



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 403/2019

In the matter between:

THE MINISTER OF POLICE

APPELLANT

and

MS K

RESPONDENT

Neutral citation: *The Minister of Police v K* (Case no 403/2019) [2020] ZASCA 50 (6 May 2020)

Coram: MAYA P and ZONDI and DLODLO JJA and KOEN and GORVEN AJJA

Heard: 2 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 6 May 2020.

Summary: Claim for aggravated psychological damages suffered by rape survivor arising from alleged failure of police to conduct proper search for her and to conduct reasonably effective investigation into crimes perpetrated against her – negligence, causation and wrongfulness elements not established.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Sephton AJ, sitting as court of first instance): judgment reported *sub nom K v Minister of Safety and Security and Others* [2018] ZAECPHC 82; [2019] 1 All SA 415 (ECP); 2019 (1) SACR 529 (ECP)

1 The appeal succeeds with costs, including the costs of two counsel where employed;

2 The order of the court a quo is set aside and is substituted with the following: 'The plaintiff's claim against the defendant is dismissed with costs, such costs to include:

- (i) the costs of two counsel;
- (ii) the costs in obtaining medico-legal reports from Dr Louise Olivier and Dr Franco Colin, as well as their reasonable qualifying, travelling and accommodation expenses (if any) in connection with the trial;
- (iii) the costs of one pre-trial inspection in loco attended by counsel;
- (iv) the costs in obtaining exhibits "A1" to "A6";
- (v) the costs of the opposed application brought by the plaintiff before Mageza AJ for the separation of the issues of the quantum of damages and causation from the other issues on the merits.'

JUDGMENT

Zondi JA (Maya P and Dlodlo JA and Koen and Gorven AJJA concurring)

Introduction

[1] In *State v Chapman*¹ Mahomed CJ stated as follows:

'Women in this country are entitled to the protection of [the rights to dignity, privacy and integrity of the person]. They have a legitimate claim to walk peacefully on the streets, to

¹ *State v Chapman* 1997 (2) SACR 3 (SCA) at 5B–D.

enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives’.

This was said in the context of an appeal against conviction and sentence imposed on the appellant, who had brutally raped the complainant in that case. Unfortunately, in this case what happened to the respondent, Ms K, is the antithesis of the views and sentiments expressed by Mahomed CJ in *Chapman*.

Factual background

[2] Ms K was abducted, robbed of her personal belongings and sexually assaulted by an unknown man or men on 9 December 2010 at about 14h30 at King’s Beach, Port Elizabeth. This was shortly after she had purchased a house for her mother in Summerstrand, Port Elizabeth, a dream she had always wished to achieve. She was due to take a flight back to Johannesburg, where she stayed, at 17h00 that day. Since she had time to spare before catching her flight, she decided to spend her free time at King’s Beach, Port Elizabeth. She parked her vehicle at the parking lot and thereafter walked to the beach. As she enjoyed her afternoon walk, Ms K was suddenly confronted by an unknown man. She tried to fight him off but he overpowered her. Thereafter her assailant assaulted her, robbed her of her personal belongings and dragged her into the bushes. In the bushes Ms K, on the instruction of her assailant, took off her clothes which he used to blindfold her. He kept her captive in vegetation on the sand dunes. Her assailant raped her repeatedly for the entire duration of her captivity, until 06h00 on 10 December 2010, when she managed to escape from him. Ms K ran to the beach in search of help. Eventually she got assistance from a group of men who were jogging along the beach. One of the joggers, Mr Britz, escorted her back to the parking lot and then to the Humewood police station, where she opened a case of abduction, assault, rape and robbery arising from the incident.

[3] Concerned about her failure to return home in time for her flight back to Johannesburg, her cousin, Mr M, at the request of Ms K's mother, reported her missing at the local police station at approximately 19h00 on 9 December. He provided the police with details of the vehicle she was driving when she left home on that fateful day. That information was relayed to the South African Police Service (SAPS) radio control room, emergency number, 10111. Ms K's vehicle was discovered by SAPS members at the parking area of the beach at about 23h30 that night. The vehicle had been broken into and its contents looted. Ms K was nowhere to be seen. A suspect who was found in possession of some of her belongings was arrested shortly thereafter, but he could not be linked to the crimes of abduction, assault and rape perpetrated against Ms K.

[4] A police search was launched, which included the use of a trained search and rescue dog and a helicopter. These searches produced nothing and were aborted in the early hours of the morning of 10 December. The offences which were perpetrated against Ms K were investigated by the police, but nothing came of it. Her assailant/s was/were never found. There is no doubt that Ms K suffered a great deal of trauma and stress following the highly severe traumatic events of that night.

