CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/20

In the matter between:

AK	Applicant
and	
MINISTER OF POLICE	Respondent
and	
CENTRE FOR APPLIED LEGAL STUDIES	First Amicus Curiae
WISE4AFRIKA	Second Amicus Curiae

Neutral citation:	*AK v Minister of Police* [2022] ZACC 14
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J and Tlaletsi AJ
Judgments:	Tlaletsi AJ (majority): [1] to [129] Theron J (concurring): [130] to [148] Pillay AJ (dissenting): [149] to [287]
Heard on:	9 February 2021
Decided on:	5 April 2022
Summary:	Delict — wrongfulness — negligence — extent of police liability for negligent police work — psychopathological harm

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Eastern Cape Local Division, Gqeberha):

1. Leave to appeal is granted.
2. The application by the first amicus curiae, Centre for Applied Legal Studies, to lead further evidence, is granted.
3. The appeal is upheld.
4. The order of the Supreme Court of Appeal is set aside and is substituted with the following:
   "The appeal is dismissed."
5. The Minister of Police must pay the costs of the applicant in the Supreme Court of Appeal and in this Court, including the costs of two counsel, where applicable.

JUDGMENT

TLALETSI AJ (Khampepe J, Madlanga J, Majiedt J, Mhlantla J and Theron J concurring):

Introduction

[1] What happened to the applicant is distressing. The applicant was attacked, robbed and held in captivity among the bushes and sand dunes abutting Kings Beach in Gqeberha (formerly Port Elizabeth) from 14h30 on 9 December 2010 until the following morning. She was, over this period, traumatised and repeatedly raped. The incident demonstrates how women in this country are unable to enjoy their freedoms,

enshrined in the Bill of Rights, free from gender-based violence. Truly, few things can be more important to women than freedom from the threat of sexual violence.[1]

[2] Unfortunately, this matter cannot be divorced from the horrific reality that this country has for far too long been, and continues to be, plagued by a scourge of gender-based violence to a degree that few countries in the world can compare. In *Tshabalala*, this Court observed:

> "Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation."[2]

[3] The state has a duty to protect women against all forms of gender-based violence that impair their enjoyment of fundamental rights and freedoms. It has to take reasonable and appropriate measures to prevent the violation of those rights. The South African Police Service (SAPS) is one of the primary state agencies responsible for the protection of the public in general, in particular women and children, against the invasion of their fundamental rights by perpetrators of violent crimes. The courts are also under a duty to send a clear message to perpetrators of gender-based violence that they are determined to protect the equality, dignity, and freedom of all women.[3] This matter is about whether the SAPS, in the execution of their duties, indeed took reasonable and appropriate measures in the circumstances to prevent the violation of the rights that the applicant should at all times enjoy.

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[1] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62.

[2] *Tshabalala v S*; *Ntuli v S* [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC) at para 61.

[3] *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at 345C-D.

[4] The applicant is applying for leave to appeal against the decision of the Supreme Court of Appeal,[4] which upheld an appeal against the decision of the High Court of South Africa, Eastern Cape Local Division, Gqeberha. The High Court held that the Minister of Police was delictually liable for the wrongful omissions of the SAPS, which negligently failed to protect the applicant from harm by not conducting a reasonably effective search to find her, or a reasonably effective investigation thereafter into the crimes committed against her. The nub of the applicant's complaint is that the failed search and investigation caused her to suffer serious psychological and psychiatric trauma.

Parties

[5] The applicant is AK, an adult woman living in Johannesburg. The respondent is the Minister of Police who is sued in his capacity as the Minister responsible for the conduct of members of the SAPS in executing their constitutional obligations to prevent, combat and investigate crime. As such, the Minister is vicariously liable for the delictual conduct, including omissions of members of the SAPS. There were other respondents cited, who were individual members of the SAPS connected to the investigation of the horrific incident. Claims against them were dismissed by the High Court.

[6] The Centre for Applied Legal Studies (CALS)[5] was admitted as the first amicus curiae and WISE4AFRIKA[6] as the second amicus curiae.

Background

[7] On 9 December 2010, the applicant was in Gqeberha on a business trip and to visit her mother. She had a few hours to spare before her flight back to Johannesburg and so decided to take advantage of the perfect weather conditions and go for a walk at

[4] *The Minister of Police v K* [2020] ZASCA 50; 2020 (3) All SA 38 (SCA) (Supreme Court of Appeal judgment).

[5] CALS is a civil society organisation based at the University of the Witwatersrand, Johannesburg.

[6] WISE4AFRIKA is an organisation not for gain that operates to advance the empowerment of women by challenging patriarchy through advocacy and advancing women-inspired solutions for empowerment.

Kings Beach. She planned to return to her mother's house to fetch a friend before heading to the airport to catch a flight back to Johannesburg. She parked her motor vehicle in the parking area of the beach at around 14h30 and started her walk to the shoreline.

[8] An unknown man accosted and assaulted the applicant and robbed her of her personal belongings. The man made her choose between death or accompanying him into the bushes. In desperate fear for her life, she surrendered and accompanied her assailant. She was taken into the bushes and dunes. She was instructed to take off her clothes and was blindfolded with a piece of her clothing. She was kept in captivity and raped repeatedly for a period of approximately 15 hours, until about 06h00 the next morning (10 December 2010). Although she was accosted by one man, it is not known how many assailants were involved in the rape and assault.

[9] When she eventually managed to escape, on the morning of 10 December 2010, she came across a group of joggers and pleaded for assistance. One of the joggers escorted her to the Humewood Police Station, where she reported the incident. In the meantime, since she had not returned to her mother's house to fetch her friend, and having missed her flight back to Johannesburg, she was reported missing by her uncle on the night of 9 December 2010. Her motor vehicle was discovered by the SAPS at Kings Beach around 23h30 on the night of 9 December 2010. It had been broken into and some items had been removed. Members of the Humewood Police Station arrived at Kings Beach around midnight.

[10] Warrant Officer (W/O) Gerber from the Search and Rescue section of the K9 unit attached to the Humewood Police Station was called to the scene to conduct a search for the applicant in the area. On arrival, he found at least two SAPS officers, W/O Rae and Sergeant Pretorius from the Drug Detection section of the K9 unit attached to the New Brighton Police Station, waiting for him next to the applicant's motor vehicle. Their attack dog (which was trained to detect drugs rather than for search and rescue) was kept in their police vehicle, as they could not use it. They briefed W/O Gerber of

the situation. He started to plan his search. He drove his 4x4 vehicle along the shoreline to check whether there could be a person lying in the water. He activated the vehicle's blue light and intermittent siren sound to make the SAPS presence known in the area in case someone was stranded. He drove up to the harbour wall. He thereafter conducted a foot search with his dog in the area he had identified in his plan. His dog managed to spot three male "bush dwellers" among the bushes and the dunes. He asked them if they had seen anything out of the ordinary, or a person who might be lost. They said they had not. W/O Gerber could not find the applicant and the foot search was called off.

[11] The police then called the helicopter unit to the scene for assistance. It arrived at around 01h45 on 10 December 2010. It conducted a search with a high powered "night sun" – a bright light used to enhance visibility at night – along the shoreline, dunes and bushes which lasted approximately 20 minutes. The "night sun" was operated by Mr Smith, a former W/O. Part of the area adjoining the nearby harbour was demarcated as a no-fly zone. The search yielded no positive results. In the circumstances, the applicant endured several more hours of rape, and trauma and only escaped in the early hours of the next morning.

[12] Following the incident, the applicant's case was initially investigated by Detective W/O Andrews who was on standby duty on 10 December 2010. He arrested Mr Jakavula who was found in possession of some clothing items which had been in the applicant's motor vehicle. On Monday, 13 December 2010, the docket was handed to W/O Madubedube to take over the investigation. He is a detective attached to the Family Violence, Child Protection and Sexual Offences Unit. On the same day, W/O Madubedube arranged with the Humewood Fire Department to view the CCTV footage of the Kings Beach parking area with the applicant. He also sent Sergeant Solomons to the applicant to compile an identity kit of the suspect. On 15 December 2010, the applicant attended at St Albans Correctional Centre for an

identity parade. She could, however, not identify anyone in the parade as her assailant. Mr Jakavula was part of the parade.[7]

[13] Later that day, municipal officials rounded up the "bush dwellers" to relocate them as part of their festive period clean-up and invited W/O Madubedube to bring the applicant in for an informal identification parade. The applicant could not identify anyone as her assailant among the 25 to 30 "bush dwellers" paraded. On 23 May 2011, DNA tests excluded Mr Jakavula as the donor of the DNA material found in samples obtained from the applicant. Other suspects were similarly excluded as the rapists, and to this day, the applicant's assailants remain at large and no arrests have been made nor has a prosecution been instituted for the rape, abduction and assault the applicant endured.

[14] In the applicant's view, the quality of the SAPS' search and investigation fell below the standard required of them by the Constitution. After two and a half years of attempting to coax the SAPS into conducting what she believed to be a proper investigation, the applicant instituted an action in the High Court in November 2013 to hold the respondent delictually liable for the alleged negligent omission to conduct an effective search and investigation.

Litigation history

High Court

[15] The High Court summarised the applicant's submissions as follows:

> "The [applicant] alleged that SAPS wrongfully and negligently breached its duty to investigate the crimes committed against [her]; alternatively, if they did so investigate, they failed to do so with the skill, care and diligence required of reasonable police

[7] Even though the applicant was told that Mr Jakavula was found in possession of some of the items from her car, she was not convinced that he could be her assailant given the length of time she spent with her captor and the time when her vehicle could have been broken into.

officers. As a result of this the [applicant] contended that the SAPS have caused her psychological injury and are liable to pay her damages."[8]

Negligence

[16] In its analysis on negligence, the High Court cited the well-known test for negligence established in *Kruger*[9] and, after articulating the applicable test,[10] embarked on an analysis of the evidence to determine whether the applicant had presented sufficient evidence to find the Minister of Police liable in delict. As will be shown, the High Court made certain credibility findings against the witnesses and considered probabilities and improbabilities in the versions of the parties. I proceed to set out the findings and conclusions of the High Court.

The search for the applicant

[17] The High Court first made a few observations regarding the ground search. First, the applicant's car was discovered at approximately 23h30. Second, the SAPS arrived at the Kings Beach parking lot before 00h00. Third, W/O Rae was the first officer on the scene who alerted the K9 Search and Rescue Unit. Subsequently, W/O Gerber received his call at about 00h25 and reached the scene at about 00h45. The High Court found that, since the SAPS officers who first arrived at the scene were not called to testify, the only reasonable conclusion that can be drawn is that the SAPS members who first arrived on the scene did not conduct the most basic of foot searches. They did not walk up to the beach with their torches and search the sparse dunes to the right of the

[8] *K v Minister of Safety and Security* [2018] ZAECPEHC 82; 2019 (1) SACR 529 (ECP) (High Court judgment) at para 18.

[9] *Kruger v Coetzee* 1966 (2) SA 428 (A).

[10] The Court articulated the test as follows:

"This test prescribes that negligence would be established if:

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."

walkaway or the dunes from points "F" to "G".[11] The High Court held that it is the least that would have been expected of reasonable SAPS officers in their position. Given the restricted size of the area, the High Court concluded, it would not have taken longer than an hour to conduct such a search and the applicant would have been found by 01h00.

[18] Regarding the search by W/O Gerber and his dog, the High Court held that he was negligent, in that he stopped his search 20 metres short of point "F" and should have walked up to point "F" to make certain that there was no area beyond that to search. Had he done so, he would probably have found the applicant at approximately 01h00 on 10 December 2010, thus reducing the further trauma experienced by the applicant, who experienced further rape over the following hours. The High Court held further that W/O Gerber, as a reasonably competent police officer duly exercising his skills, would have realised that the area did not end at point "F" and that there was a greater area to cover right up to the harbour wall.

[19] The High Court held that the helicopter search also fell short of what was required from a reasonable helicopter search and rescue operation. It did not accept the applicant's version that the helicopter did not fly over the whole dune area and that she could only hear it from afar. Instead, it preferred the respondent's version that it flew over the sand dunes and bush area. The High Court, however, concluded that the helicopter crew did not find the applicant because they did not fly over where she was kept at point "F[2]" which is beyond point "F". Neither did they hover close to that area and direct their "night sun" towards the bushes in the no-fly zone. The High Court further accepted the evidence that the search had to be terminated because there was a second aircraft coming in to land. However, it remarked that the helicopter search was terminated prematurely and as such, the critical area where the applicant was kept

[11] The references to points "F" and "G" are based on the agreed aerial map of the beach and shoreline where the search was conducted. In the High Court, the parties agreed that on the night of the incident the applicant was being held at point "F2" on the map.

remained unsearched by both W/O Gerber with his dog and by Mr Smith with the helicopter.

[20] The High Court also held that the search was negligent, because there was no communication or coordination between the different SAPS units. In its view, the SAPS only went through the motions and this highlighted the "extreme indifference" of the SAPS to ensure that a proper search was conducted.

[21] On this score, the High Court held that the SAPS was grossly negligent in the performance of its duties. It recognised that the search did not have to be perfect. The only requirement, however, was that a reasonably diligent and skilful search and investigation had to be carried out.

The investigation

[22] The High Court pointed out several aspects of the SAPS investigation that, in its view, were seriously flawed. For example, W/O Madubedube was negligent insofar as he failed to follow up on certain suspects (the "bush dwellers") and obtain their names and contact details in order to reach them in future. In addition, W/O Madubedube failed to view the CCTV footage timeously; he only reviewed it before the trial in which delictual damages were claimed. In this regard, the only reasonable inference that the High Court could draw was that W/O Madubedube's alleged inaction in relation to the CCTV footage was grossly negligent.

[23] The High Court pointed out that W/O Madubedube missed critically important footage of a potential suspect. Had he viewed the footage earlier in the investigation, he could have used it to try to trace the possible suspects. On this score, the High Court accepted that the applicant's assailant may never be found and that it was not clear that she could positively identify her assailant. However, in its view, this did not exonerate W/O Madubedube. The High Court pointed out that the applicant did not need to prove that if he viewed the CCTV footage it would necessarily have led to an arrest and conviction of her assailant.

[24] The High Court also noted certain flaws regarding the collection of potential DNA evidence. Constable de Waal attended the scene with a "body fluid dog" but did not use it. On 10 December 2010, he collected a number of exhibits for potential DNA evidence. One of the exhibits was a piece of a newspaper, which he marked "possible blood stains for DNA analysis". On 14 December 2010, Constable de Waal addressed a letter to the Forensic Science Laboratory (laboratory) in Gqeberha, forwarding the piece of newspaper with a request that they check for possible blood or semen and keep it safe. On 10 February 2011, the laboratory wrote to W/O Madubedube indicating that blood had been found on the piece of newspaper and if DNA analysis was required, they should be notified four months in advance of the trial date. No further testing or analysis was conducted until the applicant requested it during the course of this litigation. In March 2011, the sample was simply sent to the laboratory in Cape Town for safekeeping, without any request for it to be analysed.

[25] The Minister of Police tendered evidence that during the course of the proceedings, the piece of newspaper was sent to the Pretoria laboratory on 16 July 2018 for analysis. A report was received on 20 July 2018 confirming that the DNA profile found in the newspaper was identical to the applicant's vaginal swabs. The report excluded Mr Jakavula, as well as two other suspects, as the donors. The High Court essentially held that the failure to analyse and assess this evidence timeously was negligent. W/O Madubedube conceded that he was aware of the existence of the evidential material and the correspondence between Constable de Waal and the Gqeberha laboratory. He, however, did nothing to ensure that the tests were done.

Conclusions regarding wrongfulness

[26] In determining the correct approach to the wrongfulness enquiry, the High Court cited this Court's decisions in *Loureiro*[12] and *Country Cloud Trading CC.*[13] The Minister argued that finding in favour of the applicant in these circumstances would have a chilling effect on its ability to conduct investigations and carry out its constitutional mandate. The SAPS also cited two English authorities in support of this proposition.[14] The High Court found that while these two decisions were not binding on it, the present matter was, in any event, distinguishable in that the errors in the search and investigation were serious and significant. In particular, the failure to: (i) search the entire area which included the area where the applicant was held captive; (ii) use the "night sun" in the area where the applicant was kept and raped when the no-fly zone was not a barrier to conducting this search with the tools at their disposal; and (iii) search, question and investigate all "bush dwellers" in and around Kings Beach with any sense of urgency at all from 9 December to when they were removed from the area on 15 December, were very serious and significant shortcomings in the SAPS investigation.

[27] The High Court noted that "crimes against women and children are of alarming proportions in this country" and that the SAPS has a duty to attend to its investigations thoroughly and make use of all skills and resources at its disposal. In addition, the High Court was of the view that *not* holding the SAPS accountable in such circumstances would have a chilling effect on the ability of citizens to enjoy their fundamental constitutional rights and, in addition, could lead to self-help. Lastly, the High Court pointed out that the trust that the public is entitled to repose in the SAPS also has a critical role to play in the determination of the Minister's liability in this matter.

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[12] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC).

[13] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC).

[14] See *Hill v Chief Constable of West Yorkshire* [1987] 1 All ER 1173 (CA) and *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11 (*DSD*).

Conclusions regarding causation

[28] The High Court remarked that had the SAPS conducted a proper search, the applicant would have been found by 01h30 at the latest, which would have spared her nearly four and a half hours of the ordeal, which is nearly a third of the time that the ordeal lasted. The High Court held that, although the SAPS was not responsible for the actual abduction and rape, its failure to conduct a proper search and subsequent investigation exacerbated the applicant's trauma. As such, the negligent omissions were not too remote to be considered a factual and legal cause of the harm she suffered. In the result, the High Court held that the respondent was 40% liable for the applicant's damages.

Supreme Court of Appeal

[29] Aggrieved by the outcome, the Minister appealed against the judgment and orders of the High Court. It is necessary to discuss the findings of the Supreme Court of Appeal in detail, since that judgment is the subject of this appeal.

[30] The Supreme Court of Appeal identified the issues as: firstly, whether the SAPS breached their duty to search, by failing to search for the applicant in the sand dunes or, if they did search the sand dunes, whether they did so negligently; and, secondly, whether they breached their duty by failing to properly investigate the applicant's criminal case. The Supreme Court of Appeal held that this being a claim founded in delict, in order to succeed, the applicant had to establish the elements of delict, namely, conduct, unlawfulness or wrongfulness, fault, damage and causation.

[31] The Supreme Court of Appeal acknowledged that the SAPS has a duty to protect members of the public from the violation of their constitutional rights. The SAPS also has a constitutional obligation to prevent crime and protect members of the public, especially the vulnerable. Therefore, the SAPS had a constitutional duty to search for the applicant after 23h00 on 9 December 2010 immediately after finding out that she

was missing. It also had a duty to investigate the applicant's allegations of abduction and rape. The Supreme Court of Appeal held further that the applicant has a constitutional right to freedom and security of the person, as provided for in section 12(1) of the Constitution, and the right to have her inherent dignity respected and protected.[15]

[32] On the issue of negligence, the Supreme Court of Appeal also applied the test for negligence established in *Kruger*[16] and *Mashongwa*.[17] Relying on *Mashongwa,*[18] the Supreme Court of Appeal noted 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'".[19]

The Supreme Court of Appeal accepted that the standard to be applied is not that of the reasonable person, but that of a reasonable organ of state. It held that a reasonable organ of state is expected to take reasonable measures to advance the realisation of the rights in the Bill of Rights; that the availability of resources is an important factor when determining what steps are available to the organ of state and whether reasonable steps were in fact taken; and that it is necessary for the organ of state to present information to the court to enable it to assess the reasonableness of the steps taken.[20]

[33] As regards the search, the Supreme Court of Appeal analysed the measures undertaken by the SAPS to search for the applicant. It referred to the briefing provided

[15] Section 10 of the Constitution provides that "Everyone has inherent dignity and the right to have their dignity respected and protected".

[16] *Kruger* above n 9.

[17] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC).

[18] Id at para 40.

[19] Supreme Court of Appeal judgment above n 4 at para 20.

[20] Id at para 21 relying on *Mashongwa* above n 17 at para 41.

to W/O Gerber by W/O Rae and Sergeant Pretorius about what had happened; that W/O Gerber drove along the shoreline in a 4x4 vehicle, from where the abandoned vehicle was found up to the harbour, to check for any sign of a body floating in the water; the use of blue lights and the siren of the vehicle to alert anyone in the vicinity of the presence of the SAPS; that W/O Gerber planned and used a trained search and rescue dog to search for the applicant around the sand dunes and surrounding area which he believed had not yet been searched and, when that failed, an aerial search with a helicopter fitted with a strong "night sun" light was conducted along the waterline and the sand dunes area.

[34] The Supreme Court of Appeal disagreed with the High Court's finding that the applicant would have been saved from suffering further trauma had she been found earlier. It found such a conclusion to be inconsistent with the opinions of the experts. The Supreme Court of Appeal held that the evidence made it clear that no quantifiable psychiatric loss or contribution to her psychopathology could be specifically attributed to whether she should or could have been found earlier during the morning of 10 December 2010.

[35] Regarding the conclusion by the High Court that the helicopter search fell short of what was required of a helicopter search only because it did not conduct an effective search beyond point "F" on the map, the Supreme Court of Appeal based its disagreement on the evidence of Mr Smith to the effect that the decision to withdraw from the air was based on safety considerations and was thus reasonable.

[36] The Supreme Court of Appeal concluded that, in this case: the SAPS mobilised all the available resources at its disposal in the circumstances to find the applicant; that the steps taken by the SAPS were reasonable; and that the SAPS took all reasonably practicable and appropriate measures to carry out an effective search for the applicant. It held that no negligence regarding the search was established.

