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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

THE MINISTER OF LAW AND ORDER ..... Appellant

and

DINA NOTATSI NGOBO ..... Respondent

CORAM : CORBETT CJ, KUMLEBEN, EKSTEEN JJA, HOWIE et KRIEGLER AJJA

HEARD : 3 SEPTEMBER 1992

DELIVERED : 28 SEPTEMBER 1992

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

The fatal shooting of Abednego Buthise Ngobo by a police constable during the early hours of the morning of 19 April 1986 gave rise to the present dispute. Initially there were multiple plaintiffs and defendants. However, before and during the trial certain parties to the action fell away. In the result the mother of the deceased was the sole plaintiff, now the respondent, and the Minister of Law and Order the remaining defendant, the present appellant. The respondent's claim was for damages, based upon loss of support as a result of the death of her son, for which she alleged the appellant was vicariously liable. The trial court, Kuhn J sitting in the Cape Provincial Division, upheld her claim and ordered the appellant to pay damages in an amount of R26 350 with interest; and to pay costs, restricted to those incurred in the employment of one counsel. With leave of the court a

quo, the appellant appeals against the substantive order granted and the respondent against the qualification attaching to the costs order.

On the merits two men, Messrs Spayire and Fika, gave evidence for the respondent. Two police officers, Colonel Burger and Captain Koeglenberg, testified for the appellant.

During the afternoon of 18 April 1986 and that night the deceased attended a wedding celebration. After midnight he and his two companions, Spayire and Fika, were walking in Zone 4, Langa, Cape Peninsula. Two men, Charlie and Ngili (who turned out to be police constables) approached them on foot from the opposite direction. As the two groups crossed, Fika unintentionally bumped against one of the policemen. When Fika apologised, the policeman swore at him. An argument ensued involving abusive language on both sides. At a certain stage one of the

policemen, and immediately afterwards the other, drew his .38 service revolver. Shots were fired, one of which injured the deceased. He was in due course conveyed to hospital and subsequently died. At the time of the shooting the two policemen were standing next to each other and a short distance from the deceased and his group. The eye-witnesses were unable to say which of the two assailants fired first; how many shots were discharged; which one caused the injury; or who was responsible for that shot. However, at the pre-trial conference the appellant admitted that it was Charlie who had killed the deceased. After the shooting the two constables ran into a yard of a nearby house. Spayire, with commendable courage, followed them and asked them why they had deserted an injured person. Their response was to threaten to shoot him. He fetched the deceased and brought him to the house where the policemen were still present. He,

and Fika who had joined them in the house, overheard the policemen arguing about who had fired the fatal shot. Fika deduced from the spent cartridge cases taken from each revolver that Charlie had fired three shots and Ngili two, five shots in all. The policemen said they were going to the police station at Langa. Standing orders required them to report immediately the use of an issued fire-arm whenever shots were discharged. When they arrived at the police station Spayire and Fika were already there. At this stage they learned for the first time that their assailants were policemen. Captain Koeglenberg was summoned to conduct an impartial administrative enquiry into the shooting. This is routine procedure whenever a policeman uses a fire-arm whether or not he was on duty at the time. The captain arrived at the Langa police station at 4 a m.

The facts thus far recounted were common

cause or undisputed. The question of intoxication is less clear. Fika said in his evidence-in-chief that both policemen were "drunk" in that they were "stammering when they talked" at the house and apparently also at the police station. Under cross-examination this assertion was not challenged nor was he ever asked whether there were any other indications of intoxication. Captain Koeglenberg said that both policemen appeared to him to be sober when he saw them at 4 a m. This evidence is not necessarily contradictory. It is not clear for how long the four of them were at the police station before the captain arrived or whether, according to Fika, they were still "drunk" at 4 a m. As regards the condition of the eye-witnesses, Fika said that he was at the wedding celebration from about 5 p m until after midnight during which period he drank sorghum beer, malt beer (six or seven glasses) and brandy. He also had

some more beer at the home of a friend before the encounter with the policemen. Spayire said that he also drank beer with this friend but - for an unexplained reason - not at the celebration which he too attended. Apart from this direct evidence, the occurrence itself strongly suggests that some if not all of the participants were to an extent under the influence of liquor. There is no other reasonable explanation for such a trivial incident causing such a wrangle or for the irrational behaviour on the part of the policemen.

