

VICARIOUS LIABILITY FOR INTENTIONAL DELICTS – THE CONSTITUTIONAL FACTOR CLINCHES LIABILITY

Von Beneke v Minister of Defence 2012 5 SA 225 (GNP);
Minister of Defence v Von Beneke (115/12) [2012] ZASCA 158

1 Introduction

The law of delict has recently (hopefully) seen the conclusion of the saga surrounding the determination of the true juristic basis of an employer's liability for intentional wrongs committed by an employee during the performance of his or her duties as an employee – particularly in the field of state liability. It was finally settled in the majority judgment in *F v Minister of Safety and Security* (2012 1 SA 536 (CC)) that vicarious liability is the true foundation of this type of liability, despite strong contrary opinion in this regard (the latter being reflected in the judgment of one of the concurring judges in that case, Froneman J, as well as in the preceding majority judgment of the supreme court of appeal (*Minister of Safety and Security v F* 2011 3 SA 487 (SCA)); on this judgment and its preceding judgments see *inter alia* Scott “Middelike aanspreeklikheid van die staat vir misdadige polisie-optrede: die heilsame ontwikkeling duur voort” 2011 *TSAR* 135; Neethling “Vicarious liability of the state for rape by a police official” 2011 *TSAR* 186; Neethling and Potgieter “Deliktuele staatsaanspreeklikheid weens polisieverkragting” 2012 *Litnet Akademies* <http://litnet.akademies.co.za/Article/deliktuele-staatsaanspreeklikheid-weens-polisieverkragting>).

Since the first judgment was delivered in the ground-breaking case of *Carmichele*, and particularly after judgment was given in the so-called “K cases”, a considerable amount of academic writing, in which widely diverging opinions are reflected, has emerged. (On *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA), *Carmichele v Minister of Safety and Security* (Centre for Applied Legal Studies Intervening) 2001 4 SA 938 (CC), *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C) and *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) see, (apart from the most recent editions of the standard textbooks on the law of delict) *inter alia* Roederer and Grant “Law of delict” 2001 *Annual Survey* 317; Neethling and Potgieter “Toepassing van die grondwet op die deliktereg” 2002 *THRHR* 265; Leinius and Midgley “The impact of the constitution on the law of delict: *Carmichele v Minister of Safety and Security*” 2002 *SALJ* 17; Pieterse “The right to be free from public or private violence after *Carmichele*” 2002 *SALJ* 27; Roederer and Grant “Law of delict” 2003 *Annual Survey* 297; Carpenter “The

Carmichele legacy – enhanced curial protection of the right to physical safety: a note on *Carmichele v Minister of Safety and Security*; *Minister of Safety and Security v Van Duivenboden*; and *Van Eeden v Minister of Safety and Security*” 2003 *SAPL* 252; Pretorius “Law of delict” 2004 *Annual Survey* 290; and Fagan “Reconsidering *Carmichele*” 2008 *SALJ* 659. On *K v Minister of Safety and Security* 2005 3 SA 179 (SCA) and *K v Minister of Safety and Security* 2005 6 SA 419 (CC) see in general Scott “*K v Minister of Safety and Security*” 2006 *De Jure* 471; Calitz “The close connection test for vicarious liability” 2007 *Stell LR* 451; Wagener “*K v Minister of Safety and Security* and the increasingly blurred line between personal and vicarious liability” 2008 *SALJ* 673; Fagan “The confusions of *K*” 2009 *SALJ* 156; and Du Bois “State liability in South Africa: a constitutional remix” 2010 *Tulane European and Civil Law Forum* 139.) In spite of the judicial and academic debate concerning the true juristic basis of an employer’s liability in cases such as those just mentioned, it is suggested that one can now proclaim, with a considerable measure of certainty, that the true basis of state liability in cases of intentional wrongdoing by an employee in the course of his or her employment has finally been settled in our law by the majority judgment of the constitutional court in *F v Minister of Safety and Security* (*supra*), in which it was held that the liability of the state (employer) was vicarious, and not of a direct nature (depending on an actionable omission by the employer). This state of affairs is to be attributed to the recent extension of the so-called “standard test” (expounded in earlier case law such as *Estate Van der Byl v Swanepoel* 1927 AD 141 150; *Feldman (Pty) Ltd v Mall* 1945 AD 733 774; and *Minister of Police v Rabie* 1986 1 SA 117 (A) 134D-F), by means of which a court has to establish one of the prerequisites for an employer’s vicarious liability, *viz* that the employee who committed the delict should have done so in the course and scope of his or her employment. This extension was occasioned in the constitutional court judgment of *K v Minister of Safety and Security* (par 32 and 44) in which O’Regan J pointed out that where an employee has subjectively disassociated himself or herself from the affairs of the employer, and a court has to decide whether, objectively speaking, a sufficiently close link will still exist between the actions of the employee and the business of the employer, the questions that need to be answered are not “purely factual questions”, but mixed questions of fact and law:

“The questions of law it raises relate to what is ‘sufficiently close’ to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights” (par 32).

