CS and another v Swanepoel and others
[2022] JOL 52581 (WCC)

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case no: 19027/13

In the matter between:

CS	First Plaintiff
AHS	Second Plaintiff
and	
KEITH NOLAN SWANEPOEL	First Defendant
THE MEMBER OF THE EXECUTIVE COMMITTEE FOR EDUCATION, WESTERN CAPE	Second Defendant
VLEIPLAAS PRIMARY SCHOOL	Third Defendant

JUDGMENT DELIVERED (VIA EMAIL) ON 17 MARCH 2022

SHER, J:

1. I have before me an action for damages pursuant to an alleged sexual assault[1] by the 1st defendant on the second plaintiff ('the plaintiff')[2] which occurred some 10 years ago, and a counterclaim thereto, in terms of which 1st defendant in turn claims damages from the plaintiff, on the basis that she wrongfully and maliciously set the law in motion by laying a false charge of rape against him.

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[1] It is alleged that the 1st defendant raped and/or 'indecently assaulted' the plaintiff.

[2] The plaintiff's action was initially prosecuted by her mother, in a representative capacity. At the commencement of the trial the plaintiff was added to the proceedings in her own name and right.

2. The plaintiff was 12 years old at the time of the incident which gave rise to the action. She was a learner at the Vleiplaas primary school near Barrydale and the first defendant was its acting principal, and her class teacher.
3. By agreement between the parties the matter proceeded in respect of the merits of the claim and the counterclaim (i.e the issue of liability) only, with quantum standing over for later determination.

The evidence

4. The plaintiff gave evidence and called a number of witnesses to testify on her behalf, including her mother and Ms Colleen Kees, a former secretary at the school, as well as a Ms De Waal and a retired police officer, Capt De Jongh. Thereafter 1st defendant gave evidence. Mr G Moroasui, the manager of legal affairs at the SA Council of Educators ('SACE') and Mr H Wyngaardt, a Deputy Director in the WC Education Department, testified on behalf of 2nd and 3rd defendants. Only the relevant and salient aspects of the evidence of the witnesses will be traversed.
5. The plaintiff testified that shortly after second break on a school day in September 2011 first defendant asked her to help him move boxes in his office. However, when she arrived there, he instructed her to go to the staff toilet which was situated in an adjacent building and followed after her.
6. On entering the facility, he closed and locked the door and told her to remove her school trousers and panty and to lie down on the floor. He then pulled his pants down and after putting on a condom, lay on top of her, pulled her legs apart and 'raped' her. When he was done, he gave her a wash rag which he always carried with him and told her to wipe herself. The plaintiff then put her clothes back on and left the toilet. She was in a state of shock and anger at what had happened to her.
7. A few days later she approached Ms Kees, and told her what 1st defendant had done. Kees then contacted the education authorities and the police and summonsed the plaintiff's mother to the school, where a social worker spoke to her. The plaintiff later made a statement to the police and was examined by the district surgeon.

8. During cross-examination the plaintiff alleged that aside from this incident 1st defendant had also acted inappropriately towards her on a number of other occasions, when he had tugged at her clothes or touched her, or had asked her to kiss him.

9. The plaintiff was confronted with certain discrepancies between her testimony and the evidence she gave during the course of a disciplinary hearing which was held against 1st defendant in January 2012, at the conclusion of which the presiding officer held that the Department of Education had failed to make out a case of misconduct against him, on a balance of probabilities. It is not necessary for me to traverse these aspects at this juncture. I will revert to them in due course, when I proceed to weigh up the evidence and deal with the decision of the disciplinary hearing.

10. The plaintiff was also confronted with the contents of the district surgeon's report in which it was noted by the medical practitioner who examined her on 23 September 2011 that there were no visible injuries to her genitalia and that she had allegedly reported that 1st defendant had 'pressed' his penis against her and had not 'penetrated' her.

11. In this regard it must firstly be pointed out that the plaintiff testified that she had seen blood on the condom after the assault on her, an averment which was not questioned or contested, and it is evident that the medical examination which was performed was only an external one and took place some 10 days after the alleged incident.

12. In the second place it must also be pointed out that the plaintiff was not interrogated, during cross-examination, as to the intimate details of what exactly the 1st defendant had allegedly done to her at the time of the incident and why she considered that he had raped her, or whether the doctor's notes recorded *ad verbatim* that she claimed that the 1st defendant had only 'pressed' himself against her and had not 'penetrated' her or whether this was the doctor's interpretation of what had happened, and he was not called to give evidence. The plaintiff's curt statement that what had occurred was rape, was not questioned or contested.

What was challenged was that the 1st defendant had instructed her to go to the staff toilet and that he had raped her there, as she claimed.

13. When the plaintiff was challenged as to why she had spoken to Ms Kees and not her mother about what had happened, she said that 1st defendant had warned her not to tell anyone. She had decided to confide in Kees because she had approached her on a number of occasions and had asked her whether anything had happened in the toilet, and whether 1st defendant had done anything to her.

14. Lastly, the plaintiff was confronted with the fact that in January 2013 the senior prosecutor at the Worcester magistrate's court had noted in a letter which he had written, that a prosecutor had withdrawn a charge of rape against the 1st defendant in May 2013 after he had consulted with the plaintiff, allegedly because she had not given him a 'true' account of events.[3]

15. The plaintiff denied that she had been untruthful during consultations with the prosecutor and nothing specific was put to her in relation to this third-hand, hearsay assertion. No particulars were provided as to what exactly she had allegedly said which was supposedly untrue, and as in the case of the district surgeon's report neither the author of the letter nor the original, first-hand source of the averments which were made therein were called to testify on behalf of the 1st defendant.

