THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 35/2016

In the matter between:

MINISTER OF SAFETY AND SECURITY **APPELLANT**

and

ELSA BOOYSEN **RESPONDENT**

Neutral citation: *Minister of Safety & Security v Booysen* (35/2016) [2016] ZASCA 201 (9 December 2016)

Bench: Bosielo, Leach, and Wallis JJA and Schoeman and Makgoka AJJA

Heard: 10 November 2016

Delivered: 9 December 2016

Summary: Vicarious liability – on duty police reservist shooting partner with service pistol – whether a sufficient link between the wrongful conduct of the police officer and the business of South African Police Service.

ORDER

On appeal from: Eastern Cape Division, Grahamstown of the High Court (Plasket J sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and replaced with the following:

'The plaintiff's claim is dismissed with costs.'

JUDGMENT

Makgoka AJA (Leach JA, Wallis JA and Schoeman AJA concurring):

[1] The issue for determination in this appeal is whether the appellant (the Minister) was vicariously liable for the damages suffered by the respondent (Ms Booysen) as a result of her being shot by a police reservist. The appeal, with leave of this court, is against the judgment of the high court, Eastern Cape Division, Grahamstown. Plasket J, found the Minister vicariously liable for the conduct of Mr Johannes Mongo, a police reservist who shot and wounded Ms Booysen on 22 March 2013 and promptly committed suicide by shooting himself. I shall refer to him as 'the deceased'.

[2] At the trial of the matter, the issues of liability and quantum were separated in terms of Rule 33(4) of the Uniform Rules of Court. Certain factual issues were agreed upon by the parties and recorded in a pre-trial minute. The only issue for determination was whether the Minister was vicariously liable for the damages suffered by Ms Booysen as a result of the deceased's conduct. Only Ms Booysen testified during the trial.

[3] The facts are simple. Ms Booysen and the deceased were involved in an intimate relationship for at least six months. They both lived in Pearston, Eastern Cape. The deceased was a police reservist in the employ of the South African Police Service (the SAPS). He worked night shifts and was assigned the duties of crime prevention and attending to complaints by members of the public. On the day of the incident, he visited the home of Ms Booysen to have supper, as he usually did when he was on duty. He was dropped off by a marked police vehicle, while dressed in full police uniform, and he was carrying a service pistol, which had been issued to him for the night shift. He was obliged to return the pistol to the shift commander at the completion of his shift. The arrangement was that after supper, the police vehicle would return and collect him and he would continue with his duties.

[4] Although he commenced his duties at approximately 19h40pm that evening, the deceased was not carrying out any official duties of the SAPS when he visited Ms Booysen's home. Upon his arrival at her home, he offered to buy everyone soft drinks and went out and purchased them from a nearby shop. After he had supper, he and Ms Booysen sat outside. Suddenly, and without any warning, the deceased drew his service pistol and shot Ms Booysen in the face and promptly committed suicide by shooting himself too. Other than a remark immediately before the shooting that, if 'he could not have her, no-one else would', there is no clue to the deceased's reasons for acting as he did. Ms Booysen's evidence was that their relationship was untroubled.

[5] It is on these facts that the court a quo found the Minister vicariously liable to compensate Ms Booysen for her injuries. It is this finding with which the Minister is aggrieved. This is a classic 'deviation' case, where an employee deviates from the ordinary tasks of his or her employment. The test for vicarious liability in such cases finds its jurisprudential foundation in two leading cases of this court: *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *Minister of Police v Rabie* 1986 (1) SA 117 (A). As will be discussed later, this test has been refined by the Constitutional Court to take account of the impact of the Bill of Rights and to ensure that it is applied in line with the spirit, purport and objects of the Bill of Rights.

[6] In *Feldman* this court had to consider a dependant's claim for damages. There, an employee had, after delivering the parcels he had been instructed to deliver, driven his employer's vehicle to attend to his own personal matters. He consumed alcohol, which rendered him unable to drive the vehicle safely. On his way back to his employer's garage, he negligently collided with another vehicle and killed a father of two minor children. This court, by a majority, held the employer to be vicariously liable. Watermeyer CJ at 742 held that if an employee's acts while doing his employer's work or activities incidental to or connected with it, are carried out in a negligent or improper manner so as to cause harm to third parties, the employer is liable. On the facts of that case, the majority found that the employee had never entirely abandoned his employer's work as he had throughout retained the custody and control of the vehicle on behalf of his employer. Hence it held the employer vicariously liable.

