IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 57523 / 14

In the matter between-

N J APPLICANT

And

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES RESPONDENT

JUDGMENT

Mavundla J;

[1] On or about 1 April 2012 and at Vrede street, Oudshoom, in Western Cape the plaintiff, an adult female born in 1989, attended a festival with her friends. In the early hours, she decided to leave the festival, with the intention to go to her vehicle, so that she could drive to the place where she was to be directed by her friends to spend the overnight. She was accosted by an unknown male person she had mistaken to be one of the car guards, who attacked and attempted to assault, rape

and rob her. She valiantly struggled and managed to wrench free and ran to a lit street where she was rescued and taken to safety. The culprit was fortunately arrested that very night.

[2] The unknown assailant, she later came to know during his criminal trial, as one Ivan Botha who was subsequently convicted of common robbery and attempt, conspiracy and enticement to commit a sexual offence under MAS 11/04/2012, OSG 126/ 12.

[3] Botha had been granted parole, prior to the above mentioned attack on the plaintiff, after having been incarcerated for numerous crimes listed herein below by the Department of Correctional Services Oudshoorn:

3.1 06 August 1996 for theft 3.2 02 December 1996 for theft 3.3 30 December 1996 for theft 3.4 May 1997 for housebreaking	3.5 15 February 2003 indecent assault; 3.6 13 October 2003 rape; 3.7 06 May 2011 possession of dangerous producing substance / any undesirable dependence producing substance

[4] The plaintiff subsequently sued the defendant for payment of R2 million which she alleged were damages she suffered as the result of the aforementioned attack, contending that the defendant was negligent in releasing Botha on parole, regard being had to his record of previous convictions, it was foreseeable that he would commit another offence, such as the one committed on her. Botha had not complied with the conditions of parole and the Department of Correctional Services did not re-incarcerate him after such conditions were not complied with.

[5] In her particulars of claim plaintiff alleged *inter alia,* that:

5.1 she has constitutionally enshrined and protected rights, such as right to human dignity, right to life; right to freedom and security of person, right to privacy.

5.2 the Department of Correctional Services, as an organ of state, has a duty:

5.2.1 to effect the aforesaid human rights, and to protect women against violent crimes;

5.2.2 to develop, enforce and maintain laws, regulations and structures to realise the duty to protect society and effect the constitutional rights of individuals entrusted to their specific functionary at the best of their ability.

5.3 the Department of Correctional Services:

5.3.1 by granting Ivan Botha, a criminal with an appalling criminal record including multiple sexual offences, parole;

5.3.2 by not seeing to it that the parole conditions on which said parole was granted be enforced;

5.3.3 failed to perform its duty to protect the public and to protect women against violent crimes, more in particular the plaintiff's human rights; and

5.3.4 failed to adhere to the objectives of the Correctional Services Act, 111 of 1998 by not giving effect to the Bill of Rights in the Constitution, 1996 and by not adequately regulating the release of inmates and system of community corrections.

5.4 Due to the defendant's failure to perform its duty to protect the mentioned human rights of plaintiff and the defendant's non- compliance to the objectives of the Correctional Services Act 111 of 1998, Ivan Botha was free to rob, assault and attempt to rape plaintiff.

5.5 It was at all material times foreseeable by the Department of Correctional Services, Oudshoorn, a department failing under the Defendant:

5.5.1 that should a criminal not suitable for parole, being granted same, the public may be endangered; alternatively, reasonable officials would have foreseen that granting a criminal not suitable for parole, same the public may be endangered;

5.5.2 that should a criminal previously convicted of rape and indecent assault, the said criminal will commit a sexual crime whilst out on parole and by committing said crime, endanger the public and/ or commit a violent crime against a woman; alternatively, reasonable officials would have foreseen that should a criminal convicted of rape and indecent assault, said criminal; will commit a sexual crime whilst out on parole, any by committing said crime, endanger the public and/ or commit a violent crime against a woman.

5.6 should not have granted Ivan Botha parole in the light of his criminal history and reasonable officials would not have granted Ivan Botha parole and the defendant by so doing acted negligently and against the expectations of the public, rendering the defendant's decision to grant Botha parole, alternatively defendant's failure to foresee that by granting Both parole, the public may be endangered wrongfully.

5.7 In the light of the defendant's aforesaid wrongful conduct and culpable failure to its duty to protect plaintiff and uphold the objectives of the Correctional Services Act, 111 of 1998, the plaintiff:

5.7.1 experienced stress, physical pain, emotional scarring, pain and suffering,

5.7.2 the monetary amount thereof estimated at R2 000 000. 00, for which the defendant is liable.