[5] In consequence, on 14 November 2013, Ms K instituted action against the Minister of Safety and Security (the appellant), along with three individual members of the SAPS involved in the investigation of her case, in the Eastern Cape Division of the High Court, Port Elizabeth. She claimed damages for the harm she allegedly suffered as a result of the relevant SAPS members' failure to conduct an effective search for her and to find her shortly after 23h30, and thereafter to conduct a reasonably effective investigation into the crimes perpetrated against her. She contended that these failures by the SAPS members aggravated her psychopathology. In other words, her complaint was about the quality of the search that was undertaken by the police to find her and the subsequent investigation that was carried out by the police to find her assailant/s. In her summons, Ms K cited

the Minister of Safety and Security as the first defendant and three SAPS members, who were involved in the investigation of her case, as the second, third and fourth defendants respectively. I shall refer to them collectively as ‘the police’ or ‘the defendants’.

[6] The trial before the high court proceeded on a separated basis, the court having ordered, by agreement between the parties, that the issues relating to the appellant’s delictual liability were to be determined first, while those relating to the quantum of Ms K’s damages would stand over for later determination. The matter was heard by Sephton AJ, who found for Ms K. The learned judge found that the SAPS was under a legal duty to conduct a reasonably effective search for Ms K during the night of 9 to 10 December 2010, and to conduct a reasonably effective investigation into Ms K’s case in order to find her assailant/s. The high court concluded that the SAPS negligently breached these duties and that this caused Ms K to suffer additional psychopathology. Accordingly, the appellant was held liable for 40 percent of the damages that Ms K would be able to prove. She further ordered the appellant to pay Ms K’s costs, including the qualifying expenses for her expert witnesses. Sephton AJ nevertheless granted the appellant leave to appeal to this court against her judgment and orders.

Pleadings

[7] The basis of Ms K’s claim was that the SAPS owed her, among others, the following duties first, a constitutional duty to prevent, combat and investigate the crimes and/or the continuation of the crimes of assault, abduction, kidnapping and rape, to protect and secure Ms K and her property, and to hold and enforce the law. Secondly, the SAPS owed her a duty to protect her right to dignity and to ensure that her dignity was respected and protected. Thirdly, she contended that the SAPS had a duty to ensure her safety and security, as well as protect her other rights contained in the Bill of Rights; and fourthly, a duty to obtain information from persons whom the police officers concerned reasonably suspected of having committed the offences or who could provide evidence as to the commission or

suspected commission of the offences. Finally, Ms K contended that the SAPS had a duty to exercise the powers and perform the duties conferred on or assigned to them in a reasonable manner.

[8] Ms K contended that the SAPS unlawfully and/or wrongfully and negligently breached its duty to protect and secure her and her property, and to prevent and combat the continuation of the crimes of assault, abduction, kidnapping and rape between 23h00 on 9 December 2010 until 06h00 the following morning, by failing to search the area in the vicinity of the car park at King's Beach, particularly the sand dunes. In the alternative, Ms K pleaded that in the event of a search having been conducted by the SAPS, it failed to do so with the skill, care and diligence required of reasonable police officers in the circumstances.

[9] Ms K then listed the various respects in which she contended that the SAPS had breached its duties. As a result of these breaches, she continued:

20.1 Plaintiff's abductor/s continued to rape her after 23:00;

20.2 Plaintiff was not found in the clearing of the vegetation in the sand dunes approximately 20 metres from the beach or shoreline, at or shortly after 23:00;

20.3 The abductor/s and/or rapist/s and/or suspects were not apprehended at or shortly after 23:00;

20.4 The abductor/s and/or rapist/s and/or suspects were not apprehended on the morning of 10 December 2010;

20.5 The abductor/s and/or rapist/s and/or suspects were not apprehended after 10 December 2010;

20.6 The abductor/s and/or rapist/s and/or suspects were not identified and/or plaintiff was unable to identify them;

20.7 The plaintiff herself has had to conduct the investigation and collect evidence herself;

20.8 The plaintiff suffered further physical injury, post-traumatic stress disorder and/or depression;

20.9 The plaintiff has been unable to return to work to run her Investment Brokerage consultancy since December 2010.

21. As a result of the depression resulting from the police's negligent handling of the case, the plaintiff is undergoing psychiatric treatment and has to undergo future psychiatric treatment for an indefinite period of time.'

[10] In short, her case is that: (a) had the police searched for her, or carried out a reasonably effective search, they would have found her and stopped the continuation of the rape shortly after 23h00 when they arrived at King's Beach; and (b) had the police conducted a reasonably careful, diligent and skilled investigation on the morning of 10 December and thereafter, she would not have suffered the full extent of the injury of which she complained.

[11] The defendants did not deny being under the duties alleged by Ms K. What they denied was that the police officers, who searched for Ms K and those that investigated the criminal case acted negligently or unlawfully. They pleaded that both the search for Ms K, in difficult circumstances and terrain, as well as the subsequent investigation of the crimes perpetrated against her, were carried out with due diligence and regard to the trauma she had allegedly suffered. The defendants denied specifically that Ms K suffered any 'further physical injury, post-traumatic stress disorder and/or depression' as a result of any breach of duty by the SAPS. They further denied that Ms K had been unable to return to work in any capacity since December 2010 as a result of any breach of their lawful duties. As regards causation the defendants denied the existence of a causal link between the alleged conduct of the police and any mental or psychiatric condition, or aggravation thereof, suffered or being suffered by Ms K.

