Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 196/13
Reportable

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **APPELLANT**

and

X **RESPONDENT**

Neutral citation:	*The Minister of Justice and Constitutional Development v X* (196/13) [2014] ZASCA 129 (23 September 2014)
Coram:	Lewis, Tshiqi, Wallis and Zondi JJA and Fourie AJA
Heard:	1 September 2014
Delivered:	23 September 2014

Summary: Delictual claim – Duty of prosecutor at bail hearing – Failure to place all relevant information before court – Should have foreseen violent crime of sexual nature being committed by accused if released – negligence established – defence based on s 42 of the National Prosecuting Authority Act 32 of 1998 rejected.

ORDER

On appeal from: Western Cape High Court, Cape Town (Yekiso J sitting as court of first instance)

The appeal is dismissed with costs, including the costs of two counsel, where employed.

JUDGMENT

Fourie AJA (Lewis, Tshiqi, Wallis and Zondi JJA concurring):

[1] This is an appeal against the order of the Western Cape High Court, Cape Town (Yekiso J). The appeal is with the leave of the court below. Yekiso J declared the appellant to be liable to the respondent for the payment of damages arising out of the abduction and rape of her five year old daughter. The claim was brought by the respondent as mother and natural guardian of her minor child as well as in her personal capacity. In order to protect the identity of the minor child, the respondent is cited as X. As explained below, the court a quo held the appellant liable by virtue of the negligent conduct of a public prosecutor in regard to a bail application hearing in the magistrates' court for the district of Ladismith.

[2] On 11 May 2007 O[…] J[…] S[…] (S[…]) made his fourth appearance in the Ladismith Magistrates' Court on a charge of raping his 12 year old daughter on four occasions during 2006 and 2007. He applied for bail and as the offence of rape is listed as a Schedule 6 offence in terms of s 60(11)*(a)* of the Criminal Procedure Act 51 of 1977, he bore the onus of proving the existence of exceptional circumstances justifying his release on bail in the interests of justice.

[3] S[…] was legally represented at the bail hearing and gave evidence under oath. The investigating officer, Sergeant De Kock (De Kock), testified on behalf of the State in opposing the application. At the conclusion of the hearing the magistrate granted S[…] bail, but remanded the matter to 16 May 2007, awaiting proof of an address at which S[…] would reside when released on bail. S[…] was detained in custody.

[4] On 16 May 2007 the matter was remanded to 29 May 2007 as S[…] had not yet succeeded in furnishing an acceptable address. S[…] remained in custody. On 29 May 2007 the matter was again postponed, to 15 June 2007, due to S[…]'s continued inability to furnish an acceptable address. He was again detained in custody.

[5] On 15 June 2007 S[…] provided the court with an address in Ladismith where he could reside upon his release from custody. The magistrate found it to be an acceptable place of abode for S[…] and released him on his own recognisance, subject to certain conditions.

[6] On 9 July 2007 and in the neighbouring town of Oudtshoorn, S[…] abducted the respondent's five year old daughter from her home and raped her twice. In the trial that followed the commission of these offences, S[…] was found guilty and received two sentences of life imprisonment for the rape of the minor child and a sentence of five years' imprisonment for her abduction. I should add that, in the same trial, S[…] was also found guilty and received four sentences of life imprisonment for the rape of his own daughter.

[7] When she was abducted and raped, the minor daughter and the respondent were residing with the respondent's fiancé (the brother of S[…]) at Oudtshoorn. It was during the course of her relationship with her fiancé that the respondent met S[…]. She soon became aware that S[…] was a loafer and a beggar who would visit his brother whenever he needed money. It was during one of these visits that S[…] abducted and raped the respondent's minor daughter.

[8] The respondent maintained that the combined negligent conduct of members of the South African Police Service and the prosecutor, who appeared on behalf of

the State at the hearing of the bail application, caused S[…] to be released on his own recognisance, thereby allowing him the opportunity to abduct and rape her minor daughter. She accordingly issued summons against the Minister of Safety and Security (as the first defendant) and the appellant (as the second defendant), for the payment of damages suffered as a consequence of the abduction and raping of her minor daughter. The defendants defended the action.

