



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 25/17

In the matter between:

**ELSA BOOYSEN**

Applicant

and

**MINISTER OF SAFETY AND SECURITY**

Respondent

**Neutral citation:** *Booyesen v Minister of Safety and Security* [2018] ZACC 18

**Coram:** Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ; Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

**Judgments:** Mhlantla J: [1] to [65]  
Zondo DCJ: [66] to [123]

**Heard on:** 22 August 2017

**Decided on:** 27 June 2018

**Summary:** Delict — vicarious liability — deviation case — police officer — domestic violence — police firearm

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**ORDER**

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On appeal from the Supreme Court of Appeal (hearing an appeal from the Eastern Cape Division of the High Court of South Africa, Grahamstown), the following order is made:

1. Leave to appeal is refused.
2. There is no order as to costs.

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## JUDGMENT

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MHLANTLA J (Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ; Kollapen AJ, Madlanga J, Theron J and Zondi AJ concurring)

### *Introduction*

[1] This is an application for leave to appeal against an order of the Supreme Court of Appeal. This case concerns a tragic incident in which Ms Elsa Booysen (the applicant) was shot and wounded by her boyfriend, Mr Johannes Mongo, a constable reservist (the deceased) in the employ of the South African Police Service (SAPS).

[2] The applicant seeks to hold the respondent, the Minister of Safety and Security (Minister), vicariously liable for damages arising out of the incident. She was successful in the High Court, which held that vicarious liability should be imputed to the Minister. The Minister then appealed to the Supreme Court of Appeal, which overturned the judgment of the High Court. The applicant now applies to this Court for leave to appeal.

[3] The issues for determination are:

- (a) Should leave to appeal be granted?
- (b) If so, should the Minister be held vicariously liable for the damages suffered by Ms Booysen?

*Factual Background*

[4] The applicant and the deceased grew up together in Pearston, in the Eastern Cape Province. They eventually came to be involved in an intimate relationship.

[5] Before the High Court, the applicant testified that she had known the deceased for many years and confirmed that they were involved in an intimate relationship and that she fell in love with a private individual and not a policeman. At the time they had been in the relationship for less than a year.

[6] On 22 March 2013, the deceased was on night shift duty. He was dressed in his full police uniform and armed with a service pistol. The pistol had been issued to him by the shift commander at the commencement of his shift. He had been assigned crime prevention duties and was required to attend to complaints by members of the public.

[7] That night, the deceased was dropped off at the applicant's home by a marked police vehicle. He had gone there to have dinner, as was his routine when he was on duty on Friday and Saturday nights. After he had eaten, the police vehicle would collect him and he would continue with his shift duties.

[8] Initially, there appeared to be nothing unusual about the evening. The deceased went to buy some soft drinks from a nearby shop. On his return, he offered these to the applicant and her family. After supper, he and the applicant sat outside together. Suddenly, and without warning, the deceased drew his service pistol and shot the applicant in the face. He then turned the firearm on himself and committed suicide. The last words uttered by the deceased were to the effect that, if he could not have the applicant, then nobody else could. The applicant testified that she and the deceased had not argued before the incident and they did not have problems in their relationship.

[9] As a consequence of the gunshot, the applicant sustained injuries to her face. She was admitted to Livingstone Hospital in Port Elizabeth where she received medical treatment.

*Vicarious liability in our courts*

[10] Before detailing the judgments of the lower courts in this case, it is helpful to briefly set out the accepted common law test for vicarious liability in deviation cases.<sup>1</sup>

[11] The test to be applied when determining whether vicarious liability should be imposed in these cases was first set out in *Rabie*.<sup>2</sup> It was later expanded upon in *K*,<sup>3</sup> and further explored in *F*.<sup>4</sup> The test essentially consists of two questions: first, whether the employee committed the wrongful acts solely for his or her own interests or those of the employer (the subjective question); and second, if he or she was acting for his or her own interests, whether there was nevertheless a “sufficiently close link” between the employee’s conduct and the business of his employment (the objective question). The expansion of this test in *K* and *F* is detailed below.

*K v Minister of Safety and Security*

[12] In *K*, Ms K was left stranded at a petrol station without transportation to her home and without any means of calling her family after a disagreement with her boyfriend. Ms K was 20 years old at the time. A policeman, Sergeant Nathaniel Rammutele, came to the petrol station driving an official SAPS vehicle. Sergeant Rammutele approached Ms K and asked her where she was going. She answered and said she wanted to go home. He then offered to take her home and she accepted his

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<sup>1</sup> 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. See Botha and Millard “The Past, present and future of vicarious liability in South Africa” (2012) 2 *De Jure* 225 at 231.

<sup>2</sup> *Minister of Police v Rabie* 1986 (1) SA 117 (A) (*Rabie*) at 134C-E.

<sup>3</sup> *NK v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) (*K*) at para 32.

<sup>4</sup> *F v Minister of Safety and Security* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC).

offer. She climbed into the vehicle and found two other policemen, Sergeant Ephraim Gabaatholwe and Sergeant Edwin Nqandela, who were also both in uniform. All of the police officers were on duty at the time.<sup>5</sup>

[13] She fell asleep for a short while and when she woke up, the car took a turn in the wrong direction. A police jacket was thrown over her head and was held tightly so that she would not see where the car was going. The car stopped and she was forced to the back seat of the car. She was raped by the three police officers in turn. After raping her, they threw her to the ground and drove away swiftly. Ms K sought damages against the Minister. Both the High Court and the Supreme Court of Appeal held that the Minister could not be held to be vicariously liable for the conduct of the police officers. Ms K then appealed to this Court, arguing that the Supreme Court of Appeal erred in its application of the common law test; and that if it did not err in its application of the test, that the test should be developed in line with section 39(2) of the Constitution as the outcome of her case did not accord with the spirit, purport and objects of the Constitution.

[14] In a unanimous judgement, O'Regan J, in finding for Ms K, held that a court must bear in mind constitutional norms when deciding whether the case before it is in principle one in which the employer should be held liable. To determine whether the Minister was vicariously liable, the Court applied the two-stage common law test for liability set out in *Rabie*, while simultaneously developing it to take into account constitutional norms.

[15] On the first leg of the test, O'Regan J held that the three police officers had been acting in pursuit of their own interests when they raped Ms K.<sup>6</sup> It was in applying the second leg of the test that the Court developed the common law. It held that a court should promote constitutional values in an assessment of the presence of a sufficient link. It should do so through expressly articulating the normative

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<sup>5</sup> The factual background is set out in *K* above n 3 at paras 2-7.