[12] I must point out that although Ms K pleaded that she was held in the area in the vicinity of the car park, which was the basis on which the trial was conducted, on 26 July 2018 her counsel informed the trial court that Ms K was, in fact, held at the point marked 'F2' on the map, the area within the 'clump of bushes'. This area is some 700 metres north of the car park, close to the northern fence of the

harbour. This late confirmation did not prejudice the police in the conduct of their defence.

[13] In the joint minute dated 18 July 2018 the experts, Dr P F Colin, Dr L Olivier and Mr T Reynolds reached an agreement on the following points regarding the source and extent of Ms K's psychological and psychiatric sequelae:

'1. We agree that we stand by our respective reports compiled after examination of [Ms K] and submitted to the Honourable Court.

2. We agree that:

a. There was no evidence of premorbid pathology;

b. [Ms K] has been severely traumatised by a prolonged and life-threatening incident occurring over 9/10 December 2010 (hereafter "the incident"). She sustained serious psychological and psychiatric sequelae due to the incident. This has led to serious functional impairment in social and occupational domains;

c. Regardless of our various psychiatric and psychological diagnoses made (and reported on in our respective reports), these will not impact on the matter at hand before the court, as the outcomes remain similar;

d. The prolonged life-threatening trauma of the incident (as described in para 2b) cannot be divided into subunits that are quantifiable with any level of psychological or psychiatric validity, as was also testified to by Prof Subramaney;

e. From a psychological and psychiatric point of view, the prolonged life-threatening incident carries the predominant causative weight in the psychiatric illness diagnosed in the case of [Ms K];

f. We cannot comment on the quality of the SAPS investigation into [Ms K's] case: it is a matter before the court;

g. [Ms K's] subjective experience of the quality of the SAPS investigation (amongst other factors) contributes to, maintains and aggravates the psychiatric illness;

h. Regardless of the diagnoses made respectively, outcomes, cost and prognosis from a psychological and psychiatric perspective remain similar;

i. The prognosis of ever returning to a premorbid (before falling ill) level of functioning is poor. The final outcome can only be determined after comprehensive treatment has been given. We note the fact that some of her premorbid potential remains intact;

j. The civil litigation is a contributing factor to the poor treatment outcomes to date.

3. Dr's Colin and Olivier reiterate the opinion that the civil action was initiated by [Ms K].
4. Mr Reynolds notes the symptoms reported in the various expert reports.'

[14] It is not in dispute that there was a duty on the police to search for Ms K shortly after 23h00 on 9 December 2010 after becoming aware that she was missing, and to investigate Ms K's allegation that she had been abducted, held hostage and raped on 9 and 10 December 2010. This is so because the State has a general duty to protect members of the public from violations of their constitutional rights. The constitutional obligations to prevent crime and to protect members of the public, particularly the vulnerable, such as Ms K, must enjoy some prominence.² Ms K has the constitutional right to freedom and security of the person, provided for in s 12(1) of the Constitution. She also has the constitutional right to have her inherent dignity respected and protected.³

[15] These are rights which the State, through its agency (the SAPS), is under a constitutional obligation to respect, protect, promote and fulfil.⁴ The Constitution provides for the establishment of the Police Service in s 205, which reads in relevant part:

'(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.'

[16] The objects of the police service are stated in s 205(3):

'[T]o prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

² *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001(4) SA 938 (CC) para 61.

³ See s 10 of the Constitution.

⁴ See s 7(2) of the Constitution.

[17] Accordingly, the issues are, first, whether the police breached their duty⁵ to search, by failing to search for Ms K in the sand dunes or, if they searched the sand dunes, whether they did so negligently; and, secondly, whether they breached their duty by failing to investigate Ms K's criminal case. This being a claim founded in delict, in order to succeed, Ms K had to establish the elements of delict,⁶ namely, conduct; unlawfulness or wrongfulness; fault; damage; and causation.

Negligence

[18] I shall start with negligence. The question is whether the actions of the relevant SAPS members, during the search for Ms K and the subsequent investigation of her case, fell below the standard reasonably expected of them. Put differently, the legal issue to be adjudicated is whether the search and the investigation were conducted negligently.

[19] The test for negligence was set out by Holmes JA in *Kruger v Coetzee*⁷ as follows:

'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 in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.'

⁵ Scott JA in *McIntosh v Premier, KwaZulu-Natal and Another* 2008 (6) SA 1 (SCA) para 12, pointed out that 'the word "duty", and sometimes even the expression "legal duty", in this context, must not be confused with the concept of "legal duty" in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression "duty of care" is similarly a source of confusion. In English law "duty of care" is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in *Trustees, Two Oceans Aquarium Trust* at 144F, "duty of care" in English law "straddles both elements of wrongfulness and negligence"'.
⁶ P Q R Boberg *The Law of Delict* (1984) vol 1 at 24.
⁷ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430.