[9] In the event, the trial proceeded before Yekiso J, who ordered that the issue of liability be determined first. After hearing evidence the learned judge declared the defendants liable, jointly and severally, for payment of such damages as the respondent may in due course prove that she has suffered in her personal and representative capacity. It is only the appellant who has noted an appeal against this finding, with the first defendant abiding the judgment of the court a quo.

[10] On appeal the appellant submitted that the court below erred in finding that the prosecutor had negligently failed to execute his prosecutorial duties at the hearing of the bail application. The appellant further contended that the presiding magistrate erred in finding that, on the evidence before him, S[…] had discharged the onus of showing that he should be granted bail. In addition, the appellant argued that the court a quo erred in finding that the respondent had suffered a psychiatric injury or emotional shock entitling her to claim damages.

[11] I should add that, on appeal, the appellant also relied on a new defence based on s 42 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). This defence was first raised in the application for leave to appeal and Yekiso J granted the appellant leave to appeal on this ground too.

[12] I now proceed to deal with the relevant legal requirements for a delictual claim of this nature.

Wrongfulness

[13] In a claim, such as the instant, where the conduct complained of manifests itself in an omission, the negligent conduct will be wrongful only if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The

omission will be regarded as wrongful when the legal convictions of the community impose a legal duty, as opposed to a mere moral duty, to avoid harm to others through positive action. See *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12 and *Local Transitional Council of Delmas & another v Boshoff* 2005 (5) SA 514 (SCA) paras 18 and 19.

[14] In *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), it was held that, in developing our common law, as required in terms of s 39(2) of the Constitution, the element of wrongfulness for omissions in delictual actions for damages had to be developed beyond existing precedent, taking into account the rights to life, human dignity and freedom and security of the person (sections 11, 10 and 12 of the Constitution). In particular (para 44), it was emphasised that there is a duty imposed on the State and all of its organs not to perform any act that infringes these constitutional rights of the person. The Constitutional Court added that, in some circumstances, there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.

[15] With regard to the duty of a prosecutor in a bail application hearing, the Constitutional Court in *Carmichele* said the following (para 74):

‘There seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court. If such negligence results in the release of the accused on bail who then proceeds to implement the threat made, a strong case could be made out for holding the prosecutor liable for damages suffered by the complainant.’

[16] To this should be added the observation in para 72 of *Carmichele*, that, although the consideration of bail is pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer can but come from the prosecutor. A prosecutor has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or the refusal of bail and, if

granted, any appropriate conditions attaching thereto. It follows that a failure to discharge this duty by a prosecutor constitutes wrongful conduct for purposes of the law of delict.

[17] In *Van Eeden v Minister of Safety and Security (Woman's Legal Centre Trust As Amicus Curiae)* 2003 (1) SA 389 (SCA) paras11-14 it was held that the question whether a particular omission to act should be regarded as unlawful has always been an open-ended and flexible one. This court held that, in determining the wrongfulness of an omission to act, the concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution. It was stressed that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms and that s 12(1)*(c)* of the Constitution requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. In particular, it was held that s 12(1)*(c)* of the Constitution places a positive duty on the State to protect everyone from violent crime. In this regard reference was made to the seminal decision in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 20, where this court concluded that, while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.

[18] In *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA) paras 36-37, it was held that the public law duty of employees of the State who performed functions on its behalf to protect the rights of citizens in terms of the Bill of Rights, can, in appropriate circumstances, be transposed into a private law duty which, if breached, may lead to an award of damages. In this regard reference was made to the dictum in *Carmichele* (CC) para 74 regarding the duty of a prosecutor at a bail application hearing. This court concluded that the position of prosecutors in this context can in principle be no different from that of the police. Therefore, this court held that, unless public policy considerations point in the other direction, an action for damages would be the norm.

Negligence

[19] Fault is a general requirement for delictual liability; in the instant matter the respondent alleges that the prosecutor was negligent in the execution of his duties.

[20] The test for determining negligence was formulated as follows by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-F:

'For the purposes of liability culpa arises if—

(a) a diligens paterfamilias in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'

[21] As emphasised by Harms JA in *Carmichele* (SCA), para 45, it should not be overlooked that, in the ultimate analysis, the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. See also *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another* 2000 (1) SA 827 (SCA) para 21.

