

RECONSIDERING CARMICHELE

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INTRODUCTION

The aim of this note is to reconsider the Constitutional Court's judgment in the case of *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (hereafter *Carmichele* (CC)). The note focuses on the Constitutional Court's judgment, not in isolation, but rather in the context of the Supreme Court of Appeal judgments that preceded and succeeded it (*Carmichele v Minister of Safety and Security & another* 2001 (1) SA 489 (SCA) (the first judgment of the Supreme Court of Appeal, or *Carmichele* 2001 (SCA)) and *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA) (its second judgment, or *Carmichele* 2004 (SCA)). This trilogy of judgments is seen by many, I think, to demonstrate just how important it is for High Court judges and judges on the Supreme Court of Appeal to respect and understand the Constitution (Constitution of the Republic of South Africa, 1996). As this note explains, in fact the opposite is the case. The *Carmichele* trilogy shows just how important it is for judges on the Constitutional Court to respect and understand private law. As the note explains, had the Constitutional Court had a better grasp of the South African law of delict, and in particular of two of its key requirements, namely negligence and wrongfulness, it would never have set aside the first judgment of the Supreme Court of Appeal as it in fact did.

Before plunging into a discussion of the three judgments, I need to make two preliminary points. The first is that it was accepted in all three judgments (and by the litigants) that the defendants' liability could only be vicarious (*Carmichele* 2001 (SCA) at 493G, 497G; *Carmichele* (CC) at 950I-J; *Carmichele* 2004 (SCA) at 315n14, 321C). In other words, none of the judgments concerned itself with the question whether the defendants had themselves committed a delict vis-à-vis the plaintiff. Instead, the focus of the judgments was on whether one or more persons in the employ of the defendants, specifically one or more policemen or prosecutors, had

committed a delict against the plaintiff. The defendants in the case were the Ministers of Safety and Security and of Justice. To simplify things, I will refer to them as ‘the state’. My first preliminary point can thus be rephrased as follows: the judgments were not concerned with whether the state itself had committed a delict against the plaintiff, but only with whether a policeman or prosecutor in its employ had done so.

The second preliminary point is that, for a policeman or prosecutor in the state’s employ to have committed a delict vis-à-vis the plaintiff, it was necessary but not sufficient that he or she, by his or her conduct, caused the plaintiff’s harm. In addition, two further conditions had to have been satisfied. One is that the policeman or prosecutor’s conduct was unreasonable — that being judged not with the wisdom of hindsight, but *ex ante*. The other is that it would be reasonable to impose liability on the policeman or prosecutor if his or her conduct had been unreasonable. The South African law of delict uses a distinct term to express each of these further conditions. It expresses the first condition, namely that the conduct must have been unreasonable *ex ante*, by saying that it must have been ‘negligent’ (*Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) at 838I-839G). It expresses the second condition, namely that it must be reasonable to impose liability, by saying that the conduct must have been ‘wrongful’ (*Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at 144E-F).

THE SUPREME COURT OF APPEAL’S FIRST JUDGMENT

In its first *Carmichele* judgment the Supreme Court of Appeal made two findings that are of importance to this discussion. The first was that the evidence presented by the plaintiff was insufficient to show that any policeman or prosecutor had caused the plaintiff’s harm by conduct that was unreasonable (at 498D). The second was that, even if the evidence presented by the plaintiff had been sufficient to show that a policeman or prosecutor had caused the plaintiff’s harm by conduct that was unreasonable, it was insufficient to show that it would have been reasonable to impose liability on the policeman or prosecutor for that conduct (at 498E).

I wish to make two comments about these findings. The first comment is that the Supreme Court of Appeal ought to have expressed its first finding, namely that no policeman or prosecutor had conducted him- or herself unreasonably, by saying that no policeman or prosecutor had been negligent. It ought to have expressed its second finding, namely that, even if a policeman or prosecutor had conducted him- or herself unreasonably, it would have been unreasonable to impose liability on him or her for doing so, by saying that, even if the conduct of a policeman or prosecutor had been negligent, it would not have been wrongful. Unfortunately the Supreme Court of Appeal got its terminology confused and expressed both findings in the language of wrongfulness (at 493I-494C).

