

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
DATE	SIGNATURE
4/3/2024	[Redacted Signature]

Case Number: 40975/2016

In the matter between:

UNDERWRITERS AT LLOYD'S OF LONDON

Plaintiff

And

THE MINISTER OF SAFETY AND SECURITY

Defendant

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 4 March 2024.

JUDGMENT

RANCHOD J

[1] Almost a decade ago, during the late evening of 27 April 2014 and the early morning of 28 April 2014, a well planned and executed robbery took place at the Witbank premises of a company named SBV. SBV conducts business, *inter alia*, by taking custody of cash on behalf of clients in the banking sector and providing secure cash handling, safekeeping, transport and related services to its clients in terms of written service contracts concluded between it and each of its clients.

[2] SBV had concluded service contracts with Standard Bank of South Africa Limited (Standard Bank), FirstRand Bank Limited (FirstRand), Nedbank Limited (Nedbank) and Absa Bank Limited (Absa).

[3] Each of the service contracts incorporated a written service level agreement (the SLA). The SLAs would *inter alia* provide to the relevant bank and to the retail customers of the bank the services contemplated therein, including cash management and retail cash processing services.

[4] In terms of a policy of insurance, which was in effect at the time of the robbery, the plaintiff (the Underwriters) undertook to indemnify SBV for losses of cash under the control or in the custody of SBV on behalf of its clients, including

losses sustained due to robbery, while in transit or at rest anywhere in the Republic of South Africa.

[5] The robbers broke into SBV's premises and stole R101 207 456.28 in cash which had been secured in a vault by SBV on behalf of all its banking clients including cash deposited by the banks' retail customers.

[6] At all material times Detective Constable Tamsanqa Gladstone Khubeka (Khubeka) and Warrant Officer Lekele Reckson Lekola (Lekola) were employed as members of the South African Police Service (the SAPS) by the defendant (the Minister). Khubeka was attached to the SAPS Trio Unit at the Witbank Police Station – a unit specially established to investigate, prevent and combat hijacking, murder and robbery in the Witbank area. Lekola was stationed at the Witbank Police Station. His duties included investigating, preventing and combatting crime in the Witbank area.

[7] Plaintiff alleges that at all relevant times before, during and after the robbery, Khubeka and Lekola: whilst acting in the course and scope of their employment and duties as members of the SAPS knowingly participated in planning, directing and in executing the robbery and in preventing the detection and proper investigation of the robbery as well as preventing and frustrating lawful attempts to recover the stolen cash.

[8] SBV became liable under the service contracts to indemnify each banking client and its retail customers for the loss they suffered as a result of the robbery. SBV duly indemnified each banking client and its retail customers in the total sum of R101 207 456.28. The amount is made up of each of the amounts deposited by the relevant banking client and its retail customers that was in SBV's custody at the relevant time and stolen in the robbery.

[9] The Underwriters' claim against the Minister is in terms of written contracts of cessions concluded between them and SBV and its banking clients. In the alternative, the Underwriters, having indemnified SBV, claim against the Minister by subrogation.

[10] It is the plaintiff's case that the Minister became vicariously liable to each of SBV's clients who suffered loss due to the robbery. Alternatively, the Minister became vicariously liable to indemnify SBV for its own loss, further alternatively, for the loss SBV suffered having indemnified its clients and their retail customers.

[11] The Minister contends that Khubeka and Lekola were acting on a frolic of their own hence he could not be held vicariously liable for their participation in the robbery.

[12] Several of the gang of robbers were apprehended, tried and convicted (including Khubeka and Lekola) in a criminal trial before Bam J on various charges in relation to the robbery.

The issues in dispute

[13] During oral arguments at the conclusion of the trial before me, I was informed by the Minister's counsel that the Minister does not dispute that the Underwriters may institute action based on subrogation. However, the Minister does not concede that he is vicariously liable for the delicts committed by Khubeka and Lekola.

[14] Insofar as quantum is concerned the Minister concedes to an amount of R93 919 298.47¹ and not R101 207 456.28. The reason appears to be that an amount of about R 6 000 000.00 was recovered said plaintiff's counsel in his opening statement at the commencement of the trial.

[15] The plaintiff sought certain admissions from the defendant in terms of Rule 37(4) of the Uniform Rules of Court in preparation for trial. The defendant admitted that both Khubeka and Lekola were each on duty "at any one or more time or times before, during and after the robbery".² A number of other admissions were made.