“[The objective element] 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” (par 44).

From these dicta it is manifestly clear that the constitutional court did not develop a “new” test in the *K* judgment in addition to the time-honoured standard test, but merely developed the law to “enrich” and “expand” that test in order to serve the needs of justice in a constitutional dispensation. This was expressly stated as follows by Mogoeng J in the majority judgment of the constitutional court in *F v Minister of Safety and Security* (550H): “All these elements [referring to the normative components mentioned by O’Regan J] complement one another in determining the State’s vicarious liability in this matter.” This in fact demonstrates that the judgment of O’Regan J in *K* will in future always be of paramount importance in determining

the scope and ambit of the activities performed by an employee for which his or her employer will have to accept delictual liability of a vicarious nature. It is suggested that no single case in which the state is the defendant on account of a delict committed by one of its employees will in future be considered without properly accounting for the requirements set in *F v Minister of Safety and Security*. (For a more recent reference to and application of the expanded standard test *à la K*, see *eg Kasper v André Kemp Boerdery CC* 2012 3 SA 20 (WCC) par 32-34; on this judgment, see Scott “*Kasper v André Kemp Boerdery CC*” 2012 *De Jure* 189.)

2 Facts

The parties to this case placed a stated case before the court *a quo*. By mutual agreement the issues of quantum and liability were separated under rule 33(4) of the Uniform Rules of Court. The crucial dispute between the parties hinged on whether the agreed facts justified the court in holding the state (represented by the minister of defence) vicariously liable for the conduct of one of its employees, Jacob Motaung.

During a robbery in 2003 one Vusi Mahlangu shot and wounded the plaintiff and killed his partner with an R4 assault rifle. At some stage before 2002 the body of this rifle had been stolen from the SA national defence force at TEK base in Pretoria by unknown employees of the defendant, or as a result of the wrongful and negligent conduct of unknown employees of the defendant, and it subsequently fell into Mahlangu’s hands. During the course of 2002 and early 2003 Motaung was responsible for the safekeeping and storage of various lethal infantry weapons, *inter alia* R4 assault rifles, at the 4th SA Infantry base at Middelburg, Mpumalanga. During this period Motaung supplied Mahlangu with R4 rifle parts, ammunition and magazines, enabling the latter to render the stolen rifle operable and thus to use it to injure the plaintiff.

The plaintiff’s claim rested on two grounds. In the first place, it was alleged that the unlawful conduct of the defendant’s employees at the TEK base gave rise to the plaintiff’s damage, but due to a total lack of information on the precise nature of this claim (*eg* whether the unknown employees were acting in the course and scope of their employment with the defendant) this cause of action was abandoned. The trial thus proceeded on the sole basis of the second ground, *viz* that the defendant was vicariously liable for the unlawful conduct of Motaung.

It appeared that subsequent to his attack on the plaintiff Mahlangu had been shot dead by the police and that his co-robbers were arrested and convicted of murder, attempted murder and armed robbery. For obvious reasons the plaintiff opted not to institute civil proceedings against those criminals and to seek his fortune exclusively from the deeper pocket of the state. (For more detail, see the judgments of the Gauteng North high court par 1 and 3-9; and of the supreme court of appeal par 3-9.)

3 Judgments

3.1 Judgment of the Gauteng North high court

Applying O’Regan J’s judgment in *K v Minister of Safety and Security*, referring to *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* and *Feldman (Pty) Ltd v Mall*, distinguishing the judgment of the supreme court of appeal in *Minister of Safety and Security v F* (subsequently

overturned by the constitutional court in *F v Minister of Safety and Security*) and comparing the judgments in *Minister of Safety and Security v Van Duivenboden* (2002 6 SA 431 (SCA)) and *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* (2003 1 SA 389 (SCA)), Tuchten J *inter alia* concluded as follows:

“In the present case the relevant omission of Motaung is that he failed to perform his duty to preserve the weapons and equipment of the defence force from being used for purposes other than those sanctioned by law, as he was obliged to do pursuant to the lawful orders given to him and the principles in s 2 of the Defence Act, which are expressly made binding upon persons in Motaung’s position. The safekeeping of these weapons and equipment is at the core of the duty undertaken by Motaung.

This being so, I conclude that there is a sufficient connection between the conduct of Motaung and the purposes and business of the defendant, to render the defendant vicariously liable to the plaintiff for the conduct of Motaung, which caused the plaintiff to suffer damages [*sic*]” (par 18 and 19).

The court accordingly declared Motaung’s conduct wrongful and held the defendant to be liable for the damage suffered by the plaintiff as a result of the robbery (the issue of *quantum* to be determined at a later stage) (par 20).

3.2 Judgment of the supreme court of appeal

Relying heavily on the judgment of O’Regan J in *K v Minister of Safety and Security* and Mogoeng J in *F v Minister of Safety and Security*, Heher JA (with Malan, Theron, Wallis JJA and Saldulker AJA concurring) dismissed the minister’s appeal with costs, expressing himself as follows:

“It appears that there was, on the facts of the stated case, an intimate connection between Motaung’s delict and his employment. First, he abstracted the equipment and ammunition while under a positive duty to preserve and care for the items in question; second, it is the most probable inference that the opportunity to make away with them arose from the opportunity provided by the scope of his duties without which he would have possessed neither access to them nor knowledge of the means to avoid such security controls as the defence force must have put in place.

