CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 52/04

N K Applicant

versus

MINISTER OF SAFETY AND SECURITY Respondent

Heard on : 10 May 2005

Decided on : 13 June 2005

JUDGMENT

O'REGAN J:

[1] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal. Ms N K, the applicant, seeks damages in delict from the Minister of Safety and Security, the respondent, on the basis that she was raped by three uniformed and on-duty policemen after she had accepted a lift home from them when she found herself effectively stranded in the early hours of the morning. The case raises the scope of the vicarious liability of the Minister of Safety and Security under our law. Both the High Court and the Supreme Court of Appeal dismissed Ms K's claim on the grounds that the respondent was not vicariously liable for the conduct of the policemen which had caused the harm to Ms K.

The facts

[2] The parties agreed to a statement of facts and so no evidence was led in the High Court. According to that statement, on 26 March 1999, Ms K who was then just 20 years old, had a date with a boyfriend at the Bundu Inn. The arrangement was that he would take her home at the end of the evening. At midnight, when the Inn closed, they chose to go to another bar. There a former girlfriend of her companion turned up and an argument broke out between Ms K and her companion. Shortly after, she asked him to take her home but he refused and she decided to find a telephone to call her mother to collect her. There was no phone at the bar and she decided to walk to a nearby petrol station. It was now approximately 4 am.

[3] At the petrol station, the attendant informed her that the phone could not be used for outgoing calls. She did not accept this and begged him to let her use the telephone. At that time, a car drew up and a policeman in full uniform came into the shop. The policeman, Sergeant Nathaniel Rammutle, was the driver of the car which was an official South African Police Service vehicle. Sergeant Rammutle approached Ms K and, according to the agreed statement, addressed her in fluent Afrikaans to ask where she was going. She answered that she really wanted to go home and he offered to take her there. She accepted his offer and climbed into the car in which there were two other policemen, Sergeant Ephraim Gabaatlholwe and Sergeant Edwin Nqandela who were also both in uniform. All of the policemen were on duty at the time. She did not know any of the policemen.

[4] They started in the direction of her home. Ms K did not speak to them, but they spoke amongst themselves in a language she did not understand. She fell asleep for a short while. When she awoke, the car took a turn in the wrong direction. She immediately said to the driver that it was the wrong direction. But the policemen immediately told her to be quiet and a policeman's jacket was thrown over her head and held tight. She began to kick and scream and to ask what was happening, but the jacket was held tight and she was instructed to keep quiet. She struggled unsuccessfully to free herself. The jacket was pulled tighter and tighter over her head until she was struggling to breathe. She then begged the policemen to remove the jacket but she was punched sharply in the stomach and told that she would be killed if she did not stay quiet. Thereafter the car came to a halt.

[5] According to the agreed statement of facts, the applicant was then forced onto the back seat of the car, her denim jeans, underwear, socks and shoes were removed and she was raped by the three policemen in turn. She continued to struggle to no avail. After raping her, the policemen put some of her clothing back on her, and helped her out of the car. The police jacket was still held over her head. She was then thrown on the ground, the jacket removed and the three men climbed back into the vehicle which raced away.

[6] Looking around her, she realised she was in some bushes but did not know where she was precisely. She was hysterical and began to run. She soon realised that she was near her home and ran there, where she found her mother. A charge of rape

was laid and the three policemen were arrested, charged and convicted of rape and kidnapping on 25 May 2000 in the Johannesburg High Court. They were sentenced to life imprisonment for rape and ten years' imprisonment for kidnapping. They are still serving their sentences.

[7] It was admitted by the Minister that as policemen who were on duty, the three policemen had a general duty to ensure the safety of members of the public and to prevent crime. It was also accepted by both parties that the three policemen were aware of the provisions of section 10(1) of Special Force Order 3(A) of 1987 of the South African Police Services which prohibits the transport of unauthorised passengers in police vehicles. According to the standing order, the following passengers may be transported: persons who have been arrested; awaiting trial prisoners; sentenced prisoners; state witnesses; defence witnesses in certain circumstances; and people who, in the interests of the state, are assisting the police to carry out their official duties such as doctors.[1] According to the standing order, there is a further category of persons who may be transported ─

> "(aa) where a policeman encounters a collision or breakdown and there are persons who have sustained injuries or who are stranded,[2] he may, if necessary, use the government-owned vehicle to convey the injured, who may safely be moved together with their private property, free of charge, to a hospital or doctor on his authorised route, or to convey the persons who are stranded and their private property, free of charge, to an hotel or other place on his authorised route.

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[1] See subsections 10(1)(c)(i)-(vi) of the Special Force Order, SFO3A/87/10.

[2] This is the term used in the official English version. The Afrikaans version, included in the agreed statement of facts, reads "in die nood is".

> (bb) The names, residential addresses and the registration numbers of the vehicles of persons so conveyed must be entered in the vehicle register (SAP 132(b)).
> (cc) Although the State is indemnified by section 32 bis of Act 7 of 1958, it must, where at all possible, be explained to persons conveyed in accordance with sub-paragraph (1)(c)(vii) that they are being conveyed at their own risk." (footnote added)

Proceedings in the High Court and Supreme Court of Appeal

[8] Ms K instituted proceedings in the Johannesburg High Court against the respondent, as well as the three policemen, for damages arising from the conduct of the policemen in the early morning of 27 March 1999. She subsequently abandoned the claim against the three policemen who were in prison and unlikely to be able to pay any damages awarded against them. The remaining two parties agreed that the issue of the liability of the Minister should be determined first and that the quantum of damages investigation should await the outcome of that determination. The High Court dismissed Ms K's claim but granted her leave to appeal to the Supreme Court of Appeal.

