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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: Yes |

Date: **8th August 2019** Signature: _____

CASE NO: 10735/2013

DATE: 8th August 2019

In the matter between:

S, E,

Personally and for and on behalf of her minor son:

S, N

First Plaintiff

S, T

Second Plaintiff

and

THE MINISTER OF POLICE

First Defendant

LUKHELE, CONSTABLE LWAYIPHI

Second Defendant

Coram: Adams J

Heard: 06 August 2019

Delivered: 08 August 2019

Summary: Delict – shooting and killing of breadwinner by off-duty policeman – vicarious liability – application of legal principles – there needs to be a sufficiently close connection between the delict and the business of the SAPS

ORDER

- (1) The claims of the first and second plaintiffs against the first defendant are dismissed with costs.
 - (2) The first and the second plaintiffs, jointly and severally, the one paying the other to be absolved, shall pay the first defendant's cost of this action.
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JUDGMENT

Adams J:

[1]. An issue central to the dispute between the parties in this action relates to vicarious liability on the part of the first defendant (the Minister) for the conduct of his employee, the second defendant, whilst off-duty, who in a road rage incident shot and killed the husband of the first plaintiff. The first plaintiff sued the minister in her personal capacity and in her representative capacity on behalf of her minor son, for loss of support, as did the second plaintiff, the adult son of the first plaintiff and the deceased person.

[2]. The first plaintiff's husband ('the deceased') was shot and killed by the second defendant, Constable Lukhele ('Lukhele'), a policeman in the employ of the South African Police Services ('the SAPS'), in an apparent road rage incident after a collision between the private vehicle of Lukhele and the deceased's vehicle. The second defendant felt aggrieved by the fact that, in his opinion, the deceased was the cause of the accident, and immediately after the collision he approached the deceased and confronted him. During the ensuing altercation the second defendant shot the deceased in the leg, grabbed the car

keys of the deceased and returned to his vehicle. After a minute or two the deceased approached the second defendant, who by then had returned to his vehicle, and a further argument ensued, during which squabble three more shots were fired by the second defendant at the deceased, which were the cause of the deceased's death. In a twist of fate the deceased turned out to be Police Captain employed at another police station. Both the second defendant and the deceased were not on duty when this tragic incident played itself out on a Saturday night at about 22:30 in Kathlehong. The deceased was accompanied on the night in question by his two sons, who were passengers in his vehicle when the whole tragic incident happened.

[3]. The plaintiffs claim loss of support from the minister, alleging that their loss of support resulted from the intentional killing of the deceased by the second defendant and for which conduct the minister is vicariously liable.

[4]. The only remaining dispute between the parties relates to whether Lukhele's unlawful conduct can and should be attributed to the minister on the basis of indirect or vicarious liability. It is the case of the plaintiffs that this court should find vicarious liability despite the common cause fact that Lukhele was not on duty on the night of Saturday, the 18th of August 2012, and he was not driving an official police vehicle. There is no connection between the shooting incident and Lukhele's employment as a police officer, other than the fact he used his police issued firearm to shoot and kill the deceased. Lukhele was not dressed in an official police uniform and the indications are that he did not at any stage identify himself as a police officer.

[5]. It bears emphasising that the shooting incident was unrelated to the employment by the second defendant as a police officer. It had everything to do with the fact that the private vehicle of the second defendant was damaged in a motor car collision, which collision Lukhele believed had been caused by the deceased.

[6]. Mr Mathebula, Counsel for the plaintiffs, submitted that the vicarious liability on the part of the minister arises from the fact that Lukhele was lawfully in

possession of the firearm only because he was a member of the SAPS. He was issued with an official police firearm and he received training in his official capacity as a member of the SAPS to handle firearms. He would have received training on the use and handling of a firearm and he would have been instructed on when and how to resort to using a gun. In the end, so Mr Mathebula submitted, Lukhele was certified as a fit and a proper person to possess a firearm and he understood the risks involved in the use of a firearm. Thereafter, he would have been issued a firearm licence and a firearm which he would have been required to use in the course and scope of his employment as a member of the SAPS. These common cause facts, together with the fact that the second defendant was permitted to keep and retain possession of his police issue firearm even when he was not officially on duty as a police officer, means, so it was argued on behalf of the plaintiffs, that vicarious liability should be attributed to the minister for the conduct of the second defendant when he used the gun unlawfully.