That the risk should fairly fall on its creator when the public is exposed to weaknesses in its systems or frailties in its personnel is merely a reciprocal to the powers that the defence force exercises

For the foregoing reasons the conclusions of the court *a quo* cannot be faulted” (par 25-27).

In the light of the court’s conclusion (in par 27), it is clear that the judgment of the court *a quo* retained its effect and that it should therefore also be subjected to scrutiny.

4 Critical evaluation

4.1 Judgment of the Gauteng North high court

4.1.1 Introduction

In stark contrast to the long judgments delivered in virtually all of the recent cases reported in respect of an employer’s vicarious liability where an employee caused harm in an intentional way, Tuchten J substantiated his decision in the present matter in scarcely more than two pages. Having regard to the fact that the thorny issue at the centre of this kind of case – *viz* whether it is at all possible to hold an employer liable where the positive damage-causing act of the employee in question is so far removed from his or her duties that it cannot even be regarded as an improper way

of performing them – has now been firmly settled by the constitutional court in judgments such as *K v Minister of Safety and Security* and *F v Minister of Safety and Security*, this can certainly be expected. One can surely come to the conclusion that the “dust has finally settled” after a prolonged period of uncertainty and that vicarious – and not direct – liability (specifically that of the state) in this kind of case is to be regarded in our law as the true basis on which an employer will be forced to reimburse a plaintiff who suffered damage and/or injury as a result of such intentional wrongdoing. It has been pointed out that the alternative – *viz* direct in contrast to vicarious – basis of liability mooted by Froneman J in *F v Minister of Safety and Security* (par 87-149) is in terms of the reigning system of *stare decisis* not to be regarded as a possible ground of state liability in the type of case at hand (Scott 2012 *TSAR* 553 *sqq*). This entails that any investigation into the possible existence of *culpa* on the part of the employer in order to endeavour to establish delictual liability would be superfluous and even erroneous.

4.1.2 Establishing vicarious nature of liability

As could be expected, counsel for the defendant relied on the defence that the deviant behaviour of the errant employee constituted a “frolic of his own” (a phrase originating from the English case of *Joel v Morrison* (1834) 6 C&P 501 503 and introduced into South African law in the *locus classicus* of *Feldman (Pty) Ltd v Mall* 743-744), totally unrelated to the business of his employer, thus absolving the latter from delictual liability. The court then touched on an interesting further aspect of the matter: in accepting that the employee, Motaung, had been fully aware of the fact that his behaviour would enable the robber, Mahlangu, to commit a crime, it could be said that Motaung was an accomplice to the crime of robbery, which entails intention as a form of fault on Motaung’s part. This had in fact been the core of the defendant’s plea in endeavouring to point out that Motaung had totally disassociated himself from his employer’s business. This led Tuchten J to comment as follows:

“Counsel [for the defendant] accepted that the strange consequence of his submission was that the defendant would have been liable if the plaintiff had established negligence on the part of Motaung, but should escape liability if the case is evaluated on the footing that Motaung’s fault constitutes *dolus*. ... Counsel’s submission is therefore that foreseeability arises twice in the present context: firstly when Motaung’s conduct is evaluated to determine whether Motaung would have been liable to the plaintiff, and secondly when the issue of vicarious liability is evaluated” (par 11).

It would appear that Tuchten J identified “foreseeability” with fault in either of its forms, namely negligence and intent (although it is customary to confine foreseeability in the context of fault solely with negligence, seeing that the first tier of the time-honoured test for negligence – in terms of the recognised test formulated in *Kruger v Coetzee* (1966 2 SA 428 (A) 430E-F) – is the question whether the *diligens paterfamilias* in the shoes of the defendant would reasonably have foreseen the harm caused by the defendant).

In respect of counsel’s submission that the employee would be personally liable to the plaintiff for the damage he had sustained in the robbery, the court expressed full agreement, mentioning that the basis of liability is to be found in the employee’s fault – either negligence or intent. The reason submitted in support of this conclusion, is the fact that in South Africa the “predominant, if not the only” motive for the unlawful acquisition of assault rifles is the commission of crimes such as armed robberies (par 12). From a theoretical point of view it would thus appear that the court interpreted “foreseeability” in two senses: first, as an element of negligence

(*culpa*), where one deals with the *objective* notion of foreseeability of the reasonable person and, secondly, as an element of *dolus eventualis*, where one deals with the question whether a person *subjectively* foresaw the possibility of ensuing harm. It is suggested that if the court's twofold application of the concept of foreseeability is not kept in mind, confusion might be created in the mind of the reader (in particular the inexperienced student relying on the "ordinary" meaning of words).

