IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 27220/2010

L P Plaintiff

and

MINISTER OF CORRECTIONAL SERVICES First Defendant

ADAM STRYERS Second Defendant

Court: Justice J Cloete
Heard: 30 and 31 October 2017; 1, 2, 15, 16, 20, 21, 22 and 23 November 2017; 5,6 7 and 8 March 2018; 18 and 19 February 2019; 7 August 2019; supplementary written submissions 9 and 17 October 2019.
Delivered: 5 November 2019

JUDGMENT

CLOETE J:

Introduction

[1] The plaintiff claims damages from the defendants, jointly and severally, arising from an alleged sexual assault at the hands of the second defendant ("Stryers") on

9 January 2009 while both were on duty in the employ of the first defendant ("the Minister"). The merits and *quantum* were previously separated and the trial thus proceeded on the merits only.

[2] The issues for determination at this stage are whether: (a) the plaintiff was assaulted by Stryers; and (b) if so, whether Stryers acted in the course and scope of his employment at the time of the assault and the Minister is thus vicariously liable. The last issue requires some clarification.

[3] In his plea Stryers denied that he assaulted the plaintiff in the manner alleged or at all. He admitted however that at all relevant times he was on duty and acting in the course and scope of his employment.

[4] The Minister pleaded that he did not admit the assault, given Stryers' denial, but fairly disclosed that the chairperson of a subsequent internal disciplinary hearing found Stryers guilty of sexual harassment and imposed a 6 months final written warning as a sanction. While accepting that Stryers had been on duty, the Minister denied that he was acting at the time in the course and scope of his employment as alleged (despite the former's admission to the contrary) and pleaded further, in the alternative, that in the event of such assault being proven, then his Department acted reasonably in addressing the assault and the plaintiff's complaint, and is consequently not vicariously liable for Stryers' conduct.

[5] However, before the commencement of the trial the plaintiff and the Minister agreed, for reasons not disclosed to the Court, that the determination of vicarious

liability does not involve a consideration of the Minister's plea in the alternative. They instead agreed that this is a matter to be canvassed only in relation to *quantum* if the plaintiff succeeds on the merits. I will thus not refer to any of the evidence adduced on events subsequent to the incident except insofar as it is strictly necessary to do so.

[6] The trial ran for 16 days (excluding argument) over a prolonged period, mostly due to the unavailability of counsel as it progressed and the delay caused by the Minister's instruction, during the course of the trial, to join Stryers by way of a third party notice. By agreement, an order was granted to this effect on 12 December 2018, but the Minister thereafter failed to comply with uniform rule 13(5), i.e. delivery of the third party annexure itself, as a consequence of which Stryers was not obliged to comply with uniform rule 13(6). It is not in dispute that there is therefore no third party claim before the Court.

The evidence

[7] In addition to her own testimony, the plaintiff called three witnesses, namely Messrs Du Plessis and Plaatjies and Ms Manus to testify on her behalf. Stryers testified but called no other witnesses. The Minister called three witnesses, namely Ms Nyokana, Ms Le Roux and Mr Sontlaba. It is not necessary to deal with the evidence of Ms Nyokana since it turned out to relate to events subsequent to the incident; and the evidence of Ms Le Roux was so unreliable that counsel for the Minister correctly did not even refer to it in argument.

[8] The plaintiff testified that she became permanently employed as a social worker by the Department of Correctional Services ("the Department") in 2004, initially at Brandvlei Medium Corrections Centre and later, during the first half of 2006, at Dwarsrivier Corrections Centre ("Dwarsrivier") just outside Wolseley. She resigned in early 2013.

[9] She recalled having first come into contact with Stryers in the second half of 2008 when he was appointed as CC Corrections, Dwarsrivier, but later accepted that he was in fact appointed to this position in April 2007. Both lived in Worcester and would commute daily in the centre's staff vehicle to and from work along with other employees.

[10] Dwarsrivier is small compared to other centres, with a population of about 300 (male only) offenders. She was the only social worker permanently employed there for most of her tenure. At the time when the incident occurred on Friday 9 January 2009 the Head of Centre was a Ms Claassen. Falling directly below Ms Claassen in the reporting line were three Senior Correctional Officials – all of whom occupied the same tier or "level" – and who were also referred to as Centre Co-ordinators (or CC's). These were the CC Operational Support (Sontlaba), CC Staff Support (Du Plessis) and CC Corrections (Stryers).

[11] The nursing staff, social workers and similar professional employees fell under the CC Operational Support; human resources under the CC Staff Support; and offenders and correctional services staff such as warders under the CC Corrections. The latter was also the custodian of the Offender Rehabilitation Path ("ORP")

programs, and the unit manager (Plaatjies) and case officers (correctional service officers who had completed the required courses) reported to him as well.

[12] Her evidence was also that all offenders sentenced to longer than a certain period of imprisonment (according to Stryers, this applied to those sentenced to imprisonment for a year or more) were evaluated on admission for the purpose of identifying an appropriate sentence plan (an integral part of the ORP), which could include one or more programs directed at education, anger management, drug or sexual offender rehabilitation, as well as other non-therapeutic correctional programs, such as life and business skills, presented by case officers. The plaintiff was responsible for assessing each such offender to determine appropriate therapeutic program(s) – such as anger management, drug and sexual offences – as well as rendering these programs. Each offender's sentence plan required monitoring, given that it played a crucial role in the later assessment of eligibility for parole.

[13] On the occasions that the Head of Centre was not available then one of the Senior Correctional Officials would stand in as Acting Head. Usually this was Sontlaba (CC Operational Support) who was second in command and the staff members who had to report directly to him, such as the plaintiff, would then report to one of the other two Senior Correctional Officials.

[14] Given their respective positions and responsibilities, the plaintiff would generally have contact with Stryers on a daily basis. She was also required to attend regular Case Review Team ("CRT") meetings, at least once per month, along with Stryers

as custodian of the ORP, Plaatjies as unit manager and other role players responsible for presentation of the ORP programs. If Stryers was not available Plaatjies would chair these meetings. Their purpose was to review the progress of each offender's sentence plan in the presence of the offender concerned. Given their caseload, priority was usually given to those offenders who would become eligible for parole within the following 6 to 12 months.