[37] Regarding the investigation, the Supreme Court of Appeal observed that the applicant instituted the claim against the SAPS because she believed that its investigation was poor. The Supreme Court of Appeal further observed that her pleaded case and her evidence suggested that this perception 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. It was at this time that she contacted Colonel Engelbrecht who reported that her docket was with the Public Prosecutor and that she could enquire from them if she wanted information about the case. She understood this to mean that the investigations were completed. This perception, the Supreme Court of Appeal held, was factually incorrect because the investigations were ongoing.

[38] The Supreme Court of Appeal held that the High Court's finding, that the SAPS were negligent in failing to search for "bush dwellers" in the sand dunes and to photograph them, was wrong for two reasons. First, that was never a complaint by the applicant and, secondly, the applicant was happy with the investigations as conducted by W/O Andrews during the period of 10 to 13 December 2010. On the alleged failure by W/O Madubedube to view the CCTV footage, and the inference drawn by the High Court that he was grossly negligent, the Supreme Court of Appeal found those conclusions to be wrong, because the notes in W/O Madubedube's pocketbook showed that he had made arrangements for the compilation of a compact disc of the footage stretching from 8 to 10 December 2010. Furthermore, during February 2011, he arranged for discs to be cut for the private investigation company that the applicant had hired to assist with the investigations. The company representative handed a copy to the applicant. She could, however, not watch the footage as she was still traumatised. The Supreme Court of Appeal held that it was only the applicant, and not W/O Madubedube, who could possibly identify her assailant if he appeared on the footage, and to alert the SAPS to that fact; and that it was reasonable that she be allowed to view the footage at her leisure in a less formal environment, either in the presence or absence of private investigators of her choice.

[39] The High Court had concluded that the SAPS failed to have the DNA evidence evaluated timeously, and that the delay was unreasonable and a breach of the SAPS' legal duty to conduct a reasonably effective investigation. The Supreme Court of Appeal disagreed, holding that this was not one of the grounds on which the applicant relied to establish negligence on the part of the SAPS, and, as such, it was not a factor which might have influenced her to institute a claim against the SAPS.

[40] On the issue of causation, the Supreme Court of Appeal considered whether the wrongful omission by the SAPS was a cause of aggravation of the applicant's psychopathology. It correctly held that she bore the onus to prove that the alleged poor search and investigation of the criminal case by the SAPS officers contributed to, or aggravated, her psychopathology; or, differently put, that but for the poor police search and investigation, her psychopathology would not have been aggravated (factual causation). The Supreme Court of Appeal continued thus:

> "In the case of an omission, the inquiry 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*."

[41] The Supreme Court of Appeal held that the existence of a relationship of factual causation between the defendant's conduct and the harm suffered by the applicant was not sufficient to establish the presence of a legally relevant causal connection. The Supreme Court of Appeal explained that an additional test is required to determine whether the defendant's conduct was a legal cause of the applicant's harm (legal causation). It entails an enquiry into whether the alleged wrongful act is sufficiently linked to the harm for legal liability to ensue.

[42] In relation to legal causation, the Supreme Court of Appeal held that the High Court's findings flew directly in the face of the Joint Minute compiled by the

expert witnesses, as well as direct evidence by the applicant's own expert witness regarding the issue of causation. The Supreme Court of Appeal held that her expert witness, Professor Subramaney, conceded that it did not matter what the correct diagnosis was relating to her 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 similar. There was therefore no method of quantifying the psychopathological damages suffered by the applicant as a result of the SAPS' omission. As a result, the Supreme Court of Appeal held that factual and legal causation had not been established on a balance of probabilities.

[43] On the element of wrongfulness, the Supreme Court of Appeal held that the High Court's determination of the element of wrongfulness was flawed, as 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 the applicant. Moving from the assumption that the High Court was correct in its finding that the SAPS officers were "grossly negligent", the Supreme Court of Appeal held that to impose liability for the psychopathological injuries that the applicant was suing for would cause difficulties for the SAPS to conduct investigations in the future. The Supreme Court of Appeal held that imposing liability would also expose the SAPS to a flood of civil litigation for every case where it negligently conducted search and rescue operations and investigations, regardless of the degree of negligence, where a successful arrest and conviction did not ensue.

[44] In sum, the Supreme Court of Appeal held that the High Court's findings that the elements of negligence, wrongfulness and causation were established could not be supported by the evidence that was presented on the applicant's behalf. For all these reasons, the applicant's claim was dismissed.

[45] On the issue of costs, the Supreme Court of Appeal held that the applicant did not raise a constitutional issue and, that being the case, the costs for the action could not be determined in terms of the *Biowatch* principle, which is to the effect that where

individuals litigating against the state in order to vindicate constitutional rights are unsuccessful, they must not be mulcted in costs.[21] It applied the general rule that costs follow the result. The appeal was upheld and the applicant was ordered to pay costs, both in the High Court and on appeal.

In this Court

[46] The applicant advances numerous arguments contending that the Supreme Court of Appeal got the law and the facts wrong on negligence, causation, wrongfulness and costs. She contends that the correct formulation of the issues before the Supreme Court of Appeal should have been: (a) whether the officers who arrived at Kings Beach some 45 minutes before the dog-handler should have conducted a foot search for her; (b) whether the failure to search the area "F" to "G" with the dog, in circumstances where the K-9 officer was aware of that area, but failed to get the dog to search that area, was negligent; (c) whether the helicopter crew searched the area "F" to "G" at all, and, if they did, whether they did so negligently; and (d) whether the SAPS investigated her criminal complaint with the diligence and skill reasonably expected of detectives of many years' experience, in the specialist unit for the investigation of crimes against women and children.

[47] In line with the practice in this Court, on 26 August 2020, the Chief Justice issued Directions to the parties to file written submissions on these issues:

> "(a) Whether the matter engages this Court's jurisdiction as a constitutional matter in terms of section 167(3)(b)(i) of the Constitution:
>
> (i) Is the applicant challenging factual disputes and evidence?
> (ii) Is the applicant challenging the application of an accepted legal test and principles in the law of delict?
> (iii) Is the applicant seeking the development of the common law of delict pursuant to section 39(2) of the Constitution?

[21] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

(b) Any further submissions on whether the principles distilled in *Biowatch* should apply to the costs in this Court, and those in the Supreme Court of Appeal and the High Court?"

[48] Both parties responded as directed. In brief, the applicant stated that: (a) she challenges the application by the Supreme Court of Appeal of the wrongfulness and negligence tests, which are inconsistent with the relevant constitutional rights enjoyed by the applicant; (b) she seeks the development of the common law test of negligence as applied by the Supreme Court of Appeal, where the SAPS executes its duties of search and investigation negligently; (c) wrongfulness is in dispute in the appeal and, in the context of her claim, wrongfulness is a constitutional issue; (d) the wrong test for wrongfulness was applied; (e) negligence is related to wrongfulness, which makes it a constitutional issue that engages this Court's jurisdiction; and (f) on causation, the wrong test was applied in that the Supreme Court of Appeal required causation to be proved as a matter of mathematical certainty by finding that the test was not met, because the legal experts had not quantified the harm she suffered as a result of the SAPS' negligence. On costs and the application of the *Biowatch* principle, she submitted that she instituted the litigation to vindicate her fundamental constitutional rights against an organ of state.

[49] For present purposes, it is not necessary to set out the respondent's submissions in any detail. It suffices to mention that the respondent disagreed with the applicant's submissions and contended that she had not succeeded to prove the elements of delict and that hers is an ordinary delictual claim in which no constitutional issues exist.

[50] On 11 November 2020, the Chief Justice issued further Directions[22] setting the matter down for hearing of oral argument. In the notice the parties were "directed *to file written submissions solely on the issues of wrongfulness and costs*" on specified

[22] Rule 13(2) of the Rules of this Court provides that "Oral argument shall not be allowed if directions to that effect are given by the Chief Justice". Sub rule (3)(a) reads: "Oral argument shall be relevant to the issue before the Court and its duration shall be subject to such time as the Chief Justice may impose."

dates. However, during the course of oral argument, the parties were allowed to present their cases covering all aspects of a delictual claim. They did so without any hesitation or difficulty. In fact, the parties correctly agreed that the issue of negligence, the nature of the damage and the important issue of factual causation, must all be considered holistically in an enquiry as to whether wrongfulness had been established.[23] Having had the benefit of the full argument on all the elements of delict, and both the High Court and the Supreme Court of Appeal having pronounced on negligence and causation, this Court is enjoined to consider all aspects of the delictual claim. None of the parties will be prejudiced thereby.

The parties' submissions

[51] The applicant submitted that the Supreme Court of Appeal was wrong about the test for wrongfulness. It was contended that, having assumed that the SAPS was grossly negligent in discharging their constitutional and statutory duties of search and investigation, and that their negligence caused the harm suffered by the applicant, the Supreme Court of Appeal should have asked the following questions: (i) can that duty be vindicated other than by means of a delictual claim for damages? (ii) are there public interest considerations that militate against imposing liability on the SAPS? and, (iii) are there compelling public interest considerations that trump the constitutional norm of accountability, which requires holding the SAPS accountable to victims of crime and to victims of gender-based violence generally?

[52] As regards costs, the applicant submitted that the costs order of the Supreme Court of Appeal is inconsistent with *Biowatch*. If unsuccessful, costs should not have been awarded against her, except if the litigation is frivolous, vexatious, or manifestly inappropriate. It was further submitted that, should the applicant not be successful in these proceedings, costs should not be awarded against her.

[23] In *Loureiro* above n 12 at para 36, this Court held that negligence and the interpretation of the contract in that case were issues connected to the required decision on a constitutional issue.

[53] The first amicus curiae's submissions 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. It also referred to foreign jurisprudence relating to the required standard of investigation of gender-based crimes; the impact of failed policing and insufficient investigation on behalf of victims of gender-based violence. They also submitted that a victim-centred approach to policing gender-based violence generally is required. Separately, the first amicus curiae submitted that the community's legal convictions are against sexual violence and demand of the state that women be protected from such violence. Further, that there is no need to develop the common law, because harm resulting from secondary victimisation such as psychological or psychiatric harm is already actionable in our law.[24] The first amicus curiae supported the applicant's submissions on costs to the effect that she should not be ordered to pay the respondent's costs should the appeal not succeed.

[54] The second amicus curiae submitted that the prevailing legal convictions of the community (*boni mores*) have evolved to demand a heightened duty of care from the SAPS when it comes to the investigation and application of law enforcement in respect of gender-based violence. To this end, the contention goes, this Court must develop the common law in relation to wrongfulness by imposing a heightened duty on the SAPS in the investigation of and law enforcement against gender-based violence. Such a development would be in line with the spirit, purport and object of the Bill of Rights. In respect of costs, the second amicus curiae argued that the costs award of the Supreme Court of Appeal should be set aside because mulcting the applicant with costs amounts to silencing survivors of gender-based violence and will deter women in the applicant's position from attempts to vindicate their constitutional rights to this end.

[55] The Minister of Police made the following submissions in support of the findings of the Supreme Court of Appeal. The SAPS submitted that it has never denied its

[24] *Komape v Minister of Basic Education* [2019] ZASCA 192; 2020 (2) SA 347 (SCA).

constitutional and statutory duty to protect the public, and specifically to prevent and to investigate crimes of gender-based violence against women. In fact, a special unit, the Family Violence, Child Protection and Sexual Offences Unit, has been created to deal specifically with such crimes. It contended that the reason why the respondent should not be held liable in the instant case is for the lack of proof of: (i) negligence; (ii) factual causation; and (iii) wrongfulness.

[56] Regarding costs, the Minister of Police submitted that the applicant's delictual claim never raised issues of "genuine constitutional concern" and that its character was that of an ordinary delictual action. The Minister of Police further submitted that the conduct of the applicant throughout the trial justified the order made by the Supreme Court of Appeal for the reasons that follow. The separation of the issues for determination, which was never necessary, was at the applicant's instance. Her perception that there was an inordinate delay in the SAPS reacting to her complaint, which was later abandoned, resulted in unnecessary evidence being led to disprove her perception. Furthermore, time had to be spent during the trial to identify the actual spot where her assailant kept her due to her having pointed out a wrong spot. Unnecessary costs were incurred by the calling of Mr Olivier, a former captain in the SAPS who was instrumental in the development of the SAPS dog unit, by the applicant, whose evidence was a duplication of that of Colonel Engelbrecht. The applicant should have known from the beginning that she faced an insuperable difficulty in proving causation, and her inclusion of individual SAPS officers in her action increased the costs significantly.

Issues

[57] The issues for determination are whether—

(a) leave to appeal should be granted;
(b) the rule 31 application should succeed;
(c) the Minister should be held liable for the applicant's loss; and
(d) the costs order in the Supreme Court of Appeal should be overturned.

Jurisdiction and leave to appeal

[58] To entertain the application for leave to appeal, it must first be shown that this Court has jurisdiction. The applicant submitted that the SAPS is under a duty to take reasonably practical and appropriate measures to protect women against gender-based violence, to investigate crimes of gender-based violence, and to give effect to the constitutional values and rights conferred by the Constitution on women. She states that these rights include the values of dignity, equality, freedom and the rights to physical and psychological integrity. She contends further that gender-based violence is an important constitutional issue; and the failure of the SAPS to protect and promote the rights of women is a matter of public interest.

[59] The Minister submitted that the applicant's case is not about gender-based violence, nor does it involve a constitutional issue; it was a normal delictual action. He submitted that whilst the courts are acutely aware of the scourge of gender-based violence, the applicant's constitutional rights to bodily integrity, dignity and freedom of movement did not affect the standard of the duty of care that had to be displayed by the SAPS in their search for the applicant, and in the criminal investigation against the perpetrator of the crimes against her. Further, it was submitted, there was nothing of great public interest, nothing of constitutional importance and nothing legally novel in the action. For these reasons, the Minister submitted that this application should not enjoy the attention of this Court.

[60] This Court has held that "an appeal against a finding on wrongfulness on the basis that [a Court] failed to have regard to the normative imperatives of the Bill of Rights does ordinarily raise a constitutional issue".[25] What particularly brings this matter within this Court's jurisdiction is the novelty of the issue at hand. At issue is the novel legal question whether a negligently conducted police search and investigation, which causes a person harm, can be wrongful and give rise to delictual liability. That

[25] *Loureiro* above n 12 at para 34.

question bears directly on sections 12 and 7(2) of the Constitution and requires that we consider whether the SAPS' section 205(3) obligations to protect, combat and investigate crime should translate to private law duties. The question certainly does raise a constitutional issue.

[61] The enquiry into the negligence of the SAPS and causation, as well as the consideration of the findings of the Supreme Court of Appeal in this regard, are issues connected to the required decision on a constitutional issue, and therefore can also be adjudicated by this Court.[26] It is also in the interests of justice to grant leave to appeal since the applicant has good prospects of success.

Rule 31 application

[62] It is apposite to dispose of the rule 31 application at this stage. The first amicus curiae made an application in terms of rule 31 of this Court's Rules to tender new evidence. It is trite that such evidence will only be admitted if it is relevant and incontrovertible or of a scientific or statistical nature, and capable of easy verification.

[63] During oral argument, counsel for the first amicus curiae submitted that there were two main objectives which they sought to achieve with the rule 31 application. First, it contextualises the applicant's position and demonstrates how women in the position of the applicant interact with the criminal justice system. Second, it highlights the reasonableness or otherwise of the SAPS' conduct in light of the need for a victim-centred approach to policing and the duty to mitigate secondary victimisation. In response, the Minister argued that the evidence is not relevant, because the effects of rape on victims of gender-based violence are trite.

[64] In my view, this evidence is relevant and will be of assistance to this Court for several reasons. First, the evidence demonstrates how, when the SAPS fail to act with empathy and compassion or engage in victim-blaming behaviour, this results in

[26] Compare *Loureiro* above n 12 at para 36.

secondary victimisation. Second, the evidence demonstrates that this contributes to the relatively high rate of attrition in respect of rape and other sexual offences cases. These two points have been explained in the following words:

> "However, [rape victims] also indicated that they would not have reported their rape incidents to the police if they knew they would be treated by the police in the way they were. All of the rape victims that were interviewed described the police officers' behaviour as apathetic, uncaring, intimidating, and suspicious. Furthermore, none of the rape victims at the time of being interviewed had received any feedback from the police with regard to the investigative progress of their cases. It can also be argued that these rape victims would not advise other rape victims to report their rape incidents to the police due to their own negatively perceived experiences of police treatment."[27]

[65] Essentially, what the evidence seeks to demonstrate is: (i) what a victim-centred approach to policing is; (ii) how the failure to adhere to a victim-centred approach contributes towards secondary victimisation and; (iii) how this undermines the capacity of the criminal justice system to effectively prosecute and punish those who commit acts of sexual violence against women and children. Put differently, the evidence demonstrates that when the SAPS fail to act in accordance with a victim-centred approach, this violates victims' rights to equality, dignity and freedom from violence. In addition, it undermines the constitutional and international law obligations to eradicate gender-based violence.

[66] It follows that this evidence is relevant to what the legal convictions of the community demand in respect of the quality of police work, in the context of the scourge of gender-based violence.

[67] The Minister misunderstood the basis on which admission of this evidence was sought. The evidence is not meant to clarify the impact of rape on victims of gender-based violence, but rather the impact of non-compassionate and sub-standard

[27] Steyn and Steyn "Revictimisation of rape victims by the South African Police Service" (2008) 1 *Acta Criminologica* 41 at 56.

police work on rape victims and how this exacerbates their existing trauma. The latter phenomenon is known as secondary victimisation / traumatisation.

[68] I am of the view that this evidence contextualises the position of the applicant and those who are similarly situated. Furthermore, in *Frankel*,[28] this Court accepted similar evidence related to the importance of victim-centred approaches in the law. It seems to me that, much like in *Frankel*, this evidence is relevant to the determination of what a victim-centred approach should entail on these facts and the constitutional issues at play, particularly the scope of the police's duties and whether their omissions were wrongful. Regard being had to rule 31, I see no impediment to its admission.

[69] For all these reasons, the evidence satisfies the requirements of rule 31. The evidence is consequently admitted. Having found that this Court has jurisdiction to entertain the application, I proceed to consider the merits of the appeal.

Negligence

Search

[70] The test for negligence in respect of organs of state (such as the SAPS in this instance) was expounded by this Court in *Mashongwa*, in the following terms:

> "The real issue on this aspect of the case is not whether the posting of a single guard, or three guards, could have prevented the attack. It is whether the steps taken by PRASA could reasonably have averted the assault. *Crucial to this inquiry is the reasonableness of the steps taken. However, it must be emphasised that owing to the fact that PRASA is an organ of state, the standard is not that of a reasonable person but a reasonable organ of state. Organs of state are in a position that is markedly different from that of an individual. Therefore, 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. That approach would be overlooking the fundamental differences*

[28] *NL v Estate of the Late Frankel* [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 921 (CC) (*Frankel*).

> *between the state and an individual. It would also be losing sight of the fact that the standard of a reasonable person was developed in the context of private persons. . . .*
>
> The standard of a reasonable organ of state is sourced from the Constitution. The Constitution is replete with the phrase that the state must take reasonable measures to advance the realisation of rights in the Bill of Rights. In the context of socio-economic rights the availability of resources plays a major part in an enquiry whether reasonable steps have been taken. I can think of no reason in principle or logic why that standard is inappropriate for present purposes. Here, as in the case of socio-economic rights, the choice of steps taken depends mainly on the available resources. That is why an organ of state must present information to the court to enable it to assess the reasonableness of the steps taken."[29] (Own emphasis).

[71] It follows from the above that the enquiry must be centred on whether the SAPS acted reasonably in the circumstances, considering the resources which were available to them at the time. Whether the SAPS acted reasonably is based on, amongst others, the positive obligation imposed on organs of state to respect, protect, promote and fulfil the rights in the Bill of Rights. I therefore agree with the applicant that the SAPS must establish that they took reasonable and appropriate measures available to them in the circumstances. Furthermore, in my view, the enquiry must centre on whether the SAPS took reasonable measures to protect and fulfil the rights of women, such as the applicant, to dignity, equality and freedom and security of the person, including the right to be free from violence from both public and private sources.[30]

[72] In respect of the foot search, the High Court found that the SAPS officers who were at the scene before W/O Gerber's arrival did not conduct a foot search. The Minister seems to acknowledge the fact that there was a duty on these SAPS officers to conduct a search, hence an attempt during oral argument in this Court to suggest that the search was indeed conducted. As a reason why the evidence relating to this search was not tendered, it was submitted on behalf of the Minister that it was because the applicant's case was initially that she was held at point "M" rather than

[29] *Mashongwa* above n 17 at paras 40-1.

[30] Sections 9, 10 and 12 of the Constitution.

point "F2". Because of this change, the Minister decided not to call one of the SAPS officers who arrived at the scene before W/O Gerber. This, of course, could not have been a justifiable reason not to present the evidence of the first responders at the scene. Although the applicant had initially pointed out that she was held at point "M", a change to point "F2" was made before the trial started and was confirmed during her cross-examination when the legal representatives agreed that she could only have been kept at point "F2". This conclusion was based on the objective facts. This was agreed to long before the applicant's case was closed. Counsel for the Minister also indicated during the inspection *in loco* (on-site inspection) that their version was that the applicant was kept at the area around point "F" and not "M". There was consequently ample opportunity for the respondent to present evidence of a foot search by the first responders if it had such evidence. In the premises, based on the common facts, the Minister has simply not presented any evidence as to why it was reasonable for the SAPS not to have conducted a foot search at point "F".