[9] The Supreme Court of Appeal dismissed the appeal. It held that on the existing principles of vicarious liability the respondent was not liable for the damages suffered by Ms K. Scott JA for a unanimous Court reasoned as follows ─

> "The legal principles underlying vicarious responsibility are well-established. An employer, whether a Minister of State or otherwise, will be vicariously liable for the delict of an employee if the delict is committed by the employee in the course and scope of his or her employment. Difficulty frequently arises in the application of the rule, particularly in so-called 'deviation' cases. But the test, commonly referred to as the 'standard test', has been repeatedly applied by this Court. Where there is a deviation the inquiry, in short, is whether the deviation was of such a degree that it

> can be said that in doing what he or she did the employee was still exercising the functions to which he or she was appointed or was still carrying out some instruction of his or her employer. If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee."[3]

The Court held that on this test the Minister could not be held liable for the rape of the applicant. The Court also rejected arguments that the common-law rule should be developed in the light of the spirit, purport and objects of the Constitution and an argument that the Minister was liable because at the time of the rape, the policemen were simultaneously failing to perform their duty to protect the applicant. In ending, Scott JA noted that he had the "deepest sympathy for the appellant" but held that providing her with compensation was a matter for the Legislature and not the courts.[4]

[10] The applicant now seeks leave to appeal to this Court.

The application for leave to appeal

[11] The applicant bases her appeal on three arguments: the first is that the Supreme Court of Appeal erred in its application of the standard, common-law test for vicarious liability; the second is that if the Supreme Court of Appeal did not err in its application of the test, that test should be developed in the light of section 39(2) of the Constitution as the result does not accord with the spirit, purport and objects of the Constitution. The third argument is that the state should be held directly liable for its

[3] *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA) at para 4.

[4] Id at para 10.

failure to protect Ms K from harm. The respondent opposes the application for leave to appeal.

A constitutional issue?

[12] The first question that arises is whether the matter raises a constitutional issue. The respondent argues that it does not, at least to the extent that the case concerns the application of the principles of vicarious liability. It relies on this Court's judgment in *Phoebus Apollo Aviation CC v Minister of Safety and Security*.[5] In that case the appellant had sought to hold the Minister of Safety and Security liable in delict for damages arising from the theft by certain policemen of property of the appellant. It was common cause that the appellant was robbed of a large sum of money by an armed gang. The investigating officer traced the proceeds of the robbery but when he arrived he discovered that the money had already been taken by three dishonest policemen. It was not clear where these three policemen had come by the information concerning the location of the stolen money, but it was clear that they had not been responsible for the investigation of the robbery, nor had they been on duty when they went to recover it, nor had they been in uniform although they had induced the man guarding the money to hand it over because they were policemen.

[13] The appellant in that case did not argue either that the rules of vicarious liability were in conflict with the Constitution or that they failed to give effect to the spirit, purport and objects of the Bill of Rights. In the light of this and on the facts of

[5] 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC).

the case, the Court accordingly concluded that the matter did not raise a constitutional issue and dismissed the appeal. In doing so, Kriegler J on behalf of a unanimous court made the following remarks upon which the respondent relied ─

> "It is not suggested that in determining the question of vicarious liability the SCA applied any principle which is inconsistent with the Constitution. Nor is there any suggestion that any such principle needs to be adapted or evolved to bring it into harmony with the spirit, purport or objects of the Bill of Rights. On the contrary, counsel for the appellant expressly conceded that the common-law test for vicarious liability, as it stands, is consistent with the Constitution. It has long been accepted that the application of this test to the facts of a particular case is not a question of law but one of fact, pure and simple. The thrust of the argument presented on behalf of the appellant was essentially that though the SCA has set the correct test, it had applied that test incorrectly ─ which is of course not ordinarily a constitutional issue. This Court's jurisdiction is confined to constitutional matters and issues connected with decisions on constitutional matters. It is not for it to agree or disagree with the manner in which the SCA applied a constitutionally acceptable common-law test to the facts of the present case."[6] (footnotes omitted)

[14] In this case, however, both before this Court and the Supreme Court of Appeal, counsel for the applicant have contended that if, on a proper application of the ordinary common-law rule of vicarious liability, the state is not liable for the applicant's damages, then that rule should be developed. In developing the rule, the argument goes, the Court should consider the applicant's constitutional right to freedom and security of the person, and in particular, the right to be free from all forms of violence from either public or private sources[7] as well as her right to dignity,[8]

[6] Id at para 9.

[7] Section 12 of the Constitution─

> "(1) Everyone has the right to freedom and security of the person, which includes the right─

right to privacy[9] and right to substantive equality.[10] The applicant's argument was quite different, therefore, from the argument levelled in *Phoebus Apollo*. It is an argument, albeit in the alternative, that the common-law rule of vicarious liability should be developed to render it consistent with the spirit, purport and objects of the Bill of Rights, and in particular to vindicate the applicant's constitutional rights and provide a remedy to correspond to the respondent's alleged constitutional duties. I conclude, therefore, that the respondent is not aided by its reliance on the judgment in *Phoebus Apollo*.

(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent."

[8] Section 10 of the Constitution—

"Everyone has inherent dignity and the right to have their dignity respected and protected."

[9] Section 14 of the Constitution—

"Everyone has the right to privacy, which includes the right not to have—
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed."