16. Ms Colleen Kees testified that she had been employed at the school from 2005 onwards and knew the 1st defendant well, as he had taught there for a number of years. Shortly after break on the morning of 14 September 2011 she went to check on the condition of the kitchen. She explained that the school provided food to the children who attended it and 2 learners were usually assigned kitchen duties.

17. On her arrival there that morning she found only one learner in attendance and on enquiring who the other learner was who was supposed to be on duty, was informed that it was the plaintiff. Kees went in search of her, but was unable to find her in either of the 2 classrooms, or 1st defendant's office, and he was also nowhere to be seen. The plaintiff was also not in the girls' toilets. However, Kees noted that the staff toilet, which was also housed in the ablution block adjacent to the classrooms, appeared to be occupied, as the door was closed. When she tried the

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[3] I have translated the word used in the letter, which was in written in Afrikaans, literally.

door handle, she found the door was locked, and she heard 1st defendant say that he was inside.

18. Kees decided to take up a position at a small wall under a tree a few metres away from the facility, so that she could observe it. By that stage she was no longer alone and had been joined by Salome De Waal, a member of the local community who regularly made use of the school library. After a while the door to the staff toilet opened and the plaintiff exited and proceeded towards the classrooms. She appeared somewhat dishevelled. Moments later, 1st defendant emerged. He had a wash rag in his hand with which he wiped his face.

19. Kees was disturbed by what she had observed and approached Ms Rall, the other teacher at the school, who had previously served as its acting principal, and told her what she had seen. Rall instructed her to inform the Circuit manager.

20. Kees said that instead of going to the school library after school that day, as she customarily did while she was waiting for her transport to collect her, the plaintiff immediately left for home, so she was unable to speak to her.

21. A day or so later Kees had an opportunity to approach her. She asked her what she and 1st defendant had been doing in the toilet. The plaintiff did not answer her. Over the course of the next few days Kees again attempted to ascertain from the plaintiff what had happened, without success.

22. On 23 September the plaintiff came to her. She was distressed and crying, and reported to her that 1st defendant 'had sex' with her in the staff toilet. After she had been comforted, the plaintiff agreed to speak to a departmental social worker, who arrived later that day, together with the Circuit manager and the police. The plaintiff's mother was then summonsed and apprised of what had allegedly happened.

23. During cross-examination Kees dismissed the suggestion that she had a motive to falsely incriminate 1st defendant, because he had allegedly altered her terms of service from 3 working days to 5. She said she was being paid for working 5 days, and prior to 1st defendant's appointment as principal she had been required to work for 5 days but was only paid for 3. In addition to her secretarial duties, she had initially been required to administer the school's feeding system, which was

onerous. She denied that there was any resentment on her part towards 1st defendant after her duties in this regard were transferred by him to someone else, or that she had a motive to falsely implicate him in an unfounded sexual assault on the plaintiff.

24. When she was asked why she went to look for the plaintiff that day and why she had gone to take up a position outside the staff toilet in order to keep it under observation, she explained that there were aspects of the relationship between the plaintiff and 1st defendant which had concerned her.

25. In the first place, she had noticed that 1st defendant appeared to favour the plaintiff, as he would frequently bring her treats and ask her to do favours for him. Secondly, there had been an earlier incident which had troubled her, when she had also gone to the kitchen and had found that the door was locked. She had then gone to the office in search of the kitchen door key, only to find that it was missing, and 1st defendant was not in his office. However, upon returning to the kitchen she found the door was open and 1st defendant and the plaintiff were there, and the plaintiff's face appeared to be 'flushed'.

26. From her evidence it is therefore apparent that Kees had reason to consider that there was an inappropriate relationship between the first defendant and the plaintiff, and the circumstances of their combined absence on the day of the incident were suspicious and led her to suspect that they might be together in the staff toilet.

27. During cross-examination it was contested that the plaintiff was 1st defendant's favourite, and it was pointed out to Kees that she had not testified about this during her evidence at the disciplinary hearing. As was done to the plaintiff in respect of the district surgeon's report and the letter from the senior prosecutor of Worcester, Kees was also confronted with certain comments which were contained in a report which was compiled by a third party who was not called to testify viz a forensic social worker employed by the police, and it was averred that aspects of her evidence were not substantiated by it.

28. However, not only was the social worker never called to testify but it is evident that her report was one prepared simply in order for the State to consider whether an

intermediary should be appointed to assist the plaintiff in giving evidence. It was not a report prepared with a view to obtaining a comprehensive and complete account of the incident from the plaintiff or anyone else, let alone Kees, and it was not compiled in order to evaluate the plaintiff's account or to determine the cogency of her version, or that of Kees.

29. Save for some minor discrepancies (in relation to where they met up and the exact position where they had gone to stand)[4] Salome De Waal largely confirmed the evidence which was given by Kees. In particular, she confirmed that while they were standing outside the staff toilet the plaintiff had emerged, followed shortly thereafter by the 1st defendant, who had a wash rag in his possession.

30. That then as far as the evidence which was tendered by the plaintiff is concerned. First defendant testified that after obtaining a diploma in 1999 he commenced teaching at Prospect Primary school, a farm school in Ashton, where he remained for approximately 5 years (save for a short stint at the Montagu Primary school in 2003). In 2005 he took up a temporary position at Vleiplaas where he was responsible for teaching a number of subjects to children in grades 4 to 6. He was appointed in a permanent position the following year. In July 2010 he was appointed to the position of acting principal, after the previous incumbent had taken early retirement.

31. First defendant denied that he had favoured the plaintiff or had ever acted inappropriately towards her. He said that he used to ask all the children to perform menial tasks at the school, as and when necessary, and frequently brought treats for them. On an occasion they had even washed his feet (allegedly at their instance).

32. He denied that he had ever asked the plaintiff to go to the staff toilet and that he had either raped or sexually molested her. He could not think of any reason why she would falsely accuse him of doing so.

