

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**“IN THE HIGH COURT OF SOUTH AFRICA”
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 393/2015

In the matter between:-

REBECCA MOSEPELE

Plaintiff

And

CONSTABLE J K MOKGETHI

First Defendant

MINISTER OF POLICE

Second Defendant

JUDGMENT

GUTTA J.

A. INTRODUCTION

- [1] Plaintiff instituted an action against first and second defendant for damages suffered as a result of an alleged unlawful assault and rape committed by, first defendant Constable Mokgethi (the deceased) during the course and scope of his employment with the Minister of Police, second defendant.
- [2] First defendant was substituted by the executrix of his estate as he has passed away. On the day of the hearing the attorney of record for first defendant withdrew as first defendant's attorney and informed the Court that the executrix who is the deceased wife would not be participating in these proceedings.
- [3] The merits and *quantum* of the matter were separated by agreement between the parties in terms of Rule 33(4) of the Uniform Rules of Court and the trial proceeded on the merits of plaintiff's claim.

B. PLEADINGS

- [4] Plaintiff alleged that second defendant is vicariously liable for the delict of assault and rape committed by the deceased who was at the time of the commission of the offence employed by the South African Police Service (SAPS) as constable and stationed at Huhudi police station, Vryburg, North West.
- [5] Plaintiff alleged that on 2 September 2014 at Vryburg, the deceased assaulted her by threatening to shoot her with his official firearm and raped her by having sexual intercourse with her without her consent. At the time she was three months pregnant with her second child who was prematurely born on 17 February 2015 and passed away on 23 June 2015.

[6] In the plea, the deceased alleged *inter alia* that:

- 6.1 at all material times, he was off duty and not discharging his official duties with SAPS.
- 6.2 He denied raping plaintiff and alleged that he had consensual sexual intercourse with plaintiff on 2 September 2014.
- 6.3 He denied threatening to shoot plaintiff with his service pistol.
- 6.4 On 3 September 2014, plaintiff called him and advised him that her boyfriend forced her to lay a false charge of rape against him and that her boyfriend demanded that the deceased pay them an undisclosed amount of money before she withdrew the rape charge against him.

C. PLAINTIFF'S CASE

[7] Plaintiff, **Rebecca Mosepele**, a 27 year old woman testified that on 2 September 2015 she was employed at the Pick 'n Pay. At the time she was in a relationship with one Vusile Mabopa and was 3 months pregnant with his child. On 2 September 2015, she left work at 18:30 and walked to Shoprite where she purchased some items. As she was leaving Shoprite, she heard someone hooting in a silver Mercedes Benz and the person called her name, Rebecca. She realized it was the deceased. She said the deceased was wearing his police uniform. She knew that he was a police officer as she had on previous occasions lodged complaints at the police station against her abusive boyfriend and the deceased

was present at the police station. She did not know whether he was on duty.

- [8] The deceased asked her where she was going and she replied to the taxi rank. He offered to give her a lift as he said he was meeting someone at the taxi rank. She accepted the offer. She said she trusted him as he was a police officer. The deceased did not drive her to taxi rank but drove her to a house. When she realized that he was not driving in the direction of the taxi rank, she tried to open the door but it was locked. She argued with him and he produced his firearm and pointed the firearm at her head. At the house he opened two gates while keeping her locked in the vehicle. Thereafter he parked the vehicle near a backroom, He escorted her inside the room and pushed her on a bed and locked the door. He asked her to undress and she refused. He undressed her of her tights and her trouser. He put his firearm on top of the pillow. When she resisted, he pointed her with the firearm and said she should choose whether she sleeps with him or he shoots her. He didn't care that she was pregnant. He climbed on top of her and raped her. Later someone knocked on the door and he told her to stand up and get dressed. He requested directions to her residence and she refused to disclose. While driving she saw a security guard and told the deceased that he is her boyfriend and he should leave her with him. He left her with the security guard and drove off. She called her boyfriend and his phone was off. She then called Bontlwe and told her that she was raped. She went to the police station where she made a statement which was tendered into evidence. She was also taken to the hospital.

