R E P O R T A B L E

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

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

Case No.: **11215/2013**

In the matter between:

NAIDU Plaintiff

and

THE MINISTER OF CORRECTIONAL SERVICES Defendant

JUDGMENT: 9 MARCH 2017

MEER J.

[1] The Plaintiff, a school teacher from Somerset-West issued summons against the Defendant, the Minister of Correctional Services, in which she claimed damages in the amount of R1 332 000,00 arising from an attack perpetrated upon her on 19 July 2010 by one Marius Michaels ("Michaels") who was at the time on parole. She claimed that the attack was a direct result of the negligent release of Michaels on parole, for which the Defendant was liable.

[2] By agreement between the parties the issues of the merits and quantum have been separated. This judgment deals with the merits only and calls for a determination as to the liability of the Defendant on the grounds of negligence, as alleged.

[3] In her particulars of claim the Plaintiff stated that she was attacked in her home in Somerset-West, by Michaels on 19 July 2010. Michaels threatened her with a knife, bit her and threatened to murder and rape her. The particulars allege that the assault was a direct result of the negligence of the Defendant who *inter alia*:

> 3.1 Failed to act with reasonable care and diligence in determining whether Michaels should become the subject of community corrections, alternatively be granted amnesty. With the exercise of reasonable care, it would have been ascertained that there was a reasonable risk that, if released, he would commit further crimes and pose a risk to society;
>
> 3.2 Failed to take into account adequately Michaels' previous convictions and that he had previously violated his parole conditions;
>
> 3.3 Failed to have proper regard to the reports of the Case Management Committee which was tasked with assessing Michaels;
>
> 3.4 By virtue of her position as custodian and guardian of all sentenced prisoners, the Defendant had a legal duty to prevent harm from being caused to members of the public by sentenced prisoners within her custody, and subject to community corrections. It was at all relevant times reasonably foreseeable to the Defendant that if acts or omissions such as

those perpetrated on the Plaintiff were to take place, harm of the nature caused to the Plaintiff would result.

[4] In her plea the Defendant claimed no knowledge of the attack, denied it was due to any negligence on her part, and further denied that she had any legal duty to protect the public as alleged. However, contrary to her plea, at the commencement of the hearing Mr. Jacobs for the Defendant stated that it was no longer disputed that the Plaintiff had been attacked by Michaels as alleged in her particulars of claim. He further conceded that if it were to be found that the Defendant was negligent in releasing Michaels on parole, such negligence was causally connected to the harm that was ultimately suffered by the Plaintiff. He further conceded that there existed a legal duty on the part of the Defendant to ensure the safety of members of the public such as the Plaintiff, sufficient to found liability. Such, he accepted, was a legal duty akin to that stipulated in the well-known case of *Minister of Safety and Security and Another v Carmichele 2004 (3) SA 305 (SCA)* alluded to by Mr Acton for the Plaintiff. I note that in *Carmichele,* the Court, in finding at paragraph 43 that the state owed a legal duty to the plaintiff flowing from the general norm of accountability, went on to say:

> " ...the State is liable for the failure to perform the duties imposed upon it by the Constitution unless it can be shown that there is compelling reason to deviate from that norm".

Mr Jacobs acknowledged too that Section 131 of the Correctional Services Act 111 of 1998 ("the Act"), also made provision for the Defendant's liability. Mr. Jacobs however persisted with the stance that the Defendant had not been negligent in releasing Michaels on parole.

[5] The issue that therefore remains to be determined is whether the Defendant, acting through the Correctional Supervision and Parole Board ("the Board") at Brandvlei Prison, was negligent in releasing Michaels on parole in May 2009.

Common Cause Facts

[6] Marius Michaels assaulted the Plaintiff in her home on 19 July 2010 whilst he was on parole from Brandvlei Prison. As a consequence, he was convicted on 27 October 2010 on charges of robbery with a weapon other than a fire-arm, housebreaking and escaping from custody. He was sentenced to 15 years' direct imprisonment for robbery, 6 months' imprisonment for housebreaking to run concurrently with the sentence for robbery, 2 years' direct imprisonment for escaping from custody, and he was declared unfit to own a fire-arm. Michaels is therefore currently once again in custody.

