

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO:

SCA CASE NO: 403/2019

HIGH COURT CASE NO: 3429/2013

In the matter between:

ANDISIWE KAWA

Appellant
Plaintiff in the High Court

and

MINISTER OF POLICE

Respondent
1st Defendant in the High Court

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Signed at **Sandton** on this the **26th** day of **May 2020**.



Norton Rose Fulbright South Africa Inc
Attorneys for applicant / plaintiff
34 Fredman Drive
Sandton
Tel +27 (0) 11 685 8708
Fax +27 (0) 11 301 3266
Email david.kapelus@nortonrosefulbright.com
Ref 39/KAW/85/Mr D Kapelus

To:

The Registrar
Constitutional Court
Braamfontein

And to:

The State Attorney
Defendants' attorney
29 Western Road
Central
Port Elizabeth
Tel: +27 (0) 41 585 7921
Fax: +27 (0) 41 585 2687
Email: monaidoo@justice.gov.za
Ref: 2257/2013/K

SERVICE BY EMAIL AS PER AGREEMENT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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NOTICE OF APPLICATION

TAKE NOTICE that the applicant intends to apply to the Constitutional Court, subject to directions by the Chief Justice, for an order in the following terms:

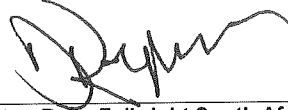
1. Granting the applicant leave to appeal against the whole of the judgment and orders of the judgment by the Supreme Court of Appeal in the Minister of Police v Ms K (403/2019) [2020] ZASCA 50) dated 6 May 2020.
2. Directing that the costs of this application be costs in the appeal.
3. Further and/or alternative relief.

TAKE NOTICE FURTHER that the affidavit of Andisiwe Kawa and its attachments will be used in support of this application.

TAKE NOTICE FURTHER that if you intend to oppose this application, you are required, within ten days of service of this application on you, to lodge with the Registrar, and to serve on the applicant's attorneys an affidavit setting out the grounds on which you oppose the application.

AND TAKE NOTICE FURTHER that the applicant has appointed **NORTON ROSE FULBRIGHT SOUTH AFRICA INC**, as her attorneys of record, at the address set out below, where she will accept service of all further notices, documents and other processes in these proceedings.

DATED AND SIGNED AT JOHANNESBURG ON 26 MAY 2020



Norton Rose Fulbright South Africa Inc
Attorneys for applicant / plaintiff
34 Fredman Drive
Sandton
Tel +27 (0) 11 685 8708
Fax +27 (0) 11 301 3266
Email david.kapelus@nortonrosefulbright.com
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3

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

I, the undersigned –

ANDISIWE KAWA

make oath and say that –

- 1 I am a woman. I am 58 years' old. I live at 112a Patricia Road, Atholl, Johannesburg, 2196. I was the plaintiff in the High Court (HC) the respondent in the Supreme Court of Appeal (SCA) and I am the applicant in the Constitutional Court (CC). To keep these papers as brief as possible, I attach my CV submitted at the trial. It provides some detail and insight into my life and career.
- 2 The facts in this affidavit are within my personal knowledge and belief and they are true and correct. Legal submissions are made on the advice of my lawyers.

My injury



3 Near the end of a visit to my elderly mother in Port Elizabeth to buy a house for her, I went for a walk on the Kings Beach on 9 December 2010. Shortly after arriving at the beach, at about 14:30, I was attacked and abducted by an unknown man. He held me hostage between 14:30 on 9 December and 06:00 on 10 December 2010. During that time he threatened me with my life and raped me repeatedly.¹ That traumatic experience resulted in my suffering a severely traumatic psychological injury. It has changed my life such that I have been unable to return to the confident, successful businesswoman I used to be.

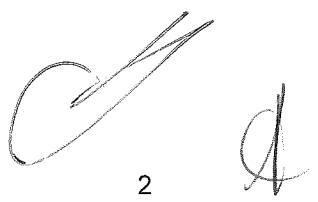
4 I was held hostage in a clearing, in vegetation in an area of sand dunes adjacent to the harbour wall, on the north side of the Kings Beach² The clearing is identified as F2 and the dune area as F-G in an aerial photograph tendered as **Exhibit A1** at the trial, and attached as such to this affidavit.³ The clearance at F2 is shown in **3 photographs** (photos 1, 2 and 5 from the SAPS photograph bundle and attached as such to this affidavit) taken by police officers on the morning of 10 December 2010.

My claim

5 During that night, between 11:30 – 01:30 members of the SAPS were at the Kings Beach. They failed to conduct a foot search. They conducted a dog and helicopter search. But both were carried out negligently.

6 Had the SAPS officers conducted a foot search, or conducted their dog and helicopter searches with the diligence, skill and care reasonably expected of police officers, it is likely that they would have found me some 5 – 6 hours before

¹ SCA Appeal Record (“AR”)/ Vol 9/ p 1460/plaintiff’s amended particulars of claim at [7]- [10]
² AR/ Vol 9/ p 1460/plaintiff’s amended particulars of claim at [7] – [9]
³ AR/Vol 1/Core Bundle (CB)/CB1/Exhibit A1.



2

I was finally able to get away at 06:00. Their failure to carry out a reasonably skilful, diligent, careful and effective search, prolonged my trauma. That materially contributed to its severity.

- 7 On the morning of 10 December 2010, I laid a charge of rape at the Humewood Police Station. An investigation was started. It has not yet been concluded. The investigation has been characterized by an abject lack of diligence, skill, care and effectiveness, that is reasonably expected of police detectives. The failure by police officers (including W/O Madubedube who was from the specialist SAPS unit that investigated crimes against women and children) to conduct a reasonably diligent and skilful investigation, exacerbated my injury.
- 8 Consequently, I claimed damages in delict from the Minister in the Port Elizabeth HC, because the negligent search and investigation by the SAPS prolonged and exacerbated my injury.

The judgments of the HC/SCA

- 9 The HC found that the Minister was liable for 40% of the damages resulting from my injury because of the negligent search and investigation by the SAPS. The SCA overturned the judgment of the HC on appeal. It upheld the appeal by the Minister and dismissed my claim with costs. The HC and the SCA's judgments are attached and marked "HC" and "SCA" respectively.