[10] Section 9 of the Constitution—

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[15] Our Constitution requires a court when developing the common law to promote the spirit, purport and objects of the Constitution.[11] The pervasive normative effect of our Constitution was acknowledged by this Court in *Carmichele v Minister of Safety and Security and Another*[12] where it held that ─

> "Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:
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> > 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the Legislature, Executive and Judiciary.'
>
> The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by s 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed." (footnotes omitted)

In addition to section 39(2) of the Constitution, section 8 of the Bill of Rights makes it plain that the judiciary is bound by the provisions of the Bill of Rights in the performance of its functions.[13] The cumulative effect of these constitutional

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[11] Section 39(2) of the Constitution reads─

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[12] 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54.

[13] Section 8(1) of the Constitution.

provisions is to create an expressly normative legal system founded on the norms articulated in our Constitution.

[16] Section 39(2) of the Constitution requires courts when developing the common law to promote the spirit, purport and objects of the Bill of Rights. In *S v Thebus and Another*,[14] Moseneke J noted that there were at least two instances in which the need to develop the common law under section 39(2) of the Constitution could arise.

> "The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution." (footnotes omitted)

It is necessary to consider the difficult question of what constitutes "development" of the common law for the purposes of section 39(2). In considering this, we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common-law rule is changed altogether, or a new rule is introduced, and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule. There are at least two possibilities in such cases: firstly, a court may merely have to apply the rule to a set of facts which it is clear fall

[14] 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28.

within the terms of the rule or existing authority. The rule is then not developed but merely applied to facts bound by the rule. Secondly, however, a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.

[17] The question we should consider is whether one characterises such cases as development of the common law for the purposes of section 39(2). The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.

[18] In this case, the applicant argues that the Supreme Court of Appeal's conclusion that the principles of vicarious liability do not render the respondent liable in this case is inconsistent with the spirit, purport and objects of the Bill of Rights and that the principles of vicarious liability therefore need to be developed to hold the respondent liable. This argument raises a constitutional issue. The question of the protection of Ms K's rights to security of the person, dignity, privacy and substantive equality are of profound constitutional importance. In addition, it is clear and it was conceded by the respondent that it was part of the three policemen's work to ensure the safety and security of all South Africans and to prevent crime. These obligations arise from the Constitution[15] and are affirmed by the Police Act.[16] In the light of these obligations,[17] the Court said in *Carmichele* —

> "In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the *amicus curiae:*
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> > 'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.'
> >
> > . . . .
>
> South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of

[15] Section 205(3) of the Constitution provides that:

> "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[16] Preamble to the South African Police Service Act, 68 of 1995.

[17] Note that the interim Constitution was in force at the relevant time for the purposes of *Carmichele* as well as an earlier Police Act, 7 of 1958. The differences between the two Constitutions and the two pieces of legislation have no relevance for the purposes of this case.

> fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. 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."[18] (footnotes omitted)

[19] These comments are of equal importance in the present case. I am prepared to accept for the purposes of the discussion at hand that the Supreme Court of Appeal was correct in reasoning that the issue of wrongfulness in delict is not at issue in this case as it was in *Carmichele*.[19] The fact that the Court is concerned with a different aspect of the law of delict, the one pertaining to vicarious liability, does not mean that questions of constitutional rights cannot arise. The obligations imposed upon courts by sections 8(1) and 39(2) of the Constitution are not applicable only to the criterion of wrongfulness in the law of delict. In considering the common-law principles of vicarious liability, and the question of whether that law needs to be developed in that area, the normative influence of the Constitution must be considered.

[20] One last thing needs be mentioned here concerning *Phoebus Apollo*. The respondent sought to argue that this Court has no jurisdiction to consider the application of the principles of vicarious liability in this case. It based that argument on the dictum of Kriegler J in *Phoebus Apollo* that the application of the principles of vicarious liability to a particular situation had always been considered to be a matter of fact. The argument overstates the reasoning in *Phoebus Apollo* which, first, records

[18] *Carmichele* above n 12 at para 62.

[19] Above n 3 at para 8.

that the courts have traditionally viewed the common-law approach to vicarious liability to raise a factual question; and secondly, restates the principle that the application of law to facts, in itself, does not ordinarily raise a constitutional issue. For it to do so, some separate constitutional issue beyond the factual question must be raised. In that case, the appellant had sought to rely erroneously on the property clause, an argument the Court dismissed, but did not argue that the common-law rule of vicarious liability needed reconsideration. It was not necessary therefore for this Court to consider in *Phoebus Apollo* whether the principle that the application of the rule of vicarious liability concerned only a question of fact needed to be reconsidered in the light of the demands of the Constitution. In this case, on the other hand, the sharp issue of the constitutionality of the common-law rule is in issue. The question of whether the application of the principles of vicarious liability to a set of facts can properly be termed purely factual is a matter to which I now turn.

The application of the common-law principles of vicarious liability — purely a factual question?

[21] The common-law principles of vicarious liability hold an employer liable for the delicts committed by its employees where the employees are acting in the course and scope of their duty as employees. The principles ascribe liability to an employer where its employees have committed a wrong but where the employer is not at fault. As such, the principles are at odds with a basic norm of our society that liability for harm should rest on fault, whether in the form of negligence or intent. This tension between our ordinary rules for delictual liability and the special case of vicarious

liability is often discussed in judicial decisions[20] and academic writing.[21] The rationale for vicarious liability is to be found in a range of underlying principles. An important one is the desirability of affording claimants efficacious remedies for harm suffered. Another is the need to use legal remedies to incite employers to take active steps to prevent their employees from harming members of the broader community.[22] There is a countervailing principle too, which 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.

[22] Despite the policy-laden character of vicarious liability, our courts have often asserted, though not without exception,[23] that the common-law principles of vicarious liability are not to be confused with the reasons for them,[24] and that their application

[20] See, for example, *Bezuidenhout NO v Eskom* 2003 (3) SA 83 (SCA) at para 19; *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 833G-H; *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D) at 647G-H. See also the judgment of the Supreme Court of Appeal in this matter above n 3 at para 4.