33. Pursuant to the statement which the plaintiff lodged with the police he was arrested on a charge of rape on 26 September 2011 and kept in custody until 13 October

[4] According to De Waal they had gone to stand under some trees near a small wall opposite the toilets, and not on the wall itself.

2011, when he was released on bail. He appeared in the Regional Court in Swellendam on a number of occasions, before the charge was withdrawn on 6 May 2013.

34. During cross-examination 1st defendant was repeatedly confronted with numerous, standardized 'A2' departmental application forms which he had completed over the years, each and every time he applied for a teaching position (be it temporary or permanent) at the various schools which he had taught at, including Vleiplaas.

35. A section of the form, in which applicants were required to disclose their personal particulars, contained a standard question asking them to indicate whether or not they had ever previously been found guilty of a criminal offence 'in their work',[5] and if so, to provide particulars thereof. In every instance when he had answered this question 1st defendant had indicated that that he had no such convictions.

36. He conceded that he had previously been convicted of 'indecent' assault[6] (as it was known at the time) of a girl under the age of 16, in 1992, but he contended that his answers to the question on the A2 forms had in each instance been correct, as the offence had not been committed in the course of his 'employment' or 'work'. At the time he was undergoing military service and the incident which gave rise to the conviction had occurred after hours. According to him, he had consensual sex with a 15-year-old girl, who he had met earlier the same day. (Somewhat disturbingly, in elaborating on what happened he alleged that the incident had involved more than one male participant).

37. Aside from the numerous departmental A2 forms which he completed over the years, when 1st defendant applied for a position as an educator at Prospect Primary, on 27 July 2001, he completed a so-called Z83 application form, a generic form which is commonly used in order to apply for positions in the wider public service.

38. Unlike the analogous question which is posed on the A2 form, on the Z83 form an applicant is asked whether they have ever previously been found guilty of *any*

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[5] Or whether they had ever been dismissed from any position they held.

[6] In terms of s 14(1)(a) of the Sexual Offences Act, 23 of 1957.

criminal offence, without the qualification that such offence must be related to, or must have arisen in the course of, their 'work' i.e their employment.

39. In response to this question on the Z83 form, 1st defendant similarly provided a negative answer. Given his previous conviction for sexual assault, he conceded that it was obviously wrong. However, he claimed that he had simply made a 'mistake' when filling in the form and had not set about being deliberately untruthful.

40. When pressed on this during cross-examination he was unable to explain how he had made such an error, and conceded that the other answers which he had provided to the various questions on the Z83 form and the A2 forms he had filled in over the years, had been correct.

41. He did not claim to have misunderstood, or to have misread, the question and acknowledged that he was aware that he was required to fill in the form carefully and correctly, as it could affect whether he was to be accepted for the position he was applying for. He acknowledged that the form contained a declaration, at the end thereof, which stated that the particulars which were provided therein were correct and that any false information which may be supplied could lead to summary dismissal.

42. He conceded that in the event that he had answered the question correctly and had provided particulars of his previous conviction he would in all likelihood not have been appointed, as his conviction was one which obviously impacted negatively on his suitability to work with children. Notwithstanding this concession, he denied that he must therefore have deliberately filled in the form incorrectly, in order to hide his criminal record.

43. At a later stage in his cross-examination 1st defendant did attempt to provide an explanation for the 'error' he claimed he had made in completing the form. He said that he must have assumed that, as in the case of the analogous question which was posed in the A2 forms which he had previously completed, it was one directed at ascertaining whether he had previous convictions pertaining to his employment, and not to previous convictions that were not work-related.

44. That then as far as 1st defendant's evidence is concerned. Mr G Moroasui, the manager of legal affairs at SACE, testified that in terms of s 21(2) of the South African Council for Educators Act [7] no person may be employed as an educator by any employer in the public or private sector in South Africa, unless they are registered with the Council. An application for registration must be made in the manner and form determined by it.[8] In this regard, aside from providing proof of their academic and teaching qualifications, applicants are required to provide a so-called police 'clearance' certificate, which will set out the particulars of any criminal record which they may have. In the event that applicants have previous convictions these will be assessed in order to determine whether they may impact on their suitability and fitness to work with children, and if this is the case their registration may, in appropriate circumstances, be refused.[9]

45. Between the time when the Act came into operation in 2000 and 2017, the provision of such a certificate was not required. It was only introduced as a registration requirement for prospective applicants by SACE, in 2018, pursuant to a public outcry in relation to the large number of educators who were being employed, notwithstanding that they had criminal records pertaining to the sexual assault or rape of children. Prior to the introduction of this requirement, educators were not vetted by SACE in relation to their criminal records and this was left to their prospective employers.

46. Thus, from SACE records it appears that in accordance with the prevailing practice at the time, 1st defendant was simply registered by SACE as an educator on 18 September 2003 without being vetted for any previous criminal convictions and without having to disclose his previous conviction for the sexual assault of a minor, in 1992, and SACE had accordingly been unaware thereof.

47. Mr Harry Wyngaardt, a Deputy Director in the Recruitment & Selection branch of the Western Cape Education Department confirmed that applicants for positions

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[7] Act 31 of 2000.
[8] S 22 (1)(a).
[9] Applicants who might be affected are invited to make representations to a so-called 'Fit to Teach' sub-committee, before a decision is taken.

at schools in the Western Cape were required to complete an A2 form[10] and to submit it together with the necessary supporting documents, including proof of their qualifications, their *curriculum vitae* and testimonials, and their professional registration as educators with SACE. He said that because SACE vetted educators the Department never used to do so, and never used to require applicants to disclose anything more than employment-related previous convictions in respect of offences which had taken place in the course of their 'work'. Consequently, when the Department received proof of an applicant's registration with SACE, it assumed he/she did not have a criminal record which would impact on their employment.