[15] The therapeutic programs were rendered on a group basis. Because of the particular environment, the plaintiff had to take care to ensure that the dynamics within each group were suitably conducive for this purpose. She thus needed to know, for example, whether any offender was a member of a particular gang within the centre to avoid the potential conflict that might arise if members of rival gangs were placed in the same group. This involved regular interaction with Stryers who was best placed to provide this information as well as guidance on how it should be handled, usually behind closed doors due to the confidential nature of these discussions.

[16] The plaintiff was also responsible for dealing with individual offender complaints and requests of a social work nature. These were recorded in registers by the Senior Correctional Official concerned (usually Stryers as a result of his position) or Plaatjies as unit manager. She was required to respond to these within 7 days and record her response in these registers which were checked on a regular basis, again usually by Stryers.

[17] Her workload was immense and she would keep Stryers informed about her challenges, given his position as custodian of the ORP. According to her, Stryers was in a position to report her to the Head of Centre for failing to properly fulfil her duties, which could have resulted in disciplinary steps being taken against her. He could also influence her performance evaluation (a precursor to receipt of any performance bonus). Such was his position of authority over her that he was also, as a Senior Correctional Official, able to authorise or refuse permission for her to take leave of absence when the Head of Centre was not available and her direct superior, Sontlaba, had assumed the position of Acting Head. She referred to one documented occasion when Stryers had favourably recommended her request for leave. Prior to the incident, none of this posed any difficulty since the plaintiff and Stryers enjoyed a good working relationship and she considered him to be a trusted mentor and "father figure". When describing her interactions with Stryers she referred to him as "Meneer" and to him addressing her by her surname.

[18] At the time of the incident the plaintiff and Stryers occupied offices about 20 paces from each other[1] in the same corridor, although at opposite ends. On that morning Stryers approached the plaintiff in her office to obtain the key to another office in which the communal computer modem was located (he had a problem with his email). She handed it over and left to render one of her group therapeutic programs, where there was an incident in the adjoining passage involving offenders who were fighting. The prison staff brought the situation under control and after she completed the session, she returned to her office and continued with her work. At a point she

[1] Stryers testified as to the distance.

remembered that Stryers had not returned the key which she needed to retrieve because the inventory for that office was her responsibility.

[19] She knocked on Stryers' door. He was working on the computer. She told him she was there to collect the key and picked it up from his desk. He asked her for assistance in sending an email which she gave. As she was leaving he called her back. She closed the door, assuming that he wished to discuss with her the altercation in the centre that morning.

[20] She took a seat across from his desk and he handed her a pamphlet of a restorative justice program which he had been given by an offender transferred from another centre for comment. She glanced through it and they held a brief discussion in which she expressed concern about its appropriateness to the South African situation. After asking after her young daughter, Stryers told the plaintiff that he had dreamt about her as a man dreams about a woman. Uncomfortable, she got up to leave. He came around from behind his desk and stood between her and the door.

[21] As she tried to pass he grabbed her with both arms around her waist, pinning down her arms and putting his hands on her bottom. He kissed her, trying to force his tongue into her mouth, at the same time pushing his lower body against her. She managed to wriggle free and fled in the direction of her office, encountering Ms Manus along the way. Manus accompanied her into the office, and as she was reporting to her what happened, Stryers called her on her office extension. She ignored his call. Manus advised her to report the incident to the Head of Centre

immediately. However the plaintiff was too distressed at that point and all she could think of was getting away from the premises. She had to travel home in the staff vehicle with Stryers shortly thereafter, and texted Manus from the vehicle to express her dismay.

[22] It is common cause that the plaintiff reported the incident on the following Monday, 12 January 2009 and that in addition to the internal disciplinary proceedings, Stryers was subsequently convicted in the magistrate's court on 14 April 2011 on one count of sexual assault and sentenced to a fine of R600 or 12 days imprisonment. Despite maintaining his innocence and being granted leave to appeal his conviction by the magistrate, he did not pursue any appeal.

[23] It is also common cause that the plaintiff subsequently received treatment from a psychologist and a psychiatrist (including two periods of hospitalisation) for post-traumatic stress. From 14 January 2009 until 13 March 2009 (i.e. during the two months immediately after the incident) she took sick leave of 25 working days. Following the conclusion of the disciplinary hearing on about 3 September 2009 she took sick leave, from 9 September 2009 until 13 November 2009 (again about two months), of 39 working days. Her sick leave record reflects that all of this leave directly related to her post traumatic stress.

[24] During the plaintiff's cross-examination the Minister maintained that Stryers had no managerial authority over her, because he was not her official supervisor. She responded that although Stryers was not her direct supervisor, she was

nonetheless obliged to report to him in respect of the therapeutic programs she rendered.

[25] This too was disputed since, according to the Minister, the plaintiff should have reported, in relation to these programs, not to Stryers directly but to Plaatjies as unit manager, who was also responsible for convening the CRT meetings as part of his official job description. The plaintiff responded that, irrespective of what documentation detailing the responsibilities of a particular official might contain, at Dwarsrivier the execution of responsibilities, and the interaction between herself and Stryers, in fact occurred in the manner she described.

[26] According to the Minister, Plaatjies in fact convened the CRT meetings and it was only on the rare occasion when he was unavailable that Stryers would stand in for him. With reference to other Departmental documentation, the Minister disputed that the plaintiff regularly attended the CRT meetings and contended that she was only obliged to do so upon request. The plaintiff stuck to her version.

[27] The plaintiff agreed that Stryers never in fact reported her for any infraction, but stated that he would have had no need to do so given that she managed to fulfil her duties before the incident despite her workload. The plaintiff accepted that it was either Sontlaba (her direct supervisor) or the Head of Centre who would ultimately have to approve any application she made for leave of absence. However she testified that when Sontlaba was unavailable (including those periods when he was acting as Head of Centre) she would approach one of the other Senior Correctional Officials (i.e. Du Plessis or Stryers) or the nursing sister, Ms Matthys (who occupied

a rank senior to her) to first obtain a recommendation for such leave. Her evidence was further that, given the close proximity between their respective offices, she would generally approach Stryers for this purpose.

[28] Although Sontlaba was responsible for the annual completion of her performance *'booklet'*, the plaintiff's evidence was that he was logically entitled to obtain input from other senior role players, such as Stryers, for purposes of reporting on such performance. She accepted that, had any negative input been provided, she would have been afforded the opportunity to respond thereto. She also accepted that prior to the incident Stryers never gave negative input, explaining that he would have had no cause to do so.