[20] In *Mashongwa v Passenger Rail Agency of South Africa*⁸ the Constitutional Court pointed out that ‘the standard of a reasonable person was developed in the context of private persons’ and, given the fundamental difference between the state and individuals, ‘it does not follow that what is seen to be reasonable from an individual’s point of view must also be reasonable in the context of organs of state’. The standard to be applied is not that of the reasonable person, but that of a reasonable organ of state.

[21] A reasonable organ of state is expected to ‘take reasonable measures to advance the realisation of the rights in the Bill of Rights’ and the availability of resources is an important factor when determining what steps were available to the organ of state and whether reasonable steps were in fact taken.⁹ It is therefore necessary for the organ of state ‘to present information to the court to enable it to assess the reasonableness of the steps taken.’¹⁰

Search

[22] As I have already stated, the police used a trained search and rescue dog to search for Ms K. When that failed, an aerial search was conducted. Warrant Officer (W/O) Gerber testified in relation to the manner and pattern of the search that he conducted using his search and rescue dog named Kojak, which he handled. He arrived at King’s Beach parking lot at about 00h40. He was met at the scene by W/O Rae and Sergeant Pretorius, who briefed him about what had happened. He was told that a vehicle apparently belonging to Ms K was found on the scene and that she was missing.

[23] The first thing he did after briefing was to check the shoreline, because he suspected that Ms K might have drowned or committed suicide. He searched the shoreline using a 4x4 Isuzu from where the abandoned vehicle was found up to

⁸ *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 40.

⁹ *Mashongwa* para 41.

¹⁰ *Mashongwa* para 41; 15 LAWSA 3 ed para 170.

the harbour wall, that is, from south to north, to check if there was any sign of a body floating in the water. He switched on the blue lights and sounded the siren of his vehicle. He found nothing and returned to the parking area. Gerber thereupon took his dog, Kojak, out of the vehicle and started searching the sand dune area which he believed 'was not searched already by that time'. But he did not find Ms K. He briefed W/O Rae on his next action.

[24] His initial search started around point 'A' on the map. The dog managed to locate only three 'bush dwellers' sleeping behind a sand dune. His search shifted to the western side, up to the harbour. He searched in a zigzag or 'Z' fashion, starting from point 'D' and then proceeding to points 'E', 'F' and then back along the red line to point 'R'. The dog walked in front of him, against the direction of the wind so that it could catch the scent of a human being. On that morning the wind was blowing directly east. The dog was fitted with a reflective harness which reflected the light from Gerber's torch light.

[25] Gerber did not walk right up to point 'E' but followed his dog, which was off leash at a distance of some 20 to 25 metres, and allowed it to proceed up to the fence near point 'F'. As soon as Gerber saw the dog make contact with the fence, he called it and worked out his next line of search, which would be in a diagonal line. In other words, the first leg of the search was in a north-westerly direction and the second leg was in a south-easterly direction. The dog did not pick up any scent.

[26] The third leg of the 'Z' started. He walked in the direction of point 'F', more or less on the edge of the bushes, close to where the actual beach starts. The dog did reach the fence near point 'F', but Gerber did not. He was not aware that the fence angled away at this point. The dog completed the search and Gerber withdrew from the area after nothing was found or indicated by the dog. He walked with the dog back to the vehicle. Mr Olivier, the respondent's dog training expert

witness, conceded that the procedure followed by Gerber in relation to the search was correct.

[27] Thereafter, at about 01h30 in the morning, Gerber called air support to come and do an aerial search for Ms K, with floodlights on the shoreline and the waterline. A helicopter took off at 01h45 from the base. Gerber told the pilot where to land. Upon landing, Gerber briefed the pilot and his assistant, W/O Smith, on the search. He was present for the entire duration of the helicopter search. The helicopter crew searched the waterline first and thereafter the sand dunes area, that is, the whole block marked 'A' to 'E' and to 'F' on the map.

[28] The pilot landed without finding Ms K. After a short debriefing with the pilot and Smith, Gerber left the scene and returned home. The following morning he heard over the radio that Ms K was found. He drove to the scene to see for himself where she was found and to establish what could have prevented the dog from finding her.

[29] According to Mr Maja, when he arrived at the parking lot at about 12h00 in the morning to identify Ms K's motor vehicle, he found approximately six police officers already at the scene. Shortly thereafter, the police handler arrived with two police dogs.

[30] Under cross-examination Mr Maja testified that the police officers he found at the car park when he arrived to identify Ms K's vehicle were just standing around. They did not conduct any search, at least while he was there. His evidence was that they only started searching with the police dog. They accompanied Gerber, who was with the dog. This evidence is however inconsistent with Gerber's evidence, who testified that he conducted the search alone with the help of the police dog. Gerber's evidence in this regard was not contradicted and the trial court found him to have been an honest witness.