An evaluation of the evidence

48. It is common cause that the plaintiff bore the onus of proving the alleged sexual assault on her by the 1st defendant, on a balance of probabilities. In my view, she discharged this onus amply.

49. She gave her evidence in a clear and straight-forward manner and there were no material inconsistencies between the account she provided in chief, and her evidence in cross-examination. The few inconsistencies which were pointed out between her testimony before the disciplinary hearing and the evidence that she gave in this matter were not significant, and of the kind that one would expect to find in the case of a witness who is required to repeat what happened many years earlier, at the time when she was a child.

50. In addition, there were aspects of her evidence which bore the distinct hallmarks of authenticity, such as the evidence which she gave about the blood on the condom and the defendant's wash rag, which one would not expect to find in a version which had been contrived or fabricated by a 12-year-old child, some 10 years ago. In my view it is inconceivable that, had the version been a fabrication or an attempt to falsely implicate the 1st defendant in an alleged sexual assault so long ago, it would nonetheless have been retained in the plaintiff's memory for all that time and then presented in Court in such a coherent and consistent manner, without being riddled with contradictions. And had it been a deliberate fabrication

[10] The Department also accepted applications which were made utilizing from Z83, which is commonly used to apply for positions in the wider public service.

with a view to falsely implicating the 1st defendant in an unfounded sexual assault of the plaintiff one would have expected some motive for doing so to have been elicited, or at the very least, suggested. None was.

51. Most importantly, the plaintiff's evidence was corroborated in material respects by the evidence of Kees and De Waal, 2 independent witnesses who confirmed that on the day in question they saw the plaintiff emerge from the staff toilet, followed shortly thereafter by 1st defendant, who, as alleged by the plaintiff, had a wash rag in his possession. Neither of them were shown to have any reason or cause to lie about what they saw.

52. In ordinary circumstances, a 12-year-old female learner would surely not be going to a staff toilet at a school, and would certainly not be in the company of an adult male educator were she to do so. And if there were to be an innocent explanation for this to have occurred one would have expected 1st defendant not to have denied that he had been with the plaintiff in the toilet, and to have been forthcoming with such explanation. In this regard I may point out that from the photographs which were tendered into evidence it is apparent that the facility is small and cramped and houses only a single toilet and wash basin, and it can therefore hardly be used simultaneously by 2 people for the purpose for which it is intended. Thus, on the probabilities the plaintiff and the 1st defendant were not likely to have been together in the staff toilet unless it was for some purpose *other* than to use the facilities.

53. As I have previously pointed out, although there were certain minor contradictions between the evidence of Kees and De Waal (these related to where they had met up and where they had taken up station opposite the toilets), and there were certain minor inconsistencies between their evidence in Court and that which was tendered before the disciplinary hearing, in my view these were not material, and if anything they were the sort of discrepancies which one would expect to find in an honest account by witnesses who are called to testify about events that occurred so many years earlier. Rather than diminishing the quality of their evidence they similarly serve as a mark of the authenticity and truth thereof.

54. In contrast to the plaintiff, 1st defendant was a poor witness. He was smug, opinionated and evasive. He gloated about the fact that he had prevailed at the

disciplinary hearing, and tried to suggest[11] that this meant that the plaintiff's version had been rejected and that she had been untruthful, when it is evident to anyone reading the record of the decision in the disciplinary hearing that this was not the case.

55. From the record in that matter, it appears that the evidence which the plaintiff gave at the hearing in January 2012 largely and materially accords with the contents of the sworn statement which she made to the police shortly before that and the evidence which was given by her in these proceedings, some 10 years later, and was likewise corroborated by the evidence of Kees, whose evidence there also materially accorded with the testimony which she gave in this matter.

56. In response to the evidence which the plaintiff tendered, 1st defendant elected not to testify at the disciplinary hearing. From an evidentiary point of view therefore the plaintiff's evidence as to what the 1st defendant had allegedly done to her was not controverted or refuted, and should have been accepted. However, from the reasons which she gave for her findings it is apparent that the presiding officer did not even mention, let alone take into account that the 1st defendant had failed to testify, and had thus failed to put up any evidence to refute the plaintiff's evidence.

57. Instead, she held that she was unable to find that the employer i.e the Department of Education had proved its case on a balance of probabilities. The basis for this startling finding appears to be that, although it had (understandably) been submitted in argument that any 'inconsistencies' in the plaintiff's evidence (which appear to have pertained to minor discrepancies such as in relation to the date when the incident allegedly occurred and the like) were ascribable to the trauma which the plaintiff had suffered, the social worker who was present failed to testify as to this, nor was other expert testimony led in this regard. The presiding officer held that in the absence of such evidence she was unable to take cognizance of the traumatic effect which the commission of the offence may have had on the plaintiff, as a minor.

58. How the failure to lead expert evidence as to the trauma which the plaintiff sustained could possibly negate the unanswered evidence which she gave as to

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[11] As he did in relation to the withdrawal of the criminal charge.

what the 1st defendant did to her is not apparent to me, especially when the presiding officer did not make any adverse credibility finding against the plaintiff and did not find that, for that reason, her evidence fell to be rejected.

59. To compound the irregular nature of the proceedings it further appears that in coming to the decision which she did the presiding office not only failed to consider and to have due regard for the overall probabilities (in this regard *vide* para 52 above), but failed to properly apply the test for determining the matter on the probabilities.

60. Thus, she failed to consider and determine whose 'version' was the more probable one i.e to determine whether it was more probable in the light of the evidence which had been tendered by the plaintiff and Kees and De Waal, that she had been sexually assaulted by the 1st defendant, than not. In this regard, although he obviously bore no onus whatsoever, 1st defendant was unable to suggest any reason why the plaintiff would falsely accuse him of having done what she said he did and legally speaking there was in fact only one 'version' to which the presiding officer could attach any weight i.e that which was tendered in evidence by the plaintiff, as 1st defendant did not testify.