[9] The next day two male officers asked her to point out where the deceased resides and where she was raped. There were four male persons including the deceased outside the room. She pointed out the deceased. Photographs were taken of the scene. They then drove to the police station where two female police officers from Mafikeng took her statement. They interviewed her in the presence of the deceased and other officers. She also identified the firearm. Thereafter the police requested to meet her boyfriend who they questioned and they also interviewed Bontlwe. The police told her that she will be informed about the Court date. To date the police have not contacted her with the date for the trial.

[10] In cross examination she denied that the deceased had sexual intercourse with her with her consent. She confirmed that she met the deceased outside Shoprite at 19:00. A police SAP15, being the report by the commander with the names of the police officers who worked on 2 September 2014 was tendered into evidence. The times when the deceased was on duty was noted as 6:00 and was off duty at 18:00. It was put to her that the deceased had sexual intercourse with her when he was not on duty. She replied that he was wearing his police uniform.

D. ABSOLUTION FROM THE INSTANCE

[11] Plaintiff closed her case and second defendant applied for absolution from the instance. Mr Mmolawa, counsel for second defendant briefly submitted that the deceased was not on duty when he allegedly raped plaintiff and the second defendant cannot be held vicariously liable. He relied on **Minister of Safety and Security v Booysen**¹.

¹ 2016 (35) SCA 201 (9/12/16)

- [12] Counsel for plaintiff, Ms Zwiendelaar submitted that it might be so that he was not on duty but it is clear that plaintiff entered the deceased's vehicle because she knew he was a police officer and he was dressed in a uniform and she trusted him. Ms Zwiendelaar raised a constitutional argument that police officers have a constitutional duty to protect the community against crime and the trust plaintiff placed in him created a close enough link between his conduct and his employment. She relied on the Constitutional Court case of **F v Minister of Safety and Security**².
- [13] Ms Zwiendelaar submitted that a reasonable Court would come to the conclusion that plaintiff's trust in the deceased led to her placing herself in his care and he used this opportunity to commit a crime and failed to carry out his constitutional duty. As a result there is an intermittent connection between the delict committed and the employment with the SAPS.
- [14] After considering the submissions made by counsel, the evidence and the case authority referred to in particular the two Constitutional Court decision of **F v Minister of Safety and Security (F)**³; **K v Minister of Safety and Security (K)**⁴ *supra*, I dismissed the application for absolution from the instance and undertook to provide reasons in this judgment. My reasons follow hereinbelow.

² 2012 (1) SA 536 CC

³ 2012(1) SA 536 (CC)

⁴ 2005 (6) SA 419 CC

[15] The test for absolution from the instance at the end of plaintiff's case is well established. It is set out in the following passage from **Gordon Lloyd Page & Associates v Rivera and Another**⁵:

'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

"... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required or to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff. This implies that a plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no Court could find for the plaintiff. As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one. The test has from time to time been formulated in different terms, especially it has been said that the Court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff: Such a formulation tends to cloud the issue. The Court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a Court should order it in the interests of justice".

[16] The foregoing is the approach to be applied in determining whether or not plaintiff has crossed what has been referred to as the low threshold of proof that the law sets when a plaintiff's case is closed but defendant's is not⁶. It is necessary to have regard to and assess the evidence for that purpose. However, it should be borne in mind that as a general rule where absolution at the close of plaintiff's case is refused, a court should avoid unnecessary discussion of the evidence, lest it seem to take a view of its quality and effect that should only be reached at the end of the whole case⁷.