The two constables, members of the uniform branch of the S A Police, were stationed at Guguletu, Cape Peninsula. The incident took place in an area where they would not ordinarily have carried out police work when on duty. In fact they were off duty at the time and not in uniform. At no stage did they announce, or otherwise disclose, that they were

policemen. They did not attempt to effect an arrest or purport to be acting in their official capacity. Their use of fire-arms, one need hardly say, was wholly unjustified. The revolver each possessed was issued for his protection and use during the course of official duties. Before a subordinate is thus armed an officer takes into account his record and makes suitable enquiries as to his fitness to be entrusted with a fire-arm. Both policemen were authorised to possess a service revolver. (In the case of one of them, Charlie, a number of contraventions of the police disciplinary code were on record but both witnesses for the appellant said that there were no grounds for not issuing him with a fire-arm.) Due to civil unrest in certain townships and several attacks upon the lives of policemen when off duty, a decision was taken to allow a policeman to retain for his protection the revolver issued to him, notwithstanding the fact that he was no

longer on duty.

In argument before us counsel for the respondent, Mr Veldhuizen, supported the conclusion that the appellant was vicariously liable, firstly, with reference to the actual shooting of the deceased; and secondly, on the ground that Ngili failed to prevent his colleague from firing the fatal shot. Thus an act or, alternatively, an omission is relied upon. The trial court based its decision on the first ground with particular reference to what was said in the majority judgment in the case of Minister of Police v Rabie 1986(1) S.A. 117(A).

In a brief review of the law on this subject prior to Rabie's case two early decisions of this court serve as a useful starting point: in fact to judge from their frequent citation in subsequent cases they appear as lodestars in this firmament. In Mkize v Martens 1914 AD 382 at 390 Innes JA, after a discussion

of the views of our common law writers and other authorities on vicarious liability, adopted the principle that:

> "[A] master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment."

(In this quoted passage, and in others to follow, I have italicised for emphasis.) In Estate Van der Byl v Swanepoel 1927 AD 141 the test was stated to be whether the servant was "engaged in the business of his master" (per De Villiers JA at 152) and this requirement was thus explained by Wessels JA at 147:

> "It is clear therefore that this Court in applying the general principle that a master is liable for the torts of his servant acting within the scope of his employment has taken the extended view of the master's liability to third parties [rather] than the narrower one which would confine his

liability strictly to acts done within the instructions or necessarily incidental thereto."

The critical consideration is therefore whether the wrongdoer was engaged in the affairs or business of his employer. (I shall refer to it as the "standard test" or "general principle".) It has been consistently recognised and applied, though - since it lacks exactitude - with difficulty when the facts are close to the borderline.

The problem of application presents itself particularly in what have become known as "deviation cases": instances in which an employee whilst in a general sense still engaged in his official duties deviates therefrom and commits a delict. S A Railways & Harbours v Marais 1950(4) S.A. 610(A) and African Guarantee & Indemnity Co. Ltd v Minister of Justice 1959(2) 437(A) are perhaps the best known examples of such cases. The former case involved an engine driver

who, acting contrary to instructions, allowed a passenger to travel in the locomotive. As a result he was killed. On appeal the decision allowing his widow to sue *in forma pauperis* was reversed. At 617 B - D Watermeyer CJ pointed out that:

> "[T]he test is not whether the act or omission complained of occurred whilst the servant was engaged in the affairs of his master but whether it constituted a negligent performance of the work entrusted to the servant. The act or omission may occur whilst the servant is engaged in the affairs of his master and yet the master may not be liable. For instance a servant may, whilst engaged in the affairs of his master, assault a third person in order to satisfy a grudge of his own such assault being quite unconnected with his master's work. In such a case the master would not be liable, for the servant in committing the assault was not performing the work entrusted to him, or doing anything ancillary to it."