61. Thus, by any measure, the proceedings in the disciplinary hearing were a complete travesty and what occurred there was a shocking failure of justice. Consequently, the outcome of that process must be completely disregarded for the purposes of this matter.

62. I have previously referred to the difficulty which 1st defendant had in trying to explain how and why he had made a 'mistake' on the Z83 form, when he had incorrectly answered that he had never been found guilty of a criminal offence. In my view the most likely reason why he answered the question in the way which he did was not because he had made a 'mistake', but because he knew that, in the event that he were to answer it truthfully he would not be employed, as he would rightly be considered unsuitable to work with children. From the manner in which he ducked and weaved during his evidence on this aspect he was clearly being untruthful, and his 'explanation' constituted little more than an attempt to hide his patent dishonesty when filling in the form. In the circumstances, he was an

unreliable and unsatisfactory witness, whose evidence falls to be rejected, insofar as it is at odds with the evidence which was tendered by the plaintiff.

The relevant legal principles and the defendants' liability

63. In the circumstances, I am satisfied that the plaintiff proved that 1st defendant assaulted her in the staff toilet at the Vleiplaas Primary school, in September 2011. For the purpose of these proceedings, which concern a civil claim for damages, it is not necessary for me to determine whether that assault satisfies the definition of rape, attempted rape, or sexual assault, as these terms are understood and defined in a criminal context.

64. The plaintiff has succeeded in proving that 1st defendant committed a delictual act in the form of a physical, bodily assault on her of a sexual nature, which caused her both physical as well as psychological harm, as is evident from the joint minute which was filed by the parties' psychologists which was received into evidence by agreement, from which it is evident that apart from the other *sequelae* she is suffering from a post-traumatic stress disorder, as a result of the assault. On that basis 1st defendant is liable to her in delict for damages.

65. As far as the remaining defendants are concerned, as opposed to the 1st defendant (who is liable by virtue of the positive commission of an act which amounts to a delict), their liability is predicated on an alleged omission which is phrased in the standard and generic terms of the wrongful and negligent breach of a legal duty which allegedly rested on them, to protect the plaintiff from harm.

66. As was explained in *Hawekwa Youth Camp*[12] the reason for this is because, whereas conduct which manifests itself in the form of a positive act which results in physical harm to the person of another is *prima facie* considered wrongful, where harm is caused as a result of an omission, liability does not follow automatically, as *prima facie* an omission is not regarded as wrongful unless there was a legal duty on the person who caused the harm to have acted in a particular manner, instead of sitting back and omitting to do so.

67. Whether such a duty existed in a particular case is an issue which must be determined judicially, on the basis of criteria which include public and legal policy,

[12] *Hawekwa Youth Camp & Ano v Byrne* 2010 (6) SA 83 (SCA) para 22.

and constitutional norms.[13] In essence, the exercise which the Court is required to engage in requires it to determine whether the 'policy and legal convictions of the community, constitutionally understood' regard the omission which is complained of, as 'acceptable' or not.[14] As such, it is an exercise in determining whether it is reasonable to impose liability on a defendant for their failure to take action.[15]

68. At common law it is well-established that educators and those who are in charge of schools have a duty to take such care of the children that have been entrusted to them in *loco parentis*, as a reasonably careful father or mother would of their own children.[16]

69. In *Carmichele*,[17] the Constitutional Court held that in our post-constitutional dispensation the test for the wrongfulness of omissions must be carried out with due regard for, and in accordance with, the spirit, purport and object of the Bill of Rights, in the context of a State founded on dignity, equality and freedom.[18]

70. In terms of s 7 of the Constitution the State is obliged to respect, protect and promote the rights in the Bill of Rights, which include the rights to dignity[19] and freedom and security of the person[20] and there is consequently a duty on it not to perform any act that infringes upon them, and in certain circumstances there will be a positive obligation on it to provide 'appropriate protection' to persons, against such infringements.[21]

71. Subsequent to *Carmichele*, both the Constitutional Court and the Supreme Court of Appeal held in a number of instances that there was a legal duty on State organs

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[13] *Id*.

[14] *Loureiro & Ors v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 53, endorsed in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) para 21.

[15] *Le Roux & Ors v Dey (Freedom of Expression Institute & Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 122.

[16] *Rusere v The Jesuit Fathers* 1970 (4) SA 537 (R) 539D as endorsed in *Broom & Ano v Administrator, Natal* 1966 (3) SA 505 (D) 518F-519A; *Wynkwart NO v Minister of Education* 2002 (6) SA 564 (C) 567I-568C; *Minister of Education v Wynkwart NO* 2004 (3) SA 577 (C) at 580A; *Hawekwa* n 12 para 25, *Gora v Kingswood College & Ors* 2019 (4) SA 162 (ECG) para 7.

[17] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

[18] *Id*, paras 43 – 44.

[19] Section 10.

[20] Section 12, which includes the right to bodily and psychological integrity.

[21] *Carmichele* n 17 para 44.

to act positively to prevent harm to others[22] and insofar as educators are concerned, in *Hawekwa*[23] the Supreme Court of Appeal endorsed the dictum of a full bench of this Court in *Wynkwart*,[24] that 'teachers owe young children in their care a legal duty to act positively to prevent physical harm being sustained by them'.[25]

72. Consequently, in general terms the State has a legal duty to protect and not to harm the children who are entrusted to its care on a daily basis, in our public schools, such as the one which features in this matter. In the context of the pleadings in this matter this general duty subsumes in it the duty to protect (or rather the duty to take reasonable steps to protect) children from exposure to sexual assault and molestation.