[7] *Rabie* concerned a claim for damages arising from the wrongful arrest, detention and assault of the plaintiff. The police officer who had made the arrest was employed as a mechanic in the South African Police Force and at relevant time off duty and in plain clothes. In making the arrest he had acted in pursuance of his own interests. He had however identified himself as a policeman to the plaintiff; taken the plaintiff to the police station; filled out a docket; and wrongfully charged the plaintiff with attempted housebreaking. The question was whether his employer, the Minister of Police, was vicariously liable for the damages suffered by the plaintiff. Writing for the majority of this court, Jansen JA held the Minister liable. At 134C-E he formulated the following test for determining vicarious liability in such cases:

> '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.'

[8] In a seminal judgment, the Constitutional Court in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) adapted the test laid down in *Rabie* to give effect to constitutional norms and ethos. After a detailed and careful analysis of our earlier jurisprudence, including *Feldman* and *Rabie*, and foreign law, O'Regan J (para 32) stated the adapted test as follows:

'The approach makes it clear that there are 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.' (Footnote omitted.)

[9] O' Regan J continued to explain (para 44) that the objective element of the test which relates to the connection between the deviant conduct of the wrongdoer and their employment, approached with the spirit, purport and objects of the Bill of Rights as intended in s 39 (2) of the Constitution, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.

[10] The Constitutional Court in *K* thus developed the common law of vicarious liability in two critical respects: firstly, it laid bare the policy-laden or normative character of vicarious liability and required that the normative considerations at play be expressly articulated by the courts. Secondly, it endorsed a new test for the

imposition of vicarious liability in the deviation cases which embraces such normative considerations.[1]

[11] The facts in the case of *K* were as follows: a 20 year-old woman was stranded at a petrol station in the early hours of the morning, when three on-duty police officers offered to give her a lift home, in fulfillment of their duties as police officers. En route, she was brutally raped by all three police officers and abandoned by the side of the road. Ms K had trusted them in their capacity as police officers, in circumstances where it was reasonable for her to do so. The Constitutional Court, on these facts, concluded that the police officers' conduct bore a sufficient connection to their employment as police officers to attach vicarious liability to the Minister. The Court based its conclusion on three considerations (paras 51 – 53):

'(a) The police officers and their employer all carried a statutory and constitutional duty to prevent crime and protect the members of the public;

(b) The police officers had offered to assist Ms K and she had accepted their offer and by doing so, displayed her trust in the police officers in uniform in circumstances where it was reasonable for her to do so; and

(c) There had been a simultaneous commission and omission: the police had committed the rape; and their simultaneous omission was that they failed while on duty to protect her from harm, which they had a general and special duty to do.'

[12] The Constitutional Court had occasion to consider the issue again in *F v Minister of Safety and Security & others* [2011] ZACC 37; 2012 (1) SA 536 (CC), where the facts were disturbingly similar to those in *K*. A 13-year old girl (Ms F) was given a lift by an off-duty SAPS member in the early hours of the morning after she had visited a nightclub. The police officer was in civilian clothes and had also been at the night club, although he was on standby. This meant that he could, at any time of the night, have been called upon to attend to any crime-related incident if the need arose. He had been given possession of an unmarked police vehicle to enable him

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[1] H Barnes. Heidi. '*F v Minister of Safety and Security*: Vicarious liability and state accountability for the criminal acts of police officers.' SA Crime Quarterly [online]. Jan.Mar. 2014, n.47 at 29-34. Available from <http:www.scielo.org.za/scielo.

to discharge any police functions that he might have been required to perform whilst on standby duty. That was the vehicle in which Ms F was driven. Whilst inside the vehicle, she noticed a pile of police dockets bearing the police officer's name and rank. On her questioning the presence of police dockets in the vehicle, he replied that he was a private detective, which she understood to mean that he was a police officer. Ultimately, instead of taking Ms F home, the police officer took her to a secluded spot and raped her. The majority of the Constitutional Court held the Minister vicariously liable for the police officer's conduct.

[13] Mogoeng J, writing for the majority of the court, set out (para 52) the normative components that pointed to liability in that case as being the following: the state's constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman's commission of the rape and omission to protect the victim; and the existence or otherwise of an intimate link between the policeman's conduct and his employment. Mogoeng J noted that these elements complemented one another in determining the state's vicarious liability in the matter.