The second comment is that the Supreme Court of Appeal’s reasons for its two findings, though not *unconstitutional*, were *non-constitutional*. The

Supreme Court of Appeal's reason for holding that no policeman or prosecutor had caused the plaintiff's harm by unreasonable conduct was that the only person who, in its view, had caused the plaintiff's harm, namely the control prosecutor Ms Louw, had done all that her job required of her (at 497B-G, 498A-D). The Supreme Court of Appeal's reason for holding that, even if Ms Louw had conducted herself unreasonably (because she had not done what her job required of her), it would nonetheless have been unreasonable to impose liability on her, was that there existed no 'special relationship' between her and the plaintiff (at 497I, 498E-499B). Neither of these reasons is unconstitutional, as neither is in conflict with any provision in the Constitution. But both are non-constitutional, as their validity is wholly independent of the Constitution.

THE CONSTITUTIONAL COURT'S JUDGMENT

In its *Carmichele* judgment, the Constitutional Court held that both of the Supreme Court of Appeal's findings (just described) might have been mistaken. That is, contrary to what the Supreme Court of Appeal had held, it was possible that a policeman or prosecutor had caused the plaintiff's harm by unreasonable conduct (at 965B-966F, 967D-968D, 970H-971A). And, contrary to what the Supreme Court of Appeal had held, it was possible that it would be reasonable to impose liability on a policeman or prosecutor, if he or she had caused the plaintiff's harm by his or her unreasonable conduct (at 968E-F, 970H-971A).

The Constitutional Court's reason for so holding, that is, for holding that the Supreme Court of Appeal might have been mistaken in both its findings, was that the Supreme Court of Appeal ought to have made those findings only after having regard to the Constitution (at 955B-C, 957C). More specifically, the Supreme Court of Appeal ought to have made its determinations as to the reasonableness of the policemen and prosecutors' conduct, and the reasonableness of imposing liability for that conduct, were it unreasonable, only after taking account of the 'constitutional duty [on the state] to protect the public in general and women in particular against violent crime' (at 952I, also at 962F).

Of course, the mere fact that the Supreme Court of Appeal ought to have made its two findings only after having regard to the Constitution does not entail that either finding may have been mistaken. For it is possible that the Constitution had no relevance to the two questions before the Supreme Court of Appeal, namely whether a policeman or prosecutor conducted him- or herself unreasonably and whether, if so, it would be reasonable to impose liability on him or her. It is also possible that, even if the Constitution did have a bearing on the two questions before the Supreme Court of Appeal, it did not require different answers to those given by the Supreme Court of Appeal.

Underpinning the Constitutional Court's holding that the Supreme Court of Appeal's two findings might have been mistaken was thus an important

assumption. It was that it was possible, and perhaps even probable, that the Constitution not only had a bearing on the two questions that were before the Supreme Court of Appeal, but also required different answers to those questions than the answers given by the Supreme Court of Appeal. In other words, according to the Constitutional Court it was possible that — judged in the light of the Constitution, in particular the duty which it imposes on the state to protect the public in general and women in particular against violent crime — the conduct of one or more policemen or prosecutors was unreasonable. It was also possible — given the Constitution, in particular the duty which it imposes on the state to protect the public in general and women in particular against violent crime — that it would be reasonable to impose liability on one or more policemen or prosecutors, if their conduct had been unreasonable.

I believe that this assumption was a mistaken one and will presently explain why that is so. But first I wish to make three other comments about the Constitutional Court's disagreement with the Supreme Court of Appeal. The first comment is a terminological one. Like the Supreme Court of Appeal before it, the Constitutional Court got negligence and wrongfulness confused. It ought to have expressed its first claim, namely that the Constitution may entail that a policeman or prosecutor had conducted him- or herself unreasonably, by saying that the Constitution may entail that a policeman or prosecutor had been negligent. It ought to have expressed its second claim, namely that the Constitution may entail that, if a policeman or prosecutor had conducted him- or herself unreasonably, it would have been reasonable to impose liability on him for doing so, by saying that the Constitution may entail that, if the conduct of a policeman or prosecutor had been negligent, it would also have been wrongful. Instead, the Constitutional Court (like the Supreme Court of Appeal in its first judgment) used the language of wrongfulness to express both these claims (at 955C, 956E, 963C, 966B-C).