The general principle as expressed in this passage, if considered in isolation, may be said to have been too narrowly stated but words used in a judgment are not to be construed as though they were carefully selected by

the draftsman of a statute. Be that as it may, the illustration given in the quoted passage is for present purposes instructive.

In the other case, the African Guarantee decision, Ramsbottom JA concluded:

> "[T]he constables [after deviating from their police duties] did not entirely abandon their employer's work but continued, partially, at any rate, to do it while they were devoting attention to their own affairs; they were still exercising the functions to which they were appointed. Their employer, therefore, is liable." (447 E - F)

Finally, to complete a selective - though I trust representative - reference to certain decisions of this court preceding Rabie's case, it should be pointed out that in both Mhlongo and Another N O v Minister of Police 1978(2) S.A. 551(A) and Minister van Polisie en 'n Ander v Gamble en 'n Ander 1979(4) S.A. 759(A) the policemen involved were on duty; they were proved to have acted within the scope of their

employment; and they were carrying out police functions or genuinely believed themselves to be so engaged. Each of these decisions was concerned with a narrower issue: whether within such context "the policeman was engaged upon a duty or function of such a nature as to take him out of the category of servant pro hac vice" as it was put in Mhlongo's case at 567F. (These two decisions are commented upon in more detail in Rabie's case at 126E - 128E.) In each it was decided that the Minister was liable. And, one notes in passing, in each of these decisions the general principle is affirmed: Mhlongo at 567E and Gamble at 764G.

Reverting to the facts of the present case, there can be no doubt that applying the standard test the appellant ought not to have been held liable on the first ground, that is, for Charlie's wrongful act. The constables, as I have said, were not on duty and they

did not at any stage purport to be carrying out any police function. They unnecessarily resorted to the use of fire-arms in the course of an equally unnecessary altercation with strangers. They were in no sense engaged in the affairs of the appellant, the only connection between their conduct and their employment being their use of the revolvers they were authorised to retain. This fact, though of relevance in applying the standard test, is not in itself one that determines whether it has been satisfied. As Schreiner JA observed:

> "Where the delict arose out of the use by the servant of the master's vehicle or other form of property this feature may assume importance, but such cases must still be dealt with in accordance with the general principle. ..... The ownership of the vehicle through which the harm was done, though it may provide material for inference, is by itself irrelevant. Just as the master may be liable though the servant is using his own vehicle about the master's business (Canadian Pacific Railway Company v. Lockhart, 1942 A.D. 591), so the master will not be liable

merely because he is the owner of the vehicle used by the servant and has entrusted it to him (cf. Hewitt v. Bonvin and Another, 1940 (1) K.B. 188). On the same lines is para. 238 of the American Restatement, Agency, which reads,

'Except as stated in paras. 212 to 214'
(these are not relevant)
'a master is liable for harm caused by the use of instrumentalities entrusted by him to a servant only if they are used within the scope of the employment.'"

(Carter & Co (Pty.) Ltd. v McDonald 1955(1) 202(A) 207 D - G.)

Counsel for the respondent conceded that on the authority of the abovementioned decisions of this court, and others to which there is no need to refer, the claim of the respondent ought not to have been sustained. But he submitted that "this Court in the Rabie judgment considerably broadened the traditional application of the rule and, it is respectfully submitted, rightfully so."

