CONSTITUTIONAL COURT OF SOUTH AFRICA

A.K. v Minister of Police

CCT 94/20

Date of Judgment: 5 April 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 5 April 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal (SCA), which held that the Minister of Police (Minister) was not delictually liable for the alleged omissions of the South African Police Service (SAPS) in respect of their search and subsequent investigation into the crimes committed against Ms AK (applicant). The primary issue for determination was whether the failure of the SAPS to conduct a reasonably effective search to find the applicant when she had been abducted, assaulted, and raped and, thereafter, to conduct a reasonably effective investigation to hold her perpetrators accountable, was wrongful in terms of the law of delict and in light of the constitutional obligation on the state to eradicate gender-based violence.

On 9 December 2010, the applicant, while in Gqeberha, was attacked, robbed of her personal belongings and held in captivity in the bushes and sand dunes abutting Kings Beach. The incident occurred from 14h30 on 9 December 2010 until the following morning. During this period, the applicant was traumatised and repeatedly raped for approximately 15 hours.

The SAPS conducted four searches for the applicant. First, a SAPS officer drove his 4x4 vehicle along the shoreline in search of the applicant. Second, a foot search was conducted along certain parts of the beach. Third, a dog search was conducted by the K9 Search and Rescue Unit. Lastly, a helicopter search, which lasted approximately 20 minutes, was conducted. Despite these searches, the SAPS was unable to find and rescue the applicant. As such, she endured several more hours of rape and trauma until she eventually managed to escape during the early hours of the morning of 10 December 2010.

In terms of the subsequent investigation, one individual was arrested and charged for being in possession of the applicant's belongings. He could not be positively connected to the assault, abduction and rape of the applicant and, to this day, her assailants remain at large. On 14 November 2013, the applicant instituted an action in the High Court of South Africa, Eastern Cape Local Division, Gqeberha (High Court) to hold the Minister delictually liable for the alleged negligent omissions by SAPS to conduct an effective search and investigation.

The High Court ruled in favour of the applicant, finding that the Minister was delictually liable for the negligent omissions of the SAPS, in that they did not conduct a reasonably effective search to rescue her, or a reasonably effective investigation thereafter into the crimes committed against her. In its view, the dog search, foot search and helicopter search were negligent in various respects and fell below the standard required of the SAPS by the Constitution. The Court also held that the subsequent investigation was negligent due to several crucial flaws including, in particular, the failure to view the CCTV footage timeously, the failure to follow up on important leads and the failure to analyse and evaluate DNA evidence. The High Court held that the negligent conduct of the SAPS was wrongful and that not holding the SAPS liable would have a chilling effect on fundamental constitutional rights, particularly within the context of the current scourge of gender-based violence.

The Minister appealed the High Court's decision to the SCA, which upheld the appeal with costs. In the SCA's view, the applicant had not established the requirements for delictual liability, namely, negligence, causation and wrongfulness. The SCA found that the conduct of the SAPS, when conducting the search and investigation, was not negligent, because the SAPS had used all available resources to search for the applicant and investigate her case. Further, the SCA held that there was no causal connection between the alleged omission and the damages suffered by the applicant. The Court based its finding on evidence tendered by the experts that the psychopathological damages suffered by the applicant because of the SAPS' omission could not be quantified. The SCA further disagreed with the High Court on the issue of wrongfulness, finding that even if the SAPS officers were grossly negligent in the performance of their duties, the omission by the SAPS was not wrongful because imposing liability on the SAPS would have a chilling effect on the SAPS when conducting searches and investigations in the future. Imposing liability would also, in the SCA's view, open the floodgates of civil litigation. Regarding costs, the SCA held that the matter did not raise a constitutional issue and as such, the principle established in *Biowatch Trust v Registrar Genetic Resources* did not apply. The applicant was consequently ordered to pay costs.

In this Court and in response to directions, the parties made written and oral submissions. The applicant submitted that the SCA erred in its findings on the law and the facts on negligence, causation, wrongfulness and costs. The Minister submitted that it has never denied its constitutional and statutory duty to protect the public, and specifically to prevent and to investigate crimes of gender-based violence against women. However, he contended

that the reason why the SAPS should not be held liable in the instant case is the lack of proof of: (i) negligence; (ii) factual causation; and (iii) wrongfulness.

