THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 176/2001

In the matter between :

GHIA VAN EEDEN (FORMERLY NADEL) Appellant

and

MINISTER OF SAFETY AND SECURITY Respondent

Before: **HEFER AP, VIVIER ADP, OLIVIER, SCHUTZ JJA & JONES AJA**
Heard: **23 AUGUSTUS 2002**

Delivered: **27 SEPTEMBER 2002**

Summary: **Delict - legal duty - police - liability for omissions - failure to take steps to prevent known dangerous criminal escaping from police custody.**

J U D G M E N T

VIVIER ADP

VIVIER ADP:

[1] On 5 August 1998 and at Pretoria the appellant, a 19-year old woman, was sexually assaulted, raped and robbed by one André Gregory Mohamed, a known dangerous criminal and serial rapist who had escaped from police custody in Durban on 22 May 1998.

[2] Mohamed escaped from police cells, where he was being held for an identification parade, through an unlocked security gate. At the time he was facing no fewer than 22 charges, including indecent assault, rape and armed robbery committed in the Durban area. Within six days of his escape he resumed his sexual attacks on young women, this time near Pretoria. The appellant was the third victim of the latter series of attacks.

[3] Following the attack on her the appellant instituted an action for delictual damages against the State, represented by the respondent, in the Transvaal High Court. She claimed that members of the South African Police Service owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and causing her harm and that they negligently failed to comply with such duty.

[4] At the trial the question of liability was by agreement separated from that of the quantum of damages. Vicarious liability, negligence and causation

were conceded by the respondent so that the only issue remaining for decision was whether the police owed the appellant a legal duty to prevent Mohamed from escaping and causing her harm.

[5] This issue was further narrowed by the respondent's admission that at the time of Mohamed's escape the police realised that he was a dangerous criminal who was likely to commit further sexual offences; that his continued detention was necessary for the protection of the general public and their personal rights and property; that his escape could easily have been prevented by ensuring that the gate was locked and that in view of the high incidence of escapes from police custody and sexual attacks on women at the time of Mohamed's escape, the police had come to regard these matters as a "policing priority". The Police are to be commended for not arguing the unarguable and for their co-operation in restricting the trial in this way to the true legal issue.

[6] The Court *a quo* (Swart J) dismissed the appellant's claim and made no order as to costs. The judgment of the Court *a quo* is reported *sub nom Van Eeden v Minister of Safety and Security* 2001 (4) SA 646 (T). Swart J held that he was bound by the decision of this Court in *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) and concluded that the police owed no legal duty to the appellant to act positively in order to

prevent harm. With the leave of the Court *a quo* the appellant now appeals to this Court.

[7] Since the judgment of the Court *a quo* was delivered the Constitutional Court has upheld an appeal against this Court's judgment in *Carmichele*. The judgment of the Constitutional Court is reported *sub nom Carmichele v Minister of Safety and Security and Another* (*Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC)).

[8] The Constitutional Court held (at paras 32-37) that in applying the traditional, pre-constitutional test for determining the element of wrongfulness for omissions in delictual actions for damages as it had developed in our common law, this Court had overlooked s 39(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), which requires all our courts to develop the common law so as to reflect the spirit, purport and objects of the Bill of Rights.

The Constitutional Court said (para 57) that it was by no means clear how the constitutional obligation on the State to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected, translated into private law duties towards individuals, and proceeded to speculate on the different ways of

developing the common law, in particular the wrongfulness element of delictual liability. The Court did not undertake the exercise of developing the common law itself. It held that the trial court should not have granted an order for absolution from the instance and remitted the case to the High Court for the trial to proceed.

[9] Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment, based *inter alia* upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the

many factors which have to be considered. See the judgment of this Court in *Carmichele* at para 7 and recent decisions of this Court in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) paras 14-17; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) para 6; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) paras 11 and 31; *BOE Bank v Ries* 2002 (2) SA 39 (SCA) para 13 and the unreported judgment of this Court in *Minister of Safety and Security v Van Duivenboden*, case no. 209/2001 delivered on 22 August 2002, para 16.

[10] In applying the concept of the legal convictions of the community the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the legislature and judges. See *Schultz v Butt* 1986 (3) SA 667 (A) at 679 D-E and *Premier Hangers CC v Polyoak (Pty) Ltd* 1997 (1) SA 416 (A) at 422 E-F.

[11] The approach of our courts to the question whether a particular omission to act should be regarded as unlawful has always been an open-ended and flexible one. This approach was accurately described by Corbett

JA in a public lecture entitled *"Aspects of the Role of Policy in the Evolution of our Common Law"* and published in (1987) 104 SALJ 52 where he said (at 56):

> "Even in 1975 there were probably still two choices open to the Court in the *Ewels* case. The one was to confine liability for an omission to certain stereotypes, possibly adding to them from time to time; the other was to adopt a wider, more open-ended general principle, which, while comprehending existing grounds of liability, would lay the foundation for a more flexible and all-embracing approach to the question whether a person's omission to act should be held unlawful or not. The Court made the latter choice; and, of course, in doing so cast the Courts for a general policymaking role in this area of the law."