[14] Applying the *K* test to the present case, the answer to the first question, which is subjective, does not establish liability. The deceased's visit to Ms Booysen's home was solely for his own purposes. He was on a private visit to his lover's home to have supper. He was not there in his capacity as a police officer. Simply put, he had no official police function to perform. The visit was purely social during the time when he was permitted to be away from the police station for a meal break. It had nothing to do with his employer, any more than it would have had anything to do with his employer's business if he had been sitting having a meal in a café, or purchasing a take-away at a fast food restaurant.

[15] I now consider whether the requirements of the second leg of the test, which is objective, have been established. This is to determine whether there is a sufficiently close link between the shooting incident and the business of the SAPS. I

accept that the deceased was on duty at the time he visited Ms Booysen's home, although he was not carrying out any official duties of the SAPS. However, as stated earlier, he was on a meal break during which time he was entitled to be away from the station and to go about his own business. He was in full police uniform, and in possession of a service pistol. He had been dropped at Ms Booysen's home by a police vehicle, which, but for the incident, would have picked him up later for him to continue with his duties. These are the factors that influenced the court a quo to come to the conclusion that a sufficient link had been established between the deceased's wrongdoing and his employment with the SAPS.

[16] The court a quo relied on *Pehlani v Minister of Police* (9105/2011) [2014] ZAWCHA 146; (2014) 35 ILJ 3316 (WCC) (25 September 2014), which bears some similarity to the present case. A police reservist had volunteered for duty. After being provided with a service pistol, she had gone out and found her former boyfriend (the plaintiff), whom she had previously assaulted and threatened. She shot and injured him with her service pistol, while dressed in full police uniform, but had abandoned her duties. Shortly before the shooting, she had sent threatening emails to the plaintiff, stating that if he did not return to her, she would book out a firearm and kill him. There was no evidence that the management of the SAPS were aware of the threats that she had made against the plaintiff. On these facts, the court a quo found the Minister to be vicariously liable. The court found very significantly, the fact that the police officer used a service firearm to commit the delict. It reasoned as follows (which reasoning the court a quo endorsed):

'[32] The fact that Petshwa used a SAPS firearm to shoot the plaintiff is, in my view, a particularly weighty factor in the conclusion that there was a sufficiently close connection between her wrongful conduct and SAPS business. In *K* and *F* the wrongdoers used police vehicles to facilitate their crimes. The vehicles were, however, only an indirect aid to the perpetration of the rapes, hence the significance of other factors. Here, by contrast, the firearm was the very means by which the crime was committed. Of all the accoutrements of police office, the firearm is the most obviously and immediately dangerous. The normative values underlying the imposition of vicarious liability would be served by acknowledging the risk created for members of the public when police officials are placed in possession of

dangerous weapons and by encouraging strict official control over the issuing of firearms to police officials.'

[17] I respectfully disagree with the reasoning in this passage. What it amounts to is this: by issuing a firearm to a police officer, the Minister is liable for any delict committed by a police officer using that firearm. The finding of liability based on the mere fact of the SAPS issuing a firearm to a police officer, amounts to the imposition of strict liability, which is impermissible. For liability to arise under such circumstances, there must be evidence that the police officer in question was, for one reason or the other, known to be likely to endanger other people's lives by being placed in possession of a firearm, and despite this, he or she was nevertheless issued with the firearm or permitted to continue possessing it. Such was the situation in *F*, where the police officer was retained in the employ of the SAPS as a detective despite previous criminal convictions. See also the facts in *Ramushi v Minister of Safety and Security* (6859/2002) [2012] ZAGPPHC 175 (18 August 2012).[2]

[18] We are not concerned with such a situation in this matter. There is no evidence that when the deceased was employed and issued with a firearm, the management of the SAPS were aware or should have been aware that this created a material risk of harm to the community. On the contrary, it was common cause between the parties that the shooting was not foreseen by either Ms Booysen or the management of the SAPS. As the court a quo correctly observed, there appeared to have been no sign at all that the deceased would have done what he did. In her evidence, Ms Booysen also testified that she and the deceased had no relationship problems, nor had they argued about anything. Therefore, to the extent that *Pehlani*

[2] An off-duty police officer shot a member of the public, using his service pistol. It was common cause that between the period he was assigned the service pistol and the shooting incident, there were four complaints against the police officer, all relating to the handling and use of a firearm. Among those, he had been internally found guilty (for negligent handling of a firearm) and criminally convicted (for being drunk in a public place and pointing of a firearm) for which he was sentenced to a fine or imprisonment period. Despite this information being known to the management of the SAPS, no steps were taken to remove the firearm from the police officer or investigate his fitness to continue possessing a firearm. It was held that the Minister was vicariously liable under those circumstances.

imposed vicarious liability merely on the basis that the SAPS had issued a firearm to a police officer who committed a delict with that firearm. In my view, it was wrongly decided.