[73] Counsel for the Minister of Police referred to the evidence of W/O Gerber where he testified that after driving his 4x4 vehicle on the shoreline, "I decided the next step would be to search the sand dunes areas which was not searched already by that time and that is when I took the dog out, I briefed W/O Rae on what my next action would be in deciding to search the dune area with the dog". Counsel contended that this statement implied that the other SAPS members searched the area before W/O Gerber arrived. There is no merit in this argument. W/O Gerber stated under cross-examination that when W/O Rae briefed him, he did not get the impression that they had gone out on foot to check the beach area. His impression was that when they got to the parking area they called for his help. He conceded that W/O Rae and Sergeant Pretorius were not of much use to him insofar as the search was concerned, and he had to make his own determination on how to plan and conduct the search. W/O Gerber's entry in his pocketbook does not indicate that he was informed of any search conducted before his arrival, and that he planned his search with that in mind. W/O Gerber's version contradicts what was put to Mr Olivier regarding the search by W/O Rae and Sergeant Pretorius. It was put to Mr Olivier that W/O Gerber's version

was that "the police men at [the scene] informed him, amongst others, that they had searched the immediate surrounding areas close to the super tubes the Water World and where it is marked ERF 577, the open grassy area and the thick bushes there at the southern end of the Manganese dumps, where the yellow line is, approximately, not from "C" but just above "C", to "D"; they have searched that area and the beach area in the immediate vicinity". It was therefore necessary for one of these officers to testify since W/O Gerber contradicted this version. Reference to "the sand dunes areas which was not searched already" may also mean the area which was not searched by W/O Gerber with his vehicle.

[74] The factual conclusion of the High Court that not even a basic foot search was conducted between the time the SAPS discovered the applicant's vehicle and when W/O Gerber arrived at 00h45, which was 75 minutes after, should therefore stand. This is a factual finding made by the trial court. An appellate court should be loath to interfere with factual findings of a trial court. It may only do so if the finding is clearly wrong.[31] This is not the case in the matter at hand. Reasonable police officers in this situation would have conducted a basic foot search of the area with or without torches. And they could easily have found the applicant. Of course, they could well have not found her. The total failure to conduct the most basic of foot searches before W/O Gerber's arrival was certainly negligent. If the SAPS are not required to act promptly and respond with appropriate seriousness, as they failed to do in this case, then the obligation upon them to protect the public and ensure the safety and security of vulnerable persons becomes hollow and meaningless.

[75] It is also the applicant's case that the "search and rescue dog search" conducted by W/O Gerber was conducted negligently in that he failed to search the area "F" to "G" at Kings Beach. He chose not to include this area in his plan. He was aware of this area, as well as the harbour wall, because he had driven past Kings Beach many times. He mentioned that he visited Kings Beach with his family quite often. He had

[31] *S v Francis* [1999] ZASCA 11; 1999 (1) SACR 650 (SCA) at para 33; *Rex v Dhlumayo* 1948 (2) SA 677 (A) (*Dhlumayo*) at 705-6; and *S v Hadebe* [1997] ZASCA 86; 1998 (1) SACR 422 (SCA) at paras 426A-C.

also seen the boundary wall and sand dunes when he drove along the shoreline prior to conducting his search. His motor vehicle lights as well as the lights immediately on the harbour side of the wall illuminated the area between "F" and "G".

[76] Nothing prevented W/O Gerber from including this area in his plan. Mr Olivier, who is a dog handling expert, testified that in general, the manner and method in which W/O Gerber conducted his search with the dog was correct. However, he insisted that he should have included the area "F" to "G". Even if he did not include it as part of his plan, he should have walked up to point "F" with his dog. Once there, he would have noticed that the area does not end there and would have been obliged to search the area beyond point "F" as well. He mentioned that W/O Gerber should have searched the area "F" to "G" to complete his search since there is some shrubs around the area as well. That is what a reasonable dog handler in the position of W/O Gerber would have done in the circumstances.

[77] There is, therefore, no justifiable reason why W/O Gerber stopped 20 metres short of point "F". He called the dog back after it had reached point "F" and did not allow it to go beyond this point and encroach the area. Had W/O Gerber walked up to point "F" and allowed his dog to move 20 to 30 metres into the area, it would possibly have picked up the presence of the people who were in the area, including the applicant. There is no evidence that there were barriers that would have prevented him or his dog from reaching the area "F" to "G". There is no evidence to suggest that it would have been dangerous to traverse that area. It was not reasonable for W/O Gerber to rely on the dog's failure to pick up any scent as a justification for not searching the area. It is not the dog, but the handler who is conducting the search. W/O Gerber's failure to include the area "F" to "G" in his plan and to ultimately search it is negligent. It is not merely with the benefit of hindsight, as the respondent suggests, that it can be said that the failure to search was negligent. It remains a material omission on the part of W/O Gerber who at the time of the search knew of the existence of the area but chose not to search it. He also conceded that he knew that there were dunes in front of the harbour wall and described the area beyond point "F" as including an elevated dune

area. Moreover, knowing that he had not searched the area "F" to "G" which he knew existed, W/O Gerber also did not instruct that the helicopter crew search this area.[32] In my view, this is yet another material omission.

[78] Our law does not require perfection. It requires conduct in line with a diligent and reasonable person. Lack of negligence does not connote exactitude. However, my view is that in the circumstances of this case, a diligent and reasonable police officer who, like W/O Gerber, possesses expertise in searching would have either included the area "F" to "G" in his plan or, when actually conducting the search, would have walked up to point "F" with his dog. Failing these, at the very least he would have specifically instructed the helicopter to search this area. And this is not an armchair ex post facto observation; the exigencies of the facts and circumstances compel this conclusion. It bears emphasis that the duty imposed on the SAPS is not one of result, that is, a successful search or investigation, but one of means. The applicant herself has emphasised that her complaint is not about the lack of an arrest and successful prosecution, but about what she sees as a woefully inadequate search and investigation.

[79] It was not disputed that the area "F" to "G" fell within the no-fly zone and that the helicopter could not be flown over that area in search of the applicant. Mr Smith, the crew member whose responsibility it was to direct the search light, testified that the helicopter was able to fly close enough to the area "F" to "G" such that they could see the perimeter fence and the road beyond it with the assistance of the search light. He conceded that if they hovered above the clearing and had directed the search light at "F2" he would have been able to see the towel, blanket, and the sleeping bag in the clearing at "F2". These were items found at the scene the following morning and depicted on photographs handed in as exhibits at the trial. Mr Smith, however, could not recall whether the light was indeed directed at that specific area. He also mentioned

[32] Although it was not possible for the helicopter to fly over the area "F" to "G", Mr Smith had conceded that he did not inform W/O Gerber of this at the time that W/O Gerber requested the air search and so, for all intents and purposes, W/O Gerber could and should have at the very least requested that the helicopter search the area "F" to "G". He did not.

that they could have crossed into the area inside "F", but he doubted that he could have been within 15 metres of "F2" because of flight restrictions.

[80] The High Court found that the failure of Mr Smith to shine the search light towards the dunes and bushes in the area "F" to "G" constituted negligence on the part of the SAPS. Failure to direct the search light towards point "F2" was, in my view, a tragic omission. And this must be viewed in light of W/O Gerber's failure to make a specific request to those conducting the helicopter search to search this area. The Supreme Court of Appeal mentioned that it disagreed with the conclusion of the High Court that the helicopter crew did not conduct an effective search beyond point "F", because the withdrawal of the helicopter search was based on safety considerations and was reasonable. It must be remembered, though, that according to Mr Smith, the search was stopped because of an incoming aircraft and the thickening mist. The search was not continued thereafter. The High Court's conclusion that the search was discontinued prematurely is, in my view, quite convincing. The helicopter crew did not even report to W/O Gerber about their search and the area they could not cover. They only reported on the radio that they could not find anything in the "bush area directly behind".

[81] It was not required of the SAPS to know or suspect before the search that the applicant was at "F2" for them to search the area. There are no justifiable reasons why the area that was known to exist was excluded from the search. It should be appreciated and is commendable that the SAPS managed to deploy the search and rescue dog with a handler and the helicopter search at such short notice. What matters though, is the conduct of the SAPS in utilising the resources deployed. It was required of the SAPS officers in the circumstances to utilise their deployed resources with the requisite degree of diligence, care and skill reasonably expected of the SAPS officers in the circumstances. The Supreme Court of Appeal thus erred when it held that the conduct of the SAPS in respect of the search was not negligent merely because they mobilised all the resources available to them in the circumstances. As indicated, in the

circumstances, it is not the type of the resources that were made available, but how they were used to conduct the search and rescue mission that is important.

Investigation

[82] In my view, there are at least two fundamental omissions by the SAPS that tainted the investigations. First, the SAPS knew on the morning of 10 December 2010 that the applicant was kept in and around the vegetated sand dune area populated by the so-called "bush dwellers". However, the SAPS failed to immediately round up the area to search for possible suspects while the incident was still fresh. A reasonable police officer would have suspected that the perpetrator could not be too far from the scene, given the information that the applicant had recently escaped and immediately reported the incident to the SAPS. In addition to focusing on the spot where the applicant was raped and kept overnight, the investigations should also have focused on trying to apprehend the perpetrator as quickly as possible. To that end, the SAPS ought to have questioned the "bush dwellers" as early as they could. That could have helped them find possible suspects or potential eyewitnesses. As people who lived in the vicinity of the spot where the applicant was raped, the "bush dwellers" were the most obvious first or early port of call for police enquiries. The SAPS only met most, if not all, of the "bush dwellers" on 15 December 2010, at the invitation of the municipal officials who were clearing the area of all "bush dwellers" for the festive season. Even on this occasion, no attempt was made to obtain their full particulars and pictures for purposes of further investigations. Since the SAPS were aware that the applicant was unable to identify her assailant in the informal identity parade, the least they could do was to have these details for further investigation. It is not explained why the three "bush dwellers" spotted by W/O Gerber when he was searching on foot with his dog were not interviewed to obtain more information about possible leads that could help in the search and the investigations. They would surely have had better knowledge about the area and the activities there. The interview could have been conducted by other SAPS members at the scene whilst W/O Gerber continued with his dog search.

[83] Secondly, with full knowledge that the parking area at Kings Beach is covered by CCTV cameras, the SAPS should immediately have made plans to obtain and view the video footage for possible leads. The only time the viewing of the CCTV footage was arranged was on 13 December 2010. On this day, W/O Madubedube left the applicant to view the footage and rushed to hand over a motor vehicle to his senior, and never returned. It matters not, as he claimed, that he viewed part of it. According to the applicant, her motor vehicle was depicted in the parking bay. She was seen leaving her motor vehicle walking towards the beach. It was important for the SAPS to view the entire footage at that time for them to have a full picture of the activities around the parking area and the possible modus operandi of possible perpetrators of crime. They would have established whether the breaking into the applicant's motor vehicle and stealing therefrom was in any way connected to her abduction. It is not the Minister's case that viewing the entire video footage would have amounted to a waste of time for W/O Madubedube or misuse of police resources.

[84] Warrant Officer Madubedube viewed the CCTV footage for the first time eight years later in preparation for the civil trial. Even then, he did not view the whole footage. He only became aware of a male person depicted in the CCTV footage walking in the vicinity of the parking area closer to the date of commencement of the civil trial, leaving no time to identify and follow him up. The High Court found that the delay in the viewing of the footage and the SAPS' inactiveness to view the whole footage was negligent. I agree with this conclusion. This is basic. Any and all reasonable leads had to be followed up in the course of a proper investigation. This the SAPS failed to do.

[85] The Supreme Court of Appeal found nothing wrong with the failure by the SAPS to view the CCTV footage and held that it would be reasonable that the applicant be the one to view it herself as she was the only one who could identify her assailant. This conclusion cannot be right for at least two reasons. First, it places a duty on the victim of gender-based violence to conduct her own investigations and relieves the police of their responsibility. Second, viewing the footage could not only have been about the identification of the assailant. An astute investigator could have picked up from it

material that could have assisted the investigative process one way or the other. A simple example: surely, police do view CCTV footage of the abduction of a missing person who is not there to identify the abductor. That can only be because doing so will be of benefit to the investigative process. The SAPS, unlike victims of crime, are trained in the investigation of crime and would be able to view the video footage with an investigative eye and look at all aspects that might provide leads for the investigations. The investigations cannot be conducted solely on whether the perpetrator is depicted on the video footage. There could be other potentially relevant surrounding factors depicted on the video footage. And the sooner the footage is viewed, the more likely it is that whatever leads are picked from it may lead to something. Otherwise, any available leads may soon go cold. As the European Court of Human Rights (ECHR) held, "[a] requirement of promptness and reasonable expedition is implicit" in taking reasonable available steps to secure evidence, including forensic evidence, and to secure eyewitnesses and their testimony.[33]

[86] For these reasons, the police investigation was negligent. The police failed to take reasonable measures which were available to them in the circumstances. They furthermore failed to act promptly and expeditiously so as to follow up on any available leads. The investigation was not deficient because it failed to result in a successful prosecution of the applicant's perpetrators, but because the methodology was flawed; the police failed to act diligently and with the skill required of them by the Constitution.

International law

[87] The applicant and the first amicus, CALS, made references to international and foreign law in support of their submissions on the standard required of the police to conduct an effective search and investigation.

[33] *Makaratzis v Greece*, no 50385/99, § 74, ECHR 2004.

[88] It is trite that the duty to prohibit rape and other forms of gender-based violence is a customary norm of international law.[34] South Africa is a party to several treaties which enshrine the rights of women. Chief amongst these are the Convention on the Elimination of All Forms of Discrimination Against Women[35] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[36] Taken together, these instruments regard gender-based violence as a pernicious form of discrimination against women that undermines their rights to equality and sexual autonomy.[37]

[89] Whilst this Court already established, in *Carmichele*, that the SAPS is under a duty to take appropriate measures to combat gender-based violence and protect women from harm,[38] this Court has not yet crystallised the duties which the SAPS owe in respect of search and investigation operations in circumstances such as the present case.

[90] The ECHR has held that articles 2 and 3 of the European Convention[39] impose a positive obligation on States Parties to conduct an efficient and effective investigation

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[34] See for example *MC v Bulgaria*, no 39272/98, § 20, ECHR, 2003.

[35] United Nations Convention on the Elimination of all Forms of Discrimination against Women, 18 December 1979 (CEDAW).

[36] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 25 November 2005 (Maputo Protocol).

[37] The Maputo Protocol prohibits gender-based violence as part of women's rights to life, integrity and security of the person (article 4), and dignity (article 3). Also see articles 1, 2, 3, 6, 11,12 and 16 of CEDAW. In 1992, the CEDAW Committee recommended that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". See General Recommendation 19, U.N. GAOR, Committee on the Elimination of Discrimination Against Women, 11th session (1992). In their Concluding Observations on South Africa's Fifth Periodic Report, the CEDAW Committee noted as a principal area of concern, the "failure by the [SAPS] to systematically investigate, prosecute and adequately punish the negligence and mishandling of cases by police officers". The Committee recommended that South Africa ensure systematic training, awareness raising and capacity building of among others, police officers on the application of criminal law provisions on gender-based violence, gender-sensitive investigation procedures, and the need generally to create an enabling environment for women and girls to report gender-based violence. CEDAW Committee, Concluding Observations on the fifth periodic report of South Africa, 11 November 2021 at E(9)(b), E(10)(b), E(22)(c) and E(34)(d). See also Combrinck, "Positive State Duties to Protect Women from Violence: Recent South African Developments" (1998) 20 *Human Rights Quarterly* 666 and *S v Baloyi* [1999] ZACC 19; 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 13.

[38] *Carmichele* above n 1 at para 62.

[39] Articles 2 and 3 of the European Convention provide as follows:

> "Right to Life

into an infringement of either of the rights protected in these articles (the right to life and the prohibition against torture). The ECHR has applied this positive obligation to cases of gender-based violence, such as instances in which women have been raped, to find that the police failed to conduct a diligent and effective investigation thereafter.[40]

[91] The ECHR has stated that the general principles related to an effective investigation are as follows:

> "The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence. A requirement of promptness and reasonable expedition is implicit in this context. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness."[41]

[92] Amongst other things, the ECHR has emphasised that an investigation must be prompt and expeditious. In *Menson*, for example, the ECHR held that although the state may encounter obstacles in conducting its investigation, it must act promptly, lest it be seen to be colluding or tolerating the unlawful acts.[42]

[93] The ECHR has also stressed that an effective investigation "must be capable of establishing the cause of the injuries and the identification of those responsible with a

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> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

And Article 3 states that "[n]o one shall be subjected to torture or to inhuman or degrading punishment or treatment."

[40] See *MC* above n 34 at 151-3.

[41] *Makaratzis* above n 33 at para 74.

[42] *Menson v United Kingdom*, no 47916/99, ECHR, 2003.

view to their punishment".[43] This must not be misunderstood. It is about means;[44] that is, what – all things being equal – the investigation is capable of achieving. It does admit of the possibility of the investigation not achieving what it is meant to achieve, but that should not be because of the inadequacy of the investigation. In addition, held the ECHR, "the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident".[45] This includes any evidence relevant to the investigation, such as eyewitness accounts or forensic evidence.[46]

[94] In applying these principles, the ECHR has imposed a high standard of professional conduct on the police. The approach taken by the ECHR is far more strenuous than the relatively lax approach which the Supreme Court of Appeal took in this matter. As stated earlier, the Supreme Court of Appeal merely found that, because the SAPS deployed all their available resources, they had discharged their constitutional obligations. In my view, the stricter standard of the ECHR is more consistent with the positive obligation to combat gender-based violence, which was established by this Court in *Carmichele*.

[95] Therefore, the police are under a duty to act promptly and expeditiously, and they must furthermore take all reasonable measures which are available to them in the circumstances. It is not sufficient that they mobilise the resources at hand; they must also deploy those resources diligently and effectively. They must act with haste, they must take appropriate steps to secure the available evidence, including eyewitness accounts, potential leads and suspects, and they must subject relevant evidence to forensic analysis. They must never act in a cavalier manner or display indifference to the plight of women in the position of the applicant.

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[43] Id at page 13.

[44] Id.

[45] Id.

[46] See *Fanziyeva v Russia*, no 41675/08, ECHR, 2015.

[96] As stated above, in the present matter the police failed to deploy their resources effectively during the search for the applicant. Furthermore, the investigation was riddled with material flaws, particularly the failure to act promptly and expeditiously in respect of the CCTV footage.

Causation

[97] In my view, the negligent omissions of the SAPS were both the factual and legal cause of the harm sustained by the applicant.

[98] In respect of factual causation, the Minister contended that the test has not been met because, according to the experts, at most, had the applicant been found earlier this *could* have reduced the trauma she suffered. Put differently, the failure to find her during the searches prolonged her trauma and suffering. The Minister argued that the operative word, to this end, was *could* in contradistinction to saying that if she had been found earlier this *would* have reduced the trauma she suffered.

[99] The applicant's contention that the Minister misconstrued the test for factual causation has merit. In *Lee*,[47] this Court stressed that the "but-for" test has always been flexible and "does not require proof equivalent to a control sample in a scientific investigation".[48]

[100] Reliance on *Lee* is apt here because, similarly to *Lee,* the Minister contends for a scenario in which the risk of trauma is "altogether eliminated".[49] To this end, the Minister argued that because one cannot quantify the trauma one experiences from rape and divide it into portions, the applicant has not established factual causation. This approach is in my view untenable and would render it virtually impossible for survivors

[47] *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC).

[48] Id at para 56.

[49] Id at para 22.

of gender-based violence to hold the SAPS liable for the secondary trauma they endure as a result of any negligent omissions on the part of the SAPS.

[101] The starting point in determining factual causation is the evidence tendered at trial. In the Joint Minute of the expert witnesses, it is recorded, *inter alia*, that—

(a) there is no evidence of premorbid pathology;

(b) the applicant has been severely traumatised by a prolonged and life-threatening incident occurring over 9/10 December 2010. She sustained serious psychological and psychiatric sequelae due to the incident leading to serious functional impairment in social and occupational domains;

(c) the prolonged life-threatening trauma of the incident cannot be divided into sub-units that are quantifiable with any level of psychiatric validity, as was testified to by Professor Subramaney;

(d) 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 the applicant;

(e) her subjective experience of the quality of the SAPS investigation (among others) contributes to, maintains and aggravates the psychiatric illness;

(f) regardless of the diagnoses made respectively, outcomes, cost and prognosis from psychological and psychiatric perspective remain similar; and the civil litigation is a contributing factor to the poor treatment outcomes to date.

[102] The expert witnesses further agreed that although the predominant cause of the applicant's injury was the traumatic incident itself, "this cannot absolve [the defendants] from responsibility for the exacerbation of the initial trauma of the prolonged and life-threatening incident".[50] The severity of the applicant's trauma, the experts agreed,

[50] High Court judgment above n 8 at para 217.

bore a direct relationship not only to the initial injury but also to its prolonged duration and the events which have taken place subsequently.