[12] The concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution. The Constitution is the supreme law of this country, and no law, conduct, norms or values that are inconsistent with it can have legal validity, which has the effect of making the Constitution a system of objective, normative values for legal purposes (*Van Duivenboden* para 17). The Constitution cannot, however, be regarded as the exclusive embodiment of the delictual criterion of the legal convictions of the community, nor does it mean that this criterion will lose its status as an agent in shaping and improving the

law of delict to deal with new challenges (J.R. Midgley, LAWSA first reissue, vol. 8, part 1, para 52 and P.J. Visser, *Some Remarks on the relevance of the Bill of Rights in the Field of Delict* 1998 TSAR 529 at 535). The entrenchment of fundamental rights and values in the Bill of Rights, however, enhances their protection and affords them a higher status in that all law, State actions, court decisions and even the conduct of natural and juristic persons may be tested against them and all private law rules, principles or norms, including those regulating the law of delict, are subjected to, and thus given content in the light of the basic values in the Bill of Rights (Neethling, Potgieter and Visser, *Law of Delict*, 4 ed, pp. 21-23).

[13] The fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism (s 1(a) and (b) of the Constitution). In terms of s 12(1)(c) everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.

For present purposes it is not necessary to decide whether the right to be free from violence constitutes a separate entitlement or whether it is merely an explicit element of the right to freedom and security of the person.

Freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms (*S v Baloyi* 2000 (2) SA 425 (CC) para 13). Sec 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the State to protect everyone from violent crime. See *Baloyi* para 11, De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4 ed (2001) at 258; Heléne Combrinck *Positive State Duties to Protect Women from Violence : Recent South African Developments* (1998) 20 Human Rights Quarterly 666 at 683; Carpenter *The right to physical safety as a constitutionally protected human right*; Suprema Lex : *Essays on the Constitution presented to Marinus Wiechers* (1998) 139 at 144; Pieterse, *The right to be free from public or private violence after Carmichele* 2002 SALJ 27 at 29).

[14] Section 12 should be read with s 7(2) of the Constitution which imposes a duty on the State to "respect, protect, promote and fulfil the rights in the Bill of Rights". As the Constitutional Court said in *Carmichele* (para 45), the provisions of our Constitution point in the opposite direction to the due process clause of the United States Constitution, which was held in *De Shaney v Winnebago County Department of Social Services* (1988) 489 US

189 not to impose affirmative duties upon the State. In *Van Duivenboden* the majority of this Court concluded (para 20) that while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.

[15] The Constitutional Court has held in both *Baloyi* (para 13) and *Carmichele* (para 62) that the State is, furthermore, obliged under international law to protect women against violent crime and against the gender discrimination inherent in violence against women. This obligation was imposed on the State by s 39(1)(b) of the Constitution, read with the preamble to the *Universal Declaration of Human Rights*; article 4(d) of the *Declaration on the Elimination of Violence against women* and article 2 of the *Convention on the Elimination of All Forms of Discrimination against women* (Heléne Combrink *op cit* 671-681).

[16] Section 205(3) of the Constitution reads:

> "The objects of the police service are 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 the South African Police Service Act 68 of 1995 the functions of the police include the maintenance of law and order and the prevention of crime. The police service is thus one of the primary agencies of the State responsible for the discharge of its constitutional duty to protect the public in general and women in particular against the invasion of their fundamental rights by perpetrators of violent crime (*Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 321 F and the Constitutional Court's judgment in *Carmichele* (para 62)).

[17] In *Van Duivenboden* the majority of this Court emphasised (para 20) that the very existence of the State's constitutional duty to act in protection of the rights in the Bill of Rights necessarily implies the norm of public accountability, and pointed out that s 41(1) of the Constitution expressly provides that all spheres of government and all organs of State within such sphere must provide government which is not only effective, transparent and coherent, but also government which is accountable. The Court held (para 21) that this norm must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case.

[18] Our courts have in a number of recent decisions recognised that the entrenchment of the right to be free from violence in s 12(1)(c), read with

s 205(3), would, in appropriate circumstances, be strongly indicative of a legal duty resting on the police to act positively to prevent violent crime. In *Van Duivenboden* this Court held that certain police officers who were in possession of information that reflected adversely upon the fitness of a person to possess firearms owed a legal duty to members of the public to take reasonable steps to act on that information in order to prevent harm. In the majority judgment Nugent JA, after referring to the entrenchment of the rights to equality, personal freedom and privacy, to the State's positive duty under s 7 to act in protection of these rights and to the principle of public accountability, went on to say (para 21):

> "However where the state's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm."

See also: *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) at 114E-115B; *Geldenhuys v Minister of Safety and Security and Another* 2002 (4) SA 719 (C) at 728 E-I and Neethling and Potgieter, *Toepassing van die Grondwet op die Deliktereg* 2002 THRHR 265 at 270.