[6] The following:

6.1. is common cause, that:

6.1.1 Botha was a convicted criminal, with numerous previous convictions as alleged;

6.1.2 was released on parole;

6.1.3 breached on several occasions his parole conditions;

6.1.4 was not re-incarcerated for the parole conditions violation;

6.1.5 whilst on parole attacked, attempted to assault, rape and rob the plaintiff on 1 April 2012.

6.2. it is denied that:

6.2.1 by not re-incarcerating Botha on account of the violations, the defendant failed to perform his duties in terms of the Act, its policies and the Constitution

6.2.2 defendant and its employees could have foreseen that Botha would commit the attack on the plaintiff;

6.3. as pleaded by defendant that:

6.3.1 the alleged violations were, *in* the discretion of its responsible employees who exercised it *bona fide* and in accordance with its Act, policies and Constitution, relatively minor to warrant re-incarceration.

[7] The evidence of the plaintiff: her case was based, *inter alia,* that:

7.1. Botha was placed on parole on 01/11/2010 to 19 /09/2017 by Peterson, the chairperson of the Parole Board, who recommended that in Phase I Botha had to be strictly monitored and that pre- release report is compulsory.[1] The Minutes of the Correctional and Parole board on 24 November 2009 show that the parole of Botha was approved by the Chairperson Petersen CJ; N Vange a community member, L Squire Community Member; Snr Supt Josephs and Secretary N. Gunguluza.[2]

7.2. the recommendation of case management committee had written, *inter alia,* that Botha was interviewed by the Social worker. He had a long sentence. He must attend the new SORP until module 2. He had to change his life style. He realised what he had done was wrong and can't keep going on like this. It is recommended that a further profile be submitted for reconsideration. If the CSPB take another decision, it is recommended that the offender attend more programmes;[3]

7.3. various reports were not attached and not considered by the Parole Board when it considered to release him on parole; namely: the sentence remarks; sentence plan progress report; report by work place supervisor; confirmation of employment offers; report by psychologist, report by religious worker; pre-release program and supplement to parole report.[4]

7.4. the case management committee on 22 October 2007 through Fourie had recommended that Botha must undergo restorative programmes; go to a psychologist to look into his sexual behaviour and that a further profile be submitted on 2009 October 31.[5]

7.5. the report of Social Worker Ms Cronje, dated 14/08/2009, stated *inter alia* that Botha developed a understanding of what sexual violence is and how he need to change his life style. His alcohol abuse has a direct influence on his sexual deviant behaviour. This report also pointed out that the offender attends the new SORP until Module 2. The Evaluation is that the offender show remorse for his actions. He gave positive cooperation and want to

[1] Page 1 annexure "IA" of trial bundle Volume 3.
[2] Page 84 of "IA" of trial bundle Volume 3.

[3] Page 7 of " IA" of trial bundle Volume 3.
[4] Annexure " IA" of trial bundle Volume 3 pages 22; 23;58, 61; 64 inter alia; trial Bundle Two: pages 105;109;112;115

change his lifestyle to refrain from criminal behaviour. He has the ability to apply the new skills he has learnt. He needs to take responsibility for the life style. Planning Module 3-5 until October 2009.[6]

7.6. she opined that because Botha had breached some of his parole release conditions, and had committed multiple sexual offences, and had not attended some of the recommended programmes he should not have been released on parole alternatively should have been re-incarcerated and therefore the defendant was negligent in releasing him on parole;

7.7. she further opined that regard being had to Botha's list of previous conviction, it was foreseeable that he would commit another sexual offences as he in fact did on her.

[8] Under cross examination, the plaintiff conceded that:

8.1 she has not gone beyond matric at school;

8.2 she is not tutored or trained in any discipline;

8.3 she is not qualified to give expert opinion;

8.4 Botha after a certain period as a convicted criminal statutorily qualified to be released on parole;

8.5 the alleged parole breaches related to home visits;

8.6 the breaches were considered by the parole board to be minor;

8.7 according to Ms Cronje the social worker, Botha received positive support from his mother and shown remorse for his actions and wanted to change his life;[7]

8.8 according to the Health Care Nurse Jaer report Botha is fit to be released on parole; report dated 23 07 2009;[8]

8.9 while in prison Botha did not commit any offence or breach any prison condition;

8.10 the parole board exercised its discretion in placing Botha on parole;

8.11 she is unable to say what the outcome of the psychologist report would have concluded;

8.12 she was not objective in her views that Botha should not have been

[5] Page 129 Bundle Volume two page 129.
[6] Trial Bundle Volume Two paginated page 108.
[7] Trial Bundle Volume Two paginated page 47

released on parole or should have been re- incarcerated.