[19] The question remains whether in this case there is a sufficient link between the deceased's conduct and his employment to impose vicarious liability on the Minister. That question can only be answered by considering the normative factors referred to earlier, and the countervailing factors, thus conducting a balancing act. To my mind, the weighty countervailing factor is that, when the deceased visited Ms Booysen, and when the shooting incident took place, unlike the situation in both *K* and *F*, the two were not relating to one another as police officer and citizen, but as lovers in a domestic setting. From the facts it is clear that Ms Booysen did not repose trust in the deceased due to his employment as a police reservist with the SAPS. She did not fall in love with the deceased because he was a policeman. She confirmed this much in her evidence. She testified that she and the deceased grew up together in the same community.

[20] Thus, the issue of trust that the public ordinarily reposes in the police, did not arise in this matter at all, unlike in *K* and *F.* The court a quo recognised this, but nevertheless reasoned that the element of trust is not a prerequisite for vicarious liability. It is merely one factor that may or may not be present. While I agree that this is only one of the normative factors to be considered, I do not share the court a quo's relegation of that aspect to one that can be dispensed with. A careful and close reading of *K* and *F* reveals that the element of trust was central to the finding that there was a sufficiently close link connection between the acts of the police officers and their employment, hence, vicarious liability. It is indeed doubtful whether, without the element of trust, the outcome of the two cases would have been the same. *K* is explicit on this aspect:

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

[21] *F* is also emphatic on the centrality of the element of trust. Mogoeng J firmly explained:

'[66] Whenever a vulnerable woman or girl-child places her trust in a policeman on standby duty, and that policeman abuses that trust by raping her, he would be personally liable for the damages arising from the rape. Additionally, if his employment as a policeman secured the trust the vulnerable person placed in him, and if his employment facilitated the abuse of that trust, the State might be held vicariously liable for the delict. The victim's understanding of the situation would presumably be that she is being protected or assisted by a law enforcement agent, empowered and obliged by the law to do so. Whether he is on or off duty would, in all likelihood, be immaterial to her. From where she stands, he is a policeman, employed to protect her, and should therefore be trusted to uphold, and not to contravene, the law.'

[22] In this court, counsel for Ms Booysen accepted that the single most significant argument in favour of imputing vicarious liability to the Minister is the fact that the SAPS had issued a firearm to the deceased. That he was in police uniform, having been dropped at her home by a police vehicle, and that he would, but for the incident, have been picked up by a police vehicle, are all important normative considerations. But, in the context of this case, their significance is weakened by the absence of the element of trust, which, as explained above, was so pervasive in *K* and *F*. They do not, in my view, alter the simple position that this was an unfortunate domestic occurrence, and the use of a service firearm by the deceased was more incidental than anything.

[23] Would it, for instance, have made any difference had the deceased arrived at Ms Booysen's home in his private vehicle, wearing civilian clothes, and in possession of a service firearm? Put differently, in the context of the intimate relationship between Ms Booysen and the deceased, is there any significance in these considerations, and if so, to what extent? I do not think there is much. The deceased was not there to carry out any official duties as a police officer. There was no situation which called upon him to act as a police officer at Ms Booysen's house. He was there in a domestic setting to enjoy dinner with his lover. The members of

the community who saw him enter Ms Booysen's home, and who knew him as her boyfriend, would not have viewed the unfortunate incident as a police officer shooting a member of the public, but a lover, who happened to be a police reservist, shooting his partner. This is also how the public would have viewed the situation in *Pehlani.*

[24] This is unlike in *K* and *F*, where the wrongdoing of the police officers was viewed pre-eminently in their capacity as police officers, for the simple reason that the victims of their delictual conduct were in desperate need of police protection, and reposed trust in them as police officers. The police officers, instead, abused their positions as police officers by raping the victims. There is a further distinguishing feature between this case and those of *K* and *F*, namely that this is an unfortunate domestic incident in which the gender roles could easily be reversed, as was the situation in *Pehlani*.