Causation

[22] For the respondent to succeed with her claim for damages she has to prove that there is a causal link between the alleged negligent conduct of the prosecutor and the damages allegedly suffered by the respondent and her minor daughter. It is trite that causation has two elements, the first being a factual issue, the answer to which has to be sought by applying the 'but-for' test. As explained by Harms JA in *Carmichele* (SCA) para 61, the proper inquiry in this regard is what the relevant judicial officer, who is factually assumed to make decisions reasonably, would, on the probabilities, have done had all the relevant information been put before him.

[23] The second element of causation is legal causation, namely whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to

ensue or whether, as it is said, the loss is too remote. See *International Shipping Company Pty Ltd v Bentley* 1990 (1) SA 680 (A) at 700I.

The application of the legal principles

[24] At the trial in the high court the respondent gave evidence and called a clinical psychologist, Ms Lategan, to testify on her behalf. De Kock testified on behalf of the first defendant, but no witnesses were called to testify on behalf of the appellant. Significantly, the appellant did not call the prosecutor to give evidence at the trial. There was accordingly no evidence placed before the court a quo to gainsay the evidence of De Kock as to what had transpired between him and the prosecutor at the hearing of the bail application.

[25] De Kock testified that, prior to the commencement of the bail application proceedings, he had a consultation of approximately 10 to 15 minutes with the prosecutor. The purpose was to apprise the prosecutor of all the information pertaining to S[…] and the reasons why bail should be opposed. De Kock testified that he had provided the prosecutor with the following information:

a) That S[…] had five previous convictions, including one of rape. According to De Kock he had not by then succeeded in obtaining the official SAP69 record of S[...], but was in possession of a printout reflecting S[…]'s previous convictions, which he handed to the prosecutor.

b) That S[…]'s minor daughter, aged 12, whom he had allegedly raped on four occasions, and her mother, were opposed to S[...] being released on bail.

c) That S[...] was a flight risk.

d) That he was of the view that S[...] should not be released on bail and that the members of the community shared his view.

[26] In his evidence at the bail hearing, S[...] did disclose that he had previous convictions, including one for rape and four or five for assault. He did not provide any details of the rape conviction and all that the prosecutor asked him during cross-examination was how old the victim of the rape was. S[...] replied: 'Ek dink 34'. The prosecutor did not attempt to obtain any information from S[...] regarding the circumstances of this rape. Nor did he ask S[...] for any details regarding his other previous convictions, particularly whether the convictions for assault were for

common or aggravated assault and whether any weapons were used. Inexplicably too, the prosecutor failed to tender in evidence the printout reflecting S[...]'s previous convictions.

[27] Apart from the aforesaid, the prosecutor failed to place the information referred to in para 25 (c) and (d) above before the court for consideration by the magistrate. In addition, the prosecutor did not consider introducing evidence through De Kock, to show that the State had a strong case against S[...] for the rapes of his daughter. In his evidence before the high court, De Kock testified that the complainant's statement showed that the State did have a strong case against S[...], but at the bail hearing no attempt was made by the prosecutor to introduce this statement in evidence. Nor was any attempt made to obtain a statement from the child's mother to whom the daughter had reported that she had been raped by S[...].

[28] In his judgment at the conclusion of the bail hearing the magistrate was extremely critical of the evidence (or rather the lack thereof) presented by the State. This led him to conclude that the State did not have a strong case against S[...]. The magistrate was also critical of the fact that he was not presented with a record of the previous convictions of S[...] and expressed the view that De Kock had not properly prepared for the bail application. In the result the magistrate concluded that S[...] had discharged the onus of showing exceptional circumstances, justifying his release, particularly in view of his (the magistrate's) impression that the State had a weak case against S[...]. He was granted bail, but as mentioned earlier, he was only released more than a month later upon proof of an address where he could reside. Even in that regard the prosecutor was at fault. He released De Kock from attendance and made no endeavour to investigate the various addresses proffered by S[...] as being available to him. In fact none of them were suitable addresses.

[29] In view of the appellant's failure to call the prosecutor as a witness in the subsequent trial before the high court, there is no explanation tendered for the prosecutor's failure to place all the relevant information, referred to above, before the magistrate. I share the view of the learned judge a quo, that, had the prosecutor placed this information before the magistrate, it would certainly have had a material bearing on his decision whether or not S[...] should be released from custody.

