] Both witnesses gave essentially one reason for their decision. They had relied on the opinion of an experienced detective, namely Klein. Quite obviously, persons in their position are entitled to rely on the opinion of another in relation to matters such as this but that did not entitle them to rely blindly on such an opinion where there was nothing in the docket which justified the opinion. It would have been a fairly simple matter in these

[44] *S v Bochris Investments (Pty) Ltd and another* 1988 (1) SA 861 (A) 866J-867B quoted in *Sea Harvest* para 23.

circumstances at least to have asked Klein for an explanation. (We now know that he had none.) They both had read and studied the docket independently, as they were obliged to do (as explained above) and they knew what it contained. They were obliged, considering the nature of the crime, each to have made an independent assessment. The departmental guidelines issued to both of them required of them to have opposed bail. It is not a case where they had not read the docket due to time or other constraints or where there was no departmental duty to read the docket. In holding that reasonable persons in the position of Hugo and Louw would not have relied exclusively on the opinion of the investigating officer, I am not suggesting that in appropriate circumstances they could not have relied thereon; and I am not suggesting that in every case there rests a duty on them to read or study the docket. Negligence depends on the facts of a particular case.[45]

[48] Another reason for their recommendation, which may be inferred from their evidence but which was never stated by them, is the fact that courts granted bail easily at the time. An example was given of a case in which a person charged with murder was released on bail. Conspicuously absent is any detail whatsoever relating to the nature or prospects of the case or the bail conditions.

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[45] Cf *Carmichele (CC)* para 73.

[49] Obviously, if Hugo and Louw had reasonable grounds for believing that opposing the grant of bail would have amounted to a mere formality with no reasonable prospect of success, their failure would not have amounted to negligence. Their evidence does not suggest that. In any event, theirs was a simple decision, namely whether or not to oppose. They were not required to make the ultimate decision. That was for the Magistrate. As I assess their evidence, it amounts to no more than that there were cases involving serious crimes where bail had been granted. It was not that opposing applications for bail, even in serious cases, would have been a hopeless exercise. In other words they were not required to attack a windmill.

[50] From this I conclude that a reasonable person in the position of both Hugo and Louw would not have made the recommendation and would, at least, have placed the relevant facts at their disposal before the Court. This they did not do.

[51] The next aspect to consider is whether persons in their position would have foreseen the reasonable possibility that their conduct could have led to a further crime of violence being committed by Coetzee, bearing in mind that

'the precise or exact manner in which the harm occurs need not be foreseeable, [but] the general manner of its occurrence must indeed be reasonably foreseeable'.[46]

In this context regard must be had to the unpredictability of human behaviour. As was said in a slightly different context in *Palmer v Tees Health Authority and Another*:[47]

'Mr Sherman posed the example of a car mechanic who negligently failed to adjust the brakes of his customer's car, so that it went out of control and killed a psychiatrist's child. Liability would be established because there is sufficient proximity, even though the child was unidentified or unidentifiable, and is merely one of a large class of potential victims. If the psychiatrist negligently failed to diagnose, treat or restrain a psychopathic murderer who killed the mechanic's child why, asks Mr Sherman, should the psychiatrist not be equally liable?

The answer to Mr Sherman's question is that a defective machine or mechanical device will behave in a predictable way depending on the laws of physics and mechanics. But a human being will not, save in readily predictable circumstances.'

[52] Turning then to the most pertinent fact available to Hugo and Louw at the time: They were dealing with a young male (he was 21 years of age at the time) with a possible previous conviction for rape who had attempted to murder and rape a friend of his. Is it not very likely that such a person could do the same or something similar if not detained? I would think that the answer must be in the affirmative and, I may add, both Hugo and Louw

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[46] *Sea Harvest* para 22 quoted earlier.

[47] [1999] EWCA Civ 1533 para 24-25.

admitted as much, albeit not in these stark terms and with the added wisdom of hindsight seven years after the event.

[53] The last stage of the inquiry relating to negligence is whether there were reasonable steps that they could have taken to prevent Coetzee's release and which they failed to take. The answer is self-evident – they would have opposed bail – and the conclusion is that negligence has been established.

Causation

[54] Causation, like negligence, was not an issue in *Carmichele (SCA)* and although it was considered by *Carmichele (CC)* para 75-77, the Constitutional Court left the matter for the decision of the trial court. Chetty J came to the conclusion that there was a causal link between the negligence referred to and the plaintiff's damages. The matter is complicated by the fact that Coetzee was released in terms of a court order and not by Hugo or Louw. This intervening fact, which might even amount to a *novus actus interveniens*, raises a number of difficult questions. It is not in issue, however, that but for the intervening court order a factual causal link between the negligence and the plaintiff's damages was established.

[55] Causation has two elements. The first is the factual issue which has to be established on a balance of probabilities by a plaintiff[48] and the answer has to be sought by using the 'but-for' test:[49]

'In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; aliter, if it would not have ensued.'