[25] In saying this, I am not for a moment suggesting that the deceased would have been entitled to play possum and fail to act because he was on a supper break. Had a situation arisen, such as a robbery or house-breaking, whilst he was at Ms Booysen's home, that would have required him to act as a police officer and if he failed to act under those circumstances, the Minister would be held vicariously liable on the basis of an act or omission on the part of the deceased. This has been our law since *Minister van Polisie* v *Ewels* 1975 (3) SA 590 (A).

[26] In this court, counsel for Ms Booysen accepted a proposition that the factors relied on by the court a quo to find the Minister vicariously liable, have no significance in the context of this case. But that only reinforces the point that the real connection is said to lie in the deceased's possession of the service pistol and nothing else. Counsel's submission finds resonance in the erudite dissenting judgment of my colleague, Bosielo JA, which I have had the benefit of reading.

[27] My colleague and I are agreed that there is always a risk that a police officer might use his service firearm to cause harm to the public. It is the reach and extent

of vicarious liability to be imputed to the Minister under such circumstances, on which we differ. On my colleague's approach, the Minister is liable without more. I take a different view. To my mind, the Minister can only be held vicariously liable if there is evidence that the SAPS issued a firearm under circumstances which called for additional caution and circumspection, and which the SAPS ignored. I have already alluded to examples of such factors in paras 17 and 18 above, which factors are by no means exhaustive, and would depend on the facts of each case.

[28] Therefore, the question in each case should be whether, when issuing a firearm to a police officer, there were factors known to the management of the SAPS, which pointed to a heightened risk that such officer might use the firearm for wrongful conduct, such as a violent or abusive history, alcohol abuse, mental health issues, etc. In the absence of such factors, it is difficult to imagine how, other than on the basis of strict liability, the Minister can be held vicariously liable for the wrongful conduct of a police officer in deviation cases. Neither *K* nor *F* serves as authority for that proposition. As Mogoeng J was at pains to explain in *F* (para 45) some link must be established between the employer's business and the delictual conduct before the employer may be held vicariously liable. That link, in my view, is missing in this case.

[29] The main reason for my colleague imputing vicarious liability to the Minister is that the SAPS creates a potential risk of harm to the public by issuing police officers with firearms, because '[b]y giving [the police] dangerous weapons like firearms to use, the Minister is creating enormous potential that some police might use them for purposes other than those for which they are lawfully entitled to. It is the responsibility of the Minister as the employer to ensure that his or her employees are properly trained and disciplined, and will not pose danger to the public they are expected to protect.' (para 43 below). My colleague seeks support for this in *Minister of Defence v Von Benecke* 2013 (2) SA 361 (SCA) para 24. On principle, I embrace these sentiments, but they do not apply on the facts of this case. There is no evidence that the SAPS failed in its responsibility to ensure that the deceased was properly trained and disciplined, or that it should have foreseen that the deceased would pose a danger to the public.

[30] In *Von Benecke*, the Minister of Defence was held vicariously liable for the injuries sustained by a member of the public when he was shot during an armed robbery. The robber used an assault rifle that he had assembled using parts furnished by a member of the defence force who was in charge of the storage at a military base. The member had stolen the rifle parts and ammunition and handed them to the robber. The robber subsequently used those parts and ammunition together with a previously stolen rifle body, to assemble the weapon used in the robbery. Holding the minister of defence vicariously liable for the injuries sustained by a member of the public, this court noted, in the statutory context of the structure and regulation of the defence force, that the defence force was a special kind of employer with a relationship towards its employees and the public. It therefore required an approach to liability for the wrongful acts of those employees which is very different from that of an ordinary civilian employer. Heher JA, further observed that the defence force's proper functioning required it to possess quantities of dangerous weapons which cannot be permitted to escape into the hands of the public and especially the criminal element of the population.

[31] It is therefore clear that this court, in *Von Benecke*, was concerned with a different context than this case. The storage and preservation of arms and ammunition is eminently a ground for potential harm to the public, especially if they fall into the wrong hands. Heher JA summed up the basis for imputing liability to the minister of defence as follows:

'[24] [The Department of Defence] has the duty to educate its employees in the disciplines required to minimise that risk. It goes without saying that because of the enormous potential for public harm inherent in the inadequate preservation and control of arms, the department (through its responsible minister) should not in general be able to avoid liability for wrongful acts of commission or omission of employees that it had appointed to preserve and control its arms, save in cases where the court finds that those acts are not sufficiently closely connected with the employee's duties to warrant the imposition of liability on the department.'