In that decision the errant policeman, Van der Westhuizen, attended a social function on New Year's Eve. He was forced to leave after a complaint

about his behaviour had been made at a police station. Put out by this, he later that night waylaid the plaintiff in the street near the place from which he, Van der Westhuizen, had been evicted. On the pretext that the plaintiff was about to commit the offence of housebreaking, Van der Westhuizen first assaulted him by hitting him on the head with a wheel-spanner and then purported to arrest him. He followed this up with a second and more serious assault, after which he took the plaintiff to the police station and fabricated certain charges against him. The plaintiff was detained in custody. In due course he stood trial only to be acquitted on all charges. His resultant claim for damages against the Minister of Police was allowed in the court a quo.

The appeal to this court was dismissed, Van Heerden JA dissenting. The facts, which I have no more than sketched, are fully set out in the dissenting

judgment. Relying on them Van Heerden JA concluded:

> "[I]t is not possible that Van der Westhuizen could have been under the mistaken impression that the respondent was attempting to commit a crime," (128J)
>
> "Van der Westhuizen was annoyed because he had been asked, and indeed compelled, to leave the home of his former in-laws. In order to give vent to his feeling of frustration he assaulted and purported to arrest the respondent." (129H)
>
> "By that stage [when the second assault took place] Van der Westhuizen's stratagem to regain access to the function had failed, and the inference that he was continuing to take out his anger and frustration on the luckless respondent appears to be inescapable." (129J)
>
> "[H]e acted wantonly and maliciously throughout knowing full well that the respondent was entirely innocent." (130B)

In the result Van Heerden JA decided, applying the standard test and in accordance with the general principle, that the appellant was not liable.

In the majority judgment Jansen JA accepted, in favour of the appellant, the above findings and in

particular agreed "that Van der Westhuizen was actuated by malice." (134B) The Minister of Police was none the less held to be vicariously liable. The reasoning on which this conclusion was based appears from the following passage from the judgment (134C - 135B), which I have for ease of reference and discussion divided into numbered paragraphs:

(i) "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 the 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. And it may be useful to add that according to the Salmond test (cited by GREENBERG JA in Feldman (Pty) Ltd v Mall 1945 AD 733 at 774):

'a master ... is liable even for acts which

he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them ...'

(ii) Our leading cases mostly deal with deviations by the servant from his duties at a time he is actually engaged on his master's work, and the tests there applied do not seem wholly apposite to the present type of case where the servant during the pursuit of his own private affairs ostensibly embarked on his master's business. Nor do I understand the judgments of, eg WATERMEYER CJ and TINDALL JA in Feldman (Pty) Ltd v Mall (supra) or that of RAMSBOTTOM JA in African Guarantee & Indemnity Co v Minister of Justice 1959(2) SA 437 at 447 necessarily to go beyond the deviation cases and to prescribe rules for all circumstances.

(iii) In my view a more apposite approach to the present case would proceed from the basis for vicarious liability mentioned by WATERMEYER CJ in Feldman (Pty) Ltd v Mall (supra at 741):

'... a master who does his work by the hand of a servant creates a risk of harm to others if the 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 ...'

(iv) By approaching the problem whether Van der Westhuizen's acts were done 'within the course or scope of his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing Van der Westhuizen as a member of the Force, and thus clothing him with all the powers involved, the State created a risk of harm to others, viz the risk that Van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. Van der Westhuizen's acts fall within this purview and in the light of the actual events it is evident that his appointment was conducive to the wrongs he committed."

In my respectful view this reasoning warrants comment and is open to criticism in certain respects.

(i) Initially, in the first paragraph, the

general principle is acknowledged to the extent that it is said that there must be a "sufficiently close link" between the acts of the servant in his own interests and the business of his master. (And in so far as the servant's intention is a factor to be taken into account in the application of the standard test, it is accepted in the judgment that Van der Westhuizen's purpose was "totally self-serving and mala fide": 134A)

(ii) The implication in this paragraph would seem to be that the standard test as laid down in our case law has reference to "deviation cases" and is to be restricted to them; or that at the very least the general principle does not necessarily apply to "the type of case where the servant during the pursuit of his own private affairs ostensibly embarked upon his master's business." But in those leading cases which were concerned with "deviation" the essential reason

for holding the master liable was that the servant to an extent and in a sense continued to be engaged in the affairs of his master at the time the delict was committed. This is borne out, inter alia, by what was stressed in the two decisions cited in this quoted paragraph of the majority judgment. In Feldman's case at 742 Watermeyer CJ said:

