THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 431/2020

In the matter between:

NANDI JACOBS **APPELLANT**

and

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **RESPONDENT**

Neutral citation: *Nandi Jacobs v The Minister of Justice and Correctional Services (*431/2020) [2021] ZASCA 151 (27 October 2021)

Coram: MATHOPO, VAN DER MERWE, MOLEMELA, and MOTHLE JJA and UNTERHALTER AJA

Heard: 10 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand down is deemed to be 10h00 on 27 October 2021.

Summary: Practice – absolution from the instance – claim that responsible Minister liable in delict for the decision by the Parole Board to release a prisoner on parole who later attempts to sexually assault the plaintiff – whether the evidence led at trial could sustain the claim – whether the test for absolution from the instance correctly applied.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J, sitting as court of first instance):

1 The appeal is upheld, with costs.

2 The order of the high court is set aside, and substituted with the following order:

'The application for absolution from the instance is dismissed with costs.'

JUDGMENT

Unterhalter AJA (Mathopo, Van der Merwe, Molemela and Mothle JJA concurring)

Introduction

[1] The appellant, Ms Jacobs, instituted an action against the respondent, the Minister of Justice and Correctional Services (The Minister). Ms Jacob claimed R 2 040 000 from the Minister for pain and suffering. Ms Jacobs alleged that on 1 April 2012, Ivan Botha had attacked her and attempted to assault, rape and rob her. Mr Botha was a convicted criminal who had committed, among other offences, rape and indecent assault. Mr Botha was placed on parole on 1 November 2010. The attack took place during the period of Mr Botha's parole. Ms Jacobs' cause of action was predicated upon the failure by the Minister to discharge his duty to protect Ms Jacobs. Ms Jacobs' case rested upon two central claims. First, given Mr Botha's criminal record and the information that served

before the Parole Board, he should not have been released on parole. Second, Mr Botha violated his parole conditions, but was not returned to prison. This left Mr Botha at large to attack Ms Jacobs. The Department of Correctional Services should, in the circumstances, have foreseen that by permitting Mr Botha to be released on parole, the public may be endangered. That risk materialised when Mr Botha attacked Ms Jacobs. As a result, the Minister was liable for the pain and suffering caused to Ms Jacobs.

[2] The Minister defended the action. The trial proceeded before Mavundla J in the Gauteng Division of the High Court, Pretoria (the high court). Ms Jacobs testified. After which, she closed her case. The Minister applied for absolution from the instance. The high court granted absolution from the instance, together with the costs of two counsel. With the leave of the high court, Ms Jacobs appeals to this Court.

[3] The issue before us is whether absolution from the instance was correctly granted by the high court. The standard that is of application to decide whether the trial court should grant absolution from the instance is 'whether a court, applying its mind reasonably to the evidence, could or might (not should or ought to)' find for the plaintiff.[1] The high court correctly formulated the standard. The question before us is whether the high court correctly applied this standard to the evidence before it.

The evidence

[4] A number of pleaded averments in the particulars of claim were admitted by the Minister at the pre-trial conference, and other matters were

[1] *Carmichelle v Minister of Safety and Security and Another* 2 [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 26 *(Carmichelle).*

common ground as between the parties. Prior to his release on parole, Mr Botha was convicted of various offences in the period 1996-2011. These offences included indecent assault and rape. He was sentenced to periods of imprisonment. On 1 November 2010, he was placed on parole, following a decision by the Parole Board dated 24 November 2009. In the period 24 February 2011 - 28 August 2011, Mr Botha violated the conditions of his parole. He was given verbal warnings for these breaches. On 1 April 2012, in Oudtshoorn, Mr Botha attempted to assault, rape and rob Ms Jacobs. Mr Botha was, as a result, prosecuted and convicted of robbery, and conspiracy and enticement to commit a sexual offence.

[5] In her evidence, Ms Jacobs described the attack upon her and its effect upon her personally and at work. Ms Jacobs was taken, in her evidence in chief, to the documents that were served before the Parole Board in respect of Mr Botha's applications to be placed on parole. The documents were admitted without objection. Ms Jacobs was referred to various passages in this documentary record. To what end, is not entirely apparent, save to emphasise those passages which would warrant caution in any parole decision. The cross-examination of Ms Jacobs was largely taken up with an exercise to show that the documents before the Parole Board did not indicate that Mr Botha was likely to commit the crime that he did, and that his violations of his conditions of parole permitted of the discretionary sanction of warnings. Here too, the relevance of seeking Ms Jacobs' responses to these lines of enquiry is not apparent.

Absolution from the instance

[6] Mavundla J granted absolution from the instance. He did so on the following basis. The decision to place a prisoner on parole rests upon a discretion to be exercised by the Parole Board. The decision is ultimately

a value judgment. Ms Jacobs did not testify as an expert. Her opinions were of no assistance. The high court considered there to be no evidence that demonstrated that the decision to place Mr Botha on parole was tainted or flawed. That being so, there was no evidence before the high court that there was negligence attributable to the Parole Board. And hence, there was no evidence upon which the high court could find for Ms Jacobs.