<sup>6</sup> *Id* at para 49.

considerations at play in its reasoning for its conclusion as to whether there is a sufficient connection between the wrongful act and the employment.<sup>7</sup> The Court held that the Minister was vicariously liable on the basis of the presence of several factors that demonstrated that the conduct of the police officers was sufficiently close to their employment. These were:

- (a) The police officers all bore a statutory duty to prevent crime and protect members of the public. That duty also rested on their employer and the police officers had been employed to perform that obligation.
- (b) The police officers had offered to assist Ms K and she had accepted their offer. She thus placed her trust in them. In determining whether the Minister was liable, the Court had to keep in mind the importance of the constitutional role entrusted to the police and of nurturing confidence and public trust in the police to ensure that their role was successfully performed.
- (c) The conduct of the police officers had constituted both a commission and an omission: the brutal rape of Ms K and the failure to protect her from harm respectively.<sup>8</sup>

*F v Minister of Safety and Security*

[16] In *F*, Ms F needed and was offered a lift home by Mr van Wyk after a night out. She was 13 years old at the time. There were two other passengers in the vehicle. One of them was known to her. At the time, Mr van Wyk was employed as a police officer by the SAPS and during that evening was on standby duty which meant that he could have been called upon to attend to any crime-related incident if the need arose. He was in an unmarked police vehicle to enable him to perform any police functions that he might have been required to perform whilst on standby duty.

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<sup>7</sup> Id at para 44.

<sup>8</sup> Id at paras 50-2.

[17] After the other passengers had been dropped off at their respective homes, Ms F moved to the front passenger seat, at Mr van Wyk's request. It was then that she saw a pile of police dockets bearing the name and rank of Mr van Wyk. When she asked him why there were police dockets in his vehicle, he replied that he was a private detective. Ms F understood this to mean that he was a police officer. In her evidence, she said that the fact that she believed Mr van Wyk to be a police officer played a role in allaying her fears, because she "trusted" him as, at that stage, she thought he was a detective. She chose to repose her trust in a person of whom she would ordinarily have been suspicious because she understood him to be a police officer.

[18] While on their way to her home, Mr van Wyk unexpectedly turned off the road and stopped in a dark place. Ms F became suspicious and alighted from the vehicle, pretending that she needed to relieve herself. She then ran away and hid in an attempt to escape. After a short while, Mr van Wyk left. Ms F then came out of her hiding place and stood on the side of the road and tried to hitchhike. A car pulled up to her, and it turned out to be Mr van Wyk again. Ms F reluctantly accepted Mr van Wyk's offer for a lift due to her desperate situation. On their way to her home, Mr van Wyk pulled off the road again and was able to prevent her from fleeing this time around. He then assaulted and raped her. Thereafter, he took her to her home and threatened to harm or even kill her should she tell anyone about the incident.<sup>9</sup>

[19] Ms F launched proceedings against the Minister in the High Court, where she was successful. The High Court's decision was then overturned by the Supreme Court of Appeal, and Ms F appealed to this Court.

[20] The decision in *F* affirmed that the application of the test requires normative factors to be taken into account. The Court held that, as in *K*, the relevant interrelated normative factors at play in *F* were—

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<sup>9</sup> The factual background is set out in *F* above n 4 at paras 8-16.

“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 applicant; and the existence or otherwise of an intimate link between the policeman’s conduct and his employment.”<sup>10</sup>

Mogoeng J held that all of these elements complement one another in determining the state’s vicarious liability.

[21] The Constitutional Court in this case held that the facts gave rise to a sufficiently close link between Mr van Wyk’s employment and the assault and rape of Ms F. This link was founded on the grounds that a police vehicle facilitated the commission of the rape; that Ms F placed her trust in him because he was a police official; and that the state has a constitutional obligation to protect the public against crime. Consequently, the Minister was held vicariously liable for the damages suffered by Ms F as a result of the rape and assault.<sup>11</sup>

### *Litigation history*

#### *High Court*

[22] Reverting to the matter before us, in August 2013, the applicant instituted action for damages against the Minister of Safety and Security in the Eastern Cape Division of the High Court of South Africa, Grahamstown (High Court).<sup>12</sup> In her particulars of claim, the applicant pleaded that the deceased had shot and wounded her. She further alleged that during the incident, the deceased was a member of the SAPS and was acting within the course and scope of his employment under the South African Police Service Act<sup>13</sup> (SAPS Act).

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<sup>10</sup> *F* above n 4 at para 52.

<sup>11</sup> *F* above n 4 at para 81.

<sup>12</sup> *Booyesen v Minister of Safety and Security* [2015] ZAECGHC 56 (High Court judgment).

<sup>13</sup> 68 of 1995.



[23] At the commencement of the trial, the Court was requested to separate liability and quantum of damages, and determine liability only. In this regard, the Minister conceded all of the elements of delictual liability in relation to the shooting of the applicant. However, he denied that he was vicariously liable for damages suffered by the applicant as a result of the deceased's conduct. The parties agreed that the shooting was not foreseen by the applicant or by the SAPS.

[24] The High Court accepted that this was a deviation case as the wrongful act was done solely for the purposes of the employee. In order to determine whether the employer should be held vicariously liable, the Court applied the test laid down in *Rabie*, and expanded in *K* and *F*.<sup>14</sup>

[25] The High Court held that some of the elements set out in *F* were present in this matter, while others were not. It accepted that the issue of trust did not arise in this case in the same manner as in *K* and *F*. The High Court held that the element of trust was not a prerequisite for vicarious liability but was one of the factors that may or may not be present. In this regard, the Judge relied on *Pehlani*,<sup>15</sup> in holding that a far more significant factor in the circumstances of this case was the fact that the deceased used a police firearm to commit the delict.<sup>16</sup> Because the Minister had created a risk of harm by issuing the firearm used by the perpetrator, he was responsible for any harm that ensued as a result of its misuse, and the rationale for the imposition of vicarious liability would be served by recognising this risk and encouraging strict official controls over the issuance of police firearms. The other strong indicator for the imposition of vicarious liability was the fact that the deceased was dressed in police uniform and had been dropped off for dinner by a police vehicle and would, but

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<sup>14</sup> High Court judgment above n 12 at paras 11-3.