My application for leave to appeal against the SCA judgment

The test for leave to appeal



10 The test for granting leave to appeal against a judgment of the SCA in a constitutional matter is the following:⁴

10.1 Does the appeal raise a constitutional matter or an issue connected with a constitutional matter?

10.2 Is it in the interests of justice to grant leave to appeal?

11 A constitutional matter is raised if the grounds of appeal "*raise a constitutional issue of importance on which a decision of this Court is desirable*".⁵

12 The "*interest of justice*" test is met where important constitutional issues are raised that impact on the public interest, and where there are prospects of success on appeal.⁶

The test is met

Constitutional issue/public interest

13 The SAPS are under a duty to take reasonably practical and appropriate measures to protect women against gender violence and to investigate crimes of gender violence, so as to give effect to constitutional values and rights conferred by the Constitution on women.⁷ These include the values of dignity, equality, and freedom,⁸ and the rights to human dignity⁹ and to physical and psychological integrity.¹⁰

⁴ Minister of Safety and Security v Luiters 2007 (2) SA 106 (CC) at [31]

⁵ De Reuck v DPP, Witwatersrand Local Division 2004 (1) SA 406 (CC) at [3]

⁶ S v Basson 2005 (1) SA 171 (CC) at [39]

⁷ Carmichele v Minister of Safety and Security (CALS Intervening) 2001 (4) SA 938 (CC) at [63]
F v Minister of Safety and Security 2012 (1) SA 536 (CC) at [54] – [56]

⁸ s7

⁹ s10

¹⁰ s12

- 14 It is settled law.¹¹ Gender violence is an important constitutional issue. And the failure of the SAPS to protect and promote the rights of women against gender violence is a matter public interest.

Prospects of success

- 15 I show below that I have prospects of success on appeal against the SCA judgment. I do so under the following headings: the approach of SCA on appeal to the judgment of the High Court amounts to a misdirection; the SCA got the law and/or the facts wrong on negligence, causation, wrongfulness and costs.

The misdirections by the SCA

Appeal courts do not simply substitute their judgments for those of courts below

How the SCA went about overturning the HC judgment

- 16 The SCA did not establish the following:
- 16.1 The HC relied on the wrong law;
 - 16.2 It applied the correct law wrongly to the facts;
 - 16.3 It failed to identify correctly the questions it was required to answer;
 - 16.4 It failed to appreciate the nature of the issues before it;
 - 16.5 Its factual findings are not supported by the evidence;
 - 16.6 Its conclusions are not supported by the primary evidence as a whole;
 - 16.7 Its inferences are not supported by the proved facts;¹²

¹¹ Carmichele above at [66] (“Carmichele”) F above at [54] – [56]

¹² September v CMI Business Enterprise CC (2018) 39 ILJ 987 (CC) at [132] Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape [2014] ZASCA 182 at [19]




- 17 The SCA failed to proceed from the legal premise that interference with the HC judgment on appeal is limited to errors of law or fact. It moved from the premise that it was at liberty to substitute the identification of the disputed issues, conclusions and findings of the HC, with its own opinion.
- 18 That, I am advised, is a misdirection on appeal. The SCA can only interfere if the conclusions and findings by the HC are not supported by the law or the admissible evidence. The SCA never asked, as required by law, whether the HC identification of the questions for decision and its conclusions and findings, are supported by the law or the evidence. It substituted those conclusions and findings with its own, without testing the questions, conclusions and findings against the pleadings and the primary evidence.
- 19 The question before the CC is whether the SCA was right in substituting its judgment for that of the HC on the questions before the HC, the facts, and the conclusions to be drawn from the admissible primary evidence.
- 20 I am advised and submit that the SCA was wrong for two main reasons. First, there is a presumption against interference by substitution on appeal. Second, the opinion of the SCA is not supported by the law, the pleadings or the primary evidence.

The presumption against interference on appeal

- 21 There is a presumption on appeal that trial courts correctly identify the true disputed issues or questions for answer, make findings of fact based on the primary evidence and draw inferences and conclusions from the admissible primary evidence.



- 22 An appeal court may interfere with the identification of the issues, the evaluation of the primary evidence, the findings of fact, and inferences and conclusions drawn from the primary evidence by a trial court. But it may only do that if the trial court has committed a misdirection; i.e. if it is apparent from the record that the trial court failed to direct itself to the disputed issues or true questions before it, or to the primary evidence when making findings of fact, or to the proved facts when drawing inferences or conclusions, or to the primary evidence read in totality.¹³
- 23 The rationale for this rule¹⁴ is that trial judges are steeped in the trial. They are consequently in a better position than the appeal court to appreciate the pleaded disputed issues as they are tested in evidence, to evaluate the evidence against the impressions created by witnesses and the presentation of the primary evidence and to make findings and to draw inferences and conclusions from the primary evidence and the proved facts.

The SCA breached the presumption against interference

- 24 I am advised that the SCA committed a misdirection on appeal. It unjustifiably breached the presumption against interference on appeal; i.e. it substituted its opinion for the questions, findings and conclusions by the HC, without properly establishing that the HC had misdirected itself on these matters. In doing that, the SCA demonstrated that it failed to appreciate its duty and role as an appeal court. That is impermissible in law.

¹³ Makate v Vodacom Limited 2016 (4) SA 121 (CC) at [40]
Bernert v ABSA Bank Limited 2011 (3) SA 92 (CC) at [106]

¹⁴ Meintjies v Esterhuizen [2003] JOL 12335 (E) at [4]
Hoffman LJ in Biogen Inc v Medeva Plc [1997] RPC 1 at 45
Hoffman LJ in Piglowska [1999] 1 WLR 1360 at 1372



- 25 That misdirection is sufficient to set aside the judgment and orders of the SCA. But, as I show below, the formulation of the questions, the findings and conclusions of the SCA themselves are not supported by the law or the facts.

The SCA identified the questions for decision incorrectly

- 26 I pleaded the general constitutional duty of the SAPS to protect women and their bodily and psychological integrity.¹⁵ The HC, correctly understood that the question before it was whether the SAPS had discharged their constitutional duties to search and investigate that are owed to me as a woman to protect me from gender violence.¹⁶
- 27 The SCA failed to identify that the constitutional duty owed to me is not simply the duty owed by the SAPS to all citizens. Or, it was confused about the duty owed to me. That much appears from paragraph 14 of its judgment. There, the SCA appears to take the view that the constitutional duties are general duties owed to protect the public generally against violations of their constitutional rights. That is wrong. The duty at issue, is the constitutional duty owed to women to search for them when it is reasonably suspected that they might be the victims of gender violence, and to investigate crimes of gender violence against them.¹⁷
- 28 This failure by the SCA was a misdirection. That misdirection resulted in the SCA misdirecting itself on the questions before the HC and the answers to those questions.