[56] To this, *Van Duivenboden* para 25 added:

'There are conceptual hurdles to be crossed when reasoning along those lines for once the conduct that actually occurred is mentally eliminated and replaced by hypothetical conduct questions will immediately arise as to the extent to which consequential events would have been influenced by the changed circumstances. Inherent in that form of reasoning is thus considerable scope for speculation . . .. A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'

[57] An intriguing aspect raised by *Carmichele (CC)* para 76, but left for later decision, is whether an objective or subjective test should be applied in

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[48] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700E–701F.
[49] *De Klerk v Absa Bank Ltd and Others* 2003 (4) SA 315 (SCA).

determining causation. In the ordinary case the question does not arise but in this case, because one has to postulate a hypothetical judgment by a judicial officer exercising a discretion, it does. An objective test would mean that the Court has to determine what a reasonable magistrate, on the probabilities, would have done. The subjective test requires the Court to establish what the relevant magistrate would have done, something that would depend on the relevant magistrate's evidence or evidence of what he or she had done in similar cases in the past.

[58] The Court below answered the question posed by the Constitutional Court thus:[50]

'In its judgment, the Constitutional Court understandably favoured the objective approach. The subjective approach would necessitate the particular judicial officer having to testify on the hypothetical question of how he would have decided a particular case. That would certainly not be in the interests of the administration of justice. The objective approach eliminates that possibility. Adopting the objective approach therefore, the question is how would the reasonable court have determined the matter.'

[59] Apart from the fact that the Constitutional Court did not, as I read its judgment, favour any approach, I have difficulties in accepting the logic of the argument of the Court below. The first leg of causation, being a question of fact, cannot depend on policy considerations such as whether or not a judicial officer should be called to testify. Causation in this type of case will

[50] *Carmichele (CPD)* para 36.

then no longer be a factual matter of what the effect of certain conduct on the probabilities 'would' have been; it would then become a value judgment of what it 'should' have been. Factual issues cannot be decided differently depending on the type of case. It has to be conceded, however, that it would be inappropriate for a particular judicial officer to testify in relation to the hypothetical question of how he or she would have decided a particular case. The problem becomes more complicated if, depending on the organisation of a particular court or hypothetical postponements and the like, the identity of the relevant magistrate cannot be established with any measure of confidence.

[60] The solution to the conundrum appears to be this: The inquiry is subjective in the sense that a court has to determine what the relevant magistrate *on the probabilities would have done* had the application for bail been opposed. In this regard the *ex post facto* evidence of the magistrate would generally amount to an inadmissible opinion as to what his or her state of mind would have been at some time in the past. To the extent that the evidence is admissible it would generally be unhelpful because it would be speculative.

[61] Courts of appeal are often called upon to decide what a reasonable judicial officer should have done and this they do by establishing what a reasonable judicial officer *would* have done. It may be presumed factually

that judicial officers conform to that norm and it is fair to deduce that any particular judicial officer (even if his or her identity cannot be established), on the probabilities and as a matter of fact, would have so acted. The proper inquiry is, thus, what the relevant judicial officer, who is factually assumed to make decisions reasonably, would, on the probabilities, have done. We know from experience how few bail appeals emanate from Magistrates' Courts and that a small percentage succeeds and it is thus fair to assume that magistrates on the whole tend to get bail matters right. This factual presumption has to yield in the face of cogent evidence pointing in another direction. An extreme example would be the case of the maverick magistrate.

[62] To determine causation requires that we transpose ourselves back to March 1995. The law relating to bail, at the time, was in flux (the interim Constitution had been but a year in operation) and accused persons were being released on bail because some courts were overawed by the constitutional right every accused had under s 25(2)(d) of the interim Constitution 'to be released from detention with or without bail, unless the interests of justice require otherwise.'

[63] The Constitutional Court recognised the uncertainty of the law relating to bail at the beginning of the post-Constitutional era when it had to consider the constitutionality of the amended s 60 (which came into force

after the events in this case and thus plays no role)[51] of the Criminal Procedure Act:

'Although the transition to the new dispensation kept the general body of South African law and the machinery of State intact, the advent of the Bill of Rights exposed all existing legal provisions, whether statutory or derived from the common law, to reappraisal in the light of the new constitutional norms heralded by that transition. The retention of the existing legal and administrative structures facilitated a reasonably smooth transition from the old order to the new. But the transition did have an effect on the country's criminal justice system. People who had acquired specialised knowledge of the system, and had become skilled and sure-footed in its practice, were confronted with a new environment and lost their confidence. Particularly in the lower courts, where the bulk of the country's criminal cases is decided, judicial officers, prosecutors, practitioners and investigating officers were uncertain about the effect of superimposing the norms of a rights culture on a system that had evolved under a wholly different regime; and about the effect of that superimposition in a given case. Bail was no exception. On the contrary, much of the public debate, and much of the concern in official circles about law enforcement has been directed at the granting or refusal of bail.'[52]

Parliament thought it wise to intervene and a substantial overhaul of the provisions of the Act relating to bail were introduced later during 1995.

[64] All this was confirmed in evidence by the Magistrate, Mr von Bratt, who had made the order for the release of Coetzee. He was called by the

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[51] Criminal Procedure Second Amendment Act No. 75 of 1995 which came into effect on 21 September 1995.

