



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5099/2018

In the matter between:

ELIZA MOTSITSI

Plaintiff

and

MINISTER OF POLICE

1ST Defendant

**NATIONAL COMMISSIONER OF
SOUTH AFRICAN POLICE SERVICES**

2ND Defendant

**PROVINCIAL COMMISSIONER OF
SOUTH AFRICAN POLICE SERVICES,
FREE STATE**

3RD Defendant

HEARD ON: 3 SEPTEMBER and 11 OCTOBER 2019

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 24 OCTOBER 2019

- [1] The Plaintiff in this action is a female aged 31 years, who is claiming an amount of R 10 million damages from the Defendants following an incident where she was wounded by an off-duty policeman using his service firearm. He shot and killed himself thereafter. By prior agreement between the parties, the matter came before this Court on the merits of the Plaintiff's claim only, the quantum of her claim having stood down for later determination.
- [2] At the inception of the proceedings before me on 3 September 2019, the parties reached agreement on the facts of the matter, and a written Statement of Agreed Facts, duly signed by the respective attorneys representing the parties, was subsequently presented to the Court in terms of the provisions of Court Rule 33(6).
- [3] This Statement reads as follows:
- "2. Now the parties agree herewith that the following constitutes the statement of agreed facts:*
- 2.1 *That the Plaintiff was shot by a member of the African Police Service (SAPS) to wit, Constable Kabelo Die (Die).*
- 2.2 *At the time of the said shooting, Die was off-duty and he used his state issued firearm to shoot the Plaintiff.*

2.3 *Further in respect of paragraphs 4.2 to 4.5 of the Plaintiff's Particulars of Claim that:*

2.3.1 *At the time of the said incident, Die went to the Plaintiff's place of abode as alluded herein above and requested the Plaintiff to come outside, which the Plaintiff did.*

2.3.2 *Die asked the Plaintiff as to why the Plaintiff did not tell him that Sarah (Die's girlfriend) was having affairs with other men.*

2.3.3 *The Plaintiff informed Die that she did not want to be involved in Sarah's issues as Sarah was not even staying with her at the Township and that she (Sarah) was staying in town.*

2.3.4 *Die without further ado took out his service pistol and started firing shots towards the Plaintiff who sustained injuries.*

2.4 *The Plaintiff was a cousin of Sarah (the deceased Die's girlfriend)*

2.5 *There was no romantic relationship between the Plaintiff and Constable Die.*

2.6 *The Plaintiff knew Constable Die as a policeman.*

2.7 *This is a deviation case because in so shooting the Plaintiff, Die was not acting within the course and scope of his employment with the Minister of Police.*

2.8 *The parties further agree that the only issue to be determined by the Court is whether the First Defendant can be held vicariously liable for the conduct of Constable Die.*

2.9 *The parties further agree that they will argue on the question as to whether there was an issue of trust which existed between the Plaintiff and Die at the time of the shooting incident on the basis of the above agreed facts."*

- [4] In presenting final submissions to the Court on 11 October 2019, counsel for the Plaintiff Mr. Bahlekazi, pointed out that the Police Service had contravened its own Standing Order relating to the issue of official firearms and ammunition when it issued the firearm in question to Constable Die. This is one of the reasons why the Court should find the Minister liable, the argument went. Mr. Bahlekazi even went so far as to attach a copy of the relevant Standing Order to his heads of argument to substantiate his argument.
- [5] The issue of non-compliance by the Police Service of its own Standing Order in this respect, is however not alleged in the Plaintiff's Particulars of Claim, nor has any evidence been presented by the Plaintiff as far as the Standing Order or the non-compliance thereof is concerned. Even worse for the Plaintiff, this issue is nowhere referred to in the Statement of Agreed Effects at all. I therefore have to find that the Court need not consider this specific point.

- [6] What the Court does need to consider, however, is whether the First Defendant can be held liable on the ground of trust displayed by the Plaintiff, which ground has its origins in the constitutional duty of the Police to protect the Plaintiff and not to injure her. Mr. Bahlekazi submitted that the Plaintiff had clearly placed her trust in Constable Die by coming out to him when he called her, and on that basis the First Defendant has to be held liable for the damages she sustained. This is, of course, in the absence of any notion that Die was acting within the course and scope of his employment with the First Defendant. If she had contemplated the possibility of the policeman injuring her, she would not have come to Die, so the argument went. The parties have agreed that they would argue this issue of trust in paragraph 2.9 of the Statement of Agreed Facts, and therefore Mr. Bahlekazi was fully entitled to canvas this aspect when he made final submissions.
- [7] As agreed between the parties, the issue at hand is the vicarious liability of the First Defendant for the conduct of his servants who have deviated from the course and scope of their employment. The test for vicarious liability in deviation cases was initially stated by the Court of Appeal in, amongst others, the case of ***Minister of Police v Rabie***¹. More recently, the test has been developed and refined by the highest court in our country, namely the Constitutional Court, to align it with the spirit, purport and object of our new Constitution.
- [8] In the ***Rabie***-case, it was stated that an act done by a servant solely for his own interest and purposes, although occasioned by

¹ 1986(1) SA 117 (A)

his employment, may fall outside the course and scope of his employment. In deciding this question, some reference is to be made to the servant's intention. The test in this regard is 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..."*²

- [9] The Constitutional Court confirmed the test enunciated in *Rabie*, but developed the second and objective leg of the test in the cases of *K v Minister of Safety and Security*³ and *F v Minister of Safety and Security*⁴. In *K* the Court held as follows per O'Regan, J:

*"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 the constitutional norms but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusion 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"*⁵

