

AK v MINISTER OF SAFETY AND SECURITY AND OTHERS 2019 (1) SACR 529 (EC P)

KEY CONCEPTS	
Police negligence	Inadequate police investigation
Rape	Constitutional obligations of police
Impact of inadequate investigation on trauma of complainant	

Facts of the case

The plaintiff, an adult female businesswoman, brought an action for damages against the Minister of Police for alleged negligence on the part of his employees as well as an action against certain named members of the South African Police Service (SAPS) for their alleged negligence.

The plaintiff was in the Eastern Cape for business purposes in December 2010. Having a few hours to spare before her flight back to Johannesburg, the plaintiff decided to go for a walk on King's Beach. She was supposed to return to her mother's home before she left to pick up a friend who would go with her to the airport. She parked her car at the beachfront at about 14H00 and went for a walk along the beach. She was assaulted, robbed of her personal belongings and dragged into the bushes by an unknown man. The man instructed her to walk with him to the sand dunes and, in fear of her life, she complied. At the dunes, the man instructed her to take off her clothes, blindfolded her with them and raped her. For the rest of the afternoon she was consistently raped. At the time she thought it was the same man who had changed his pants but later she came to believe that it had been more than one assailant and that she had in fact been gang-raped. The assailant returned at sunset and remained there for the rest of the night, throughout which he continued to rape her. The plaintiff managed to escape during the early hours of the next morning and was assisted by a group of men who were out for an early morning jog. She was subsequently taken to the police station. She had been held captive and consistently raped over a period of approximately 15 hours.

When the plaintiff did not return home to fetch her friend and missed her flight, she was reported missing by her family. At approximately 23H30 the plaintiff's car was found at the King's Beach car park by members of the Humewood police. It had been broken into. An investigation into the incident commenced. A search, which involved a ground search with a dog and a helicopter search, took place which lasted about 3 hours but the plaintiff was not found. The investigation remained active for about two years and some arrests were made but the suspects were eventually cleared by DNA evidence. One suspect was convicted of the theft of the plaintiff's personal belongings from her vehicle but no one was ever tried for the rape. The plaintiff's abductor and rapist have never been found.

The plaintiff alleged that the SAPS wrongfully and negligently breached its duty to investigate the crimes committed against the plaintiff; alternatively, if they did so investigate, they failed to do so with the skill, care and diligence required of reasonable police officers. As a result of this the plaintiff argued that SAPS had caused her psychological injury and were liable to pay her damages. Evidence was led of the psychological trauma experienced by the plaintiff and how every aspect of her life had been changed by it. This trauma was further exacerbated by the paucity of the investigation and delay in finalising the investigation and bringing the perpetrators to book.

General constitutional obligations of SAPS and its relationship with the public

The High Court noted the following:

- Rape is an all-too-common occurrence in South Africa.
- South Africa is a country that lends itself to outdoor recreational and sporting activities.
- The threat of sexual violence to women is as pernicious as the sexual violence itself.
- It goes to the very core of the subordination of women in society and entrenches patriarchy as it imperils the freedom and self-determination of women.
- It is deeply sad that few women or girls dare to venture into public spaces alone, especially when it is dark and deserted.
- The rape of South African women is amongst the highest in the world.
- 68, 5% of sexual offence victims in South Africa are women.
- Within the 24 month period (2015 - 2017) there was an increase of 53% in the number of women who had experienced sexual offences.
- The situation is worse than the statistics show because it is estimated that one in every nine rapes is reported, which means that someone in South Africa is being raped every two minutes.
- The Constitution, national legislation and formations of civil society and communities do not allow this horrendous invasion and indignity imposed on women and children.
- It follows that the state, through its foremost agency against crime, the police service, bears the primary responsibility to protect women and girls against this prevalent plague of violent crimes.
- These are rights that the state is under a constitutional obligation to respect, protect, promote and fulfil (s7(2) of the Constitution).
- A vital mechanism through which this is to be done is the police service.

Constitutional Obligations of the State and the Police and their Relationship with citizens

The High Court noted the following:

- The state has constitutional obligations to respect, protect and promote the citizen's right to dignity and to freedom and security of the person.
- The state has established a police service for the efficient execution of its constitutional obligations to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.

The SAPS admitted that they had a duty to search for the plaintiff and to investigate the complaint that she had been raped. It was also common cause that the SAPS had a duty to:

- Carry out a search for the plaintiff with care, diligence and skill required of reasonable police officers; and
- Investigate the allegation of rape by her with the care, diligence and skill required of reasonable police officers.