[7]. The sole question which I am required to adjudicate is whether the minister should be held vicariously liable for the conduct of Lukhele on that tragic night of the 18th of August 2012.

The test for vicarious liability

[8]. The recent judgment by Eksteen AJA in *The Minister of Safety and Security v Msi* [2019] ZASZA 26 (28 March 2019) contains a useful and very helpful summary of the principles relating to vicarious liability and the recent developments in that regard. I find myself in agreement by the views expressed by the SCA in that well researched and well-reasoned judgment, which, in any event is binding on this court by virtue of the *stare decisis* doctrine. The facts in that matter were distinguishable from the facts in this matter notably because in *Msi* the police officer committed the delict whilst officially on duty at a time when he had deviated from his official duties and had embarked on frolic of his own. The principles however find application in this matter and I intend borrowing liberally from Eksteen AJA's judgment.

[9]. As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment, or whilst the employee was engaged in any activity reasonably incidental to it. In *F v Minister of Safety and Security* 2012 (1) SA 536 (CC), Mogoeng J explained:

‘Two tests apply to the determination of vicarious liability. One applies when an employee commits the deed while going about the employers business. This is generally regarded as the “standard test”. The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as “deviation cases”.’

[10]. In this matter there can be no doubt that Lukhele was not advancing the interests of his employer in any way, whether improperly or otherwise. He was not acting in the course and scope of his employment. If the minister is to be held vicariously liable in this matter, it should be considered in the context of ‘deviation cases’. The question is this: do the legal principles relating to ‘deviation cases’ find application *in casu*?

[11]. The legal foundation of the test for vicarious liability in deviation cases was initially developed in two decisions of the Supreme Court of Appeal during the previous century; *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *Minister of Police v Rabie* 1986 (1) SA 117 (A). The test was further refined by the Constitutional Court in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) and in *F v Minister of Safety and Security* (supra). It is instructive to have regard to these developments before seeking to apply the test to the facts of the present case.

[12]. In *Feldman* a servant of the defendant had been given custody of a motor vehicle and a number of parcels with instructions to drive the vehicle and to deliver the parcels to various customers in town. Having completed his deliveries he was to return the vehicle to a certain garage. Instead, however, he drove the vehicle to a place some distance away, on his own business, and there consumed alcohol which significantly impaired his driving ability. Shortly after departing from this location and on route back to the garage he collided

with and killed the father of two minor children. This SCA held that he had never entirely abandoned his master's work as he had throughout retained the custody and control of the vehicle on behalf of his master and that the master was therefore liable for his negligence.

[13]. In the course of his judgment, however, Watermeyer CJ discussed the common law position relating to vicarious liability. He stated:

'If an unfaithful servant, instead of devoting his time to his master's service, follows a pursuit of his own, a variety of situations may arise having different legal consequences.

If he abandons his master's work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant's abandonment of his master's work amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master would naturally be legally responsible for that harm. . . . If, on the other hand, the harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master would not be responsible.'

[14]. Watermeyer CJ also discussed the reasons for imposing vicarious liability on a master and explained:

'I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master's legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if a servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the Master is responsible to that harm.'

[15]. *Rabie* was decided some forty years after *Feldman*. In *Rabie*, an off-duty mechanic employed by the South African Police and dressed in civilian clothes carried out an arrest purely for his own purposes. He was not employed to perform law enforcement duties and he had clearly not acted in the course and scope of his employment. At the time of the arrest, however, he introduced himself as a policeman and after arresting his victim took him to the police station, filled out a docket, wrongfully charged his victim with attempted housebreaking and detained him. In the course of the judgment Jansen JA stated:

‘It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by a servant does so fall, some reference is to be made to the servant’s intention (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test . . .’