The second comment has to do with jurisdiction. The Constitutional Court was not entitled to set aside the Supreme Court of Appeal's decision simply because it thought that it might be mistaken (*Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) at 38G). It could do so only on the ground that the decision might have been mistaken because it failed to take account of, or give sufficient weight to, one or more reasons provided by the Constitution. However, there is some indication that the Constitutional Court's setting aside of the Supreme Court of Appeal's decision was motivated, at least in part, by the belief that the Supreme Court of Appeal might have failed to take account of, or might have given insufficient weight to, certain non-constitutional reasons. For example, to show that a certain policeman's conduct might have been unreasonable (or as I would put it, negligent), the Constitutional Court relied, amongst other things, on certain functions specified by the Police Act 7 of 1958 (at 964B-C). To show that certain prosecutors' conduct might have been unreasonable (negligent), the Constitutional Court relied, amongst other

things, on a common-law duty on prosecutors to carry out their public functions ‘in the interests of the public’ (at 967E). These may well have been good reasons for concluding that the policemen or prosecutors had conducted themselves unreasonably or negligently. But they are non-constitutional reasons. It follows that, to the extent that the Constitutional Court may have grounded its setting aside of the Supreme Court of Appeal on the latter’s failure to consider these reasons or to give them enough weight in its deliberations, the Constitutional Court would have exceeded its jurisdiction.

The third comment is substantive. It may appear that the Constitutional Court had alternative grounds for setting aside the Supreme Court of Appeal’s decision. The one was that, for constitutional reasons, one or more policemen or prosecutors might have conducted themselves unreasonably. The other was that, for constitutional reasons, it might have been reasonable to impose liability on one or more policemen or prosecutors. To put it in a way that the Constitutional Court did not: one ground was that certain policemen or prosecutors might have been negligent; the other was that their conduct might have been wrongful. In truth, these were not alternative grounds. It is not the case that the Constitutional Court’s setting aside of the Supreme Court of Appeal’s decision would have been justified if either the first or the second ground had been valid. For the Constitutional Court’s setting aside of the Supreme Court of Appeal’s decision to have been justified, both grounds had to be valid. That is, it had to be the case *both* that the Supreme Court of Appeal might have been wrong about negligence (for constitutional reasons) *and* that it might have been wrong about wrongfulness (again for constitutional reasons).

THE SUPREME COURT OF APPEAL’S SECOND JUDGMENT

In its second *Carmichele* judgment the Supreme Court of Appeal made the following two findings. First, a certain policeman, Captain Hugo, and prosecutor, Ms Louw, had caused the plaintiff’s harm by unreasonable (or as the Supreme Court of Appeal this time correctly labelled it, negligent) conduct (at 320F–321D, 325A–327F). Secondly, it was reasonable to impose liability on Captain Hugo and Ms Louw, given that they had caused the plaintiff’s harm by their unreasonable conduct (or, as the Supreme Court of Appeal put it, their negligent conduct was also wrongful) (at 321D–324H).

On the face of it, these two findings vindicate the Constitutional Court’s setting aside of the Supreme Court of Appeal’s first *Carmichele* judgment. Upon further reflection, however, it is less clear that they do so. As has just been explained, for the Constitutional Court’s setting aside to be justified, it had to be the case that the Supreme Court of Appeal’s first *Carmichele* judgment might have been mistaken not only as regards the wrongfulness of the policemen and prosecutors’ conduct (that is, the reasonableness of imposing liability on them), but also as regards the negligence thereof (that is, the reasonableness of the conduct itself). But that is not enough. For the

Constitutional Court's setting aside to be justified, it also had to be the case that the Supreme Court of Appeal might have been mistaken in both these respects because it failed to consider or give sufficient weight to one or more constitutional rather than non-constitutional reasons.

It follows that, for the Supreme Court of Appeal's second *Carmichele* judgment to vindicate the Constitutional Court's one, it would have to have done two things. First, it would have to have found that its first *Carmichele* judgment had been mistaken both about wrongfulness (the reasonableness of imposing liability) and negligence (the reasonableness of conduct). That it did. Secondly, it would have to have found that both of these mistakes were made because of its failure, in the earlier judgment, to consider or give sufficient weight to one or more constitutional reasons. This it did *not* do. Its reasons for finding that the policeman and prosecutor, Captain Hugo and Ms Louw, had caused the plaintiff's harm by unreasonable (that is, negligent) conduct were entirely non-constitutional in nature. Essentially, it found that Captain Hugo and Ms Louw had acted unreasonably (thus negligently) because they had not fulfilled a requirement of their jobs, as set out in a departmental guideline or directive (at 320G-H, 326B-C).

THE STATE'S CONSTITUTIONAL DUTY AS A GROUND FOR NEGLIGENCE

Earlier in this note I pointed out that the Constitutional Court's setting aside of the Supreme Court of Appeal's first *Carmichele* judgment was underpinned by the assumption that the Constitution, in particular the duty which it imposes on the state to protect its subjects against violent crime, might have justified the conclusion that one or more policemen or prosecutors conducted themselves unreasonably and that the imposition of liability upon them would be reasonable. That is, it was assumed that the Constitution, in particular the 'protective duty' which it imposes on the state, might have justified both a finding of negligence and a finding of wrongfulness. As I said earlier, I believe this assumption to be a mistaken one. In the remainder of this note, I first explain why the protective duty which the Constitution imposes on the state could not possibly have justified a finding of negligence. Thereafter I explain why it could not possibly have justified a finding of wrongfulness.