<sup>15</sup> *Pehlani v Minister of Police* [2014] ZAWCHC 146. In *Pehlani*, a police officer, who was on duty and in uniform, left her post, went to find her boyfriend, and shot him with a police firearm. The High Court reasoned that the case was analogous to *K* and *F*, in which a police car was used to facilitate the crime, albeit indirectly. According to the High Court, a police firearm facilitated the crime directly in *Pehlani*. By imposing vicarious liability on the Minister, the High Court held that the Minister would exercise stricter control over police firearms.

<sup>16</sup> High Court judgment above n 12 at paras 15-6.

for the unfortunate events of that evening, have been picked up by the vehicle so that he could resume his assigned duties. The High Court thus concluded that the Minister was vicariously liable for damages suffered by the applicant as a result of the deceased's delictual conduct.<sup>17</sup>

*Supreme Court of Appeal*

[26] The Minister then sought to appeal the decision of the High Court in the Supreme Court of Appeal.

[27] The Supreme Court of Appeal reversed the decision of the High Court. Makgoka AJA wrote for the majority.<sup>18</sup> He considered *K* and *F* and the two questions to be asked in deviation cases in order for vicarious liability to be imposed.

[28] In applying the test, the majority held that the answer to the first question – whether the wrongful act was done solely for the purpose of the employee – did not establish liability on the part of the employer because the deceased acted for his own interests. This conclusion was based on the following:

- (a) The deceased was on a private visit to his lover's home to have supper.
- (b) He was not there in his capacity as a police officer and he had no official police function to perform.
- (c) The visit was purely social during the time he was permitted to be away from the police station for a meal break.
- (d) The break had nothing to do with his employer any more than it would have had anything to do with his employer's business if he had been sitting having a meal in a café or purchasing a take-away at a fast food restaurant.<sup>19</sup>

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<sup>17</sup> Id at para 18.

<sup>18</sup> *Minister of Safety & Security v Booysen* [2016] ZASCA 201 (SCA judgment).

<sup>19</sup> Id at para 14.

[29] With regard to the second question – whether a sufficiently close link nonetheless exists – the majority held that there was not a sufficiently close link between the employee’s act for his own interest and the purposes and business of the employer.<sup>20</sup> Its conclusion was based on the following:

- (a) When the shooting took place, the applicant and the deceased were not relating to each other as police officer and citizen but were lovers in a domestic setting.
- (b) The applicant confirmed during her testimony that she and the deceased had no relationship problems and had not argued before the shooting. The shooting was not foreseen either by the applicant or SAPS. There appeared to have been no sign at all that the deceased would have done what he did.
- (c) The applicant did not repose trust in the deceased due to his employment as a police reservist with the SAPS.
- (d) The applicant did not fall in love with the deceased because he was a police officer.
- (e) There was no situation which called upon the deceased to act as a police officer at the applicant’s home.
- (f) There was no evidence that when the deceased was employed and issued with a firearm, the management of the SAPS was aware or should have been aware that this created a material risk of harm to the community.<sup>21</sup>

[30] The majority disagreed with the High Court’s reasoning that the trust aspect was not an essential factor in this particular case. It held that in *K* and *F*, trust was central to the finding that there was a sufficiently close connection between the acts of the police officers and their employment. In the present case, the parties were not relating to each other as police officer and citizen but were interacting as lovers in a domestic setting. The Supreme Court of Appeal therefore held that the trust element, that the public ordinarily reposes in the police, did not arise at all. In dealing with the

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<sup>20</sup> Id at para 34.

<sup>21</sup> Id at paras 18-9 and para 123.

facts that the deceased used a service pistol, was dropped off by a police vehicle and was wearing police uniform, the majority held that all of those elements were weakened by the absence of trust between the parties. It held that since the deceased was not there in his official capacity and was there to enjoy dinner, no liability could be found on the part of the Minister.<sup>22</sup>

[31] The majority also disagreed with the High Court's reliance on *Pehlani* and its conclusion that the Minister was vicariously liable on the basis of the issuance of a firearm. The Supreme Court of Appeal held that such a conclusion would amount to the imposition of strict liability. This could not be done in the absence of evidence that the SAPS had failed to ensure that the deceased was properly trained and disciplined or that the SAPS should have foreseen that the deceased would pose a danger to the public. There was no evidence that the deceased was a danger by being given a firearm. Consequently, the Supreme Court of Appeal overruled *Pehlani* to the extent that it imposed vicarious liability merely on the basis that SAPS had issued a firearm to a police officer who subsequently committed a delict with it.

[32] The majority held that, since the deceased was not there in his official capacity and the element of trust was absent, a sufficient link was not present and the Minister should not be held vicariously liable. The majority thus upheld the appeal and set aside the decision of the High Court.

[33] The minority judgment (written by Bosielo JA) held that the test for vicarious liability should not be approached mechanically as it involves relevant policy considerations. The test must be approached through the prism of the Constitution and its values and norms. The judgment emphasised the fact that police officers are not ordinary members of the public, but are appointed after a careful selection process followed by "intensive training in professionalism, discipline, self-control and skills, amongst others, in the use of firearms".<sup>23</sup> The minority highlighted the fact that the

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<sup>22</sup> Id at para 23.

<sup>23</sup> Id at para 43.

role of police officers is to protect the public, and they are issued firearms for the purpose of executing this duty. The judgment asserted that by arming police officers with dangerous weapons, the Minister creates substantial risk that police officers may use them unlawfully. As a result, the Minister has the responsibility to ensure SAPS employees are properly trained and disciplined, and all members of the public are entitled to expect a professional and disciplined police service. If the police fail to execute their duties, the responsibility for them as employees should fall on the Minister.

[34] The minority judgment therefore afforded significant weight to the factor of creation of risk in the assessment of the facts in this case. The minority held that the following factors were also relevant to the determination of the question of vicarious liability: the fact that the deceased was on duty, dressed in full SAPS uniform and armed with a police firearm; the fact that he had been assigned crime prevention duties and had to attend to complaints by members of the public; and the fact that he was driven to the applicant's home by a colleague in a police vehicle and that same colleague would have fetched him later had he not committed suicide.

[35] The minority disagreed with the majority's finding that the deceased's visit to the applicant had no link to his employment. It held that going to the applicant's home for dinner did not absolve the deceased from discharging his obligations as a police officer. Furthermore, since he was in full police uniform, to any reasonable person he epitomised a police officer who was on duty in terms of his employment with the Minister. It concluded that the mere fact that the deceased was on a break to eat supper at the applicant's home did not sever the link to him being a police officer to such an extent that it destroyed any basis of a possible imposition of vicarious liability on the Minister. This is because the applicant, like all individuals, was entitled to protection by members of the police service. The minority would have dismissed the appeal.