[7] Michaels' criminal profile reveals that he has a long list of previous convictions dating back some 26 years to 1980. His previous convictions and sentences include the following:

7.1 Theft on 30 July 1980, for which he was sentenced to "5 houe met 'n ligte rottang";

7.2 Theft on 28 April 1983, for which he was sentenced to "3 houe met 'n ligte rottang";

7.3 Assault with intent to do grievous bodily harm, and escaping or attempting to escape from custody on 12 April 1984, for which he was referred to a reform school;

7.4 Theft on 6 July 1984, for which he was sentenced to "7 houe met 'n ligte rottang";

7.5 Assault on 21 September 1984, for which he was warned and discharged;

7.6 Theft, on 12 December 1985, for which he was sentenced to 6 months direct imprisonment, suspended for 5 years;

7.7 Theft on 24 November 1986, for which he received a sentence of "6 houe met 'n ligte rottang";

7.8 Theft on 23 October 1986, for which he received a sentence of 12 months direct imprisonment;

7.9 Assault with intent to do grievous bodily harm, on 5 January 1987, for which he received a sentence of 9 months direct imprisonment;

7.10 Murder, for which he was sentenced on 17 November 1987 to 12 years' imprisonment which ran concurrently with the sentence which he was serving at the time;

7.11 Escaping or attempting to escape from custody on 9 February 1993, for which he received a sentence of 9 months direct imprisonment;

7.12 Michaels was released on parole on 4 December 1996 whilst he was serving his sentence for murder, imposed in 1987. Michaels violated his parole when he was found guilty of theft on 6 November 1997, an offence

he committed whilst he was out on parole. He received a sentence of 4and a half years' direct imprisonment.

[8] Details of the offences and sentence from which he was granted parole, when he assaulted the Plaintiff in 2010, are as follows:

8.1 On 7 June 2004 he was convicted of theft, assault with intent to do grievous bodily harm, assault and contravening the Dangerous Weapons Act. He was sentenced, on 8 July 2004, to direct imprisonment of 7 and a half years at the Strand Magistrate's Court. The sentencing magistrate annotated the judgment by adding the words "Beskuldigde mag nie op parool vrygelaat word voordat hierdie hof daarin geken is nie".

8.2 On 22 October 2004 he was sentenced for theft again and received a sentence of 2 years direct imprisonment.

[9] For the above offences, Michaels commenced serving a sentence at Brandvlei Prison of 9 and a half years. It was from this term of imprisonment that Michaels was granted parole when he assaulted the Plaintiff in 2010.

[10] The following dates and circumstances are relevant to Michaels' period of incarceration:

10.1 Maximum release date: 7 January 2014;
10.2 Amnesty/remission granted: 10 months;
10.3 Sentence expiry date: 7 March 2013.

[11] Michaels was considered for parole during 2007, but was not recommended for parole.

On 29 August 2008, whilst serving his sentence, Michaels was found to have contravened Section 23 (1) (g) of the Act, which offence is committed if an inmate conducts himself indecently by word, act or gesture.

[12] On 8 September 2008 Michaels was found to have contravened Section 23 (1) (m) of the Act, for being found in possession of an unauthorized article.

Michaels attended a three day Aggression Programme over the period 22 to 24 October 2008.

[13] On 21 December 2008 Michaels was found to have once again contravened Section 23 (1) (m) of the Act, in that he was in possession of dagga.

On 17 December 2008 to 19 December 2008 Michaels attended a three day Life Skills Programme.

[14] A report by the Unit Manager, S. Nöthnagel, dated 9 March 2009, stated of Michaels that: *"He adjusted well in the prison system but he can give better full cooperation"*.

[15] On 28 April 2009 the Case Management Committee (established in terms of Section 42 of the Act) of the Brandvlei Correctional Centre, recommended to the Board that Michaels be released on parole after completing two thirds of his sentence. The Strand Magistrate's Court was notified of Michaels's Parole Board hearing and the magistrate raised no objection thereto or to Michaels being released on parole.