[29] The Minister disputed that the plaintiff and Stryers were discussing a work related matter when the incident is alleged to have occurred. It was contended that the discussion regarding the restorative justice program booklet was "informal" only. The essence of the Minister's contention was that because Stryers was not officially in charge of the overall restorative justice program which emanated from Head Office, he had no authority to discuss such a booklet with the plaintiff and therefore it had not occurred during the course and scope of their employment. The following exchange is relevant:

> *' So my instructions are that, you know, it is clear from the description of what you've given to the Court that Mr Stryers obviously gave you this programme informally, because he is not in charge of Restorative Justice programmes. --- Soos wat ek gesê het, hy het die program vir my gegee om daarna te kyk, en dis wat ek mos gedoen het. Dis wat ek gesê het.*

> *Yes. But you said more than that. You seem to suggest very strongly to the Court that that was part of your everyday working relationship. I'm telling you, I'm putting it to you that it wasn't part of your everyday working relationship, and that he just gave you something to look at informally. --- Onthou, soos wat ek weereens gesê het, in terme van my programme, ek het gestandaardiseerde programme. Niks en niemand verander dit nie. Ons kry die programme wat ons as maatskaplike werkers aanbied, van hoofkantoor af. Dit word ontwikkel vir ons. Die programme wat binnekant – die korrektiewe programme wat aangebied word, is 'n ander saak. Dit sluit nou in* (indistinct)*. Ek weet op hierdie stadium is daar 'n vasgestelde* Restorative Justice*-program. Op daardie stadium het hy net die program vir my gegee, dis wat ek gesê het, om daarna te kyk, om my* input *te kry. Dis wat ek aanneem dis hoekom hy dit vir my gegee het, want die program moes een of ander tyd wel daar by ons ook geïmplementeer word. En vanuit die feit dat ek 'n maatskaplike werker is en baie dan te doen sou hê met die… slagoffervoorbereiding op hierdie* Restorative Justice*-sessies, is dit mos vanselfsprekend dat hy dit dan vir my sal gee, want ek gaan 'n part speel in die hele proses.'*
>
> [Emphasis supplied].

[30] When asked to explain why the plaintiff sought to hold the Minister responsible for the alleged assault, she responded:

> *'… want dit het by die werk gebeur soos wat ek mos alreeds netnou gesê het, in die werktyd by die werksplek terwyl ons werk goed bespreek het. As hy nie by die werk was nie dan sou dit mos nie gebeur het nie of as hy nie daar gewerk het nie.'*

[31] Stryers' version was that his relationship with the plaintiff extended beyond the workplace to a close personal friendship, with her regularly confiding in him and seeking guidance on a range of personal issues. She agreed that he was aware of her personal circumstances (as a widow with a young daughter) and that, given that he is also a lay preacher who would lead prayers at the centre each morning, he

would from time to time include her in emails with a spiritual message and enquire about her welfare and that of her daughter. However she regarded this as nothing other than a natural extension of their trusted working relationship.

[32] During cross-examination on behalf of Stryers, he did not dispute that she regularly discussed her caseload with him. However his version was that this was as a consequence of their personal friendship, whereas she viewed it to be a consequence of their working relationship since it did not primarily relate, as he suggested, to support and encouragement, but rather to practical advice on how to manage it effectively within prescribed deadlines.

[33] Manus testified that she has been employed by the Department since 1999, initially as a correctional services officer and later as an educator. At the time of the incident she had been a colleague and friend of the plaintiff's for about 3 years.

[34] On that day Manus was waiting at the exit to leave the centre when she noticed the plaintiff walking in her direction towards her office. She saw that the plaintiff was pale and upset, and approached her to enquire what the problem was. The plaintiff was holding her hand over her mouth, trying not to cry. She told Manus that she had been grabbed by Stryers, that she had been in his office and he told her that he had been dreaming about her and had feelings for her. Stryers had kissed her and tried to push his tongue into her mouth.

[35] Manus advised her to immediately report the incident to the Head of Centre. However the plaintiff, shaking and emotional, told Manus that she was not up to

reporting it immediately. All that she wanted to do was leave the premises and get away from Stryers. Manus confirmed that during their conversation the plaintiff's office telephone rang. She confirmed receipt of the plaintiff's subsequent text message when the latter was travelling back to Worcester in the staff vehicle.

[36] It was Stryers' version that he was not surprised that the plaintiff was upset when she left his office, because she had unburdened herself to him about a number of personal difficulties. Manus responded that she had encountered the plaintiff earlier that day and she was fine. Manus was shocked that Stryers, one of her seniors and a pastor, had done such a thing. Manus, a good witness, was patently honest and her evidence corroborated that of the plaintiff's in all material respects.

[37] Plaatjies was appointed as unit manager at Dwarsrivier in January 2007 and was promoted in June 2010 to Head of Centre, a position he occupied until his resignation in January 2015 to pursue a business opportunity. He is an educated, articulate individual who impressed favourably as a witness.

[38] He confirmed the plaintiff's evidence regarding the hierarchical structure within the centre, with one qualification, namely that as unit manager he occupied the same rank as the Senior Correctional Officials. His responsibilities included overseeing the units where the offenders were housed, ensuring that they were kept in safe custody, and supervising case management. He reported to Stryers as CC Corrections and worked closely with him on offender related matters.

[39] His evidence was further that those individuals at management level (including himself) were obliged, for practical purposes, to fill in for each other on a regular basis, principally for three reasons. First, there were invariably vacant posts that were not filled due to Departmental constraints. Second, the management officials were tasked with a number of other duties outside the centre itself, such as disciplinary matters, investigation of financial losses and assisting in collating documentation for audit purposes. Third, management officials would be on leave at various periods throughout any given year. The management officials not only filled in for each other on such occasions but also acted as Head of Centre when the latter was not available for the same or similar reasons.

[40] On such occasions, staff would approach one of the other Senior Correctional Officials for a leave recommendation and the Acting Head for final approval. If for example only one manager was present at the centre at any given time then the staff member concerned would be obliged to obtain such approval from that manager. It regularly occurred that only one manager was physically present, and thus in overall control, of the centre. Stryers himself had assumed these responsibilities on a number of occasions, including those pertaining to disciplinary issues, both in relation to staff and offenders. When Stryers was not available for this reason it was usually Plaatjies who stood in for him. As such he had personal experience of what in reality occurred at the centre with staff members such as the plaintiff.

