REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 4194 / 2006

In the matter between:

F Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY First Defendant

ALLISTER CLAUDE VAN WYK Second Defendant

JUDGMENT : 26 JUNE 2009

BOZALEK, J

[1] Plaintiff, a 24 year old woman, sued the defendants for damages arising out of her being assaulted and raped in October 1998 at or near Kraaibos in the district of George when she was 13 years of age. First defendant, the Minister of Safety and Security, is cited in his capacity as the erstwhile employer of the second defendant, Mr. Allister van

Wyk (to whom I shall refer hereafter as “Van Wyk”), the former policeman responsible for the rape and assault.

CAUSE OF ACTION

[2] In her particulars of claim plaintiff alleged that first defendant was vicariously liable for Van Wyk’s intentional delicts in the form of the assault and rape in that he was “*acting within the course and scope of his employment as a policeman in the employ of the South African Police Service*” (hereinafter referred to as “SAPS”). She also alleged that Van Wyk was, at the material time, on duty, being on “bystand”. It was alleged further that he commenced duty on 14 October 1998 at 7h30 and went off duty on 15 October 1998 at 7h30. The assault and rape was alleged to have taken place in the early hours of the morning of 15 October 1998.

[3] In his plea first defendant, whilst admitting that Van Wyk was on stand-by during the period in question, denied that he was on duty merely by virtue of this fact. It was denied, furthermore, that in committing the delicts Van Wyk was acting within the course and scope of his employment. Van Wyk did not defend the action although he testified on behalf of first defendant.

[4] In a request for trial particulars first defendant required plaintiff to state on what factual and legal basis she relied in alleging that Van Wyk was acting within the course and scope of his employment. In view of later

objections to certain evidence led on behalf of plaintiff it is worthwhile setting out plaintiff's response to these requests. Plaintiff firstly set out Van Wyk's then status as a serving member of SAPS and the facts that he was on stand-by and in possession and control of a motor vehicle issued to him by his employer which vehicle he used to transport the plaintiff to the spot where he assaulted and raped her. Plaintiff also relied on the existence of certain criminal convictions which Van Wyk had incurred prior to the assault and rape as well as the fact that on the night in question plaintiff had been stranded and had been offered a lift home by Van Wyk. Plaintiff went on to aver that in committing the assault and rape Van Wyk had infringed her rights to dignity and security and, inasmuch as there was an intimate connection between the delicts committed by Van Wyk and the purposes of SAPS, this close connection rendered first defendant vicariously liable. In making these latter averments plaintiff expressly relied on the provisions of the Constitution of the Republic of South Africa 1996, the mission statement of SAPS and SAPS' code of conduct.

ADMISSIONS MADE

[5] Prior to the hearing the parties agreed that the merits and quantum of the claim would be separated and that the Court would initially be required to determine whether first defendant was vicariously liable for Van Wyk's actions. Although not expressly stated the Court was also required to determine Van Wyk's liability, since the action against him was not abandoned. Whilst expressing their intention to lead evidence,

the parties also placed before Court the following a list of admissions by first defendant:

"1. During the period 14 October 1998 at 16h00 up to and until 15 October 1998 at 07h30 (the "relevant period"):

Second Defendant was a Detective Sergeant, employed by First Defendant.

Second Defendant was on stand-by.

Second Defendant was in possession and control of a white Nissan Sentra, with registration number CAW15946 (the "vehicle") and the vehicle was a Police vehicle;

There were Police dockets in the vehicle when Plaintiff was a passenger in the vehicle.

2. 2.1. On or about 14 October 1998, and after dark in the District of George, Plaintiff was driven by Second Defendant to Kaaimans and back to George in the motor vehicle driven by Second Defendant.

2.2 Thereafter, and on or about 14/15 October 1998, and at approximately midnight on 14 October 1998, alternatively the early hours of the morning of 15 October 1998, and in the vicinity of Kraaibos, next to the N2 road between George and the Wilderness, Second Defendant unlawfully assaulted Plaintiff.

2.3 On or about 14/15 October 1998, and at approximately midnight on 14 October 1998, alternatively the early hours of the morning of 15 October 1998, and in the vicinity of Kraaibos, next to the N2 roadway, as aforesaid, Second Defendant, having first assaulted her, wrongfully and unlawfully raped Plaintiff, having overcome Plaintiff's resistance by the assault as set out above.

2.4. In and as a result of the assault and rape as set out above, Plaintiff sustained bodily injuries.

3. On 15 October 1998 at approximately 08h44, Second Defendant had the vehicle filled with fuel to the value of R45,00 for the account of First Defendant.

4. First Defendant paid for this fuel. The vehicle was fuelled at George Police Station, at which was housed a petrol pump where SAPS vehicles could be refuelled.

5. 5.1. Plaintiff was the Complainant in a criminal case MAS397-10-98 and that employees of First Defendant investigated such complaint.

5.2. Second Defendant was charged with rape and assault with the intention to do grievous bodily harm, as a result of the injuries sustained by the Plaintiff during the relevant period.

5.3. Second Defendant was convicted of the rape of Plaintiff and sentenced to 12 years, whereof five years were suspended by the High Court."