*In this Court**Submissions by the applicant*

[36] The applicant submits that the distilled question for determination before the court a quo was whether the facts demonstrate that there is a sufficient link between the deceased's shooting of the applicant and his employment as a police officer to impose vicarious liability on the Minister.

[37] According to the applicant, the determination of this issue requires a "delicate consideration" of the factual and normative factors present in this case.

[38] She refers to the decision of the court a quo and its consideration of the policy factors that underlie the doctrine of vicarious liability, and submits that the application of these normative factors will vary depending on the facts of a particular case. The applicant submits that a relevant question here is whether there was a creation of risk of harm on the part of the Minister by arming the deceased with the police firearm that he used to intentionally harm her. The applicant contends that the court a quo rightly held that the creation of risk was a significant normative factor in this case.

[39] In this regard, the applicant states that the court a quo correctly relied upon *Feldman*, where it was held that an employer has a duty to ensure that no harm ensues as a result of an employee's negligence in the course of his employment.<sup>24</sup> The applicant contends that the court a quo properly identified the normative consideration of the creation of risk to be more significant in the determination as to whether the Minister is vicariously liable in this case, than the issue of whether the applicant subjectively trusted the deceased or was in a romantic relationship with him. Here, the Minister had issued a firearm to the deceased and therefore created a risk of harm. The firearm directly caused the harm in question and the deceased had access to the firearm due to his special role as a policeman.

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<sup>24</sup> *Feldman (Pty) Ltd v Mall* 1945 AD 733 at para 45 (*Feldman*).

[40] The applicant submits that the High Court and the Supreme Court of Appeal minority were justified in attributing vicarious liability on the basis of this and the other normative factors applicable: the deceased was on official police duty and in uniform; and the employer is under a constitutional duty to protect citizens of South Africa from both domestic and public violence. The applicant contends that these factors give rise to a sufficiently close connection between the unlawful conduct and the deceased's employment as required by *K*. Imposing vicarious liability is justified because the Minister should be held responsible for any harm that ensues as a result of creating a risk of harm. The applicant submits that the harm that she suffered would not have occurred if the Minister had not entrusted the deceased with the possession of a lethal weapon.

[41] The applicant argues that this result is supported by *Pehlani* and *Von Benecke*,<sup>25</sup> in which the Minister of Defence was held liable for a shooting that took place during an armed robbery using a firearm assembled from stolen gun parts provided to the perpetrator by a member of the South African National Defence Force (SANDF). The applicant submits that leave to appeal should be granted and that the majority decision of the Supreme Court of Appeal should be set aside.

*Submissions by the respondent*

[42] According to the respondent, leave to appeal should be refused as the applicant's prospects of success on appeal are weak. Alternatively, if leave is granted, the application should be dismissed.

[43] On the merits, the respondent submits that in both the cases of *K* and *F*, a sufficiently close link between the employees' acts and the purposes and business of the employer was established primarily through the element of trust that the victims had in members of the SAPS. According to the respondent, the element of trust should therefore be accorded primacy because the trust that the public is entitled to

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<sup>25</sup> *Minister of Defence v Von Benecke* [2012] ZASCA 158; 2013 (2) SA 361 (SCA) (*Von Benecke*).

repose in the police service justifies imposing vicarious liability on the Minister. It constitutes the sufficiently close link between the deceased's conduct and his employment. A member of the public is exposed to harm because he or she reasonably trusts a police officer. He or she may be harmed because the police officer exploits this trust. Thus, for liability to ensue, a member of the public has to repose their trust in a police officer who commits an offence against the person who trusted them. In this regard, the respondent relied on *P E*.<sup>26</sup> The respondent argues that the element of trust was more significant in *F*, where the factual situation around the connection of the police officer's acts and his employment was even more tenuous than that in *K*. The respondent submits that it may be concluded that absent Ms F's trust in the police officer involved in the case of *F*, a sufficiently close link would not have been established.

[44] The respondent argues that this central element of trust is not present in this case. The applicant trusted the deceased not to harm her not because he was a police officer, but because they were in a relationship. The respondent avers that this is confirmed by the applicant's own evidence that the deceased had gone to her home to have dinner as her boyfriend and not as a police officer. Although the applicant's trust in the deceased enabled the crime, she did not form it based on the fact that he was a police officer as required for the imposition of vicarious liability. Thus, according to the respondent, there is no sufficiently close link for the purposes of imputing vicarious liability to the Minister. The respondent contends that a finding of vicarious liability in this case would effectively amount to strict liability.

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<sup>26</sup> *P E v Ikwezi Municipality* 2016 (5) SA 114 (ECG). This case concerned a damages claim arising out of an alleged sexual assault committed upon the plaintiff by an employee of the Municipality. The employee was in a position of authority over the plaintiff. At para 77, the High Court held:

“[W]hen an employer places an employee in a special position of trust, the employer bears the responsibility of ensuring that the employee is capable of trust. That trust ‘forged a causal link’ between the [employee’s] position as Corporate Services Manager and the wrongful act.”



*Leave to appeal*

[45] The first issue in this matter is the question of whether leave to appeal should be granted. To determine whether leave to appeal should be granted, the Court must establish that the case engages this Court’s jurisdiction, and, if so, that it is in the interests of justice to grant leave to appeal.<sup>27</sup>

[46] The engagement of this Court’s jurisdiction is a threshold requirement for the granting of leave to appeal.<sup>28</sup> If a case does not overcome this initial obstacle, it cannot be entertained by this Court. It is only if the jurisdictional threshold has been met that this Court will proceed to assess whether it is in the interests of justice for the Court to determine the matter. The “interests of justice” enquiry includes – but is not limited to – an assessment of whether an applicant has reasonable prospects of success, which may involve some consideration of the application’s merits. At the point of the jurisdictional enquiry, however, this Court has held in *Gcaba* that “[j]urisdiction is determined on the basis of the pleadings . . . and not the substantive merits of the case”.<sup>29</sup> I will now proceed to examine whether the issues as pleaded by the applicant in this case confer jurisdiction on this Court.

*Jurisdiction*

[47] The Constitution provides that this Court’s jurisdiction is engaged in constitutional matters and matters that raise an arguable point of law of general public importance that ought to be decided by this Court.<sup>30</sup>

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<sup>27</sup> See *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 29.

<sup>28</sup> See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at para 11:

“A threshold requirement in applications for leave relates to the issue of jurisdiction.”