[16] The Board approved Michaels' placement on parole from 17 March 2010 to 17 March 2013. Thereafter, as aforementioned, on 19 July 2010 whilst out on

parole Michaels assaulted the Plaintiff in her home. This was the second time he had committed an offence whilst out on parole.

The Evidence

[17] In view of the Defendant's concession that the Plaintiff had been attacked by Michaels as alleged in her particulars of claim, the Plaintiff elected not to testify. Instead, she relied on the evidence of an expert witness, former social worker at Brandvlei Maximum Correctional Services, ("Brandvlei"), Mr. Jacobus Pansegrouw ("Pansegrouw"), to prove her claim.

[18] Pansegrouw was the only expert to testify and his qualifications and status as an experienced social worker formerly of Brandvlei, specialising in the rehabilitation of offenders, was not challenged. Pansegrouw worked as a social worker at Brandvlei Prison for twenty years, from 1994 until his resignation in 2014. He is currently a businessman, but still maintains an involvement with rehabilitation projects at the Department of Correctional Services.

[19] At the time of his resignation he was a head social worker at Brandvlei Maximum Prison and an Assistant Director at the Department of Correctional Services. His other qualifications are that of a specialized HIV counselor, a sexual offender specialist and a marriage counselor. His expert report records that during his time at Brandvlei Prison he was supervisor of social workers and social works students.

[20] Pansegrouw had established a rehabilitation project, which he described as internationally acclaimed, called "The Group of Hope", during his time at Brandvlei. The programme entailed over a year of daily therapy for inmates as compared to the standard programmes, averaging three days, and had a high

percentage of successful rehabilitation. The programme ran for four years and has stopped since he left Brandvlei.

[21] In Pansegrouw's opinion, group programmes of short duration conducted at Brandvlei were not sufficient to promote rehabilitation of offenders. It was, he said, impossible to change a life marked by an abusive and violent history within 2 to 3 days of group programmes. He advocated individual therapy and a programme similar to the one he had initiated at Brandvlei.

[22] Pansegrouw testified that the Parole Board had the tools to assess the existence and extent of rehabilitation and the chance of recidivism of inmates. The Board receives reports from professionals and has the authority to call experts to inform Board hearings. However, the decision to release or not to release on parole, he said, had become a logistical consideration rather than an enquiry into rehabilitation and readiness to be released into society.

[23] Pansegrouw had studied the documents presented to the Board at Michaels' parole hearing. He had also familiarised himself with a social work progress report dated 14 April 2009, by social worker Ms. S Lewis, and a report by a unit manager dated 9 March 2009. He conceded that neither report expressed anything out of the ordinary and agreed that the reports gave Michaels "a clean bill of health". Pansegrouw noted that the two programmes on Aggression and Life Skills attended by Michaels, and referred to in Lewis' report, were only of three days duration each. Whilst conceding that he could not comment on Lewis' programmes and their intervention with Michaels specifically, he maintained that it was impossible to rehabilitate a person with a background like that of Michaels after a few days of group sessions. The yardstick applied by the Defendant, he said, was whether an inmate had attended a programme, not how much impact the programme had on an inmate. Further intervention by the Board would have

been necessary for a determination on Michael's parole readiness. Based on his experience of more than twenty years as a therapist, he concluded that Michaels should not have been released on parole on the information before the Board.

[24] During cross-examination Pansegrouw conceded that he had not worked therapeutically with Michaels, but had spent a total of one day with him during his orientation on 10 October 2006, just over 2 years after his incarceration in July 2004. The delay in conducting Michaels' orientation, he explained, was occasioned by the large number of offenders to be processed.

[25] The thrust of the cross examination of Pansegrouw by Mr. Jacobs, was that Pansegrouw had "an axe to grind" with the Department of Correctional Services because of disciplinary proceedings that had been brought against him. This, Pansegrouw vehemently denied. He however conceded that he had been found guilty of one offence, namely that of starting the aforementioned non-profit organization for the rehabilitation of prisoners, without permission. The sentence imposed upon him was the receipt of a written warning, one which he had never received. The fact that he continued to be involved in projects of the Department in Worcester, he said, demonstrated that he harboured no ill will towards the Department.