[32] My colleague's approach would have far-reaching consequences for the Minister. So too, would other sectors be affected: the defence force, the security industry, and all sectors where the job description requires employers to issue firearms to their employees. Take the example of a police officer who wrongfully shoots his/her spouse or partner with a service firearm during an argument, in their private residence. On my colleague's approach, vicarious liability on the part of the Minister would be attracted automatically and without more, because a firearm was issued to such employee. But, if instead of using their service firearm the police officer had used their privately owned and licensed firearm, the Minister would not be liable. That is not our law.

[33] The liability of employers for the wrongs committed by their employees has always been vicarious, not direct or strict. As observed in *K* (para 21) one of the principles underlying vicarious liability is the desirability of affording employers an opportunity to take active steps to prevent their employees from causing harm to members of the broader community. There is a countervailing principle too: this is that damages should not be borne by employers in all circumstances, but only in those circumstances in which it is fair to require them to do so.

[34] On the above considerations, I take a view that the normative factors relied on by the court a quo do not establish a strong and significant connection between the conduct of the deceased and his employment by the SAPS. Even the closest one, namely the issuing of the firearm to the deceased by the SAPS, falls short. It does not suffice for vicarious liability to be imputed to the Minister in the circumstances of this case. The appeal should therefore succeed.

[35] The following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and replaced with the following:

'The plaintiff's claim is dismissed with costs.'

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T M Makgoka

Acting Judge of Appeal

Bosielo JA (dissenting)

[36] I have had the pleasure of reading a succinct, lucid and meticulously written judgment by my colleague, Makgoka AJA. I am furthermore grateful to him for having set out the salient facts so comprehensively that there is no need for me to rehash them. Regrettably, I do not agree with his reasoning and conclusion. Hereunder are my reasons for my dissent.

[37] I pause to observe that the problem of vicarious liability of an employer for the wrongful actions of his/her employee's deeds is not novel. It has engaged our courts for many years. As the Canadian Supreme Court held in *Bazley v Curry*, [1999] 2 SCR 534, 1999 CanLII 692 (SCC) paras 11 and 12:

> 'The problem is that it is often difficult to distinguish between an unauthorized "mode" of performing an authorized act that attracts liability, and an entirely independent "act" that does not. Unfortunately, the test provides no criterion on which to make this distinction. In many cases, like the present one, it is possible to characterize the tortious act either as a mode of doing an authorized act (as the respondent would have us do), or as an independent act altogether (as the appellants would suggest). In such cases, how is the judge to decide between the two alternatives?
>
> One answer is to look at decided cases on similar facts. As Salmond and Heuston, *supra*, put it, "the principle is easy to state but difficult to apply. All that can be done is to provide illustrations on either side of the line" (p. 522). The problem is that only very close cases may be useful. Fleming observes that "[n]o statistical measurement is possible [of when such torts are properly said to be within the "scope of employment"], and precedents are helpful only when they present a suggestive uniformity on parallel facts" (J. G. Fleming, *The Law of Torts* (9th ed. 1998), at p 421).'

This is such a case.

[38] As my colleague correctly pointed out in the main judgment, the crisp legal question to be answered in this appeal is whether, on the facts of this case, the Minister was correctly found by the court *a quo* to be vicariously liable to Ms Booysen for the damages caused to her when she was unlawfully shot by Mr Johannes Mongo, her deceased boyfriend (hereinafter referred to as the deceased), who was a police reservist in the Minister's employment at the time.

[39] In upholding the appeal, my colleague reasoned as follows at para 14:

'The deceased's visit to Ms Booysen's home was solely for his own purposes. He was on a private visit to his lover's home to have supper. He was not there in his capacity as a police officer. Simply put, he had no official police function to perform. The visit was purely social during the time when he was permitted to be away from the police station for a meal break. It had nothing to do with his employer, any more than would have had anything with his employer's business if he had been sitting having a meal in a café or purchasing a take-away at a fast food restaurant.'