¹ Plaintiff's request for further admissions dated 16 September 2021 – Caselines 004 – 105 para 7.

² Plaintiff's request for admissions Caselines 004 – 29 para 25.7 and defendant's response Caselines 004 – 42 para 17.

[16] One of the plaintiff's requests for admission³ relates to the judgment of Bam J in the criminal trial. This was in September 2019 in a second request for admissions. There the plaintiff requested the following admissions from the defendant in terms of Rule 37(6)(g) ahead of the second pre-trial conference:

"Rule 37(6)(g): Plaintiff's request for admissions:

25. The plaintiff hereby requests the defendant to make the admissions sought below concerning the issues arising in paragraphs 19, 20, 20A and 21 of the Plaintiff's particulars of claim (as amended) and paragraphs 11, 12 and 13 of the Defendant's plea. The requests are made to narrow the issues and to curtail the trial and to give due consideration to the following facts and circumstances regarding the complicity of Khubeka and Lekola in the robbery, while they were at all relevant times members of the SAPS, with Khubeka further being a member of the SAPS trio unit in Witbank; the judgment by Bam J dated 7 February 2018 in *The State v Petra December Nkosi* and 15 others (case number CC212/15) (**the judgment**) in the High Court of South Africa, Gauteng Division, Eastern Circuit (Middelburg), (**the Criminal Court**); the findings of fact in the judgment; the rulings on the admissibility of evidence; the admissions by the accused during evidence; and to the further admissions recorded in paragraphs 4.3(a) to (p) of the judgment that were made on behalf of the relevant accused, including Lekola and Khubeka. Does the Defendant admit that:
 - 25.1 The robbery was executed during the evening of 27 April 2014 and the morning of 28 April 2014.
 - 25.2 In the course of the robbery, bank notes in the total sum of R101 207 456.28, alternatively (according to the admission recorded in the judgment at paragraph 4.3(a)) in the amount of R104 440 845.60 were stolen?
 - 25.3 The bank notes stolen during the robbery were secured in the vault by SBV on behalf of its banking clients and retail customers?
 - 25.4 Khubeka, Lekola, Accused 3, Accused 5, Accused 14 and Accused 16 were each convicted, amongst other crimes relating to the robbery with aggravating circumstances and of conspiracy to commit robbery with aggravating circumstances?
 - 25.5 Khubeka, Lekola, Accused 3, Accused 5, Accuse 14 participated at all relevant times before, during and after the robbery in planning, directing and/or executing the robbery?

³ Plaintiff's request for admissions Caselines 004 – 28 para 25.

- 25.6 Khubeka, Lekola, Accused 3 and Accused 14 were at all relevant times during and immediately after the robbery, members of the SAPS?
- 25.7 Khubeka and Lekola was each on duty at any one or more time or times before, during and after the robbery?
- 25.8 Khubeka was 'on standby duty' (as recorded in para 27.5 of the judgment) at Witbank Police Station when the robbery was executed?
- 25.9 Khubeka came on duty at the Witbank Police Station at 08h00 on 28 April 2014?
- 25.10 Khubeka used cell phone number 0824554177 at the relevant times before, during and after the robbery to assist in coordinating and executing the robbery (as recorded in paras 27.5 and 47 of the judgment) in communications with others convicted in the judgment?
- 25.11 Khubeka conspired to commit the robbery with other members of the SAPS at the relevant times of the robbery, including Lekola, Accused 3 and Accused 14?
- 25.12 Khubeka obstructed and prevented lawful attempts by members of the SAPS to recover the stolen money, while he was on duty?
- 25.13 Khubeka conspired with other members of the SAPS to do so?
- 25.14 The correctness of the finding recorded at paragraph 50 (p83) of the judgment that Khubeka was 'actively involved in the commission of the robbery'?
- 25.15 The admissions recorded in paragraph 4.3 of the judgment were made?
- 25.16 The admissions contemplated in paragraph 24 of the judgment were made?"

[17] The defendant responded later in September 2019 as follows:

"Ad paragraph 25 (preface) read with paragraphs 25.1 to 25.16

Insofar as the admissions sought in these paragraphs are covered by the judgment of Bam J the admissions are made. If they are not so covered, the admissions are not made."