Failure to correctly formulate the issues

¹⁵ AR/Vol 9/p 1462/plaintiff's amended particulars of claim/para 13.3

¹⁶ HC judgment at [20] – [25]

¹⁷ Carmichele above at [66]

F above at [54] – [56]




29 In paragraph 17, the SCA identifies the issues as these:

29.1 Did the SAPS breach their duty to search by failing to search for me in the sand dunes or, if they searched the sand dunes, whether they did so negligently; and

29.2 Did they fail to investigate my criminal case?



30 That is not the correct formulation of the issues, which is as follows:

30.1 In relation to the foot search, the issue is whether officers who arrived at the Kings Beach some 45 minutes before the dog-handler should have conducted a foot search for me?

30.2 In relation to the dog search, the issue is whether the failure to search the area F to G was negligent, in circumstances where the K-9 officer was aware of the area F to G, but failed to get the dog to search that area?

30.3 In relation to the helicopter search, the question was whether the helicopter crew searched the area F to G at all, and if they did, whether they did so negligently, in circumstances where they would have detected me or signs that I might be in the clearing at F2, had they searched that area?

30.4 In relation to the investigation, the issue is whether the SAPS investigated my criminal complaint with the diligence and skill reasonably expected of detectives of many years' experience, in the specialist unit for the investigation of crimes against women and children?



Negligence

The SCA applied the wrong test for negligence

- 31 The HC found that the SAPS were grossly negligent in the performance of their duties. In coming to that finding it applied the correct legal test for negligence.¹⁸
- 32 The SCA preferred to rely on *Mashongwa v Passenger Rail Agency of South Africa*¹⁹ for its test for negligence. It held that the test laid down there is that of the reasonable organ of state and that the issue of the availability of resources is therefore an important factor. The SCA preferred the 'Mashongwa test' without examining whether the HC applied the correct legal test to the pleaded issues and primary evidence. That, I am advised amounts to substituting the test applied by the HC without reasoning why the HC test is wrong.
- 33 *Mashongwa*, I am advised, is distinguishable. The issue there was whether PRASA had employed a sufficient number of security guards to protect the appellant from being thrown from a moving train.²⁰
- 34 My case was not about the reasonable mobilization of resources. The SAPS mobilised officers to attend at the Kings Beach, a dog-handler to conduct a dog search there, and an air crew to conduct a helicopter search there, and it mobilized officers to investigate my complaint of abduction and rape.

35 The questions in my case are these. Should SAPS officers have carried out a

¹⁸ HC judgment at [178] – [180]

The HC relied on the test laid down in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E – G that this Court endorsed in *Steenkamp NO v Provincial Tender Board Eastern Cape* 2007 (3) SA 121 (CC) at [39].

¹⁹ *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) at [41]

²⁰ *Mashongwa* above at [32] - [41].



foot search? Did they carry out their dog and helicopter searches with the requisite degree of diligence, care and skill, reasonably expected of SAPS officers in the circumstances. And, did they conduct the investigation with the requisite degree of diligence, care and skill reasonably required of detectives.

- 36 The SCA's findings in this case demonstrate why the test that it applied is incorrect. On the SCA test, as long as SAPS has mobilised resources to protect a woman from crimes of gender violence and to investigate crimes of gender violence, it is not negligent. The care, diligence, skill or negligence with which they carry out a search or investigation is irrelevant. The wrong test applied by the SCA, resulted in the wrong findings on negligence. It also ignored the SAPS' constitutional duties of search and investigation when combatting gender violence.²¹ It renders my constitutional rights to be protected against gender violence hollow and meaningless.

Foot search

HC judgment

- 37 The HC found the following:
- 37.1 The SAPS officers who arrived at the scene before W/O Gerber failed to conduct a search of the area F to G;
- 37.2 It was probable that they had not searched F to G, and that their failure was negligent;²²
- 37.3 The only evidence that was before it in this regard was that of W/O Gerber. He testified that he understood from W/O Rae (who had arrived

²¹ Carmichele above at [66]; F above at [54] – [56]

²² HC judgment at [67]

at the Kings Beach before him) that the SAPS members who were there before him, had not searched the beach area on foot. They had instead called for W/O Gerber's assistance;²³

37.4 These SAPS officers could have but did not conduct the most basic of foot searches. They did not walk up the beach and search the sparse dunes from F to G;²⁴

37.5 That is the least to be expected of reasonable SAPS officers in their position. If the SAPS members had done so, it is likely that they would have found me and my assailant. In addition, given the restricted size of the area, it would in all likelihood not have taken the SAPS members longer than an hour to conduct the search and I would have been found by 1h00.²⁵

38 The High Court's factual findings are consistent with the only primary evidence on record. There is no evidence to suggest that a foot search was not practical or reasonable. The finding of negligence by the HC in relation to the failure to carry out a foot search, is consistent with the primary evidence.

SCA conclusion

39 The SCA found that the SAPS mobilized a dog and helicopter search. Therefore, it concluded, it was not negligent to fail to carry out a foot search for me.²⁶

Why the SCA conclusion about the foot search is wrong

²³ HC judgment at [66] – [68] & [101] – [103]

²⁴ HC judgment at [102]

²⁵ HC judgment at [102]

²⁶ SCA judgment at [39] – [40]




40 The conclusion drawn by the SCA does not follow logically (or otherwise) from the two premises. And, it ignores the issue and the primary evidence.

41 At least two officers arrived at the Kings Beach at least 45 minutes before Gerber got there. These two officers were mobilized by the SAPS. But after they got to the Kings Beach, they did not conduct a foot search. In the 45 minutes between their arrival and the arrival of Gerber, there is no evidence to suggest that they could not have conducted a foot search in a relatively small area.

42 Had they simply walked up the beach to the area F-G, walked up to or close to the clearance F2, and shone their torches into the clearance, it is likely that they would have detected signs of my being held there by the rapist. We were there.²⁷ So were a sleeping bag, towel, blanket and bits of old newspaper.²⁸

43 The finding by the HC of a negligent omission to conduct a foot search is supported by the primary evidence. The finding by the SCA that the SAPS had mobilized a dog search and a helicopter search, simply ignores the question before the HC. Was it negligent of the officers who arrived at the Kings Beach before Gerber, to fail to conduct a foot search? The SCA finding also ignores the most plausible conclusion to be drawn from the primary evidence: there was no apparent reason why the SAPS could not reasonably conduct a foot search.²⁹

The dog search

²⁷ HC judgment at [96].