[103] Professor Subramaney testified that:

> "[T]o what extent can we attribute the failure by SAPS to find her between twelve and two. . . to what extent can we attribute that to her PTSD? My advice to the court would be that you know in the way we look at outcomes for PTSD and prolongation of exposure in that way the impact could have been bigger. *In other words, if the police had managed to find her, she would have been spared further trauma* which as I understand it, continued to occur from the times that you mentioned SAPS could have found her to when she was eventually . . . she managed to escape." (Own emphasis)

[104] From the above reference to the evidence, a point can be made that had the applicant been found sooner, she would have been spared a significant number of hours of the ordeal, up to a third of the total time of the trauma which gave rise to her injury. Those hours are, in my view, not insignificant. The agreed expert evidence suggests that the fact that the trauma was *prolonged*, was significant. Therefore, every moment that the applicant was subjected to the violent assault, represents a moment in which her dignity, autonomy and personal security were stripped away. These are values that go to the heart of the human condition. Each rape, for as long as it continues, is an individual affront on a person's dignity. It is not inconsequential that the rape was repeated for a substantially longer period.

[105] During oral argument, counsel for the Minister submitted that what the experts meant by "prolonged", is that 11 hours is *already* prolonged and it cannot be said that if she had been found earlier, she would have suffered less, because 11 hours of a vicious repeated rape was already "prolonged". The essence of this submission is simply that because the applicant had already endured a prolonged period of assault, the further hours of her violation that were occasioned as a result of failure by the police to find her were immaterial in terms of contributing to her psychopathological trauma. This argument fundamentally misunderstands the nature of rape and its resultant harm. It

also flies in the face of what Professor Subramaney stated, namely, that had she been found sooner, she would have suffered less trauma.

[106] The argument by the Minister also flagrantly disregards the fact that, on the basis of logic alone, four and a half hours of rape is, in itself, a lengthy period of suffering and trauma. As the High Court correctly held, the SAPS' negligent omissions meant that her exposure to the terror and trauma of being held captive and repeatedly raped was prolonged for a number of hours. This negligence has to be factored in as contributing to the "prolonged" nature of the incident. Therefore, based on the evidence of the expert witnesses, the negligence of the SAPS in causing the prolongation of the incident carries causative weight, *notwithstanding that the assault was already prolonged*.

[107] Indeed, the Minister's own expert, Dr Colin, gave evidence in which he compared the trauma to a dose of poison. He said: "Imagine a poison and the higher or the *more* intense or the more severe or the more poisonous, obviously the resultant effect will be much worse". He testified that the duration of the trauma was incredibly important in terms of the outcome for her, and that the length of the trauma was as important a contributor to the effects of it as any of the other contributors, for example, the violence, intrusion, physical damage, invasion of privacy or denial of freedom. On the basis of this, and other evidence, the High Court concluded that the delay in finding the applicant unduly prolonged her exposure to the trauma and had a significant impact on her psychopathological suffering. I have to agree. The "poison" analogy leads to an irrefutable conclusion: the longer the exposure, the greater the trauma. And, with reference to the facts of this case, the duration of exposure was increased, and the degree of trauma increased, as a direct result of the omissions of the SAPS. Had she been found earlier, her experience of the trauma and its imprint in her mind would have been shorter.

[108] The Minister seeks to rely on Professor Subramaney's evidence to suggest that the diagnosis and psychopathology would have been the same regardless of the conduct

of the SAPS. Thus, the conduct of the SAPS made no difference. During oral argument, his counsel contended that the applicant is unable to prove any material contribution to her psychopathology by the longer duration of the rape, and that, ultimately, this was something that the experts, including her own expert, Professor Subramaney, conceded under cross-examination. The Minister contended that the experts could not say if the longer duration by some four and a half hours of the rape could have made a difference. The Minister relied on the finding by the experts that "the prolonged and severe trauma suffered by the applicant cannot be divided into sub-units that are quantifiable with any level of psychological or psychiatric validity, as was also testified to by Professor Subramaney". Indeed, the Minister's case has always been that it would be impossible to quantify the harm suffered as a result of the SAPS' failure to find her and, thus, impossible to quantify damages.

[109] The Minister misconceives the test for causation. The test for causation is whether, but for the negligent conduct, the applicant would have suffered the harm, and the expert note makes it clear that in this case, the failures by the SAPS did materially contribute to the applicant's harm. The Supreme Court of Appeal held in *Van Duivenboden* that:

> "[A] plaintiff is not required to establish a 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 metaphysics."[51]

[51] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) (*Van Duivenboden*) at para 26. See also *Lee* above n 47 at para 41. In *Za v Smit* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) at para 30 the Court held 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".

[110] As stated above, this Court in *Lee* held that the "but-for" test has always been flexible and the case of *Rudman*,[52] relied on by the applicant, supports this. In that case, medical experts were unable to determine to what degree each of the causal factors had contributed to the harm suffered. Yet, the Court found that this should not result in the plaintiff being non-suited. What the court is required to do is the best that it can on the evidence that is available to it. Accordingly, the applicant need not determine causation as a matter of mathematical certainty or science, but rather, causation is established on a common sense weighing up of the evidence. Thus, the Supreme Court of Appeal misdirected itself in finding that no quantifiable psychiatric loss could be attributed specifically to whether the applicant could have been found earlier and there was no method of quantifying the psychopathological damages suffered because of the omission.

[111] On the investigation, the experts also agreed that "the [applicant]'s subjective experience of the quality of the SAPS investigation contributes to, maintains and aggravates the psychiatric illness". Indeed, this was corroborated by the evidence of Ms Norton, the applicant's psychologist, who stated that whenever the applicant was forced to engage with reminders of the trauma, such as through the investigation and litigation, she would experience regression to increasingly lower levels. This, Ms Norton testified, took up her therapeutic space and her recovery was delayed. Professor Subramaney also testified that the nature of the investigation had a huge impact on her post traumatic stress disorder and depression. It is clear from the evidence, then, that the nature of the investigation and the stresses of litigation, which were informed by the negligent omissions of the SAPS, materially contributed to the harm suffered.

[112] I am satisfied that the Joint Minute of experts does support a finding that the negligent omissions of the SAPS, outlined above, made a material contribution to the applicant's psychopathology and were therefore a factual cause of the harm she

[52] *Minister of Safety and Security v Rudman* [2004] ZASCA 68; 2005 (2) SA 16 (SCA) (*Rudman*).

suffered. As the High Court correctly found, it is not necessary to scientifically quantify the measure of damage suffered as a result of the negligent search and investigation. That Court's decision to hold the Minister liable for 40% of the damages is unassailable.

[113] Turning to legal causation, the Minister raised two objections. First, that the harm was too remote. Second, that the officers could not reasonably have foreseen that their omissions would have resulted in the applicant's trauma. In *Mashongwa*, this Court described the enquiry into legal causation as follows:

> "No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant."[53]

[114] Applying this test to the facts, this Court held that the respondent in that case should be held liable because the steps required of it to prevent the harm would have come at no extra cost and the conduct in the matter invoked moral indignation. Similarly, in this matter there is a sufficiently close connection between the negligent omissions described above and the harm the applicant endured. Furthermore, much like in *Mashongwa*, the further steps which were required would have come at no extra cost to the SAPS. All that was required was for the SAPS to cover a wider area than they did with the resources already employed, both in the search and investigations. Based on this Court's strong pronouncements on the duty of all sectors of society to combat the scourge of gender-based violence, I am of the view that the omissions in this case invoke moral indignation and are not too remote to attract delictual liability.

[53] *Mashongwa* above n 17 at para 68.

Wrongfulness

[115] The three-fold enquiry into wrongfulness raised by the applicant is apposite. The three-fold test is:

(a) have the SAPS breached a duty (under the Constitution or statute)?
(b) can that duty be vindicated other than by means of a delictual claim for damages?
(c) are there public interest considerations against imposing such liability on the SAPS?

[116] In response, the Minister argued that imposing liability in these circumstances would have a chilling effect on the performance by the SAPS of their duties, because any mistake in the course of a search or investigation, however minute, would result in liability.

[117] It is trite that even if an omission is negligent it is not *per se* wrongful. Rather, whether a negligent omission is wrongful turns on the legal convictions of the community, as informed by our constitutional values. Essentially, this demands an enquiry as to whether it is reasonable to impose liability in the circumstances. In *Carmichele*, this Court emphasised the obligation on the SAPS to take effective steps to eradicate all forms of gender-based discrimination and accepted that this is a relevant consideration in the wrongfulness enquiry.[54] That gender-based violence constitutes one of the most pernicious and systematic forms of discrimination against women in our society is beyond dispute. Gender-based violence sustains women's subordination in society and imperils the constitutional values of human dignity, freedom, substantive equality, and the establishment of a non-sexist society.

[118] It is important to note that the SAPS has conceded its obligations towards the applicant and similarly placed individuals who are victims of gender-based violence.

[54] *Carmichele* above n 1.

Having found that the search and investigation were negligent, I am of the view that the SAPS has breached its statutory and constitutional duties owed to the applicant. This is because I do not accept the contention that the mistakes in the search and investigation were negligible. In my view, the omissions outlined above are *serious* and *significant* and should for that reason be actionable.

[119] Thus, the only matter left to be determined is whether imposing liability may have a "chilling effect" on the SAPS' ability to discharge its constitutional obligations. In support of this "chilling effect" argument, the respondent relied on the English decision in *Hill*.[55] Reliance on this case was misconceived and flawed for at least two reasons. First, the reasoning in *Hill* directly contradicts the approach this Court took on the scope of state liability in *Carmichele*.[56] Second, the courts in the United Kingdom have subsequently questioned the correctness of the approach taken in *Hill*. In the more recent decision of *DSD*,[57] contrary to what was held in *Hill*, the United Kingdom Supreme Court emphasised the importance of the positive obligations imposed on the police to protect members of the public from harm and the violation of their rights under the European Convention.

[120] The "chilling effect" argument is also at odds with the importance that the norm of accountability has played in the wrongfulness enquiry in our courts. In *Van Duivenboden*, the Supreme Court of Appeal pointed out that while respect for individual autonomy usually required judicial restraint in imposing liability for omissions committed by private persons, the position was fundamentally different for

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[55] *Hill* above n 14.

[56] In *Hill* above n 14 at para 75G-H the Court held:

> "If the police were liable to be sued for negligence in the investigation of crime which has allowed the criminal to commit further crimes, it must be expected that actions in this field would not be uncommon. Investigative police work is a matter of judgment, often no doubt dictated by experience or instinct. The threat that a decision which, in the end, proved to be wrong might result in an action for damages would be likely to have an inhibiting effect on the exercise of that judgment."

[57] *DSD* above n 14.

omissions committed by the state.[58] In this regard, the Supreme Court of Appeal emphasised that unlike private persons, the state has a positive obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. As such, the imposition of liability could rather be seen as an accountability enhancing measure. The same view on the norm of accountability was recognised by this Court in *Mashongwa*.

[121] Thus, I agree with the High Court that, if anything, *not* imposing liability would have a "chilling effect" on the ability of survivors of gender-based violence to vindicate their rights and hold the SAPS liable for any secondary victimisation it has caused. The imposition of liability in these circumstances will also not open the floodgates, because any potential applicant would still have to satisfy all the elements of delictual liability, and this would be dependent on the facts of each case. In the instant case, the fact that the SAPS' shortcomings occurred in the context of the scourge of gender-based violence helps tip the scales in favour of imputing delictual liability.

[122] To hold the SAPS to account for their below-par searches and investigations would improve the efficacy and quality of their work, as well as build public confidence in their ability and commitment to discharge their constitutional obligations. Preventing gender-based violence is a public policy consideration. The Supreme Court of Appeal did not apply the wrongfulness test in accordance with public policy as infused with the values of the Constitution. If it had done so, then gender-based violence would have formed part of its public policy analysis.

[123] For all these reasons, in my view, the conduct of the SAPS is wrongful.

Is there a need to develop the common law?

[124] The second amicus curiae argued that, in the event that this Court finds that there is not already a heightened duty on the SAPS in respect of survivors of

[58] *Van Duivenboden* above n 51 at paras 19 and 44.

gender-based violence, the common law must be developed to this end.[59] In *Mashongwa* the common law was developed by replacing the standard of a reasonable person with the standard of a reasonable organ of state in determining delictual liability against an organ of state.[60] In my view, the common law has already been developed to cover cases like the present. It does not need any further development.

[125] All that is required is for the SAPS to act within the framework that is already in place to appreciate the vulnerability of women and the hardship they suffer due to violent crime. The contention by the respondent that the applicant was a difficult complainant to deal with is a true reflection of the failure to appreciate the secondary trauma that victims of gender-based violence, particularly sexual offence victims, go through. It is for that reason that the SAPS should approach investigations with diligence and care, to ensure that perpetrators are brought to book. Survivors of gender-based violence should be treated with empathy and be assured that the SAPS are doing their best to arrest the perpetrators. Regular reporting is key to such treatment. They should be viewed as victims of serious crimes and not be regarded as difficult complainants to appease.

[126] In conclusion, I find that the High Court was correct in holding the Minister of Police liable. Therefore, the appeal should succeed, and the order of the Supreme Court of Appeal must be set aside.

Costs

[127] Although the success of the appeal changes the picture as to costs, something needs to be said about the approach of the Supreme Court of Appeal regarding costs. I

[59] It needs to be mentioned that the SAPS recognised that a special dispensation for sexual offences was necessary. The National Instruction was issued to ensure that members render a professional service to victims of sexual violence in respect of the investigation of such offences and assist victims in that regard. See the National Instruction in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32/2007): For general information, GNR 865, GG 31330, 15 August 2008 (Instruction). The Department of Social Development also issued the "National Policy Guidelines for Victim Empowerment". The policy is based upon the concept of restorative justice, which is in concert with international trends to promote a victim-centred approach to criminal justice. It focusses on the needs of the victim.

[60] *Mashongwa* above n 17 at paras 40-1.

agree with the applicant that the Supreme Court of Appeal misdirected itself on the issue of costs; the *Biowatch* principle should have been applied. The Supreme Court of Appeal awarded costs against the applicant based on its finding that this is an ordinary delictual matter which does not raise a constitutional issue. However, this is litigation between an organ of state and a private party, and it raises a genuine constitutional issue; that is the vindication of constitutional rights and the constitutional duties of the SAPS. I do not think that this matter or the conduct of the applicant constituted an abuse of the court process. Costs orders like the one made by the Supreme Court of Appeal will have a chilling effect and lead to a culture of silence. Part of the social effort to eradicate the scourge of gender-based violence must be to encourage victims to raise their voices.[61] 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 trauma. Public policy considerations in relation to gender-based violence, in my view, enjoin this Court to apply the *Biowatch* principle.

Remedy

[128] The order of the Supreme Court of Appeal falls to be set aside and the order of the High Court should stand. The respondent should pay the costs of the applicant, including costs of two counsel.

Order

[129] In the result, the following order is made:

1. Leave to appeal is granted.
2. The application by the first amicus curiae, Centre for Applied Legal Studies, to lead further evidence, is granted.
3. The appeal is upheld.

[61] *Frankel* above n 28 at para 24.

4. The order of the Supreme Court of Appeal is set aside and is substituted with the following:
   "The appeal is dismissed."
5. The Minister of Police must pay the costs of the applicant in the Supreme Court of Appeal and in this Court, including the costs of two counsel, where applicable.

THERON J (Majiedt J concurring):

[130] I have had the pleasure of reading the judgment of my Brother Tlaletsi AJ (first judgment) and that of my Sister Pillay AJ (third judgment). I agree with the first judgment. I write separately to provide additional reasons in support of the first judgment's findings on wrongfulness in respect of the investigation.

[131] Two preliminary points are necessary. First, the applicant did not contend that our law should be developed so that the Minister can be held directly liable for the SAPS' officers' alleged negligent omissions. I do not understand the High Court or the first judgment to have silently developed the law in this way. Rather, it was simply never placed in dispute that, if the SAPS' officers conducted themselves negligently and wrongfully, the Minister could be held vicariously for the resulting harm. Given the facts of this case, I do not consider it prudent or necessary to consider whether the time has come for our law to recognise that the state can be held directly liable in delict for the conduct of its officials.

[132] Second, for purposes of the enquiry into wrongfulness, it is important to distinguish the search and the investigation. In respect of the former, our courts have long recognised that a negligent omission by a SAPS official in the exercise of his or her duties, which results in a third party causing a plaintiff bodily harm, is actionable in

delict.[62] I can conceive of no cogent reason why a negligently conducted search, which has the result that a person suffers prolonged harm at the hands of an assailant, falls outside of the ambit of this established principle. I thus add nothing in respect of my Brother Tlaletsi AJ's findings in respect of the wrongfulness of the SAPS' negligent omissions in the course of the search. By contrast, the contention that the SAPS can be held liable in delict for a negligently conducted investigation which causes a complainant psychiatric injury is novel. Our courts have expressly left open whether negligently conducted investigations which cause harm are wrongful.[63] And, as I detail below, there are competing considerations, reflected in foreign jurisprudence, which suggest that we should proceed cautiously in imposing liability for negligently conducted investigations.

[133] English courts have refused to recognise the existence of a legal duty of care in respect of the police's investigative work. In the leading case of *Hill*,[64] the House of Lords held that to impose liability for negligently conducted police work might encourage "defensive policing", in which police refuse to take risks lest this attract liability. The Court held further that to impose liability would mean that police resources are wasted in the defence of legal suits, and would impermissibly involve courts in an adjudication of matters which lie at the heart of police discretion including how available resources should be deployed and whether particular lines of enquiry should or should not be pursued.

[134] Similar considerations influenced the House of Lords' decision in *Brooks.*[65] In considering whether liability should be recognised in a case where police negligence in an investigation negatively affected a complainant's psychological state, Lord Steyn reasoned:

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[62] *Van Duivenboden* above n 51.

[63] Id at para 22.

[64] *Hill* above n 14.

[65] *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24.

> "It is, of course, desirable that police officers should treat victims and witnesses properly and with respect . . . [b]ut to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence.
>
> . . .
>
> By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill*, be bound to lead to an unduly defensive approach in combating crime."[66]

[135] Australian courts have adopted a similar approach. In *Sullivan*,[67] for instance, the Australian High Court refused to recognise that the police owed a duty of care to a parent, who was investigated for sexual offences which he had allegedly committed in respect of his child.[68] The Court held that a duty of care could not be recognised in such circumstances, because it would saddle the police with inconsistent obligations: on the one hand, they would be duty-bound to thoroughly investigate allegations of sexual offences. On the other, the police would be required to interrogate suspects of such offences with caution.

[136] It is of course true that *Hill* does not provide for a blanket immunity in respect of delictual liability for negligently conducted police work. This was clarified recently by the Supreme Court of the United Kingdom in *Robinson*,[69] where that Court explained that *Hill* merely provides for a guarded and circumspect approach to imposing liability on the police for negligent investigations. To this extent, therefore, the *Hill* and *Brook*s dicta are consistent with the approach to wrongfulness endorsed by this Court in *Carmichele*.

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[66] Id at para 30.

[67] *Sullivan v Moody* (2001) 207 CLR 562.

[68] Id at 580.

[69] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 at para 61.

[137] There are, however, two considerations which, in my view, mean that we must nonetheless approach these dicta with caution. First, English law does not recognise the so-called norm of accountability and thus draws no distinction between private and state parties in respect of delictual liability.[70] As my Brother Tlaletsi AJ explains, that is not so in our law. The norm of accountability 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.[71] For this reason, while English law does not immunise police from delictual liability, it is nonetheless doubtful that courts in the United Kingdom, and those elsewhere that adopt a similar approach, would hold the police liable in delict in the broad range of circumstances in which our courts have done so.[72]

[138] Second, the policy arguments which undergird *Hill* and *Brooks* are speculative, have been trenchantly questioned by the Canadian courts,[73] and have been recently undermined by the Supreme Court of the United Kingdom itself.[74] In *Hamilton-Wentworth I*, a decision of the Ontario Court of Appeal, it was held in respect of the "defensive policing argument" that:

> "The assertion that the imposition of a legal duty of care on the police with respect to their criminal investigations will cause the police to change the way they perform their professional duties is, in my view, both unproven and unlikely. Surgeons do not turn off the light over the operating room table because they owe a duty of care to their patients. They perform the operation, with care. The owners of summer resorts do not lock the gates because they owe a duty of care to their customers. They open their

[70] Id at paras 30-4 and the authorities cited there.

[71] *Van Duivenboden* above n 51 at para 21.

[72] See for example *Carmichele* above n 1; *Minister of Safety and Security v Hamilton* [2003] ZASCA 98; 2004 (2) SA 216 (SCA); *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132; 2003 (1) SA 389 (SCA); and *Van Duivenboden* above n 51.

[73] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129; 2007 SCC 41 (*Hamilton-Wentworth II*) at para 61 and *Hill v Hamilton-Wentworth Regional Police Services Board* [2005] OJ No 4045 (QL) (*Hamilton-Wentworth I*) at paras 63-4.

[74] *DSD* above n 14 at paras 67, 97 and 131.

> resorts and take care to make them safe. In short, the 'chilling effect' scenario painted fairly vividly in *Hill* and *Brooks* is, in my view, both speculative and counterintuitive."[75]

[139] The Court explained further:

> "[T]he Law Lords' concern that the existence of a duty of care will divert police time and resources from the investigation of crime to a defence of the investigation at a later time ('reopened and retraversed') is simply not borne out by the Canadian experience. In Canada, a duty of care exists in two provinces, Ontario and Quebec. In neither province have the floodgates opened."[76]

[140] On appeal to the Supreme Court of Canada, similar concerns were expressed.[77] That Court explained that:

> "The best that can be said from the record is that recognising a duty of care owed by police officers to particular suspects led to a relatively small number of lawsuits, the cost of which are unknown, with effects on the police that have not been measured. This is not enough to negate the prima facie duty of care established at the first stage of the *Anns* test."[78]

[141] Of course, our law does not recognise the *Anns* test,[79] and there is therefore no question in this case of the police being required to negate a prima facie finding of wrongfulness. Nonetheless, as in *Hamilton-Wentworth II*, we have been presented with scant evidence to substantiate the contention that to impose delictual liability for a negligently conducted investigation would materially denude the effective functioning of the SAPS.