[41] Plaatjies explained that the CC Corrections had ongoing interaction with the role players involved in the ORP, primarily because he was responsible for ensuring that

they delivered the services which they were employed to perform. This thus obviously included the plaintiff. He referred to the Case Assessment Team ("CAT") which was responsible for the initial assessment of an offender who was not transferred from another centre with a sentence plan already in place (according to him, newly incarcerated offenders accounted for about 30% of the total centre population). Both Stryers and Plaatjies would attend these meetings. The CAT also reported to Stryers as CC Corrections. Ideally, the CAT met once per month. In about May 2009 (after the incident) the CAT was done away with and a new system was implemented.

[42] Both newly incarcerated and transferred offenders fell under the auspices of the CRT in order to ensure the effective implementation of their sentence plans. The CRT would usually meet on a quarterly basis. Plaatjies was tasked with chairing these meetings as unit manager but when he was unavailable Stryers would do so. Although the various role players were technically not required to attend each CRT meeting, it was common practice for them to be requested to attend to provide immediate and direct input when required. This thus again included the plaintiff.

[43] When it came to completion of staff performance *'booklets'* a staff member's direct supervisor would in certain instances obtain input from other management officials whose portfolios included the functions that such a member was obliged to perform. Plaatjies himself had done so on a number of occasions: *'I found it the most logical thing to do if I'm not directly supervising the programs part of my subordinate.'*

[44] As far as recordal of offender complaints and requests was concerned, it was Plaatjies' practice to interact directly with the staff member who was to be instructed to attend thereto. This was a small centre and the CC Corrections and various professional staff (including the plaintiff) had offices located in close proximity to each other. It was also the responsibility of the individual who recorded the complaint or request in the register – usually Stryers or failing him Plaatjies – to ensure that the complaint was attended to timeously, and the register was in any event located in Stryers' office.

[45] It would also frequently occur that an offender, under the guise of a complaint or request, would ask to see the social worker to report matters such as sexual abuse, pressure by co-offenders to commit an offence, or a planned incident such as an escape. Many of the offenders are dangerous individuals. The offenders trust the social workers. It was thus imperative that for safety and security purposes the information conveyed to the social worker was treated in the strictest confidence and dealt with swiftly. The social worker would accordingly convey the information received directly and discreetly to the Head of Centre or manager concerned which, for obvious reasons, in most instances was Stryers or Plaatjies.

[46] He confirmed that it was also necessary for the plaintiff to keep abreast of potential strife between offenders for purposes of rendering the group programs effectively, and that she would obtain this information from the managerial staff. In his words *'she would be expected to ask that of Mr Stryers or myself or any other manager who is closer to her at that specific given moment'.*

[47] Plaatjies disagreed with the Minister's version that Stryers had no direct involvement in the implementation of the ORP and that he merely had an oversight role. According to the Minister, it was the Head of Centre who was responsible for such implementation. He strongly disagreed that, as contended by the Minister, Stryers had never chaired a single CRT meeting. Plaatjies acted as CC Operational Support from March/April 2007 until Sontlaba was appointed to this position in May 2008. During that period Stryers assumed all of Plaatjies' responsibilities as unit manager and accordingly chaired all CRT meetings. It was only thereafter that Stryers would chair these meetings on the occasions that Plaatjies himself was not available.

[48] The Minister sought to draw a distinction between "official" positions and those occasions where, on a practical level, one or other manager was in overall control of the centre. He seemed to suggest that a particular manager could only be regarded as having authority over the centre if he was officially appointed on a Departmental letterhead, and that therefore, because Stryers had only been officially appointed as Acting Head for two days in March 2010, he was never in fact in control of the centre on all of the other occasions.

[49] According to the Minister, in any event a manager was nonetheless required to fulfil all of the duties of his own portfolio even when either officially or practically filling in for another. Plaatjies disagreed, pointing out that if a particular manager was physically absent from the centre it would not be possible, for example, to take complaints or requests from offenders in person. In his words *'I pointed out, M'Lady,*

previously, we are a very small correctional centre so the manual might create the idea that we are very worlds apart [but]*… we worked very close'.*

[50] He was referred to the official Departmental job description for the CC Corrections as it was at least in 2006, in which one of the responsibilities was management of offender programs. The Minister contended that this was also limited to an oversight role, because according to the document, the unit manager and chairperson of the Case Management Committee ("CMC") had to report to the CC Corrections. Plaatjies disagreed that it was limited to an oversight role in the sense relied upon by the Minister. In his experience, it included *'intervening'* with all relevant role players to ensure they carried out their responsibilities properly.

[51] Plaatjies disputed the Minister's instruction to his legal team that there was no direct interaction between Stryers and any professional staff member, be it educators or social workers, and that direct interaction was only at *'unit level'*.

> *'M'Lady, I wish to say that instruction is incorrect. As you could read from the job description of Centre Coordinator Corrections as well as in my own experience of serving at Dwarsrivier, CC Corrections has been the most hands-on person talking to all relevant role-players with regard the processes of the ORP, with regard to programmes being rendered, any challenges being experienced if a certain service or PDS person cannot render a programme, that's where CC Corrections plays a role, especially the scenario for a small correctional centre like Dwarsrivier. We, as I want to repeat, as I said earlier, we narrowly worked together at Dwarsrivier Correctional Centre.'*

[52] Plaatjies was later referred to a statement made by Stryers himself shortly after the incident in which the latter complained of having to chair all CRT meetings during 2008. This objective evidence, under Stryers' own hand, provided material corroboration for the testimony of the plaintiff and Plaatjies in this regard.

[53] Du Plessis was appointed as the CC Staff Support at Dwarsrivier in September 2008, a few months before the incident. He was transferred to Worcester Males Corrections Centre in May 2009. While at Dwarsrivier his responsibilities included human resources, finance, transport and overall custody of state property. He is familiar with Departmental policies and procedures, having been trained and having gained prior experience at other centres.