The question to be decided then is whether SAPS complied with this obligation in respect of the plaintiff.

Determination of Negligence with respect to search

The High Court made the following findings from the evidence presented to court:

- The evidence demonstrates that, while a search was conducted, the actions of the SAPS officers at all times fell below the standards reasonably expected of them.
 - o the SAPS officers, who were at the scene before WO Gerber arrived, did not conduct a search whilst waiting for him to arrive;
 - o the SAPS members could have conducted a basic foot search but did not;
 - o they did not walk up the beach with their torches and search the dunes;
 - o the area is restricted in size and a search would not have taken longer than an hour to conduct;
 - o both the dog unit and the helicopter search inexplicably did not search beyond a certain point despite being aware of the dunes;
 - o the decision not to extend the search to the dunes was a significant and glaring omission and the plaintiff could have been found by approximately 01H00 that morning, reducing the further trauma she had to experience;
 - o WO Gerber should have conducted the search right up to the harbour and it was, therefore, not reasonable of him to end his search where he had, especially as he was aware that the area extended further;
 - o the helicopter search fell short of what was required since it did not conduct an effective search beyond a certain point otherwise it would have found the plaintiff;
 - o the search was terminated early because of another aeroplane coming in to land; and
 - o there was no proper command and control of the search and no communication and co-ordination between the various SAPS units.

It was the finding of the High Court that the above constituted negligence on the part of SAPS and highlighted their extreme indifference in ensuring that the area was properly and effectively searched.

Determination of Negligence with respect to investigation

The plaintiff set out a number of grounds on which she claimed that the defendants acted in breach of their duty:

- that there was a delay in responding to the call by the jogger who had rescued her

- o the officer responded between 10 and 15 minutes after he received the call, and the court found that he had responded as soon as it was reasonably possible for him to do so;
- that there was a delay in searching for and taking statements from possible suspects and/or witnesses and failure to take reasonable steps to identify suspects and/or witnesses
 - o a statement should have been taken from the jogger who found the plaintiff, but this was not a material factor contributing to any negligence on the part of the investigation;
- SAPS failed or delayed in searching the areas for bush dwellers living in the sand dunes in the vicinity of Kings Beach and failed to round up and/or photograph them to enable the plaintiff to identify her abductor or to take statements from them or interview them on that morning or thereafter;
 - o 3 bush dwellers were found in the early hours of the morning and they were not taken in for questioning and their names were not recorded – they could have had critical information
- no assistance was sought by the officer on duty to follow up on the plaintiff's description of her attacker and there is no evidence that the SAPS searched the beach area for possible suspects;
- there is no record of the CCTV footage of those days being obtained or viewed to identify suspects or witnesses;
 - o in this regard the investigating officer was grossly negligent;
- Jakavula was arrested for being in possession of the plaintiff's clothing together with another bush dweller, Mancane, who was connected to the clothing
 - o he stated he was asleep in the bushes at Kings Beach on the night;
 - o he should have been considered a suspect until eliminated;
 - o his blood was not taken for DNA, even though SAPS knew there was DNA evidence available;
- the police officers did not do anything else to identify other suspects and did not carry out an investigation of the bush dwellers in that area;
- the case was handed over to an investigating officer 3 days later, although SAPS was fully aware that in violent crimes it was important to act quickly as this was a critical period for the investigation;
- the bush dwellers were only rounded up 5 days later by the municipality in preparation for the Christmas season:
 - o SAPS used this opportunity to conduct an informal identification parade;
- the investigating officer did not try to find Mancane either to eliminate him from the investigation;
- the investigating officer failed to take statements from witnesses and to follow up on relevant information supplied to him by witnesses:
 - o he didn't take statements from the car guards, whose details the plaintiff had given him;

- o witnesses identified the identikit as somebody by the name of Xolani (later Bongile) but this was not followed up;
 - o information was given by an informer of men discussing the rape under the influence of alcohol but this was not followed up;
- a voice identification parade could have been conducted, as the plaintiff had been blindfolded for most of the night – this was not done;
- failure to test DNA evidence found at the scene:
 - o the body-fluid dog was available when the crime scene was investigated but was not used;
 - o a number of exhibits were collected, including a piece of newspaper with possible blood stains;
 - o the stain was identified as blood and the officer was instructed that, should the Public Prosecutor requires DNA analysis, this should be done four months in advance of the trial;
 - o no DNA testing was done on the stain until the plaintiff requested it during the course of the litigation;
 - o the DNA testing was done 8 years later even though it was crucial to the plaintiff's case;
 - o it was the investigating officer's job to follow the DNA lead;
 - o this was plainly an unreasonable delay and a breach of SAPS's legal duty to conduct a reasonably effective investigation;
- the investigating officer failed to follow up on information provided by the plaintiff:
 - o the abductor told the plaintiff that he had recently been released from St Albans Prison after serving a 15 year sentence for killing his girlfriend

The High found the investigating officer to be a poor witness, whose evidence was laboured and wandered without direction. He appeared to conduct his investigation with little plan in mind.