[30] Apart from the prosecutor's unexplained conduct at the initial bail hearing, there is also no explanation for the supine attitude adopted by him subsequent to the bail hearing. He had by then been apprised of the magistrate's concerns regarding the paucity of information put before him, yet, for the period of more than a month thereafter, while S[...] was still in custody and appeared in court on three occasions, the prosecutor took no steps at all to obtain further information relevant to the question whether S[...] ought to be released from custody. I find it particularly disconcerting that no effort was made by the prosecutor to obtain and place before the magistrate the official SAP69 record of S[...], which had in the meantime been received by De Kock on 1 June 2007.

[31] S[...]'s previous convictions spanned the period March 1983 to January 1999. When convicted of rape in January 1999 he was sentenced to seven years' imprisonment. His criminal record shows that, while serving his sentence for rape, he was released on parole, but was subsequently readmitted to prison on 19 February 2005 to serve the remaining 330 days of his sentence. This apparently followed upon a breach of his parole conditions. He was finally released on 18 July 2005 upon the expiry of his sentence and during 2006-2007 he raped his minor daughter on four occasions and then abducted and brutally raped the respondent's five year old daughter. Had S[...]'s criminal record been presented to the court when it became available on 1 June 2007, the magistrate would have been alerted to the real likelihood of S[...] breaching his bail conditions if he were to be released from custody.

[32] The mere fact that, during his subsequent appearances, S[...] had difficulty in providing an acceptable address where he could reside, ought to have sounded a warning to the prosecutor. This substantiated De Kock's initial view, which he had conveyed to the prosecutor, that S[...] was a flight risk. S[...] ultimately provided an affidavit deposed to by a person not known to anyone, namely one Flink, who declared that he was prepared to put S[...] up. The prosecutor accepted the affidavit without any attempt to have the suitability of this person and the address established, particularly in circumstances where the complainant (S[...]'s daughter) was residing in the same magisterial district.

[33] As was stressed in *Carmichele* (CC) para 74, each case must ultimately depend on its own facts. On the salient facts detailed above, I have no hesitation in concluding that the prosecutor owed the general public, and in particular the respondent and her minor daughter, a legal duty to take all reasonable steps to prevent S[...]'s release. The prosecutor was faced with the possible release of a convicted rapist, accused of having raped his 12 year old daughter on four occasions in the recent past. Apart from being a convicted rapist, S[...] had a number of previous convictions for assault, indicating his tendency to resort to violence. He had no fixed abode and was considered to be a flight risk. In these circumstances, the legal convictions of the community would certainly demand the imposition of a legal duty requiring the prosecutor to do everything in his power to prevent S[...]'s release, by placing all the information relevant to the exercise of the discretion with regard to the grant or refusal of bail, before the magistrate.

[34] In *Carmichele* (SCA) para 44, it was emphasised that foreseeability of harm is a factor to be taken into account in determining wrongfulness. The greater the foreseeability, the greater the possibility of a legal duty to prevent harm existing. A reasonable prosecutor would, in my view, have foreseen that, if this potentially violent convicted rapist, who was now accused of raping his 12 year old daughter on four occasions, were to be set free, he would probably be inclined to rape others, particularly young girls to whom he may have access. The respondent and, in particular, her young daughter, were members of the public to whom this legal duty was owed to protect their right to be free from violence perpetrated on them by S[...].

[35] Turning to the requirement of negligence, a reasonable prosecutor would, in the prevailing circumstances, undoubtedly have foreseen the reasonable possibility that if he or she were to fail to place all relevant information before the magistrate, S[...] might be granted bail. Furthermore, as I have already found in dealing with the element of wrongfulness, a reasonable prosecutor would have foreseen the reasonable possibility of S[...], if released on bail, causing bodily injury to vulnerable members of the community, particularly women and young children.

[36] I accordingly find that, in the prevailing circumstances, a reasonable prosecutor would have taken steps to place all relevant information before the magistrate to prevent S[...] from being released from custody. The prosecutor failed dismally in his duty to take such steps during and subsequent to the bail application hearing. His failure to do so remains unexplained by virtue of the appellant's failure to call him as a witness at the trial in the court below. It follows that the prosecutor's conduct fell far short of the standard of the reasonable person and was negligent.