[18] The defendant thereafter sought to withdraw the admissions on the basis that all that was admitted was that Bam J made a finding in the judgment at the end of the criminal matter that Khubeka and Lekola took part in the robbery. The defendant contended that he did not admit the fact of their involvement in the robbery, only the fact that Bam J made the finding in the judgment following the criminal trial.

[19] The attempted withdrawal by defendant of the admissions became the subject of several applications by the parties, the details of which I do not deem necessary to set out in any detail for the purposes of this judgment. Suffice to say that ultimately, the defendant did not succeed in withdrawing the admissions it made. Le Roux AJ who also dealt with defendant's attempted withdrawal of the admissions held:⁴

"25 As a result, I find that the defendant did admit the facts listed in the requested admissions, and not only that they are co-extensive with the factual findings by Bam J in the criminal trial judgment. The plain language used cannot accommodate the interpretation contended for by the defendant now."

[20] The defendant's appeal to the SCA was dismissed and leave to appeal to the Constitutional Court also failed.

[21] In the result, the admissions made by the defendant (referred to in para 16 of this judgment) stand in this trial.

Evidence led in the trial before me

[22] The first witness for the plaintiff was Mr John Miles who was a senior cash processing supervisor at SBV at the time of the robbery. His evidence primarily related to how the quantum of the loss sustained by SBV was determined. In cross-

⁴ Judgment dated 25 March 2022 para [25]; Caselines 000 – 144.

examination he elaborated on his evidence-in-chief on how the amount of the loss was established.

[23] The next witness for the plaintiff was Ms Pamela Bagattini an employee of SBV at the time of the robbery but who has since retired. She testified that she was the National Manager, Support Operations for SBV. She was also the industry representative on, as she put it, 'all the cash forums ... [and] committees ... in the financial industry ... [including] the banks, the cash houses as well as the South African Reserve Bank. She explained that there were two vaults at the Witbank SBV one of which was the incoming vault (where cash came in and which had not been processed or verified yet). It was known as vault 2 and it was the one that was robbed.'

[24] Ms Bagattini testified that she was part of the group that had to determine the amount lost in the robbery. She explained the procedure in some detail. She said it was not likely for any bank or retail claimant to overstate their claims for the loss they suffered because of the controls in place. She explained them in detail. She had worked with Mr Miles in determining the quantum of the loss.

[25] Cross-examination was very brief in that counsel for the defendant merely sought clarity on how the amounts claimed by the retail clients were determined.

[26] The next witness for the plaintiff was Mr Murray John Stocks. At the time of the robbery, he was Executive Head of Corporate Shared Services at Nedbank and, he was also the Nedbank nominated non-executive director on the board of SBV. He explained what these positions entailed *vis-a-vis* Nedbank and SBV. He confirmed that SBV had fully settled four claims of Nedbank because of the robbery, which were then ceded in favour of the plaintiff. Nedbank, as host bank, had paid the claims of the other banks and the retail clients, in accordance with the arrangements between them once the claims were substantiated.

[27] Under cross-examination Mr Stocks confirmed that Nedbank was fully compensated by SBV and Nedbank thereafter ceded its claims to the plaintiff.

[28] The plaintiff closed its case and the defendant thereafter closed his case without leading any evidence.

[29] It was agreed between the parties that written heads of arguments would be prepared and delivered and thereafter oral arguments would be made.

Common cause facts

[30] In summary the common cause facts are:

- 30.1 That a robbery took place during the evening of the 27th and early morning of the 28th of April 2014 at the premises of SBV in Witbank;

- 30.2 The robbers consisted of a gang of approximately 16 persons of which two, namely, Khubeka and Lekola were at the relevant time members of the SAPS;
- 30.3 Khubeka and Lekola were involved in the planning and execution of the robbery and Khubeka was on standby duty during the evening when the robbery occurred;
- 30.4 An employee of SBV, Gift Nkosi, was part of the gang in that she provided her co-perpetrators with information about guard duties and security procedure at the SBV premises and photographs of the inside of the premises including photographs of the vaults where the money was secured;
- 30.5 That an amount of R101 207 456.218 was stolen from a vault of the SBV premises;
- 30.6 That the monies stolen were of banking and retail clients of SBV;
- 30.7 SBV subsequently indemnified all its banking clients and retail customers and in turn plaintiff indemnified SBV in the same amount, SBV being the insured under an insurance policy issued to SBV by the plaintiff; and
- 30.8 The defendant, in his heads of argument says its common cause that the quantum of damages is R 93 919 298.17. In plaintiff's heads of argument it was submitted that the amount was R101 207 456.28. However, in its replying heads, plaintiff says it seeks judgment for the amount stated by defendant, i.e, R 93 919 298.17.