[40] Based on this, my colleague found that when the deceased shot Ms Booysen, he was not carrying out any official duties for the SAPS as he had gone to Ms Booysen's place as her boyfriend to have supper as it was his routine when doing night duty. In other words, he was on a frolic of his own. As a result, Ms Booysen and her family accepted him not as a police officer, but as her boyfriend. He sought to distinguish this case from *K v Minister of Safety and Security & others* (supra) and *F v Minister of Safety and Security & others* (supra) on the basis that Ms Booysen did not treat the deceased as a police officer but as her boyfriend at the time. Hence she did not repose her trust in him as a police officer.

[41] It is true as my colleague observed that the trust which the complainants in *K* and *F* had reposed in the police officers involved played a prominent if not pivotal role in the court's finding that the Minister was vicariously liable for the delicts committed by her employees. My colleague found that as the deceased went there in his private capacity to have supper, the element of trust does not arise, hence the basis for vicarious liability is absent. I do not agree.

[42] It is true as both *K* and *F* found that the public trust in the police service is essential for a credible and efficient police service. It is further true that, given the important role played by police officers in combating and preventing crime in our society, they enjoy a special place in the psyche of members of the public. As a result, the sight of a police officer clad in full police uniform, armed with a state-issued firearm and using a visibly marked police vehicle, would without fail, instinctively evoke a feeling of comfort and trust in most, if not all members of society. To members of society it matters not whether the police officer is on or off duty, or in a private dwelling or at public facilities like a restaurant, bank, a shopping mall or a shebeen. Members of society have all the good reasons to see such a police officer as a police officer who should be ready to act as a police officer at all times in line with the state's constitutional obligations to prevent and combat crime and, importantly to protect the public. This trust is not necessarily confined to the police officer concerned, but extend to the entire police service.

[43] It is furthermore important to bear in mind that police officers are not ordinary members of the public. They are people appointed as police officers after a careful process of selection followed by appropriate and intensive training in professionalism, discipline, self-control and skills, amongst others, in the use of firearms. These policemen and women are there to protect the public. Their relationship with the public is special and unique. In order to be able to execute their duties, they require amongst others, firearms. By giving them dangerous weapons like firearms to use, the Minister is creating enormous potential that some police officers might use them for purposes other than those for which they are lawfully

entitled to. It is therefore the responsibility of the Minister as the employer to ensure that his or her employees are properly trained and disciplined, and will not pose a danger to the public which they are expected to protect. Our people also expect this from a professional and disciplined police service. Should the police fail to execute their duties, it follows that the Minister should bear responsibility for them as employees. See *Von Benecke* (supra) at para 30.

[44] In explaining the liability of an employer where his employee has intentionally deviated from his or her duties, Watermeyer CJ enunciated the principle as follows in *Feldman* (supra) at 741:

'I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of master's legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if 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 and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm'.

[45] As Mogoeng J elaborated further on this approach in *F* para 45:

'Central to this passage is the proposition that employees are extensions of their employers. This is indeed so because, figuratively, employees are the hands through which employers do their work. Employers could therefore be held to have created a risk of harm to others should their employees prove to be inefficient or untrustworthy. That potential risk imposes an obligation on employers to ensure that the employees they hold as the hands through which they would serve or do business with others, would not do the opposite of what they are instructed and obliged to do'.

[46] However, Mogoeng J cautioned, correctly so, that 'should they, however, act inconsistently with the employers' core business, some link between the employers' business and the delictual conduct must be established before the employer may be held vicariously liable.' It is this link or nexus that is at issue in this appeal.

[47] It is common cause that all elements of the delict have been admitted. The remaining issue is that of the Minister's vicarious liability for the conduct of the deceased who shot Ms Booysen. No doubt this is a difficult question involving both a factual and legal enquiry. It is trite that in order to answer this question, a critical analysis and careful evaluation of facts is inevitable. The test must not be applied mechanically as it involves some policy considerations. This requires trial judges to investigate amongst others, the employees' duties, the supervision, if any exercised over him/her and to determine whether the nature of his/her duties created opportunities for wrongdoing. Importantly, this must be done through the prism of our Constitution and its values and norms.

[48] The following essential facts are not only common cause but are relevant to answering this vexed question: that the deceased was on duty on this fateful day for the whole night; that he was dressed in full SAPS uniform; that he was issued by the SAPS with a 9mm Parabellum semi-automatic pistol; that he had been assigned crime prevention duties; that he was required to attend complaints by members of the public; that he was driven to Ms Booysen's residence by a colleague in a police vehicle and that, the same colleague would have fetched him from Ms Booysen's residence so that he could continue with his official duties as a police officer, had he not committed suicide.