[37] In considering the requirement of causation I have no doubt that, had the prosecutor placed all the available relevant information before the court at the original bail hearing, or at a subsequent re-hearing, the magistrate would not have ordered S[...]'s release, and the resultant abduction and rape of the respondent's minor child would not have taken place. In the circumstances the requirements for the establishment of both factual and legal causation have been met.

[38] As mentioned earlier, it was submitted on behalf of the appellant that, in any event, the magistrate erred in finding that S[...] had on the evidence before the court discharged the onus of showing that he should be granted bail. In my view, this is a self-serving argument which does not assist the appellant. What the respondent has proved is that, had the prosecutor (as he was lawfully obliged to do) placed all the relevant information before the magistrate at the bail hearing, or at a subsequent re-hearing, the release of S[...] would probably have been prevented. Therein lies the negligent dereliction of duty by the prosecutor and the question whether or not the magistrate had erred in granting S[...] bail on the basis of the incomplete evidence placed before him, is legally irrelevant.

Section 42 of the NPA Act

[39] I now deal with the appellant's belated reliance on s 42 of the NPA Act. The section reads as follows:

'Limitation of liability

No person shall be liable in respect of anything done in good faith under this Act.'

[40] This defence was not raised in the appellant's pleadings. Counsel for the appellant submitted that it was not necessary to do so, as it is a matter of law which

has to be considered irrespective of whether or not it has been pleaded. In fact, counsel contended, it is the respondent who bears the onus of proving that the prosecutor had failed to act in good faith.

[41] I do not agree. To my way of thinking, s 42 of the NPA Act seeks to introduce a ground of justification for conduct which is prima facie wrongful. Therefore, wrongful conduct that would otherwise give rise to delictual liability, may be justified and rendered lawful by virtue of the statutory immunity conferred in terms of s 42 of the NPA Act. It is a defence specifically directed at the wrongfulness element of delictual liability. It is trite that, in the case of a defence of this nature, the onus rests on the defendant (the appellant in this instance) to plead and prove the defence. See J R Midgley & J C van der Walt '*Delict*' in *Law of South Africa* 2 ed Vol 8, Part I para 86, read with the authorities cited at note 1.

[42] Apart from failing to plead this defence, no evidence was tendered by either party in regard thereto. The respondent objected to the raising of this new defence on appeal, in that, apart from not being covered by the pleadings and the evidence, its consideration at this late stage involves unfairness to the respondent. See *Cole v Government of the Union of South Africa* 1910 AD 263 at 272 and *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-F.

[43] I have no doubt that, had this defence been properly pleaded by the appellant, the course of the trial would have been fundamentally different. The appellant as the party bearing the onus of proving this defence would certainly, if it wished to discharge the onus, have been bound to call the prosecutor as a witness to demonstrate his good faith. Apart from calling witnesses in rebuttal, one can imagine that the respondent's legal representatives would have covered several issues relating to the s 42 defence with the prosecutor once he entered the witness box.

[44] It would certainly be grossly unfair to the respondent if the appellant were to be entitled to raise the s 42 defence at this late stage. Therefore, the interests of justice dictate that the appellant should not be allowed to do so.

[45] Further, and in any event, I am of the view that, for the following reasons, a defence based on s 42 of the NPA Act has no merit. In *Simon's Town Municipality v Dews & another* 1993 (1) SA 191 (A), a statutory defence of this nature, based upon a similarly worded statutory provision, namely s 87 of the Forest Act 122 of 1984 (now repealed), was raised. This section read as follows:

'No person, including the State, is liable in respect of anything done in good faith in the exercise of a power or the carrying out of a duty conferred or imposed by or under this Act.'

[46] Corbett CJ, writing for the court, concluded that the relevant statutory provision had to be interpreted against the general background of the law relating to statutory authority as a defence to a delictual claim. In terms of this defence, conduct which would otherwise give rise to delictual liability, may be justified and rendered lawful by the fact that it consists of the exercise of a statutory power. See also *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd & another* 1997 (1) SA 157 (A) at 164I-165H.