[7] The high court cannot be faulted for its estimation that the opinions of Ms Jacobs as to whether the Parole Board had properly carried out its statutory function bore little, if any, weight. Ms Jacobs was not called as an expert witness and did not claim to have expertise as to the decision to place Mr Botha on parole. But, by parity of reasoning, the reliance that counsel for the Minister placed upon the apparent concessions of Ms Jacobs, in her testimony, that there was no way of knowing in advance whether Mr Botha would commit the offences that he did, whilst on parole, is equally unavailing.

[8] The issue before the high court was whether, applying its mind reasonably to the evidence before it, could the high court find for Ms Jacobs. Mavundla J recognised that the Parole Board enjoyed a discretion, and concluded that unless there was evidence that could show that the exercise of that discretion was flawed, Ms Jacobs could not prevail.

[9] This conclusion of the high court fails to recognise the complexity of the issues that arise from the pleaded case of Ms Jacobs. Ms Jacobs relies upon the constitutional duty of the Minister to protect the public and to protect women from violent crimes. Her particulars of claim also allege that the Minister failed to adhere to the objectives of the Correctional Services Act 111 of 1998 (the Act), by not giving effect to the Bill of Rights

and not adequately regulating the release of inmates and the system of community corrections. The Parole Board exercises its powers under the Act. If, as Ms Jacobs alleges, the Parole Board has failed to regulate the release of inmates in terms of the Act, it has breached its statutory duty. However, this postulate raises questions of importance and some complexity. It is by no means axiomatic that a breach of statutory duty by the Parole Board in the exercise of its powers under s 75 of the Act gives rise to a delictual claim for damages.

[10] In *Steenkamp N O v Provincial Tender Board, Eastern Cape*, (*Steenkamp N O),*[2] this Court, in a case concerning pure economic loss following upon an award by a tender board that was set aside, explained that where a breach of statutory duty gives rise to a claim for damages, a common law duty cannot arise. Where the breach of the statute excludes such a claim, there can be no common law duty. And where the statute is unclear as to whether statutory breach permits a claim for damages, policy may weigh against the recognition of a common law duty. The decision of the Constitutional Court, on appeal in *Steenkamp N O*,[3] came to a similar conclusion: nothing in the statutory scheme contemplated that an improper but honest exercise of discretion must attract a delictual action in favour of the disappointed tenderer.

[11] An issue that arises on the pleaded case of Ms Jacobs is whether, even if the Parole Board failed to discharge its statutory functions, does the Correctional Services Act confer or exclude a claim for damages against the Minister? If the statute does neither, does the common law nevertheless

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[2] *Steenkamp N O v Provincial Tender Board, Eastern Cape* [2005] ZASCA 120; [2006] 1 All SA 478 (SCA); 2006 (3) SA 151 (SCA) para 22.
[3] *Steenkamp N O v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) para 47.

found a cause of action? And in answering this question, how is the reasoning in *Carmichelle v Minister of Safety and Security and Another (Carmichelle)*[4] , which recognised that a delictual action may lie against a police officer and prosecutors who failed in their duty to protect the plaintiff from attack, to be reconciled with the precautionary *dicta* in the *Steenkamp N O* appeals?

[12] Counsel for the Minister invited us to consider these issues in deciding this appeal. That invitation is to be declined, and for these reasons. First, while certain of these issues may have been usefully considered had an exception been taken at the outset, it is of less utility to do so when some of the evidence at trial has been heard. Second, should the enquiry reach the question of unlawfulness at common law, this is an issue of public policy that may yet be elucidated by evidence that the Minister would wish to call, in the event that the appeal succeeds and absolution is not granted. Third, the parties did not address full argument to this Court as to the correct interpretation of the Correctional Services Act and whether a common law delictual claim is supportable. Fourth, no reconciliation has been attempted in explanation of the Minister's recognition at the pre-trial conference of Ms Jacobs' constitutional rights, as pleaded, but the denial of the Minister's duty to act and protect Ms Jacobs.

[13] In my view, therefore, it would be unwise for us to address the important but wider issue as to whether Ms Jacobs enjoys a claim for damages by reason of a failure by the Parole Board, lawfully, to exercise their powers. Rather, the issue of law as to whether a cause of action is cognisable on the basis of a duty by the Parole Board to protect Ms Jacobs

[4] *Carmichelle supra.*

should have provided the high court with a compelling basis to decline the application for absolution from the instance. In *Carmichelle*,[5] the Constitutional Court recognised that where a substantial issue of law arises the interests of justice ought to incline a trial court to refuse absolution. That is the position here. Whether Ms Jacobs enjoys a cause of action, and if she does, its basis, are matters of some difficulty. They are best dealt with once all the evidence has been heard. For this reason, in my view, the high court should not have granted absolution from the instance.