Dealing with counsel's submission that "foreseeability arises again" in the context of vicarious liability (par 12), the court obviously evaluated the theoretical basis of vicarious liability as such. In rejecting the submission, the court left no doubt that fault on the part of the employer has no part whatsoever to play in establishing an employer's vicarious liability. In formulating this well-established truth (which has to my mind already gained the status of a patent truism) Tuchten J referred to the leading case of *Feldman (Pty) Ltd v Mall* (741) in declaring (par 13):

"[V]icarious liability is founded upon the public-policy consideration that, if the servant is about the affairs of the master, then *by that fact* the employer is bound to see that his affairs are conducted with due regard for the safety of others. It follows that once the employee is fixed with liability, then, if the test for vicarious liability is satisfied, the liability of the employer will follow regardless of whether the master could have anticipated the nature of the harm that befell the plaintiff."

One can support this clear restatement of the basic principle underlying an employer's vicarious liability for the delicts of an employee wholeheartedly. It simply reiterates the fact that this type of liability is to be regarded as strict liability in its purest sense. Furthermore, it is well worth calling again to mind the theoretical basis established in *Feldman (Pty) Ltd v Mall* (741) for this type of liability, namely the creation of *risk* by the employer (which, as is well known, does not constitute an independent basis of an employer's liability: see Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* (2010) 370-371 and the case law referred to in n 149; see also § 4.2.6 below).

4.1.3 Statutory measures introducing the constitutional factor

The court referred to certain sections of the constitution, 1996, and the Defence Act 42 of 2002 as having a particular bearing on the matter on which it had to decide (par 14). Section 200(2) of the constitution reads as follows (italics provided): "The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people *in accordance with the Constitution* and the principles of international law regulating the use of force."

The same principle is reflected in section 2(b) of the Defence Act, although compliance with the constitution is not expressly required in terms of this subsection. Section 2(b) provides as follows: "The primary object of the Defence Force is to defend and protect the Republic, its people and its territorial integrity."

Compliance with the constitution is expressly stated as a requirement of its own in section 2(c), although the court strangely failed to draw attention to this, opting instead to refer further only to section 2(g) in which the legislature indirectly requires compliance with constitutional principles in the form of an "afterthought" (probably *ex abundanti cautela*, having regard to the fact that this is the logical implication of an application of s 2(c)). Section 2(g) provides as follows: "The Defence Force must respect the fundamental rights and dignity of its members and of all persons."

The main body of section 2 enjoins the minister of defence and any other organ of state defined in section 239 of the constitution (the definition section), as well as all members of the defence force and any auxiliary service and employees, in exercising

any power or performing any duty in terms of the Defence Act, to have regard to the former principles (in addition to four other fundamental propositions).

The court then proceeded to point out that the “business” (applying the terminology adopted by the constitutional court in *K v Minister of Safety and Security* (par 49)) of the defence force is not merely to wage war, but that it is constitutionally mandated to see to it that its members do not abuse their training and access to arms against the people of South Africa, “and to see to it that its engines of destruction are used only for constitutional purposes” (228I). It is suggested that this is a sound conclusion of the reading of the statutory measures referred to above and that this explains that the duty owed by the defence force to members of the public is in fact of a constitutional nature, representing the obverse of each and every member of the public’s fundamental rights (such as the rights to human dignity, freedom and security of the person etc). In this sense the table has solidly been laid for the court to apply the standard test, as developed by the judgment of the constitutional court in *K v Minister of Safety and Security*. In view of this, the following *dictum* appears utterly perplexing (par 15):

“It thus follows, in my view, that, at the factual level, it was certainly foreseeable by the defendant that the people of South Africa could suffer harm if the weapons of the defence force at the 4th SA Infantry base at Middelburg were not properly preserved, or deliberately placed in the hands of criminals. ... So, even if foreseeability is an issue in this context, its existence had been established.”

If this was meant as a reference to foreseeability as an element of either negligence or *dolus eventualis*, it constitutes a blatant contradiction of the court’s own earlier finding, with reference to *Feldman (Pty) Ltd v Mall* (741), that “the liability of the employer will follow regardless of whether the master could have anticipated the nature of the harm that befell the plaintiff” (228E); see the discussion under § 4.2.2 and § 4.2.6 below). Furthermore, in the sense that the court could have alluded here to the possibility that negligence in particular on the part of the employer is a requirement for vicarious liability, its formulation of such test is not in accordance with established principle: it is trite that “foreseeability by the defendant” is not the first tier of the negligence test, but indeed “foreseeability by the reasonable person (*diligens paterfamilias*)”. Finally, the court’s reference to *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* (par 19) as authority for this proposition holds no water, as the *dictum* quoted by Tuchten J (229B) from that case merely refers to an additional reason for imposing delictual liability on the state in cases of omissions by state employees, based on policy considerations (namely that “there is no other practical and effective remedy available to the victim of violent crime”). On the whole it would appear that the court endeavoured to sit on two chairs, the one being the (correct) option of vicarious state liability as a form of strict liability (which the court had already accepted earlier), the other being either vicarious liability with a fault basis (which would fly in the face of existing theory), or direct state liability for which fault would always be a requirement (which basis has finally been discredited in the majority judgment of the constitutional court in *F v Minister of Safety and Security supra*). This aspect of the otherwise clear and logical judgment of Tuchten J can therefore not be commended.