> "If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs."
>
> (And see the African Guarantee case 447 E - F supra)

If the standard test is to be accepted as the appropriate one for cases in which at the relevant time the servant had deviated from the course of his regular employment, it follows, in my view, that this test

applies ad eundem - indeed more pertinently - where the servant cannot be said to have deviated for the reason that he was not even remotely engaged in his master's affairs at any relevant stage prior to the commission of the delict and any claim on his part to have been thus employed at the time of the wrong is no more than a subterfuge.

(iii) The extract from Feldman's case at 741 is cited in this paragraph in support of a "more apposite approach" to be applied in preference to the standard test. In this regard I respectfully agree with the comment in the minority judgment, namely, that in the quoted extract

> "the emphasis falls on the employee's improper conduct or negligence 'in carrying out his (ie the employer's) work', and that in the present case Van der Westhuizen did not act in furtherance of his employer's business." (132 C - D)

This is borne out by the last sentence of the paragraph at 741 in Feldman's case from which the quotation in the majority judgment is taken. It reads:

> "[I]f 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 for that harm."

(iv) In the concluding paragraph the "dominant question" is said to be "whether the acts fall within the risk created by the State." But since there was no genuine link between Van der Westhuizen's acts and his police work, and no real intention to carry out such duties, the question posed appears to have been the sole, not merely the dominant, one: Put another way, having regard to Van der Westhuizen's intention and the facts proved, "approaching the problem ... from the angle of risk" would appear to be the only basis on which vicarious liability could be said to arise from

Van der Westhuizen's misconduct. But what is regarded as an underlying reason - perhaps the main one - for attaching vicarious liability to the employer, namely, the creation of risk (also known as "risk liability"), has hitherto never been regarded in our law as the consideration which determines whether such liability is proved. As Schreiner JA observed in Carter & Co. (Pty.) Ltd v McDonald (supra) 207B:

> "[I]n order to make the master liable the servant must have committed the delict while engaged upon the master's business; and that a principal reason why the master is held liable may be that 'he has created the risk for his own ends' (Feldman (Pty.) Ltd. v. Mall, 1945 A.D. 733 at pp. 737 - 741)."

and at page 211H significantly adds:

> "It is often useful to examine the reason which probably gave rise to the rule, in order to discover the rule's limits, but the reason, even if certainly established, is not the same as the rule."

Rabie's case has been referred to in three

subsequent decisions of this court. In Tshabalala v Lekoa City Council 1992(3) S.A. 21(A) the court was concerned with the unlawful shooting of the plaintiff by a municipal policeman. The court (per E M Grosskopf JA) concluded that the wrongdoer had acted in the course and scope of his duties as a servant of the respondent. It was therefore not necessary for the court to consider certain reservations expressed in the judgment of the court a quo about the correctness of the majority judgment in Rabie's case. In another case Minister van Wet en Orde v Wilson en 'n Ander 1992(3) S.A. 920(A) the court (per Van Heerden JA) after commenting on the fact that the respondents were unrepresented, found it unnecessary to review the correctness of the Rabie decision though requested in argument to do so. In upholding the appeal, the court held on the facts that the conduct of the wrongdoer was so far removed from any risk created by his appointment

as a policeman that no liability could attach to the appellant. Finally in the as yet unreported decision in Macala v Town Council of Maokeng (Case no 15/91: judgment delivered on 22 May 1992) Goldstone JA said that the standard test was in fact part of the ratio of the majority judgment in the Rabie decision and concluded by saying that:

> "It follows that the 'creation of risk' principle is directly related to the enquiry as to whether the policeman was acting in the course and scope of his employment as such."