[31] Smith, an airborne law enforcement officer with the SAPS, testified with regard to the aerial search which was conducted on 10 December 2010 to find Ms K. He assisted the pilot. They left the base at about 01h45 in the morning. The journey to the King's Beach took them about two minutes. He operated the light known as west night sun light and cargo slinging. They used a Messerschmitt BO-105 helicopter. It was not fitted with a flir camera, that is, a camera with infrared imaging that is able to detect the heat from a person located near it. Upon landing at the car park they received a briefing from Gerber. Thereafter, they started off on the shoreline and proceeded to the bush area marked 'D', 'E', 'F' to 'R'. The area beyond point 'G' is a no-fly zone because it stores gas and petroleum. They flew at about 30 to 50 metres above the ground and used the night sun light to illuminate the area. The helicopter crew was in the air for about 20 minutes. The area was densely vegetated and if somebody was under the bushes it would have been very difficult to spot them. They had to stop the search because the mist was thickening and there was also an incoming aircraft. The air traffic controller requested them to land, because two aircraft are not allowed to be in the air in the same area at the same time.

[32] Under cross-examination he stated that the search light covers a wider area of about 15 to 20 metres. One can see clearly what is happening on the ground at an altitude of 50 metres above the ground. The light was powerful enough to illuminate what was happening at point 'F2'. But they did not get close to that point because of the restrictions.

[33] Ms K's evidence regarding the search was to the following effect. She was taken to Humewood police station by Mr Britz. She was interviewed by a female police officer and later by W/O Andrews who investigated the matter until 12 December 2010. Ms K took Andrews to the scene and pointed out the spot where she was held captive, which she had marked by placing a sleeping bag over shrubs on the sand dunes. She testified that during the time she was kept captive she never heard a siren go off nor did she get a sense that there were any lights in the

vicinity. Neither did she hear other voices during the course of the night. What she heard was the sound of a helicopter and she moved the sleeping bag to the clearing so that she could be spotted by a helicopter. It did not spot her as it was flying over the shoreline and not over the spot where she was held captive.

Findings of the high court on the search

[34] The high court held that the evidence demonstrated that while a search was in fact conducted, the actions of the SAPS officers at all times fell below the standards reasonably expected of them. It had this to say:

‘None of the SAPS officers who were present at the scene before W/O Gerber arrived, were called to give evidence. W/O Gerber’s is the only evidence about what the ground crew did before he arrived. Thus, the only reasonable conclusion that the court can draw is that the SAPS officers who were at the scene before Gerber arrived did not conduct a search whilst waiting for him to arrive.

SAPS members could have, but did not, conduct the most basic of foot searches. Thus, they did not walk up to the beach with their torches and search the sparse dunes to the right of the walkway or the dunes from point “F” to “G”. This is the least that would have been expected of reasonable SAPS officers in their position.

Thus, if the SAPS members had conducted such a search, they may have walked right into the plaintiff and her perpetrator. Given the restricted size of the area, it would in all likelihood not have taken the SAPS members longer than an hour to conduct such a search. The plaintiff would have been found by 01h00.

The plaintiff was also let down by both the dog unit and the helicopter search because they inexplicably both failed to search beyond point F, and did not search the area between point “F” up to point “G”.¹¹

[35] The high court held that Gerber was aware of the northern boundary of King’s Beach, namely the palisade fence and the harbour wall, and of the fact that there were sand dunes along this boundary. It concluded that, despite this knowledge, Gerber elected to end his search when his dog reached point ‘F’. In its

¹¹ *K v Minister of Safety and Security and Others* [2018] ZAECPHC 82; [2019] 1 All SA 415 (ECP); 2019 (1) SACR 529 (ECP) paras 101-104.

view, it was a significant and glaring omission in his investigation that he did not search the area where Ms K was held captive, at point 'F2', being a point along the northern palisade fence in the dense bushes northeast of point 'F'.

[36] The high court found Gerber to have been negligent in that he stopped his search 20 metres short of point 'F'. He should have walked up to point 'F' to make certain that there was no point beyond this to search. Had he done so, the high court reasoned, given that his trained sniffer dog was 'off lead' and according to his evidence, would have been 20 metres ahead of him, it would probably have found Ms K. This would have been at approximately 01h00 am on 10 December 2010, thus reducing the further trauma experienced by Ms K of hearing the helicopter fly over her, and subsequently flying away, and further rapes over the next number of hours.

[37] The high court's finding that Ms K would have been saved from suffering further trauma, had she been found earlier, is inconsistent with the opinion of the experts. Their evidence made it clear that no quantifiable psychiatric loss or contribution to her psychopathology could be attributed specifically to whether she should or could have been found earlier during the morning of 10 December 2010.

[38] As regards the quality of the helicopter search, the high court concluded that it fell short of what was required from a helicopter search and rescue operation. It did not conduct an effective search beyond point 'F' on the map. I disagree with this conclusion because, on the evidence of Smith, the decision to withdraw from the air was based on safety considerations and was reasonable.