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[75] *Hamilton-Wentworth I* above n 73 at para 63.

[76] Id at para 64.

[77] *Hamilton-Wentworth II* above n 73 at para 61.

[78] Id.

[79] This test emanates from the House of Lords decision in *Anns v Merton London Borough Council* [1978] AC 728. It was held in that case that the test for whether a duty of care exists proceeds in two stages. First, a court asks whether there is sufficient proximity between the parties to impose a duty. If so, a prima facie duty of care is recognised, and the Court then considers whether there is any reason to negate that duty.

[142] Tellingly, in *DSD*, the Supreme Court of the United Kingdom expressed similar scepticism over the *Hill* and *Brooks* policy arguments. That Court held:

> "[T]he claim that to 're-visit such matters step-by-step by way of litigation . . . would inhibit the robust operation of police work . . . divert resources from current inquiries [and act as a deterrent] not a spur to law enforcement' is unsupported by any evidence. . . . Carrying out police investigations efficiently should not give rise to a diversion of resources. On the contrary, it should lead to more effective investigation of crime, the enhancement of standards and the saving of resources. There is no reason to suppose that the existence of a right under article 3 to call to account egregious errors on the part of the police in the investigation of serious crime would do other than act as an incentive to avoid those errors and to deter, indeed eliminate, the making of such grievous mistakes."[80]

[143] There are, of course, important differences between *DSD* and the case before us. Amongst others, that case was brought in terms of the Human Rights Act,[81] and not as a claim in delict. However, *DSD,* and the other authorities referred to, nonetheless provide four important points of guidance. First, in the absence of substantiating evidence, we must approach the *Hill* and *Brooks* policy arguments with trepidation.

[144] Second, and relatedly, 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.

[145] 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. That is not the case here. The duty which the first judgment recognises is simply the duty

[80] *DSD* above n 14 at para 71.

[81] 1998.

that the SAPS conduct investigations non-negligently. That duty is entirely consistent with the SAPS' various other duties.

[146] Finally, and importantly, it is not every negligent omission, which occurs during the course of a police investigation and which causes a complainant psychiatric injury, that will attract delictual liability. In most cases, it will only be egregious errors which do. In *DSD*, this requirement was derived from an interpretation of article 3 of the European Convention on Human Rights.[82] In our law, however, this most naturally flows from the requirements of legal causation and negligence. This is because it will rarely be the case that it is reasonably foreseeable that isolated instances of mere negligence, in an otherwise effectively conducted investigation, will cause a complainant psychiatric injury. Moreover, while the policy considerations in *Brooks* and *Hill* might be overstated, it is nonetheless true that the SAPS' investigative work might well be adversely affected if it can be dragged to court by hyper-sensitive complainants.

[147] I accept that "egregious" is a vague term and its application calls for a value judgment. The precise contours of that term are, in my view, best worked out on a case-by-case basis. Nonetheless, at its core, the requirement that the errors be egregious to attract liability indicates that mere negligence during the course of a police investigation will not suffice. In this case, the SAPS indeed made egregious errors during the course of its investigation. Most notably, it inexplicably failed to view CCTV footage of the Kings Beach parking lot in the hours immediately following the applicant's escape. It matters not that that footage was provided to the complainant. Crucial investigative work should not be outsourced to survivors of violent crime, least of all survivors of sexual crimes. Nor does it matter that the footage would not have led to the capture of the assailant or assailants. As my Brother Tlaletsi AJ holds, in a matter such as this, the SAPS' duties in respect of an investigation are about means and not results.

[82] See article 3 of the European Convention on Human Rights above n 39.

[148] For these reasons and those set out in the first judgment, I support the decision to uphold the appeal.

PILLAY AJ (Mogoeng CJ and Jafta J concurring):

Introduction

> "[V]ictims of rape, as a class of vulnerable people in our society, ought to have a reasonable expectation that their cases are taken seriously enough to be investigated properly and tried at a standard that the guilty do not wriggle free because of an uninsightful and superficial attention to details by those who are responsible to protect them."[83]

[149] The lament above is all too familiar amongst judicial officers. Burgeoning gender-based violence cases continue to clutter court rolls at an alarming rate. Secondary victimisation is as commonplace as suicidal tendencies amongst victims. So ubiquitous is gender-based violence and, often, so inadequate is the SAPS' response to it that I take judicial notice of this social scourge and constitutional relapse. One too many violent crimes go unpunished as inefficiencies in the police services proliferate. Our collective abhorrence is aptly articulated in the main judgment, with able assistance from the amici. Unwaveringly I agree with similar sentiments of my Colleague, Tlaletsi AJ, on whose coattails I ride for the background, chronology and litigation history. But is this that kind of a case?

[150] Jurisdiction poses no difficulties. This Court has jurisdiction. Wrongfulness of the conduct of members of the SAPS, who have obligations under section 205(3) of the Constitution, raises constitutional questions. Furthermore, the applicant invites this

[83] *Motsagki v S*, unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 2013/A5043 (14 October 2014) at para 66.

Court, not only to interpret and develop the common law in terms of section 39(2), but also to recognise that the social scourge of gender-based violence imposes a heightened duty of care upon the police. Sections 7(2), 10, 12(1)(c), 39(2) and 205(3) of the Constitution are at issue.

[151] However, whether leave to appeal should be granted is controversial. If the Supreme Court of Appeal erred in overturning the High Court on findings of fact, then this Court must itself tread a similar path of fact finding to determine whether the conclusions reached by the courts below are justified. On the one hand, for an appellate court to overturn the findings of fact and credibility made by the court of first instance is exceptional.[84] The rationale for this general rule is that, being steeped in the trial, the court of first instance would have the opportunity to observe the demeanour, "appearance and whole personality" of witnesses and would thus be better placed than the appeal courts to test and evaluate the evidence against impressions created by witnesses.[85]

[152] On the other hand, this Court's oversight is required to assess the conduct of the police for compliance by the SAPS with its constitutional obligations. In this case, the complaints are of wrongful conduct by omission and therefore scrutinising the facts is inevitable. Facilitating the phenomenal scale of this enterprise, given the voluminous evidence generated over the five-week trial, is the fact that credibility and the material facts are either not in dispute or are self-evident from the record. What is in dispute are the inferences to be drawn from the facts. In these circumstances, deference to the

[84] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 40 and *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106.

[85] *Zwane v S* [2013] ZASCA 165; at para 9; *Meintjies v Esterhuizen* [2003] JOL 12335 (E) at para 4 and *Dhlumayo* above n 31 at 705, where the Court held that:

> "The trial judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he/she had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. The mere fact that the trial judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he/she was."

findings of fact of the High Court would be slavish. Therefore leave to appeal must be granted.

Issues

[153] The complaints about conduct are a series of omissions. The issues are whether the SAPS breached its legal duty towards the applicant in the way that its members searched for her and investigated her complaint of abduction and rape. If I find no unlawful omissions, then I must also find that the SAPS did not breach its legal duty. That will be the end of the enquiry. Then wrongfulness would typically have acted "as a break on liability".[86] But, if there were omissions and they impaired or flawed the searches and investigations, imputing liability against the SAPS must follow but only if it is reasonable to do so.

Wrongfulness

[154] An enquiry into wrongfulness begins by establishing whether the SAPS was under a legal duty to act positively to prevent the harm suffered by the applicant.[87] If there was a duty, then the enquiry moves on to determine whether that duty was breached. If it was breached, then unless the respondent proves a ground of justification, wrongfulness will be established. If wrongfulness is proved, then it must be further established that imposing liability would be reasonable. If wrongfulness of conduct is not proved, then the SAPS will not be liable,[88] even if the other three elements

[86] *Country Cloud Trading CC* above n 13 at paras 20-1.

[87] *Mashongwa* above n 17 at paras 19-21; *Oppelt v Department of Health, Western Cape* [2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) at paras 51-4; *Carmichele* above n 1 at paras 27-30; *Minister of Justice and Constitutional Development v X* [2014] ZASCA 129; 2015 (1) SA 25 (SCA) at para 13; *Minister of Water Affairs v Durr* [2006] ZASCA 102; 2006 (6) SA 587 (SCA) at paras 19 and 50; *Lubbe v Louw* [2004] ZASCA 130; 2005 JDR 0037 (SCA) at paras 13-7; *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* [2000] ZASCA 187; 2001 (4) SA 814 (SCA); *Steenberg v De Kaap Timber (Pty) Ltd* [1991] ZASCA 144; 1992 (2) SA 169 (A); *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A) at paras 80 and 82; *Dews v Simon's Town Municipality* 1991 (4) SA 479 (C) at 485; Van der Walt and Midgley *Principles of Delict* 4 ed (LexisNexis, Durban 2016) at 115-6; Loubser et al *The Law of Delict in South Africa* (Oxford, Cape Town 2017) at 186 and Neethling et al *Law of Delict* 7 ed (LexisNexis, Durban 2015) at 58.

[88] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) (*Fetal Assessment*) at para 54.

of delictual liability – fault, causation and harm – are present.[89] However, the same facts sometimes serve as proof of the other elements of delict.[90] Notwithstanding this, wrongfulness is a discrete requirement reserved for the assessment of conduct.[91] Considering that the complaints are a series of omissions, investigating wrongfulness and the reasonableness of imposing liability would be dispositive of the appeal.

[155] Wrongfulness is presumed if a positive act causes physical injury.[92] No such presumption arises in the case of an omission. An omission will be wrongful if a legal duty rests on a defendant to act positively to prevent harm, the defendant fails to fulfil that duty, and such failure results in harm to a plaintiff. An omission alone is not wrongful. For liability to follow, a wrongful omission must also be culpable or blameworthy of harm.[93] Confirming these general principles is the holding of this Court in *Mashongwa* that liability follows an omission or negative conduct when there is a pre-existing duty, such as the failure to provide safety equipment to employees in a factory.[94]

[156] It must be reasonable[95] to impose delictual liability on the respondent for the loss caused by an omission.[96] Assessing reasonableness for purposes of a wrongfulness enquiry has nothing to do with the reasonableness of the respondent's omissions, which implicate negligence and causation. Rather, reasonableness in relation to omissions

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[89] Id at para 67.

[90] *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC); 2019 (12) BCLR 1425 (CC) at para 28. See also cases cited in fn 34 and 35 therein.

[91] *Stedall v Aspeling* [2017] ZASCA 172; 2018 (2) SA 75 (SCA) at para 11 and *Van Duivenboden* above n 51 at para 12.

[92] *Country Cloud Trading CC* above n 13 at para 22.

[93] *Van Duivenboden* above n 51 at para 23 citing *Kruger* above n 9 at 430E–F.

[94] *Mashongwa* above n 17 at para 19.

[95] *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 122.

[96] *Oppelt* above n 87 at para 51. See also *Fetal Assessment* above n 88 at para 67; *Loureiro* above n 12 at paras 53-6. See also *TS v Life Healthcare Group (Pty) Ltd* 2017 (4) SA 580 (KZD) at paras 14-6, where the High Court stated that the test for wrongfulness in our law is trite, and thereafter described the *boni mores* legal duty test followed closely by the new test as if no differences exist between the two tests. See *Country Cloud Trading CC* above n 13 at paras 20-5. See also *Minister van Polisie v Ewels* [1975] ZASCA 2; 1975 (3) SA 590 (A) at 597 (*Ewels*); *Local Transitional Council of Delmas v Boschoff* [2005] ZASCA 57; 2005 (5) SA 514 (SACR) at paras 19-20 and Neethling et al above n 87 at paras 81-2.

takes into account public and legal policy, which in turn must be "informed by the norms and values of our society, embodied in the Constitution".[97] Enquiring into wrongful conduct means delving into whether the *boni mores*, constitutionally understood, regard imposing liability as acceptable. Based on the duty not to cause harm, but to respect rights, the enquiry questions the reasonableness of imposing liability.[98] This approach combines the traditional common law *boni mores* criteria with the reasonableness test derived from the Constitution, which this Court adopted in *Le Roux*:

> "In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn *depend on considerations of public and legal policy in accordance with constitutional norms*. Incidentally, to avoid confusion it should be borne in mind that, *what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct*."[99] (Own emphasis.)

[157] Wrongfulness is an *ex post facto* (after the fact) evaluation.[100] Therefore, foreseeability is not normally a factor.[101] Notwithstanding this, subjective

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[97] *Loureiro* above n 12 at para 34.

[98] *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) at 113G-H as regards the "legal convictions of the community".

[99] *Le Roux* above n 95 at para 122.

[100] Neethling and Potgieter "Foreseeability: Wrongfulness and Negligence of Omissions in Delict – the Debate Goes on *MTO Forestry (Pty) Ltd v Swart N.O.* 2017 5 SA 76 (SCA)" (2018) 43 *Journal for Juridical Science* 145 at 155.

[101] In *Country Cloud Trading CC* above n 13, this Court held at para 34:

> "The Supreme Court of Appeal agreed with Country Cloud on the facts, holding that the Department had intent, at least in the form of *dolus eventualis*– and that this was a relevant factor in assessing whether its conduct was wrongful. *It disagreed, however, that foreseeability of harm in and of itself is a relevant consideration in that enquiry*. Although it had been adopted in previous judgments, the Supreme Court of Appeal stated that this approach was 'bound to add to the confusion between negligence and wrongfulness'. Furthermore, the Court held that

foreseeability could be relevant in determining wrongfulness *ex post facto* in a particular case.[102] If a police officer knew or subjectively foresaw that the applicant would suffer harm because of his conduct, it must be considered in determining the wrongfulness of his omissions.[103]

[158] On using hindsight, in the context of the legal duty of prosecutors, *Carmichele* cautioned as follows:

> "In considering the legal duty owed by a prosecutor either to the public generally or to a particular member thereof, a court should take into account the pressures under which prosecutors work, especially in the magistrates' courts. *Care should be taken not to use hindsight as a basis for unfair criticism*. To err in this regard might well have a *chilling effect* on the exercise by prosecutors of their judgment in favour of the liberty of the individual.

> this factor could not single out Country Cloud's claim for 'special treatment' because foreseeability is already a 'prerequisite for delictual liability in all cases'. This is because foreseeability of harm is already required to establish other delictual elements, namely negligence and causation."

[102] Neethling and Potgieter above n 100 at 155.

[103] Neethling et al above n 87 at 38. This Court in *Country Cloud Trading CC* above n 13 held at paras 38 and 41-2:

> "The evidence also suggests, as the Supreme Court of Appeal correctly held, that Mr Buthelezi foresaw the risk that his purported cancellation would breach the completion contract. Mr Buthelezi came under severe pressure from within the Department and from the media for not following the [departmental acquisition council's] recommendation to put the completion contract out to tender. He was no doubt desperately looking for reasons to cancel, and the reasons he advanced proved to be utterly unfounded. Finally, despite the allegation in Country Cloud's founding papers that Mr Buthelezi had intentionally cancelled the completion contract without any basis for doing so, the Department failed to call Mr Buthelezi to give evidence at the trial. So the probable inference that he foresaw that his conduct was contractually unlawful was not rebutted.
>
> However, Country Cloud also contends that foreseeability of loss, and the fact that Mr Buthelezi foresaw the precise loss it would suffer, is relevant in the wrongfulness enquiry. Of course foreseeability is relevant, as has been noted above, to the extent that it plays a role in establishing the nature of the defendant's fault. It is not necessary, however, to consider whether foreseeability might have some broader relevance in the wrongfulness enquiry. I am prepared to assume that the purpose it might serve here – to limit potential plaintiffs and diminish the risk of limitless liability – is already served by the nature of the Department's fault.
>
> Does all of this impel a finding of wrongfulness in this case? No. As the Supreme Court of Appeal correctly noted, the defendant's blameworthiness, and the risk of indeterminate liability, are relevant but not dispositive considerations. They should be weighed with all others in determining whether conduct is wrongful. In addition, there are cases where knowingly causing loss, even absent any risk of indeterminate liability, could not plausibly be wrongful, for the plaintiff would not have harmed a right or legal interest of the defendant." (Footnotes omitted).

> That said, each case must ultimately depend on its own facts."[104] (Own emphasis.)

[159] In *Mashongwa*, this Court went further to affirm that it is reasonable to impute liability to an organ of state, but favoured enquiring into "whether imposing liability for damages is likely to have 'a chilling effect' on the performance of government functions."[105] Boldly chipping at the "chilling effect" defence against delictual liability, this Court had already applied the Constitution and its values to hold in *Carmichele*:

> "Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise in appropriate cases will establish limits to the delictual liability of public officials. *A public interest immunity excusing the respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and its values. Liability in this case must thus be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims granted to the respondents*."[106] (Own emphasis.)

[160] The breach of a statutory duty resulting in harm is prima facie wrongful. To prove wrongfulness where a statutory duty exists, the applicant must prove that the relevant statutory measures provided her with a private law remedy; that she is a person for whose benefit and protection the statutory duty was imposed; that the nature of the harm and the way it occurred are such as are contemplated by the enactment and that the SAPS in fact transgressed the statutory provision.[107]

[161] In *Mashongwa*, this Court had to rule on the liability of an organ of state and determine "whether the legislation's scheme is primarily about protecting individuals

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[104] *Carmichele* above n 1 at paras 73-4.

[105] *Mashongwa* above n 17 at para 22.

[106] *Carmichele* above n 1 at para 49.

[107] Neethling et al above n 87 at 65.

or advancing public good"[108] was a consideration. Unlike in *Mashongwa*, the Constitution imposes specific duties on the SAPS, so that protecting individuals and advancing the public good are not binary and mutually exclusive goals. Undeniably, the special relationship that exists between a police officer and a citizen, like that between an officer of the law and a prisoner,[109] establishes a legal duty (outlined below) to prevent harm. When wrongfulness rests on a series of alleged omissions, what the SAPS did must be established first, before deducing from that, whether what they omitted to do, if anything at all, amounts to wrongful omissions. A piecemeal assessment of only particular omissions will miss out on painting a proper picture of what was done, against which, what was omitted must be adjudicated.

Duty to act

[162] The SAPS has a duty under section 205(3) of the Constitution "to 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". Under section 7(2) of the Constitution, the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Pertinent to this case are the rights to human dignity[110] and freedom and security of the person.[111] Section 13(3)(a) of the SAPS Act provides that "a member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is *reasonable in the circumstances*".

[163] To reinforce these constitutional and statutory obligations, the SAPS' Code of Conduct is a commitment to create "a safe and secure environment for all people in South Africa" by—

[108] *Mashongwa* above n 17 at para 22. See also *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007(3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 42.

[109] *Ewels* above n 96 at 594.

[110] Section 10 of the Constitution.

[111] Section 12 of the Constitution.

> "*investigating criminal conduct which has endangered the safety or security of the community and bringing the perpetrators thereof to justice*."[112] (Own emphasis.)

[164] Pertinently, the SAPS' Instruction[113] which targets gender-based violent crimes directs:

> "Any person who reports the alleged commission of a sexual offence to a member must be treated in a professional manner and must be reassured that the report is viewed in a serious light and will be thoroughly investigated."[114]

[165] The Instruction was issued to ensure that "[t]he SAPS renders a professional service to victims in the investigation of [sexual] offences . . . and [will] assist victims in this regard".[115] It seeks to alert members of the SAPS to the secondary trauma experienced by victims of sexual offences and urges them to be sensitive when interviewing and assisting victims. Informing the victim on a regular basis of the progress of the investigation is also imperative.[116] The Instruction details the role of the investigating officer.[117] Members are instructed on how to preserve and package evidence taken from the body of the victim for dispatch to the Forensic Science Laboratory.[118] Importantly:

> "Upon receipt of a control sample, the sample must be handed over to the Forensic Science Laboratory as soon as possible. A letter must then be obtained from *the prosecutor* concerned in which *the prosecutor requests that a DNA analysis be conducted on the samples.* This letter must be handed over to the Forensic Science Laboratory as soon as possible and a copy of the letter must be filed under part "B" of the docket."[119] (Own emphasis.)

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[112] Code of Conduct of the South African Police Service dated 22 May 2020 (SAPS Code).

[113] Instruction above n 59.

[114] Id section 4(6).

[115] Id section 1.

[116] Id sections 5(11) and 9(2)(e).

[117] Id section 9.

[118] Id sections 8(2)(a), 10(6)(f) and 16(3)-(4).

[119] Id section 16(3).

[166] Regarding identification, the "investigating officer must ensure that an identification parade is held in the circumstances provided for and in accordance with the provisions contained in the National Instruction on Identification Parades".[120]

[167] Under international law, South Africa has a duty—

> "to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular".[121]

[168] Preventing and combating gender-based violence described in the legal instruments above articulates public and legal policy about police conduct. Undoubtedly, the SAPS has a constitutionally mandated duty to search for and protect victims of crimes and to investigate crimes.[122] In *K*, this Court went further to identify trust in the police as the greater good to be gained from the police doing their duty:

> "Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. Where such trust is established, the achievement of the tasks of the police will be facilitated. In determining whether the Minister is liable in these circumstances, courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed."[123]

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[120] Id section 20.

[121] *F v Minister of Safety and Security* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC) at para 37 and CEDAW above n 35.

[122] *Carmichele* above n 1 at para 62; *Van Duivenboden* above n 51 at para 33; and *Van Eeden* above n 72 at para 18.

[123] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 52.