THE EVIDENCE

[6] Plaintiff's evidence dealt mainly with the circumstances in which she came to accept the lift from Van Wyk, an account of the events leading up to the assault and the rape and the aftermath thereto and the question of the extent to which she believed, at the time, that he was a policeman. Plaintiff also led the evidence of a former policeman, Mr. Johan van Dyk, concerning his practical experience of stand-by duty. First defendant called a former provincial commissioner of police, Mr. Andrè du Toit, to testify on the selfsame subject and also called Van Wyk to explain the circumstances in which he committed the rape and the assault with particular reference to the question of whether he was on duty at the time or not.

[7] Plaintiff testified that she had visited a night club in Conville, George on the night in question with two girlfriends to play pool and dance. She had an argument with one of them and decided that she wanted to go home. Outside in the parking lot, a man had asked her what was wrong and offered her a lift home in a vehicle. That person was Van Wyk and the vehicle was a white Nissan driven by him but belonging to SAPS. Because plaintiff had known one of the other two occupants she had

accepted the lift. She had also noticed that there was a police radio in the vehicle. After Van Wyk had dropped off the last of the other two occupants, plaintiff moved into the front passenger seat. Instead of taking plaintiff home, Van Wyk told her that he wanted to go to Kaaimansriver to see if his friends were still there.

[8] Plaintiff became suspicious of Van Wyk's intentions, however, and under the pretext that she needed to relieve herself, climbed out of the vehicle at Kaaimansriver and ran away and hid herself. After emerging from her hiding place, she made her way to the road and began to hitchhike. It was now around midnight. The first vehicle to stop was, however, the white unmarked Nissan driven by Van Wyk who again offered to take her home. She got into the vehicle and they set off in the direction of George. Shortly thereafter, in the vicinity of Kraaibos, Van Wyk turned off the road and prevented her from jumping out of the moving vehicle. When it came to a halt plaintiff again tried to escape but was followed closely by Van Wyk. In this dark and lonely spot Van Wyk first severely assaulted plaintiff and then raped her. Afterwards he drove her home telling her that the vehicles which were following were his bodyguards and that if she disclosed anything of what had happened she would be harmed or killed. When she arrived home plaintiff eventually disclosed to her mother what had happened. It is common cause that the following morning plaintiff laid criminal charges with the police in George and furnished them with a sworn statement.

[9] There are two aspects of plaintiff's evidence which require special focus: firstly, the question of whether she believed she was dealing with a policeman and secondly, at what stage she formed this belief. Plaintiff's evidence in this regard turned around three aspects, namely, the presence of a police radio, the presence of criminal dockets in the vehicle and what Van Wyk allegedly told her regarding his occupation.

[10] Plaintiff testified that as early as when she was standing alongside the vehicle in the parking lot outside the night club she noticed that it was equipped with a police radio. Thereafter, when she moved to the front seat she noticed criminal dockets in the front passenger footwell and on them read Van Wyk's name. When she asked him what the dockets were doing in the car, Van Wyk told her he was a private detective. In her mind, however, she saw no distinction between a private detective and a policeman and formed the belief that Van Wyk was a policeman as a result of having seen the radio, the dockets and his having told her he was a detective.

[11] According to plaintiff this information had caused her to trust Van Wyk and to drive further with him. Notwithstanding this, it was plaintiff's evidence that Van Wyk had not told her his correct name but had introduced himself only as Wayne. She testified that the conversation regarding Van Wyk being a private detective took place before she was raped but it is not clear precisely when during the journey. On the probabilities it would have been after she moved to the front seat and

spotted the dockets and therefore before she jumped out of the vehicle at Kaaimansriver.

[12] When Van Wyk testified, the thrust of his evidence in chief was that although he had committed the assault and rape, he had been off duty at the time. He stated that upon arrival at the night club he had removed the vehicle's radio aerial for fear of it being stolen. There he had drunk and socialised with friends in the process noticing plaintiff. Just before midnight as he and his two friends were about to leave plaintiff approached him, telling of an argument that she had had and asked for a lift home. This was the first occasion on which he had met her. Van Wyk conceded that when he had offered plaintiff a lift she had been dependent upon him. After he had dropped off his friends plaintiff had moved to the front passenger seat. It was correct, he testified, that there had been police dockets in the front passenger footwell but before plaintiff had climbed into this seat he had removed them and placed them on the back floor. According to him it would have been impossible for plaintiff to have read his name on the dockets given the small script and the poor lighting in the vehicle.

[13] Van Wyk confirmed that he had driven to Kaaimansriver, approximately 10 km from George, and stated that even at this stage his intention was to have intercourse with plaintiff and only then take her home. In cross-examination it emerged that at that time Van Wyk was 29 years old and had been a policeman for 10 years. He conceded that his duty as a

policeman was to protect children but disputed that he had any such obligation when he was off duty. He confirmed that he had been subsequently found guilty in the High Court of raping plaintiff. Regarding the events at Kaaimansriver, Van Wyk confirmed that plaintiff had climbed out of the car and hidden away. He had then driven around searching for plaintiff and eventually came across her on the road. Asked why she had got back into the vehicle his explanation was that it was late, it was dark and plaintiff was alone. Furthermore, he testified, plaintiff was stranded and he had again promised her that he would take her home.