[21] See, for example, Barlow *The South African Law of Vicarious Liability in Delict* (Juta, Cape Town and Johannesburg 1939), at 3-4; Neethling et al *Deliktereg* 4 ed (Butterworths, Durban 2002), at 389-391; Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (Butterworth, Durban and Pretoria 1983), at 12-13; Fleming *The Law of Torts* 9 ed (LBC Information Services, Sydney 1998), at 409-10; Atiyah *Vicarious Liability in the Law of Torts* (Butterworths, London 1967), at 12-15; Laski "The Basis of Vicarious Liability" (1916-17) 26 *Yale Law Journal* 105 at 105-7.

[22] See the discussion of these principles by McLachlin J in *Bazley v Curry* [1999] 2 SCR 534 at para 26ff, and Binnie J in *Jacobi v Griffiths* [1999] 2 SCR 570 at paras 68-76.

[23] See, for example, *Feldman (Pty) Ltd v Mall* 1945 AD 733 per Watermeyer CJ at 741, per Davis AJA at 784-5; *Grobler v Naspers Bpk en 'n Ander* 2004 (4) SA 220 (C) at 296F-297C (with reference to recent court decisions in the USA, UK, Canada, Australia and New Zealand); *Hirsch* above n 20 at 647G-649B.

[24] See, for example, *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) at paras 9-10; *Ngobo* above n 20 at 831G; *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A) at 211H.

remains a matter of fact.[25] If one looks at the principle of vicarious liability through the prism of section 39(2) of the Constitution, one realises that characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common-law test for vicarious liability and purge it of any normative or social or economic considerations. Given the clear policy basis of the rule as well as the fact that it is a rule developed and applied by the courts themselves, such an approach cannot be sustained under our new constitutional order. This is not to say that there are no circumstances where rules may be applied without consideration of their normative content or social impact. Such circumstances may exist. What is clear, however, is that as a matter of law and social regulation, the principles of vicarious liability are principles which are imbued with social policy and normative content.[26] Their application will always be difficult and will require what may be troublesome lines to be drawn by courts applying them.

[23] Denying that the principles bear such normative implications will only bedevil the exercise by rendering inarticulate, premises that in a democracy committed to openness, responsiveness and accountability[27] should be articulated. To this extent, at

[25] See, for example, *Bezuidenhout* above n 20 at para 23; *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA) at para 1; *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty)* Ltd 2001 (1) SA 372 (SCA) per Zulman JA at para 5.

[26] See the South African authorities above n 23; *Bazley* above n 22; *Jacobi* above n 22, and at paras 13-19 (per McLachlin J, dissenting); *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 at 336f-339h; *Lister and others v Hesley Hall Ltd* [2002] 1 AC 215 (HL) per Lord Millet at para 65. See also Fleming above n 21; Atiyah above n 21, at 171-2; Heuston and Buckley *Salmond & Heuston on the Law of Torts* 21 ed (Sweet & Maxwell, London 1996) at 431.

[27] Section 1(d) of the Constitution requires government to be committed to accountability, responsiveness and openness. This commitment is affirmed in sections 41(1)(c) and 195, which oblige all spheres of government

least, therefore, the principles of vicarious liability and their application needs to be developed to accord more fully with the spirit, purport and objects of the Constitution. This conclusion, however, should not be misunderstood to mean anything more than that the existing principles of common-law vicarious liability must be understood and applied within the normative framework of our Constitution, and the social and economic purposes which they seek to pursue. Nor does this conclusion mean that an employer will be saddled with damages simply because injuries might be horrendous. Rather, it implies that the courts, bearing in mind the values the Constitution seeks to promote, will decide whether the case before it is of the kind which in principle should render the employer liable. Whether the principles of vicarious liability themselves, as currently applied by the courts, require development beyond an acceptance of the normative character of their provenance and application will be considered later. I turn now to consider the existing principles of vicarious liability.

The common-law principles of vicarious liability

[24] The general principle of vicarious liability holds an employer responsible for the wrongs committed by an employee during the course of employment. The courts have held that as long as the employee is acting "within the course and scope of his or her duty"[28] or is "engaged with the affairs of his master" that the employer will be

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and all organs of state within each sphere to provide effective, transparent, accountable and coherent government. See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 74-78.

[28] See, for example, *Jordaan v Bloemfontein Transitional Local Authority and Another* 2004 (3) SA 371 (SCA) at para 3; *Bezuidenhout* above n 20 at para 3; *Minister Van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA) at para 5; *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at para 3; *Ess Kay* above n 24 at para 7; *ABSA* above n 25 per Zulman JA at para 5; *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) at para 5; *Sea Harvest Corporation (Pty) Ltd and*

liable.[29] The principle of vicarious liability is not peculiar to our common law, but is also to be found in customary law rules.[30] It is clear, therefore, that there is a deep-seated sense of justice that is served by the notion that in certain circumstances a person in authority will be held liable to a third party for injuries caused by a person falling under his or her authority.

[25] Many cases are straightforward. However, difficulties arise when the delict is committed in the course of a deviation from the normal performance of an employee's duties. The question the courts have to answer is whether the employee is still acting within the course and scope of his or her duty or is still engaged with the affairs of the employer. The difficulty is particularly pronounced where the deviation itself is intentional and even more pronounced where the deviation constitutes an intentional wrong, such as in the present case.