[54] He testified that during his time there he was required to step in as *de facto* acting Head on a number of occasions, in the absence of the Head and other managers: *'U Edele, baie keer weens die omstandighede in Dwarsrivier moes jy help waar jy kan. As iemand nie die dag by werk is nie en daar is 'n dringende matter wat aandag geniet, dan moet jy maar in keer.'*

[55] He was referred to extracts from the Head of Centre diary and demonstrated that between May and September 2007 alone, Stryers was *de facto* in charge on 30 occasions and on numerous others between 28 July 2008 and 20 December 2008. He disputed the Minister's version that the entries in the diary meant nothing more than that top responsibility was assumed only for shift purposes: *'…hy is ten volle verantwoordelik vir enigiets wat gebeur, he needs to account, so you are in the shoes of the Head of the Centre when you take over the diary.'*

[56] With reference to the complaints and requests register it was his evidence that, according to standard Departmental policy and procedure, the official who noted them down (in a number of documented instances, Stryers) was the one responsible for delegating it to the relevant staff member for attention (in a number of documented instances, the plaintiff).

[57] He maintained that the delegating official was responsible for ensuring that the subordinate staff member attended to it promptly and efficiently within 7 days. He thus disputed the Minister's version that this responsibility fell squarely on Plaatjies only as unit manager:

> *'Now Mr du Plessis if one uses Mr Stryers as an example if he were the one to follow up personally that complaints are attended to then he would be walking around with this register in his hand every day and he would be doing nothing else, so even from a practical perspective that is not realistic, and that is not how it happened in practice. --- My Edele om met die register fisies te loop na die persoon toe sou dit nog nie binne die sewe dae afgehandel is nie, is nie die enigste opsie nie, ons het telefone, ons het eposse, jy kan die persoon bel en navraag doen wat nog nie eers 'n halwe minuut vat nie, so om te loop met die register fisies is net nie die enigste keuse of metode om dit op te volg nie.'*

[58] According to Du Plessis, where there were complaints and requests which could be dealt with on the turn, it was unnecessary to record them in the register but only to ensure that they were noted in the offender's case file. He himself handled them in this manner on various occasions, given that in most instances they would be relayed when the cells were unlocked in the morning which it was common cause was a responsibility he assisted with from time to time. It was Stryers' version that, when it came to him personally, his responsibility ended when he delegated the

handling of a complaint by making a note to that effect in the register. Although he conceded having no personal knowledge of the *modus operandi* adopted by Stryers and Plaatjies, and that those extracts before Court did not contain his signature, he denied that he was unfamiliar with standard policy and procedure or that he never in fact made any such recordals in the register.

[59] As previously indicated I have no hesitation in accepting the evidence of Manus and Plaatjies as honest, reliable and credible. I also have little difficulty in accepting the evidence of Du Plessis as well as that of the plaintiff. Although they were not as impressive as Manus and Plaatjies, I have no reason to doubt that they were essentially honest witnesses who played open cards with the Court. On the material aspects, their testimony was corroborated to a degree by objective evidence, and also by that of the other two witnesses. Moreover, although the plaintiff and Plaatjies are no longer in the Department's employ, and would thus have little to lose by embellishing their testimony, the same cannot be said of Manus and Du Plessis who remain so employed.

[60] On the other hand, Stryers, to put it mildly, was an extremely poor witness. I will not deal with his evidence in detail because, as the record will show, he repeatedly demonstrated himself to be untruthful. His testimony was riddled with contradictions and it is no surprise that in both the internal disciplinary and criminal proceedings that followed the incident he was found guilty of sexually assaulting the plaintiff. Indeed it was often difficult to make sense of his testimony in relation to his version of the incident itself, and no purpose would be served by attempting to summarise it. It therefore also came as no surprise that his legal representative was clearly

constrained to go through the motions in argument, and counsel for the Minister did not suggest that Stryer's version of the incident should be accepted over that of the plaintiff's.

[61] It did not improve for Stryers when it came to his testimony about the factual arrangements at Dwarsrivier and the consequent opportunities afforded to him to abuse his position *vis-a-vis* the plaintiff. He is still employed by the Department and there is little doubt in my mind that, where possible, he tried to distance himself from the truth to avoid any potential repercussions for both the Department and himself. It is instead of more assistance to focus on those aspects of his testimony which are helpful in determining the issue of whether or not the Minister should be held vicariously liable.

[62] Stryers described what appeared to be a somewhat tedious process for the reporting of requests and complaints. According to him the register was kept in the unit manager's office. If Plaatjies himself was not there at the time, a case officer would first have to fetch it and bring it to Stryers, along with the offender concerned. Once Stryers determined who should attend to the complaint and noted this down, the case officer would then depart with both the register and the offender to the staff member delegated to deal with it, and Stryers himself would have no further involvement. It was Plaatjies upon whom the responsibility fell to ensure that the request or complaint was satisfactorily attended to within the 7-day period. He did not explain what procedure was followed when Plaatjies himself was not at Dwarsrivier.

[63] He maintained that as CC Corrections he had nothing whatsoever to do with the professional staff, for whom the responsibility resorted in the CC Operational Support (Sontlaba). He described his relationship with the plaintiff during the time they worked together as *'…maar net 'n professionele werksverhouding tussen ons, kollegas'.* However when asked about the nature of his interaction with her he responded: *'…omdat ek 'n pastoor is het ek baie keer soggens die parade geopen en skriflesing en by drie gevalle het sy my gekontak vanuit haar kantoor waar sy my meegedeel het van die probleme wat sy het… wat die werk betref daar was nie 'n werkshouding tussen ons nie om rede sy in 'n ander afdeling was en sy 'n professionele persoon was en ek CC Corrections was'.* He also maintained that under no circumstances would he have discussed gang related incidents and concerns with her. Stryers confirmed however that it was he who raised the restorative justice issue with the plaintiff in his office on the day in question.

[64] During cross-examination Stryers confirmed that his office was a mere distance of about 20 paces from the plaintiff's. Plaatjies' office was initially next door to hers, and after Sontlaba was appointed he shared that office with Plaatjies for some time. Stryers agreed that there was often a shortage of managerial staff, given that at times posts were not filled and managers also had duties outside of Dwarsrivier. He also agreed that when Plaatjies was unavailable he would assume his responsibilities, given that unit management fell under his portfolio, including chairing the CRT meetings. It was only in those instances when he too was unavailable that he would delegate these responsibilities to a case management supervisor.