[26] Pansegrouw denied in cross examination that he had embellished his curriculum vitae. When it was put to him that he had not been the supervisor of social workers and social work students as reflected in his report, he replied that he had supervised a social worker for 6 months. When it was further put to him that he could not have been a head social worker in 2014 when he resigned, as the description Head Social Worker was abolished in 2008, he admitted to not being sure about this.

[27] Mr. Jacobs was critical of Pansegrouw as an expert witness, arguing that his testimony was tainted with bias and did not measure up to the objective standard required for experts. He took issue with Pansegrouw's failure to testify in chief that he had conducted Michaels' orientation in 2006 and described as a gross dereliction of duty Pansegrouw's two year delay in the orientation of Michaels. Mr. Jacobs was also critical of Pansegrouw's testimony concerning the disciplinary charges against him, stating he had denied the charges in cross examination. He took issue further with the fact that Pansegrouw, during cross examination, was unable to provide details of the social workers he had supervised, and with his title as head social worker, which Mr Jacobs submitted was incorrect. Pansegrouw, he said, adduced this evidence to bolster his status as an expert.

[28] These criticisms of Pansegrouw are in the main unfair, given Pansegrouw's ready admission to the disciplinary charge and conviction and his explanation for the two year delay in the orientation of Michaels. Neither of these aspects, nor his evidence concerning his job title and those he supervised, serves to render his expertise of 20 years in the field of rehabilitation with the Department of Correctional Services and his assessment of the processes of the Parole Board, nugatory. I agree that Pansegrouw's continual involvement with the Brandvlei Prison does not suggest he has an "axe to grind". On balance, Pansegrouw showed himself to be a measured and fair witness making concessions where they were appropriate. As there was no expert evidence adduced by the Defendant to contradict Pansegrouw, his expert testimony stands.

Case for the Defence

Testimony of Shafiel Adonis

[29] Mr. Shafiel Adonis ("Adonis") is employed as a clerk of the Parole Board at Brandvlei Prison. He was a member of the three member Board that took the

decision to grant Michaels parole in 2009. At the time he was acting secretary to the Board. The other members were the Board chairperson, a Mrs. Bushwana, and a community member, Mr. Mkentsha. Adonis has been employed by the Department of Correctional Services for 20 years and has been working for the Board since 1997. He has attended numerous Board hearings. He said the Board deals with 5 to 6 parole applications a day.

[30] Prior to the Board hearing in respect of Michaels, its members had been given a bundle of documents numbering some 45 pages, said Adonis. These included a number of reports, namely, the aforementioned social worker and unit manager reports, as well as a report by a religious worker, a medical report and a report by an educational officer. Adonis conceded that a report in terms of Section 42 (2) (d) of the Act, which obliges the Case Management Committee to report to the Board regarding *inter alia* the likelihood of relapse into crime, had not been furnished in respect of Michaels.

[31] The crucial reports on the basis of which parole was granted to Michaels, were those of the case manager and social worker. There was nothing negative about Michaels in these reports, said Adonis. The social worker's report that Michaels had attended Life Skills and Aggression Programmes were factors which weighed in his favour. Had he not attended these programmes and had the reports contained negative information, Michaels would not have been granted parole, said Adonis.

[32] Adonis explained that in arriving at its decision to release Michaels on parole, the Board had weighed up both the negatives and positives pertaining to him. It had taken cognizance of his many previous convictions, the fact that he had committed an offence whilst out on parole in 1997 and that he had been charged with 3 disciplinary offences during his time in prison. These, he said,

were outweighed by the positive reports, in particular those of the social worker and unit manager.

[33] As the offence committed whilst Michaels was out on parole in 1997, had occurred more than 10 years before the parole hearing in 2009, Adonis said it was not an obstacle to the granting of parole. When asked whether the Board could not have foreseen that Michaels would once again commit a crime on parole, Adonis replied that it was possible in all cases for offenders to commit crimes once released. A person who had committed a crime whilst out on parole could, he said, be considered again for parole.