[169] The Supreme Court of Appeal re-enforced the protection of women by stating that:

> "The constitutional obligations to prevent crime and to protect members of the public, particularly the vulnerable, such as Ms K, must enjoy some prominence. Ms K has the constitutional right to freedom and security of the person, provided for in section 12(1) of the Constitution. She also has the constitutional right to have her inherent dignity respected and protected."[124] (Footnotes omitted.)

Heightened duty and developing the common law

[170] The ubiquity of gender-based violence induces an overwhelming sense that more must be done to prevent, deter and investigate such crimes. Hence the call on the Court to develop the common law and to impose a "heightened duty" on the police to combat such crimes.

[171] In my view, there is no shortage of prescripts elevating the legal duty of police officers to combat crime generally and gender-based violence specifically. The SAPS' legal duty starts with section 205 of the Constitution. It continues in section 13(3)(a) of the SAPS Act and the Instruction. Then the slew of judge-made laws developed the common law to hold the police, prosecutors and organs of state liable for wrongful omissions resulting in harm. Thus, it is not for lack of law imposing legal duties on the SAPS that police services unravel. Making more laws will be the wrong place to search for remedies to flick the switch on inefficiencies in the police services.

[172] However, if "heightened duty" means a strategic approach to targeting gender-based violence, I would agree unreservedly. Central to such an approach would be DNA testing by the SAPS' Forensic Science Laboratories. At the pre-trial conference, it became common cause that once a DNA profile of any suspect is obtained, it is automatically logged on to a computerised national DNA database by the SAPS Forensic Science Laboratories. If a future analysis matches the DNA profile of

[124] Supreme Court of Appeal judgment above n 4 at para 14.

a previously logged one, the analyst would be alerted. The investigating officer of the older, unsolved case would be notified that a possible suspect in his case has been located to be further investigated. The DNA of repeat offenders of sexual offences is bound to surface during forensic testing. Once an offender is identified through DNA, his range of possible defences against sexual offence charges would be narrowed. Consent of the victim would be the focus. This would have a domino effect of bolstering efficiencies in the administration of justice. Therefore, submitting DNA for testing and maintaining a database of offenders cannot be over-emphasised. Similarly, having efficient, responsive forensic laboratory services is indispensable to a successful strategy for combating gender-based violence. However, a heightened duty would not authorise harvesting DNA randomly for no better reason than people are homeless and dwelling in bushes around Kings Beach. That would cross the line of propriety.

[173] Delays in the under-resourced Forensic Science Laboratories, a fact I take judicial notice of, impact directly on the capacity of the SAPS to identify and pin down perpetrators. Being a scourge, gender-based violence complaints cause backlogs in the laboratories. Back in February 2011, four months was the lead time that the Forensic Science Laboratories requested if reports were needed for court. In this matter, getting tests done within a week was an aberration induced by the urgency of the matter already being in court and the applicant requesting a report from the SAPS during discovery proceedings in the civil trial.

[174] The 2020 publication of the National Strategic Plan on Gender-based Violence and Femicide[125] (the Plan), endorsed by the President of South Africa, recognises the importance of forensic testing DNA samples. The Plan's Emergency Response Action Plan identifies "clearing backlog of all DNA samples at forensic laboratories related to GBVF [gender-based violence and femicide] especially sexual offences cases . . . [and] prioritising GBVF cases to clear the backlog".[126]

[125] National Strategic Plan on Gender-Based Violence and Femicide - Human Dignity and Healing, Safety, Freedom and Equality in our Lifetime, 2020 at 48.

[126] Id at para 4.3.4.

[175] In these circumstances, a heightened duty does not require more rules. Certainly not judge-made rules, if that is what the applicant and the amici have in mind. Instead, a heightened duty must refer to, for instance, consequence management of the police to be attentive to their responsibilities, and intervening strategically to execute their well-known legal duties. The Forensic Science Laboratories must also clear backlogs and expedite reports on specimens tested. Accordingly, I find no basis upon which to impose a heightened duty beyond that which is already recognised in law.

Submissions on wrongfulness

[176] In response to the directions calling for submissions on wrongfulness and costs, the applicant limited her causes of action to six categories of omissions covering the searches for the applicant the night she was raped and the ensuing investigations. The respondent denied that there were any negligent omissions on the part of the SAPS.

[177] The applicant's causes of action, summarised in the first judgment, place this dispute squarely within the ambit of a private law claim for damages. It is not a public interest law dispute in which the cause of action is an omission by the SAPS and the remedy sought is not compensation but providing a safe environment at Kings Beach, free of rapists and thieves. Therefore, the personal interests of the applicant in a successful outcome, is a material context for assessing the evidence.

[178] Below, the analysis of the applicant's final submissions on wrongfulness and costs will take the format of deconstructing each complaint under the broad headings of "the searches", "investigating the 'bush dwellers'", "viewing the CCTV footage" and "testing DNA". Each complaint will be examined first against what the SAPS did before considering what it omitted to do. It will soon become apparent that the case pleaded is not the same as the one pursued in this appeal. Notwithstanding this, I accept the invitation from the applicant to examine every complaint. Omissions to perform constitutional and statutory duties are so serious that shortcomings in the pleadings should not stand in the way if the evidence allows an inquiry into substance.

The searches

Foot search

[179] In this appeal, the applicant submits that the officers who arrived on the scene before W/O Gerber did not conduct a foot search for the 45 minutes that they waited for his arrival. If they had walked up the beach and searched the area from "F" to "G"[127] by walking along the dunes and shining their torches into the clearings in the bushes, they would have found the applicant. So the applicant submits.

[180] Context matters. It was dark, nearing midnight. The SAPS had no clue as to where the applicant was. They could not be certain that she was even in the vicinity of where her vehicle was found. She might have drowned. There was not much information to work with. Considering the circumstances in which the applicant went missing, there was some urgency to find her to avert harm. Strategically, W/O Gerber, and subsequently Mr Smith, focused their searches 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.

[181] In the applicant's Notice of Intention to Institute Legal Proceedings (Notice) dated 13 August 2012, which was served on the respondent in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act,[128] the applicant did not include as an omission *any* failure by the police to search for her. In her Amended Particulars of Claim dated 13 May 2014, she alleged that the police considered it "too dangerous to enter the bushes" and called off the search despite having a police dog to assist with the search. And when she amended her Particulars of Claim finally, as late as 6 February 2018, about a week before the trial was due to commence, it was to allege that the SAPS breached its duty to protect her "by failing to

[127] These and others are points marked on the aerial maps exhibits CBV1–CB1-2.

[128] 40 of 2002.

search the area in the vicinity of the carpark at Kings Beach, particularly the sand dunes".

[182] In response to a request at pre-trial, the respondent indicated that it had every intention of adducing at the trial the evidence of the police officers who arrived first at the parking area and searched the area at "M", the clearing approximately 20 metres from the beach and 350 metres from the carpark, where she said she had been held captive.

[183] However, at the inspection *in loco* conducted at the start of the trial on 15 February 2018, the respondent disagreed that "the place pointed out by the applicant's counsel [was] the place where the applicant was raped, and took the court to approximately point F". In the photograph of the applicant, taken on the morning after the incident, she was depicted as pointing out the spot where she had been raped. That spot was "probably closer to where the vegetation could be seen after the bend in the palisade fencing near point F." Regarding the applicant's counsel pointing out "M" as the place where she had been raped, the respondent's counsel showed that there were no bushes, unlike near "F". The absence of bushes at the time of the incident was confirmed by an aerial photograph of the terrain taken by a registered surveyor, A D Hemsley in 2011.

[184] Thus it became common cause at the start of the trial that the applicant was at "F2", a bushy area some 700 metres from the carpark, and not at "M" as she had indicated. Once the applicant clarified that her complaint related to no search being conducted at "F2", the respondent considered it unnecessary to call any of the officers who had arrived first on the scene. Consequently, it led no evidence of foot searches before W/O Gerber arrived.

[185] The High Court concluded that the actions of the SAPS "fell below the standards reasonably expected of them" because the "SAPS members could have, but did not,

conduct the most basic foot searches".[129] In contrast, the Supreme Court of Appeal noted that "the late confirmation [of the location of "F2"] did not prejudice the police in the conduct of their defence." Disagreeing with the finding of the High Court, it found that the police took all reasonably practicable and appropriate precautions to carry out an effective search for Ms K. No negligence concerning the search was proved. Effectively, the Supreme Court of Appeal rejected the High Court's finding that the respondent should have led the evidence of the officers who arrived first on the scene.[130]

[186] I agree with the finding of the Supreme Court of Appeal. Undertaking a foot search was an obvious, perhaps even intuitive first step. Considering that "M" was close to and in front of the carpark, it cannot confidently be inferred that the police were so unreasonable and derelict in their duties as to have not searched at "M". Additionally, there were no bushes at "M". The allegations that the police were scared to venture into the bushes did not apply to a search at "M". Therefore, proving a foot search at "M" rather than at "F" would have been easier for the respondent. As the police had to undertake costly searches subsequently, it is incomprehensible that they would not have undertaken the most basic, least costly search at no risk to their personal safety. After the respondent assisted the applicant to correctly locate the hideaway at "F2", for the applicant to insist that the SAPS should have searched at "M" is ingratitude at best.

[187] Militating against the inference that no basic search was conducted are (a) the pre-trial minute in which the respondent signalled its intention to lead the evidence of searches at "M" and (b) counsel's explanation for ultimately not leading the evidence, namely, that he considered it to have become irrelevant. This is not an instance of no evidence but an election not to lead evidence of a foot search because the evidence had become irrelevant. In the interests of curtailing an already protracted trial, the

[129] High Court judgment above n 8 at paras 100 and 102.

[130] Supreme Court of Appeal judgment above n 4 at paras 39-40.

explanation is reasonable. Relying on these factors is sound. In contrast, relying on W/O Gerber's after the fact "impression" that no foot search had been conducted prior to his arrival is inadmissible hearsay. As for the applicant's claim that the police should have walked up the beach and searched the area from "F" to "G" by walking along the dunes and shining their torches into the clearings in the bushes, that was easier said than done without a search and rescue dog. Both experts for the applicant, former policeman Messrs Engelbrecht and Olivier, agreed that using a police dog for the search in the bushes was correct in the circumstances. Bearing in mind that the applicant bears the onus of proof, she does not scale the hurdle in proving any omission, let alone a wrongful omission by the SAPS not undertaking a foot search at either "M" or "F" to "G". Additionally, having failed to include as an omission any failure by the SAPS to search for her in her Notice, establishing a causative connection between the alleged failure to search and harm to the applicant and damages would be contrived. This observation would apply to all the searches.

Dog search

[188] In this appeal the applicant submits that W/O Gerber did not search the area from "F" to "G" with his dog, even though he was aware of the area beyond "F". "He stopped the dog some 20 metres short of F". So the applicant submitted.

[189] Since the trial, the applicant's complaint has morphed from an allegation about the police not searching on foot near the carpark, into an allegation that they did not search the area between "F" and "G", a fact that she had not pleaded. In this appeal, the applicant persists that if the SAPS had searched between "F" and "G", they would have found her and that the rape would have ended sooner and not continued for approximately four hours longer.

[190] The evidence was that for his initial search, W/O Gerber drove his four-wheel drive vehicle with its blue lights and siren switched on to alert the applicant that the police were looking for her. He searched the shoreline driving along the high water mark, up to "G1", close to the harbour wall. Interestingly, to get to "G1", W/O Gerber

had to drive beyond "F2", which was inland and away from, but parallel to, the high water mark. According to W/O Gerber, his siren could have been heard at point "F2". However, the applicant testified that she did not hear any sounds of police personnel or dogs in her vicinity.

[191] Having checked for her possible drowning, W/O Gerber then searched on foot with Kojak, a dog that was trained to find people, dead or alive. Based on the direction of the wind, he adopted a search pattern called the "saw tooth" or "zig-zag" method. W/O Gerber, identified and, with Kojak, searched the dunes within "FEDR", forming a sort of trapezoid over the sand dunes. At the trial, this search method and the use of a dog earned the approval of Mr Olivier. W/O Gerber searched the dunes, commencing close to the carpark. To catch the scent cone of a human, Kojak had to be downwind. Kojak worked off leash. W/O Gerber did not walk up to "F" because Kojak had been there. He called Kojak back *after* it had checked "F" at the boundary fence.

[192] The High Court found that W/O Gerber "should have walked up to point "F" to make sure there was no point beyond this to search",[131] and that his failure to walk from "F" to "G" was "a significant and glaring omission". [132] Although the High Court found W/O Gerber to be an honest witness with a plausible explanation, it also found that he demonstrated shortcomings in the way he undertook this search. It rejected W/O Gerber's explanation about the kink in the fence, and inexplicably found that the wind would have blown the scent cone past Kojak's nose. As stated above, the Supreme Court of Appeal disagreed with the findings of the High Court generally regarding the searches, and held that they were "effective".[133]

[193] Warrant Officer Gerber gave two reasons for not searching between "F" and "G". First, Kojak did not pick up a scent that signalled the presence of a person beyond "F"

[131] High Court judgment above n 8 at para 107.

[132] Id at para 106.

[133] Supreme Court of Appeal judgment above n 4 at para 40.

towards "G". Second, W/O Gerber had predetermined his search range, which did not include "F" to "G".

[194] As for the first reason, after the inspection *in loco*, the kink in the fence had been established. Messrs Engelbrecht and Olivier confirmed the scent cone factor, namely that the kink could have deflected the scent cone resulting in Kojak not picking up the scent. The High Court erred in rejecting this uncontested evidence of the specialists.

[195] Warrant Officer Gerber searched on foot just short of 20 metres from "F". He did not search at "F" because Kojak had searched there. He had no reason to distrust Kojak's search and rescue abilities, nor could he anticipate the kink in the fence. Omitting to walk up to "F" was not wrongful. In this regard, the evidence of the applicant's witness, Mr Olivier, is instructive.

[196] Mr Olivier described himself as a former police captain instrumental in developing the SAPS' dog unit and their search and training together with their handlers. His evidence was that all the SAPS' dogs and handlers were subjected to ongoing assessments to ensure that operational standards were met. To this end, dogs were issued with "green cards" or work certificates without which they were not allowed to work. To be certified, the dogs had to pass an evaluation conducted regularly. The dogs are subjected to periodical inspection and assessment with their handlers. Mr Olivier and W/O Gerber were confident that if the applicant had been in the trapezoid "FEDR", Kojak would have found her. This evidence does not support the finding in the first judgment that the SAPS cannot rely on dogs to search because the handler and not the dogs conduct the search. The finding of the first judgment contradicts evidence for both parties that dogs succeed in search and rescue work and that they are effective in searching through thick bushes inaccessible to the handlers.

[197] However, having approved of W/O Gerber's search methods conducted with Kojak, Mr Olivier's insistence that W/O Gerber should have included "F" to "G" in his search and that he should have walked up to point "F" with Kojak, must be weighed

against Mr Olivier being a partisan witness for the applicant. His "insistence" was based on nothing more than his unsubstantiated opinion formed with the benefit of hindsight.

[198] Warrant Officer Gerber's second reason for not searching between "F" and "G" was that searching the trapezoid quickly was his priority. Searching at "F2", which fell outside the trapezoid, would have been a deviation from his search plan. Once the applicant's expert accepted that defining the search area and searching within it was reasonable and a standard operating procedure, then there was no basis to criticise W/O Gerber for not including "F" to "G" in his search plan. The significance of his knowing the area between "F" and "G" is not apparent from the evidence. "F" to "G" was not the only bushy area. Having defined the search area to be "FEDR", and that such definition was reasonable, the SAPS' duty was to ensure that it searched within "FEDR". Omitting to do so would have been wrongful. Searching beyond "FEDR" was an option but not an obligation, the non-fulfilment of which would result in legal liability.

[199] Warrant Officer Gerber searched for the applicant for two and a half hours. When he did not find the applicant within "FEDR", the possibility of her drowning gained traction. Then he called for air services. He had a plan. He was sufficiently concerned about where the applicant had been hidden to return to the scene the following morning to find an explanation. This is not the conduct of a policeman who did not care about his duties. The applicant cannot support her contention that W/O Gerber omitted to search for her out of concern for his own safety. W/O Gerber's searches were methodical and thorough. Furthermore, by second guessing the SAPS' reliance on and use of dogs, this Court would be trespassing into the SAPS' operations and powers. Having regard to what W/O Gerber did, what he did not do – namely, search at "F2" – was not a wrongful omission. Consequently, his conduct was not wrongful.

Helicopter search

[200] In this appeal, the applicant submits that Mr Smith failed to direct the helicopter search to cover the area from "F" to "G". If the helicopter had flown between "F" and "G", Mr Smith would have seen the applicant in the clearing in the bushes at "F2". "The only reasonable inference was the one that the High Court made, namely that the helicopter did not search the area "F" to "G".", so the applicant submits.

[201] Not searching between "F" and "G" was not an inference to be drawn but an established common cause fact. The only issue was whether this was a wrongful omission resulting in liability for the respondent.

[202] The evidence for the respondent was that Mr Smith was "an extra pair of eyes and ears" for the pilot. He operated the "night sun" searchlight for illumination. They flew from the carpark, down to and along the shoreline and then to the harbour wall, near "G". "G" was a no-fly zone. Retracing W/O Gerber's route, the helicopter flew low along the high water mark, passing "F2" to its left where the applicant was held captive. As it was low tide, Mr Smith anticipated that if the applicant had drowned, her body could have been on the sand. Then, even though the dog had searched through the bushes, the helicopter went over "FEDR" to ensure that nothing was missed. It flew approximately 30 to 50 metres above the ground with good illumination of a wide area of about 15 to 20 metres. Mr Smith testified that the helicopter flew close enough to "E", "F" and "G" that he could see the illuminated road beyond the fence. They could not fly across the fence into the harbour area which was a no-fly zone. Under cross-examination, he clarified that the helicopter was further than 15 metres from "F2" and could not approach closer because of the restrictions.

[203] The applicant's evidence differs markedly from Mr Smith's. She testified that she heard the helicopter. "It was far away . . . around the shoreline . . . the helicopter never hovered around where we were . . . I didn't hear it over where we were." On her version, the helicopter did not fly within "FEDR".

[204] Against this backdrop, the High Court found that "the helicopter search fell short of what was required from a helicopter search and rescue operation" and that "they did not find the plaintiff because they did not fly over where she was held at F[2] . . . or they did not hover close to that area and direct the 'night sun' towards the bushes in the 'no-fly' zone".[134]

[205] It was common cause that the helicopter did not fly over "F2". For the "night sun" to reach "F2", the helicopter had to be within 15 to 20 metres. This was not possible because of the aviation restrictions. Missing from the High Court's analysis was an appreciation that "G" was a no-fly zone. Even if the applicant was in a clearing, she was out of the range of visibility from the helicopter, which had to be more than 15 metres away from "G" due to the restrictions. Thus, even if Mr Smith had directed the "night sun" searchlight towards her, he would not have seen her. At "F2", she was about 20 m away from "F". "Hovering" over "F2" was out of the question.

[206] I take issue with the recording and analysis of the evidence in the first judgment in three respects: First, Mr Smith did not "concede" "that if they had directed the search light at "F2" he would have been able to see the towel, blanket, and the sleeping bag in the clearing at "F2"." He was emphatic that he would see those items "*if* [he] was close to it and a light went over it". He added that if you "hover above it at 30 metres and you focus the light, direct the light down you can see through those sorts of clearings". And finally the theoretical proposition was put again: "if one *hovered* above that with the night sun, you would be able to see that? . . . yes . . . ". But Mr Smith could not hover over "F2", the restricted area. In fact, his evidence was that he had to be more than 15 metres away.

[207] Second, the first judgment's statement "Gerber's failure to make a specific request to those conducting the helicopter search to search this area," suggests that W/O Gerber had a duty to make such a request and that somehow he had authority to

[134] High Court judgment above n 8 at para 109.

instruct the helicopter crew. He had a duty to brief the crew which he did before suggesting that they should search the bushes. If W/O Gerber requested the helicopter crew to search at "F2" his request would have been unlawful as "F2" was a no-fly zone.

[208] Third, discontinuing the helicopter search was not premature. With the mist thickening and an incoming aircraft approaching, terminating the helicopter search was necessary. Abandoning the search on instruction from the control centre, and in compliance with safety protocols, was not a matter of discretion. To hold that the helicopter search was terminated prematurely is to overstep the separation of powers boundary.

[209] Not hovering over "F2" cannot constitute a wrongful omission to search at "F2". Remarkably, however, the applicant did not see or hear the helicopter around the fence ("EFG"), even though it searched that area for about 20 minutes. The High Court correctly preferred the respondent's evidence over the applicant's on this issue.

[210] Regarding all the searches, the High Court found that there was "no proper command and control of the search and no communication and coordination between the various SAPS units".[135] Evidence of the combination of foot, four-wheel drive, dog and helicopter searches refute this and the High Court's further finding:

> "It also serves to highlight the extreme indifference on the part of SAPS in relation to ensuring that the area was properly and effectively searched. From the ground crew to W/O Gerber to the SAPS helicopter crew – all simply went through the motions of searching without conducting a reasonably effective search, or indeed anything vaguely resembling such, at all."[136]

[211] The evidence of both W/O Gerber and Mr Smith which dovetailed each other, was corroborated by book entries for record keeping and was not impugned during

[135] High Court judgment above n 8 at para 111.

[136] Id at para 112.

cross-examination. Furthermore, the High Court found W/O Gerber to be an honest witness.