The present case can perhaps be distinguished from the Rabie case on the narrow ground that, unlike Van der Westhuizen in that case, the policemen with whom we are concerned at no stage, whether genuinely or ostensibly, acted as such or exercised any official function. However, in so far as Rabie's case may be said to have replaced the standard test with one based

on creation of risk, I am for the reasons stated of the view that it was wrongly decided. Moreover, whatever direct liability may in certain circumstances attach to an employer as a result of a risk created by him, this consideration in my opinion is not a relevant one to be taken into account when the standard test is to be applied in order to decide whether the master is vicariously liable. In this regard I again refer to the quoted passage of Schreiner JA in McDonald's case at 207B and must respectfully differ from the conclusion in the extract from Macala's case quoted above.

Mr Veldhuizen further argued that, whatever the effect or interpretation of Rabie's case, considerations of "social policy" should prompt this court to accept the creation of risk as the basis and determinant for vicarious liability with the requirement of reasonable foreseeability of risk

serving as the factor limiting the scope of such liability. For this submission counsel relied on two of the main South African proponents, Prof W E Scott and Prof J C van der Walt, of an extension of liability along these lines. Scott's views are, inter alia expressed in an article entitled "The Theory of risk Liability and its application to vicarious liability" appearing in "The Comparative and International Law Journal of Southern Africa" (CILSA) Volume 12 (1979) 44. The essence of his thesis is reflected in the following excerpts:

> "According to my view, risk liability is the basis of vicarious liability. Risk liability (or liability based upon the risk principle) is an acceptable basis for liability, apart from delictual liability, and these two are in essence totally different principles of liability and can therefore never conform to the same basis." (Pages 49 and 50)
>
> and

"Risk liability can therefore be described as the liability of a certain person (the defendant) for the damage caused by the typical risks attached to a dangerous fact for which the defendant is made responsible." (Page 50)

and

"In view of my analysis of the basic elements of vicarious liability, I have proposed that the following must be determined: Has the nature of the servant's work, viewed objectively, increased the possibilities of committing the delict or not? If so, in order to keep the liability of the master within reasonable limits, one must determine whether the conduct of the servant, in view of the nature of his work, could reasonably have been foreseen." (Page 64)

(See too the author's textbook "Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg" (viii and 35 - 68).) It is noteworthy that earlier in the article he remarks that: "Writers have tried over a long period to define the concept of danger [the correlative of risk] as a concept of law, and have failed to do so." (Page 47)

Van der Walt's note on Rabie's case, "Die

Staat se Aanspreeklikheid vir Onregmatige Polisie-optrede" (THRHR Vol 51 (1988) at 515) is also referred to by counsel for the respondent. In this note the views of the writer in his disquisition on "Risiko Aanspreeklikheid uit Onregmatige Daad" (unpublished doctoral thesis 1974) are discussed in reference to the Rabie case. The following extract from the note sets forth the basic elements which in the writer's view ought to determine liability based on the creation of risk:

> "Die grondslag van risiko-aanspreeklikheid is myns insiens geleë in die skepping van 'n juridies-relevante risiko. Die risikobegrip, wat teoreties die verskynsel van risiko-aanspreeklikheid fundeer, is normatief bepaald. Die aanwesigheid van 'n regtens relevante risikoskepping is afhanklik van a priori bepaalde normatiewe elemente. .....
> Wat is die normatiewe elemente van risikoskepping as grondslag van risiko-aanspreeklikheid? Hierdie vraag verteenwoordig die wesenskern van die probleem ten aansien van die teoretiese regverdiging van risiko-aanspreeklikheid. Dit stel die vraag na die regtens relevante faktore of