[14] Van Wyk denied ever telling plaintiff that he was a private detective or giving her any name whatsoever. He confirmed that prior to the rape he had been on duty from 7h30 till 16h00, working a normal shift, although he had been on stand-by from over the same period as well. He concisely explained his duty status over the 24 hour period from 07h30 on 14 October 1998 to 07h30 on 15 October 1998 as follows: he had been on stand-by for this entire period but was on stand-by to do a normal office shift until 16h00. From 16h00 to 20h00 he was in and out of his office receiving further dockets. Thereafter he was supposed to be at home and, if any incidents occurred in respect of which he was needed, he would be called in and placed on duty. Van Wyk himself considered that he had been on duty from 07h30 until 20h00.

[15] He confirmed that he had signed the SAPS code of conduct and, furthermore, that the unmarked vehicle had been allocated to him for the purpose of him fulfilling his stand-by duties. At the time he did not have his own private motor vehicle and as a detective he never wore uniform. Van Wyk confirmed further that all police vehicles driven by detectives were difficult to identify by lay persons as they were generally unmarked. He also confirmed that the vehicle had been equipped with a police radio but stated that prior to arriving at the night club he had also removed its attached handset so that anyone approaching the vehicle would be unable to identify it as a police vehicle. He added that the light on the radio had been off and insisted that the radio could not have been identified by plaintiff as a police radio. In response to questions from the Court, Van Wyk stated that he had been contactable that night on a cell phone and that it was not necessary for him to have kept the radio on whilst driving the vehicle. In a stand-by situation he would normally use the radio but then only to avoid having to use his cell phone excessively.

[16] Regarding the kilometres which he travelled that night in the police vehicle, Van Wyk stated that upon reporting for duty the following morning he falsely ascribed them to investigation work. He confirmed that in accordance with normal practice he had filled up the vehicle's tank with petrol at the police pump the following morning at police expense.

[17] At his criminal trial Van Wyk had pleaded not guilty. When he testified in his own defence he had denied that he had raped plaintiff. The rape had taken place in the early hours of 15 October 1998 and he had been approached by the police in connection with the incident the following day. He had no idea how the police had gotten onto his trail so quickly. Van Wyk confirmed his previous criminal convictions. The first was for assault with the intent to commit grievous bodily harm in September 1993 for which he had been sentenced to a fine of R300,00 or 3 months imprisonment conditionally suspended. The second conviction in December 1994 was for the negligent discharge of a firearm and thereby injuring someone or damaging property, in terms of the Arms and Ammunition Act 75 of 1969 and handling a weapon whilst under the influence of alcohol or drugs for which he had been jointly sentenced to a fine of R4000,00 or 4 months imprisonment half of which had been conditionally suspended. In May the following year he had paid an admission of guilt fine for assault. He had incurred all these previous convictions whilst in the service of SAPS. Van Wyk confirmed that when he had enticed plaintiff into his vehicle after she had run away by promising to take her home, his intention had nevertheless been to rape her.

[18] The evidence of the remaining witnesses (whom I shall refer to as “Van Dyk” and “Du Toit”), was largely directed at the nature of stand-by duty. On behalf of plaintiff Van Dyk testified that in his experience SAPS had on occasion accepted liability for the delicts of police officials

committed whilst they were on stand-by duty. He testified, further, that once a police officer drove an official police vehicle he automatically placed himself on duty. The latter proposition was criticised by Mr. Van der Schyff, who appeared for first defendant, as simplistic and too broadly stated and ultimately this was one of the main thrusts of the evidence of Du Toit, first defendant's witness. In 1998, at the time plaintiff was assaulted, Du Toit had been the Provincial Commander, General Investigations, for the Western Cape and all detectives in the province fell under his command. As such he had been aware of the stand-by duty system which applied at the time. According to him the rationale for the system was that since detectives normally work a 7h30 – 16h00 shift it was necessary for every detective office to make available members in the event that their services were required after these hours. This was done by arranging a stand-by duty roster which provided for detectives to be available to be called out between 16h00 and 7h30 when crimes were reported to that particular police station. When a detective on stand-by duty was called out, Du Toit testified, he or she would place him or herself on duty, preferably by making a relevant entry into his or her pocket book. An allowance was payable to every member placed on stand-by duty.

[19] As far as the use of police vehicles was concerned, these were assigned to members doing stand-by duty but strictly for such purposes. Were the member on stand-by duty to use the vehicle for any other purpose other than driving to and from the police station or

responding to a specific call or instruction, he or she would be using the vehicle unlawfully. Du Toit stated that where a police member was convicted of a criminal offence, an internal enquiry was also held at which the presiding officer decided what disciplinary measures, if any, should be taken against the member including the question of whether he or she should be discharged from the service.

[20] Further as regards the obligation of members on stand-by duty, Du Toit testified that although such a member had to be available to be called out this did not mean that he/she was confined to his/her residence. When the facts of Van Wyk's case were put to him, Du Toit expressed the view that it had been inappropriate for the former to have used alcohol whilst on stand-by duty and to have used the police vehicle for private purposes. It had been inappropriate, furthermore, for Van Wyk to have removed the aerial and switched off the radio. According to Du Toit, police instructions at that time had been that if one used a police vehicle equipped with a radio one was required to book on air the moment one drove the vehicle, inform radio control of your call sign and that you were on duty and available for service. He expressed the further view that Van Wyk had removed the aerial and the handset to hide the fact that he was using a police vehicle. Commenting further on the nature of stand-by duty, Du Toit stated that such members were not under the direct control of the particular police station or community service office. Regarding the nature of a detective's duties he stated as follows:

> "The nature of the service as a detective is, and that's the trust that's put in a detective, and why you only should – normally do become a detective after sometime is that you've proven that you can be trusted, and that you can work individually and you work on your own and you can place yourself on duty and off duty and you are to be trusted with the investigation of cases…".