The idea that the state's constitutional duty to protect its subjects can justify a finding of negligence on the part of a policeman or prosecutor in its employ is, on the face of it, an odd one. To see just how odd it is, consider the following analogy.

A playschool enters into a contract with a security company. In terms of the contract, the security company is obliged to provide a certain level of security to the school. In order to discharge its contractual obligation to the school, the security company employs X as a security guard. Its instructions to X are to patrol the school twice an hour. X does so. However, during the interval between two patrols, Y climbs over the school fence and assaults a child.

The child's parents seek to hold the security company vicariously liable for the harm done to the child. To succeed, they have to show that X, the security guard, committed a delict vis-à-vis their child. For that to be the case, X must have caused the child's harm by his negligence. That is, X must have caused the child's harm by conduct that was unreasonable ex ante.

The parents know that X did all that he was required to do by his job: his employer instructed him to patrol twice an hour and he did so. However, they argue that whether X caused the child's harm by his negligence, that is, whether he caused the harm by conduct that was unreasonable ex ante, is to be determined also by taking account of the security company's contractual duty to provide a certain level of security to the school. They further argue that, given the level of security that the security company was contractually obliged to provide to the school, it was unreasonable, and thus negligent, for X to have patrolled the school premises only twice an hour. He ought to have done so three times an hour at the very least. Moreover, had X done that (i.e. patrolled the grounds three times an hour), Y would not have had the opportunity to assault their child. Hence, they conclude, X caused their child's injury by conducting himself negligently.

Any sensible lawyer would regard the parents' attempt to ground X's negligence on his employer's contractual duties as absurd. They would regard it as absurd for the obvious reason that the fact that an employer owes someone a duty to do something does not entail that all its employees are under that duty too. To see the lack of entailment, consider an institution that is under a duty to strike the right balance between two competing interests, x and y. It does not automatically follow that all the institution's employees have a duty to strike that balance. It may be, for example, that the institution best discharges its duty (to strike the right balance between x and y) by imposing on some of its employees the duty to serve only interest x, but on others the duty to serve only interest y. This is not a far-fetched example. A state may choose to discharge its duty to strike the right balance between the interests of victims of crime and those accused of committing it by employing both prosecutors and public defenders, and by imposing on the former the duty to serve only the interests of the victims, and on the latter the duty to serve only the interests of the accused.

It may be objected that the analogy which I have drawn is a misleading one. In the *Carmichele* case the policemen and prosecutors had to decide whether to oppose the granting of bail to a certain Coetzee. They decided not to do so. Their decision caused the plaintiff's harm. The question of negligence, therefore, was the question whether that decision, the decision not to oppose bail, had been an unreasonable one. And the Constitutional Court's assumption as to negligence was that that decision, the decision not to oppose bail, may have been unreasonable because of the duty on the state to protect its subjects. It may be said that, in order to make the analogy a true one, it must thus be imagined, not that the security guard was instructed to do only two patrols an hour, but rather that he was instructed to do as many patrols an hour 'as were necessary', and that the decision to do only two

patrols an hour was his rather his employer's. If, in this case, the security guard's negligence may be determined by looking at the security company's contractual duty to provide a certain level of security to the school, then the Constitutional Court's assumption that the policemen and prosecutors' negligence in the *Carmichele* case may be determined by looking at the state's constitutional duty to protect its subjects gains plausibility.

Of course, there is a circumstance wherein it would be appropriate to determine whether the security guard's decision to patrol only twice an hour was negligent by looking at the security company's contractual duty to provide a certain level of security to the school. That is where, by express or tacit agreement between the security guard and the security company, the security guard was placed under the duty (owed to the security company) to do as many patrols an hour as are necessary *to discharge the security company's duty to provide the stipulated level of security to the school*. By agreement between the guard and the company, a term of the company's contract with the school would, in effect, have been incorporated into the guard's contract (of employment) with the company. It is possible that this is what the Constitutional Court had in mind in its *Carmichele* judgment. Perhaps it felt that whether the policemen and prosecutors' decision not to oppose bail had been unreasonable (negligent) had to be determined by taking account of the constitutional duty on the state to protect its subjects against violence because, by virtue of an express or tacit agreement between the state (on the one hand) and the policemen and prosecutors (on the other), the policemen and prosecutors were under a duty to make that decision in a way that discharged the state's constitutional duty towards its subjects.