[47] However, the learned Chief Justice further emphasised (at 196B-E) that the person exercising the statutory power is under a duty to use due care and to take all reasonable precautions to avoid or minimise injury to others. The failure to exercise the statutory power with due care and without having taken reasonable precautions to avoid or minimise injury to others, renders the conduct of the repository of the statutory power unlawful.

[48] With regard to s 87 of Act 122 of 1984, it was held (at 196G-H) that it postulates two requirements for legal immunity: (a) the act in question must have been done in good faith, and (b) it must have been done in the exercise of a power or duty under the Act.

[49] As to the requirement of 'good faith', it was held (at 196H-I) that it relates to the subjective state of mind of the repository of the power and, broadly-speaking, requires that, in exercising the power, he or she should have acted bona fide, honestly and without ulterior motive.

[50] With regard to the second requirement for legal immunity, Corbett CJ said the following (at 196J-197A):

'As to (b), it seems to me that the section is clear. The person sought to be held liable must show that he acted within the authority conferred by the power in question. It necessarily follows that if, owing to a failure to exercise due care or to take reasonable precautions, he exceeded the power and acted without authority, he will be unable to establish requirement (b) and his reliance on s 87 must fail.'

[51] I should add that it was held (at 196H and 197C, respectively) that a person seeking to rely on s 87 bears the onus of establishing that his or her conduct falls within the ambit of the section and that the onus of establishing the requirement of good faith would also be on the party claiming immunity.

[52] Returning to s 42 of the NPA Act and in view of the principles outlined above, it has to be borne in mind that, in terms of s 20 of the NPA Act, the prosecuting authority and accordingly also the prosecutor involved in this matter are clothed with the statutory power to institute and conduct criminal proceedings and matters incidental thereto on behalf of the State. Where s 42 refers to 'anything done . . . under this Act', it by necessary implication refers to the powers conferred in terms of s 20 of the NPA Act. A prosecutor exercising this power and wishing to avail him or herself of the immunity afforded by s 42 is required to show that he or she acted within the authority conferred by the power in question, which, in turn, requires him or her to have taken all reasonable precautions to avoid or minimise injury to others. A failure to do so would render his or her conduct unlawful and the reliance on s 42 of the NPA Act would therefore fail.

[53] Even if it is accepted, without so deciding, that the prosecutor in this case acted bona fide, it is abundantly clear that he had failed to use due care and to take all reasonable precautions to avoid or minimise injury to the respondent and her minor daughter. His negligent failure to place all relevant information before the magistrate resulted in S[...] being released from custody, thereby allowing him the opportunity to abduct and rape the minor child. This negligent conduct would

preclude the appellant from relying on the ground of justification created by s 42 of the NPA Act.

Liability for the respondent's emotional shock

[54] I now turn to the appellant's contention that the respondent failed to prove that she has suffered a psychiatric injury or emotional shock as a consequence of the abduction and rape of her minor daughter. In my view, there is no merit in this submission. The clinical psychologist, Ms Lategan, testified that, subsequent to the abduction and rape, she treated the child and in the process observed the respondent who was always present. Although her main focus was the welfare of the child, she necessarily had to deal with both of them. According to her the respondent has suffered severe post-traumatic stress as a result of this incident, which will endure for the rest of her life.

[55] The appellant did not present any evidence, expert or otherwise, in rebuttal. Had it wished to do so all that it needed to do was to invoke the provisions of rules 36(1) to (5) but the respondent did not do so. I therefore agree with Yekiso J that the respondent has established the existence of a psychological injury or emotional shock for purposes of the merits of her claim in her personal capacity.

[56] In the result the appeal falls to be dismissed.

[57] Finally, with regard to costs, it was submitted on behalf of the respondent that the appeal has been brought on spurious grounds, which justifies the granting of a punitive costs order against the appellant. I do not believe that it can be said that the grounds of appeal are spurious. On the contrary, Yekiso J granted appellant leave to appeal on the basis that a reasonable prospect of success exists. In the circumstances a punitive costs order is not justified. I am, however, of the view that the matter justified the employment of two counsel.

[58] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel, where employed.

_____

P B Fourie
Acting Judge of Appeal

APPEARANCES:

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