See also: *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 12 and *Koyabe v Minister for Home Affairs* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) at para 31.

<sup>29</sup> *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

<sup>30</sup> Sections 167(3)(b)(i) and (ii) of the Constitution.

[48] The first question is whether this appeal raises a constitutional issue. The applicant in her founding affidavit argues that the constitutional matter raised for consideration in this application relates to the “application of all relevant considerations, and in particular the normative factors considered in a constitutional setting of the Bill of Rights, in respect of vicarious liability on the part of the servants of the State”. In support of this contention, the applicant argues that the Supreme Court of Appeal erred in its finding that there was no sufficient link between the SAPS and the conduct of the deceased for the purposes of establishing vicarious liability. In addition, the applicant argues that she has reasonable prospects of success on appeal, and that the existence of conflicting judgments in respect of the issues that this appeal raises is another compelling basis for leave to appeal to be granted. The applicant does not argue that the test for the imposition of vicarious liability is at odds with our constitutional order, or that it requires development.

[49] The respondent, on the other hand, submits that the reasoning and conclusion reached in the majority judgment of the Supreme Court of Appeal are sound and that the applicant does not have strong prospects of success on appeal.

[50] In the context of the applicant’s submission that the constitutional issue in the present case is the application of the test developed in *K* and in *F*, it is important to recognise that this Court does not ordinarily grant leave to appeal on the basis that an applicant is dissatisfied with a preceding court’s application of an established legal test.<sup>31</sup>

[51] This was affirmed in *Mankayi* where this Court stated that the Court has found that it is inappropriate for the concept of what constitutes a “constitutional issue” to be narrowly construed, but that it has nonetheless “refused to entertain appeals that seek

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<sup>31</sup> See for example: *Loureiro v Invula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33; *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at paras 193-4; and *Mankayi* above n 28 at para 12.

to challenge only factual findings or incorrect application of the law by the lower courts”.<sup>32</sup>

[52] In *Mbatha*, Madlanga J (in a concurring judgment) found that “what is in essence a factual issue” may not “morph into a constitutional issue through the simple facility of clothing it in constitutional garb”.<sup>33</sup>

[53] This Court had to grapple with the issue of whether the application of the test for vicarious liability amounted to a constitutional issue in *K*. In doing so, O’Regan J acknowledged the contention raised by the respondent that, to the extent that the case concerned the mere *application of the principles of vicarious liability*, it did not amount to a constitutional issue.<sup>34</sup> In this regard, O’Regan J quoted the decision of this Court in *Phoebus Apollo*:

“It is not suggested that in determining the question of vicarious liability the SCA applied any principle which is inconsistent with the Constitution. . . . The thrust of the argument presented on behalf of the appellant was essentially that though the SCA has set the correct test, it had applied that test incorrectly — which is of course not ordinarily a constitutional issue. This Court’s jurisdiction is confined to constitutional matters and issues connected with decisions on constitutional matters. It is not for it to agree or disagree with the manner in which the SCA applied a constitutionally acceptable common-law test to the facts of the present case.”<sup>35</sup>

[54] O’Regan J found that *K* was distinguishable from *Phoebus Apollo* because, unlike in that case, the argument put forward by the applicant in *K* was not purely that the Supreme Court of Appeal incorrectly applied the established test for the imposition of vicarious liability. Counsel for the applicant went further and contended that, if the Supreme Court of Appeal had applied the common law rule correctly in

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<sup>32</sup> *Mankayi* above n 28 at paras 10-2.

<sup>33</sup> *Mbatha* above n 31 at para 222.

<sup>34</sup> *K* above n 3 at para 12.

<sup>35</sup> *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) (*Phoebus Apollo*) at para 9 quoted in *K* above n 3 at para 13.

holding that the state was not vicariously liable for the applicant's damages, then the rule should be developed to take into account the applicant's constitutional rights and to provide a remedy to correspond to the state's alleged constitutional duties.

[55] A similar argument was made by the applicant in *F*. There, the Court was also asked to develop the common law of vicarious liability in the event that it found that the Supreme Court of Appeal had correctly applied the common law test to arrive at its conclusion (which was largely based on the fact that the police official was on standby duty rather than active duty as was the case in *K*). For this reason, the Court's jurisdiction was not only grounded in the implication of certain constitutional provisions, but also in the enjoinder by the Constitution for courts to "develop the common law, including the delictual principle of vicarious liability, in accordance with the spirit, purport and objects of the Bill of Rights". These factors cumulatively led the Court to conclude that the matter raised constitutional issues of importance.<sup>36</sup>

[56] In *Luiters*,<sup>37</sup> the applicant (the Minister) applied for leave to appeal against the order of the Supreme Court of Appeal confirming the High Court's order that the Minister was vicariously liable for a delict committed by an off-duty police officer. In an appeal to this Court, the Minister sought to develop the test set out in *K* to confine its application to on-duty police officers. This Court held that the matter engaged this Court's jurisdiction because the Minister had raised a constitutional issue by seeking the development of the common law of vicarious liability. Despite finding that a constitutional matter was raised, this Court dismissed the Minister's application for leave to appeal on the basis that it lacked reasonable prospects of success.<sup>38</sup>

[57] That is not the case here. In the present matter, the applicant has brought a narrow case before this Court. The applicant's pleaded case is purely that the

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<sup>36</sup> *F* above n 4 at para 36.

<sup>37</sup> *Minister of Safety & Security v Luiters* [2006] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC) (*Luiters*).

<sup>38</sup> *Id* at paras 31-2.

Supreme Court of Appeal incorrectly assessed the facts in its application of the *F* and *K* test. It is clear from the submissions before us that the applicant does not contend that the Supreme Court of Appeal and the High Court held different views about the content of the law, only that they applied accepted principles in different ways.

[58] The difference between the reasoning in the Supreme Court of Appeal majority and the minority (and the High Court) judgments ultimately comes down to the weight that was attached to the different normative considerations underpinning vicarious liability based on their assessment of the facts. The Supreme Court of Appeal minority and the High Court judgments attached substantial weight to the fact that the delict was committed using an official firearm, and the policy consideration that – because the Minister creates risk by issuing firearms to police officers and bears the responsibility of training police officers – he should be encouraged to take active steps to prevent employees from causing harm to the broader public. The Supreme Court of Appeal majority judgment found on the assessment of the facts that significant weight should be attached to the element of trust, since the deceased did not gain access to the applicant due to her trust in him as a police officer, but instead due to the fact that they were in a romantic relationship.