[39] It was submitted on behalf of the respondent that the high court's finding regarding negligence in relation to the search was unassailable. Counsel for the respondent argued that there was no evidence that the police who first arrived at the scene conducted a foot search at all, and none of the area 'F' to 'G'. He pointed out that Ms K's concession, that she was not held at point 'M' but at 'F2', did not

prevent the police from calling the individual officers who first arrived at the scene to testify about what they did to find Ms K. Her concession, the argument proceeded, could not have affected the police's ability to adduce that evidence.

[40] I do not agree with the finding of the high court on this score. Gerber testified that, after searching for Ms K, using a vehicle, he 'decided the next step would be to search the sand dunes area which was not searched already at that time'. In this case the police mobilised all the available resources at their disposal at that time and in the circumstances to find Ms K. A well-trained search and rescue dog was used and, when it failed to find her, Gerber called for a helicopter search. The steps that were taken by the police to find Ms K are, in my view, reasonable. They took all reasonably practicable and appropriate precautions to carry out an effective search for Ms K. No negligence concerning the search was proved.

Investigation

[41] Ms K's case was that she instituted a claim against the SAPS because she believed that its investigation of the crimes perpetrated against her was poor. It is clear from both pleadings and the evidence she adduced that her perception of the poor police investigation must have commenced during the latter part of December 2010 and early January 2011, when she was unable to get hold of W/O Madubedube.

[42] Ms K's evidence in this regard was that she then decided to contact Colonel Engelbrecht, the head of the Unit to which Madubedube was attached, to enquire about progress. Engelbrecht told her that the docket was with the prosecutors and that there was nothing he could do. If she wanted to find out anything about the case, she would have to contact the prosecutors. She understood this to mean that the investigation was complete. Her perception was factually incorrect, because at that stage the investigation was ongoing. Ms K said she could not understand why the police could stop the investigation before finding the

perpetrators, because the person that the police arrested for being in possession of her personal belongings was not the same person who raped her.

[43] One of the grounds upon which Ms K relied, and which was accepted by the high court in support of her contention that the police investigation was poor, was the following:

‘18.4 [The SAPS] failed to round up and/or photograph the bush dwellers living in the sand dunes to enable the plaintiff to identify her abductor and/or to interview them and/or to take statements from them on the morning of 10 December 2010 or thereafter.’

[44] In addition, Ms K alleged further breaches by Madubedube, the third defendant in the court below, in that he:

‘19.2.2. failed to obtain CCTV footage from the municipal street cameras and instead indicated to the plaintiff that she would have to obtain it herself;

19.2.5. failed to take statements from the car-guards ... Francis and Eldridge whose details the plaintiff had given him and who knew who her abductors and associates were; [and]

19.2.6. once the plaintiff had obtained the video footage after engaging the services of a private investigator, the third defendant never viewed the footage and also failed to act on the footage given to him by the plaintiff ...’

Delay in searching the area of the sand dunes and to round-up and/or photograph the bush dwellers

[45] The high court found that the police officers were negligent because they failed or delayed in searching the area for the ‘bush dwellers’ living in the sand dunes in the vicinity of King’s Beach, and failed to round up and/or photograph those ‘bush dwellers’ to enable Ms K to attempt to identify her abductor or to take statements from them, or to interview them on the morning of 10 December 2010. According to the high court, this should have been done as the three ‘bush dwellers’ found by Gerber when he commenced a foot search could have had critical evidence which would have been valuable in terms of both finding Ms K and identifying her assailant.

[46] The finding by the high court that the police were negligent in failing to search for 'bush dwellers' living in the sand dunes and to photograph them was wrong for two reasons. First, this was not a complaint by Ms K. Secondly, at that stage the investigation was conducted by Andrews, who was responsible for the investigation up until 13 December 2010. Ms K was happy with the work he did.

Warrant Officer Madubedube's failure to obtain CCTV footage

[47] The high court found that the only reasonable inference it could draw was that Madubedube's failure to view the entire CCTV footage was grossly negligent. This finding was based on the evidence that Madubedube was wholly unaware of the fact that the CCTV footage of 10 December 2010 depicted a man walking in the vicinity of King's Beach and later loitering around the King's Beach parking lot.

[48] The conclusion of the high court was wrong, having regard to the notes in Madubedube's pocket book which showed that he made arrangements with Mr Rampo of Humewood Fire Station, to compile compact discs of the footage stretching from 8 December 2010 to 10 December 2010. During February 2011 he had arranged for discs to be cut for SSG, the private investigation company which Ms K had hired to assist with the investigation. According to the SSG's report it was in possession of the CCTV video footage in February 2011. SSG gave Ms K a copy of the disc containing video footage, but she did not view it, because she was still traumatised. It was only Ms K, not Madubedube, who could possibly identify her assailant if he appeared on this footage and to alert the police to that fact. It would be reasonable that she be allowed to view the video footage at her leisure in a less formal environment, either in the presence or absence of private investigators of her choice.