[52] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771, 1999 (4) SA 623 (CC) para 2. Significant is fn 6.

plaintiff and said that after the advent of the interim Constitution there was very much a renewed emphasis on personal freedom. The vast majority of people who had been arrested on murder charges and who had appeared before him and other magistrates at Knysna, he said, were released on bail or on their own recognisances. In exceptional cases only were people kept in custody. He gave no particulars of those instances and the generality of his evidence is in that regard of little value because as Wessels JP pointed out more than 80 years ago –

'where the personal opinions of various judges are concerned, one can always refer to cases where bail has been given and to cases where bail has not been given, and can press in the one case a judgment similar to that given in the case where no bail was granted, and in another case a judgment similar to that given where bail was allowed.'[53]

[65] Since in deciding this issue we are trapped in a time capsule we are to imagine an ordinary bail hearing, one of maybe hundreds, before Mr von Bratt or one of the other magistrates at Knysna and we have to consider what evidence would have been placed before the court by the average prosecutor who is not negligent.

[66] A prosecutor, I believe, would have applied for a postponement of the bail application for a day or two in order to obtain particulars about the alleged previous rape conviction and a report of the medical examination of the complainant. A postponement would have been granted and on the next

[53] *Ali Ahmed v Attorney-General* 1921 TPD 587 589. The statutory provisions relating to bail during 1921 differed from what they were during 1995 but the point is still valid.

occasion the information would have been available. The medical report would have shown that the complainant's injuries were not that serious and that there were limited prospects of proving rape. It would have transpired that Coetzee had no previous conviction for rape; instead there were two previous convictions about six months old: one for housebreaking and the other for indecent assault accompanied by physical force ('fisiese geweld'). The sentence for the latter was a fine of R600 or six months' imprisonment but, importantly, there was a suspended sentence of a further twelve months' hanging over his head on this conviction. The other information contained in the docket – namely the content of the complainant's statement and that of Coetzee's warning statement – would likewise have been presented to the Court. It would have been established that, although fairly well educated, he was unemployed, was living with his mother (a domestic with other children) at Noetzie on a precarious basis and that he had no visible source of income.

[67] What then would Mr von Bratt have done? He was never really asked the question in relation to the relevant factors but only some questions about his approach to bail in general. There is nothing that suggests that he would have acted in some or other irrational manner. On the contrary, his answers were quite properly in general terms and amounted to this: if the facts justified it, he would not have released Coetzee.

[68] Argument about the factors that could have been taken into account during March 1995 was presented to us. Much was made of whether or not a person could have been refused bail because (as in now the case under s 60(4)(a) of the Criminal Procedure Act) there was a likelihood that the accused, if released on bail, would endanger the safety of the public or any particular person, or commit a serious offence. The Constitutional Court, I might mention, has held that this was a legitimate objective of bail recognised at common law.[54] Whether we are bound by this finding – the argument assumed that we are not – I do not know but in any event I am not sure whether magistrates in 1995 would have appreciated that such a factor could have been taken into account.

[69] In my judgment the matter should be decided without legal niceties. Judicial officers, in dealing with run of the mill bail applications, take an overall and broad view of the matter. They always have taken into account the seriousness of the offence, the probabilities of a conviction, the nature of the probable sentence, and the ability to put up bail. All these factors go to the likelihood whether the accused will stand trial, the main consideration in deciding the bail issue.

[70] In this case the offences were serious. The complainant was told that she would be killed, she was throttled and she was left for dead. Coetzee ran

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[54] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771, 1999 (4) SA 623 (CC) para 52. The authorities quoted in support of this statement – S v Ramgobin 1985 (3) SA 587 (N); 1985 (4) SA 130 (N) – unfortunately, do not bear this out.

away, believing that he had killed her. There was at least a serious attempt to rape her. The likelihood of a conviction was overwhelming if regard is had to the fact that Coetzee directly after the event confessed to having committed a 'murder' and that in his warning statement he accepted that he may have raped the complainant. A lengthy sentence of imprisonment was a foregone conclusion especially since Coetzee was not a first offender. In addition, it was highly likely that his suspended sentence would have been put into operation. Bail he could not afford. The only real factor in favour of Coetzee was that he had confessed to the crime and gave himself up to the police but it must be remembered that he was at the time under the influence of liquor.

[71] I am satisfied that Mr von Bratt, more probably than not, would have refused bail in these circumstances. At best for the appellants he might have granted bail but then he would have fixed bail at a substantial amount which Coetzee or his family would not have been able to afford. Release Coetzee with a warning he would not have done. Factual causation has accordingly been established.

[72] Then to legal causation, namely whether[55]

'the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part.'[56]

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[55] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700.

The Court below, without adumbrating, held that the plaintiff's loss was not too remote. Since appellants do not attack that finding, more need not be said about the issue.

[73] The appeal is dismissed with costs, including those consequent on the employment of two counsel.

L T C HARMS
JUDGE OF APPEAL

AGREE:

STREICHER JA
FARLAM JA
NAVSA JA
LEWIS JA

[56] For a detailed discussion of the subject in another context see *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* 2001 (4) SA 551 (SCA); [2001] 4 All SA 161 (A) para 46 et seq.