⁵ 2001(1) SA 88 (SCA) at 92E - 93A

⁶ *De Klerk v Absa Bank Ltd and Others* 2003(4) SA 315 (SCA) at paragraph 1

⁷ *Gafoor v Unie Versekeringsadviseur (Edms) Bpk* 1961(1) SA 335 (A) at 340D – G

[17] The two Constitutional Court judgments of **F and K** are relevant to both the application for absolution from the instance and the merits as set out fully hereinbelow. I refused the application for absolution, as I was of the view that there was evidence led by plaintiff upon which this Court applying its mind reasonably to such evidence could find for plaintiff. The evidence in brief was the following:

17.1 It was alleged that first defendant committed the assault and rape during the course and scope of his employment with second defendant. Plaintiff in her particulars of claim alleged that “Ter alle tersaaklike tye hiertol het die Eerste Verweerder opgetree in sy diensbestek met die Tweede Verweerder en in die uitvoering van sy pligte en werksaamhede en is die Tweede Verweerder derhalve middlelik aanspreeklik”. Hence the *onus* was on plaintiff to prove that the rape and assault was committed during the course and scope of the deceased's employment with the second defendant.

17.2 Plaintiff testified that the deceased was wearing his police uniform when he offered her a lift.

17.3 Plaintiff alleged that she knew the deceased because she had on previous occasions reported her boyfriend to the SAPS for assault and she knew the deceased from the police station.

17.4 Plaintiff alleged that she trusted the deceased.

17.5 Plaintiff alleged that the deceased threatened to shoot her with his firearm.

[18] In **K**⁸ *supra*, the Court adapted the test laid down in **Minister of Police v Rabie**⁹ to give effect to constitutional norms and objectives. The applicant claimed delictual damages from the Minister of Safety and Security because she was raped by three uniformed and on duty policemen, after she accepted a lift. The Court at paragraphs 32 held that:

“[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 what is “sufficiently close” to give rise to vicarious liability. It is in answering this question that Court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights. (own emphasis)

[19] The Court in **K** at paragraph 45 *supra* stressed that the test for vicarious liability in deviation cases depends on the facts of each case which needs to be applied. The test contains both a factual assessment (the question of the subjective intention of the perpetrators of the delict) as well as an objective consideration which raises a question of mixed fact and law, the objective question is whether the delict committed is “sufficiently connected to the business of the employer to render the employer liable”. In order to determine whether the

⁸ 2005 (6) SA 419 (CC)

⁹ 1986 (1) SA 117 (A)

second defendant was vicariously liable for the harm plaintiff suffered, it is necessary to consider whether the conduct of deceased comprised both a commission which was wrongful, (the rape) and an omission which was wrongful. (Failure to protect plaintiff from a crime). The question of the simultaneous omission and commission is relevant to the issue of wrongfulness.

[20] Rape is a deviation from the deceased duties as a police officer. In *casu*, the subjective element is met as the deceased was acting for his own purpose. The second question for consideration, was whether there was a sufficiently close connection between the delict committed by the deceased and the purpose and business of second defendant.

[21] The Court in **K**¹⁰, *supra*, in considering the second question of whether the conduct was a sufficiently close to the employers business to render defendant liable, at paragraph [51] – [53] held:

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

¹⁰ 2005 (6) SA 419 CC at [50], [51] and [52]

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. (own emphasis)

[22] From the foregoing it is clear that the omission is borne from the fact that the police officers failed while on duty to protect the applicant from harm.

[23] In **F** *supra*¹¹, the Court considered the question of whether the Minister of Safety and Security should be held vicariously liable for damages arising from the rape of a 13 year old girl by a policeman who was on standby duty. The Court held that:

“[41] Two tests apply to the determination of vicarious. One applies when an employee commits the delict while going about the employer’s business. This is the standard test. The other is where the wrongdoing takes place outside the course and scope of employment. There are known as deviation cases. The matter before us is a typical deviation case.

[50] As the Court stated in **K**, the objective portion of the two-stage test requires a Court to ask whether there is a sufficiently close connection between the wrongful conduct and the wrongdoer’s employment. This requires “explicit recognition of the normative content” of this stage of the test. The pivotal enquiry is therefore whether “there was a close connection between the wrongful conduct of the policemen and the nature of their employment.” That is the question that must be asked in determining the states vicarious liability in this matter”.