FACTUAL DISPUTES

[21] Before determining the question of vicarious liability it is necessary to resolve certain disputes of fact which arose from the evidence of plaintiff and Van Wyk. Plaintiff's evidence was that through a combination of factors, namely, the presence of the police radio and dockets in the vehicle and Van Wyk telling her that he was a private detective, she believed that he was a police official and that this played a role in her accepting the lift from him. For his part, Van Wyk denied telling plaintiff that he was a private detective or that she could have seen his name on the dockets or identified the radio as a police radio. By implication Van Wyk appeared to contend that the fact that he was a police officer played no role in plaintiff's decision to accept a lift from him.

[22] In my view the probabilities strongly favour plaintiff's version in regard to these issues. It was common cause, in the first place, that the vehicle did contain criminal dockets identifying the investigating officer on the cover page as Van Wyk. He claimed to have removed these dockets before plaintiff could have seen them or read any details on them but her evidence gives the lie to this. If she did not see the

dockets how else would she have known that they were in the vehicle. Secondly, and more importantly, in a written statement made just after noon on the day of the assault and rape, plaintiff stated that she read his name and rank on the dockets. It was common cause that Van Wyk's name did appear on the cover page of the dockets as the investigating officer. He was unable to explain how plaintiff could have given this information to the police within hours of the incident without having read it on the dockets. Plaintiff's written statement records that the man told her that the dockets were not his but that he was a private detective and is thus consistent with her evidence.

[23] As regards the radio, it was common cause that it was fitted to the vehicle and that the handset had been removed, the only difference between plaintiff's and Van Wyk's evidence being whether the light on the radio was on and whether she could have recognised it as a police radio. Again plaintiff's evidence is consistent with her earlier statement in which she said that she noticed a radio in the vehicle such as was normally found in a police vehicle.

[24] Plaintiff impressed as a sincere and credible witness notwithstanding her vagueness on certain aspects of her evidence. Her reluctance to dwell on the details of the night in question, particularly those relating to her assault and rape, was apparent. This was quite understandable given the traumatic nature of her ordeal as a 13-year old girl. Despite

her diffidence in certain respects, plaintiff was not shaken on the essential aspects of her version or, for that matter, on the detail.

[25] Insofar as Van Wyk's credibility is concerned, to the extent that he was candid regarding his criminal acts, this was borne of necessity. His attitude was well expressed when, asked by the Court in a different context whether he admitted the rape, he replied:

> "Dit is korrek... ek is skuldig bevind deur die Hooggeregshof vir verkragting. Wat is die doel daarvan dat ek dit sou ontken."

It must also be borne in mind that Van Wyk testified in his criminal trial that he had not raped plaintiff. In my view Van Wyk's testimony on the points of difference between his evidence and that of plaintiff was false and self-serving. It may well have been borne of his apparent initial belief that, if he was off duty and not acting as a police officer at the time, both he and first defendant would escape civil liability for his criminal acts.

[26] For these reasons I accept plaintiff's version of events as regard the indicators she observed suggesting that Van Wyk was a policeman. The further question which arises is when did plaintiff form this belief? It seems reasonably clear that prior to accepting the lift outside the nightclub the only indication which plaintiff could have seen that Van Wyk was a policeman was the presence of the police radio in the vehicle. It would appear furthermore that her primary reason for accepting a lift at that point, apart from the fact that she was upset and wanted to go home, was the presence in the vehicle of someone she

knew. In the circumstances I consider that on the probabilities when plaintiff first accepted a lift from Van Wyk the fact that he was or may have been a police officer played no role in her decision. However, I accept her evidence that, as a result of all the factors aforementioned, by the time she accepted his second offer of a lift near Kaaimansriver, her belief that he was a police officer played a role in her decision to accept the promised lift home, albeit reluctantly. Given that she was only 13 years old at the time, I accept as credible plaintiff's evidence that at the time in her mind a private detective and a policeman were one and the same thing.

[27] The nett effect of this evidence is that, notwithstanding Van Wyk's attempts to conceal from plaintiff that he was a police officer, she in fact was observant and quick-witted enough to conclude otherwise and this played a role in her decision to accept, in the desperate circumstances in which she found herself, the second offer of a lift from Van Wyk.

THE NATURE OF STAND-BY DUTY

[28] Given that the degree of control exercised over Van Wyk by first defendant is a relevant consideration in determining the latter's vicarious liability, the nature of stand-by duty and the question of whether Van Wyk was on or off duty is clearly a factor which must be considered. Apart from the evidence of Van Dyk and Du Toit regarding stand-by duty, there is also evidence of the relevant standing order,

issued by the National Commissioner, SAPS in June 1997, in force at the time. The material portions thereof read as follows:

"6. STAND-BY ALLOWANCE

A non-pensionable Stand-by Allowance at a tariff of R16-80 is payable to officials who must be available for 24 hours per day for the performance of duty. (This must not be regarded as payment for overtime duties performed.)