[59] Unlike in *F* and *K*, the applicant has not averred that the common law test requires further development or that the bounds of the *F* and *K* test need to be further explored due to contextual factors. As a result, this case purely concerns the application of an accepted legal test, which this Court has repeatedly held is not a constitutional matter.<sup>39</sup> It follows that no constitutional issue has been raised in this matter to clothe this Court with jurisdiction.

[60] Furthermore, the applicant has not pleaded that this Court has jurisdiction in this matter because it concerns an issue of general public importance. The applicant has simply argued that the approach taken by the High Court and the Supreme Court of Appeal minority judgment is correct. The case is narrowly framed

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<sup>39</sup> See cases listed in n 31 above.

and brought in the applicant's own interest. No arguments have been put forward by the applicant to the effect that this matter concerns an issue of national legal import. Had the applicant done so and had the respondent had an opportunity to answer to an argument of this nature, it is possible that the Court could have entertained the matter, however the Court is bound by the pleadings in this case. In the result, the threshold requirement of jurisdiction has not been met.

[61] Since there is no constitutional issue, it is not necessary for this Court to assess the merits of the case. In the result, leave to appeal must be refused.

### *Conclusion*

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

[63] Consequently, the application for leave to appeal is refused. This outcome should not be perceived to detract from this Court's grave concern about the abuse of official firearms by police officers, which has proven to be a pervasive issue in our country.

*Costs*

[64] The respondent makes no argument as to costs. In the result no order as to costs will be made.

*Order*

[65] The following order is made:

1. Leave to appeal is refused.
2. There is no order as to costs.

ZONDO DCJ:

*Introduction*

[66] I have had the opportunity of reading the judgment (first judgment) prepared by my Colleague, Mhlantla J. The first judgment concludes that this Court has no jurisdiction in respect of this matter because this matter does not raise a constitutional issue and, for that reason, it refuses leave to appeal. The basis that the first judgment advances for the conclusion that this matter does not raise any constitutional issue is that this Court is called upon to simply apply what I call in this judgment the *Rabie*<sup>40</sup> test for vicarious liability or to decide whether the *Rabie* test was correctly applied by the Supreme Court of Appeal. The first judgment proceeds to hold that the application of an established legal test does not raise a constitutional issue. For the reasons that I set out shortly, I am unable to agree with the first judgment that this matter does not raise a constitutional issue, that this Court has no jurisdiction and that leave to appeal should be refused. In my view, this matter does raise a constitutional issue and this Court has jurisdiction. Indeed, in my view, leave to appeal should also be granted. However, before I set out my reasons for my views in this regard, let me briefly set out the background.

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<sup>40</sup> I call it the *Rabie* test because it was decided upon in *Rabie* above n 2 and it appears in [11].

*Background*

[67] Although the first judgment has already set out the facts of this matter, they can be stated briefly here as well in order to ensure a proper understanding of this judgment. Mr Mongo and Ms Elsa Booyesen, the applicant, had a romantic relationship. He was a police reservist. During the evening of 22 March 2013 Mr Mongo was on duty as a police officer. He decided to visit the applicant and have dinner with her during his meal break. Mr Mongo was wearing a police uniform and carrying a service pistol. He was dropped at the applicant's place of residence by a marked police vehicle on the understanding that he would be picked up by the same vehicle at the end of the dinner or when he was ready to return to work.

[68] According to the applicant, Mr Mongo and the applicant spent time together and they did not have any quarrel. However, according to her, out of the blue Mr Mongo pulled out his service pistol and said that, if he could not have her, nobody could. He then shot her, turned the pistol on himself and committed suicide. The applicant was injured but, fortunately, she survived.

*High Court and Supreme Court of Appeal*

[69] The applicant sued the Minister of Safety and Security for damages arising out of the incident on the basis that he was vicariously liable for Mr Mongo's wrongful conduct. The issue between the parties was whether the Minister was vicariously liable for Mr Mongo's wrongful conduct in shooting the applicant. The High Court concluded that the Minister was vicariously liable. On appeal, the Supreme Court of Appeal was divided 4:1. The majority held that the Minister was not vicariously liable. The minority held that he was. The Supreme Court of Appeal upheld the Minister's appeal and set aside the order of the High Court.



*In this Court**Jurisdiction*

[70] The applicant has now applied to this Court for leave to appeal against the decision of the Supreme Court of Appeal. As I have said, the first judgment concludes that the application for leave to appeal should be dismissed. The basis it advances is that this Court has no jurisdiction to entertain this matter. For the reasons that follow, in my view there is a constitutional issue in this matter and this Court has jurisdiction.

[71] When Mr Mongo shot and injured the applicant for no valid reason on the evening in question, he violated or infringed the applicant's right to freedom and security of the person including the right to be free from all forms of violence which is entrenched in section 12(1)(c) of the Constitution. Section 12(1)(c) reads:

“Everyone has the right to freedom and security of the person, which includes the right—

- (c) to be free from all forms of violence from either public or private sources.”

[72] In *K*<sup>41</sup> this Court had this to say about Ms K's right to security of the person, her right to dignity, privacy and substantive equality: “The question of the protection of Ms K's rights to *security of the person, dignity, privacy and substantive equality* are of profound constitutional importance”.<sup>42</sup> The same sentiment applies to the applicant's right to security of the person including the right to be free from all forms of violence and the right to human dignity in this case.

[73] If the applicant had sued Mr Mongo for, inter alia, an order declaring that he had violated her right under section 12(1)(c) and the matter had come to this Court after the High Court and the Supreme Court of Appeal, nobody could have taken the

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<sup>41</sup> *K* above n 3.

<sup>42</sup> *Id* at para 18.

view that this Court had no jurisdiction to adjudicate an appeal in respect of a claim based on a violation of section 12(1)(c). Indeed, in *Mashongwa*<sup>43</sup> Mr Mashongwa was injured when he was thrown out of a moving train operated by the Passenger Rail Agency of South Africa (PRASA). He sued PRASA for damages arising out of the incident. This Court held that it had jurisdiction to entertain that matter on the basis that Mr Mashongwa's claim was based on an alleged breach of the rights in sections 7(2) and 12(1)(c) of the Constitution. Section 7(2) places an obligation on, among others, the executive, under which PRASA fell, to respect, promote, protect and fulfil the rights entrenched in the Bill of Rights.