¹¹ 2012(1) SA 536 (CC)

[24] When considering **F** and **K** *supra* coupled with plaintiff's evidence and the fact that save for the SAP 15, there was no evidence that the deceased was not on duty. I was of the view that there was *prima facie* evidence that the deceased conduct comprised both a commission which was the assault and the rape and an omission which was wrongful as the deceased as a police officer had a duty to protect plaintiff from a crime. Further there was *prima facie* evidence of a close connection between the delict and the business of the second defendant as plaintiff trusted the deceased as he was a policeman and he wore his police uniform and carried his firearm. For the foregoing reasons, I dismissed the application for absolution from the instance.

E. SECOND DEFENDANT'S CASE

[25] The second defendant called **Tumelo Nikolas Gorogang** to testify. He is a warrant officer with the South African Police for 28 years. He said on 2 September 2014 he was stationed at Huhudi. He was the relief commander and was in charge of the members who were on duty. He started work at 6:00 until 18:00. His duties included completing a SAP15 which reflects what time members of the SAP are on duty and what time they leave.

[26] On 2 September 2014, he completed the SAP15 and noted that the deceased commenced work at 6:00 and left at 18:00. The SAP15 was handed in as exhibit. On the SAP15, the deceased signed when he reported in for duty and signed again when he left his duty. He said when a police officer leaves work, they are usually dressed in their police uniforms. Every police officer is issued with their own firearm and members of the SAP take their firearm with them when they leave as it is their personal issue.

F. COMMON CAUSE

[27] The following facts are common cause:

27.1 The deceased was not on duty at the time of the commission of the delicts of assault and rape against the person of the plaintiff. This was not plaintiff's case in the particulars of claim.

27.2 The matter is not a typical deviation case as the commission of the delicts of assault and rape by the deceased against plaintiff took place outside the course and scope of the deceased employment with the SAPS.

27.3 The deceased was acting for his own interests and purpose when he assaulted and raped plaintiff.

G. EVALUATION

[28] The common law principle 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 duties as employees. The principles ascribe liability to an employer where its employers have committed a wrong but where the employer is not at fault. The difficulties arise when the delict is committed in the course of a deviation from the normal performance of an employee's duties. In *casu*, a further important consideration is that the delict was committed when the deceased was not on duty. Hence the deviation was not committed during the course and scope of his employment.

[29] The only issue that this Court has to consider is whether the conduct of the deceased was sufficiently close to the business of second defendant to render second defendant liable for the damage sustained by plaintiff. This issue relates to the objective portion of the two-stage test referred to in the matter of **K** and it requires 'explicit recognition of the normative content' and it 'does not raise purely factual questions but mixed questions of fact and law'. Hence there are several interrelated factors which this Court must consider namely, 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 deceased being off duty, the role of the simultaneous act of the deceased's commission of rape and omission to protect plaintiff and the existence or otherwise of a sufficiently close link between the deceased's conduct and his employment.

[30] As stated *supra*, the Constitutional Court in **K**¹² developed the principles of vicarious liability to accord with the spirit, purport and object of the Constitution. The Court found that the test laid out in **Minister of Police v Rabie**¹³ was sufficiently flexible to incorporate the constitutional norms. In **K**¹⁴, the Minister admitted that as the policemen were on duty, they had a general duty to ensure the safety of members of the public and to prevent crime. The Court at paragraphs [51] – [53] and [57] said the following:

“[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

¹² 2005(6) SA 419 CC

¹³ 1986(1) SA 117 A

¹⁴ 2005(6) SA 419 CC

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”.