[9] The plaintiff did not call any other witness, but through her counsel indicated that she also relied on the joint minutes of experts and reports of other experts for her case. Her case was closed.

[10] The defendant applied for absolution from the instance, contending, *inter alia,* that the plaintiff has not made out a case, upon which a court applying its mind reasonably on the evidence presented by her could find in her favour. There is no evidence to show any negligence on the part of the defendant, no evidence to show a prima facie wrongful causation, nor no *prima facie;* Adv Gwala SC submitted that plaintiff has to prove *prima facie* wrongful causation negligence, foreseeability, and causal connection. No evidence to show any negligence on the part of the defendant; no *prima facie* evidence of foreseeability, nor causal connection. It was submitted that there was no wrongfulness in releasing a prisoner, such release is statutorily mandated once a prisoner has served one third of his sentence. Senior counsel further referred the Court to the matter of *Steenkamp NO v The Provincial Tender Board of Eastern Cape.*[9] Needless to state that this application was vehemently opposed on behalf of the plaintiff.

[11] It is trite that the test to be applied in considering absolution from the instance at the close of the case for the plaintiff, is 'whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff.. .' *Vide Claude Neon Lights (SCA) Ltd v Daniel*[10] approved by the *Supreme Court of Appeal* in *Gordon Lloyd Page & Associates v Riever and Another.*[11]

[12] In the matter of *Ruto flour Mills (PTY) Ltd v Adelson*[12] it was held inter alia that: If the defendant does not call any evidence but closes his case immediately, the question for the Court would then be: "Is there such evidence upon which the Court *ought* to give judgment in favour of the plaintiff?" if the evidence is not only

[8] Trial Bundle Volume Two paginated page 114
[9] 2006 (3) SA 151 (SCA) at 162E-163A.
[10] 1976 (4) SA 403 (A) at 403G-H.
[11] 2001 SA 88 (SCA) at 92E-93A.
[12] (2) 1958(4)307{TPD) at 309E-F

convincing, but actually found by the trial Court to be an utter fabrication - *(Katz v Bloomfield,* 1914 T.P.D. 397 at p. 381; *Theron v Behr,* 1981 C.P.D 443; *Hodgkinson v Fourie,* 1930 T.P.D 740 at p 745)- or, if it be a fact that it is too vague and contradictory to serve as proof of the question in issue - *(Shenker Bros. v Bester,* 1952 (3) SA. 664 (A.O.) at p 670)- then it would be evidence on which a reasonable man would not find, and the court would be perfectly justified in granting absolution from the instance at the close of the case for the plaintiff.

[13] In the matter of Rosherville Vehicle Services v BFN Plaaslike Oorgaaansraad[13] the Court held that: "W)hen absolution from the instance is sought at the close of plaintiffs case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."
The purpose of absolution application is clear. When the plaintiff has placed all his evidence before the Court, and it appears that that evidence does not have a potential of achieving a decision in favour of the plaintiff, it would be senseless to allow the proceedings to continue. The test to be applied is aimed at determining whether the evidence of the plaintiff has the potential of having a decision in his favour. Albeit Bewysreg (989) at 83.
The test is a fraction lower than the *prima facie* case: the evidence need not call for an answer. Nonetheless it must have the likelihood of a finding in favour of the plaintiff: a reasonable court must thereon be in a position to find in favour of the plaintiff."

[14] I must hasten to refer to the matter of *McIntosh v Premier, KwaZulu-Natal and Another*[14] the Supreme Court of Appeal held, *inter alia,* that: "[12] As is apparent from the much-quoted dictum of Holmes JA in Kruger v Coetzee 1966 (2) SA 428 {A) at 430E - F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the diligens paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms

[13] 1998 (2) SA 289 at 293D-G
[14] 2008 (6) SA l SCA.

of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as... perform some or other act positive act, and if so whether the failure on the part of the defendant to do so amounted to a breach of that duty.

[13] .... .