[16]. *K* came before the Constitutional Court in 2005. It concerned the unlawful kidnap and rape of an innocent woman by three policemen on duty. *K* had been on a date with her boyfriend. The arrangement had been that he would take her home at the end of the evening, but he had met up with a former girlfriend during the course of the evening which led to a disagreement between *K* and her companion. When she asked him to take her home he refused and she therefore decided to look for a telephone in order to call her mother so that she could collect her. As there was no telephone available at the venue where they were she proceeded on foot to a nearby petrol station. There too she was unable to obtain access to a telephone. However, in the shop attached to the petrol station a policeman in full uniform entered. He was the driver of a marked SAPS vehicle and addressed her in fluent Afrikaans asking where she was headed. She advised that she wanted to go home and he offered to take her there. In the vehicle there were two other members of the SAPS, also dressed

in full uniform. They were all on duty. Instead of taking her home, however, they kidnapped and raped her.

[17]. The Constitutional Court accepted the test enunciated in *Rabie* as a point of departure and further refined the test in order to give effect to Constitutional norms. It held that in seeking to establish what constitutes a 'sufficiently close link' the court should consider the need to give effect to the spirit, purport and object of the Constitution. It referred with approval to the dicta in *Feldman* and *Rabie* which I have set out above and O' Regan J proceeded to state, in respect of deviation cases:

'The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the constitution in mind, is sufficiently flexible to incorporate not only constitutional norms but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.'

[18]. The Constitutional Court concluded that the police officers' conduct bore a sufficient connection to their employment as police officers to attach vicarious liability to the Minister. In applying the new refined tests for vicarious liability three considerations weighed heavily with the court: (a) the police officers and their employer had a statutory and constitutional duty to prevent crime and to protect members of the public; (b) the police officers had offered to assist K and she had accepted their offer and by doing so, reposed her trust in the police officers in uniform in circumstances where it was reasonable for her to do so; and (c) there had been a simultaneous commission and omission. The police committed the rape on K; simultaneously they had omitted to protect her from harm which they had a general and special duty to do.

[19]. In *K*, however, the Constitutional Court sought only to lay down the legal parameters. O' Regan J went on to explain:

‘The common-law test for vicarious liability in deviation cases as developed in *Rabie*’s case and further developed earlier in this judgment need to be applied to new sets of facts in each new case in the light of the spirit, purport and objects of our Constitution. As courts determine whether employers are liable in each set of factual circumstances, the rule will be developed. The test is one which contains both a factual assessment (the question of the subjective intention of the perpetrators of the delict) as well as a consideration which raises a question of mixed fact and law, the objective question of whether the delict committed is “sufficiently connected to the business of the employer” to render the employer liable.’

[20]. The facts in *F* were similar to those in *K*. A young teenage girl had been to a night club in George. In the early hours of the morning she found herself stranded without transport. She was offered a lift home by an adult man in civilian clothes in an unmarked vehicle. As it turned out he was a policeman on standby duty and the vehicle was a police vehicle which he was entitled to use by virtue of the police functions which he might be required to fulfil if called upon. The vehicle was fitted with a radio which *F* noticed when she entered the vehicle. Whilst travelling she noted a pile of police dockets bearing the name and the rank of the police official. Upon enquiry he advised that he was a private detective, which *F* understood to mean that he was a policeman. Contrary to his earlier undertaking, however, he drove the vehicle to a secluded spot outside of the town. The direction in which he drove caused *F* to become suspicious and when the vehicle came to a stop at the secluded spot *F* alighted and fled. A short while later the vehicle departed and *F* returned to the road side in order to seek a lift back to town. A vehicle approached and stopped to afford her a lift. Remarkably, it was the same vehicle and the same driver. Despite her misgivings she reluctantly boarded the vehicle. This she did partly owing to her desperate situation and partly because she believed that he was in fact a policeman and that she could for that reason trust him. He abused that trust and raped her.

[21]. In *F*, the majority in the Constitutional Court held that there was a sufficiently close link between the conduct of the policeman and the business of

his employer. Mogoeng J, writing for the majority, again had an occasion to discuss the nature of the test to be applied. He held:

‘As O Regan J stated in *K* the second question “does not raise purely factual questions but mixed questions of fact and law”. Accordingly, several interrelated factors have an important role to play in addressing the question whether the Minister is vicariously liable for the delictual conduct of Mr Van Wyk. The normative components that point to liability must here, as *K* indicated, be expressly stated. They are: the state’s constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policemen’s commission of rape and omission to protect the victim; and the existence or otherwise of an intimate link between the policemen’s conduct and his employment. All these elements complement one another in determining the state’s vicarious liability in this matter.’