[212] The High Court also failed to appreciate that the applicant had changed her case from no complaint about the SAPS omitting to search for her, to the SAPS omitting to search the area in the vicinity of the carpark at Kings Beach, to the SAPS refusing "to enter the area to free the plaintiff and apprehend the perpetrators", and then to the SAPS omitting to search at "F2", twice the distance away. Accepting in favour of the applicant that she was unaware of the foot and dog searches, she knew about the helicopter search before she instituted proceedings. She now claims that because the helicopter omitted to hover close to "F2", it did not find her and the rape was prolonged. It is surprising that the applicant did not include in her Notice *any* omission or failure by the police to search for her. The principle thrust of her claim is that because the SAPS omitted to search for her, the rape at the hands of the rapist was prolonged by some four hours. Therefore, pleading that the searches were omitted and flawed was imperative from the outset when she issued the Notice. And when she amended her Particulars of Claim finally a week before the trial, the applicant had sufficient particularity to plead precisely in what respects the searches fell short of the standards required of reasonable policing services. This was not done. The searches are one of two poster boards for this litigation. They inform the computation of the duration of the rape and concomitantly the quantum (R25 million) she claims as damages. Pleading the searches should have been strident. Instead, the applicant is clutching at snippets of information presented incoherently during the trial to impermissibly found so substantial a cause of action on appeal.

[213] Knowledge of the applicant being at "F2" comes after the fact. The police had no clue or reason to suspect that she was at "F2", a spot as much as 700-odd metres away from where her car was found. She might just as well have been at the opposite end of the beach or nowhere near the beach. Precisely in circumstances like this, foreseeability is not a factor when assessing wrongfulness. This is not a case of the SAPS subjectively foreseeing that the applicant was in the vicinity of "F2" and in

disregard of such foresight, omitting or failing to search there.[137] Deconstructing the reasons why, when the police went as far as "G1" on the high water mark, they did not go inland to "F2", or why, when W/O Gerber was at "F" he did not search at "F2", are the sort of questions asked with the wisdom of hindsight. How close to the no-fly zone should the helicopter have hovered is a discretion that the pilot had to exercise without fear of interference from a court. Judicial interference to determine when and how helicopters should be flown would, without more, be dangerous overreach.

[214] Similarly, whether it is reasonable for the police to search 350 or 700 metres and whether (and how) to conduct a search and rescue operation with a dog, are judgement calls that the police must make as the circumstances require. Second guessing the exercise of police discretion about such operational issues would amount to undue interference in police business. The High Court's findings encroach on standard operating procedures and safety protocols of the SAPS' search and rescue services. To apply the general rule of deference to findings of fact of a trial court would be to permit this impermissible encroachment to prevail.

[215] Using the helicopter to search for the applicant was unusual. Rape victims seldom have helicopters searching for them. The crime scene was a tourist destination, it was near an airport and it was the opening of the summer holiday season – an accumulation of factors which would explain this extraordinary but commendable use of a public resource. The entire helicopter search went on for about 20 minutes.

[216] The sense of being so close to finding the applicant, and yet not finding her, must induce an overwhelming sense of regret and reflection as W/O Gerber's returning to the crime scene suggests. Regret and wisdom after the fact do not inform the wrongfulness of not searching at "F2". If they did, they would impermissibly raise the bar for liability from a duty to search to a duty to find the applicant. Assessing wrongfulness based on hindsight is impermissible. Even if it were found that the SAPS omitted to search at

[137] Contrast with *Country Cloud Trading CC* above n 13.

"M" and omitting to search at both "M" and "F2" were wrongful, imputing liability against the SAPS in all the circumstances would not be reasonable. Reasonableness is the common law, statutory and constitutional standard against which wrongful omissions must be adjudicated. What the SAPS did must count in assessing reasonableness.

Investigations

[217] As foreshadowed above, the investigations relate to the "bush dwellers", the CCTV footage and the DNA test. Success in all three strands of the investigations depended on the applicant's ability to identify her assailant(s). A positive identification would trigger DNA testing to confirm that a suspect was a perpetrator. Thus identification was a priority.

[218] Sergeant Solomons started preparing an identikit. She used Identi-Kit 2000 and Photoshop One, software that had been in use for more than 20 years. Identi-Kit 2000 had different facial options from which to choose to compose a face, irrespective of race. The description that the applicant tried to give her was of the suspect who had passed her as she was walking on the beach. He was a black man, aged 40, of medium build and short hair, Sergeant Solomons testified. To her the applicant appeared unsure about the facial features of the suspect. The identikit that emerged depicted a younger man. If the applicant had told Sergeant Solomons that her attacker was older with angry eyes, as she later described in Court, Sergeant Solomons would have adjusted the identikit to achieve that result. Following complaints from the applicant, Sergeant Solomons arranged for the identikit to be redone by Sergeant Steenkamp in Gauteng where the applicant resided. The same software was used to prepare both identikits. The High Court dismissed the applicant's complaint against Sergeant Solomons and the suitability of the software. The applicant's action against Sergeant Solomons as the fourth defendant failed.

[219] Understandably, the applicant's ability to identify her perpetrator was compromised. Her attacker had blindfolded her throughout the incident, she said. The

trauma itself could also have impaired her faculties of observation. Consequently, the investigations were impeded from the outset.

Investigations: the "bush dwellers" and delays

[220] In this appeal, the applicant submits that from 10 to 15 December 2010, the SAPS failed to investigate the homeless "bush dwellers" who lived in the sand dunes. Having arranged an informal identity parade, W/O Madubedube failed to obtain information from the "bush dwellers", despite knowing that they were about to be moved from Kings Beach that day. He failed to record their names and details, to show them the identikit and to ask them if they recognised the person depicted. W/O Madubedube failed to ask the car guard and informant, Mr Ruiters, and another municipal worker, who knew the "bush dwellers", if they had recognised any of the "bush dwellers" who had been assembled on 15 December 2010 for the informal identity parade as suspects that Mr Ruiters had named to the SAPS earlier that day. These are the applicant's complaints.

[221] The complaints of the applicant in this appeal differ from those in her Particulars of Claim. What the applicant stated in her Particulars of Claim was that W/O Madubedube had failed to take statements from the car guards, Messrs Francis and Ruiters, whose details she had given to him, as they knew who her abductors and their associates were. In neither her Notice nor her Amended Particulars of Claim (2018) did she mention the "bush dwellers". Furthermore, in her Amended Particulars of Claim, the applicant asserted that the SAPS delayed for over an hour after one of the joggers had called for the police. As a result, Mr Britz, a jogger who had encountered her on the beach, had to drive her to the police station three kilometres away. Allegedly, the delay also resulted in the SAPS missing the opportunity to investigate three "bush dwellers" who were busy with their ablutions before the police arrived. These complaints about delays suggest that the SAPS subjected the applicant to secondary trauma.

[222] Turning first to the alleged delay in attending to the applicant, in the pre-trial minute the applicant asked the respondent to admit that by 08h00 on 10 December 2010, the SAPS had not arrived at Kings Beach and that they only attended there at about 09h30. The respondent declined to make this admission but pointed the applicant to the objective evidence of the police photographer and forensic investigator whose photographs reflected that they were taken at her point out of the crime scene at about 08h10 on the morning after the incident. Also contradicting her, Mr Britz, who was her witness, testified that the delay was for about half an hour. The chronology reveals that there was no delay in the police response. When the SAPS was contacted the applicant was no longer in danger. W/O Andrews was on the scene with the photographer within an hour of being instructed to attend to her complaint. And for the rest of the day there was no delay in taking her statement, which W/O Andrews commissioned at 09h30. She was medically examined at 12h30 according to the J88 report.

[223] Although at the trial the applicant did not persist in her complaint that W/O Andrews delayed in attending to her at the crime scene, the High Court criticised W/O Andrews for not having the beach area searched for possible suspects, for not viewing the CCTV footage to identify suspects and for not testifying to explain these alleged omissions. Furthermore, the High Court found that after arresting Mr Jakavula, W/O Andrews did nothing else to identify other suspects amongst the "bush dwellers". In contrast, the Supreme Court of Appeal found that "at that stage the investigation was conducted by W/O Andrews, who was responsible for the investigation up until 12 December 2010. Ms K was happy with the work he did".[138]

[224] I align myself with the Supreme Court of Appeal. The uncontested evidence is that W/O Andrews took charge of the investigation on Friday, 10 December 2010 before he handed over to W/O Madubedube on Monday morning. The chronology also reveals that W/O Andrews was occupied with interviewing and processing suspects, namely Messrs Jakavula and Manqane. Mr Jakavula had been arrested on the morning

[138] Supreme Court of Appeal judgment above n 4 at para 46.

of Saturday, 11 December 2010. Three observant warrant officers had spotted him while they were scouring Kings Beach for leads to find the assailants. The first judgment's statement that "the SAPS failed to immediately round up the area to search for possible suspects while the incident was still fresh", discounts what the SAPS did.

[225] The High Court correctly rejected several other complaints including an omission by the SAPS to take a statement from Mr Britz. Another unfounded complaint was that Brigadier Koll had failed to supervise the SAPS in their search for the applicant on 9 and 10 December 2010. The High Court found that he was not even aware of the search that night. In any event he was not in charge of the Family Violence, Child Protection and Sexual Offences Unit (FCS Unit) which fell under Colonel Engelbrecht. The applicant's action against Brigadier Koll as the second defendant failed.

[226] Regarding the "bush dwellers", as the applicant omitted to mention them in her Notice and her Amended Particulars of Claim (2018), the Supreme Court of Appeal unsurprisingly found that the SAPS' failure to follow leads on the "bush dwellers" was not one of the applicant's complaints.[139] In this appeal, the applicant alleges that W/O Madubedube had failed to follow leads on the "bush dwellers", record their names, show them the identikit and follow up with the informants.

Investigations: "bush dwellers" – informal identity parade

[227] Early on 15 December 2010, the applicant together with a witness to whom some of the applicant's clothing had been sold, attended a formal identification parade at the St Albans Correctional Centre. The applicant did not point out Mr Jakavula as a perpetrator but the witness did.

[228] The informality of the identity parade held later that day forms the backdrop to one of the complaints regarding the "bush dwellers". With commendable co-operation with the municipality, which was about to remove the "bush dwellers" a day ahead of

[139] Id.

the holiday season, W/O Madubedube seized the opportunity, at short notice, to hold an informal identity parade. W/O Madubedube telephoned the applicant to inform and prepare her for the identity parade. The applicant was willing to participate. She drove out to Kings Beach. Once there, W/O Madubedube spoke to her again while she was still in her car to ascertain whether she was able to go through with the identity parade. She was keen to catch the rapist(s) quickly. She was also due to return to Johannesburg the following day. So, there was some urgency to conduct the parade even under those circumstances.

[229] Naturally, the applicant was traumatised by having to identify her assailant(s). Subsequently, she complained to the medical experts, and in Court, that she was traumatised by having to be so close to the possible suspects. Secondary trauma was unavoidable once she set out to catch her assailant(s).

[230] Complaining about W/O Madubedube's handling of the identity parade was unjustified. W/O Madubedube had checked with the applicant twice about whether she was willing to proceed with the informal identity parade. She could have refused. But without her identifying the suspects, the investigation would have been hamstrung. It was suggested to W/O Madubedube during cross-examination, that he should have had the applicant seated in a car with tinted windows during the identity parade. Whether he had access to such a vehicle in the short time he had to hold the hastily assembled identity parade was not tested. That it did not occur to W/O Madubedube to use such a vehicle, does not render this omission a flaw in his investigation or treatment of the applicant. Reasonable precautions were taken to protect her during the identity parade. She stood with W/O Madubedube about three metres away from the line-up. She had her face covered with a burka. Her fears of being recognised were unfounded. To criticise W/O Madubedube for holding an informal parade under those conditions, and when the applicant participated in it without demur, is unreasonable, unfair and unjustified.

[231] The applicant criticised the composition of those participating in the parade. She said that there were only about 10 participants. The evidence for the respondent was that the SAPS had lined up some 25 to 30 "bush dwellers". W/O Madubedube testified that they had to be transported in three vehicles. Contradicting the applicant, Mr Robile who testified for the applicant, confirmed under cross-examination that the vagrants – as counsel preferred to refer to the "bush dwellers" – were off-loaded eight at a time; they were viewed and reloaded into the van before the next van of eight men were viewed. Objectively, Mr Robile's evidence is convincing.

[232] The "bush dwellers" were accounted for as it was the municipality's plan to remove them all. The applicant was unable to identify any of the "bush dwellers". Drawing blood samples from all of them – an instruction from Major General Rabie in March 2012 – came with the risk of multiple civil suits by the "bush dwellers", as Captain Winter astutely pointed out when she declined to carry out the instruction. Unsurprisingly, other specious complaints about the composition of the parade made in the Notice did not surface in the Particulars of Claim. In this instance, what was done and not done matter.

Investigations: omitting to show the identikit

[233] The applicant criticised W/O Madubedube for not distributing copies of the identikit to the "bush dwellers" and for not asking for information from Mr Ruiters, who was working at the beach at the time. Strangely, this complaint contradicted the cross-examination of W/O Madubedube when counsel put to him that he had shown the identikit resembling Mr Lawrence to the "bush dwellers". If this complaint had any substance at all then the applicant would surely have led the evidence of her witness, Mr Robile. Mr Robile had arranged and attended the informal identity parade. He was able to comment on the number and composition of the "bush dwellers" participating in the identity parade and whether W/O Madubedube had distributed the identikit. But the applicant omitted to secure corroboration from Mr Robile.

[234] Warrant Officer Madubedube had distributed and pasted photocopies he had made of the identikit of the suspect in the parking area. Not every "bush dweller" received a copy as he did not have that many printed. Nor did he hold up a copy of the identikit or specifically ask the "bush dwellers", assembled for the informal identity parade, if any of them recognised the suspect in the identikit, as the applicant suggests he should have done. However, it was obvious to W/O Madubedube that if the "bush dwellers" had recognised the face in the identikit and, assuming they were willing to co-operate with the police, they would have told him. None did. He distributed the identikit twice; once on 15 December 2010 and again after the prosecutor had so requested.

[235] After the informal parade, W/O Madubedube also asked Mr Ruiters, and others to be informal informants. It was he who had introduced SSG, the applicant's private investigators, to Mr Ruiters. The High Court accepted that W/O Madubedube attempted to trace the possible suspect serving a 15 years sentence for killing his girlfriend at St Albans Correctional Centre but that he was unsuccessful because the information he had from the applicant was too sparse. When she eventually did go to St Albans with Lieutenant Gallant, the applicant did not identify the suspect.

Investigations: omitting to note the names of the "bush dwellers"

[236] As for W/O Madubedube omitting to note the names of the "bush dwellers" assembled for the informal identity parade, once the applicant failed to identify anyone as her assailant, noting the details of the "bush dwellers" would have been merely administratively efficient or academic. Practically, this omission had no impact on the investigation. Furthermore, the applicant's complaint rests on an assumption that the "bush dwellers" had some form of identification, that they would have given the police their correct details and that the police would have some means of verification and follow-up. This was not the case. For example, the three "bush dwellers" who were investigated had multiple names.

[237] The High Court criticised W/O Gerber for not questioning the "bush dwellers" or recording the names of those he had encountered. During the search for the applicant, Kojak took W/O Gerber to where three "bush dwellers" were asleep. W/O Gerber did not take their names; he merely asked them whether they had seen anything out of the ordinary, maybe a person who was lost. They had not. W/O Gerber did not report seeing these three "bush dwellers" to W/O Rae and Sergeant Pretorius and there was no follow up on them.

[238] Warrant Officer Gerber had no reason to suspect them or think of them as witnesses as they were asleep when he found them. For administrative efficiency, W/O Gerber could have noted their names or enlisted help from one of the other officers to do so. His omission had no impact on the investigation as the applicant could not identify any of the "bush dwellers". Omissions by the warrant officers to record the names of the "bush dwellers" were not wrongful.

Investigations: Follow up on the names of suspects

[239] The applicant's complaint that W/O Madubedube did not follow up on the names of suspects that Mr Ruiters gave him is, once again, at odds with the questions counsel put to W/O Madubedube. Under cross-examination, counsel sought and obtained confirmation from W/O Madubedube that Mr Ruiters had given him the names of suspects, that W/O Madubedube had noted these names in his pocketbook; that he had spoken to the informers on the morning of 15 December 2010; that he had showed Mr Ruiters the identikit and Mr Ruiters had identified the identikit to be "Bongile" (Mr Lawrence), a "bush dweller", and that he meticulously recorded the events of 15 December 2010 in his pocketbook.

[240] The High Court correctly accepted that apart from "drunken gossip", W/O Madubedube got no "tangible evidence" from Mr Ruiters. And further, that in "W/O Madubedube's professional opinion as an experienced detective . . . he received no information from [Mr] Ruiters or anyone else on which he could reasonably and

lawfully arrest anyone. [This] was vindicated by subsequent events".[140] Notwithstanding the High Court's assessment of Mr Ruiter's, in this appeal the applicant persists that W/O Madubedube could not have put much effort into the investigation because it was the applicant's efforts to meet with Mr Ruiters in August 2012 that led the police to Messrs Manqane and Lawrence at St Albans Correctional Centre. This is untrue.

[241] The uncontroverted evidence about Mr Manqane is that by 13 December 2010, the police had arrested him, questioned him, taken a statement from him, taken items of clothing for forensic testing from him, and then released him. At the instance of the applicant, her erstwhile attorneys and her cousin, Mr Rubusana, Lieutenant Gallant detained Mr Manqane again on 6 September 2012. On 9 September 2012, Mr Manqane made another statement in which he repeated his denial of the rape charge. On 7 December 2012, for the third time, Mr Manqane was rearrested, questioned and detained to give a blood sample for DNA testing the following day. Sergeant Leppan recorded the third statement from Mr Manqane in which the latter yet again denied knowing about the rape. This arrest has a background relevant for assessing again what the SAPS did against claims of what it did not do.

[242] On 7 December 2012, the applicant participated in a march to the police station to protest against gender-based violence. Along the way, Messrs Jakavula and Manqane were pointed out to be suspects in the rape case. Sergeant Leppan arrested both men. These arrests were again at the instance of Mr Rubusana and probably also the applicant. At the trial, the applicant denied having anything to do with their arrests. She denied making the statement that Sergeant Leppan relied on to effect their arrests and disowned the signature on it. She denied being inside the police station which, she said, explained why her purported statement was not commissioned. Additionally, the address on her purported statement was for her business, whereas she had always used her residential address.

[140] High Court judgment above n 8 at para 134.

[243] Sergeant Leppan testified that he had no idea what the applicant's residential and business addresses were. He used the address she gave him. He recalled that the applicant arrived at the police station in the company of a group of marchers. She had "insisted" that both Messrs Jakavula and Manqane "were part of the group that raped her". However, he had to have the applicant's affidavit before he could effect an arrest and depose to his own arrest statement. He was adamant that it was he who took her statement and that she was lying about her statement being fabricated and her signature being forged. His reason for omitting to commission her statement was that things were awkward that day with W/O Andrews declining to rearrest them because the FCS Unit had already discovered during their investigation that they were "not linked to the rape itself". Sergeant Leppan is convincing.

[244] Re-arresting Messrs Jakavula and Manqane during the march on 7 December 2012 caused tension amongst members of the SAPS. Sergeant Leppan was unaware of the history of the investigations. Furthermore, he would have been relying on hearsay in the statement of Mr Rubusana and needed the applicant's statement to effect the arrests. In the meantime, the marchers had assembled outside the police station to protest. Lieutenant Gallant's evidence was that eventually both men had to be detained for their own safety.

[245] At the trial, the applicant complained that W/O Madubedube had decided to arrest and charge Mr Jakavula when she had made it clear that he was not her abductor. She had already stated that she was "100%" certain that Mr Jakavula was not her assailant. Following the first identity parade in which she had failed to identify Mr Jakavula who had been arrested for possessing her property, she had informed the prosecutor accordingly. The prosecutor was going to withdraw the rape case against Mr Jakavula. However, even though the applicant eschewed Mr Jakavula as her rapist, she was instrumental in having him rearrested on the rape charge. Mr Jakavula was convicted not for rape but for the theft of the applicant's property that had been removed from her vehicle.

[246] As for Mr Lawrence, the applicant's alleged "main" assailant, W/O Madubedube testified that he was unaware that he was in the St Albans Correctional Centre. He had many discussions with Mr Ruiters who would have disclosed Mr Lawrence's whereabouts had he known of it then. Mr Lawrence's whereabouts only came to light in August 2012 when W/O Madubedube was no longer the investigating officer. In September 2012, Lieutenant Gallant accompanied the applicant to the St Albans Correctional Centre. She could not identify Mr Lawrence. Afterwards, she realised that she had made a mistake and informed Lieutenant Gallant. She was aggrieved that he did nothing to return to the prison to help her remedy her mistake. Unsurprisingly, Lieutenant Gallant did not reconvene an identity parade. To have done so would have compromised the fairness and consequent reliability of the evidence of a second identity parade.

[247] Mr Lawrence's arrest and detention, his statement of 11 September 2012 to Lieutenant Gallant denying the allegations that he raped the applicant, followed by DNA tests that excluded him as a donor, ended the investigations against him. Thus all three suspects had been investigated and excluded as her assailants by the end of December 2012. Therefore, there were no omissions regarding the investigation of the "bush dwellers".