[65] Stryers confirmed that during 2008 he chaired all CRT meetings, and went even further, claiming that he did so because he was dissatisfied with the manner in which Plaatjies chaired them. With reference to his statement made shortly after the incident, he testified that he chaired these meetings during that period on a monthly basis. However, according to him, not once did the plaintiff attend these meetings, despite his concession that she played a cardinal role in offender rehabilitation.

[66] In spite of his earlier testimony that he had no involvement with the plaintiff's work responsibilities, Stryers conceded that he knew her workload was immense and that she struggled to keep on top of it. He conceded that the CRT monitored the plaintiff's work because it was an integral part of the ORP, of which he was in charge overall. He also conceded that in his statement he had complained about his struggle to get co-operation from all role-players in the ORP.

[67] When asked how he came to learn of the plaintiff's work challenges, Stryers maintained that it was Plaatjies who reported this to him. The first occasion on which the plaintiff herself had done so was on the day of the incident. This testimony contradicted the version put to the plaintiff when she testified. He also claimed that CRT monitoring of the plaintiff's work performance during the period that he chaired the CRT meetings was limited to perusing the reports produced by her for discussion in her absence.

[68] According to him, had he become aware of any difficulty in the plaintiff's performance, this would be delegated to a case officer to take up with her because it would be unethical for him to deal with it in the presence of the offender

concerned. He later conceded however that he was perfectly able to take it up with the plaintiff directly, given that their offices were in the same corridor, and that as chairperson of the CRT, if a role player did not perform satisfactorily, it was his duty to take this up with the individual in question. However throughout the period that he chaired the CRT meetings she gave him no cause for concern.

[69] His evidence was further that during the course of 2008 the sentence plans of about 160 to 162 offenders were reviewed in the CRT meetings: 5 on a monthly basis, 20 each 3 months, 10 each 6 months and 1 to 2 per annum, depending on the length of the sentence. Although not all plans fell under the auspices of the plaintiff to ensure their successful implementation, he conceded that she carried a good deal of that responsibility, and was therefore required to produce a commensurate number of reports for this purpose. According to him, these reports had to cover a range of aspects.

[70] When asked how queries arising from the reports were dealt with in CRT meetings, his response was that throughout that entire period, neither he nor any other attendee ever raised a query in relation to any report, whether those of the plaintiff or other role players. This flew in the face of his documented complaint shortly after the incident about how he had struggled to obtain co-operation from many of the role players in the ORP. Moreover, on the inherent probabilities, it was patently untrue.

[71] So too was his claim that if such a query were to have been raised he would delegate it to the case management supervisor for follow-up before the next CRT

meeting. This is because it would have resulted in the monitoring of the particular offender's rehabilitation path being stalled until the next review, which, as previously mentioned, in the case of certain offenders could be for as long as 3, 6 or 12 months. In addition, it was his evidence that the CRT meetings were either held in his office (thus 20 paces from the plaintiff's) or another office 40 paces away. He also could not dispute Plaatjies' evidence that he himself would deal with queries arising there and then by calling in the role player concerned.

[72] Stryers eventually also conceded that if Sontlaba was not available to assist the plaintiff in rescheduling her programs to keep her workload up to date, then his position was such that he could step in to do so. Despite much evasion he was ultimately forced to concede that it was essential for the plaintiff to be aware of potential or actual strife among offenders, but insisted that the only individual responsible for imparting this information was her immediate supervisor, Sontlaba, without explaining who would do so when Sontlaba was not available. He also claimed that under no circumstances would he have provided the plaintiff with this information, only to admit a little later that if no-one else was available he could and would have done so.

[73] Again, despite his earlier testimony, Stryers conceded that he exercised authority over the entire centre, including those employees falling under Sontlaba (and thus the plaintiff) when acting as *de facto* head of centre. He also eventually conceded that during the course of performing her duties as a social worker, he was one of the individuals who from time to time, by virtue of his managerial position, exercised authority over her and that she was obliged to report certain matters to him.

[74] He was referred to his warning statement in the criminal proceedings in which he declared that at the time of the incident he was discussing work responsibilities with the plaintiff for purposes of compiling statistics for submission to the Department's area manager. He ultimately conceded that these statistics were not limited to the restorative justice programs or the pamphlet he presented to the plaintiff for input, but to all ORP programs at the centre. These logically included all those for which the plaintiff was responsible. His evidence was further that these statistics had to be submitted by him on a monthly basis.

[75] When Stryers was cross-examined by counsel for the Minister, considerable effort was made to draw a distinction between "authority" and "control", which was understandable given the material concessions made by him in his earlier testimony. Apparently realising the predicament in which he had placed both himself and the Department, Stryers blithely went along with this, in keeping with his earlier attempts to distance himself from the truth.

[76] Emphasis was placed on whether he was in a position to report the plaintiff for disciplinary action, approve her leave applications; and provide input for purposes of her performance assessment. For reasons that follow later, these aspects are not solely determinative of the issue of vicarious liability. In any event, the about turns that he made on earlier crucial concessions only served to demonstrate that he had no compunction in trying to mislead the Court.

[77] Sontlaba was employed as CC Operational Support at Dwarsrivier from May 2008 until sometime in 2011. He is still employed by the Department but in a different capacity at a different centre.

[78] He initially testified that during that period there were indeed occasions when Stryers assumed the position of acting Head of Centre although he could not recall specific dates. However after being referred to the official letters of appointment for Stryers as acting Head for 18 and 19 March 2010, Sontlaba claimed that he could not recall Stryers having done so on other occasions, and thereafter that he was certain this had not occurred prior to March 2010. This was consistent with his approach throughout his evidence, in which he relied almost exclusively on departmental policy, official job descriptions and official line management functions.

[79] By way of example, Sontlaba accepted that he had no knowledge of how the centre was managed on a practical level prior to May 2008, but simultaneously expressed doubt that, given official policy, Plaatjies' testimony in this regard could be correct. Similarly, his evidence was that if a manager acted in any other position then he or she remained responsible for all duties pertaining to their official post (it would seem irrespective of practical constraints); that Stryers was not required, by virtue of his official job description, to chair CRT meetings; and that in the absence of the unit manager this responsibility was that of the case management supervisor.

[80] However Sontlaba accepted that Stryers might have stood in for Plaatjies as chair of the CRT meetings in the latter's absence; but then, contrary to Stryers' own evidence, Sontlaba maintained that after he was appointed in May 2008 Stryers did

not chair any such meetings, since Plaatjies reverted to his position as unit manager.