“[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”. (own emphasis)

- [31] Plaintiff has in terms of section 12(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") the right to freedom and security of her person which includes the right to be free from all forms of violence from either public or private sources and not to be treated in a cruel, inhuman or degrading way and has pursuant to section 12(2) of the Constitution the right to bodily and psychological integrity. It was submitted on behalf of plaintiff that her constitutional rights have been infringed by the assault and rape which were committed against her person by the deceased.
- [32] Policemen have a statutory and constitutional duty to prevent crime and protect members of the public. The constitutional role entrusted to the police and the role played by the police in nurturing the confidence and trust of the community is important and is relevant to the question of law when determining whether there was a sufficiently close link between the deceased's conduct and the purpose and business of the second defendant. As a policeman, the deceased had a statutory and constitutional duty to prevent crime and protect members of the public. As stated *supra*, the statutory and constitutional role cannot be considered in isolation as there are several interrelated facts which play an important role as found in **K** and referred to in **F**.
- [33] In **F** *supra*¹⁵, the applicant applied for leave to appeal the judgment of the SCA, which raises the question whether the Minister should be held vicariously liable for damages arising from the rape of a thirteen year old girl by a policeman who was on standby duty. The Court in **F** said that the conclusion

¹⁵ 2012(1) SA 536 (CC)

in **K** that the state was liable was based on the delictual omission of the on-duty policeman. The Court considered the issue of a policeman on standby duty and a policeman who is off duty and said the following:

“[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 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

[67] I accept that the distinction between a policeman who is on duty and one who is off duty is a relevant factor in determining the closeness of the connection between the wrongful act and the perpetrator’s employment. I do not accept, however, that it is determinative of whether the state may be held liable. Could we say that because a policeman is not on duty, he has no obligation as a policeman to protect a child against rape? I do not think so. The on-duty-off-duty discussion in this case is rendered less significant by the fact that a vulnerable young girl was led to believe that a policeman, whether on or off duty, assumed the responsibility to protect her or secure her safety. This was sufficient to cause her to let her guard down and place herself in his capable hands’. Generally, that would weigh in favour of rendering the state vicariously liable in the event of that trust being betrayed.

[68] In addressing the question of Mr van Wyk’s personal liability and his employer’s vicarious liability, it should make little difference that he was on standby duty, for which he was being paid. What matters is whether the trust placed in him as a policeman by a vulnerable member of the public, creates a sufficiently close connection between his delictual conduct and his employment. This I address later in this judgment. (own emphasis)

[34] In **Minister of Safety and Security v Booysen**¹⁶, Ms Booysen and the deceased were involved in an intimate relationship for at least six months. The deceased was a police reservist in the employ of the SAPS.

¹⁶ 2016 SCA 201 (9/12/16)

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 was on duty when he visited the home of Ms Booysen to have dinner. 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 not carrying out any official duties of the SAPS when he visited Ms Booysen's home. After dinner, the deceased without any warning, drew his service pistol and shot Ms Booysen in the face and promptly committed suicide by shooting himself too.

[35] Makgoka AJA writing for the majority in **Booyesen** considered **K** and **F** and the two questions to be asked in deviation cases in order for vicarious liability to be imposed. The majority held that there was not a sufficiently close link between the employee's act for his own interest and the purposes and business of the employer. The Court considered that:

- (a) When the shooting took place, the applicant and the deceased were not relating to each other as police officer and citizen but were lovers in a domestic setting.
- (b) The applicant confirmed during her testimony that she and the deceased had no relationship problems and had not argued before the shooting. The shooting was not foreseen either by the applicant or SAPS. There appeared to have been no sign at all that the deceased would have done what he did.

- (c) The applicant did not repose trust in the deceased due to his employment as a police reservist with the SAPS.
- (d) The applicant did not fall in love with the deceased because he was a police officer.
- (e) There was no situation which called upon the deceased to act as a police officer at the applicant's home.
- (f) There was no evidence that when the deceased was employed and issued with a firearm, the management of the SAPS was aware or should have been aware that this created a material risk of harm to the community.

[36] In **Booyesen**, SCA the majority in dealing with the facts that the deceased used a service pistol, was dropped off by a police vehicle and was wearing police uniform, held that all of those elements were weakened by the absence of trust between the parties. It held that since the deceased was not there in his official capacity and was there to enjoy dinner and the element of trust was absent, a sufficient link was not present and the Minister should not be held vicariously liable.