[74] In *Mashongwa* this Court unanimously said through Mogoeng CJ:

“Although it may not look like the outcome turns on the meaning or vindication of any constitutional provision or right, [sections] 7(2) and 12(1)(c) of the Constitution are the pillars on which the superstructure of this case rests. Mr Mashongwa's claim owes its origin largely to the obligations imposed on PRASA, an organ of state, by these provisions. In addition, an enquiry into wrongfulness “focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable”. On these bases this Court does have jurisdiction in terms of section 167(3)(b)(i) of the Constitution.”<sup>44</sup>

[75] In the present case it can be said that the applicant's claim owes its origin largely to the constitutional and statutory obligations that Mr Mongo and the Minister of Safety and Security had towards the applicant and to protect her and to prevent harm to her, to respect, promote, protect and fulfil her fundamental right in section 12(1)(c) of the Constitution to be free from all forms of violence. When a police officer is in possession of a service firearm issued to him or her for use in the course of his or her duties, he has a constitutional and statutory obligation not to use that firearm in any circumstances in which its use is not authorised by law. In other words,

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<sup>43</sup> *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) (*Mashongwa*).

<sup>44</sup> *Id* at para 13.

he or she may not use it unlawfully. If he used it unlawfully, he or she acts in breach of that constitutional and statutory obligation. In this case the applicant's case is in effect that in shooting and injuring the applicant, Mr Mongo acted in breach of that constitutional and statutory obligation. That is a constitutional issue.

[76] Both sections 7(2) and 12(1)(c) apply to the present matter. Mr Mongo and the Minister were obliged to respect, promote, protect and fulfil the applicant's right under section 12(1)(c) to be free from all forms of violence. All parties accept that the matter must be decided on the basis that Mr Mongo's conduct was wrongful and he infringed the applicant's rights. What this Court is asked to do is to grant leave to appeal so as to decide whether the Minister is vicariously liable for Mr Mongo's wrongful conduct.

[77] It is accepted by all concerned that the test to be used to determine vicarious liability is the *Rabie* test<sup>45</sup> as developed in this Court's judgment in *K*. That test has two legs. In this case the first leg of the test has been satisfied. What remains to determine is whether the second leg of the test as developed in *K* has been satisfied. The second leg is represented by the question whether, bearing in mind the values the Constitution seeks to promote, it can be said that there was a close connection between Mr Mongo's conduct and the purposes and business of the Minister. The reference to "bearing in mind the values the Constitution seeks to promote" was made part of the *Rabie* test by this Court in *K*.<sup>46</sup> Accordingly, the *Rabie* test, as developed in *K*, must be applied to determine vicarious liability.

[78] Through O'Regan J this Court said in *K*:

"The fact that the Court is concerned with a different aspect of the law of delict, the *one pertaining to vicarious liability does not mean that questions of constitutional rights cannot arise*. The obligations imposed by sections 8(1) and 39(2) of the

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<sup>45</sup> See [11].

<sup>46</sup> *K* above n 3 at para 23.

Constitution are not applicable only to the criterion of wrongfulness in the law of delict. *In considering the common law principles of vicarious liability, and the question of whether that law needs to be developed in that area, the normative influence of the Constitution must be considered.*<sup>47</sup>

[79] This Court went on to say in paragraphs 22 and 23 of its judgment in *K*:

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

[23] *Denying that the principles bear such normative implications will only bedevil the exercise by rendering inarticulate premises that in a democracy committed to openness, responsiveness and accountability should be articulated. To this extent, at least, therefore, the principles of vicarious liability and their application needs to be developed to accord more fully with the spirit, purport and objects of the Constitution. This conclusion should not be misunderstood to mean anything more than that the existing principles of common-law vicarious liability must be understood and applied within the normative framework of our Constitution, and the social and economic purposes which they seek to pursue. Nor does this*

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<sup>47</sup> Id at para 19.

*conclusion mean that an employer will be saddled with damages simply because injuries might be horrendous. Rather, it implies that the courts, bearing in mind the values the Constitution seeks to promote, will decide whether the case before it is of the kind which in principle should render the employer liable.”<sup>48</sup>*

[80] In my view, the policy features of vicarious liability relate to public policy. It will be noticed from the first sentence of paragraph 22 in *K* that this Court described vicarious liability as having a “policy-laden character”. Attention must also be drawn to the second last sentence of paragraph 22 in *K* which in part says that “the principles of vicarious liability are principles which are imbued with social policy and normative content”. Further attention should be drawn to the point made in the last sentence of paragraph 23 in *K*. That point is that this Court’s conclusion in the second sentence of paragraph 23 means that, in applying the second leg of the *Rabie* test for vicarious liability, “the courts, bearing in mind the values the Constitution seeks to promote, will decide whether the case before it is of the kind which in principle should render the employer liable”.

[81] In *K* this Court held that the three policemen who raped Ms K had a simultaneous constitutional and legal obligation towards Ms K of protecting her and of preventing harm to her. It called this a simultaneous omission and commission. It went on to say that the simultaneous omission and commission is relevant to the determination of vicarious liability. It articulated this in these terms:

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

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<sup>48</sup> Id at paras 22-3.

<sup>49</sup> Id at para 49.

In this passage this Court held in *K* that, in answering the second question in the *Rabie* test, which is what the present case before us is about, the simultaneous constitutional and statutory commission and omission obligations which the wrongdoer and the Minister owed the victim are relevant to determining vicarious liability. That means that the determination of vicarious liability, at least in so far as it involves the consideration of the constitutional and statutory simultaneous omission and commission obligations of the perpetrator and the employer towards the victim, raises a constitutional issue.

[82] As will be seen below, in the present case Mr Mongo's conduct constituted a breach of his and the Minister's constitutional and statutory simultaneous omission and commission obligations referred to in this Court's judgment in *K*.<sup>50</sup> The commission lay in Mr Mongo's conduct in shooting and injuring the applicant. The simultaneous omission lay in his failure to protect the applicant from harm when he had a general duty to do so.

[83] In *Minister of Safety and Security v Luiters*<sup>51</sup> Langa CJ, writing for a unanimous Court, had this to say about what this Court's judgment in *K* said concerning the determination of vicarious liability:

“This Court may decide only constitutional matters and issues connected with decisions on constitutional matters. In *K* this Court explicitly recognised that questions relating to vicarious liability are not always purely questions *of fact but that policy and constitutional considerations are inherent in all questions of vicarious liability*. *Vicarious liability, it was stated, requires the—*

*‘court, bearing in mind the values the Constitution seeks to promote, [to] decide whether the case before it is of the kind which in principle should render the employer liable.’*

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<sup>50</sup> *Id* at para 53.