Written and oral submissions were also presented by the two amici curiae, the Centre for Applied Legal Studies (CALS) and WISE4AFRIKA. The submissions by CALS centred mainly around this country's international obligations to take measures to protect women and children against violence and to prevent further acts of violence. CALS also made a rule 31 application to tender new evidence before this Court. The evidence was found to be relevant and of assistance to the Court and was subsequently admitted. WISE4AFRIKA made submissions that the prevailing convictions of society demand a heightened duty of care from the SAPS when it comes to investigations and the application of law enforcement in respect of gender-based violence.

The first judgment, penned by Tlaletsi AJ (Khampepe J, Madlanga J, Majiedt J, Mhlantla J and Theron J concurring), found that the novel question whether a negligently conducted police search and investigation, which causes an applicant harm, can be wrongful, is a constitutional issue as this question bears directly on sections 12 and 7(2) of the Constitution. Leave to appeal was therefore granted.

On negligence, the first judgment held that in relation to the search, reasonable police officers in the same position as the SAPS would have conducted a basic foot search of the area and further would have included the area "F" to "G" (where it was ultimately established the applicant had been held captive) in their plan when conducting the dog search. The failure by the dog handler to include the area "F" to "G" (which area he knew existed) in his plan, and to ultimately search that area and the failure by the helicopter crew to shine the search light towards the dunes and bushes in the area "F" to "G" were also found to be negligent. If the SAPS were not required to act promptly and respond with appropriate seriousness, which the first judgment found the SAPS failed to do in this case, then the obligation upon the SAPS to protect the public, and ensure the safety and security of vulnerable persons, becomes hollow and meaningless. In relation to the investigation, the SAPS were found to have conducted two fundamental omissions: the failure to round up and question the "bush dwellers" who lived in the vicinity of the spot where the applicant was raped and who were therefore the most obvious first or early port of call for police enquiries; and the failure to view the CCTV footage promptly. The first judgment found that the SCA's finding that there was nothing wrong with the SAPS' failure to view the CCTV footage promptly was incorrect for two reasons. The first is that it places a duty on the victim of gender-based violence to conduct her own investigations and relieves the SAPS of this duty. The second is that viewing the footage could not only have been about the identification of the assailant. An astute investigator could have picked up material that could have assisted the investigative process. Therefore, the first judgment found that the investigation was negligent in fundamental respects.

On causation, the first judgment found that the negligent omissions of the SAPS were both the factual and legal cause of the harm sustained by the applicant. Tlaletsi AJ noted that, based on the evidence tendered by the experts in the High Court, had the applicant been found sooner, she would have been spared a significant number of hours of the rape.

On wrongfulness, the first judgment found that this demands an enquiry into whether it is reasonable to impose liability on the SAPS in the circumstances. The first judgment found that the SAPS breached its statutory and constitutional duties owed to the applicant because the mistakes in the search and investigation were significant and therefore should be actionable. The first judgment further agreed with the High Court that not to impose liability on the SAPS, would have a chilling effect on the ability of survivors of gender-based violence to vindicate their rights. Accordingly, the first judgment found the conduct of the SAPS to be wrongful.

In response to the submissions of the second amicus curiae, the first judgment held that there is no need to develop the common law as it has already been developed to replace the standard of a reasonable person with a standard of a reasonable organ of state, such that a heightened duty is required in respect of organs of state.

On costs, the first judgment found that the SCA misdirected itself insofar as it found that the *Biowatch* principle was not applicable. As this was a matter between an organ of state and a private party that concerned a genuine constitutional issue, the first judgment held that the *Biowatch* principle is indeed applicable. Tlaletsi AJ further noted that courts must avoid discouraging victims but should rather protect victims who choose to litigate, in the knowledge that they do so in the face of a real chance of being re-victimised by the judicial scrutiny of their past traumas. Accordingly, it was held that public policy considerations in relation to gender-based violence enjoin the Court to apply the *Biowatch* principle.