[26] It is clear that an intentional deviation from duty does not automatically mean that an employer will not be liable. In the early leading case of *Feldman v Mall*,[31] a driver of the appellant's vehicle had, after delivering the parcels he had been

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Another v Duncan Dock Cold Storage (Pty) Ltd and Another 2000 (1) 827 (SCA) at para 29; *Venter v Bophuthatswana Transport Holdings (Edms) Bpk* 1997 (3) SA 374 (SCA) at 386A; *Tshabalala v Lekoa City Council* 1992 (3) SA 21 (A) at 28A-B; *Feldman* above n 23 at 736; *Estate Van der Byl v Swanepoel* 1927 AD 141 at 146; *Mkize v Martens* 1914 AD 382 at 390.

[29] *Estate Van der Byl v Swanepoel* above n 28 at 146. See also *ABSA* above n 25 per Zulman JA at para 5; *Ngobo* above n 20 at 827A.

[30] Thus, a kraalhead is liable for all the delictual acts of inhabitants of the kraal. See the discussion in Bennett *A Sourcebook of African Customary Law for Southern Africa* (Juta, Cape Town 1991) at 351ff and Bekker *Seymour's Customary Law in Southern Africa* (Juta, Cape Town 1989) at 82ff.

[31] Above n 23.

instructed to deliver, driven to attend to some personal matters of his own during which time he consumed enough beer to render him unable to drive the vehicle safely. On his way back to his employer's garage, he negligently collided with and killed the father of two minor children. The case concerned a dependant's claim for damages and the Court, by a majority, held the employer to be vicariously liable.

[27] In his judgment holding the employer liable, Watermeyer CJ captured the test for vicarious liability in deviation cases as follows ─

> "If an unfaithful servant, instead of devoting his time to his master's service, follows a pursuit of his own, a variety of situations may arise having different legal consequences.
>
> (a) If he abandons his master's work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant's abandonment of his master's work amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master will naturally be legally responsible for that harm; there are several English cases which illustrate this situation and I shall presently refer to some of them. If, on the other hand, the harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master will not be responsible.
>
> (b) If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs."[32]

In a later passage in the judgment, Watermeyer CJ continued as follows ─

[32] Id at 742.

"This qualification is necessary because the servant, while on his frolic may at the same time be doing his master's work and also because a servant's indulgence in a frolic may in itself constitute a neglect to perform his master's work properly, and may be the cause of the damage."[33]

[28] Watermeyer CJ explained the reason for the rule as follows ─

"I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master's legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if 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."[34]

[29] Tindall JA formulated the approach in slightly different terms ─

"In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case a

[33] Id at 744.

[34] Id at 741.

> matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed."[35]

[30] In subsequent cases the approaches advocated by Watermeyer CJ and Tindall JA and concurred in by Fischer AJA in *Feldman*'s case were held to constitute the majority judgment of the Court.[36] Both judgments have been repeatedly cited in subsequent cases[37] and variations of the approach suggested have been adopted and applied.

[31] In *Minister of Police v Rabie*,[38] the Appellate Division had to consider a claim for damages arising from the wrongful arrest, detention and assault of the plaintiff. The member of the police force who had made the arrest was a mechanic, in plain clothes and not on duty at the time. 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 case thus concerned the clear deviation of an employee from the ordinary tasks of his employment. The question was whether his employer, the Minister of Police, was vicariously liable for the damages suffered by the plaintiff. Jansen JA, for the majority of the Court holding the Minister liable,

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[35] Id at 756-7. See also the dictum of Davis AJA at 784; and that of Greenberg JA (dissenting) at 762.

[36] See, for example, *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 130F-G; *African Guarantee & Indemnity Co Ltd v Minister of Justice* 1959 (2) SA 437 (A) at 446F-G.

[37] See, for example, the judgments referred to in the previous note and *ABSA* above n 25 per Zulman JA at para 5; *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* above n 28 at para 5; *Viljoen v Smith* 1997 (1) SA 309 (A) at 316B-F.

[38] Above n 36.

formulated a test for determining vicarious liability in such cases, which has since been applied in many cases. He reasoned as follows ─

> "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."[39]

[32] 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

[39] Id at 134C-E. Although Jansen JA's judgment was criticised in a later case, especially insofar as it appeared to adopt "creation of risk" as a material factor relevant to the determination of vicarious liability (*Ngobo* above n 20 at 832B-D), its statement of the standard test cited in this paragraph was not directly criticised (see *Japmoco* above n 25 at para 11). Indeed, the *Rabie* test has been applied in many cases since *Ngobo*. See, for example, *Minister van Veiligheid and Sekuriteit v Phoebus Apollo* above n 28 at para 10; *Japmoco* above n 25 at para 11; *ABSA* above n 25 per Zulman JA at para 5; *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* above n 28 at para 5.

what is "sufficiently close" to give rise to vicarious liability.[40] 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.

[33] It is instructive to note, however, that the test applied in *Rabie* although frequently applied, has not always been followed. Indeed, in this case, the Supreme Court of Appeal formulated the test somewhat differently to the *Rabie* test. It said that the question to be asked is whether the deviation is of such a degree that it can be said the employee is still exercising the functions to which he or she was appointed or still carrying out some instruction of the employer. Variations of the test have proliferated, and have resulted in uncertainty.[41] In my view, this is unsatisfactory. I shall return to the question of what the rule that should govern vicarious liability should be later in the judgment. First, it will be helpful to consider briefly the doctrine of vicarious liability as it has developed in other jurisdictions.

The law of vicarious liability in other jurisdictions

[34] As noted above, it is not only our law that has struggled to determine the proper ambit of the principles of vicarious liability and to apply them in a manner that is both

[40] See above n 39. See also *Rail Commuters* above n 27 at para 60 and *S v Basson* 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at paras 50-53 as to the distinction between purely factual and mixed fact and law questions.