Admissions

[31] I have already mentioned earlier that a number of admissions were made by the defendant regarding, *inter alia*, the participation of Khubeka and Lekola in the robbery; that they were members of the SAPS at the time of the robbery and they were on duty at any one or more times before, during and after the robbery.

[32] In the criminal trial Bam J found that Khubeka conspired with Lekola and other robbers to commit the robbery, that Khubeka was “actively involved in the commission of the robbery” and that he knowingly participated in the prevention and proper investigation of the robbery and prevented and frustrated lawful attempts to recover the stolen cash.

[33] The banks had ceded, in writing, to the plaintiffs claims they had against third parties, including claims in delict against the defendant.

Issues in dispute

Loss settled – no claim left to cede

[34] Inasmuch as plaintiff relies on the cessions of the respective claims of SBV; and SBV's banking clients the defendant in his heads of argument says the plaintiff failed to adduce any evidence that any of the banking clients of SBV had a claim against the defendant at the time when the cession agreements were entered into, or thereafter. By the time of the cessions, SBV had already fully indemnified

Nedbank, its banking clients, as well as its retail customers. Hence, so the argument went, none of the banking clients of SBV had a claim for damages to be ceded to the plaintiff as they had been fully paid. Counsel relies on *Brayton Carlswald (Pty) Ltd and Another v Brews*, 2017 (5) SA 498 (SCA) at paras [12] - [14] where the principle that nobody can transfer more rights to another than he himself has, was reaffirmed. Counsel says the facts in this matter are on all fours with those in *Brayton*.

[35] However, counsel for the plaintiff submitted that the reliance on *Brayton* is misplaced. I agree. *Brayton* involved the cession of a judgment debt after it had been satisfied, whereas in the present case the banks ceded to the plaintiff their own claims in delict against the defendant.

[36] First, there is a fundamental distinction between a claim for payment (cause of action) and a judgment debt. A claim, if disputed, is discharged or extinguished only if settled or by final judgment, whereas a judgment debt is discharged or extinguished on payment. Accordingly, upon satisfaction of the judgment debt by payment in *Brayton*, the judgment debt was discharged and there was no judgment debt left to cede.

[37] By contrast, in the present case when the robbery was executed Nedbank, as the host bank, suffered the loss for which it had a primary delictual claim (cause of action) against the defendant – as the wrongdoer – and a contractual claim

(cause of action) against SBV – as the indemnifier. When SBV indemnified Nedbank for its loss, Nedbank's cause of action against the defendant was not extinguished or discharged. This meant that when Nedbank ceded its claims (in delict) against the defendant, that claim remained valid and enforceable against the defendant by the plaintiff as cessionary. Secondly, after SBV indemnified Nedbank, SBV as a secondary debtor acquired a claim against the defendant to recover what it paid to Nedbank.⁵ After the plaintiff indemnified SBV, the plaintiff acquired SBV's claims against the defendant by way of cession and subrogation.⁶

[38] It follows that SBV's claim was not discharged by indemnification from the plaintiff.

[39] Thirdly, there is the collateral source rule which precludes the defendant from relying, as a defence in delict, on SBV indemnifying Nedbank based on its *contractual* liability.

SBV not liable under Standard Bank and FirstRand contracts

[40] Defendant contends that the service contracts between SBV and Standard Bank and FirstRand respectively provide that SBV would only be liable to those banks if the loss was caused by the wrongful act or omission of SBV,⁷ and that the

⁵ Plaintiff's written closing argument ("Plaintiff's CA"), pp 37 – 40 paras 125 – 130.

⁶ Plaintiff's CA, pp 31 – 32 paras 109 – 112.

⁷ Defendant's heads of argument, p 24 paras 27 – 28.

plaintiff was not liable under the SBV policy of insurance to indemnify SBV for the losses of those two banks.