Investigations: CCTV footage

[248] In this appeal, the applicant submits that W/O Madubedube had failed to view the full CCTV footage that was taken of Kings Beach on 9 and 10 December 2010 until shortly before he testified. He was unaware that the footage of 10 December 2010 showed a man walking in the vicinity of Kings Beach parking, who could have been a potential suspect or witness. If he had watched the footage earlier, he could have used it to try and trace the suspect, for example, by showing still images of the footage to Mr Ruiters and the "bush dwellers". He spent under four hours viewing a total of 60 hours of footage. The bulk of his time was spent on 10 February 2011, which was

an unreasonable delay after the incident. So the applicant submits. However, in my view, this was another complaint that was neither pleaded nor proved.

[249] The applicant alleged in her Notice and Particulars of Claim that W/O Madubedube had failed to get the CCTV footage from the municipality and had told her that she would have to obtain it herself. At the trial, she persisted that she had obtained the footage after engaging the services of SSG, and that she gave W/O Madubedube the footage but he never viewed or acted on it. She was unable to pinpoint a time when she became dissatisfied with the police investigation. It was a continuous set of events, she said. But she settled for the first trigger being the failure by W/O Madubedube to call her to view the footage.

[250] Viewing the footage with her was never an omission she relied on to ground her claim. The earliest and only indication that she wanted the police to show her the footage was when she wrote to Brigadier Koll on 4 June 2011 to plead with him. In the appeal before this Court, the applicant's complaint about the footage has evolved once more. Her central thrust in this appeal is that W/O Madubedube watched less than four hours of the 60 hours of footage; consequently he omitted to notice a potential suspect, and he unreasonably omitted to view the footage until 10 February 2011.

Obtaining and viewing the CCTV footage

[251] Warrant Officer Madubedube was first to suggest to the applicant that she view the footage. He took her to the municipality and obtained copies of the footage for himself and for the applicant at his own initiative. Not even the prosecutor had listed viewing the footage as an issue for further investigation. He proceeded to view the footage with the applicant on the very first day that he was tasked with the investigation. He wanted to check for anything suspicious and to confirm the time when the applicant was taken to the crime scene by the assailant.

[252] At the municipality, viewing the footage was not easy. More than 20 rotating cameras zooming in from different angles to the beach had to be viewed.

W/O Madubedube had to work with Mr Rampo, the attendant, to find the cameras that recorded the parking bay where the applicant had parked. They established that the applicant had alighted from her car that afternoon at about 14h30. The footage showed the applicant walking from her car onto the path that stopped short of the dunes.

[253] Warrant Officer Madubedube was able to satisfy one of his reasons for viewing the footage, namely, to confirm the time when the applicant arrived at the beach and to gauge when the crime was committed. Getting footage of her assailant(s) was impossible. There were no cameras filming the beach where the applicant was apprehended and assaulted. Consequently, W/O Madubedube had established that the usefulness of the footage was limited to spotting any suspicious people or activities in the parking area.

[254] Warrant Officer Madubedube viewed sufficient footage on the same day he took over the investigation, which was three days after the applicant's rape. That was enough to ascertain that images of her assailant attacking her on the beach would not be available for her to identify. W/O Madubedube watched the four short discs that he received from Mr Rampo on 8 February 2011 for almost three hours. Having already established the limited usefulness of the footage, the urgency to view them sooner had abated. With the applicant being uncertain of her assailant's identity, viewing the footage with her would also have been pointless. Certainly, by 20 June 2011, Brigadier Koll was able to confirm to the applicant that the footage provided no positive leads.

[255] Warrant Officer Madubedube gave the recordings to SSG, because the applicant requested them. It was a special dispensation for her considering that the municipality had refused to let her view the recordings alone in the absence of W/O Madubedube when he had to return Lieutenant Colonel Engelbrecht's car. By giving her the recordings the SAPS was not shifting its duty to view the footage on to the applicant. Instead of appreciating the special dispensation, the applicant seeks to turn it against the SAPS.

[256] SSG Forensic Consultants subsequently acquired 60 hours of footage, from 06h00 on 8 December 2010 until 18h00 on 10 December 2010. On 18 February 2011, SSG gave the applicant their report and informed her that they had identified possible suspects in the footage. SSG had also printed photographs of possible suspects for her convenience, which she could have viewed without trawling through 60 hours of the footage. She did not view the footage. Nor did she show the footage of the alleged suspect in the carpark to W/O Madubedube until he was about to testify. It was only during trial preparation that the applicant watched the footage for the first time, despite receiving it as early as 18 February 2011. Effectively, she instituted legal proceedings without having viewed the footage. Her explanation for not viewing the footage sooner than the seven years that had passed was that she was too traumatised to view it on her own.

The man in the carpark

[257] On 19 February 2018, in preparation for the trial that was already underway, the respondent was invited to but was unable to make any admissions about the footage of the man in the carpark, and put in issue the relevance of such footage. W/O Madubedube had not seen that footage until shortly before he testified. During the trial, counsel pointed out on the screen shown in court, footage of a man wearing a yellow vest with dark blue shorts at Kings Beach parking on 10 December 2010 at 10:49:04, several hours after the rape. No other allegedly suspicious sightings were pointed out in the rest of the 60 - hour footage. Not even footage of her car being broken into in the carpark emerged from the footage.

[258] The applicant was mindful that it was she, and she alone, who had to identify the perpetrator. If viewing the footage of the man was critical to the investigation, it begs the question why neither SSG nor her legal representatives drew the attention of any of the members of the SAPS to it despite the lapse of more than seven years. The applicant appreciated fully the urgency to investigate every lead without delay. Considering that a substantial part of her case was the delays in the investigations, it remains unexplained

why she herself would delay until the trial to share with the police apparently vital information she had taken trouble to procure.

[259] As it turned out, the entire exercise of viewing 60 hours of footage yielded no more than the picture of the solitary man in the carpark, hours after the incident. The man depicted was not someone the applicant recognised. He did not fit her description of her assailant. Nor was he behaving oddly. He was just a man walking in a public space, as he was entitled to. Nothing suggested that he was a suspect. Merely because he appeared to be poor and possibly homeless, did not make him a suspect. Certainly not when the applicant could not identify him.

[260] Unquestionably, the legal duty rested on the police to view the footage as an aspect of their investigative function. However, if the applicant had better information, it was up to her to communicate that to W/O Madubedube. W/O Madubedube would have had no reason to doubt that she had viewed the footage. Anxious as she was to have her assailant arrested, it was reasonable for W/O Madubedube to expect her to have alerted him at the earliest to footage that she wanted him to investigate.

[261] The High Court found it "difficult", as I do, "to understand why the plaintiff who had appointed and paid for SSG to assist the police with their investigation, chose not to view the footage in an effort to try and make an identification of her assailant".[141] The finding of the Supreme Court of Appeal, that it would have been reasonable to allow the applicant to view the footage at her leisure in a less formal environment, either in the presence or absence of private investigators of her choice, is unassailable.[142]

[262] Warrant Officer Madubedube did not watch six discs consisting of 60 hours of footage. Sixty hours of viewing would have taken at least 8 working days. W/O Madubedube investigated "a lot" of rape cases. His time spent on one case must

[141] High Court judgment above n 8 at para 150.

[142] Supreme Court of Appeal judgment above n 4 at para 48.

always be at the expense of his other cases. Considering the limited usefulness of the recordings, coupled with the applicant's uncertainty as to the identity of her assailant, it was reasonable for W/O Madubedube not to expend more time than he did to view the footage. For the same reason, viewing the footage about two months after the incident instead of sooner, was also reasonable. As it turned out, his exercise of discretion was prudent as the 60 hour footage produced no better evidence than a solitary man doing nothing more than simply standing in the carpark.

[263] Investigating the man in the carpark – assuming the SAPS was able to find him – could, not necessarily would, have led to arrests or finding witnesses. However, by not following this lead, assuming indeed it was a lead, neither W/O Madubedube nor the SAPS committed any omission. Choosing not to watch 60 hours of footage in the circumstances was not an omission, but an exercise of discretion. For W/O Madubedube to focus on the footage more than 36 hours before the crime, instead of 15 hours after the crime, was reasonable. Similarly to exercise judicial restraint in prescribing the distances that the police should search, how much footage the police are duty bound to view, is also a discretion that the police should be allowed to exercise as the context requires, without interference from the courts.

[264] I agree with the finding of the High Court that W/O Madubedube had a duty to facilitate the viewing of the footage by the applicant. He fulfilled this duty, first by viewing part of the footage with her. Subsequently, he gave copies of the footage to her through SSG. I disagree with the High Court's finding that granting the applicant access to the footage to view as she pleased was "grossly negligent" or wrongful. As the Supreme Court of Appeal said, the "conclusion of the High Court was wrong".[143] Similarly to her complaint about the searches, having failed to plead any omission about viewing and investigating the man in the carpark, establishing a causative connection between that alleged omission and harm to the applicant and damages would be contrived.

[143] Supreme Court of Appeal judgment above n 4 at para 48.

Omitting DNA tests of blood on paper

[265] In this appeal, the applicant alleges that W/O Madubedube failed to take steps that were available to him to ensure that a piece of paper found at the crime scene that had blood and semen stains, was subjected to DNA testing. The SAPS tested the blood sample only eight years later and in response to a request for further discovery during trial proceedings. The results were obtained within a week. This showed that the SAPS had always been able to have the evidence tested. The delay of eight years was consequently negligent. So submits the applicant.

[266] The Supreme Court of Appeal found that the failure by the SAPS to conduct any DNA analysis was not one of the applicant's stated grounds for establishing wrongfulness.[144] Therefore, that complaint did not influence her claim.[145] The applicant contends that she did not plead this ground precisely because she was unaware until the trial that this line of investigation had not been undertaken.

[267] As foreshadowed in the discussion on the arrests of the three "bush dweller" suspects, multiple DNA tests were done. On 22 December 2010, W/O Madubedube delivered the sexual assault evidence collection kit and smears from the applicant, the blood and hair sample collection kit from Mr Jakavula, the applicant's clothing and the clothing of Mr Manqane, and the piece of paper to the Forensic Science Laboratory to test for the presence of spermatozoa. As per protocol, a letter from the prosecutor accompanied his request.

[268] Warrant Officer Madubedube explained that he did not have authority to draw blood from Mr Manqane for DNA testing purposes once W/O Andrews had taken a statement which excluded Mr Manqane as a suspect. Unless new information came to

[144] Supreme Court of Appeal judgment above n 4 at para 50.

[145] Id.

the fore, W/O Madubedube could not second guess W/O Andrews. In my view, the High Court erred in rejecting this explanation from W/O Madubedube.

[269] On 10 February 2011, the laboratory responded that the preliminary report showed that there was no hair or semen detected on any items tested, including a pair of panties, a blanket, a sleeping bag, a towel, a mirror and, importantly, the piece of paper. Furthermore, the report read:

> "Presumable blood has been detected on the piece of paper. If the *state prosecutor* is of the opinion that DNA analysis will have evidential value s/he must notify the laboratory in writing *four months* before the court date. . . . The control blood sample of the suspect and victim must be sent to the laboratory for comparison." (Own emphasis.)

[270] In these circumstances, the Forensic Science Laboratory kept the samples in safekeeping pending further instructions. Notably such instructions had to be from the prosecutor.

[271] On 23 May 2011, the Forensic Science Laboratory reported that the sample of DNA taken from Mr Jakavula excluded him as the donor of the DNA obtained from the vulva, vestibule, cervical and vaginal swabs from the applicant. Mr Jakavula was the only accused person. The report did not include DNA results for Mr Manqane whose blood sample was not included for testing in December 2010. After questioning Mr Manqane and determining that he was not a rape suspect, W/O Andrews had released him as he was obliged to after forty-eight hours.

[272] About 29 August 2012, Brigadier Koll received a letter from Eversheds, the applicant's erstwhile attorneys, requesting the investigating officer to follow up on Mr Ruiter's leads "as DNA testing of Messrs Lawrence and Manqane will provide evidence as to the identity of [the applicant's] rapists". On 7 September 2012, Lieutenant Colonel Engelbrecht reported to the Provincial Head: Detectives' Secretary that in relation to Mr Manqane:

> "His fingerprints and photograph [were] also obtained should the DNA be positive and his address was verified. If he can be linked with DNA to the case he will be arrested and brought before court."

[273] On 12 September 2012, the prosecutor wrote to the Forensic Science Laboratory attaching the blood samples of Messrs Lawrence and Manqane and requesting DNA tests which were "urgently" required. Together with the blood samples, Lieutenant Gallant dispatched samples of DNA obtained from the vulva, vestibule, cervical and vaginal swabs from the applicant. On 11 December 2012, the Forensic Science Laboratory reported that Messrs Manqane and Lawrence were excluded as donors of the DNA obtained from all the applicant's swabs. This report ended the investigation against these suspects. With none of the suspects' DNA connecting them to the rape, on 20 February 2013, Lieutenant Gallant asked the prosecutor for her decision, which she gave as follows:

> "Both cases [were] removed from the court roll after the victim . . . stated in Humewood Cas . . . that accused 1 Mzwandile Jakavula, is not the person who raped her and due to the fact that additional accused 2, Themba Mavupa Mancano and suspect, Sibongile Lawrence's DNA results were negative."

[274] Under these circumstances, testing the blood on the piece of paper for DNA would have been superfluous. By May 2013, the rape case was provisionally withdrawn due to insufficient evidence. Significantly, it was the prosecutor's duty to assess whether DNA analysis of the blood found on the piece of paper was required for court. Section 16(3) of the Instruction provides that "[a] letter must then be obtained from the prosecutor concerned in which the prosecutor requests that a DNA analysis be conducted on the samples". With no prosecution pending and no suspects in sight, further DNA testing was pointless. The SAPS did not seek or receive another request until the applicant sought discovery on 18 June 2018, when the civil trial was well underway.

[275] When the piece of paper was tested on 20 July 2018, after the trial started, the results excluded Messrs Jakavula, Manqane and Lawrence once more. The male DNA found in the bloodstain on the paper was identical to the DNA found in the vaginal swabs taken from the applicant. This DNA showed no match with any suspect. Testing the paper was not needed for a criminal prosecution. Importantly, the male DNA found in the vaginal swabs were already on the DNA database of the Forensic Science Laboratory after samples from the applicant were tested in May 2011. If that male DNA is logged on the database from some other source, there would be a match. That could lead to identifying and tracing the rapist. That might still happen. Again, the first judgment discounts what was done.

[276] Neither in her Notice nor in the various versions of her Particulars of Claim did the applicant refer to DNA evidence. The Pre-Amended Particulars of Claim were delivered on 14 November 2013 and the final Amended Particulars of Claim were delivered on 6 February 2018, nine days before the trial. In addition, there were lengthy requests for further particulars for trial and extensive pre-trial conferences. The applicant was aware that DNA tests had been carried out and of the significance of such evidence. She had many opportunities to request for DNA reports timeously. Requesting DNA reports via discovery proceedings as late as 18 June 2018 begs the question: Why did the applicant delay to seek and obtain such information when three reports had been available since November 2012 whence she would have known that the piece of paper had not been tested? She had to have known from the letter of 10 February 2011 from the laboratory that the prosecutor had to request for the paper to be tested. Yet she did not enquire whether this had been done, not even when her attorneys wrote letters demanding that Messrs Lawrence and Manqane be tested. If she was unaware of the DNA line of investigation, it was because she chose not to know. Her failing to plead and prove omissions regarding the DNA testing and raising it belatedly on appeal is yet another afterthought. Therefore, the following finding of the High Court is not justified either in law or fact:

> "Warrant Officer Madubedube and SAPS failed to take steps to have all the DNA evidence evaluated timeously. Doing this eight years after the fact and in response to a request for discovery in the context of civil litigation was plainly an unreasonable delay and a breach of SAPS' legal duty to conduct a reasonably effective investigation."[146]

[277] The Supreme Court of Appeal correctly found that the failure by the SAPS to conduct any DNA analysis was not one of the applicant's stated grounds for establishing wrongfulness.[147] Establishing a causal connection between this alleged omission and harm when the applicant was unaware of the omission would be, like the searches and investigating the man in the park, a hard ask. The applicant's contention that she did not plead this ground because she was unaware until the trial that this line of investigation had not been undertaken, is contrived. It is also after the fact reasoning that the test for wrongfulness eschews.

Delays and secondary trauma

[278] The chronology shows that the police acted with remarkable alacrity and diligence, not least because of the media attention that the case attracted. The applicant's high profile, her commendable agency, her access to resources and social capital also kept the police on their toes. She had access to the deputy mayor, a representative of the community policing forum, the Ministry of Justice and People Opposed to Women Abuse (POWA) to keep the pressure on the police. She frequently contacted senior police management to complain about poor police services. As a result, in June 2012, Brigadier Koll assigned three very senior officers to her case. The investigation diary was closely supervised. Scrutiny of the investigation by the applicant's private investigators, SSG, compounded the pressure on the SAPS to do better.

[146] High Court judgment above n 8 at para 164.

[147] Supreme Court of Appeal judgment above n 4 at para 50.

[279] Still, the applicant complained about delays. Within the space of the first five days, the police had effected arrests of two suspects, Messrs Jakavula and Manqane, charged Mr Jakavula but released Mr Manqane, 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 Mr Jakavula and within a further 18 months had similarly excluded the DNA of Messrs Manqane and Lawrence.

[280] Other alleged delays on the morning after the rape were shown above to be unfounded. The alleged omissions and delays in the overall management of the investigation are unfounded in my view. They could not be the cause of the applicant's secondary trauma. As the medical experts agreed, reliving the ordeal for the purposes of the litigation compounded her secondary trauma.

Assessing W/O Madubedube

[281] This judgment would be incomplete without a response to the following overall impressions of the High Court of W/O Madubedube:

> "[H]e was a very poor witness. His evidence was laboured and wandered without clear direction. He appeared to conduct his investigation with little plan in mind. He meticulously recorded everything he did, but the overall impression one is left with is that there is much that he did not do which he could have done and should have done. He did conduct an investigation of sorts, but the investigation was characterised by a number of glaring omissions which could only have left the plaintiff with a clear impression that he was doing very little to follow up on all possible leads which might lead to the apprehension of her assailant. In the circumstances, it is not surprising that she became slightly 'hysterical' and difficult to deal with or that she contacted a number of civil society organisations, various police officials higher up the chain of command, private investigators and eventually lawyers to try and galvanise W/O Madubedube into some sort of action."[148]

[148] High Court judgment above n 8 at para 177.

[282] The High Court's observations of W/O Madubedube are not borne out by the facts. Nor was it fair to hold it against him that his evidence was "laboured", considering that he was testifying through an interpreter who had been engaged on the spur of the moment without forewarning that W/O Madubedube would be testifying in isiXhosa. W/O Madubedube was not evasive. The evidence shows that he did have a plan for his investigations and wasted no time in implementing it. He took initiatives even before the Senior Public Prosecutor gave directions about posting identikits, holding identity parades and processing DNA testing. Viewing the CCTV footage was his idea. All this he did despite having a difficult complainant. He was a detective experienced in "lots" of rape cases. The High Court concluded that the applicant's complaint that he was always without transport and sending her "Please call me" messages were unfounded. There were no omissions, glaring or otherwise, in his investigations.

[283] From the outset, the applicant was unhappy with W/O Madubedube taking over the investigation from W/O Andrews. Around 15 February 2011, she called General Rabie, the cluster commander, to enquire about progress with the investigation and to complain about its slow pace. General Rabie and Colonel Engelbrecht supervised W/O Madubedube to monitor progress with the investigation. By signing off the investigation diary periodically, Colonel Engelbrecht signalled his satisfaction with the progress.

[284] Warrant Officer Madubedube testified that he and the applicant did not "click". His attempts to "humble" himself failed to curry favour with her. He testified that the applicant telephoned him over a weekend. She spoke harshly to him. Around April 2011, after W/O Madubedube's aunt informed him that what was being said about him in the media pertaining to the case was not good, he asked Colonel Engelbrecht to release him from the investigation. Colonel Engelbrecht convinced him to remain on the case, which he did until June 2011. In the circumstances, the applicant's case that the SAPS and W/O Madubedube in particular, had failed to investigate her complaint

of rape is unfounded on the objective evidence. As with the actions against Brigadier Ronald Koll and W/O Adine Solomon, the action against W/O Madubedube as the third defendant, also failed.

Conclusion

[285] To answer the question I posed at the outset,[149] I find that this is not "that kind of case". The Supreme Court of Appeal's finding is entirely fortified by the facts that had to be traversed in considerable detail in this appeal. The burden on the applicant was to prove that the SAPS omitted to do their duty to search and investigate her complaints. Her burden was not to prove that the searches and investigations would have resulted in successful arrests and prosecutions. Of course, conversely, if they did result in prosecutions, the applicant would have no claim against the SAPS. On the facts, the police did not omit to perform any of their duties. No omission resulted in the rapist not being apprehended. Rather, the applicant's inability to recognise her assailant – which is understandable given the traumatic circumstances – was an impediment.

[286] The applicant fails to meet the threshold of proving any material omissions on the part of the SAPS. Imposing liability on the respondent in these circumstances is unreasonable as the legal convictions of the community, conscious of the Constitution, would not support it. This finding on wrongfulness is dispositive of all the elements for liability in delict. The applicant's claim for compensation in excess of R25 million must fail.

[287] Regarding costs, *Biowatch* applies. The applicant should have been able to trust that public spaces would be safe and that she could exercise her constitutional right to freedom of movement without the risk of harm. Although the applicant did not frame her claim under public interest law but private law, judicial supervision of steps to eliminate this social scourge must be accessible for as long as the blight persists. The trauma suffered by the applicant as a rape victim militates against awarding any costs.

[149] See [149].

But for the costs order in the Supreme Court of Appeal, I would dismiss the appeal with no order as to costs in the Supreme Court of Appeal and in this Court.

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