[34] Explaining the workings of the Board, Adonis testified that the Chairperson goes through the profile of the offender, reads the reports and asks the Board if there are any questions. Thereafter the Chairperson asks the offender if he or she wants to say anything, the offender is then excused and the Board makes a decision. The hearing in respect of Michaels' parole took approximately 34 minutes, commencing at 10h45 and ending at 11h19. This, he said, was one of the shorter hearings, as hearings can span up to 2 hours.

[35] During cross-examination Adonis acknowledged that Michaels had not been referred to a psychologist and that there had been no psychologist's report before the board. He explained that parole is not a right but a privilege, and that the over-riding issue was whether an offender had been rehabilitated so as to be let out on parole. He conceded that the negative factors pertaining to Michaels, namely his many previous convictions, his escapes from custody, and the disciplinary offences whilst incarcerated, did not suggest rehabilitation.

[36] For factors which pointed to meaningful rehabilitation on the part of Michaels, Adonis pointed to the social worker's report and his completion of the

Life Skills and Aggression Programmes. Completion of the courses, he said, was regarded as the test to counter the negative aspects. He however denied that the Board engaged in an administrative process and did not exercise proper discretion in determining if Michaels should have been released.

[37] Adonis was unable to point out how or where in the report by Nöthnagel, the unit manager, one could find that Michaels had been rehabilitated, but said that the content of the report was suggestive of rehabilitation.

[38] Adonis conceded that the timing of the courses that Michaels attended appeared to be related to his disciplinary convictions whilst in prison. He however denied that these offences were a reason to refuse parole. He said that were it not for Michaels' profile and disciplinary offences he would have been released after serving a third of his sentence, adding that various conditions had been attached to the granting of parole to Michaels.

[39] Adonis denied that once the minimum requirement for parole, being service of one third of a sentence, had been achieved, the Board would be looking for a reason to grant parole.

Testimony of Geraldine Suzanne Lewis

[40] Ms. Lewis ("Lewis") is the social worker and author of the crucial Social Work Progress report, dated 14 October 2009, upon which the Board took the decision to release Michaels on parole. Lewis has been a social worker since 1992 and has worked at Brandvlei Medium Prison since 2005. Prior thereto she worked at Kroonstad Prison.

[41] Lewis' interaction with Michaels commenced in November 2007 when he was transferred from the maximum to the medium section of the prison. She

testified in chief that she had conducted individual therapy with Michaels about five times, concerning mostly relationships with his family and contact with them. During cross-examination she said that she could not actually remember these sessions.

[42] The only other contact Lewis had with Michaels was during his attendance of the Life Skills Programme between 17 – 19 December 2008 and his attendance at the Aggression Programme between 22 – 24 October 2008. She had selected Michaels to attend these programmes as part of his sentence plan. In each of these programmes, there were two sessions a day and each session lasted an hour and a half. Not more than 12 inmates would have attended the two programmes.

[43] The Life Skills Programme had dealt with self-image, relationships, communication and aggression. Lewis confirmed the contents of her report, *inter alia* that Michaels had completed the programme, participated well, was open and honest about his feelings, had shown no aggressive behaviour and had gained insight into the programme.

[44] The Aggression Programme dealt with domestic violence, anger management, conflict management styles, relationships, communication and how to be assertive. Lewis similarly confirmed the contents of her report under the heading Aggression Programme, namely *inter alia* that the offender had completed the programme attending all 6 sessions, "never used any drugs and does not understand his aggressive behaviour", and participated very well throughout the programme. Lewis had taken notes during the programmes and these, she said, had informed her report to the Board. She could not remember precisely what Michaels had said that informed her opinion as expressed in her report.

[45] When asked to comment on a statement in her report that Michaels had committed his offences while intoxicated, Lewis said the statement had been informed by Michaels. In her opinion Michaels needed no more social work intervention and she had therefore recommended that he be released on parole. Had there been negative aspects she would not have recommended parole, she said.