CONDITIONS OF PAYMENT

As this allowance may vary from month to month, as a result of the number of days on which Stand-by duties were performed by an official during a specific month, the allowance is payable monthly on a retrospective basis and payment is based on the total number of completed 24-hour cycles worked during a month.

The allowance is payable at the daily tariff for each completed 24-hour cycle worked by an official. The fact that personnel are placed on stand-by for a week (for example) has the effect that Stand-by duties and usual office duties are frequently worked simultaneously…

PROCEDURES TO CONTROL, KEEP RECORD AND CLAIM

……..

Stand-by duties must be limited to actual services / tasks in which the availability, on a full time basis, of personnel with certain field expertise is of the essence and where the absence of these personnel at short notice will hold serious consequences for the provision of core SAPS services. The number of personnel needed to be on stand-by as well as the actual call outs must also be taken into account. The need and extent of stand-by duties must also be reviewed on a regular basis.

……..

> The Stand-by Allowance was instituted to compensate for the restriction of movement placed on personnel on Stand-by duty and their households. This implies that these personnel have to be available at their dwelling in order to be available for duty at short notice unless where special alternative arrangements have been made. The mere fact that some personnel have been issued with cell phones and are thus 'available' does not, in itself, imply that these personnel are on Stand-by. The measures outlined in the above paragraphs must still be adhered to."

[29] Of note in these provisions is that, as the term "stand-by allowance" suggests, an official on stand-by must be available 24 hours per day for the performance of duty and, furthermore, is restricted in his/her movements whilst on stand-by duty. The standing order goes so far as to suggest that such personnel have to be available at their dwelling when not engaged in their normal duties where special alternative arrangements have not been made. Of further significance is the fact that stand-by duty and the performance of normal duty can overlap and, accordingly, the degree of control exercised by the employer over the police officer concerned. In the present case this is illustrated by the fact that between 07h30 and 16h00 on 14 October 1998 Van Wyk was both on stand-by and working a normal office hours shift.

THE LAW

[30] The leading case relating to the vicarious responsibility of employers is *K v Minister of Safety and Security*[1]. The facts in the *K* case were

[1] 2005 (6) SA 419 (CC).

similar to the facts in the present case to the extent that both involved policemen who deviated from their duties by raping a woman stranded at night and to whom they had offered a lift home. The Court held that the appropriate test to be applied in cases where employees deviate from their normal duty requires two questions to be asked:

> "The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights."[2]

[31] The Constitutional Court expressly approved the test for the vicarious liability of employers formulated by the Appellate Division in *Minister of Police v Rabie*[3]. O' Regan J, in referring to *Rabie*, held[4]:

> "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

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[2] At 436 C – E, para 32.
[3] 1986 (1) SA 117 (A).
[4] In the *K* case at para 44, page 441 G – I.

> 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."

[32] In upholding, in *Rabie*, the liability of the Minister of Police for the delicts of his servant, Jansen JA, stated as follows[5]:

> "It is true that at the time and place in question Van der Westhuizen was dressed in private clothing, in his private vehicle in Malvern and on the scene in pursuance of private interests. However, these circumstances do not *per se* exclude the possibility of his having then embarked upon police work. As has been pointed out above, he could at any time decide to proceed as a policeman if the circumstances so required. Van der Westhuizen certainly professed at the material time to act as a policeman: he identified himself to the respondent as a policeman, by stating that he was a policeman and that he was arresting the respondent and taking him to the police station.
>
> I am prepared to accept in favour of the appellant that on the stated case and the evidence of the respondent the probabilities are that Van der Westhuizen, in committing the delicts in question, was totally self-serving and *mala fide*, and that he knew from the very beginning that the respondent was innocent and that there were no grounds for using his powers as a policeman."

[33] Apart from establishing the blueprint for the test for vicarious liability later approved in the *K* case, *Rabie's* case thus incidentally serves as authority for the proposition that the employer of a police officer does not necessarily escape vicarious liability for the latter's delicts simply because he or she is formally off duty, dressed in private clothes and commits the delicts purely for his/her private and selfish purposes.

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[5] At 133 F – G and 133 I – 134 B.

[34] In *Minister of Safety and Security v Luiters*[6] Langa CJ stated as follows[7]:

> "It follows in my view that once off-duty police officers are found on the facts of a particular case, to have put themselves on duty, as they are empowered and required to do by the employer, they are for the purposes of vicarious liability in exactly the same legal position as police officers who are ordinarily on duty."

The Court rejected a suggestion that the test for vicarious employer liability formulated in the *K* case should be varied, in respect of off duty police officers who put themselves on duty, by the addition of a further component which would render the Minister liable only if the conduct of the police officer was, in addition, objectively closely related to the interests of the Minister. The main justification put up for seeking to draw such a distinction between on duty and off duty police officers lay in the different levels of control exercised over the two categories of police officers.

[35] In reaching its conclusion the Constitutional Court made the following remarks which are also relevant to the present matter[8]:

> "While vicarious liability is not based on the employer's control over an employee, the level of control exercised by the employer will obviously be a relevant factor in determining whether there was a sufficiently close link between the conduct and the employment when considering the second stage of the *K* test. The level of control is therefore already a relevant consideration. It does not seem necessary or desirable to elevate it to the status of a decisive factor which determines the test that applies."

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[6] 2007 (2) SA 106 (CC).
[7] At 116 D – E, para 35.
[8] *Luiters* at 116 A – B, para 33.