It must be pointed out that in *Van Duivenboden* Marais JA held in a

minority judgment that in the particular circumstances of that case the police were under a legal duty to act even on an application of the traditional test for delictual wrongfulness and that it was not necessary to have regard to the Constitution. Similarly, in *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* 2002 (1) SA 771 (T) the Court held that the responsible authorities and personnel at a mental hospital owed a legal duty to members of the public to take reasonable steps to prevent mental patients from leaving the hospital premises and causing them harm. The Court relied on two factors in particular as indicative of the existence of a legal duty, namely that the defendant was in control of potentially dangerous patients and that it could easily have taken proper preventative measures such as fencing or guarding the premises. The Court did not find it necessary to rely on the Constitution in finding that a legal duty existed.

[19] An important consideration in favour of recognising delictual liability for damages on the part of the State in circumstances such as the present is that there is no other practical and effective remedy available to the victim of violent crime. Conventional remedies such as review and *mandamus* or interdict do not afford the victim of crime any relief at all. The only effective remedy is a private law delictual action for damages.

[20] In England the courts have on occasion declined to impose liability in delict on public authorities such as the police for the negligent performance of their functions on the ground that it would not be in the public interest as it would inhibit the proper performance of their primary function of providing public services in the interest of the community as a whole and lead to defensive policing and a diversion of the resources available for combating crime. See *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 (HL) at 243 h-j and 244 b-c.

In *Carmichele* the Constitutional Court pointed out (paras 46-48), that in a recent decision of the House of Lords in *Barrett v Enfield London Borough Council* [1999] 3 All ER 193 (HL) at 199 d-j a more flexible approach to delictual claims against public authorities has emerged, and that in two cases the European Court of Human Rights has found against the "immunity approach" of the English Courts (*Osman v United Kingdom* (2000) 29 EHRR 245 para 142 and *Z and Others v United Kingdom* (2001) 10 BHRC 384 para 111). The Constitutional Court in *Carmichele* went on to say (para 49) that a public interest immunity absolving the respondents from liability that they might otherwise have in the circumstances of that case, would be inconsistent with our Constitution and its values.

[21] The considerations upon which the English Courts have based their approach are in any event not applicable to a case such as the present. This case does not concern the manner in which the police performed their functions relating to the detection of crime and the apprehension of criminals. These are matters in which public policy may well require that police should have a wide discretion. This case is concerned solely with the control that the police are required to exercise over a known dangerous criminal in police custody, in other words with the operational implementation of their own policies and not with the policy itself. The recognition of a legal duty in such circumstances will not disrupt the efficient functioning of the police, nor will it necessarily require additional resources. There is accordingly no reason to fear that it might inhibit the proper performance by the police of their primary functions or lead to defensive policing.

[22] Counsel for the respondent submitted that the imposition of a legal duty on the police in the present case could open the 'floodgates' of litigation and result in limitless liability on public authorities and functionaries. He submitted that it was for this reason necessary first to set the limits to delictual liability and then to determine in each case whether the facts of that case fell within those limits. I do not agree with counsel's submissions. As

has been pointed out earlier, our courts do not confine liability for an omission to certain stereotypes but adopt an open-ended and flexible approach to the question whether a particular omission to act should be held unlawful or not. In deciding that question the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability (*Van Duivenboden* para 19).

[23] The requirement of a special relationship between a plaintiff and defendant as an absolute pre-requisite for imposing a legal duty can, in the light of the State's constitutional imperatives which I have set out above, no longer be supported. To do so would mean that the common law does not adequately reflect the spirit, purport and objects of the Bill of Rights. Carpenter *op cit* 151 describes this requirement as 'altogether out of step with our present constitutional system'. It should not be regarded as anything more than one of several factors to be considered in deciding the reasonableness of an omission to prevent violent conduct (Pieterse *op cit* 37).

[24] In all the circumstances of the present case I have come to the conclusion that the police owed the appellant a legal duty to act positively to prevent Mohamed's escape. The existence of such a duty accords with what I would perceive to be the legal convictions of the community and there are no

considerations of public policy militating against the imposition of such a duty. To sum up, I have reached this conclusion mainly in view of the State's constitutional imperatives to which I have referred; the fact that the police had control over Mohamed who was known to be a dangerous criminal and who was likely to commit further sexual offences against women should he escape, and the fact that measures to prevent his escape could reasonably and practically have been required taken by the police (Neethling and Potgieter *op cit* 64 and *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A).

The police accordingly acted wrongfully and in view of the admission of negligence, vicarious liability and causation the State must be held liable for any damages suffered by the appellant.

[25] In the result the appeal is upheld with costs, such costs to include the costs of two counsel. The judgment of the Court *a quo* is altered to read:

"1. It is declared that the conduct of the defendant's servants was wrongful and that the defendant is liable to the plaintiff for such damages that she is able to prove.
2. The defendant is ordered to pay the costs of the action including the costs of two counsel."

VIVIER ADP

Hefer AP
Olivier JA
Schutz JA **Concur**
Jones AJA