[14] The crucial question, therefore, is the reasonableness or otherwise of the respondent's conduct. This is the second leg of the negligence inquiry. Generally speaking, the answer to the inquiry depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations, including such factors as the degree or extent of the risk created by the actor's conduct, the gravity of possible consequences and the burden of eliminating the risk of harm. See Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA) para 7...".

[15] In the Steenkamp matter *(supra)* it was held that:

> **"THE GENERAL APPROACH TO DELICTUAL LIABILITY FOR PURE ECONOMIC LOSS CAUSED BY ADMINISTRATIVE BREACHES**
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> [27] Subject to the duty of courts to develop the common law in accordance with constitutional principles, the general approach of our law towards the extension of the boundaries of delictual liability remains conservative.[15] This is especially the case when dealing with liability for pure economic losses.[16] And although organs of state and administrators have no delictual immunity, 'something more' than a mere negligent statutory breach and consequent economic loss is required to hold them delictually liable for the improper performance of an administrative function.[17] Administrative law is a system that over centuries has developed its own remedies and, in general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in another direction."[18]

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[15] Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pry) Ltd 1985 (l) SA 475 (A) at 500D.
[16] Telematrix (Pty) Ltd v Advertising Standards Authority SA (SCA case 549/04, unreported); Premier, Western Cape v Faircape Property Developers (Pty) Ltd 2003 (6) SA 13 (SCA).
[17] Mason J in Kitano v The Commonwealth of Australia (1973) 129 CLR 151 at 174-175. Referred to with approval in Dunlop v Woollahra Municipal Council [1981] l All ER 1202 (PC) at 1208f-g. The case concerned the liability of a local authority in tort for passing an ultra vires resolution.
[18] State of New South Wales v Paige [2002] NSWCA 235 at para 172: 'Compensatory damages for

[16] The plaintiff's case is essentially that:

16.1 Botha was prematurely released on parole;

16.2 various documentations were not attached, consequently were not considered in determining the suitability of placing him on parole;

16.3 in her opinion Botha should have been incarcerated once he breached his parole conditions.

[17] It needs mentioning that the recommendation by the CMC that Botha should be assessed by a psychologist to look at his sexual behaviour was made on 2007/10/22 (paginated page 129 Trial Bundle Volume Two). The fact that a report of psychologist regarding his sexual behaviour was not attached, Is in my view, watered down by the fact that Cronje's report dated 14/08/2009, stated *inter alia,* that Botha developed an understanding of what sexual violence is and how he need to change his life style. (vide 6.4 supra). Besides the plaintiff conceded that she cannot say what the psychologist would have said.

[18] It is trite that the placing on parole of a prisoner serving determinate sentence is in the discretion of the Parole Board, if it is found that the said prisoner qualifies to be so placed on parole, which decision is a value judgment. In this regard the nature of the offence or offences of the prisoner, his history, his behaviour and progress made during incarceration, his domestic circumstances and employment opportunity. In this case, the Parole Board found that Botha qualified to be placed on parole. In my view, there is no evidence placed before this court which demonstrate that such decision was tainted or floured.

[19] It is common cause that in 2007 Botha was not placed on parole because further assessments were recommended. He was however eventually through a decision taken by a majority vote of four on 2009/10/21/24 by the Correctional Supervision and Parole Board placed on parole on 01/11/2010 to 19 /09 /2017. (vide paginated page 84 of Trial Bundle Volume Three.). The attack on the plaintiff occurred during this period of parole.

[20] In my view, the plaintiff is a lay person and not an expert in any discipline, as

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administrative error are available only in very limited circumstances.'

such her opinions are of no great moment and remain to be ignored. I am unable to find that on the evidence placed before this court, there is evidence upon which a court, applying its mind reasonably to such evidence, could find for the plaintiff. It stands to follow that absolution should be granted with the general principle that costs follow the event.

[21] The defendant employed the services of two counsel, justifiable so in my view, regard being had to the quantum claimed and the fine point of law involved in this matter.

[22] In the result the following order is issued:

1. That absolution is granted;
2. That the plaintiff is ordered to pay the costs inclusive the costs of two counsel.

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N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	: 18/09/2017
APPICANTS ADV	: ADV. (Ms) BURGENTEIN
INSTRUCTED BY	: HURTER SPIES INC.
RESPONDENTS' ADV	: ADV. GWALA S.C. with
	ADV. (Ms) SHIBE
INSTRUCTED BY	: STATE ATTORNEY PRETORIA
INSTRUCTED BY	: DIALE MOGASHOA ATTORNEYS.