[36] Amongst the constitutional norms which the flexibility of the test gives expression to is, I would venture, that of government accountability. Of this norm, Cameron JA said the following in *Olitzki Property Holding v State Tender Board and Another*[9]:

> "The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the according of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, uncorrupt and responsive government."

The following remarks of Nugent JA in *Minister of Safety and Security v Van Duivenboden*[10] are also relevant in considering the boundaries of vicarious liability in relation to police officers:

> "Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case[11]".

APPLICATION OF THE TEST IN THE K CASE TO THE FACTS

[37] The first leg of the test in the *K* case poses the question whether the wrongful acts were done solely for the purposes of the employee and requires a subjective consideration of the employee's state of mind, a purely factual question. In the present case it is clear that in assaulting and raping plaintiff Van Wyk did not further first defendant's purposes or obligations. Clearly, in acting as he did, Van Wyk was pursuing his own objectives. Notwithstanding that Van Wyk was pursuing his own

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[9] 2001 (3) SA 1247 (SCA) at 1263 D – E, para 31.
[10] 2002 (6) SA 431 (SCA).
[11] At 446 F – G, para 21.

purposes in raping plaintiff, the next and crucial question is whether, there was nevertheless a sufficiently close link between his conduct and his employer's business and purposes to render first defendant vicariously liable.

[38] The facts which distinguish *K'*s case from the present are principally that the three policemen in that instance were formally on duty and were in uniform. On behalf of first defendant, Mr. Van der Schyff contended that the focus of the enquiry should be on the level of control first defendant had over Van Wyk, the question being whether he had completely disengaged himself from his duties as provided for in his contract of employment. Relevant in this regard, Mr. Van der Schyff contended, was that plaintiff's rape was in no way linked to the business and purposes of first defendant and that Van Wyk had used the police vehicle unlawfully. He submitted further that, irrespective of his use of the vehicle, Van Wyk was not on duty on the night in question. Mr. Van der Schyff contended that since Van Wyk was off duty, first defendant could not attract vicarious liability in respect of any omission or commission by him since it had no right whatsoever to exercise any control over him. This submission loses sight of the fact that being on duty is not a necessary requirement for vicarious liability for the delicts of a police officer. Furthermore, it takes no account of the fact that Van Wyk's employer could at any time have called upon him to attend upon a crime scene or report to his office for official duties

and that to this end Van Wyk had to hold himself available and in a fit and proper state.

[39] Referring to the finding in *Luiters* that once an off duty police officer places himself on duty he is judged by the same standards as a police officer formally on duty, Mr. Van der Schyff argued that the corollary thereof was that should a police officer elect not to place himself on duty he remains off duty and thus no vicarious liability for any delicts committed during this period could attach to the employer. In my view there are several answers to this argument. Firstly, a placing on duty in such circumstances will often be a deemed decision rather than a conscious one on the part of the officer concerned. Secondly, I do not understand *Luiters'* case as authority for the proposition that the Minister will only attract vicarious liability for the delicts of off duty police officers if they can be construed as having placed themselves on duty. The second leg of the test approved in the *K* case is much wider, namely, whether the connection between the wrong and the employer's business and purposes is sufficiently close or not. It is also clear from *Luiters'* case that the question of the degree of control exercised by the employer over the employee is but one factor to be considered in determining vicarious liability.

[40] In my view it would be mistaken to see only a sharp distinction between being on and off duty and then to treat Van Wyk as being off duty. His status as being on stand-by at the material time fell rather somewhere

between these two states. The standing order captures the essence of stand-by duty when it states that the allowance is payable to officials "*who must be available for 24 hours per day for the performance of duty*" and was instituted to compensate for "*the restriction of movement placed on personnel*" on such duty who "*have to be available at their dwelling in order to be available at short notice*". Sight should also not be lost of the fact that stand-by and normal duty can and do overlap.

[41] It is correct that first defendant's direct control over Van Wyk was attenuated whilst he was on stand-by duty and was out of office. However, such limited control is also a natural consequence of the conditions of service of any detective. As former Commissioner Du Toit pointed out, the nature of a detective's duties are such that they work on their own much of the time. It is also of some significance that had Van Wyk operated the vehicle in accordance with standard police procedures the radio would have been on and he would have placed himself in contact with radio headquarters.

[42] Finally, it was submitted that to hold the first defendant vicariously liable in the present circumstance would be to visit it with strict liability and open the flood gates to ill-founded claims. This possibility can be discounted given the flexible test approached in the *K* matter and the case by case approach which this requires from the courts.

[43] The single most important connection between Van Wyk and the business of his employer involved his use of a police vehicle. It was allocated to him for purposes of fulfilling his stand-by duties. Unfortunately there was limited control by the employer over the use of the vehicle for unauthorised purposes as was demonstrated by the fact that the next morning Van Wyk ascribed the kilometres which he had covered the previous night to investigation work and refuelled the vehicle at the State's expense. It can hardly be over-emphasised that without the use of the police vehicle Van Wyk would not have had the means to abduct, assault and rape plaintiff. He took her from a busy area to a deserted spot to accomplish his purposes and, on two separate occasions, used the pretext of offering her transportation home as the means to entice her into the vehicle. When plaintiff tried to escape from him on the first occasion, Van Wyk used the vehicle to find her and, after picking her up a second time and driving to the secluded spot near Kraaibos, he used the vehicle to hold her captive and he eventually raped her in the vehicle. At the time Van Wyk had no private vehicle and, without the use of the police vehicle, he would not have been able to gain control over plaintiff and assault and rape her with impunity.