²⁸ Photographs 1, 2 and 5 from the SAPS photograph bundle.

²⁹ September v CMI Business Enterprise CC (2018) 39 ILJ 987 (CC) at [132]

Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape [2014] ZASCA 182 at [19]

The HC findings

- 44 The primary evidence before the HC was that I was held at F2. That is in the area F-G along the northern palisade fence, north east of point F.³⁰
- 45 Gerber conceded that before he conducted the dog search, he acquainted himself with and knew about the area F-G that ran along the harbour wall. He knew that there were vegetated sand dunes in front of the harbour wall. Gerber conceded that he was aware of the area beyond point F. Despite this, he made the decision not to conduct a dog search between F-G.³¹ He stopped the dog search some 20m short of point F.
- 46 The HC found that he should have walked to point F to ensure that there was nothing beyond it. That was a measure that was reasonably available to him. It was necessary to complete a diligent and careful search for me. If he walked up to point F, it is likely that his search and rescue dog, which would have been 20m ahead of him, would have found me. I would been found at approximately 1h00 on 10 December 2010.³² The HC found that W/O Gerber failed to search the area F-G. That failure was negligent.³³

SCA findings

- 47 The SCA found that the SAPS had mobilized its resources for a dog and helicopter search. That was reasonable. Therefore, the SCA concluded, the dog search was not conducted negligently.³⁴

³⁰ HC judgment at [106]

³¹ HC judgment at [105] – [106] & [108]

³² HC judgment at [107]

³³ HC judgment at [106] – [108]

³⁴ SCA judgment at [40]

Why the SCA conclusion about the dog search is wrong

- 48 The conclusion – that the dog search was not conducted negligently – does not follow from the premises – that SAPS officers carried out a dog and helicopter search.
- 49 The conclusion by the SCA ignores the question before the HC. The question was not whether mobilizing a dog and helicopter search was negligent. The question was whether Gerber conducted the dog search reasonably diligently, skilfully, carefully and effectively; i.e. whether he failed to take reasonably practical measures available to him, to conduct a reasonably diligent and careful dog search.
- 50 Had the SCA asked whether the finding of the HC on that question is supported by the primary evidence, as it should have done, it would have found that Gerber failed to take the reasonably practical measure of walking his dog in the area F-G.
- 51 When the SCA tried to engage with the question, the SCA ignored the evidence. It found that W/O Gerber did not know that the "*fence angled away at point F*".³⁵ That finding is not supported by the primary evidence. W/O Gerber conceded that he knew of the area F – G but decided not to search it.³⁶
- 52 The SCA also ignored the evidence when it found that Mr Olivier, the dog expert, said that Gerber conducted a satisfactory search.³⁷ Olivier said that generally,

³⁵ SCA judgment at [38]

³⁶ AR Vol 6/p 1063, lines 5 – 1067, line 7, 1077, line 24 – 1078, line 16, 1079, lines 1 – 5.

³⁷ SCA judgment at [26].



Gerber conducted the search satisfactorily. But his failure to search the area F – G was not satisfactory. Had Gerber carried out a dog search in F - G, his dog would likely have found me.³⁸

The helicopter search

The HC findings

- 53 The primary evidence is that of W/O Smith. He said that the air-crew searched the areas D, R, F to R. The area from E, F to G was a “no-fly” zone, i.e. beyond the perimeter fence. They were not allowed to cross it. They went close to the line but not across it. However, they went close enough to see the line on the other side of it.³⁹ Although they were not allowed to fly right up to the harbour wall, they could see along the line of dunes and bushes along the harbour wall. If he had shone the “night sun” towards a particular area, clearings in the bush would be illuminated by it. Had they hovered near the clearing at F2 (where I was being held) and shone their night sun at that area, they would have seen blankets or towels in the clearing from the helicopter.⁴⁰
- 54 I testified that I was held in the clearing in the bushes at F2 under a sleeping bag or blanket. When I heard the helicopter, I devised an excuse to be allowed to move the sleeping bag closer to the clearing, which I did to make myself or the sleeping bag visible.⁴¹ I also said that I heard the helicopter in the distance. It did not appear to me to be near the area F – G.
- 55 After about 20 minutes the helicopter search was completed because the mist

³⁸ AR Vol 4/p 721, lines 5 – 10, 722, lines 5 – 10, 741, lines 10 – 14, 743, lines 15 – 20, 748, line 25 – 749, line 2, 751, line 18 – 752, line 20, 753, line 14 – 755, line 13.

³⁹ HC judgment at [89].

⁴⁰ HC judgment at [92].

⁴¹ HC judgment at [96].

was thickening and there was an incoming aircraft. The air search ended without me being found.⁴² It was terminated early and a critical part of the area at the Kings Beach was not searched by W/O Gerber or the air-crew.⁴³

- 56 The HC found that the helicopter search fell short of what was required from a SAPS helicopter search and rescue mission. The air-crew did not conduct an effective search beyond point "F" on Exhibit A1 and did not fly over the area where I was held at point "F2" on the map. Alternatively, they did not hover close to that area and direct the "night sun" towards the bushes in the "no-fly" zone.⁴⁴

The SCA findings

- 57 The SCA found that the SAPS had mobilised a dog search and helicopter search.⁴⁵ That was reasonable. Therefore, it concluded, the helicopter search was not negligent.

Why the SCA conclusion about the helicopter search is wrong

The conclusion by the SCA – that the helicopter search was not conducted negligently - does not follow from the premises – that the SAPS mobilized a dog and helicopter search. The conclusion ignores the question. It was not whether dog or helicopter searches were mobilized. It was whether the air-crew conducted a reasonably diligent, skilled, careful and effective search; i.e. did they take reasonable measures available to them? And did they execute those measures reasonably diligently, skilfully, carefully and effectively?