[37] In **Booyesen v Minister of Safety and Security**¹⁷ *supra*, the Constitutional Court refused the application for leave to appeal on the grounds that “the threshold requirement of jurisdiction has not been met”. The Court at paragraph [62] said the following:

“[62] The two-stage enquiry for the imposition of vicarious liability in deviation cases first set out in *Rabie* and as developed in **K** and **F** is now an established legal test. Vicarious liability matters involve a careful consideration and

¹⁷ 2018(6) SA 1 (CC) (27 June 2018)

weighing of the various factors set out in **K** and **F** to establish whether a sufficiently close link exists between an employee's conduct and the business of an employer. **K** and **F** expressly refer to factors as opposed to requirements and the weight to be accorded to each factor must inevitably be determined on a case by case basis. This flexibility inherent in the test will naturally lead to different factors being accorded different weights by different courts, but it is this very flexibility that has imbued the common law of delict with the values of the Constitution. As the applicant has not put forward an argument that the established test should be developed in order to afford greater weight to any one factor, this matter purely concerns the application of an established test. The threshold requirement of jurisdiction has not been met”.

[38] In **F** the Court at paragraph [48] said that “The employer could still be held vicariously liable if a connection exists between the conduct complained of and the business of the employer. That link must, however, be a real and sufficiently close one”. The Court said the facts of the case in **F** was more tenuous than in **K** where the police were on duty and in uniform and driving a marked police vehicle. The Court in **F** considered that the victim was a vulnerable child aged 13 and at paragraph [67] and [68] said the distinction between an on and off duty policeman is less significant because the victim is vulnerable and that this weighed in favour of rendering the state liable and that where a vulnerable woman or girl-child places her trust in a policeman whether he is on duty or off duty and his employment facilitated the abuse of the trust, the state may be held vicariously liable.

[39] The Court in **F** at paragraph [80] held that:

“[80] It is so that Mr van Wyk was not in uniform, that his police car was unmarked and he was not on duty but on standby. But his use of a police car facilitated the rape. That he was on standby is not an irrelevant consideration. His duty to protect the public while on standby was incipient. But it must be seen as cumulative to the rest of the factors that point to the necessary connection. He could be summoned at any time to exercise his powers as a police official to protect a member of the public. What is more, in that time and space he had the power to place himself on duty. I am therefore satisfied that a sufficiently close link existed to impose vicarious liability on Mr van Wyk's employer”. (own emphasis).

[40] Plaintiff relies on the following facts to submit that there is a sufficiently close link between the deceased's conduct and his employment namely, plaintiff trusted the deceased because she knew him to be a police officer, the deceased was wearing his uniform and the deceased produced his firearm. Although trust is an important factor. This fact cannot be considered in isolation and cannot overshadow the other factors. As the Constitutional Court in **Booyesen** said, that the weight to be accorded to each factor must be determined on a case by case basis.

[41] The question for consideration is whether the objective factors created a sufficiently close connection between the deceased delict and his employment. I am of the view, when considering the facts in *casu*, that plaintiff failed to show a real and sufficiently close link between the conduct of the deceased and his employment for the following reasons:

- a) The deceased and plaintiff were known each other before the time of the incident.
- b) The deceased's meeting with plaintiff was solely for his own purposes and interests. He offered to give her a lift to the taxi rank. Hence this was not related in any way to his works as a police officer.
- c) Although he was wearing his police uniform he was in a private vehicle and he was off duty.
- d) When he met with plaintiff, the deceased was not there in his capacity as a police officer, nor was he there to carry out any official duties as a police officer. He was not engaged in the

business of second defendant. There was no situation which called upon the deceased to act as a police officer when he met with the plaintiff.

- e) Plaintiff testified that she knew the deceased from the police station and she trusted him as he was a police officer. She said she did not know if he was on duty or not. There is no evidence that the deceased employment facilitated the abuse of trust.
- f) Plaintiff was neither a vulnerable woman nor a child. She voluntarily accepted a lift from the deceased.