[44] A further connecting factor to be taken into account is that although Van Wyk went to some lengths to conceal his identity as a police officer, through her own observations plaintiff formed the belief that he was indeed a police officer. To some extent at least this belief operated

to lull her suspicions when she reluctantly accepted the second lift that Van Wyk offered her. In this regard sight must not be lost of the fact that by then plaintiff was in a desperate situation, a 13-year old child alone on a dark road in the small hours of the morning trying to get home.

[45] Mr. Van der Schyff relied, amongst other factors, on the fact that Van Wyk's use of the motor vehicle was unlawful and unauthorised. The same argument was raised in *K's* case where the court held that even were such transportation to have been in breach of standing orders, the fact that employees breach a rule of their employment is not sufficient of itself always to avoid employer liability[12]:

> "It remains a factor to be considered in determining whether the connection between the wrong and the employment is sufficiently close or not. It cannot on its own always be determinative."

[46] A further important connecting factor is the coincidence between the nature of the assistance which Van Wyk pretended to offer plaintiff in order to lure her into his vehicle i.e. transportation home to a 13-year old girl stranded late at night, and the normal duty of a police official in such a situation. Van Wyk himself conceded had he been on duty at the time he would have transported plaintiff home and it would have been his duty to do so. The evidence of former Commissioner Du Toit is also relevant in this regard namely that, in his view, in accordance with their duty to uphold the law and protect members of the public,

[12] In the *K* case at 444 E – F, para 55.

police officers are obliged to come to the assistance of people in need, even if they are off duty.

[47] This obligation to uphold the law and protect citizens, in particular vulnerable groups such as women and children, is fundamental function of SAPS. The preamble to the South African Police Service Act[13] provides *inter alia* that:

> "...there is a need to provide a police service throughout the national territory to –
>
> (a) ensure the safety and security of all persons and property in the national territory;
>
> (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution."

The Bill of Rights provides in s 7(2) that the State must respect, protect, promote and fulfil the rights contained therein. These include the right to freedom and security of the person and to bodily and psychological integrity. S 28 provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation. The Constitution further provides that SAPS has a responsibility to prevent, combat and investigate crime, protect and secure the inhabitants of the Republic and their property, uphold and enforce the law and create a safe and secure environment for all people in South Africa.

[48] The official code of conduct of the SAPS was introduced on 31 October 1997. According to the SAPS vision and mission statement it is a

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[13] Act 68 of 1995.

written undertaking which each member of SAPS is obliged to uphold in order to bring about a safe and secure environment for all people of South Africa. Every SAPS member is enjoined to make the code a part of their code of life, principles and values and commits him/herself to at all times uphold the Constitution and the law and, in order to achieve a safe and secure environment for all the people of South Africa, to uphold and protect the fundamental rights of every person. Each member undertakes to "*at all costs, avoid any conduct which would make us violators of the law*" and to "*protect the inhabitants of South Africa against unlawful actions*". Of course these commitments and aspirations represent an ideal to be striven for, one which cannot always be attained. However, the underpinning of these values and principles by the Constitution does not allow the courts to treat these commitments as mere verbiage or empty promises.

[49] The role of the police was described in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)*[14] as follows:

> "The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime".

As long ago as 1975 in *Minister van Polisie v Ewels*[15] the Appellate Division stated as follows:

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[14] 2001 (4) SA 938 (CC) at 965 A – B, para 62.
[15] 1975 (3) SA 590 (A) at 597 G.

> "Wat misdaad betref, is die polisieman nie net 'n afskrikker of opspoorder nie, maar ook beskermer".

In *Van Duivenboden*[16] the Court stated that:

> "...the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights. The very existence of that duty necessarily implies accountability..."

[50] The effect of these duties, values and obligations on the part of SAPS, acting through its employees, is, to my mind, to introduce into matters such as the present, when applying the second leg of the test in the *K* case, public policy considerations which do not necessarily arise in the determination of vicarious liability in other employment relationships. This was recognised in the *K* case when the Court stated that in answering the question of what is "*sufficiently close*" to give rise to vicarious liability "*a court should consider the need to give effect to the spirit, purport, and objects of the Bill of Rights*"[17]. It was, no doubt, in the light of this approach, that in affirmatively answering the second question posed in the test, O' Regan J, stated as follows[18]:

> "In this regard, there are several important facts that point to the closeness of that connection. First, the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty is a duty which also rests on their employer and they were employed by their employer to perform that obligation. Secondly, in addition to the general duty to protect the public, the police here had offered to assist the applicant and she had accepted

[16] Supra at 446 C – D, para 20.
[17] At page 436 E, para 32.
[18] At 443 F – 444 C, paras 51 – 53 (an inapplicable passage omitted).

> their offer. In so doing, she placed her trust in the policeman although she did not know them personally.
>
> ...Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. Where such trust is established, the achievement of the tasks of the police will be facilitated. In determining whether the Minister is liable in these circumstances, courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her.
>
> Thirdly, the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in the brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case. In my view, these three inter-related factors make it plain that viewed against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable."