- 58 The conclusion also ignores the primary evidence. W/O Smith testified that the

⁴² HC judgment at [94]

⁴³ HC judgment at [110]

⁴⁴ HC judgment at [109]

⁴⁵ SCA judgment at [40]

helicopter flew 30 – 50 metres above the ground.⁴⁶ They flew “*to the inside of F2...just to the inside of F, roughly*”.⁴⁷ He was aware that there were dunes and bushes along the harbour wall.⁴⁸ He could not recall whether he had used the “night sun” to search these dunes and bushes.⁴⁹ However, he would have been able to use the “night sun” –its width and area of illumination – to search the clearings in the bushes,⁵⁰ including at F2.⁵¹ If he had done that, he would have seen the blanket and the sleeping bag, which were in that clearing.⁵²

59 The conclusion that the air-crew conducted the search negligently, is supported by the primary evidence. It is the most plausible inference to draw from the primary evidence.⁵³

60 When the SCA attempted to engage with the question, it ignored the primary evidence or ignored all the primary evidence and failed to read it in its totality. The SCA found that the “night sun” was capable of illuminating the point at F2 but that it “*did not get close to that point because of the restrictions*”.⁵⁴ This finding is contrary to Smith’s evidence.

The investigation

61 The SAPS detectives are under a constitutional and statutory duty to take all reasonably practical and appropriate measures available to them, to conduct a reasonably diligent and effective investigation of crimes of gender violence that

⁴⁶ AR Vol 7/p 1255/ lines 3 – 6

⁴⁷ AR Vol 7/p 1255/ lines 3 – 6

⁴⁸ AR Vol 7/p 1266/line 23 – 1267, line 1

⁴⁹ AR Vol 7/p 1267/lines 2 – 5

⁵⁰ AR Vol 7/p 1267/lines 5 – 15

⁵¹ AR Vol 7/p 1267/line 16 – 1268, line 1

⁵² AR Vol 7/p 1268/lines 4 – 12

⁵³ *September v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC) at [132]

⁵⁴ SCA judgment at [32]

impact on human dignity. The failure to take such measures, amounts to negligence.⁵⁵ It is not disputed that the investigation dragged on for many years. By the time of the trial it had not yet been concluded or closed. The HC identified a number of obvious, glaring omissions by the detectives in the investigation, drawn to its attention in the primary evidence. The HC found that these omissions were negligent and characterized what has been a negligent investigation.

The failure to conduct an investigation of the bush dwellers in order to identify suspects

HC findings

- 62 It was well known that bush-dwellers lived in the vegetated sand dunes at the Kings Beach. Some of the suspects were possibly bush-dwellers.⁵⁶
- 63 W/O Andrews failed to round up bush-dwellers between 10 – 13 December 2010⁵⁷ for the purpose of obtaining information from bush-dwellers that could assist the investigation. W/O Madubedube took over as the investigating officer on 13 December 2010. He failed to obtain information from bush-dwellers between 13 – 15 December 2010.⁵⁸
- 64 When the municipality rounded up bush dwellers on 15 December 2010 (and notified W/O Madubedube so that he could arrange an informal identity parade), W/O Madubedube failed to obtain information from bush-dwellers. This was despite the fact that he knew the municipality was going to move them out of the

⁵⁵ Carmichele above at [66]; F above at [54] – [56]; Koky v Slovakia, Application No 39272/98, 4 December 2013 at [215]

⁵⁶ HC Judgment at [117]

⁵⁷ HC judgment at [122]

⁵⁸ HC judgment at [123]

Kings Beach area on that day.⁵⁹

65 The High Court found as follows in this regard:

65.1 He failed to record their names and details.

65.2 He failed to ask them whether they knew the bush dwellers whom Mr Ruiters (a car guard at Kings Beach who was W/O Madubedube's informant) had named as potential suspects earlier that day.

65.3 He failed to ask Mr Ruiters and Mr Mpumlo (a municipal worker who had told him that he knew the bush dwellers) whether they recognised any of the bush dwellers as the persons whom Mr Ruiters had named as potential suspects earlier that day.⁶⁰

65.4 He failed to show the bush dwellers the ID kit photo and to ask them if they recognised the person who was depicted in it.⁶¹

66 The HC found that SAPS' was negligent because it failed to obtain information from bush dwellers between 10 – 15 December 2010.⁶²

67 The steps that W/O Madubedube failed to take were reasonable measures that were available to him in order to try and identify potential suspects. The High Court was consequently correct to find that his failure to do so was negligent. Any contrary finding would have failed to give effect to my constitutional rights to

⁵⁹ HC judgment at [124] & [141] – [144]

⁶⁰ HC judgment at [141]

⁶¹ HC judgment at [142] – [143]

⁶² HC judgment at [123] – [124]

human dignity and to physical and psychological integrity.⁶³ There was consequently no basis in fact or law to set them aside.

SCA finding

68 The SCA found that the HC finding that the failure to obtain information from bush-dwellers was not a complaint by me. And until 13 December 2010, Andrews was in charge of the case and I was happy with the investigation by him.

Why the SCA is wrong

69 This finding by the SCA ignores the question. The experts agreed. My perception that the investigation was negligent, exacerbated my injury.⁶⁴ If my perception is justified, I will have succeeded in my claim about the investigation. Is there objective evidence of a negligent investigation? Put differently, were there measures that the detectives could reasonably take to investigate the crime against me effectively?

70 Obtaining information from bush-dwellers was a reasonable measure, not adopted by the detectives. There is no explanation from the SAPS for why information was not obtained from bush-dwellers from the night of 9-10 December and during those crucial days just after the crime from 10-15 December 2010.

71 The SCA finding is not supported by the primary evidence. I complained about the failure to obtain information from bush-dwellers generally. These include the 3 whom Gerber⁶⁵ encountered on the south side of the footpath during the night

⁶³ Carmichele above at [66]; F above at [54] – [56]; Koky v Slovakia above at [151]

⁶⁴ **The expert minute**, paras 2(g) and (j) (attached as such).

⁶⁵ HC judgment at [118]

of 9 - 10 December. It also includes the failure by the SAPS to collect any information from bush-dwellers between 10 – 15 December 2010.⁶⁶

- 72 The finding that I had no complaint about W/O Andrews generally, is not correct. My evidence that I did not have complaints against W/O Andrews did not relate to how he conducted the investigation from 10 – 13 December 2010. It related to the manner in which he treated me on 10 December 2010. After 10 December 2010, I did not have any further contact with W/O Andrews.⁶⁷ The SCA failed to give effect to my constitutional rights to human dignity and to physical and psychological integrity.