Findings

[46] The release of a sentenced prisoner on parole appears under the section on Community Corrections at Chapter V1of the Correctional Services Act 111 of 1998. Section 50 (2) records the aim of community corrections as being to ensure that persons subject to community corrections abide by the conditions imposed upon them in order to protect the community from offences which such persons may commit. Section 64 (1) authorises the Board to impose treatment, development and support programmes on a person subject to community corrections. Section 42 provides for the establishment of a Case Management Committee ("CMC") at a Correction Facility. The function of a CMC is to report to the parole Board regarding the possible placement of an offender on parole. See *Van Vuren v Minister for Correctional Services and Others 2010 (12) BCLR 1233(CC)* at paragraph 26. Importantly section 42 (2) sets out the mandatory duties of the committee and specifies what reports must be placed before the Parole Board for the purposes of parole hearings.

"**42. Case Management Committee.**—(1) At each correctional centre there must be one or more Case Management Committees composed of correctional officials as prescribed by regulation.

(2)The Case Management Committee must—

(*a*) ensure that each sentenced offender has been assessed, and that for sentenced offenders serving more than 24 months there is a plan specified in section 38 (1A);

(*b*) interview, at regular intervals, each sentenced offender sentenced to more than 24 months, review the plan for such offenders and the progress made and, if necessary, amend such plan;

(*c*) make preliminary arrangements, in consultation with the Head of Community Corrections for possible placement of a sentenced offender under community corrections;

(*d*) submit a report, together with the relevant documents, to the Correctional Supervision and Parole Board regarding—

(i) the offence or offences for which the sentenced offender is serving a term of incarceration together with the judgment on the merits and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department;

(ii) the previous criminal record of such offender;

(iii) the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of such offender;

(iv) the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced;

(v) the assessment results and the progress with regard to the correctional sentence plan contemplated in section 38;

(vi) the possible placement of an offender under correctional supervision in terms of a sentence provided for in section 276 (1) (i) or 287 (4) (*a*) of the Criminal Procedure Act, or in terms of the conversion of such an offender's sentence into correctional supervision under section 276A (3) (*e*) (ii) or 287 (4) (*b*) of the said Act, and the conditions for such placement:

(vii) the possible placement of such sentenced offender on day parole, parole or medical parole, and the conditions for such placement;

(viii) a certified copy of the offender's identity document and, in the case of a foreign national, a report from the Department of Home Affairs on the residential status of such offender;

(ix) the possible placement under correctional supervision or release of an offender who has been declared a dangerous criminal, in terms of section 286B (4) (*b*) of the Criminal Procedure Act; and

(x) such other matters as the Correctional Supervision and Parole Board may request; and

(*e*) submit a report as contemplated in paragraph (d) to the National Commissioner in respect of any sentenced offender sentenced to incarceration of 24 months or less.

(3) A sentenced offender must be informed of the contents of the report submitted by the Case Management Committee to the Correctional Supervision and Parole Board or the National Commissioner and be afforded the opportunity to submit written

> representations to the Correctional Supervision and Parole Board or National Commissioner, as the case may be."

[47] Finally Section 131 makes clear that the State is liable for delicts committed by persons subject to community corrections. It states:

> "In the event of a person serving community corrections being liable in delict for an act or omission in the course of such service, the damages sustained may be recovered from the State."

[48] It is common cause that the Case Management Committee did not comply with their mandatory duty to place *inter alia* the following crucial reports before the Board hearing Michaels' parole application:

48.1 A report on his mental state as required by Section 42 (2) (d) (iii);

48.2 A report on the likelihood of his relapsing into crime, the risk posed to the community and the manner in which this risk can be reduced, as required by Section 42 (2) (d) (iv);

48.3 A report regarding the assessment results and progress with regard to Michaels' correctional sentence plan contemplated in section 38 as required by Section 42 (2) (d) (v).