As a result, the first judgment upheld the applicant's appeal by setting aside the order of the SCA, and holding that the Minister was delictually liable for the harm sustained by the applicant following the negligent search and investigation conducted by the SAPS. The Minister was also ordered to pay the costs of the applicant in the SCA and in this Court, including the costs of two counsel, where applicable.

Theron J, with whom Majiedt J concurred, wrote separately to provide additional reasons in support of the first judgment's findings on wrongfulness in respect of the investigation. Theron J explained that it followed from settled law that the negligent omissions which occurred during the search were wrongful. By contrast, whether the negligent omissions which occurred during the investigation and which caused the applicant psychiatric injury were wrongful raised a novel legal question.

Theron J noted that in the United Kingdom, in the leading case of *Hill v Chief Constable of West Yorkshire* and subsequently in *Brooks v Commissioner of Police of the Metropolis*, the House of Lords had refused to hold the police liable for a negligently conducted investigation. The House of Lords did so because, it reasoned, to hold the police liable in such circumstances would lead to "defensive policing" in which the police fail to take necessary risks lest this attract liability. Theron J explained that the Australian courts had adopted a similar approach, refusing to impose liability for police conduct in circumstances where doing so would saddle the police with mutually inconsistent duties. Theron J noted, however, that there were two considerations which meant these precedents were to be approached with caution. First, South African law recognises the so-called norm of

accountability which provides that, unlike in respect of private litigants, the state's negligent harm-causing omissions are wrongful, absent an alternative means of holding the state to account, or a compelling countervailing consideration. This distinguished South Africa from the United Kingdom and Australia. Second, the policy arguments which undergird *Hill* and *Brooks* are speculative, have been trenchantly questioned by the Canadian courts, and have been recently undermined by the Supreme Court of the United Kingdom itself. Thus, in *Hill v Hamilton-Wentworth Regional Police Services Board*, the Supreme Court of Canada rejected arguments that holding the police liable would inhibit its effective functioning. And in *Commissioner of Police of the Metropolis v DSD*, the Supreme Court of the United Kingdom held that holding the police liable for a negligently conducted investigation was more likely to encourage effective policing than to inhibit the police's functions.

Theron J held that the relevant foreign jurisprudence provided four important points of guidance. First, in the absence of substantiating evidence, the "defensive policing" argument was to be approached with caution. Second, though a plaintiff bears the onus of proof in respect of wrongfulness, if the state as defendant intends to rely on the possible deleterious effect of imposing liability on its operations in order to rebut a finding of wrongfulness, it must put up evidence to substantiate such a claim. In this case, the Minister failed to do so. Third, the SAPS' negligent harm-causing omissions ought not to be recognised as wrongful if to do so would saddle the SAPS with mutually inconsistent duties, but that was not so in this case. Finally, not every negligent omission, which occurs during the course of a police investigation and which causes a complainant psychiatric injury, will be actionable in delict. In most cases, only egregious errors will be actionable. Theron J held that, in this case, the SAPS had indeed made egregious errors and thus concurred in the first judgment.

The third judgment (minority), penned by Pillay AJ (Mogoeng CJ and Jafta J concurring), disagreed with the first and second judgments on the outcome and underlying reasoning. At the outset, it agreed with the first judgment that this Court enjoys jurisdiction, because wrongfulness of the conduct of members of the SAPS, who have obligations under section 205(3) of the Constitution, raises constitutional questions. Furthermore, it also agreed with the first judgment that leave to appeal should be granted, because this Court's oversight is required to assess the conduct of the SAPS with its constitutional obligations.

As a starting point, the third judgment summarised the issues raised by the applicant – complaints about the SAPS' conduct amounting to a series of omissions. Accordingly, unlike the first judgment, its enquiry focused on one element in determining delictual liabity – whether the SAPS' alleged omissions were wrongful. It cautioned that an omission alone does not amount to wrongfulness. An omission will only be wrongful if a legal duty rests on a respondent to act positively to prevent harm, the respondent fails to fulfil that duty, and such failure results in harm to an applicant. Accordingly, for liability to follow, a wrongful omission must also be culpable or blameworthy of harm. In this respect, it was further held that it must be reasonable to impose delictual liability on the respondent for the loss caused by an omission. The judgment then went on to determine whether the alleged omissions by the SAPS were indeed wrongful.