4.1.4 Distinguishing of *F* and application of *K*

For an obvious reason the present case was distinguished on the facts from *F v Minister of Safety and Security*, namely that the employee in that case was an off-

duty policeman, whereas the employer in the present case committed the wrongful actions while on duty. However, Tuchten J applied that judgment of the constitutional court as authority for holding that the standard test as it had been laid down in the constitutional court judgment of *K v Minister of Safety and Security* should be applied. In other words, the court employed the former judgment as a “gateway” to applying the standard test which had been developed and restated in the latter (par 16).

In what can be described as the heart of the judgment where the constitutional factor and the “ordinary” rules pertaining to an employer’s vicarious liability converge – in particular regarding the application of the standard test to determine whether the employee was acting in the course and scope of his or her employment when damage was caused to the plaintiff – Tuchten J correctly followed the course mapped out in *F v Minister of Safety and Security* by O’Regan J in declaring (par 17, italics provided):

“As I understand the law as laid down in *K*’s case, if the indulgence of the employee in a frolic embodies a neglect to perform the employer’s work properly, the employer will be vicariously liable. The *simultaneous omission and commission*, which constituted the act of Motaung in providing the articles to Mahlangu, would not only be relevant to wrongfulness – which is not, on the arguments presented to me, an issue in this case – but may also be relevant to determining the question of vicarious liability in general and, in particular, the question whether there were [*sic*] a sufficiently close connection between the wrongful conduct and the purposes and business of the employer.”

Following the lead of the *F* judgment, where the police officials’ positive acts of rape had also been construed as a failure to perform their constitutional duties vis-à-vis members of public, the court then declared that the relevant omission in the present case had been Motaung’s failure to perform his duty to preserve the weapons, the safekeeping of which is “at the core of the duty” undertaken by him – which duty has its origin in section 2 of the Defence Act (and, more indirectly as earlier pointed out, in section 200(2) of the constitution) – as a result of the orders issued to him and principles embodied in the statutory measures alluded to, “which are expressly made binding upon persons in Motaung’s position” (229G). The logical conclusion that the court arrived at (par 19) is in full accordance with the normal deductive method of reasoning inherent in everyday legal argument, namely that it had been proved by the plaintiff that there is a sufficiently close connection between the actions of Motaung and the normal business of the defence force to render the defendant vicariously liable to the plaintiff for Motaung’s conduct. This simple, uncomplicated method of applying the standard test as it was restated in *K v Minister of Safety and Security* is to be commended. It is suggested that the ultimate result arrived at by Tuchten J reflects what the constitutional court had in mind when it expanded the standard test to reshape it in order to meet the needs of our modern constitutional dispensation.

4.1.5 A belated attempt to negate legal causation

In the fashion of an “afterthought”, the court briefly dispensed with a rather futile argument presented on behalf of the defendant, namely that “the cases do not go as far as holding an employer liable where the perpetrator of the act which immediately led to the harm – in the present case the armed robber Mahlangu himself – was not in the employ of the defendant” (par 19). Although the court does not spell this out emphatically, this argument entails an application of the defence of *novus actus interveniens*, viz where it is argued that the intervening conduct of a third party

breaches the nexus of legal causation between the conduct of the employee and the harm suffered by the plaintiff (see Van der Walt and Midgley *Principles of Delict* (2005) 207-208). Stated differently, such plea entails that the final detrimental result was not foreseeable. Tuchten J dismissed this suggestion without wasting too much ink, by merely comparing the sets of facts of two cases in which the defendants were held vicariously liable, notwithstanding the fact that the final perpetrators of the harm were not employees in their service, namely *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* and *Minister of Safety and Security v Van Duivenboden*. It is suggested that any attempt of this kind to raise a plea of lack of legal causation in cases of this kind is bound to founder, seeing that most instances where defendants are held liable for so-called “pure economic loss” occasioned through their neglect of a duty, are cases where a third party ultimately causes direct harm to the plaintiff. There are virtually dozens of cases that can be quoted as authority for this proposition (see, eg, Neethling and Potgieter *Law of Delict* 290-297; Loubser, Midgley *et al The Law of Delict in South Africa* (2009) 224-229; Boberg I *The Law of Delict: Aquilian Liability* (1984) 103-149).

4.2 Judgment of the supreme court of appeal

4.2.1 Introduction

Following the lead of the court *a quo*, Heher JA wrote a brief judgment, the bulk of which deals with the issue of vicarious liability (par 12-27) and causation (par 28), which is to be expected in the light of the fact that the court rejected the appeal and stated that “the real dispute between the parties was whether the agreed facts justified the court in holding the Minister vicariously liable for the acts and omissions of its employee, Jacob Motaung” (par 2). The court declined to make findings on several other issues previously raised in the trial court and emphatically stated that it would restrict its judgment to the questions of vicarious liability and (legal) causation (par 11). The following discussion will thus focus on these two issues only.