There was also no evidence as to his sentence plan. Thus both the Case Management Committee and the Parole Board failed to comply with their obligations under the Act. Decisions of this ilk taken by Parole Boards without all the prescribed information being available, have been described as arbitrary and capricious and have been set aside for that reason alone. See *CV v The Minister of Correctional Services and Others,* unreported, North Gauteng 48967/2012 at paragraph 12. See also *Lebotsa and Another v Minister of*

Correctional Services and Others, unreported North Gauteng 6478/2009 at paragraph 22.

[49] The oft stated test for negligence, as expressed in *Kruger v Coetzee 1966 (2) SA 428 (A)* at 430 E – G by Holmes JA, is as follows:

"For the purposes of liability *culpa* arises if-

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

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

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

(b) the defendant failed to take such steps.

...Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down."

[50] In my view the reasonable person in the position of the Board appraised with:

50.1 Michaels' history prior to incarceration which showed him to be a habitual violent criminal who was historically not rehabilitated by time spent in prison, nor by early release on parole;

50.2 The fact that Michaels had previously violated the parole conditions imposed on him while serving his sentence for murder and had committed a further crime while on parole;

50.3 The knowledge that after his 2004 incarceration Michaels continued to commit offences in prison and his aggression was flagged on more than one occasion by officials, as pointed out by the Plaintiff;

would have foreseen, in the absence of any clear evidence of rehabilitation, the reasonable possibility of his conduct, if released on parole, injuring another. It would have foreseen the reasonable possibility that, if released, Michaels would cause harm of the kind that he ultimately caused to the plaintiff.

[51] There simply was no clear evidence before the Board enabling a decision that Michaels had been rehabilitated and could be granted parole. Lewis' social worker report which was primarily relied upon by the Defendant to justify Michaels' release on parole, did not offer clear evidence of rehabilitation. It did not assess whether the programmes attended had actually led to rehabilitation. The yardstick appeared to have been Michaels' mere attendance at the programmes and not how the programmes had impacted on his rehabilitation. As much was conceded by Adonis. In this regard Pansegrouw's extreme scepticism about the prospects of a person with Michaels' criminal profile being rehabilitated by the mere attendance of group sessions over a few days, is more than warranted.

[52] Given the absence of clear evidence of rehabilitation in Lewis' report, the Board should not have relied upon it to the extent that it did. The report ought to have been viewed cautiously also, given that it was informed solely by Lewis' notes and that she had no independent recollection as to Michaels' participation. In contrast, had the Case Management Committee and the Board complied with their obligations under the Act and submitted and considered the requisite reports as specified at Section 42 (2) of the Act , the situation might well have been different and there could have been clear evidence of Michaels' rehabilitation.

[53] Given the absence of evidence that Michaels had been rehabilitated, the Board ought in the circumstances to have taken reasonable steps to guard against the foreseeable harm of Michaels' release on parole, by refusing his parole application. Failure to do so was an act of negligence. A further act of negligence

was the failure to comply with the mandatory statutory requirements of Section 42 (2) of the Act. The negligence was causally connected to the harm suffered by the plaintiff. But for Michaels' release on parole, the plaintiff would not have been attacked by him. The Board and the Case Management Committee had a direct legal duty to protect members of the public from persons on parole, as was correctly conceded by the Defendant, and failed to meet that duty by negligent commission, an act for which the defendant is liable.

[54] I accordingly grant the following order:

1. The Plaintiff's claim is upheld on the merits.
2. The Defendant shall pay the costs of the action to date.

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Y S MEER

Judge of the High Court

PRESIDING JUDGE	**:**	**YASMIN SHEHNAZ MEER**
Counsel for Plaintiff	**:**	**Adv Rob Acton**
Instructed by	**:**	**G Van Zyl Attorneys** **Ref.: Mr Gideon Van Zyl**
Counsel for Defendant	**:**	**Adv Donald Jacobs SC**
Instructed by	**:**	**State Attorney** **Ref.: Mr George Kohler**
Date of Hearing	**:**	**28, 29 and 30 November 2016**
Date of Argument	**:**	**6 February 2017**
Date of Judgment	**:**	**9 March 2017**