At the outset, the decision held in *Country Cloud Trading CC*, that wrongfulness is an *ex post facto* (after the fact) evaluation, was reiterated. Therefore, the third judgment cautioned that foreseeability is not normally a factor in the wrongfulness enquiry.

Regarding the searches, the third judgment disagreed with the first judgment's finding that the SAPS did not conduct a basic foot search of the area near the carpark and between "F" to "G" (where it was ultimately established that the applicant had been held captive), with or without torches and when conducting the dog search. Additionally, the helicopter search was not wrongful when it had to be terminated prematurely for safety reasons.

It held that context matters when considering this complaint. It was dark, nearing midnight and the SAPS had no clue where the applicant was. They could not be certain that she was even in the vicinity of where her vehicle was found. Considering the circumstances in which the applicant went missing, the SAPS' search was strategic and focused along the high water mark, in case she had drowned, and in the vegetation on the sand dunes, in case she was concealed in that vicinity. In the circumstances, it was held that the SAPS' omission to search where the applicant was held captive, cannot be said to amount to a wrongful omission by the SAPS.

In respect of the investigation, it held that one of the purposes of the SAPS viewing the footage was to confirm the time when the applicant arrived at the beach and to gauge when the crime was committed. However, getting footage of her assailant(s) was impossible because there were no cameras filming the beach where the applicant was apprehended and assaulted. Therefore, the usefulness of the footage was limited to spotting any suspicious people or activities in the carpark and not the rape scene. Accordingly, it disagreed with the finding in the first judgment that an astute investigator could have picked up material from the CCTV footage that could have assisted the investigative process. It found that the SAPS fulfilled their duty by, amongst other things, viewing parts of the footage with the applicant and subsequently giving copies of the footage at the request of the applicant to the investigation company she employed.

It held that it must be borne in mind that the SAPS investigates numerous gender-based violence cases, thus time spent on one case is always at the expense of another case. Accordingly, viewing a few hours of the CCTV footage cannot be found to be unreasonable in the circumstances. In addition, in contrast with the first judgment, it held that by giving the applicant the recordings, the SAPS was not shifting its duty to view the footage on to the applicant. Instead of appreciating this special dispensation, the applicant sought to turn it against the SAPS. As it turned out, having eventually viewed 60 hours of footage, the applicant failed to point to any footage that could have assisted the investigation.

As for omitting to have a piece of paper found at the crime scene tested timeously for DNA, the forensic results eventually failed to identify a suspect. Three suspects had their DNA tested several times and had been long excluded as the assailants. Testing the piece of paper was pointless.

The third judgment also rejected claims that there were any delays in the investigations that caused the applicant secondary trauma. Within the space of the first five days, the police had effected arrests of two suspects, charged one but released the other, conducted two identity parades, neither of which showed up any suspects, obtained samples found at the crime scene for DNA analysis, composed a facial identikit of a suspect, viewed parts of the CCTV footage of Kings Beach and submitted the docket to the prosecutorial services. Within six months, the police had excluded the DNA of one suspect and within a further 18 months had similarly excluded the DNA of another two suspects.

The third judgment held that the applicant had the burden of proving that the SAPS omitted to do their duty to search and investigate her complaints. Unlike the first judgment, it found that the applicant failed to meet the threshold of proving any material omissions on the part of the SAPS. It found that no omission on the part of the SAPS resulted in the assailant(s) not being apprehended. Rather, the applicant's inability to recognise her assailant – which is understandable given the traumatic circumstances – was an impediment.

Accordingly, the third judgment found that the conduct of the SAPS was not wrongful.

In respect of the submissions of the second amicus curiae, the third judgment agreed with the first judgment that there is no need to develop the common law. It held that there is no shortage of prescripts elevating the legal duty of police officers to combat crime generally and gender-based violence specifically. Thus, it is not for lack of law imposing legal duties on the SAPS that police services unravel and making more laws will be the wrong place to search for remedies to flick the switch on inefficiencies in the police services.

As to costs, it agreed with the first judgment that *Biowatch* applies and costs should not discourage litigation against gender-based violence. The dissenting judgment would dismiss the appeal with no order as to costs in the SCA and in this Court.