[22]. On a consideration of all these authorities and applying the test which emerges, the SCA, in *Minister of Safety and Security v Booysen* [2016] ZASCA 201, summarised the approach to be adopted thus:

‘The question remains whether in this case there is a sufficient link between the deceased’s conduct and his employment to impose vicarious liability on the minister. That question can only be answered by considering the normative factors referred to earlier, and the countervailing factors, thus conducting a balancing act.’

[23]. It seems to me that this approach constitutes a fair reflection of what is required in terms of *K* and *F*.

Application of the test

[24]. Applying the test in *K* in the present case the answer to the first question, which is subjective, does not establish liability. Lukhele’s driving of his own private motor vehicle on the night in question was purely for his own purposes. He was attending to his own private and social business relating to personal affairs and he had no police function to perform at the time when the accident happened. It cannot possibly be suggested that he was on the road at the time by virtue of his employment as a police officer. He was not, for example, on his way to investigate a criminal complaint or to go and arrest a suspect. There was

nothing in the conduct of Lukhele that suggests that he subjectively intended to advance the interests of the SAPS. It bears emphasising that strictly speaking this was not even a 'deviation' case as the second defendant was not even on duty shortly before or after or during the shooting incident.

[25]. I turn therefore to consider the second leg of the inquiry, whether there is a sufficiently close link between the shooting of the deceased and the business of the SAPS. This enquiry is objective and it involves issues of fact and law. The point of departure is the recognition that the constitutional duty resting on the state, and more particularly on the police, to protect members of the public against crime and violence provides a normative basis for holding the state liable for the wrongful conduct by policemen. This liability, however, will only be imposed where there is a 'sufficiently close connection' between the conduct of the policemen and their employment.

[26]. In *K* and in *F* the trust which the public is entitled to place in the police and which the victims had placed in the policemen involved was pivotal to the conclusion reached. It weighed heavily with the court that an innocent citizen in distress had reposed her trust in the police as she was entitled to do and the policeman in issue had breached that trust. Thus, in *F*, Mogoeng J held:

'In addressing the question of Mr Van Wyk's personal liability and his employer's vicarious liability it should make little difference that he was on standby duty, for which he was being paid. What matters is whether the trust placed in him as a policeman by a vulnerable member of the public, creates a sufficiently close connection between his delictual conduct and his employment.'

[27]. The trust in issue in *F* was explained thus:

'... Additionally, if his employment as a policeman secured the trust of the vulnerable person placed in him, and his employment facilitated the abuse of that trust, the state might be held vicariously liable for the delict. The victim's understanding of the situation would presumably be that she is being protected or assisted by a law enforcement agent, empowered and obliged by the law to do so. Whether he is on or off duty would, in all likelihood be immaterial to her. From where she stands he is a policeman,

employed to protect her, and should therefore be trusted to uphold, and not contravene, the law'.

[28]. *In casu* I am not convinced that in the circumstances of this matter it can be said that there was an element of trust involved in the encounter between the deceased and Lukhele. Both of these persons were on their own personal missions on a Saturday night and they were brought together literally by accident and a sheer coincidence. It cannot possibly be said that the deceased, in the heat of the moment and the altercation, was entitled to place his trust in Lukhele to maintain decorum, law and order.

[29]. What is more is that Lukhele was not on duty. He was not dressed in uniform and he was not driving a marked police vehicle. It is so that he was armed with a police issued firearm and he utilised the very same gun to shoot and kill the deceased. The question is whether these factors should lead me to the conclusion that a sufficiently close link had been established between the conduct of Lukhele and the business of the SAPS. The answer to this question, in my judgment, is no. I am of the view that the shooting incident and the killing of the deceased is so far removed in time and space from the business of the SAPS and the employment of the second defendant as a police officer that it can safely be said that a link between the two is non-existent.

[30]. Nothing in the facts suggests that the deceased even knew that Lukhele was a police officer. The deceased therefore probably did not place his trust in Lukhele by virtue of him being a policeman. From where the deceased stood Lukhele was not a policeman employed to protect him but rather just another motorist with whose vehicle he had a collision.