SAPS' failure to view the CCTV footage

HC findings

- 73 Until W/O Madubedube gave evidence, SAPS version was that the CCTV footage had been viewed and nothing could be seen on it.⁶⁸

- 74 The HC found as follows in this regard:

74.1 During the cross-examination, W/O Madubedube admitted that, until the day before he testified, he was wholly unaware that the CCTV video footage of 10 December 2010 depicts a man walking in the vicinity of Kings Beach parking lot.⁶⁹

74.2 Even if it was doubtful whether or not the man was a good match for the description of my assailant, W/O Madubedube had not known of his existence and had done nothing to follow up on him being a potential

⁶⁶ HC judgment at [122] – [124], [141] – [143]

⁶⁷ AR/Vol 5/p 877, lines 12 – 19

⁶⁸ HC judgment at [147]

⁶⁹ HC judgment at [148]

suspect or witness.⁷⁰

74.3 From the evidence at trial, it can be concluded that, at most, he spent under four hours viewing sixty hours of footage. The bulk of this time (three out of four hours) was spent on 10 February 2011, which was an unreasonably long time after the incident occurred. W/O Madubedube missed critically important footage, namely the footage of a potential suspect.⁷¹

74.4 If W/O Madubedube had viewed the footage earlier on in the investigation he could have used it to try and trace the suspect, for example, by showing still images of the footage to Mr Ruiters and to the bush dwellers who were gathered together by the Municipality on 15 December 2010. In addition, he could have shown it to me in order to see whether I recognised the man who is visible on the footage of 10 December 2010.⁷²

75 The HC found that SAPS was negligent because it failed to view the CCTV footage (from the municipality's security cameras at Kings Beach) in its entirety until shortly before gave evidence at the trial.⁷³ This finding is supported by the primary evidence that include concessions during cross-examination.

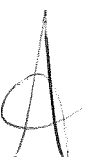
76 In addition, viewing the CCTV footage was a reasonable step that was available to W/O Madubedube in order to try and identify potential suspects. The High Court was therefore correct to find that his failure to do so was negligent. Any

⁷⁰ HC judgment at [148]

⁷¹ HC judgment at [153]

⁷² HC judgment at [153]

⁷³ HC judgment at [154]



contrary finding would have failed to give effect to my constitutional rights to human dignity and to physical and psychological integrity.

SCA findings

- 77 The SCA did not take issue with the HC finding that W/O Madubedube had failed to view the entire CCTV footage until shortly before he testified.⁷⁴ Instead, the SCA found that the duty to view the CCTV footage fell on me.⁷⁵

Why the SCA is wrong

- 78 As the High Court found, this only has to be stated in order to be rejected.⁷⁶ This finding by the SCA ignores the constitutional duty of the SAPS to take reasonable measures to prevent and investigate crimes of gender violence.⁷⁷ It also ignores the primary evidence.
- 79 Viewing the CCTV footage was a measure reasonably available to the SAPS from 10 December 2010. It knew at that date that there were cameras at the Kings Beach. And that video footage from those cameras were recorded and stored by the municipality.⁷⁸ There is no reason why detectives at the SAPS could not view all the footage during those crucial days between 10 – 15 December 2010. Yet Madubedube failed to view all the footage until shortly before the trial.
- 80 The conclusion by the HC that Madubedube was negligent is readily apparent and plausible from the proved facts.⁷⁹ The conclusion by the SCA that I could and should have viewed the CCTV footage, is a conclusion that subverts the duty

⁷⁴ SCA judgment at [47] – [48]

⁷⁵ SCA judgment at [47] – [48]

⁷⁶ HC judgment at [153]

⁷⁷ Carmichele above at [66]; F above at [54] – [56]; Koky v Slovakia above at [215]

⁷⁸ AR/Vol 7/p 1203, lines 12 – 22

⁷⁹ HC judgment at [145] – [154]

to investigate by imposing it on me and violates my constitutional rights⁸⁰ to have crimes of gender violence investigated by the SAPS, and not by me.

The SAPS' failure to test the DNA evidence that was found at the scene

HC finding

81 The HC found that SAPS' delay of eight years in submitting for DNA analysis a piece of evidence that was found at the crime scene and which possibly had blood and semen stains on it was negligent.⁸¹

82 The HC relied on objective evidence (and W/O Madubebedube's concessions during cross-examination) that showed that during the investigation he did not take steps that were available to him to ensure that the evidence was submitted for DNA testing. SAPS only did so eight years later and in response to a request for further discovery during the trial proceedings. The results were then obtained within a week. This showed that SAPS had been able to have the evidence tested at all times. Its delay of eight years was consequently negligent.⁸²

SCA finding

83 The SCA found that the failure to conduct DNA testing timeously, was not one of the grounds relied on for negligence by the SAPS.⁸³ Consequently, the HC could not find that the dismissal failure to conduct DNA testing timeously was negligent.⁸⁴

Why the SCA is wrong

⁸⁰ Carmichele above at [66]; F above at [54] – [56]; Koky v Slovakia above at [215]

⁸¹ High Court Judgment at [164]

⁸² HC judgment at [115] – [164]

⁸³ SCA Judgment at [49]

⁸⁴ SCA Judgment at [50]

84 The SCA did not find that the HC findings were wrong because they were not supported by the evidence. It found that I had not complained about the failure to conduct DNA testing timeously. This finding ignores the primary evidence. I did not know that DNA testing was not conducted timeously, until I called for the results during the run up to the trial. When I called for the results, the SAPS confirmed that it had not yet conducted DNA analysis of part of the evidence found at the crime scene. It should have been tested at the time it was found during the investigation; i.e. at or shortly after 10 December 2010. I complained at the trial about this grossly negligent delay.⁸⁵

Wrongfulness

HC findings

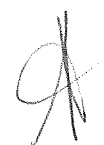
85 The HC held that public policy or legal considerations required that the SAPS be held liable in delict for their failure to carry out a reasonably effective search and investigation that are characterized by serious and significant shortcomings.⁸⁶

86 It reasoned as follows:

“The purpose of the police service is 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 consequences of inefficient, negligent, wrongful or sub-standard execution of these obligations can be dire, and damages flow from this.

⁸⁵ AR/Vol 7/p 1240, line 20 – 1241, line 2

⁸⁶ See the HC judgment at [193] – [196] with reference to Commissioner of Police of the Metropolis v DSD [2018] UKSC 11.



If our police service is not held to account for their actions and inaction it will have a chilling effect on the ability of members of our society to enjoy the freedoms guaranteed to them by the Constitution...