[14] But even assuming that a breach of duty by the Parole Board can found a cause of action for damages, was the high court correct that the evidence before it could not sustain the claim that the Parole Board had failed lawfully to exercise its powers?

[15] I have already observed that the evidence of Ms Jacobs as to what the Parole Board should have done is of little assistance and doubtful relevance. But her testimony does not exhaust the evidence placed before the high court. Together with the matters that were common cause following the pre-trial conference, and summarised above, documentary evidence was received by the high court that bears upon the decision taken by the Parole Board to place Mr Botha on parole, as well as Mr Botha's record of compliance with his conditions of parole. It is to this evidence that I now turn.

[16] It is common ground that Mr Botha was convicted of various offences, and in 2003 he was convicted on two counts of indecent assault and rape. Mr Botha was sentenced to imprisonment for a period of 15 years.

[5] *Carmichelle supra* at paras 78 -81

Mr Botha was not granted parole in 2007. The case management committee, on 22 October 2007, recommended that Mr Botha should be seen by a psychologist to look into his sexual behaviour. When Mr Botha again applied to be placed on parole in 2009, the information placed before the Parole Board indicated that his conduct whilst in prison was good. Mr Botha had attended various rehabilitative programmes, including restorative justice, conflict handling and aggression, and, perhaps of most importance, certain modules of a sexual offences rehabilitation programme (SORP). The report of a social worker, Ms Cronje, dated 14 August 2009, indicates that Mr Botha had attended two modules of the SORP from 26 August 2008, and it was planned that he would undertake modules 3-5 until October 2009. Whether he did so is unclear, though the profile report contains the ambiguous notation 'Modules 2-5 was done by soc. workers'. Elsewhere in the documents reference is made to programmes completed including 'SORP up to module 4'.

[17] The report of Ms Cronje commended Mr Botha's progress. The report reflected that Mr Botha recognised his wrongdoing, gave cooperation, and was starting 'to learn from social intervention to change his thoughts and behaviour'. Ms Cronje's view was that Mr Botha showed remorse for his actions, and wanted 'to change his lifestyle to refrain from criminal behaviour'.

[18] The report of Ms Cronje, taken together with Mr Botha's conduct in prison, the programmes he had completed, his cooperation and remorse appear to have persuaded the Parole Board to place Mr Botha on parole. The documents also show that Mr Botha enjoyed support from his family and would stay with his mother if parole was approved. He had also been 'crime free' for 5 years and 4 months and had committed no disciplinary

infractions. The Parole Board approved Mr Botha's parole. The chairperson of the case management committee noted that phase 1 of the parole was to be monitored very strictly.

[19] Once placed on parole, Mr Botha was made subject to monitoring. In the period from 12 December 2010 until 21 May 2013, Mr Botha is recorded as having been visited at his home, at the office and before a supervision committee for the purpose of monitoring. These visits were frequent, and in some months are recorded to have occurred weekly. Mr Botha is also reflected as having kept appointments for compulsory office visitation and before the supervision committee. On five occasions, the records show that Mr Botha violated his parole conditions. He was given four verbal warnings and on one occasion he was placed under parole supervision.

[20] The case of Ms Jacobs rested on the following propositions. First, given Mr Botha's criminal record, including convictions for rape and indecent assault, the Parole Board should not have placed Mr Botha on parole. By doing so, the Board failed to carry out its duties under the Correctional Services Act and failed to protect Ms Jacobs, as the Parole Board was bound to do, to give effect to the Bill of Rights. Mr Botha's violations of his parole conditions should have been sanctioned by re-incarceration, rather than merely giving warnings. This too, it is claimed, amounted to a failure to protect Ms Jacobs. These failures were wrongful.

[21] Second, the Parole Board was negligent. It should have foreseen the reasonable possibility that releasing Mr Botha on parole may have led to his committing another sexual assault. This indeed occurred. The

Parole Board should have taken reasonable steps to avoid this outcome by refusing Mr Botha parole in the first place, and sending him back to prison, upon his violation of his parole conditions.

[22] Finally, but for the wrongful and negligent conduct of the Parole Board, the attack on Ms Jacobs would not have taken place. Factual causation is thus satisfied. The causal relationship between the conduct of the Parole Board and the attack on Ms Jacobs was sufficiently proximate to meet the requirement of legal causation. Hence, the Minister, being liable for the impugned conduct of the Parole Board, must pay damages to Ms Jacobs for the pain and suffering suffered by her as a result of the attack upon her by Mr Botha.