[41] In a recent judgment of the Supreme Court of Appeal, as yet unreported, but drawn to our attention during the hearing, for example, the Supreme Court of Appeal formulated the test so as to ask whether the employee had failed to discharge a duty, and held vicarious liability to exist (*Commissioner for the South African Revenue Service and Another v TFN Diamond Cutting Works (Pty) Ltd* 070/04, 22 March 2005, at paras 8-9). Neethling's review of the test indicates that it has mutated over the years (above n 21 at 402-3), and Scott's statement that the courts have formulated specific rules from case to case bears out the protean character of the test (above n 21 at 133).

consistent and fair. There can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own. Counsel for the respondent argued that because our common-law principles of delict grew from the system of Roman-Dutch law applied in Holland, a province of the Netherlands, in the 17th century, we should not have regard to judgments or reasoning of other legal systems. He submitted that the conceptual nature of our law of delict, based as it is on general principles of liability, is different from the casuistic character of the law of torts in common-law countries. These differences, he submitted, render reliance on such law dangerous. Counsel is correct in drawing our attention to the different conceptual bases of our law and other legal systems. As in all exercises in legal comparativism, it is important to be astute not to equate legal institutions which are not, in truth, comparable.[42] Yet in my view, the approach of other legal systems remains of relevance to us.

[35] It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights.[43] It is clear that in looking to the jurisprudence of other countries, all the

[42] See, for example, the seminal article by Otto Kahn-Freund "On the uses and misuses of comparative law" (1974) 37 *Modern Law Review* 1.

[43] See section 39(2) of the Constitution above n 11.

dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.

[36] In the recent House of Lords decision, *Lister v Hesley Hall*,[44] the plaintiffs, who had been boarders at a private school for boys, were sexually abused by the warden in charge of the school's hostel. The school was held vicariously liable for the conduct of the warden even though it was clear that it constituted a gross deviation from his duties. The test established by Lord Steyn, after a careful consideration of the authorities, was whether the torts "were so closely connected with [the warden's] employment that it would be fair and just to hold the employers vicariously liable."[45] Lord Millett reasoned as follows ─

[44] Above n 26.

[45] Id at para 28. See also the approach adopted by Lord Clyde who held that –

> ". . . the essence of the decision seems to me to lie in the recognition of the existence of a sufficient connection between the acts of the employee and the employment. This in turn was explored by reference to various factors by reference to which the strength of the connection can be established." (At para 48.)

Lord Hobhouse too spoke of a connection between the wrongful conduct and the duties of the employee as follows –

> "Whether or not some act comes within the scope of the servant's employment depends upon an identification of what duty the servant was employed by his employer to perform. . . . If the act of the servant which gives rise to the servant's liability to the plaintiff amounted to a failure by the servant to perform that duty, the act comes within 'the scope of his employment' and the employer is vicariously liable. If, on the other hand, the servant's employment merely

> "The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys. . . . I would hold the school liable."[46]

[37] In each of their speeches, the Law Lords held therefore that although the conduct of the warden had been clearly a gross deviation, the conduct itself was sufficiently closely related to the obligations borne by the employer in respect of the children who were abused to render the employer liable.

[38] Similar issues have arisen in Canada and were considered by the Supreme Court in two judgments handed down on the same day, *Bazley v Curry*[47] and *Jacobi v Griffiths*.[48] Both cases concerned the vicarious liability of employers for the sexual assaults of their employees on children within their care. In a comprehensive and careful review not only of the existing legal principles, but also of the policy that underlies the doctrine of vicarious liability, McLachlin J in *Bazley's* case concluded

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> gave the servant the opportunity to do what he did without more, there will be no vicarious liability, hence the use by Salmond and in the Scottish and some other authorities of the word 'connection' to indicate something which is not a casual coincidence but has the requisite relationship to the employment of the tortfeasor (servant) by his employer". (At para 59.)

[46] Id at para 82.

[47] Above n 22.

[48] Above n 22.

that the proper approach to determining vicarious liability in these cases is the following ─

> "[C]ourts should be guided by the following principles:
>
> (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'.
>
> (2) The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice.
>
> . . . .
>
> (3) In determining the sufficiency of the connection between *the employer's creation or enhancement of the risk* and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
>
> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power."[49] (emphasis in original)

[39] This was a unanimous judgment of the Supreme Court of Canada holding a non-profit foundation vicariously liable for the conduct of one of its employees. The

[49] Above n 22 at para 41.

foundation had operated a children's residential care facility and the employee had been employed as a "substitute parent". The employee had sexually abused the children in his care. The Court held that –

> "[t]he opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition [the employee's] sexual abuse. The employer's enterprise created and fostered the risk that led to the ultimate harm. The abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished. Indeed, it is difficult to imagine a job with a greater risk for child sexual abuse. This is not to suggest that future cases must rise to the same level to impose vicarious liability. Fairness and the need for deterrence in this critical area of human conduct – the care of vulnerable children – suggest that as between the Foundation that created and managed the risk and the innocent victim, the Foundation should bear the loss."[50]

[40] In *Jacobi*, however, which also concerned the vicarious liability of an employer for the sexual abuse of children by an employee, the Court split and a majority held that on the test set in *Bazley*, the employer was not liable on the facts of that case. In that case, an employee of a non-profit organisation which organised group recreational facilities for children had abused children by enticing them outside of club activities outside of club hours to his home where he had abused them. The majority of the Court held that the activities of the employer were not sufficiently connected to the wrongs performed by the employee to result in the vicarious liability of the employer.

[50] Id at para 58.