Failure to test DNA evidence found at the crime scene

[49] The high court found that Madubedube and the SAPS failed to have all DNA evidence evaluated timeously. According to the high court the delay was unreasonable and a breach of the SAPS' legal duty to conduct a reasonably

effective investigation. It is correct that a piece of newspaper was found by Constable de Wal during his forensic investigation of the crime scene on the morning of 10 December 2010. He noted that it had possible blood and semen stains on it. De Wal sent it to the forensic science laboratory and instructed the laboratory to determine whether there was any blood or semen on it, in addition to determining whether DNA analysis would be possible. He asked the laboratory to keep it safe. On 10 February 2011 the laboratory addressed a letter to Madubedube confirming that blood had been found on the exhibit concerned and that, should the DNA analysis be required, the laboratory should be notified a few months in advance of the trial date.

[50] It is correct that no further testing or analysis was conducted in relation to the exhibit concerned until 20 July 2018. The police delay in having the DNA analysis conducted in relation to the exhibit was not, however, one of the grounds on which Ms K sought to rely in establishing negligence on the part of the SAPS or Madubedube. It is therefore not a factor which might have influenced her to institute a claim against the police.

Wrongfulness

[51] On the assumption that the high court's conclusion that the police officers were grossly negligent in the performance of their duties is correct, the next question is whether their omission was wrongful. This is so because even if it should be found that some of the alleged omissions of the police in this matter were negligent, the mere fact of such negligence does not make the omissions wrongful.¹² That wrongfulness is also an essential and discrete element which has to be established for delictual liability to ensue, was emphasised by this Court in *Minister of Safety and Security v Van Duivenboden*.¹³ Nugent JA had this to say:

¹² See *Stedall and Another v Aspel and Another* [2017] ZASCA 172; 2018 (2) SA 75 (SCA) para 11 and the cases there cited; *Za v Smith and Another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) para 15.

¹³ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12. (Citations omitted.)

‘Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.’

[52] The high court, with reference to *Commissioner of Police of the Metropolis v DSD and Another* [2018] UKSC 11, found that the errors in the search and investigation in this matter were indeed serious, with obvious significant shortcomings. In particular it found Gerber’s failure to search the entire dunes area up to the area ‘F’, and beyond to point ‘G’ marked on exhibit ‘A’, which included the area ‘F2’ where Ms K was held captive, to have been the most significant shortcoming of the entire procedure.

[53] As regards the investigation conducted by the police, the high court found that the police officers’ failure to search, question and investigate all bush dwellers in and around King’s Beach with any sense of urgency from 9 December 2010 to when they were removed from the area on 15 December 2010, was a serious and significant shortcoming in the police investigation. It concluded that the trust that the public is entitled to repose in the police also has a critical role to play in the determination of the Minister’s liability in this matter. Public policy and legal

considerations impose an obligation on the police to fulfil their obligations and a failure to do so was wrongful.

[54] The high court's determination of the element of wrongfulness was flawed. It did not consider whether it was reasonable, in the circumstances of this case, to impose liability on the SAPS for the harm suffered by Ms K.¹⁴ The Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*¹⁵ considered the role that the element of wrongfulness plays in the law of delict. It held that:

'[Wrongfulness] functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue". Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.'

[55] To impose liability for the harm for which Ms K sued would make it difficult for the police to conduct their investigations in the future and would expose them to the potential risk of civil litigation in every case where any rescue search or their investigations are negligent, even if only to a slight degree, and a successful arrest and conviction of the perpetrators of serious crimes do not ensue.

Causation

[56] What remains to be considered is whether the wrongful omission of the police was a cause of aggravation of Ms K's psychopathology. Ms K bore the onus to prove that the alleged poor search and investigation of the criminal case by the police officers contributed to, or aggravated, her psychopathology. More precisely, she was required to establish that, but for the poor police search and investigation, her psychopathology would not have been aggravated.¹⁶ This is factual causation

¹⁴ *Le Roux and Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122.

¹⁵ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 20. (Citations omitted.)

¹⁶ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-H.

and it is established by applying the so-called ‘but for’ test. In the case of an omission, the enquiry involves substituting the defendant’s conduct with a hypothetical positive act and then asking whether, in the latter case, the harm-causing event would still have occurred. If this is answered in the negative, the defendant’s conduct was indeed a factual cause of the plaintiff’s harm; while if answered in the affirmative, the defendant’s conduct was not a factual cause of the plaintiff’s harm and *caedit quaestio*.¹⁷

[57] It was held in *Minister of Safety and Security v Van Duivenboden*¹⁸ that ‘[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’.

[58] In *Za v Smith and Another*,¹⁹ Brand JA explained that ‘the application of the “but-for test” ... is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant’s wrongful and negligent conduct, his or her harm would not have ensued’.

[59] The existence of a relationship of factual causation between the defendant’s conduct and the harm suffered by the plaintiff is not sufficient to establish the presence of a legally relevant causal connection. An additional test is required to determine whether the defendant’s conduct was a legal cause of the plaintiff’s harm. This is legal causation. It entails an enquiry into whether the alleged wrongful

¹⁷ *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC) para 41, especially fn 77 and the authorities there referred to.