[31]. It was argued by Mr Mathebula that the commission of the delict was facilitated by Lukhele's employment as a policeman and that but for such employment the assault would not have occurred. Furthermore, as a police officer Lukhele had an obligation to protect and serve the community whether he was on duty or off duty. This is the reason why he was allowed to carry his service firearm, which was issued to him by the SAPS, even when he was not

officially on duty. As a police officer, so the submissions on behalf of the plaintiffs continued, the standard of his behaviour was measured at a very high standard, as he, as a police official had been entrusted with the protection of the community at all times. He was obliged to carry the mandate as a police officer, which meant that he had the power to lawfully arrest a suspect for committing a crime even when he was not on duty. All of these facts, which are common cause, so the argument on behalf of the plaintiffs was concluded, translate into a 'sufficient connection' between the wrongful conduct on the part Lukhele and his employment as a police officer. This, in turn, means that vicarious liability attaches to the minister.

[32]. I cannot agree with these submissions by the plaintiffs. In the context of the present case and the fact that he was not on duty, not dressed in uniform and travelled in his personal vehicle means that, irrespective of his employment as a policeman and the fact that he had been issued with an official police firearm, probably meant that the result would always have been precisely the same.

[33]. *In casu* the consideration that the public are generally entitled to put their trust in the police is, in my judgment, not a factor to be considered in the application of the test for vicarious liability. This fact therefore, on its own, distinguishes *K* and *F* from this matter. As was held in *Booyesen* by the SCA:

'A careful and close reading of *K* and *F* reveals that the element of trust was central to the finding that there was a sufficiently close link connection between the acts of the police officers and their employment, hence, vicarious liability. It is indeed doubtful, whether, without the element of trust, the outcome of the two cases would have been the same. *K* is explicit on this aspect:

"[57] In sum, the opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that mandate is successfully fulfilled".'

[34]. In *Booyesen* a police officer on duty had utilised his police issue firearm to shoot his girlfriend. The fact that the police firearm was utilised in the shooting

weighed heavily with the trial court when it held the minister liable for the conduct of a police official. On appeal, however, the SCA held:

‘The finding of liability based on the mere fact of the SAPS issuing a firearm to a police officer, amounts to the imposition of the strict liability, which is impermissible. For liability to arise under such circumstances, there must be evidence that the police officer in question was, for one reason or the other, known to be likely to endanger other people’s lives by being placed in possession of a firearm, and despite this, he or she was nevertheless issued with the firearm or permitted to continue possessing it. Such was the situation in *F*, where the police officer was retained in the employ of the SAPS as a detective despite previous criminal convictions.’

[35]. On the basis of this principle as enunciated by the SCA in *Booyesen*, I am of the view that the arguments on behalf of the plaintiffs are not sustainable. I do not think that the use of the police issue firearm in the murder leads to the conclusion that the employment of Lukhele provided the means to commit the crime. Lukhele clearly reacted angrily to the collision between this vehicle and that of the deceased, whose negligence he perceived to have caused the accident and he shot and killed the deceased in a fit of rage. Had he not been in possession of the police firearm he would in all probability have utilised some other object to commit the crime. As stated earlier, the death of the deceased would, on the facts of this case, have occurred in any event.

[36]. For these reasons I find that there is not a sufficiently close connection between the business of the SAPS and the conduct of the second defendant on the night of the 18th of August 2012 to justify the imposition of vicarious liability.

[37]. The first defendant therefore cannot be held liable for the damages suffered by the plaintiffs. Their claims against him stand to be dismissed.

Order

Accordingly, I make the following order:-

- (1) The claims of the first and the second plaintiffs against the first defendant are dismissed with costs.

- (2) The first and the second plaintiffs jointly and severally, the one paying the other to be absolved, shall pay the first respondent's cost of the action.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

HEARD ON:	6 th August 2019
JUDGMENT DATE:	8 th August 2019
FOR THE FIRST & SECOND PLAINTIFFS	Advocate L L Mathebula
INSTRUCTED BY:	H C Makhubele Incorporated
FOR THE FIRST DEFENDANT:	Mr W Sekwati
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE SECOND DEFENDANT:	No appearance
INSTRUCTED BY:	No appearance