[41] The respondent relied heavily on the United States case of *Primeaux v United States*[51] which it said was the only foreign case to be directly comparable on the facts to the case under consideration here. In that case, decided by the US Court of Appeals for the Eighth Circuit, an off-duty police officer returning from a work seminar in his government vehicle in the early hours of one morning encountered a woman walking along the road. She had abandoned her car because it was stuck in a snow-drift. He offered her a lift and then drove to a side road where he raped her. The question of the vicarious liability of the employer is governed in the US by the provisions of the Federal Tort Claims Act[52] in terms of which the government is liable if the employee was acting within the scope of his office or employment. A majority of the Court held, treating the question of whether the police officer was acting within the course and scope of his duty as a mixed question of fact and law, that —

> ". . . recent cases from other jurisdictions have concluded it is sufficiently foreseeable to a government employer that on-duty police officers will occasionally misuse their authority to sexually assault detainees. But this case is far different. The connection between Officer Scott's government employment and his sexual assault of Primeaux was simply too remote and tenuous to be foreseeable to his employer."[53]

In reaching this conclusion, the Court emphasised that the officer was "unarmed, out of uniform, and off duty, insofar as his law enforcement responsibilities were concerned."[54]

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[51] 181 F 3d 876 (8th Cir 1999).

[52] 28 USC §§ 1346(b)(1), 2671 et seq.

[53] Above n 51 at 882.

[54] Id

[42] However, it is important in considering this case to record that nearly half the court dissented (the court split 6:5) and the minority held that ─

> "The officer was also within the 'scope of employment' even as narrowly defined by the court. The officer was authorized to travel to a training session in New Mexico. During his return trip, he was receiving per diem and mileage. He was authorized to drive his assigned police car with red lights affixed on top. He testified that he thought it part of his duties to offer a stranded motorist a ride. Ms. Primeaux testified that Officer Scott approached her and turned on his red lights on the police vehicle. The district court found all of these facts to be true. To hold that Officer Scott, under these circumstances, was not acting within the scope of his employment is inexplicable."[55] (footnotes and emphasis omitted)

The decision was accordingly highly fact sensitive and there was a powerful dissent signed by nearly half the members of the court which must weaken its persuasiveness to us. Moreover, the facts of the case are distinguishable from the facts of the present case, particularly in view of the fact that the police officer was neither formally on duty, nor in uniform. Its persuasiveness is weakened, too, by the fact that it is clear that the provisions of the United States federal legislation are not directly comparable to our own rules. I cannot accept therefore that the respondent's reliance on this case can be dispositive of the case before us.

[43] This brief review illustrates that the problem of the vicarious liability of employers for sexual assaults committed by employees is one which is faced by legal systems in some other parts of the world. Courts have grappled with the need to

[55] Id at 887.

identify the circumstances in which employers will be liable for such assaults. It is interesting to note that the approach in the United Kingdom, in terms of which the courts ask whether there is a close link between the wrongful conduct of the employees and the business of the employer or the nature of the employment, is very similar to the test set in *Rabie*. The approach taken by the Canadian Supreme Court sets a similar objective test to be answered in the light of a range of factors. There can be no doubt that the jurisprudence of these jurisdictions will be of value in considering the development and application of our own rules of vicarious liability.

The development of the common law

[44] From this comparative review, we can see that the test set in *Rabie*, with its focus both on the subjective state of mind of the employees and the objective question, whether the deviant conduct is nevertheless sufficiently connected to the employer's enterprise, is a test very similar to that employed in other jurisdictions. The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.

Application to facts of this case

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

[46] The applicant's counsel argued that in order to determine whether the respondent was vicariously liable for the harm the applicant suffered, it is necessary to bear in mind that the conduct of the policemen comprised both a commission which was wrongful, the rape of the applicant, and an omission which was also wrongful, the failure to protect the applicant from crime. The Supreme Court of Appeal rejected this argument in the following passage ─

> "Counsel submitted, however, that a different test should be applied. He contended that once it was shown that the policemen were on duty when they gave the appellant a lift and that in offering to take her home safely they were acting within the course of their duties as policemen to prevent crime, then by the very act of deviating from those duties they rendered the respondent vicariously liable. In other words, it was the deviation itself that rendered the respondent liable and the degree of the deviation was wholly irrelevant. This is not the law and never has been; nor was counsel able

> to refer to any authority in support of such a novel proposition. In my view it is without merit."[56]

[47] In making the submission in this Court, applicant's counsel relied on the statement by Watermeyer CJ in *Feldman's* case, cited earlier,[57] that the fact that an employee's conduct is, on the face of it, purely in pursuit of the business of the employee, is not necessarily sufficient to ensure that the employer will not be liable. A further question will need to be considered and that is whether in pursuing his or her own interests, the employee will be neglecting the tasks required by the employer. If so, then the employer may nevertheless be liable. In his judgment, Watermeyer CJ gave the example of a railway gate keeper who, on a hot day, deserts his post to get refreshment, and while he is away an accident occurs. Watermeyer CJ noted that the "servant's indulgence in a frolic may in itself constitute a neglect to perform his master's work properly, and may be the cause of the damage."[58] In such circumstances, Watermeyer CJ implied the employer would be vicariously liable.[59]

[48] There can be no doubt that Watermeyer CJ's reasoning is correct and that to the extent that the Supreme Court of Appeal rejected this argument of the applicant in this case, it was mistaken. An employee can at the same time be committing a delict for his or her own purposes, and neglecting to perform his or her duties as an employee

[56] Above n 3 at para 6.

[57] At 742 of the judgment, above at para 27.

[58] At 744 of the judgment, above para 27.