It is unnecessary to consider whether such an agreement really existed. For, even if it did, it would not vindicate the Constitutional Court's approach to the policemen and prosecutors' negligence. Assume for the moment that an agreement of this kind did exist. That is, assume that by virtue of an express or tacit agreement between them and the state, the policemen and prosecutors who had to decide whether to oppose the granting of bail to Coetzee were under a duty to make that decision in a way that discharged the state's constitutional duty towards its subjects. Assume also that the state's constitutional duty towards its subjects would have been discharged only if the policemen and prosecutors had made a decision contrary to the one that they in fact made: that is, only if they had decided to oppose the granting of bail to Coetzee. It would then follow that the policemen and prosecutors had a reason — not considered by the Supreme Court of Appeal in its first *Carmichele* judgment — to oppose the granting of bail to Coetzee. It would further follow that, in so far as the Supreme Court of Appeal (in its first *Carmichele* judgment) failed to consider that reason in determining whether the policemen and prosecutors' decision not to oppose bail had been unreasonable (ie negligent), it made a mistake.

However, and this is critical, that mistake (if it existed) would not be one that the Constitutional Court could rely upon as a basis for setting aside the Supreme Court of Appeal's decision. As was explained earlier, the Constitu-

tional Court could set aside the Supreme Court of Appeal's decision only on the ground that it might have been mistaken because it failed to take account of, or give sufficient weight to, one or more reasons provided by the Constitution. That is, the Constitutional Court had to show that the Supreme Court of Appeal failed to take account of, or give sufficient weight to, constitutional rather than non-constitutional reasons. And there's the rub. If the policemen and prosecutors had agreed to make decisions about bail in a manner which discharged the state's constitutional duty to protect its subjects, and if the state's constitutional duty would have been discharged only by a decision to oppose the granting of bail to Coetzee, then, as explained, the policemen and prosecutors would have had a reason to make that decision. They would have had a reason, that is, to oppose Coetzee's getting bail. However, that reason would have been a non-constitutional rather than a constitutional one. It would have been a non-constitutional reason because the Constitution would have contributed nothing to its normative force. Its normative force would have been owed entirely to the agreement. All the Constitution would have done would have been to identify what the agreement was a reason for.

Compare to this a contract between two South Africans, concluded in Cape Town, which declares that the parties to the contract are to comply with the duties set out in a particular provision in a Canadian statute. Assume that the provision says that if either party does x, the other must do y. In that event, each of the parties to the contract has a reason to do y if the other does x. However, that reason is provided by the contract between them rather than by the Canadian statutory provision. The Canadian statutory provision does no more than to identify what each party has reason to do by virtue of his contract. Imagine now that, after one of the parties to the contract does x, the other fails to do y. The latter may then have acted unreasonably. But if the latter has acted unreasonably, it will be because he has failed to honour his contract rather than because he has failed to comply with Canadian law. More than that, the fact that the contract specifies the (or some of the) duties on the parties thereto by relying on a Canadian statute would not give a Canadian court jurisdiction to determine a dispute between the parties about the interpretation or breach of those duties. Even less would it give a Canadian court jurisdiction to set aside a decision by a South African court enforcing the contract or awarding damages for its breach, on the ground that the South African court had not properly given effect to the duties in the Canadian statutory provision.

Let me conclude my discussion of the question whether the constitutional duty on the state to protect its subjects against violent crimes could possibly justify the conclusion that the policemen and prosecutors in the *Carmichele* case conducted themselves unreasonably or, as I would put it, negligently. As I have shown, the fact that the state has such a duty does not, in itself, entail that the policemen or prosecutors had a reason to cause the state to discharge it. Nor, therefore, does it entail that the question whether the policemen or prosecutors conducted themselves unreasonably or negligently has to be

determined with reference to that duty. As I have also shown, the policemen or prosecutors may have had a reason to cause the state to discharge its constitutional duty by virtue of an agreement between them and the state. If so, it would be a mistake to determine whether the policemen or prosecutors had conducted themselves unreasonably or negligently without reference to that duty. However, as was explained, an agreement-based reason of this kind is not a constitutional reason. Nor, therefore, would the Supreme Court of Appeal's failure — in its first *Carmichele* judgment — to take account of this agreement-based reason in determining whether the policemen or prosecutors had conducted themselves unreasonably or negligently be a constitutional error. The Constitutional Court was thus precluded from relying on it as a ground for setting aside the Supreme Court of Appeal's decision. Was there any other basis whereupon the state's constitutional duty to protect its subjects may have been brought to bear upon the determination of whether the policemen or prosecutors' conduct was unreasonable or negligent? I am not aware of one, and the Constitutional Court certainly did not provide it.