² At 134 C-E

³ 2005(6) SA 419 (CC)

⁴ 2012 (1) SA 536 (CC)

⁵ At par. 44

[10] In *F* the Court found that the second leg of the test does not raise purely factual questions but mixed questions of fact and law. The Court stated that the state's constitutional obligations to protect the public, the trust that the public is entitled to place in the police and a policeman's own omission to protect the victim are some of the elements complementing one another in determining the state's vicarious liability in a matter.⁶

[11] Applying the test thus stated by the Constitutional Court, the Supreme Court of Appeal summarized the approach to be adopted by a court as follows:

*"The question remains whether in this case there is a sufficient link between the deceased's conduct and his employment to impose vicarious liability on the minister. That question can only be answered by considering the normative factors referred to earlier, and the countervailing factors, thus conducting a balancing act"*⁷

[12] The practical application of the test emerges from a number of decisions, including the cases of *K* and *F* quoted above. In both these cases the victims were young women who were stranded without transport in the middle of the night and offered a lift by policemen who were on duty in police vehicles. They were both raped by the policemen in the respective incidents. In both cases the Minister was held vicariously liable on the basis of the trust which the public is entitled to place in the police. It weighed heavily with the Court that, in both cases, an innocent citizen in distress

⁶ At par. 52

⁷ *Minister of Safety and Security v Booyesen* (2016) ZASCA 201 at par. 19

had reposed her trust in the police as she was entitled to do, and that the policemen had breached that trust. That created a sufficiently close connection between the delictual conduct and the employment, the Court found.

- [13] In the **Booyesen** case (footnote 7) the complainant and the police reservist on duty were involved in an intimate relationship for some six months. On the day of the incident, he visited the home of Ms. Booyesen to have supper with her whilst on duty. After they had supper, the two of them sat outside. Suddenly, and without any warning, the policeman drew his service pistol and shot Ms. Booyesen in the face and then committed suicide by shooting himself too. Applying these facts to the test in **K**, the Court found that the answer to the first question, which is subjective, is that liability was not established. The policeman was on a private visit to his lover's home, and he was not there as a police officer. As far as the second leg of the test was concerned, the court found that the link between the delictual conduct of the policeman and the business of the employer was missing, because of the absence of the element of trust. It would not have made any difference had the policeman arrived in his private vehicle and wearing civilian clothes, the Court opined.

- [14] In the recent case of **Minister of Safety and Security v Kholeka Msi**⁸ the policeman concerned was officially on duty and dressed in full uniform. While so on duty, he was summoned to a private meeting with Ms. Msi and his own brother, Madala. At this meeting, Ms. Msi, who had previously been in a lengthy intimate

⁸ (2019) ZASCA 26

relationship with the policeman, raised an alleged illicit affair between the girlfriend of Madala and the policeman for discussion. This elicited an angry response from the policeman who proceeded to assault Ms. Msi with a clenched fist and with his police handcuffs. Ms. Msi then instituted action against the Minister on the basis of vicarious liability. The trial court found in her favour, but on appeal the court's finding was overturned.

[15] The Supreme Court of Appeal found that the first question of the test, which is subjective, did not establish liability for the Minister, since the policeman's attendance at the meeting was purely for his own purposes. As concerns the second leg of the inquiry, the Court found that Ms. Msi had not placed her trust in the policeman by virtue of him being a policeman. From where she stood, he was not a policeman employed to protect her but rather an old friend who was called to the meeting. As a consequence, the Court found that there was not a sufficiently close connection between the business of the SAPS and the conduct of the policeman to justify the imposition of vicarious liability.

[16] I now turn to the facts of the present case. Mr Bahlekazi, appearing for the Plaintiff, urged the Court to hold the Defendant vicariously liable on the basis of the trust displayed by the Plaintiff in Die. She had known him to be a policeman, and therefore she was willing to come out of her house when he called her, because she trusted him as a policeman not to harm her but to protect her. In making these submissions, Mr. Bahlekazi obviously relied on the judgements referred to earlier herein. It is also obvious that the

first question of the inquiry does not call for determination, since Die was on a private mission when he approached the Plaintiff.

- [17] The first problem I have with the submissions so made, is that they are not supported by any evidence to that effect, nor by the Statement of Agreed facts, nor by the facts alleged in the Particulars of Claim. It is therefore pure speculation to allege that the Plaintiff had placed her trust in Die, and nothing more. There is simply nothing to suggest that the Plaintiff would not have come outside if she had been called by anyone else who was not a member of the Police. To put it differently, they are no grounds for suggesting that the Plaintiff only came outside because she was called by someone she knew as a policeman. On the overwhelming probabilities of the case, she would have come outside in any event had she been called by anyone else she knew. I therefore have to find that the element of trust in the police played no role in the incident that took place on the day in question.
- [18] Secondly, Die did not approach the Plaintiff in his capacity as a policeman at all. He only wanted to discuss private issues with the Plaintiff in his capacity as her friend's boyfriend. So much is clear from the Statement of Agreed Facts
- [19] Thirdly, the Plaintiff did not find herself in the position of a woman who was in desperate need of police protection, and consequently reposed her trust in Die as a policeman, as was the case of the victims in the *K* and *F* cases. Here we are only dealing with an

unfortunate domestic incident, as the Court has also found in the *Booyesen* case.

[20] For these reasons I find that there is not a sufficiently close connection between the business of the SAPS and the conduct of Die to justify the imposition of vicarious liability. The following order is therefore made:

1. The Plaintiff's claim is dismissed with costs, including the costs incurred on 3 September 2019.



P.J. LOUBSER, J

For the Plaintiff:

Instructed by:

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For the Defendant:

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