[41] Plaintiff's counsel submitted that the defendant misreads the relevant clauses in these two contracts. The service agreements expressly render SBV liable for the loss for any reason, including liability at common law. During the trial, plaintiff led uncontradicted evidence which showed that Nedbank, as the host bank, was the owner of all the cash in the Witbank SBV depot.

[42] Nedbank was the party that suffered the loss. SBV indemnified Nedbank only – not the other banks – in terms of the service agreement between SBV and Nedbank. That agreement expressly provides (unlike the corresponding clauses in the Standard Bank and FirstRand service agreements) that SBV is liable to indemnify Nedbank for loss incurred for any reason whatsoever. Quiet clearly, SBV was strictly liable to Nedbank for the loss that the latter suffered in the robbery. It was for this reason that Nedbank settled the claims of the other banks and the retail clients for all the uncleared deposits that were stolen.

Elements of delictual liability

[43] In the Constitutional Court case of *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) at paragraph 34 it was stated that it is trite that the elements of delictual liability are causation, wrongfulness, fault and harm.

[44] From the admissions made by the defendant, *inter alia*, regarding Khubeka and Lekola's involvement in the robbery as well as admission of the relevant portions of Bam J's judgment in the criminal case establishes, in my view all the elements of the delict.

[45] However, the defendant disputes that the defendant is vicariously liable in delict.

Vicarious liability

[46] The plaintiff sues the defendant as the employer of, more particularly, Khubeka and Lekola who took part in the robbery, on the basis that the defendant is vicariously liable for the delicts committed by its employees.

[47] The defendant strenuously disputes it. The defendant admits that Khubeka and Lekola were employed by him during the time before, during and after the robbery. However, he contends, that they were not acting within the course and scope of their employment but were on a frolic of their own. In other words, that the requirements for vicarious liability have not been established because the following necessary evidence was not led by plaintiff (and that no findings were made in the criminal case by Bam J to support such a finding):

47.1 of when and how Lekola and Khubeka participated in the planning and execution of the robbery;⁸

⁸ Defendant's heads of argument, p28 para 34.

47.2 of what Lekola and Khubeka did while on duty to plan the robbery;⁹

47.3 that Lekola and Khubeka participated in the planning and executing of the robbery, whilst they were “officially on duty”;¹⁰

47.4 that the members actively participated in the actual robbery whilst on duty or that they created any trust with any individual.¹¹

[48] The defendant’s counsel also contends that it was Gift Nkosi (an employee of SBV) who was the ‘kingpin’ who provided the robbers with indispensable information. The defendant’s contention seems to be, as I understand it, that Nkosi played a larger role in the robbery hence the defendant cannot be held liable vicariously for any role or part played by Khubeka and Lekola. In my view, Nkosi’s greater (or lesser) role in the robbery is irrelevant in the context of vicarious liability. The issue is whether the delict committed by Khubeka and Lekola as SAPS employees is sufficiently closely connected to their employment.

[49] In *F v Minister of Safety and Security and Another*,¹² the Constitutional Court described the general principles of vicarious liability as follows:

“40 Vicarious liability means a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct. This would arise where there is a particular relationship between those persons, such as employment. As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed

⁹ Defendant’s heads of argument, p28 para 34.

¹⁰ Defendant’s heads of argument, p28 para 34.

¹¹ Defendant’s heads of argument, p32 para 41.1.

¹² 2012 (1) SA 536 (CC).

within the course and scope of employment, or whilst the employee was engaged in any activity reasonably incidental to it.

41 Two tests apply to the determination of vicarious liability. One applies when an employee commits the delict while going about the employer's business. This is generally regarded as the 'standard test'. The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as 'deviation cases.' The matter before us is a typical deviation case."

[50] In *Booyesen v Minister of Safety and Security and Another*,¹³ the Constitutional Court accepted the following definition of the phrase "deviation case";

"A 'deviation case' refers to a case in which a delict is committed in circumstances where an employee deviates from the normal performance of his or her duties."

[51] The test for determining the employers' vicarious liability for the wrongful conducts of their employees in deviation cases was set out in *Minister of Police v Rabie*, as follows:¹⁴

"It seems clear that an act done by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."

¹³ 2018 (6) SA 1 (CC).

¹⁴ 1986 (1) SA 117 (A).

[52] In *K v Minister of Safety and Security and Another*,¹⁵ the Constitutional Court accepted the above test from *Rabie* and developed it to accord with the spirit, purport and objects of the Constitution.