[81] During cross-examination for the plaintiff Sontlaba conceded that he was unable to cast any light on how Plaatjies and Stryers co-ordinated their duties, or put differently, shared their workloads, on a practical level. He accepted that he never personally attended CRT meetings, but insisted that because the plaintiff's official job description did not include her attending these meetings as one of her *'core functions'*, any such attendance would have to have been reported to him (something not raised with the plaintiff when she testified). He went so far as to claim that because he did not recall her attending CRT meetings the plaintiff had lied to the Court.

[82] Sontlaba conceded however that in terms of an official Departmental document (referred to as a manual) it was indeed permissible for the plaintiff to be called in during these meetings, and that given her workload it was possible, and in fact likely, that this might have occurred. He agreed that he could not dispute Plaatjies' testimony that he himself had called the plaintiff into these meetings from time to time before he (Sontlaba) commenced employment at Dwarsrivier in May 2008. He also conceded that Stryers might have done so prior to that date, and that the plaintiff, as one of Stryers' subordinates, could not have refused.

[83] Contrary to the evidence of Plaatjies, Du Plessis and Stryers himself, Sontlaba maintained that senior correctional officials did not have to perform a range of duties outside the centre. According to him, during his 3 years at Dwarsrivier he

was only required to conduct one investigation elsewhere, and if Plaatjies in fact attended to outside duties this would have been a rare occurrence.

[84] Sontlaba accepted that, had Plaatjies been away from the centre and Stryers had stepped in to cover unit management, there would be regular interaction between Stryers and the plaintiff, but stubbornly insisted that even then, he would not have expected Stryers to fulfil all the unit manager's responsibilities. He accepted however that the plaintiff would have been obliged to interact with the official tasked with running the ORP, and that Stryers as CC Corrections played a vital role in those programs. Again though, according to Sontlaba, there was no direct interaction between the plaintiff and Stryers.

[85] When weighed against the evidence of the other witnesses, and the material concessions made by Stryers, Sontlaba's assertion was patently false, as was borne out by his later concession that nothing prevented Stryers from discussing matters concerning the ORP directly with the plaintiff. Ultimately Sontlaba could not dispute that Stryers and the plaintiff had a working relationship, but nonetheless persisted in his stance that because of *'protocol'* the plaintiff was not Stryers' subordinate and nor was Stryers her superior.

[86] Sontlaba did not impress as an honest witness. He was evasive, was at pains to hide behind official policy to obfuscate the real issues, and it did not escape my notice that he was present almost throughout the testimony of the other witnesses. The clear impression I gained was that Sontlaba was very much alive to what he believed the Department required of him to support their version. Accordingly,

where his testimony differed from that of the plaintiff's witnesses, and the material concessions made by Stryers, I reject Sontlaba's testimony and accept theirs over his.

Discussion

[87] I will not deal further with the sexual assault itself. I am more than persuaded that it occurred and in the manner described by the plaintiff. Accordingly, Stryers must be held liable for such damages as she may prove.

[88] This leaves the issue of whether or not the Minister should be held vicariously liable. The current legal position was very recently and comprehensively set out by the Supreme Court of Appeal in *Stallion Security (Pty) Ltd v Van Staden*.[2] In essence, it was confirmed that where an employee commits an intentional wrong entirely for his or her own purposes – the so-called "deviation" cases – the test remains whether the delict was nonetheless sufficiently closely linked to the business of the employer, but the law was developed to recognise that the creation of risk by the employer is a relevant consideration in determining the required link:

> *'[28] The principles for determining whether an employer is vicariously liable for an employee's unauthorised intentional wrong, laid down in the ground-breaking unanimous judgment in* Bazley *(per McLachlin J), were reproduced in* K *as follows:*
>
> *'"[C]ourts should be guided by the following principles:*
> *(1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'.*

[2] (526/2018) [2019] ZASCA 127 (27 September 2019).

(2) The fundamental question is whether the wrongful act is sufficiently related *to conduct authorized by the employer to justify the imposition of vicarious liability.*
Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement *of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice.*

. . . .

(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk *and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:*
(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
(d) the extent of power conferred on the employee in relation to the victim;
(e) the vulnerability of potential victims to wrongful exercise of the employee's power."

(Emphasis in original.)'

[29] …In The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of Christian Schools and others v Various Claimants (FC) and The Institute of the Brothers of Christian Schools and others, *the United Kingdom Supreme Court dealt with yet another case of vicarious liability for sexual abuse of children by their caretakers…*

[30] Lord Phillips also referred to subsequent English cases. He had extensive regard to Bazley, Jacobi *and the subsequent judgment of the Supreme Court of Canada in* John Doe v Bennet *and concluded:*

"86. Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

87. These are the criteria that establish the necessary 'close connection' between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability."

[31] These judgments show that it is now firmly established in Canada and the United Kingdom that the creation of a risk that eventuated, is an important consideration in determining vicarious liability of an employer under the "close connection" test. The reasoning in these judgments is compelling and provides valuable guidance for the development of our similar law on the subject. Leading South African academic commentators also support this proposition.

[32] For these reasons our law as developed in Rabie *and* K*, should be further developed to recognise that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer. Whether the employer had created the risk of the harm that materialised, must be determined objectively.'*

[89] In *P.E. v Ikwezi Municipality and Another*[3] the Court developed the common law to hold the employer vicariously liable where an employee was subjected to sexual harassment by her direct supervisor. The reasoning of Pickering J is instructive:

'[72] There is no doubt that in molesting the plaintiff the second defendant was acting solely for his own purposes and was in pursuit of his own prurient objectives. He was not furthering first defendant's purposes or obligations in any way. However, the incident occurred while second defendant was purportedly rendering service to first defendant and in the workplace.