The trust that the public is entitled to repose in the police has a critical role to play in the determination of the Minister's liability in this matter. Public policy and legal considerations impose an obligation the Police to fulfil their obligations and a failure to do so must lead to a finding that their conduct is wrongful."⁸⁷

87 These findings are consistent with the law on wrongfulness as restated by the SCA and this Court;⁸⁸ i.e. where there is no remedy for the breach of a constitutional or statutory duty other than a delictual claim for damages, such conduct must be found to be wrongful (unless there are compelling public policy considerations to the contrary).

88 The High Court was consequently correct to find that the public policy and legal considerations require that SAPS' failure to take reasonable steps to search for me and to investigate the multiple rapes to which I was subjected was wrongful. A finding to the contrary would have meant that there was no remedy for the violation of my rights to human dignity and to psychological and physical integrity as a result of SAPS' failure to comply with its constitutional and statutory duty to conduct a reasonably effective search and investigation.

⁸⁷ HC judgment at [199] – [201]

⁸⁸ See, Mashongwa above at [21] – [30]; Minister of Safety and Security v Carmichele [2003] 4 ALL SCA 565 (SCA) at [43]; Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA); Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA); and Minister of Safety and Security v Hamilton [2003] JOL 11621 (SCA).




SCA findings

- 89 The SCA held that the SAPS' omissions were not wrongful. Its reasons were as follows:

"To impose liability for the harm for which Ms K sued would make it difficult to for the police to conduct their investigations in the future and would expose them to the potential risk of civil litigation in every case where any rescue search or their investigations are negligent, even if only to a slight degree, and a successful arrest and conviction of the perpetrators of serious crimes do not ensue."⁸⁹

Why the SCA is wrong

- 90 This conclusion by the SCA is inconsistent with the restated test for wrongfulness where there is a breach of a constitutional duty; i.e. the SAPS are held liable for negligent breaches of constitutional duties, unless compelling public policy considerations force courts to deny liability.⁹⁰ Here, the SAPS failed to put up any compelling public policy considerations for why liability should not be imposed upon it for the breach of its constitutional duties owed to me.
- 91 The HC found that SAPS' omissions in relation to both the search and the investigation were significant and serious.⁹¹ That finding is consistent with the primary evidence. The SCA was wrong to find that the HC judgment would expose SAPS to potential litigation even where it has been negligent to a "slight

⁸⁹ SCA judgment at [55]

⁹⁰ See, Mashongwa above at [21] – [30]; Minister of Safety and Security v Carmichele above at [43]; Minister of Safety and Security v Van Duivenboden above; Van Eeden v Minister of Safety and Security above; and Minister of Safety and Security v Hamilton above.

⁹¹ HC judgment at [193] – [196]

degree".⁹²

- 92 Contrary to the SCA's findings,⁹³ the HC did not find that the SAPS' conduct was wrongful because it did not result in a successful arrest and conviction.⁹⁴
- 93 The duty on SAPS is one of means and not of result. It is the duty to take the steps that are reasonably available to SAPS (in relation to both the search and the investigation).⁹⁵ It is not the duty to secure a successful outcome. The HC did not hold SAPS liable in delict because it failed to secure an arrest and a conviction. Rather, it found SAPS liable because it failed to take steps that were reasonably available to it in relation to both the search and the investigation.⁹⁶
- 94 As the SCA has recognised in similar judgments, having to establish the other elements of delictual liability, in particular negligence and causation, acts as a sufficient brake on the liability of SAPS.
- 95 Any plaintiff must establish (as I had to) that SAPS failed to take measures reasonably available to them (negligence) and that SAPS' conduct was both the factual and legal cause of harm suffered by a plaintiff (causation). These requirements and the expense and inconvenience of litigation, act as a sufficient deterrent to frivolous litigation. They ensure that SAPS will only be found liable in delict for damages that it was (a) reasonably able to prevent and (b) that it caused. As the SCA has found in similar cases,⁹⁷ recognising the SAPS'

⁹² SCA judgment at [55]

⁹³ SCA judgment at para [55]

⁹⁴ SCA judgment at [55]

⁹⁵ Koky v Slovakia above at [151]

⁹⁶ HC judgment at [114] & [197] – [198]

⁹⁷ See, *Minister of Safety and Security v Carmichele* [2003] 4 ALL SCA 565 (SCA) at [43]; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of*

omissions as wrongful therefore strikes the appropriate constitutional balance between upholding my constitutional rights and ensuring that SAPS is not subjected to frivolous litigation.⁹⁸ The SCA here seemed oblivious its own previous judgments on wrongfulness. That amounts to a glaring misdirection.

Causation

HC findings

- 96 In relation to the test for causation, the HC applied this Court's judgment in *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) ; i.e. it applied the time-honoured test for causation. There must be factual and legal causation.⁹⁹ Factual causation requires the application of the 'but for' test.¹⁰⁰ Legal causation requires the application of considerations of remoteness and foreseeability of the consequences of the conduct causing the harm.¹⁰¹
- 97 Application of the "but-for" test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which ordinary person's mind works against the background of everyday-life experiences.¹⁰² Put differently, if the conduct materially contributed to the harm, causation is established.¹⁰³
- 98 Applying these findings to the negligent search, the High Court held as follows

Safety and Security (Women's Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA); and Minister of Safety and Security v Hamilton [2003] JOL 11621 (SCA).

⁹⁸ See, Minister of Safety and Security v Carmichele above at [43]; Minister of Safety and Security v Van Duivenboden above; Van Eeden v Minister of Safety and Security above; and Minister of Safety and Security v Hamilton above.

⁹⁹ HC judgment at [203]

¹⁰⁰ HC judgment at [205]

¹⁰¹ HC judgment at [203]

¹⁰² HC judgment at [206]

¹⁰³ HC judgment at [232]




regarding factual causation:

- 98.1 Professor Subramaney was questioned about the effect of SAPS failing to find me between twelve and two and to what extent my condition could be attributed to that. She replied that because it meant that I was exposed to the trauma for longer, it meant that the impact of the trauma on my condition was bigger.¹⁰⁴
- 98.2 Dr Franco Collins, the Minister's expert, compared the trauma to poison and stated that "*the higher or more intense or the more severe or the more poisonous, obviously the resultant effect will be much worse.*" He testified that I had experienced an extreme dose of trauma "*to the extent that would baffle the mind*".¹⁰⁵
- 98.3 He confirmed further that the length of the trauma was an important contributor to its effects and that the duration of the trauma as "incredibly important" in terms of outcome.¹⁰⁶
- 98.4 Dr Collins appeared to backtrack from the joint minute to which he is a party. He tried to qualify his agreement that the prolonged nature of my trauma contributed to the severity of my injury, by saying in cross-examination that time refers to the difference in days or months, not hours. That was a rather belated attempt to backtrack from an agreement between the experts, confirmed and recorded in the

¹⁰⁴ HC judgment at [218]

¹⁰⁵ HC judgment at [219]

¹⁰⁶ HC judgment at [219]



minute.¹⁰⁷ And the minute did not qualify time by days or months. It referred to my abduction and rape that took place over 16 hours.