"44 . . . The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order."

[53] This development of the *Rabie* test to infuse it with the value of the Constitution was confirmed and applied by the Constitutional Court in *F v Minister of Safety and Security and Another*.¹⁶

[54] The facts in *K* are apt and may briefly be summarized as follows. A 20-year-old woman was stranded at a petrol station at 4 am away from her home. Three on-duty policemen dressed in police uniforms and driving a police vehicle, all of whom were unknown to her, offered her a lift home. She accepted the offer and climbed into the car. Along the way, they took a turn in the wrong direction. When she told them that they were going the wrong way, a police jacket was thrown over her head and held tight. Thereafter, the policemen took turns and raped her, threw

¹⁵ 2005 (6) SA 419 (CC).

¹⁶ *Supra* at paragraph [52].

her on the ground and left her there. The three policemen were charged and convicted of rape.

[55] The Court applied the test referred to in *K* as follows to find the Minister vicariously liable for the intentional criminal and delictual conduct of the policemen:

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

51 The next question that arises is whether, albeit that the policemen were pursuing their own purposes when they raped the applicant, their conduct was sufficiently close to their employer's business to render the respondents liable. In this regard, there are several important facts that point to the closeness of that connection. First, the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty is a duty which also rests on their employer and they were employed by their employer to perform that obligation. Secondly, in addition to the general duty to protect the public, the police here had offered to assist the applicant and she had accepted their offer. In so doing, she placed her trust in the policeman although she did not know them personally. One of the purposes of wearing uniforms is to make public 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 reviewed 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."

[56] The facts in *F* were strikingly similar to those in *K*. Ms *F* was a fourteen-year-old girl. She had attended a night club that night, and in the early hours of the morning she needed a lift home. She was offered a lift home by a policeman who was on standby duty and driving an unmarked police vehicle, equipped with a police radio which *F* noticed before she accepted the lift. There were two other passengers in the car, one of whom was known to her. She was sitting in the back seat, but after the other passengers had been dropped off at their homes she moved to the front seat, at the policeman's request. There, she saw a pile of police dockets bearing his name and rank. The policeman drove the car away and stopped at a dark place, raising her suspicion about his motives. She immediately opened the door, alighted from the car and ran away and hid from him. After a while, he drove away. She later emerged from hiding and stood in the road and hitchhiked. A vehicle stopped, which turned out to be the same policeman. He

offered her a lift home again, she reluctantly accepted, owing to her desperate situation. He then turned off the road again and stopped the car. When she tried to run away, he stopped her and proceeded to assault and rape the girl.

[57] In finding the Minister vicariously liable for the policeman's conduct, the Court reasoned as follows:

"52 The normative components that point to liability must here, as K indicated, be expressly stated. They are: the State's constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman's commission of rape and omission to protect the victim; and the existence or otherwise of an intimate link between the policeman's conduct and his employment. All these elements complement one another in determining the State's vicarious liability in this matter. I deal with them in the same order below. ...

53 The State has a general duty to protect members of the public from violations of their constitutional rights. In grappling with the question of the State's vicarious liability, the constitutional obligations to prevent crime and to protect members of the public, particularly the vulnerable, must enjoy some prominence.

...

61 These constitutional duties resting upon the State, and more specifically the police, are significant in that they suggest a normative basis for holding the State liable for the wrongful conduct of even a policeman on standby duty, provided a sufficiently close connection can be determined between his misdeed and his employment. This leads to the discussion of the trust that people are entitled to repose in the police.

...

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."

[58] Thus, when intentional criminal deviant conduct of the police is closely connected to the Minister's business he may be held vicariously liable in a delictual claim for damages. In my view, that is the case here and the Minister is liable on that basis.

[59] In all the circumstances judgment is granted in favour of the plaintiff for payment by the defendant of:

1. The sum of R 93 919 298.47 (Ninety-Three Million Nine Hundred and Nineteen Thousand Two Hundred and Ninety Eight Rand and Forty Seven Cents).
2. Interest on the above amount at the prescribed rate per annum at the relevant time from 28 April 2014 to the date of payment.
3. Costs of suit, including the costs of two counsel.



RANCHOD J

Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 11 October and 13 November 2023

Date of judgment: 4 March 2024

Appearances:

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