[73] It is accordingly necessary to consider the objective element of the test which, as set out in K supra *at paragraph 44,* "relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and

3 2016 (5) SA 114 (ECG).

objects of the Constitution in mind." *Mr. Mullins submitted that it was hard to conceive of conduct more removed from second defendant's duties and the business of first defendant than his sexual assault on plaintiff. He relied strongly in this regard on the case of* Minister van Veiligheid v Phoebus Apollo Aviation BK *2002 (5) SA 475 (SCA) a matter in which it was held that the employer was not liable for the* "theftuous and fraudulent conduct" *of three dishonest policemen.*

[74] In my view, however, that reliance is misplaced. The Phoebus Appollo *case* supra *was decided prior to the decisions in* K *and* F supra *and, obviously, without regard to the principles expounded therein, in particular, relating to the spirit, purport and objects of the Bill of Rights. In my view it is not of assistance in the resolution of the present matter. I do not wish to burden this judgment further with a recital of the facts therein but I venture to suggest, with respect, that had the matter come before the Supreme Court of Appeal after* K *and* F *the outcome may well have been different.*

[75] In this context it is important to bear in mind that the Bill of Rights affirms the right of all people to human dignity (section 10) and to security of their persons including the right to bodily and psychological integrity. (Section 12). Second defendant, by his gross actions, infringed plaintiff's rights in both respects. His actions created an offensive and intimidating work environment that undermined plaintiff's dignity, privacy and integrity. Compare Campbell Scientific supra *at paragraph 21.*

[76] Second defendant, as Corporate Services Manager, was in a position of authority over plaintiff and was her immediate superior. She trusted him implicitly. She was obliged, by virtue of her position as archives clerk, not only to report to him but also to work with him closely, at times after hours when they were alone at the offices. It was because of the nature of their employment relationship that the opportunity presented itself to second defendant, in the course of carrying out his duties during his hours of work at his employer's facilities, to abuse his authority and to take advantage of the vulnerability of the plaintiff. Compare Grobler's *case,* supra.

*[77] The first defendant placed the second defendant in the situation where he was able to act as he did. First defendant gave him the authority to control the conditions under which plaintiff, as his subordinate did her daily work. (*Vance v Ball State University, supra.*) This employment relationship facilitated his actions. In these circumstances I agree with respect, with what was said in* Boothman's *case,*

> supra*, namely, that when an employer places an employee in a special position of trust, the employer bears the responsibility of ensuring that the employee is capable of trust. That trust* "forged a causal link" *between second defendant's position as Corporate Services Manager and the wrongful act. Compare: Pehlani* supra*.*
>
> *[78] As I have said above, there is a new understanding and appreciation of the prevalence of sexual harassment in the workplace and of its devastating effects on the victim. It has become, in effect, a systemic and recurring harm…*
>
> *[80] I bear in mind the caution reiterated by Ponnan JA against overzealous judicial reform but, in my view, having regard to the objectives of s 39(2) constitutional norms dictate that the common law be developed and extended to accommodate the present set of facts and that first defendant accordingly be held vicariously liable for the conduct of second defendant.'*

[90] I now turn to apply these principles to the facts of this matter. The evidence established on a balance of probabilities that the practical arrangements at Dwarsrivier – irrespective of any official policy, official job descriptions or line management functions – placed Stryers in a position of authority over the plaintiff. Heeding the caution of the Supreme Court of Appeal in *Stallion supra*, references to a link with Stryer's duties, authorised acts or employment should in this context be avoided. This was a situation created by the Minister's Department and endorsed, or at the very least condoned, by it.

[91] That the balance of power between Stryers and the plaintiff was unequal is beyond question. Given the *de facto* closeness of their working relationship the plaintiff was vulnerable to the wrongful exercise by Stryers of his authority over her, and the Department at least created the opportunity for Stryers to abuse that power, even though technically he was not her direct supervisor.

[92] The facts in *Rabie,*[4] *K,*[5] and *F*[6] are all distinguishable from the facts of the present matter. In those cases, the core business of the respective employers was that of safety and security. In the cases of *Rabie*, *K* and *F*, it was police officers who had committed the wrongful acts. In the case of *Stallion* it was the provision of private security services but aimed at the same objective: safety and security. In the present matter the business of the Department is that of Corrections and the custody of sentenced prisoners.

[93] It was submitted on behalf of the Minister that the Department did not create the risk of Stryers being able to sexually assault the plaintiff, because the sexual assault was not sufficiently closely linked to its business This, it was contended, is where the "safety and security" cases diverge from those in the present matter. It was also submitted that even were it to be accepted that the Department created the opportunity for Stryers to carry out the sexual assault, this would not meet the test contemplated in *Stallion*, since a mere opportunity is not enough to establish the necessary link, because it is the furtherance of the Department's "business" which is critical.

[94] To my mind, this is where the Minister's argument breaks down. His version that the plaintiff and Stryers were not discussing a work related matter when the incident is alleged to have occurred cannot be accepted. There were only two individuals present during that incident, namely Stryers and the plaintiff. While the Minister could not dispute that the discussion about the restorative justice program booklet

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4 *Minister of Police v Rabie* 1986 (1) SA 117 (A).
5 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).
6 *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA).

occurred, it was his version that this was an “informal” one only, because Stryers was not officially in overall charge of that program which emanated from Head Office; he thus had no authority to discuss such a booklet with her; and therefore it had not occurred during the course and scope of their employment.

[95] The plaintiff’s response to this was unequivocal. Stryers discussed the booklet with her because, as a social worker, she would have an integral role to play in such a program. Stryers himself conceded that at the time of the incident he was discussing work responsibilities with the plaintiff for purposes of compiling statistics for submission to the Department’s area manager; and that these statistics were not limited to the restorative justice programs or the booklet he presented to the plaintiff for input, but to all ORP programs at the centre. As previously stated, these logically included all those for which the plaintiff was responsible.

[96] In all the circumstances, I am persuaded that the plaintiff has proven on a balance of probabilities that Stryers was discharging his duties immediately prior to the incident; that those duties were discharged in the furtherance of the centre’s business, and thus the “business” of the Minister; and that the *de facto* employment relationship between Stryers and the plaintiff was not only created, but facilitated by the Minister. To my mind, the considerations taken into account by Pickering J in *Ikwesi supra* are equally decisive in the present case. It would amount to placing form over substance to hold otherwise.

[97] **The following order is made:**

1. It is declared that the first and second defendants are jointly and severally liable for such damages as the plaintiff may prove she has suffered in consequence of the sexual assault upon her on 9 January 2009 at the Dwarsrivier Correctional Centre; and

2. The defendants are ordered jointly and severally to pay the plaintiff's costs of the action on the merits, the one paying, the other to be absolved.

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J I CLOETE