4.2.2 The original standard test for vicarious liability

Referring to *Minister of Law and Order v Ngobo* (1992 4 SA 822 (A) 833G-H) and the constitutional court judgment in *K v Minister of Safety and Security* (par 21), Heher JA drew attention to the fact that the pre-constitutional standard test to determine vicarious liability “might not have provided a remedy in this case”. Although the court’s reference on this point to *K* does not, in my view, warrant such a conclusion (there O’Regan J merely provided an introduction to her extended discussion of vicarious liability, in essence pointing to the fact that such liability is not fault based), the stark difference between judgments such as *K* and *F v Minister of Safety and Security (supra)* and the *Ngobo* case clearly demonstrates the validity of the conclusion arrived at. In that case the minister of law and order escaped liability where shots fired by an off-duty policeman had killed the plaintiff’s son and the court subsequently held that there had not been a close enough connection between the act of the off-duty police official and the business of his employer to render the latter vicariously liable. One can rightly assert that this “shift” has only recently occurred in the judgment of the constitutional court of *F v Minister of Safety and Security* (where the actions of an off-duty detective were imputed to the state).

Without formulating the standard test at all, Heher JA then proceeded (par 13) to apply it. After pointing out that, *subjectively* viewed, Motaung had entirely disassociated himself from his employment and its concomitant duties, he focused

his attention on the application of the *objective* tier of the test, namely to ascertain whether there had been a close enough connection between Motaung's conduct and the business of his employer. This discussion falls into two stages, *viz* a pre-constitutional and a constitutional one. Regarding the first, the court opined that the theft and removal of parts of the assault rifle "formed no part of his duties and there was no link between his own interests (as realised by the theft) and the business of his employer (*ibid*) and that application of the pre-constitutional standard test would absolve the employer/defendant from vicarious liability. Interesting in this regard is the court's opinion (based on the judgment of Harms JA in *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 1 SA 372 (SCA) 3821-383C) of the relevance of the form of fault attaching to the relevant conduct of the errant employee, after considering counsel's submission that the theft in question can be equated with a culpable (*viz* negligent) neglect of duties (*ibid*):

"There is in my view a clear distinction between a negligent performance of a task entrusted to an employee, for which the employer must usually bear responsibility, and conduct which is in itself a negation of or disassociation from the employee/employer relationship. The theft committed by Motaung falls into the second category."

It is noteworthy that this conclusion represents a statement of fact to which the court *a quo* (par 11; see § 4.1.2 above) even referred to as a "strange consequence" of counsel's submission. In the light of later developments, this issue will not be pursued further.

4.2.3 Introduction of the "K test" as applied in the *F* case

In direct contrast to his above-mentioned exposition of the objective phase of the standard test, Heher J then pointed out that this cannot nowadays "be the end of the matter" (par 14). Posing the question whether a rule such as the present does not require development (*viz* in terms of section 39(2) of the constitution), he expressed himself as follows (*ibid*, italics provided):

"In answering the question the normative values of the constitution direct the policy that must influence the decision and they do so in relation to the objective element of the test, ie the closeness in relationship between the conduct of the employee and the business of the employer. ... *It is no longer necessary, if the constitutional norms so dictate, to limit the proximity to those cases where the employee, although deviating from the course or scope of employment, is nevertheless acting in furtherance of the employer's business when the deviation occurs.*"

This evidences in a very lucid way the court's conviction that development of the standard test has already been achieved. In its ensuing *ratio decidendi* the court then proceeds (par 15) to substantiate this development from a constitutional perspective, commencing with the judgment of Mogoeng J in *F v Minister of Safety and Security* (par 76), where that court emphasised that "[t]he establishment of this connection must be assessed by explicit recognition of the normative factors that point to vicarious liability". In the *F* case the court presented a full overview of these normative factors, which were also referred to as "normative components" (see par 51-81). They were the following five (in respect of an employee of the South African police service): (a) the constitutional duties of the state; (b) the trust placed by the general public in the police service; (c) the value to be attached to the fact whether the employee was on or off duty; (d) the role of depicting the same conduct as a positive act and an omission; and (e) the existence or not of a sufficiently close connection between the employee's conduct and the employer's business (for a

discussion of which see Scott 2012 *TSAR* 548-552). In essence these components seem to have been kept in mind *mutatis mutandis*, having regard to the fact that the defendant in the present case was the minister of defence, that the relationship of trust between the police and the population is not reflected in the relationship between the armed forces and the public (seeing that policing is not one of the normal functions of members of the defence force) and that there was no issue at all in respect of the employee in the instant case being off duty. The only of these components thus remaining for application by the court were (a), (d) and (e). Attention will now be focused on the extent to which the court considered these factors.