98.5 Not finding me in the early hours of the 10 December 2010 meant that my exposure to the terror and trauma of being held captive and repeatedly raped was unnecessarily prolonged by a number of hours.¹⁰⁸ If SAPS had conducted a reasonably effective search of Kings Beach, I would have been found by 1:30 at the latest. I would have been spared a further 4.5 hours of my ordeal. This was almost one third of the time that gave rise to my injury.¹⁰⁹

98.6 So, "but for" the SAPS negligent search and investigation, I would not have suffered the injury that I currently suffer.¹¹⁰

99 It was reasonably foreseeable that the failure to conduct a reasonably diligent, skilled and careful search for me, could prolong any trauma I was likely to suffer on the Kings Beach, resulting in my suffering a more severe injury.¹¹¹

100 In relation to the defective investigation, the HC applied the premise in paragraph 2(g) and (j) of **the expert minute** (attached as such).¹¹² The experts agreed that my subjective perception that the investigation was poor, aggravates my injury. The experts did not depart from this agreement during evidence.

101 The question then is whether my perception is justified by the objective quality of

¹⁰⁷ HC judgment at [221]

¹⁰⁸ HC judgment at [222]

¹⁰⁹ HC judgment at [223]

¹¹⁰ HC judgment at [225]

¹¹¹ HC judgment at [222]

¹¹² HC judgment at [226]



the investigation. The HC concluded from the primary evidence that the investigation was negligent. If it is negligent is it also reasonably foreseeable that a negligent investigation is likely to exacerbate my injury?

102 The HC held that the detectives must have foreseen that their failure to conduct a diligent, skilled, careful and effective investigation would affect my already existing psychiatric injury.¹¹³ That was confirmed by my treating psychologist since January 2011, Ms Norton.¹¹⁴

103 The HC held further the measure of damage as a result of the negligent search and investigation does not need to be quantified scientifically. There is little doubt that I suffered significant trauma. SAPS' omissions caused me harm and were sufficiently linked to the harm that I suffered. Applying a common-sense approach, I had discharged the burden of proving a causal link between SAPS and the harm that I suffered.¹¹⁵ Consequently, SAPS was liable for 40% of the damages that I suffered.¹¹⁶ The finding of 40% liability is obviously related to time. 40% is reasonably equivalent to the time I was held and raped after the SAPS failed to find me.

The SCA findings

104 The SCA found that I had failed to establish causation in relation to SAPS' defective search. (It made no findings on the findings by the HC on causation and the negligent investigation.)

105 The SCA provided two reasons for its finding that I failed to establish causation:

¹¹³ HC judgment at [224]

¹¹⁴ HC judgment at [228]

¹¹⁵ HC judgment at [232]

¹¹⁶ HC judgment at [232]




- The experts agreed that *“the prolonged life-threatening trauma cannot be divided into subunits that are quantifiable with any level of psychological or psychiatric validity, as was also testified to by Prof Subramaney.”* The High Court’s finding *“flew in the face of the joint minute”*.¹¹⁷
- Professor Subramaney testified that that it did not matter what the correct diagnosis was relating to my psychopathology because that pathology flowed directly from the brutal assault and rape and that future treatment would be similar regardless of the correct diagnosis.¹¹⁸

Why the SCA is wrong

- 106 It is correct that the experts were unable quantify medically the amount of the trauma resulting from the prolonging of the trauma by the negligent search and failure to find me. From that premise, the Minister argues that I have not established causation.
- 107 The HC considered this submission by the Minister. It held that this submission flies in the face of judgments by the SCA. The effect of those judgments is that a plaintiff is not required to establish the causal link with certainty or as a matter of science. Common sense and experience determine whether causation is established.¹¹⁹
- 108 This approach by the HC is supported by judgments of this Court and the SCA. They establish that it is sufficient to establish causation if plaintiffs can show that

¹¹⁷ SCA Judgment at [62] – [63]

¹¹⁸ SCA Judgment at [63]

¹¹⁹ Van Duivenboden above at [25]. See also *ZA v Smith and Another* 2015 (4) SA 574 (SCA) at [30].




conduct materially contributes to the harm suffered.¹²⁰

109 Reliance on the portion of the evidence of Professor Subramaney referred to by the SCA, for the conclusion that I failed to establish a causation is a misdirection.¹²¹ In that portion of the evidence, Professor Subramaney addressed diagnosis, pathology and treatment.¹²² She was not saying that the negligent search and investigation did not materially contribute to my injury.

Costs

110 The SCA ordered me to pay the Minister's costs.¹²³ It held that the Biowatch principle¹²⁴ did not apply. It found that "*the constitutional issue was not raised in this matter*".¹²⁵ That conclusion is wrong and a misdirection.¹²⁶ At issue in this case has always been the constitutional duties of search and investigation imposed upon the SAPS in relation to crimes of gender violence. That being the case, Biowatch applies. Whether successful or not, costs should not be awarded against me.


ANDISIWE KAWA

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Stellenbosch on 26/12 May 2020, and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended,

¹²⁰ See, Mashongwa above at [66] – [69], Vallaro NO (as curatrix ad litem for Barend Jacobus Barnard) v MEC for Health and Social Development Gauteng; and Masiba v Constantia Insurance Co Ltd 1982 (4) SA 333 (c) at p 340 - 341.

¹²¹ SCA judgment at [63]

¹²² HC judgment at [213] – [214]; AR/Vol 3/p 564, lines 20 – 22.

¹²³ SCA judgment at [66] – [67]

¹²⁴ Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC)

¹²⁵ SCA judgment at [66]

¹²⁶ SCA judgment at [14].





have been complied with



COMMISSIONER OF OATHS

KAREN VERMIAK
PRACTISING ATTORNEY
11 GARDEN AVE
ROSELAND
JERMANESBURG
(011) 327 5418