[23] I have already made it plain that for purposes of determining whether the high court correctly granted absolution from the instance, I will assume, without deciding, that the decision of the Parole Board to release Mr Botha on parole, and thereafter its failure to send him back to prison upon the violation of his parole conditions, may give rise to a common law claim in delict. The key issue is then whether the high court, reasonably applying its mind to the evidence, correctly granted absolution from the instance because it could not find for Ms Jacobs.

[24] As my recitation of the evidence makes plain, there was much in what served before the Parole Board to indicate that Mr Botha was a suitable applicant for parole. His conduct in prison was considered good; he had completed numbers of rehabilitative courses; he was reported to have shown remorse for his crimes and to evince a desire to act differently; his family was supportive of him; he had a home to go to with his mother; and the social worker's report was favourable.

[25] As against these promising indications, no report appeared in the record from a psychologist that had considered Mr Botha's sexual behaviour, as recommended by the case management committee in 2007 when Mr Botha's application for parole was turned down. There is a reference in the record to a report by a psychologist that is marked as attached. But it does not appear in the documentary record, and it is not clear whether, if it was compiled, it served before the Parole Board. If the report exists, nothing is known of its contents. The absence of any evidence in the documentary record that a psychologist report was compiled and provided to the Parole Board, before it came to its decision, is a matter of some importance. So too, the profile report compiled by the case management committee, dated 24 September 2009, recommended that a further profile report be submitted for reconsideration and that Mr Botha should attend more programmes. How the Parole Board came to its decision in the face of this recommendation requires some explanation.

[26] Mr Botha was a repeat sexual offender. Although some time had elapsed since his conviction for these crimes, his imprisonment limited the evidence available as to how Mr Botha would act in the world outside prison. Although this is no doubt a problem intrinsic to all parole decisions, there is reason to exercise particular care when a person has shown a propensity, repeatedly, to commit a particular type of crime. This is all the more so if, as in the case of Mr Botha, his abuse of alcohol was linked to sexual violence.

[27] On the documentary evidence produced at the trial as to what served before the Parole Board, there is a case to be made that the Parole Board should have flagged the risks attendant upon the release on parole of a prisoner with an apparent propensity to commit acts of sexual violence.

There is certainly a case to answer as to why the Parole Board considered that it should proceed to release Mr Botha on parole, without the benefit of a report from a psychologist.

[28] There is of course much danger in reasoning that proceeds on the basis that because Mr Botha attempted a sexual assault upon Ms Jacobs, it must have been self-evident that high risk attached to the grant of his parole. The very essence of parole decisions concerns calculated risks. Parliament has constituted the Parole Board to make difficult decisions that entail risk. But if the Parole Board exercises its powers without due regard to the risks that arise from releasing a prisoner on parole then, provided that a cause of action in delict is cognisable, its conduct may be judged wrongful and negligent.

[29] In my view, on the documentary evidence placed before the high court, a court could find that the Parole Board acted wrongfully and negligently in releasing Mr Botha on parole. Convicted of three sexual offences, the superficial commentary offered in the social worker's report, the vagueness of what was said by the case management committee, and the lack of a psychologist's report, make out a case on the basis of which it could be said that the Parole Board decided to release Mr Botha on parole when there was significant risk attached to their decision. Until such time as those who made the parole decision come to give evidence and explain what they did, there is sufficient evidence that could permit of a finding that the Parole Board acted wrongfully and negligently. Once that is so, the evidence could also suffice to establish causation, since a proper appreciation of the risk could have led to a denial of parole and the continued imprisonment of Mr Botha.

[30] The high court found that there was no discernible error in the exercise by the Parole Board of its discretion. That finding cannot stand. On the evidence before the high court, there was reason for the Parole Board to proceed with caution. This, again on the evidence, the Parole failed to do. Whatever margin of appreciation should be allowed to the Parole Board, there was reason to require more than the unsubstantiated claims made in the documents that served before it. But under the deferential standard applicable to an application for absolution, there was evidence before the high court that could permit of the finding that the discretion of the Parole Board was not lawfully exercised.

[31] There was a further aspect of the evidence to which the high court did not have proper regard. Mr Botha, once released on parole, was subject to supervision. Those responsible for his supervision categorised Mr Botha as 'high risk', having been convicted of rape and indecent assault. Yet his violations of his parole conditions resulted in verbal warnings. Whether that was a defensible sanction was a further matter that could permit of a finding that there was a failure on the part of the Supervision Committee to recommend that appropriate action be taken against Mr Botha.

[32] For these reasons the high court was in error in granting absolution from the instance.

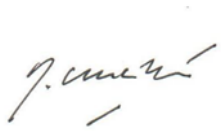
[33] The appeal must accordingly succeed with costs.

[34] The following order is made:

1 The appeal is upheld, with costs.

2 The order of the high court is set aside and substituted with the following order:

‘The application for absolution from the instance is dismissed with costs.’



DAVID UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances

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