4.2.4 Statutory measures reflecting the constitutional factor

Heher JA commenced this part of his judgment by remarking on the similarities of the constitutional foundations of the police service (he used the outdated term “force”, with its unfortunate historical connotations) and the defence force, adding thereto that “the emphasis on constitutional norms and the appropriate relations with the citizenry of this country are matters common to the security services in question” (par 16). This fully aligns the type of case under discussion with the judgments dealing with the vicarious liability of the minister of safety and security (nowadays again the minister of police), which fact is emphasised by the court’s reference to the dictum from the judgment of *F v Minister of Safety and Security* (550I) in terms of which “[t]he state has a general duty to protect members of the public from violations of their constitutional rights”.

The court then proceeded to supply a catalogue of statutory measures, casting its net extremely wide to capture measures of a very general as well as of a more specific nature, in order to build a constitutional basis for the duties attaching to the defence force. Apart from section 200(2) of the constitution and section 2(b) and (g) of the Defence Act already referred to above in respect of the judgment of the court *a quo* (see § 4.1.3 above), the following statutory measures were quoted (par 17-23):

- (a) Section 198(a) of the constitution (the first principle governing the security forces, couched in very broad terms): “National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.”
- (b) Section 199(5) of the constitution (dealing with the conduct of the security forces): “The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law.”
- (c) Section 200(1) of the constitution (a general provision regarding the establishment of a defence force): “The defence force must be structured and managed as a disciplined military force.”
- (d) Section 50(1) of the Defence Act (of a more specific nature regarding safety) provides that the rights of defence force members or employees may be restricted, in particular to ensure that the armed resources at its disposal are properly secured, preserved and controlled, which finds specific application in subsection (2):

“To the extent necessary for purposes of military security ... members and employees may from time to time be subjected to –

- (a) Searches and inspections;
- (b) Screening of their communications with people in or outside the department;
- (c) Security clearances which probe into their private lives ...”

- (e) Section 82(1)(z) of the Defence Act (dealing with the minister's power to promulgate various regulations): "The Minister may, by notice in the Gazette, make regulations regarding – ... the issue, care and disposal of arms, accoutrements, ammunition ... and equipment of the Department."

However, the reference to this section was of no practical effect, since the court declared that no such regulations were quoted and that it could not find any such regulations of its own accord. It was probably referred to merely to place more emphasis on the duty of the state to have effective measures in place to safeguard its arms and ammunition.

- (f) Section 20(a) of the Military Disciplinary Code, established under section 104 of the Defence Act 44 of 1957, renders theft of property belonging to the defence force a criminal offence rendering the offender liable for imprisonment for a maximum period of ten years. The relevance of this measure for the establishment of a stricter duty on the defence force is not clear.

The court then projected the impact of these wide-ranging statutory measures to the duties to which the defence force are subjected, drawing the following conclusion which deserves full support (par 24):

"The defence force is in this statutory context, a special kind of employer with a relationship towards its employees and the public which requires an approach to liability for the wrongful acts of those employees which is very different from that of an ordinary civilian employer."

The following factual considerations were referred to as additional reasons (factors) in reaching such conclusion: (i) the proper functioning of the defence force entails the possession of dangerous weapons which cannot be allowed to fall into the wrong hands; (ii) the defence force has the resources to prevent the occurrence of such undesirable consequence; (iii) it has the statutory powers to prevent such from happening; and, finally, (iv) it has the duty to educate its employees in the disciplines required to minimise that risk.

4.2.5 Simultaneous commission and omission

It is evident from Heher JA's judgment that he is in full agreement with the notion of one and the same action constituting a positive act and an omission at the same time, which has its origin in the judgment of O'Regan J in *K v Minister of Safety and Security* (par 53) and also received the blessing of Mogoeng J in *F v Minister of Safety and Security* (par 71-73). One can come to this conclusion on the basis of the cursory way in which he alluded to the role of the omission in the present circumstances (par 24, italics provided):

"It goes without saying that because of the enormous potential for public harm inherent in the inadequate preservation and control of arms the Department (through its responsible Minister) should not in general be able to avoid liability for wrongful *acts of commission or omission* of employees that it has appointed to carry out its duties to preserve and control its arms ..."

It is indeed with a measure of relief that one can view this very important aspect of the principles relating to the standard test for vicarious liability now being finally settled.

4.2.6 The "close connection" factor

As was previously pointed out in a critical evaluation of the judgment of Mogoeng J in *F v Minister of Safety and Security*, the last of the so-called "normative factors"

is in fact no normative component in its own right, but rather concerns the *concrete* application of the preceding factors to the facts of the case at hand (Scott 2012 *TSAR* 552). It is suggested that the same holds good for the judgment under discussion. Where the court held that “there was, on the facts of the stated case, an intimate connection between Motaung’s delict and his employment” (par 25), the reasons presented for this statement – *viz* that Motaung was under a positive duty to preserve and care for the arms in question and that his position presented him with the opportunity to steal some of the components of the assault rifle – are in fact no more than an application of several of the earlier mentioned factors, the most important of which is the constitutional nature of the duty which had rested on him. (The judgment indirectly supports such a conclusion, by having pointed out that in a Rhodesian case with similar facts – *Nel v Minister of Defence* (1979 2 SA 246 (R) 248F-249C) – factors such as the two just mentioned had not been regarded as relevant to a determination of the minister’s liability for thefts by defence force members, obviously because the constitutional dispensation in that country 33 years ago was not comparable to what we have in South Africa today.)