¹⁸ *Van Duivenboden* above at fn 13 para 25.

¹⁹ *Za v Smith and Another* above at fn 12 para 30.

act is sufficiently closely linked to the harm for legal liability to ensue.²⁰ Generally, a wrongdoer is not liable for harm that was not foreseeable.²¹

[60] The high court found that the element of causation was established. The ratio for this finding appears from the following statements in its judgment:

‘It is without doubt that W/O Gerber and W/O Smith must have foreseen that their failure to conduct the search for [Ms K] with the diligence and skill required would have caused her damage. At that stage they could possibly have foreseen that their omissions could lead to severe bodily harm and/or trauma. Not finding her in the early hours of the morning of 10 December 2010 meant that her exposure to the terror and trauma of being held captive and repeatedly raped was unnecessarily prolonged by a number of hours.

If the SAPS had conducted a reasonably effective search of King’s Beach, the plaintiff would have been found by 01h30 at the latest. Thus, she would have been spared a further four and a half hours of her ordeal. This was almost one-third of the total time of the trauma, which gave rise to her injury.

Similarly, both W/O Andrews and W/O Madubedube must have foreseen that their failure to act swiftly and round up all bush dwellers for investigation, as well as to view the CCTV footage, could result in the assailant not being found and that this would have caused or maintained any already existing psychiatric damage.

Thus, “but for” SAPS’ negligent search and investigation, the plaintiff would not suffer the injury that she currently suffers.’²²

[61] It was submitted on behalf of the police that the high court erred in finding that there was a causal connection between the alleged failure of the police to conduct an effective search for Ms K and to conduct a reasonably effective investigation into the crimes perpetrated against her, and her psychopathology. It was argued that the experts were unable to quantify the amount of trauma that Ms K suffered as a result of the police’s omissions as opposed to the rapes themselves.

²⁰ *Lee* above fn 17 para 38.

²¹ *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC) para 24.

²² Paras 222-225.

[62] The experts agreed in their joint minute that:

‘Ms K has been severely traumatised by a prolonged and life-threatening incident occurring over 9/10 December 2010 (hereafter “the incident”). She sustained serious psychological and psychiatric sequelae due to the incident. This has led to serious functional impairment in social and occupational domains;

...

The prolonged life-threatening trauma of the incident (as described in para 2.b) cannot be divided into subunits that are quantifiable with any level of psychological or psychiatric validity, as was also testified to by Prof Subramaney ...”

[63] I agree with the appellant’s submission. The high court erred in making findings which flew directly in the face of the joint minute as well as the direct evidence by Ms K’s own expert witness, Professor Subramaney, regarding the issue of causation. Professor Subramaney, a psychiatrist, conceded that it did not matter what the correct diagnosis was relating to Ms K’s psychopathology, since that pathology flowed directly from the brutal assault and rape, and that the future treatment envisaged for her, whatever the correct diagnosis, would be very similar. As causation was not established on a balance of probabilities, Ms K’s claim should have been dismissed.

[64] To conclude, the findings by the high court that the elements of negligence, wrongfulness and causation were established could not be supported by the evidence proffered on behalf of Ms K and her claim should have been dismissed.

[65] As regards the issue of costs, we were urged by Ms K’s counsel not to make a costs order against her should we be minded to uphold the appeal. The basis for this contention was that, by bringing an action against the police, Ms K is essentially asserting her constitutional right to freedom and security and that, to mulct her with costs should her claim be dismissed, would have a chilling effect not only on her, but also on members of society who might wish to assert their constitutional rights. I disagree. The constitutional issue was not raised in this

matter and that being the case the costs liability can therefore not be determined on the basis of the *Biowatch* principle.²³

[66] There is therefore no reason to deviate from the general rule that costs must follow the result. In applying this rule I will, however, not grant costs as sought by the appellant in para 2 of its heads of argument, namely to order Ms K to pay interest on costs at the prescribed statutory rate from a date 14 days after taxation or agreement to the date of payment.

[67] In the result I make the following order:

- 1 The appeal succeeds with costs, including the costs of two counsel where employed;
- 2 The order of the court a quo is set aside and is substituted with the following: 'The plaintiff's claim against the defendant is dismissed with costs, such costs to include:
 - (i) the costs of two counsel;
 - (ii) the costs in obtaining medico-legal reports from Dr Louise Olivier and Dr Franco Colin, as well as their reasonable qualifying, travelling and accommodation expenses (if any) in connection with the trial;
 - (iii) the costs of one pre-trial inspection in loco attended by counsel;
 - (iv) the costs in obtaining exhibits "A1" to "A6";
 - (v) the costs of the opposed application brought by the plaintiff before Mageza AJ for the separation of the issues of the quantum of damages and causation from the other issues on the merits.'



ZONDI JA
JUDGE OF APPEAL

²³ *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) paras 21 and 23.

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