[51] The above observations apply in virtually all respects to the present matter. As was the case in *K*, the conduct of Van Wyk which caused harm to plaintiff simultaneously constituted a commission and an omission. The commission lay in the assault and rape of plaintiff. His omission lay in his failing, whilst on an attenuated form of duty, to

protect her from harm, an obligation which was not suddenly extinguished at 20h00 that night or earlier when he went off formal duty. The continuing nature of such an obligation was referred to by Goldstone J, as he then was, in *Rabie v Minister of Police and Another*[19] as follows:

> "When a member of the South African Police Force is off duty it cannot be suggested that his statutory duties as a member of the Force or that his authority are suspended."

[52] At the conclusion of his thorough and well researched argument, Mr. Olivier, on behalf of plaintiff, submitted in summary that Van Wyk's continuing duties as a police officer, his offers of assistance to plaintiff and his use of the police vehicle whilst on stand-by duty justifies a finding of vicarious liability.

[53] In my view, these factors and all the further considerations mentioned above, compel the conclusion that, notwithstanding that Van Wyk was neither in uniform nor on full normal duty, the connection between his wrongful and unlawful conduct and his employment as a plain-clothed detective was sufficiently close to render first defendant vicariously liable for his delicts against plaintiff.

[54] There is a further factor which, in my view, strengthens the conclusion which I have reached, namely, the question of Van Wyk's fitness for the position which he occupied regard being had to the criminal

[19] 1984 (1) SA 786 (W) at 791 E - F.

convictions which he incurred whilst employed by SAPS. On behalf of first defendant, Mr. Van der Schyff objected to any reliance being placed on this aspect since no basis had been laid therefor in the pleadings. It is correct that plaintiff did not explicitly rely on this aspect in her particulars of claim but, as indicated earlier, she cited Van Wyk's criminal record in further particulars as part of the legal and factual basis for her contention that first defendant was vicariously liable for his wrongful conduct.

[55] In my view first defendant cannot claim to have been taken by surprise by this aspect. It had the opportunity to deal with it in its case and when Van Wyk testified but chose not to. In the circumstances its objection to plaintiff's reliance on this factor cannot be sustained. The question arises as to the role of Van Wyk's criminal record in this enquiry. Its relevance appears to lie in the fact that first defendant allowed Van Wyk to continue to work as a detective, with all the responsibility and freedom from direct control which that entailed, even after his conviction for two serious offences, namely assault with intent to do grievous bodily harm and the negligent discharge of a firearm whilst under the influence of alcohol or narcotic drugs. These convictions were followed not long thereafter by a further conviction for assault common.

[56] This brings into play the somewhat contentious reliance by Jansen JA in *Rabie*[20] (supra) on the "*creation of risk of harm*" approach, the genesis of which lies in *Feldman (Pty) Ltd v Mall*[21]. Applying this to the present matter it appears to me that when SAPS elected, notwithstanding his criminal record, to retain Van Wyk in its employ and to appoint or retain him in the responsible and less restricted role of a detective, it accepted the risk that his propensity for criminal conduct might continue and cause harm to others. Even allowing for the benefit of hindsight I do not regard that risk as fanciful.

[57] In my view, where the State appoints or retains as a guardian and enforcer of the law a police officer who has a record of serious criminal misconduct this is a consideration which, in appropriate circumstances, may be taken into account in determining the employer's vicarious liability for the officer's subsequent wrongful conduct. Indirect support for this approach is to be found in the remarks of Langa CJ in *Luiters'* case where, in rejecting an extended test for vicarious liability in the case of off duty police officers, he stated that such a variation to the rule[22]:

> "...would have the effect of lessening the emphasis on the responsibility of a Minister to ensure that police officers are properly trained and carefully screened to avoid the risk that they will behave in a completely and proper manner. What it would mean is that the more improper the conduct of the police officer, the less likely the Minister will

[20] At 135 H.
[21] 1945 AD 733 at 741.
[22] At 116 C – D, para 34.

be held liable. This result is not one that accords with a Constitution that seeks to render the exercise of public power accountable."[23]

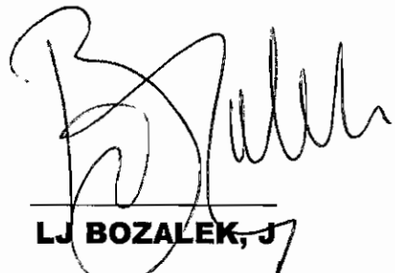
[58] For the sake of clarity I should state that, even were it not for Van Wyk's previous convictions, I would still conclude, in the light of factors mentioned earlier, that first defendant is vicariously liable for the delicts committed by its employee in relation to plaintiff.

ORDER

[59] In the circumstances and for these reasons the following order is made:

1. **First and second defendants are declared jointly and severally liable for any damages suffered by plaintiff, the one paying the other to be absolved, which she may prove arising out of her assault and rape by second defendant in the vicinity of Kraaibos near George on or about 14/15 October 1998.**

2. **First and second defendants are ordered to pay plaintiff's costs in this matter, jointly and severally, the one paying the other to be absolved.**



LJ BOZALEK, J

[23] See also the article entitled "Risk creation and the vicarious liability of employers" by JA Neethling 2007 (70) THRHR page 527 at 533 where the author proposes as a general guideline that an employer should be liable for the intentional delict of his employee where his appointment and working conditions enabled him to commit the delict.