73. In this respect, in giving substance and flesh to her cause of action on the basis of the breach of a legal duty to protect her the plaintiff alleged that the defendants failed to properly vet the 1st defendant for any prior criminal offences which might have impacted on his ability to work with children, and had they done so, he would never have been appointed, either as a teacher or as an acting principal, at the school.

74. In response to this, the remaining defendants sought to shift responsibility and blame onto SACE. They contended that inasmuch as SACE was responsible for registering educators and to this end vets them in relation to their criminal records, before doing so, it had the legal duty to do so, and had it vetted the 1st defendant he would not have been registered as an educator and would as a result not have been able to have been employed at any public school, including Vleiplaas.

75. They point out that the SACE Act provides[26] that an educator must be registered with SACE prior to being appointed as such, and no person may be employed as

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[22] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA), *Rail Commuters Action Group and Ors v Transnet Ltd t/a Metrorail and Ors* 2005 (2) SA 359 (CC).

[23] Note 12 para 25.

[24] *Minister of Education & Ano v Wynkwart NO* 2004 (3) SA 577 (C) at 580A-C.

[25] In *casu*, the duty pertained to guarding against so-called 'misadventure'.

[26] Section 21(1).

an educator by any employer (i.e either in the public or private sector), unless they are so registered.[27]

76. It is so that, had SACE vetted the 1st defendant prior to registering him in 2003 he would never have been employed and would never have been in a position to have assaulted the plaintiff sexually. In this sense the 'but-for' test which is applicable for factual causation is satisfied. But, in my view the defendants' argument is nonetheless specious.

77. SACE is a body which was established[28] to regulate and promote the teaching profession. In terms of the SACE Act[29] its objects are to determine the minimum criteria and procedures which will apply for the registration of educators for entry to the profession and to set up, maintain and protect the necessary ethical and professional standards required of educators.[30] By registering educators SACE effectively grants them a 'license' to practice as such.

78. It is no surprise that, as in the case of applicants in other professions (such as the medical and the legal), which are regulated and controlled by professional, regulatory bodies[31] SACE requires particulars of whether educators who seek registration have a criminal record or not.

79. In the same way as a doctor who has a criminal record for assault and a lawyer who has one for theft, may not be fit and proper persons to be 'licensed' to practice by their respective regulatory bodies, it is obviously necessary for SACE to determine whether an educator has a criminal record for sexual assault or rape, as this would obviously impact on whether they should be allowed to teach children, by being 'licensed' to do so.

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[27] Section 21(2).

[28] SACE was initially established by means of a collective agreement between the State and the Education sector which was arrived at in the Education Labour Relations Council. It was recognized and given statutory force in terms of s 27(1) of Chp 6 of the Employment of Educators Act 76 of 1998. Section 4 of the SACE Act provided that, notwithstanding the repeal of Chp 6, SACE would continue as a juristic person.

[29] Section 2 read together with s 5.

[30] In this regard it has the duty to compile, maintain and from time to time review the Code of Professional Ethics for educators (s 5(c)), and has the power to discipline errant educators who are found guilty of a breach of the Code, by imposing sanctions ranging from a caution or reprimand, to a fine or removal from the register for a specified period, or indefinitely (ss 5(c)(aa)-(cc))

[31] The Health Professions Council in the case of the medical profession, and the Legal Practice Council in the case of the legal profession.

80. But any 'duty' which SACE may have in this regard, by virtue of its statutory objects, does not necessarily or automatically transpose into a sub-specie of the legal duty which has been pleaded in this matter viz a legal duty to protect, or not to harm another, nor does a failure in this regard on the part of a regulatory body such as SACE, in itself translate into, or equate to the breach of such a duty, or mean that SACE would be capable of being held liable for it.

81. Put simply, in the context of the pleadings in this matter the question which arises is whether as a matter of policy it can properly be said that SACE owed the plaintiff, and other children who were taught by educators it was required to register, a legal duty to protect them, or a legal duty not to cause them harm, which it then breached by failing to vet the 1st defendant, and if so, whether it can be held liable for any failure in this respect. In this regard one struggles to put forward a tenable argument, either as a matter of public, or legal policy, and in doing so one is confronted with issues of legal, as opposed to factual causation.

82. In 2 recent decisions the Supreme Court of Appeal reversed decisions of this Court, whereby organs of State who were merely required to exercise a regulatory and 'licensing' function over daycare facilities and playcare centres were held delictually liable for harm which had been suffered, on the basis that they had a legal duty to protect, or to prevent harm from ensuing, to the children who used them.

83. In *Barley*[32] a 5-month-old child died after she rolled off a bed in a private daycare facility and asphyxiated. In *BE*[33] a 5-year-old child sustained a traumatic brain injury when a cross-beam of a swing at a playschool, which was operated by an NGO, fell on her head. In both matters the SCA held that the fact that these facilities had to be registered ('licensed') by the State, being the provincial department of social development, but were not operated by it and therefore did not fall under its control, did not translate into the State having a legal duty either to prevent harm to the children who were making use of the facilities or to ensure their day-to-day safety, and this was the responsibility of the operators of such

[32] *Western Cape Department of Social Development v Barley & Ors* 2019 (3) SA 235 (SCA).
[33] *MEC, WC Department of Social Development v BE obo JE & Ano* 2021 (1) SA 75 (SCA).

facilities and their staff i.e teachers and their assistants.[34] The decision in *BE* was recently upheld by the Constitutional Court.[35] In my view the rationale of the approach which was adopted by our highest Courts in these matters is one that lends itself to adoption in this matter.