THE STATE'S CONSTITUTIONAL DUTY AS A GROUND FOR WRONGFULNESS

I now turn to the question whether the protective duty which the Constitution imposed on the state could possibly have justified a finding of wrongfulness on the part of the policemen and prosecutors in the *Carmichele* case. That is, could the fact that the Constitution imposed a duty on the state to protect its subjects from violent crime possibly have justified the imposition of liability on the policemen and prosecutors, if they had conducted themselves unreasonably? The Constitutional Court held that it could. The Supreme Court of Appeal, in its second *Carmichele* judgment, held not only that it could, but also that it did. As I will now explain, both were mistaken. But first I need to make two preliminary points.

The first is that I will deal with the stated question in a restricted form. I will not be considering whether the state's constitutionally imposed protective duty might have justified a finding of wrongfulness on the part of the policemen or prosecutors if they had been negligent (had conducted themselves unreasonably) for *constitutional* reasons. Instead, I will be considering only whether the state's constitutionally imposed protective duty might have justified a finding of wrongfulness on the part of the policemen or prosecutors if they had been negligent for *non-constitutional* reasons. To put it another way, I will be considering whether, if the policemen and prosecutors had been negligent because they failed properly to do their jobs — as those were defined by their contracts of employment — the state's constitutionally imposed protective duty could have justified the conclusion that the policemen and prosecutors' conduct had also been wrongful. There are two reasons to discuss the stated question in this restricted form. One is that, as has been explained, there does not appear to

be any way that the policemen and prosecutors' conduct could have been negligent for constitutional reasons. The other is that the Supreme Court of Appeal, in its second *Carmichele* judgment, considered the question in precisely this restricted form.

The second preliminary point is that I will be considering the argument for an affirmative answer to the stated question that was presented by the Supreme Court of Appeal in its second *Carmichele* judgment, rather than any argument presented by the Constitutional Court. My reason for doing so is that the Constitutional Court's *Carmichele* judgment does not provide any argument for its affirmative answer to the stated question. Instead, the truth of that answer appears simply to have been assumed (at 968E-F).

What, then, was the Supreme Court of Appeal's argument for an affirmative answer to the stated question? Why did it believe that the state's constitutionally imposed protective duty might justify a finding of wrongfulness on the part of the policemen or prosecutors, if they had been negligent (for non-constitutional reasons)? In essence the Supreme Court of Appeal's argument was as follows (at 321D-322F, 324B-D). One, the fact that the state is under a constitutional duty to protect its subjects from violent crime entails that it should be held accountable for its failure to discharge that duty. Two, it sometimes happens that the state's failure to discharge its constitutional duty to protect its subjects from violent crime is caused by conduct on the part of an employee which is negligent for reasons independent of that duty, and that the state will be held accountable for its failure to discharge that duty if and only if the employee's negligent conduct is branded wrongful. Three, in that case, the employee's negligent conduct should be branded wrongful unless there are other considerations of public policy which outweigh the need to hold the state accountable.

This argument was not original to the Supreme Court of Appeal's second *Carmichele* judgment. It had first been articulated, by the Supreme Court of Appeal, in the case of *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) (at 446C-H, 447C, 448D). I will thus call it the *Van Duivenboden* argument.

The *Van Duivenboden* argument was accepted by the Supreme Court of Appeal, not only in its second *Carmichele* judgment but also in *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) (at 398E-399E) and *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) (at 236E-237A). It nevertheless is flawed. The flaw was hinted at by Marais JA in his concurring judgment in the *Van Duivenboden* case. As Marais JA put it (at 452H-453A):

'[I]t is usually the omissions of individual functionaries of the State which render it potentially liable. If one is minded to hold the State liable, one will at the same time be holding the individual functionary liable. That he or she may never be called upon to pay is not a good reason for ignoring the concomitant personal liability which will be inherent in finding the State liable. . . . [M]ore is at stake than imposing liability upon an amorphous entity such as the State.'

Marais JA should have put his objection more strongly. The problem with the *Van Duivenboden* argument is that it inevitably instrumentalizes the state

employee whose failure properly to do his or her job happens to cause the state's failure to discharge its constitutionally imposed protective duty. It treats the employee, not as an end in him- or herself, but rather as a means to an end, that end being the need to hold the state accountable for *its* failure to discharge *its* duty. To put this in the phraseology preferred by the Constitutional Court itself: the problem with the *Van Duivenboden* argument is that it fails to treat the state employee with 'dignity'.