[42] The next question for consideration is whether the deceased conduct in raping plaintiff constitutes a simultaneous commission and omission. The rape and the assault of plaintiff was the commission. In **K**, the Court found that the omission was the policeman failure 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 the case. The Court in **F** at paragraph [67] said “the distinction between a policeman who is on duty and one who is off duty is a relevant factor in determining the closeness of the connection between the wrongful act and the perpetrators employment”

[43] Although the Court in **F** recognised that there is a distinction between a policeman who is on duty and one who is off duty, the Court found that if the victim is vulnerable victim then the distinction is less significant. As stated *supra*, plaintiff is not a vulnerable woman who sought protection from the deceased.

[44] Accordingly I am of the view that the fact that the deceased was not on duty is not an irrelevant consideration, when considering it cumulatively to the rest of the aforestated facts. The minority Judges, Jacob J (Jafta J concurring) in

F also considered the issue of whether the policeman was on or off duty in more detail and said the following:

“156] The only question that must be determined in this case is whether, despite the fact that Mr van Wyk was not on duty at the time he committed the rape, the circumstances nonetheless lead to the conclusion that there was a sufficient connection between his wrongful acts and commissions and the business of the employer to render the employer liable. Something must now be said about the nature of the connection or link required. The connection must be reasonably strong, significant and relevant. A tenuous, irrelevant or insignificant connection will not do.

[164] It will have been noted that the fact that the policemen were on duty at the time of the simultaneous commission and omission was a significant factor in the evaluation in K. I accept without qualification that whether the policemen are on or off duty is not a decisive factor. This is because there may be circumstances in which the connection is sufficiently strong even though policemen are not on duty. A victim of the wrongful conduct of an off-duty police officer will necessarily have to go a longer way to establish the connection. I would say that the question of whether the person who commits the delict is on or off duty, though not decisive, is important. A court should not lightly hold the employer vicariously liable for the conduct of an off-duty police officer. In that event, the other factors must, in my view, be sufficiently strong to make up for the absence of the duty element. (own emphasis)

[45] This Court is aware that a finding in favour of plaintiff could open the floodgates to the state’s strict liability for delictual acts committed by every police officer regardless whether he is on or off duty and as stated *supra*, it is important to consider each case on its own merits. This word of warning was sounded by the Court in F at paragraphs [4], where the Court said, “In the event of the Minister being held liable, it would be necessary to ensure that the decision does not effectively give rise to state liability for all delictual acts committed by the police”.

- [46] In *casu*, as stated *supra*, the facts adduced by plaintiff are in my view not sufficiently close or real to find second defendant vicariously liable in circumstances when the deceased was off duty.
- [47] Having found that second defendant is not vicariously liable for the damages suffered by plaintiff, the only issue left for consideration is whether the deceased's estate is liable for the delict committed by the deceased.
- [48] Plaintiff issued summons against first and second defendant on 13 March 2015. After the close of pleadings the deceased passed away on 7 February 2017. The deceased was substituted by his wife, Ms L Mokgethi in her capacity as executrix of his estate as the first defendant. Service of the notice of substitution was effected on the first defendant personally on 12 March 2018. The executrix of first defendant estate, elected not to participate in the proceedings. She did not withdraw the defence but terminated the attorney's mandate on the day the trial commenced. The executrix attorney informed the Court that first defendant will not be participating in the proceedings and that she was prepared to accept the consequences of the Court's decision. Accordingly first defendant was not denied an opportunity of cross examining plaintiff and of putting first defendant's version before the Court. In such circumstances it cannot be said that first defendant's rights to a fair trial was violated or infringed.

[49] In **S v Nnasolu and Another**¹⁸ the Court said:

“[25] The importance of cross-examining on points in dispute was put as follows by Claassen j in *Small v Smith* 1954(3) SA 434 (SWA) at 438E – F, albeit in relation to a civil case.

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness’s evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.

Once a witness’s evidence on a point in dispute has deliberately been left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness’s testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever”.