[49] As alluded to above, the kernel of the main judgment is that, at the time of the shooting, the deceased was not acting as a police officer because he had gone to

Ms Booysen's residence as her boyfriend to have supper. The conclusion is that having supper at his girlfriend's place in no way linked the deceased to his employment with the appellant. I do not agree. This is because it cannot be disputed that, for all intents and purposes, the deceased assumed his official duties as a police officer from the moment his shift started until the time when he would have knocked off officially the following day. Does the fact that at some stage during the night when he was still on duty, he had entered Ms Booysen's home to have supper, mean that he had ceased being a police officer? Assuming some intruders had broken into Ms Booysen's home whilst he was still there, would it have made any difference to his official responsibilities as a police officer that he was there to enjoy his supper? Would it make sense for him to say that he could not act as he was on a break? Certainly not. Naturally, he would have been expected to act as a police officer, use his powers to prevent, combat and arrest the intruders in line with his constitutional obligations. His failure to act to prevent an offence about to happen would expose the Minister, his employer to a possible law suit. Dressed as he was in full uniform, armed with an official firearm and being driven in an official police vehicle, he epitomized a police officer who was on duty in terms of his employment with the Minister to any reasonable person. How else would any person perceive him? Any reasonable person would not see him as anything other than a police officer.

[50] In *F*, para 52 Mogoeng J spoke of the normative components in the evidence which point to the existence of vicarious liability. In my view, these factors must be seen not in isolation but holistically to determine if they complement one another to an extent that they justify a finding of vicarious liability. None of them can be decisive of this intractable question on its own. Chief amongst these is the general duty of the police to protect the public from any violations of their constitutional rights. It is trite that women and children are the most vulnerable members of society. They are defenceless victims of the scourge of family violence which is so ubiquitous in our society. The police are catapulted to the forefront of this fight to protect women and children against abuse and violence. They are the avant-garde agency against crime as encapsulated in s 205(3) of the Constitution. They cannot be allowed in any

civilized society, particularly the one underpinned by the Bill of Rights, to do the opposite as it happened in this case.

[51] Undoubtedly, this is a classic case of a police officer, clad in full police uniform and on duty, who unlawfully used a state issued firearm, not to protect the public as he was constitutionally obliged to, but instead abused his constitutional powers and shot Ms Booysen. In short, he deviated from his lawful duties with the Minister, a so-called deviation case. Does the fact that the deceased shot his girlfriend at her home whilst he had gone there to have supper make any difference? Simply put, does the fact that the deceased was on a break to eat his supper, sever his links as a police officer with the Minister to a point where it destroys any basis of a possible vicarious liability on the part of the Minister? I think not. This is simply because Ms Booysen like all other citizens is entitled to protection by members of the police service against any violation of her constitutional rights. It is worse that it is the same police officer who, instead of protecting her, violated her constitutional rights. To absolve the Minister from liability in the peculiar circumstances of this case would be subversive of the constitutional duty on the part of the police service to protect the public. It is clear to me that by allowing the deceased to go about in full police uniform, with a police vehicle, armed with a police firearm and without any supervision, created a serious risk that he may misbehave. This case differs from *Minister of Safety and Security v Morudu & others* [2015] ZASCA 91, 2016 (1) SACR 68 (SCA) where the police officer involved was using an unmarked car. He belonged to a unit from which the public would ordinarily not expect protection, as he was a fingerprint expert. His primary duty was merely to investigate crime scenes for fingerprints.

[52] To my mind, the various normative facts set out above constitute a sufficiently close or intimate connection between the unlawful shooting of Ms Booysen by the deceased and his employment with the Minister, being to combat and prevent crime, and not to violate people’s constitutional rights. This finding, in the peculiar circumstances of this matter, is in line with the spirit, purport and objects of the Bill of

Rights, in particular the state's obligation through the police service to protect and promote Ms Booysen's right to dignity and her bodily and psychological integrity. Furthermore, this is compatible with the constitutional mandate of the SAPS as set out in s 205(3) of the Constitution.

[53] For these reasons, I would dismiss the appeal with costs, including the costs of two counsel, where employed.

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L O Bosielo

Judge of Appeal

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