To see the degree of instrumentalization involved, consider the following example.

The MCSA (Mountain Club of South Africa), grown weary of the muggings on Table Mountain, employs a squad of security guards to provide security on the mountain. One of the guards — let us call him Z — is required, by his contract with the MCSA, to patrol Platteklip Gorge (site of several attacks) between 6 am and 2 pm every weekday. The contract also stipulates that if Z fails to do this, the MCSA may terminate his employment forthwith and he will have to pay a penalty of R1 000 to the MCSA.

Some time after the conclusion of the contract, a woman ascending Platteklip Gorge is assaulted. The time of the assault is 10 am on a Wednesday. The woman is not a member of the MCSA. At the time of the assault, she has no knowledge of the MCSA's safety initiative. But she finds out about it afterwards. She also finds out that, at the time of the ascent and assault, Z was asleep under a bush in a neighbouring ravine.

The woman institutes a claim against Z. She claims that he committed a delict against her because his failure to be on patrol in the Gorge at the time of her ascent (a) caused her assault (she would not have been assaulted had he been patrolling at the time), (b) was negligent (it was contrary to what his contract with the MCSA required of him), and (c) was wrongful.

The woman's claim would of course fail. It would fail because she would not manage to prove claim (c), that is, the claim that Z's negligent failure to patrol the Gorge had been wrongful.

But now imagine that the facts were in one respect different. It was not the MCSA that had employed Z, but the state (acting through the municipality). In that event, the woman's prospects of success would be a great deal better. For she would then be able to rely on the *Van Duivenboden* argument. That is, she would be able to argue that Z's negligent failure to be on patrol should be branded wrongful because (a) the Constitution imposes on the state a duty to protect her against violent crime; (b) her assault constituted, or was the result of, a failure on the state's part to discharge that duty; (c) the state ought to be held accountable for that failure; (d) the only way that the state could be held accountable would be by holding it vicariously liable for Z's negligent failure to patrol the Gorge; but (e) the state could only be held vicariously liable for Z's negligent failure to patrol the Gorge if it (ie Z's negligent failure) were in addition wrongful (otherwise it was not a delict).

So, Z did not act wrongfully and thus committed no delict because he was employed by the MCSA. But he would have acted wrongfully and would thus have committed a delict if he had been employed by the state. And the

only reason for the difference in the law's treatment of Z is one that has nothing to do with him or what he did or did not do. For the only reason for the difference is that, in the latter but not the former case, Z is capable of being used as an instrument or vehicle for attributing liability to the state. In the latter but not the former case, Z can be used as a pawn in a bigger game or, perhaps I should say, *against* bigger game, namely the state.

Do I need to point out the irony in this? Our Constitutional Court is renowned and, by some, applauded for putting dignity at the centre of its jurisprudence. Yet, in its *Carmichele* judgment, the Constitutional Court initiated a development in the law of delict which is wholly at odds with that.

POSTSCRIPT: MORE THAN A MERE FAILURE TO APPLY ITS MIND

A shorter version of the foregoing was presented at a symposium on the *Carmichele* case and its implications for the relationship between the Constitution and private law, held at the Law Faculty of the University of Cape Town on 24 April 2008. The symposium was attended by Justice Laurie Ackermann, who co-authored the Constitutional Court's *Carmichele* judgment with Justice Richard Goldstone. In a response to my presentation, Justice Ackermann objected that my criticism of the judgment was founded upon a misinterpretation thereof. The precise nature of Justice Ackermann's objection was not clear. However, its main thrust was perhaps captured by his assertion, made in the course of his response, that the Constitutional Court's ground for setting aside the Supreme Court of Appeal's first judgment was only that it had 'failed to apply its mind' to the question whether the Constitution required the law of delict to be developed.

Justice Ackermann's assertion — that is, the assertion that the Constitutional Court's ground for setting aside the Supreme Court of Appeal's first judgment was only that it had 'failed to apply its mind' to the question whether the Constitution required the law of delict to be developed — cannot be correct. Imagine for a moment that it were. It would then follow that the losing party in every single case decided by straightforward application of a common-law rule, without consideration whether the Constitution required that rule to be changed or developed, could have that decision set aside on appeal. For example, a High Court decides a delictual matter in the defendant's favour by applying the rule — long regarded as trite (see, for example, *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 448 (A) at 496I-497A) — that a person who caused another loss did not thereby commit a delict unless he or she did so culpably and wrongfully. The Supreme Court of Appeal upholds the decision. Both courts do so without considering whether the Constitution requires the rule to be changed or developed. If the Constitutional Court's ground for setting aside the Supreme Court of Appeal's decision in *Carmichele* were merely that it had 'failed to apply its mind' to the question whether the Constitution required the law of delict to be developed, as Justice Ackermann claimed, the

plaintiff necessarily would succeed in having that decision set aside by the Constitutional Court. At least, the plaintiff necessarily would succeed if the Constitutional Court correctly applied its own judgment in the *Carmichele* case, as it would be bound to do.