In the final paragraph dealing with the issue of vicarious liability (par 26), Heher JA followed the leading judgment of *Feldman (Pty) Ltd v Mall* (741), also strongly relied on by the court *a quo* (see § 4.1.2 above), in declaring that the “risk should fairly fall on its creator when the public is exposed to weaknesses in the system ...”. This is an unequivocal recognition of the strict nature of vicarious liability which accords with the modern notion of this type of liability of employers, as it has developed in our law over decades. Therefore the following dictum appears rather surprising:

“It should however be made clear that I have reached this conclusion in the limited perspective of the agreed facts. If the Minister were, for example, to have satisfied me that the defence force had taken all reasonable steps to prevent the theft of weapons by its responsible employees, appropriate to its constitutional responsibilities, I might have been persuaded that such was not a proper case for the extension of the remedy despite the closeness of the connection” (par 26).

This statement, clearly (and fortunately) *obiter*, flies in the face of the strict basis of vicarious liability, for what the court in fact declared here was that if no *blame* attached to the defence force by reason of its having performed all its relevant duties, it could well have escaped liability. This is tantamount to allowing liability based on *culpa* to enter through the back door, the same course taken by Tuchten J in the court *a quo*, when he introduced the concept of “foreseeability” (see § 4.1.3 above). Should this however be denied and the argument raised that such conclusion conforms to the principles attaching to risk-creation as a basis of delictual liability, the simple answer would be found in the judgments of *Carter & Co (Pty) Ltd v McDonald* (1955 1 SA 202 (A) 207B, 211H), *Minister of Law and Order v Ngobo* (831F-G) and *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* (2001 1 SA 1214 (SCA) 1219B) in which it was pointed out that the risk theory is a mere explanation of the principle of vicarious liability and not the formulation of the principle itself (see also Neethling and Potgieter *Law of Delict* 371).

4.2.7 The plea of a lack of legal causation

Regarding the defendant’s plea that no (legal) causation had been proved between Motaung’s delict and the harm suffered by the plaintiff at the hand of Mahlangu’s gang of armed robbers, the court dismissed this proposition out of hand, citing merely one leading case – *Minister of Police v Skosana* (1977 1 SA 31 (A) 34G) –

for holding that the former's delict was "linked to the harm sufficiently closely or directly for legal liability to ensue".

5 Conclusion

On the whole, both these judgments are to be welcomed. With the exception of attempts in *obiter dicta* by both courts to introduce the absence or presence of fault (*culpa*, foreseeability, blame) on the part of the employer as one of the factors to be considered when deciding on the issue of vicarious liability (see § 4.1.2 and § 4.2.6 above) – thereby undermining their otherwise exemplary expositions of the strict nature of an employer's vicarious liability (described in § 4.1.2 and § 4.2.6) – their strength lies in their pure application of the standard test as expanded by O'Regan J in *K v Minister of Safety and Security* and accepted in the majority judgment of Mogoeng J in *F v Minister of Safety and Security* (see in particular § 4.1.4 and § 4.2.3 above) in which constitutional considerations play a vital part in establishing a sufficiently close connection between the delict of the employee and the harm suffered by the plaintiff (see in particular § 4.1.3 and § 4.2.4).

Furthermore, it has been attempted to show that the formula developed by Mogoeng J in which "normative components" or "factors" play a role in establishing whether a close enough connection existed between the employee's delict and the plaintiff's harm, can be applied *mutatis mutandis* in cases involving other parties (§ 4.2.3-4.2.7). What has, however, been established with a great measure of certainty is that the recent developments in the law of vicarious liability pertaining to an employee's intentional delicts are on the whole restricted to employers burdened with constitutional duties, *viz* the state and organs of state (see § 4.2.4), and not to ordinary civilian employers. This is a fact well worth remembering.

Finally, judgments such as these demonstrate the extremely wide ambit of state liability in our modern constitutional dispensation. It has previously been remarked in respect of state liability for delicts committed by police officials – with reference to the first *F* judgment handed down in the Western Cape high court where the plaintiff had successfully sued the minister of safety and security for the harm she had suffered at the hands of an off-duty policeman – that the more precarious the position of members of the public become as a result of the misdeeds of such officials, the greater the state's constitutional duty becomes to restore the effects of such abusive behaviour (Scott 2011 *TSAR* 147). It is suggested that this proposition applies equally to the state in respect of all its employees. The effect of this would seem to be that the state is, for all practical purposes, gradually becoming a quasi insurer, indemnifying victims of delicts committed by civil servants. Notwithstanding any theoretical objections that one could level at such a turn of events, practical considerations suggest that this development may represent the last resort for offering legal protection to a citizenry under the growing threat of a failing civil service. For that reason alone such a development is to be heartily welcomed.

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