84. By way of analogy, I venture to suggest that one would have difficulty adopting a view that public and legal policy requires that the Health Professions Council should be held liable for the perpetration of an assault by a doctor who fails to obtain consent from a patient prior to performing an operation on them, because it registered him/her without ascertaining that he/she had a previous conviction for assault. Similarly, can it be submitted that public and legal policy requires that the Legal Practice Council should be held liable for the theft of trust or practice monies committed by an attorney who it failed to ascertain had a previous conviction for theft prior to his registration? And then there is the question of legal causation i.e whether in such instances it can be said that the harm which is suffered is sufficiently close enough to the omission such that it can be said to have been caused by it, and the omission was therefore not too remote.

85. In my view there is no need to answer these questions definitively, one way or another, in this matter, for the following reasons. First and foremost, SACE is not a party to the proceedings and it is accordingly inappropriate, if not impermissible, to determine whether it owed a legal duty to the plaintiff of the kind which is in issue in this matter. In the second place, the case which the plaintiff has put up and which requires determination is whether the 2nd and 3rd defendants owed the plaintiff a duty of the kind referred to, not SACE, and in this regard the plaintiff contends that on the basis of the general principles previously enunciated there is clearly such a duty on the relevant organ of State, the WC Education Department, and it is accordingly liable both directly and on the basis that 2nd defendant is vicariously liable for the acts of the 1st defendant.

86. Vicarious liability is a legal device which allows for an extension of liability for the acts of others, to persons who did not themselves engage in any wrongful

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[34] *Barley* para 32; *BE* para 41.

[35] *BE obo JE v MEC, Department of Social Development WC* 2022 (1) SA 1 (CC) para 26.

conduct.[36] The Constitutional Court has held that it is a special form of liability which arises in instances where there is a 'particular' relationship between such persons.[37] The most common form of such liability occurs in the case of employers, in respect of delictual acts which are performed by their employees. In this regard an employer will be liable vicariously for acts which have been performed by employees, not only in the course and scope of their employment and thus solely or primarily for the purpose or benefit of their employer, but also in instances[38] where such acts, although performed solely or primarily for the benefit of the employee, are 'sufficiently closely linked' to the business of the employer.[39]

87. In this matter there is no suggestion of the existence of any special or particular relationship, of any kind whatsoever, between SACE and 1st defendant and it is not suggested that SACE can be held liable vicariously, for his actions. However, there is such a relationship viz one of employment, between the 1st defendant and the WC Education Department, as represented by the 2nd defendant, the MEC.

88. From the exposition of the evidence, it will be apparent that the plaintiff was assaulted sexually by the 1st defendant at school, during a school day, at a time when he was 'on duty' as a teacher and acting principal. In my view, although the assault was an act which was performed solely for his sexual gratification, it was nonetheless 'sufficiently closely linked' to the educational 'business' of his employer, the WC Education Department and as such, it falls within the ambit of vicarious liability.

89. During Wyngaardt's cross-examination it came out, much to the surprise of all, that notwithstanding that since 2018 SACE vets applicant educators in respect of their criminal records, before registering them, from or about the same time the WC Education Department has also carried out its own, independent vetting process (via an entity known as MIE), whereby it not only checks on the educational

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[36] For the purpose of this judgment, it is not necessary to discuss the various jurisprudential underpinnings of vicarious liability, which range from the idea that employers should be held liable for the acts of employees because of the 'risk of harm' which is created by virtue of their employment, to the idea that liability ensues because an employee resorts under the 'control and direction' of an employer.

[37] *F v Minister of Safety & Security & Ano* 2012 (1) SA 536 (CC) para 40.

[38] These are commonly referred to as 'deviation' cases.

[39] *F* n 37, paras 40-41.

qualifications of applicants and their work records but also checks on their criminal records, and to this end it requires them to provide a set of their fingerprints which is then used to obtain such records, if any, from the SA Police Services. This apparently followed upon a decision that was taken at a meeting of State officials in Tshwane in 2016, at which it was resolved that applicants for positions in the State would have to be vetted by the relevant departments concerned.

90. Given this evidence, not only is the averment in the defendants' plea to the effect that the WC Education Department does not vet an educator's criminal record because SACE does so, factually incorrect, but the entire foundation of its defence (its contention that, as such, the responsibility for doing so falls on SACE, and not on it), is undermined. Wyngaardt effectively conceded that, had the Department truly believed that it had no obligation in this regard and could rely entirely on SACE to do this, it would hardly be conducting its own, independent vetting process.

91. In the light of this evidence and the accepted social imperative of protecting children from sexual predators, Wyngaardt was also constrained to concede that the question in the A2 form which requires applicants only to disclose whether they have ever previously been convicted of a criminal offence 'in their work', instead of any and all previous convictions, is inadequate and too narrow, as it allows applicants to hide criminal offences of the very kind which is in issue in this matter, and given that applicants have to provide their fingerprints, it is most likely that a record of all their previous convictions will in any event be obtained. He also conceded that, had the question been phrased in wide terms, by requiring the 1st defendant to disclose all previous convictions, and had he done so, he would not have been employed at Vleiplaas, either as a teacher or as a principal.

92. He had no answer as to why, given that the 1st defendant's registration by SACE only occurred in 2003, the Department failed to conduct its own screening and vetting process as to his criminal record when he was first appointed by it in a temporary position in 2000-2001, or when he was appointed in a permanent position in 2005-2006, or when he was later appointed as acting principal in or about 2010. It will be remembered that Moroasui's uncontested evidence in this regard was that prior to 2018 there was a practice that the Department would vet

applicant educators, not SACE. In each of these instances (and many others) when 1st defendant applied for the various posts, he was required to complete A2 forms, yet none of these forms were ever checked or verified with the police. In fact, in a number of instances the applications were only processed and approved after the 1st defendant had already served in the positions he had applied for. In the circumstances the application process which was utilized by the Department was clearly one which was deficient.