> omstandighede wat 'n afwyking van die skuldbeginsel noodsaak. Myns insiens bestaan daar, vir sover dit risiko-aanspreeklikheid as verskyningsvorm van deliktuele aanspreeklikheid betref, drie normatiewe elemente, naamlik (a) aansienlike verhoging van die kans op skade-intrede, (b) die verhoging van die waarskynlikheid van ernstige benadeling, en (c) 'n ongelykheidsverhouding tussen dader en benadeelde. Die aanwesigheid van een of meerdere van hierdie elemente by 'n menslike aktiwiteit kwalifiseer dit as 'n juridies-riskante gedraging. Hierdie normatiewe kwalifikasie van 'n gedraging ten einde regtens riskant te wees, verseker prinsipieel 'n betreklike omskrewe en afgebakende toepassingsgebied van die risikobeginsel." (517)

The writer proceeds to contend that requirement (c) is the justification for State liability as a result of unlawful police conduct and thus for the decision in the Rabie case. This conclusion is reached, one should stress, not on the basis of vicarious liability, which is the ground of liability pleaded in the present case, but as an independent source of State liability.

For present purposes, as regards the views expressed by these authors, I need only make the

following comments. To my mind the standard test adequately serves the interests of society by maintaining a balance between imputing liability without fault, which runs counter to general legal principle, and the need to make amends to an injured person, who might otherwise not be recompensed. Whilst one cannot gainsay the difficulty of applying the standard test in certain cases, the indeterminacy of the elements of the proposed alternatives suggests that their adoption would not make the task of determining liability any easier. In the circumstances there appears to me to be no sound reason for replacing a generally accepted principle with another, which is controversial and untried: "Nihil facile mutandum esse ex solemnibus, et recepto jure. Item in novis rebus constituendis evidentem esse utilitatem debere, ut recedatur ab eo jure, quod diu aequum visum est." (Donellus: De Jure Civili, 1.12.18). Therefore, even

assuming that such a step is within the competence of the court, and not one for the Legislature to take if so minded, I do not consider that a case has been made out for a departure from the standard test. (Cf. South African Law Commission: "Report on Risk as a Ground for Liability in Delict" Project 23 (1986) paragraph 6, page 39 in finem.)

The alternative ground on which the respondent seeks to base liability - the failure to prevent the fatal shot - raises the following questions: whether in the circumstances of this case Ngili was under a legal duty to take steps to prevent Charlie from shooting the deceased; if so, whether in failing to take any, Ngili was negligent; if this was established, whether such action as he might reasonably have been expected to have taken would have prevented the fatal shot; and, if causation was proved, whether the appellant is to be held vicariously liable for the

omission.

The general principle to be applied, and the considerations to be taken into account, in deciding whether an omission in a particular case gives rise to legal liability, have been stated and explained in Minister van Polisie v Ewels 1975(3) SA 590(A):

> "As uitgangspunt word aanvaar dat daar in die algemeen geen regsplig op 'n persoon rus om te verhinder dat iemand anders skade ly nie, al sou so 'n persoon maklik kon verhinder dat die skade gely word en al sou van so 'n persoon verwag kon word, op suiwer morele gronde, dat hy daadwerklik optree om die skade te verhinder. Ook word egter aanvaar dat in sekere omstandighede daar 'n regsplig op 'n persoon rus om te verhinder dat iemand anders skade ly. Versuim hy om daardie plig uit te voer, ontstaan daar 'n onregmatige late wat aanleiding kan gee tot 'n eis om skadevergoeding." (596H)

and

> "Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die

late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree." (597A - B)

and

"Net so goed as wat 'n reddingsplig in sekere omstandighede 'n regsplig mag wees, sou 'n beskermingsplig 'n regsplig kan wees. En dit sou van al die feite afhang of so 'n plig 'n regsplig sou wees of nie. Klaarblyklik is dit onmoontlik om in die algemeen vas te stel wanneer so 'n regsplig sou ontstaan. In die onderhawige geval het ons te doen met 'n aantal polisiemanne wat diens doen in 'n polisiekantoor, 'n gebou waaroor die Polisie beheer het en waarheen 'n gewone burger, onder ander, kan en moet gaan om 'n klagte te lê. .... Die eiser is aangerand in die polisiekantoor onder beheer van die Polisie en ten aanskoue van 'n aantal polisiemanne van wie dit gesamentlik redelik moontlik, selfs maklik, was om die aanval op eiser te verhoed of te beëindig. Ook is dit in hierdie saak 'n bykomende faktor dat Wood, in die besondere omstandighede, as sersant gesag kon uitoefen oor Barnard." (597E - H)