“the overall impression one is left with is that there is much that he did not do, which he could have done and should have done. He did conduct an investigation of sorts, but the investigation was characterised by a number of glaring omissions which could only have left the plaintiff with the clear impression that he was doing very little to follow up on all possible leads which might lead to the apprehension of her assailant.”

Findings on liability for negligence

The High Court found that SAPS were grossly negligent in the performance of their duties. Both the search for the plaintiff and the subsequent investigation did not meet the standards expected of reasonable police officers. It was not suggested that the subsequent criminal investigation be perfect as this was clearly too high a standard for the police. The only requirement is that a reasonably diligent and skilful search and investigation had to be carried out. For the above reasons, the Court found that neither the ground search, air search nor investigation was carried out with the diligence and skill required of a member of

SAPS – the duty underpinned by the Constitution and on which its citizens are entitled to rely.

Findings on wrongfulness

Wrongfulness is an essential and discrete element which has to be established for delictual liability to ensue. The Court found the conduct of SAPS to be wrongful on the following grounds:

- the errors in the search and investigation were serious with obvious and significant shortcomings;
 - failure to search the entire dune area;
 - air search's failure to use the Nightsun light to search the same area;
 - failure to search, question and investigate all bush dwellers in and around the area with any sense of urgency;
- the fact that crimes against women and children are of alarming proportions in South Africa;
- the purpose of police service is for the efficient execution of its constitutional obligations to prevent, combat and investigate crime, to protect and secure inhabitants and their property and uphold and enforce the law;
- the consequences of inefficient, negligent, wrongful or substandard execution of these obligations can be dire and damages flow from this;
- if the police service is not held accountable for their actions and inactions it will have a chilling effect on the ability of members of our society to enjoy the freedoms guaranteed to them by the Constitution, and could lead to the further use of self-help to resolve crimes;
- public policy and legal considerations impose an obligation of the police to fulfil their obligations, and a failure to do so must lead to a finding that their conduct is wrongful.

Causation

In order to prove liability, it must be proved on a balance of probabilities that the conduct of the defendant caused the harm. This involves two inquiries, namely a factual inquiry (factual causation) and a legal causation (legal causation). In terms of factual causation, the plaintiff must establish that it is more likely than not, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued.

The defendants argued that:

- the psychiatric injury to the plaintiff was caused by the multiple rapes of the plaintiff by an unknown person and these could not have been prevented by SAPS as they were unaware of them, and were thus not caused by any acts or omissions of the defendants;
- the fact that the plaintiff was upset by her own perception that the police investigation was defective cannot make the defendant liable, unless her perceptions were correct; and
- the plaintiff cannot succeed since she has been unable to prove that the damages suffered by her were as a result of the alleged actions or omissions of the defendants.

The evidence led by the experts was that the traumatic incident itself was the predominant cause of her injury. It is common cause that the defendants are not responsible for this traumatic injury, but this cannot absolve them from the responsibility for the exacerbation of the initial trauma. The experts agreed that the severity of the plaintiff's trauma is directly related to the initial injury, the length of time she endured this trauma and the events which took place subsequently. If the police had managed to find her, she would have been spared further trauma which continued to occur from the times that SAPS could have found her to when she eventually managed to escape. It was, therefore, abundantly clear that the delay in finding the plaintiff unduly prolonged her exposure to the trauma and had a significant impact on the extent of her trauma.

If the SAPS had conducted a reasonably effective search of King's Beach, the plaintiff would have been found by 01H30 at the latest. She would have been spared a further four and a half hours of her ordeal, which amounts to almost one-third of the total time of the trauma, which gave rise to her injury. Thus, "but for" the SAPS's negligent search and investigation, the plaintiff would not suffer the injury that she currently suffers. The High Court accordingly held that the defendants were liable for 40% of the damages that the plaintiff has suffered.