Fortunately Justice Ackermann's assertion — the assertion that the Constitutional Court's ground for setting aside the Supreme Court of Appeal's first judgment was only that it had 'failed to apply its mind' to the question whether the Constitution required the law of delict to be developed — is contradicted by the Constitutional Court's judgment in the *Carmichele* case. The critical passage is the following one (at 955G-H):

'[W]e do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development. . . .'

This passage entails the falsity of Justice Ackermann's assertion. If it is not the case that a court must, in every case involving the common law, apply its mind to the question whether the Constitution requires the common law to be developed, how could the mere fact that a court has failed so to apply its mind possibly constitute a sufficient ground for its decision to be set aside?

Unfortunately the Constitutional Court, having clearly stated that a court need not, in every case involving the common law, apply its mind to the question whether the Constitution requires the common law to be developed, did not clearly spell out when it need do so, and when it need not. Nor, therefore, did the court provide a clear answer to the important question: when is the fact that a court has failed to apply its mind to the question whether the Constitution requires the common law to be developed a ground for setting aside its decision?

A sensible answer to that question goes as follows: the fact that a court has failed to apply its mind to the question whether the Constitution requires the common law to be developed is a ground for setting aside its decision if and only if there is a reasonable possibility that, if the court had applied its mind and had done so correctly, it would have concluded that the common law required development, and the development is one that would have altered its decision. Two features of the 'sensible answer' require explanation. One is the requirement that 'the development [be] one that would have altered [the court's] decision'. The justification for this requirement is simple enough: it is hard to see how setting aside a court's decision could be justified on the basis that the decision should have contained an obiter dictum (to the effect that the Constitution required a particular development of the common law) which it did not. The other feature is the threshold set: not mere possibility but 'reasonable possibility'. Why does the possibility have to be a reasonable one? Because it would be irresponsible of a court to set aside a decision, and thus commit the parties to further litigation, unless it believed that there was a reasonable prospect that further litigation could produce a different outcome.

There is some evidence that the Constitutional Court, in its *Carmichele* judgment, assumed the truth of something like the 'sensible answer'

described above. For much of the judgment would be superfluous unless it were aimed at showing that the higher threshold suggested by the ‘sensible answer’ had been crossed. Why, for example, did the court set out the facts of the case in the detail that it did (at 946D-950H)? Why did it enumerate the constitutional rights that might have a bearing on the case (at 957D)? Why did it venture an opinion as to whether a ‘public interest immunity excusing the [defendants] from liability that they might otherwise have in the circumstances of the present case’ was consistent with ‘our Constitution and its values’ (at 960B)? Why did it discuss, in detail, the complaint against and conduct of Klein (a policeman) and Louw (a prosecutor) (at 965B-967C)? Why did it discuss the obligations or duties of the police (at 963I-965B) and the prosecutors (at 967D-968D)? None of this would have been necessary had the court’s aim been only to show that the Supreme Court of Appeal had failed to apply its mind to the question whether the Constitution required the common law to be developed. All of it, however, has a bearing on what I believe the court’s real aim to have been, namely to show that there was a reasonable possibility that, if the Supreme Court of Appeal had applied its mind to that question and had done so correctly, it would have concluded that the common law required development, and the development was one that would have altered its decision.

If I am correct in thinking that the Constitutional Court, in its *Carmichele* judgment, accepted the higher threshold suggested by the ‘sensible answer’ rather than the lower one suggested by Justice Ackermann’s assertion, my criticism of the judgment does not miss its mark. My criticism aims to show that, if the Constitutional Court had better understood the law of delict (particularly the requirements of negligence and wrongfulness), it would have realized that the higher threshold had not been crossed. It would have realized that it was not possible, let alone reasonably possible, that the Constitution required the law of delict to be developed in a way that required a different decision to the one reached by the Supreme Court of Appeal in its first judgment. It would have realized, therefore, that there was no justification for its setting aside the Supreme Court of Appeal’s first judgment as it in fact did.