[59] See the discussion of this precise example in Atiyah above n 21 at 264-5.

and this has been recognised by our courts, at the very least by Watermeyer CJ in *Feldman*. In this case it is clear that the delict for which the applicant seeks to hold the respondent liable is the rape by the three policemen. That rape was clearly a deviation from their duties. However when committing the rape, the three policemen were simultaneously omitting to perform their duties as policemen.

[49] The question of the simultaneous omission and commission may be relevant to wrongfulness in a particular case, but it will also be relevant to determining the question of vicarious liability. In particular, it will be relevant to answering the second question set in *Rabie*: was there a sufficiently close connection between that delict and the purposes and business of the employer?

[50] It is necessary now to apply the test set in *Rabie*, adapted in the light of the preceding discussion, to the facts of this case. As to the first leg of the test, it is clear that the three policemen did not rape the applicant upon the instructions of the respondent. Nor did they further the respondent's purposes or obligations when they did so. They were indeed, subjectively viewed, acting in pursuit entirely of their own objectives and not those of their employer. That conclusion is not the end of the matter.

[51] The next question that arises is whether, albeit that the policemen were pursuing their own purposes when they raped the applicant, their conduct was sufficiently close to their employer's business to render the respondent liable. In this

regard, there are several important facts which 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 their offer. In so doing, she placed her trust in the policemen although she did not know them personally. One of the purposes of wearing uniforms is to make police officers more identifiable to members of the public who find themselves in need of assistance.

[52] 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.

[53] Thirdly, the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their 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.

[54] In seeking to avoid this conclusion, counsel for the respondent pointed to the fact that the policemen were not permitted to transport ordinary members of the public in their car. It is true that the relevant paragraph of the standing order of the police stipulates that only people who have been injured or who have been stranded ("in die nood is") may be transported.[60] It may well be, however, as counsel for the applicant argued, that the transportation of the applicant if offered in good faith would not have constituted a breach of the standing order. The applicant was after all stranded in a big city at night on her own. She was at risk.

[55] Even were the transportation of the applicant to have been in breach of the standing order, however, it is clear that the fact that employees breach a rule of their own employment is not sufficient of itself always to avoid employer liability.[61] It

[60] Special Force Order 3(A) of 1987, above at para 7.

[61] See, for example, *ABSA* above n 25 per Zulman JA at para 5; *Estate van der Byl v Swanepoel* above n 28 at 145-6 and 151-2. The rule established in *South African Railways and Harbours v Marais* 1950 (4) SA 610 (A), and affirmed in *Bezuidenhout* above n 20 at para 19, that an employer is not liable where a driver, contrary to clear instructions, gives a lift to a friend who is subsequently injured through the negligent driving of the driver is not directly relevant to this case. It is clear that Ms K did not know the policemen and did not accept the lift

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. In this case, the applicant accepted assistance offered by the police. The fact that this may have been against standing orders is not sufficient on its own in view of the other factors already mentioned to mean that the respondent cannot be vicariously liable.

[56] Counsel for the respondent conceded that if the policemen had arrested the applicant and then raped her in circumstances otherwise similar to this case, the respondent would have been liable vicariously. He argued however that as the applicant had not been arrested in this case, no liability on the part of the respondent should arise. Although there can be no doubt that where police officers arrest or detain a person, and then assault that person, it is likely that the respondent would be liable, it does not seem to me that the converse should be true and that the respondent should not be liable where the assault is on a person who has not been arrested but has accepted an offer of assistance from the police. In this case, the applicant willingly accepted assistance from the policemen. Once in their car, when it became clear that they no longer intended to take her home safely, she struggled and sought to resist their attack. To conclude that, on the facts of this case the Minister is not liable, when it is conceded he would have been liable should Ms K have been detained on a reasonable suspicion of having committed an offence and then raped, would be absurd. It would be a conclusion quite at odds with our constitutional values and the

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in circumstances similar to either *Marais* or *Bezuidenhout*. It is not necessary to consider these cases further now.

values of our community. The concession, therefore, while rightly made, highlights the untenable nature of the respondent's argument.

[57] These factors mentioned by counsel for the respondent do not avoid the conclusion that there was a close connection between the wrongful conduct of the policemen and the nature of their employment. 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. When the policemen – on duty and in uniform – raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their employer. This close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.

[58] In the light of the conclusion to which I have come, namely that the respondent is vicariously liable for the conduct of the policemen, it is not necessary to consider the argument made by the applicant that the respondent was directly liable in delict to the applicant.

Costs

[59] The applicant has been successful in this Court and is therefore entitled to receive her costs, including the costs of two counsel where she was represented by two counsel, not only in this Court but also in the Supreme Court of Appeal, and the High Court.

Order

[60] The following order is made:

1. The application for leave to appeal is granted.
2. The orders of the Supreme Court of Appeal and the High Court are set aside, including the costs orders made by those Courts.
3. It is declared that the respondent is liable to the applicant for the damages suffered by the applicant as a result of the wrongful conduct of Sergeant Nathaniel Rammutle, Sergeant Ephraim Gabaatlholwe and Sergeant Edwin Nqandela in the early morning of 27 March 1999.
4. The case is referred back to the Johannesburg High Court to determine the quantum of damages in the light of this judgment.
5. Respondent is ordered to pay the costs of the applicant in this Court, the Supreme Court of Appeal and the High Court, such costs to include the costs of two counsel if two counsel appeared on behalf of the applicant.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of O'Regan J.

For the applicant: W Trengove SC and K Pillay instructed by Women's Legal Centre, Cape Town.

For the respondent: PF Louw SC and JA Babamia instructed by the State Attorney, Johannesburg.