[50] Plaintiff had to prove on a balance of probabilities:

- a) the act infringing her right. As stated in **Matthews vs Young**¹⁹ “there is no onus upon the defendant until the plaintiff has proved that a legal right of his has been infringed”;
- b) the fault element;

¹⁸ 2010(1) SACR 561 (KZP); See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000(1) SA 1 (CC) (1999 (10) BCLR 1059) paras 61 – 63 at 36J – 37E, *S v Boesak* 2000(1) SACR 633 (SCA) (2000 (3) SA 381) at 647 e – 648h (SA at 397F – 398I) and *S v Boesak* 2001(1) SACR 1 (CC) (2001(1) SA 912; 2001(1) BCLR 36”.

¹⁹ 1922 AD 492 at 507

- c) the nature and extent of the damage suffered by her as a result of the infringement of her legal right; and
- d) the casual connection between the damage suffered by her and the act infringing on her legal right.

[51] Plaintiff testified in support of her claim against first and second defendant. Although first defendant raised a defence of consensual intercourse in his plea, there was no evidence led by first defendant to refute or gainsay plaintiff's evidence that she did not consent to have sexual intercourse with the deceased and that the deceased assaulted and raped her. During cross-examination on behalf of second defendant, it was put to plaintiff that she and the deceased were lovers, that she and the deceased had agreed to meet each other on the day in question and that she consented to having sexual intercourse with the deceased. Plaintiff in her testimony denied the aforesaid statements. Accordingly I am of the view that plaintiff proved on a balance of probabilities that the deceased assaulted and raped her.

[52] Plaintiff claims patrimonial and non-patrimonial damages. Previously the common law only allowed claims for patrimonial losses to be transmitted to a deceased estate. The common law did not, however, generally allow the estate of a deceased person to sue a wrongdoer for non-patrimonial losses that was suffered by the deceased or a person to sue the deceased's estate for non-patrimonial losses. The exception to this rule is that if the deceased or a person had already commenced the required legal action, and if the legal action had reached "*litis contestatio*" before death, then the claim or the defence is transmitted to the deceased person's estate and it can be pursued. The stage of *litis constestatio* is usually reached when the pleadings

have closed, namely once the issues in dispute have been identified by the parties through the exchange of the required Court documents. In *casu*, the legal action between the parties had reached *litis contestatio* before the deceased death.

[53] In the case of **Nkala and Others v Harmony Gold Mining Company Limited and others**²⁰ the Court considered various foreign legal positions and held that the South African common law had failed to keep pace with the procedural development in the law. The Court developed the South African common law as it applies to the transmissibility of claims for non-patrimonial (general) damages. It altered the law to make it so that a claim for non-patrimonial (general) damages is transmissible to a deceased person's estate provided that the deceased person or the person instituting action against the deceased's estate had merely commenced with the legal action. The Court therefore removed the requirement that the Court proceedings must have reached "*litis contestatio*". The practical effect of this judgment is that claims for non-patrimonial (general) damages are now transmissible once legal action has been commenced.

[54] Accordingly, first defendant is liable in her representative capacity as executrix of the deceased estate for the patrimonial and non-patrimonial damages suffered by plaintiff as a result of the commission of the delicts of assault and rape against her person by the deceased.

²⁰ 2016(5) SA 240 GLD

H. ORDER

[55] In the result,

55.1 Plaintiff's claim against first defendant for judgment is granted with costs on an undefended scale.

55.2 Plaintiff's claim against second defendant is dismissed with costs for second defendant.

N. GUTTA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 29 AUGUST 2018

DATE OF JUDGMENT : 15 NOVEMBER 2018

ADVOCATE FOR PLAINTIFF : ADV ZWIEGELAAR

ADVOCATE FOR DEFENDANT : ADV MMOLAWA

ATTORNEYS FOR PLAINTIFF : NIENABER & ATTORNEYS

ATTORNEYS FOR DEFENDANT : MOTSHABI & MODIBOA ATTORNEYS