The considerations which weighed with the court in deciding on those facts that there was a legal duty are stated in the last-quoted passage. None feature in the present case and I doubt whether such a conclusion

in this instance would accord with the legal convictions of the community ("die regsoortuiging van die gemeenskap"). It is, however, unnecessary to decide this since in my view, even if one assumes that Ngili ought in law to have acted to prevent the shooting and was negligent in not attempting to do so, the respondent has failed to prove that he would have successfully averted the fatal consequences: in other words, the causative element of the alleged delict has not been proved. The enquiry in this regard is whether it can be said that on a balance of probabilities reasonable conduct on the part of Ngili would have prevented the deceased's death. (Minister of Police v Skosana 1977(1) S.A. 31(A) 44 G - H; and cf S v Van As en 'n Ander 1967(4) S.A. 594(A) 601A and 602D).

Turning again to the facts, the two constables, standing next to each other, were about 17 metres from the deceased and his companions. One

policeman and then the other produced his revolver. Shots were fired rapidly, so much so that at the time of the shooting neither Fika nor Spayire could say how many there were in total. In the nature of things the assailants would not have fired alternately nor was there any reason for a deliberate pause between shots. Each of the eye-witnesses was asked in court to demonstrate such interval by making more or less appropriate noises in the witness box. This was an unrealistic exercise. Even if sober, they could not have been expected in the circumstances to have taken note of such detail and thereafter accurately to convey their recollection of this feature of the case at a subsequent trial. Nevertheless, based on these demonstrations, counsel estimated that there was about half a second between shots and the court was of the view that the intervals as portrayed were shorter. Of course, in reality there would not have been the same

interval after each shot even if they were in fact successive. But even if one were to place some reliance on this evidence - in the absence of any other - the time lapse between the first and fifth shot would be in the order of two seconds. Counsel submitted as a probability that it was the last shot which found its mark. On the evidence this is a questionable deduction. But even if this is to be assumed in favour of the respondent, there is no basis for the further assumption that Charlie was the first to shoot. At the time he drew his revolver and pointed in the direction of the group, Ngili had no reason to conclude that Charlie would shoot to kill rather than merely threaten them or scare them with a shot not aimed at any of them. Had Ngili decided to take some preventative measure - after reacting to the first shot and deciding on a suitably safe course of action - it cannot be said as a probability that within a second or so, that is,

during the interval between Charlie's first shot and the fatal one, he could have prevented the latter. During argument it was submitted that in deciding this question of causation the objective test required one to substitute the hypothetical reasonable man or reasonable policeman for Ngili, who was a joint assailant, probably an inebriated one. I find it unnecessary to comment on the correctness of this approach, which in certain circumstances might be a rather artificial one, since on such basis in this case the conclusion must be the same.

There is also no need to decide whether Ngili was negligent (though what has been said on causation tends to prove that he was not) or whether in the circumstances the appellant could be held vicariously liable for any unlawful and culpable omission on the part of Ngili.

The respondent having failed to prove either

of her two causes of action, the appeal must succeed with an alteration of the costs order in the court a quo. It follows that the cross-appeal must automatically fail.

The following order is made:

1. The appeal is allowed with costs.

2. The cross-appeal is dismissed with costs.

3. The order of the court a quo is altered to one of absolution from the instance, the plaintiff to pay the defendant's costs.

M E KUMLEBEN
JUDGE OF APPEAL

CORBETT CJ)
EKSTEEN JA)
HOWIE AJA) - Concur
KRIEGLER AJA)