Conclusion

93. In my view, as employer the Department was under a legal duty to vet the 1st defendant before accepting him as its employee, in order to ensure not only that he was formally qualified to teach children, but also that he was a suitable and fit person to work with them, and would not constitute a possible danger to them. The Department failed to discharge that duty.

94. In failing to do so the Department was negligent. In this regard Wyngaardt conceded that the problem of the sexual molestation of children was a longstanding one, and the Department was well aware of it well before 2018. A reasonable employer in its position would have forseen the possibility that children would be at risk of being sexually exploited or assaulted by educators such as the 1st defendant, who had a previous conviction for the sexual assault of a minor, if it employed them, and would have taken reasonable steps to guard against such harm eventuating by properly screening and vetting applicant educators.

95. Such steps would have involved obtaining particulars of any criminal record which applicants may have had, from the SA police services (a process which De Jongh explained was a relatively simple one), and at the least, asking applicants to disclose any and all previous convictions they may have had, whether work-related or not, as is done in the case of applications in the wider public service.

96. In the result, 2nd defendant must accordingly be held liable for the Department's failure to screen and vet the 1st defendant, and for his wrongful conduct, which followed upon this failure.

97. As far as 3rd defendant, the school's governing body, is concerned, in terms of the SA Schools Act [40] it was responsible for the governance of the school, whilst the 1st defendant was responsible for its management.[41] Although it therefore could also be contended that it was under a legal duty to protect the children who attended the school and to this end was required to take reasonable steps to prevent them from being exposed to harm, no evidence was tendered as to what its responsibilities were in this regard, if any, either as a matter of fact or as of law, nor was any evidence tendered to show how, in particular, with reference to the facts in this matter, it failed to discharge this duty and had been negligent. No evidence was tendered to show that it was responsible in any way for the 1st defendant's appointment, nor was it suggested that it had any duty to have screened and vetted the 1st defendant, prior to his appointment. In the circumstances the plaintiff has failed to make out a case against it.

98. Before concluding it is necessary to say the following. As was pointed out, the disciplinary proceedings which were conducted against the 1st defendant by the Department were a travesty, and a failure of justice. Had the presiding officer properly considered and evaluated the evidence before her she would have had to come to the inevitable conclusion that the Department had succeeded in proving, on a balance of probabilities, that 1st defendant had made himself guilty of gross misconduct as an educator and principal by sexually molesting, if not raping, the plaintiff, and she would have recommended that he be dismissed from his employment. Instead, the 1st defendant was retained in the service of the Department and is still employed as an educator, thereby placing the children in his care at continued risk. This is an unacceptable state of affairs and a copy of this judgment should be forwarded to the Director of the WC Education Department, so that the appropriate action in this regard can be taken, as soon as possible. In addition, it is also unacceptable that the 1st defendant was not prosecuted criminally. What he did to the plaintiff constitutes a serious criminal offence which was perpetrated on a young child, and he should be punished

[40] Section 16(1), Act 94 of 1996.
[41] Section 16(3).

appropriately for it. It is not acceptable that those who commit such offences should be allowed to get away with them. In this regard I trust that the matter will also be referred to the Director of Public Prosecutions, for the necessary action to be taken.

99. Lastly, it should be obvious, given the findings that I have arrived at, that the counterclaim which was instituted by the 1st defendant has no merit in it and must fail. In my view, it was a litigatory tactic aimed at putting pressure on the plaintiff, by putting her at risk for costs, in the event that she were unable to succeed in successfully prosecuting her action to finality. In my view it was an abuse of process.

100. Given this, and given that the evidence establishes overwhelmingly that the 1st defendant grossly abused the plaintiff sexually, at the time when she was a vulnerable young child who was supposed to be able to trust him and to look to him for guidance and care, in the exercise of my discretion I am of the view that a special costs order is warranted, as a mark of the Court's displeasure, although this was not pertinently asked for. In this regard I am of the view that given what the 1st defendant did to her, the plaintiff should not be compelled to bear any of the costs which she incurred in having to obtain a judgment and an Order against him, holding him liable for the damages which she sustained, and she should be wholly indemnified.

101. In the result, I make the following Order:

101.1 First and second defendant are liable, jointly and severally (the one paying the other to be absolved), for such damages as the plaintiff may prove (or as may be agreed) she sustained in and as a result of the sexual assault which was perpetrated on her by the first defendant at the Vleiplaas Primary School, during September 2011.

101.2 First and second defendant are liable, jointly and severally (the one paying the other to be absolved) for the plaintiff's costs of suit (which in the case of the first defendant shall include costs on the scale as between attorney and client and in the case of the second defendant shall be limited to costs on the party-party scale), and which shall include the costs of two counsel

where so employed, the reasonable travelling costs incurred in respect of the travel to, and the inspection in *loco* which was held at, the Vleiplaas Primary School and the reasonable accommodation, subsistence and travelling costs incurred by the plaintiff and her witnesses for the purpose of travelling to Cape Town in order to testify.

101.3 The costs which are payable by the second defendant in terms of the preceding paragraph shall, in terms of s 3(3)(a)(i) of the State Liability Act 20 of 1957, be paid within 30 days of the taxing master's allocatur or alternatively, within 30 days of the date of the conclusion of any agreement in respect of the quantum thereof.

101.4 First defendant's claim in reconvention is dismissed with costs (on the attorney-client scale), such costs to include the costs of two counsel, where so employed.

M SHER

Judge of the High Court

Appearances:

Plaintiff's counsel: Adv M Salie SC and Adv L Joubert
Plaintiff's attorneys: Simpsons (Bellville)
First defendant's counsel: Adv M Filton
First defendant's attorneys: BDP Attorneys (Rondebosch)
Second & third defendants' counsel: Adv R Liddell
Second & third defendants' attorneys: State Attorney (Cape Town)