<sup>51</sup> *Luiters* above n 37.

The point was made that generally people should not be held liable for delicts they did not commit and the policy considerations that convince a court to depart from that principle prevent vicarious liability from ever being described as a purely factual issue. *It is necessarily a mixed determination of policy and fact. The Court however made a distinction between the first, subjective leg and the second, objective leg of the test established and held that the policy considerations only become relevant in the second, objective leg of the test. The first, subjective leg remains a purely factual inquiry*”.<sup>52</sup>

[84] It seems to me that the policy and constitutional considerations to which this Court referred in *Luiters* and *K* include the values of the Constitution. It is clear from the passage quoted above that this Court has said that to determine whether someone is vicariously liable for a delict committed by another, the values of the Constitution must be used to decide whether the case before the Court is of the kind which in principle should render the employer liable. In *Luiters*, this Court held that the policy considerations are relevant only in the second leg of the *Rabie* test. That is on whether there was a close connection between the delict and the purposes and business of the employer.

[85] In *F* this Court also said:

“Mr van Wyk did not rape Ms F in the furtherance of the constitutional mandate of his employer. He was not, and could not have been, ordered by his employer to do so. He acted in pursuit of his own selfish interests. Accordingly, the first leg of the *K* test, which is subjective, does not establish state liability here. What remains to be considered is whether the requirements of the second leg of the test are met.

Accordingly, *several interrelated factors have an important role to play in addressing the question whether the Minister is vicariously liable for the delictual conduct of Mr van Wyk. 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*

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<sup>52</sup> Id at para 18.

*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.”*<sup>53</sup>

[86] From the above passage I highlight that the last sentence is to the effect that all the elements or factors referred to in that passage, which include the constitutional obligations to protect the public and the role of the simultaneous omission and commission, “complement one another in determining the State’s vicarious liability”. It is clear from this passage that the determination of the vicarious liability of the Minister of Safety and Security for the wrongful conduct of a police officer involves, in so far as it relates to the second leg of the *Rabie* test, considering whether the state’s constitutional obligation to protect the public has been breached. This alone is sufficient to justify the conclusion that, where a court is required to determine the vicarious liability of the Minister of Safety and Security for the wrongful conduct of a police officer with reference to the second leg of the *Rabie* test, a constitutional issue is raised.

[87] This Court’s decision in *K* that the Minister was vicariously liable for the wrongful conduct of the three policemen in raping Ms K rested on the second leg of the *Rabie* test. That is on the existence or otherwise of a sufficiently close connection between the wrongful conduct of the policemen and their employment. This Court relied on three inter-related factors to reach the conclusion that there was such a connection in *K*. This Court held:

“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 obligation of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.”<sup>54</sup>

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<sup>53</sup> *F* above n 4 at paras 51-2.

<sup>54</sup> *K* above n 3 at paras 52-3.



[88] Seeing that, in the present case, whether or not the Minister must be held vicariously liable is going to depend on the answer to the second question in the *Rabie* test, are we not called upon to ask the same question that this Court asked and answered in *K*? That is the question whether there are no factors in the present case such as those referred to in *K* or similar factors which “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”.

[89] Of course, that is the question we are called upon to answer. If the answer is in the affirmative, as was the case in *K*, the Minister will be vicariously liable. If the answer is in the negative, the Minister will not be vicariously liable. Is that question a constitutional issue? Of course, it is. This is so in part because this Court says we must view those factors against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent which is the Minister.

[90] In *F* this Court, through Mogoeng J, said:

“As O’Regan J stated in *K*, the second question [of the *Rabie* test] ‘does not raise purely factual questions, but mixed questions of fact and law’. Accordingly, several interrelated factors have an important role to play in addressing the question whether the Minister is vicariously liable for the delictual conduct of Mr Van Wyk. 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 contemplate one another in determining the state’s vicarious liability in this matter.

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 protect members of the public, particularly the vulnerable, must enjoy some prominence. These obligations, as well as the constitutional rights of Ms F, are the prism through which this enquiry should be conducted.<sup>55</sup>

[91] If it is accepted, as I think it must be, that in the present matter this Court is called upon to determine whether the second leg of the *Rabie* test, as developed in *K*, is satisfied, then it must also be accepted that the enquiry that this Court is required to conduct is or includes the enquiry to which this Court referred in the last sentence of the passage quoted in the preceding paragraph. If that it accepted, it is difficult to understand the proposition that such an enquiry does not raise a constitutional issue. In my view, it clearly does raise a constitutional issue.

*Leave to appeal*

[92] This Court grants leave to appeal if it is in the interests of justice to grant leave. An important factor, though not decisive, in this regard is whether there are reasonable prospects of success in the appeal. There is much uncertainty about how the second leg of the *Rabie* test must be applied. Only this Court may bring certainty as to what the correct application is of the *Rabie* test after it was developed by this Court in *K*.

[93] A principle or a strong guideline has been established by this Court that, when there are different judicial opinions that have been expressed in a lower court or in lower courts in a matter in respect of which leave to appeal is sought, that means that there are, *prima facie*, reasonable prospects of success. In *NEHAWU*<sup>56</sup> this Court said:

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<sup>55</sup> *F* above n 4 at paras 52-3.

<sup>56</sup> *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*).

“That said, an important factor in considering the prospects of success in this application is the fact that members of the LAC and the Labour Court are divided on the proper construction of section 197. This factor alone suggests, at least *prima facie*, that there are prospects of success.”<sup>57</sup>

Later on in the same paragraph this Court said: “Nevertheless, given the clear division amongst the labour judges, it is desirable for this court to consider this issue.”<sup>58</sup>

[94] In *Loureiro* there had been a majority and a minority judgment in the Supreme Court of Appeal and this Court said that the substantial differences in the majority and minority judgments in that Court “provid[ed] a further reason for its being in the interests of justice to address the issues”.<sup>59</sup> In the present case the High Court found for the applicant on vicarious liability and in the Supreme Court of Appeal there was a split. In this Court there is a split as well. In line with the approach of this Court in cases such as *NEHAWU* we should hold that there are reasonable prospects of success for the applicant in this matter.

[95] In fact out of *K*, *F* and this matter in which vicarious liability had to be determined by this Court in the past few years, it was only in *K* that there was a unanimous judgment in this Court. *F* had a majority judgment and a minority judgment. In *F* there was a split in the Supreme Court of Appeal. This Court’s judgment in *K* refers to a number of cases including those in foreign jurisdictions from which one can see that the determination of vicarious liability very often results in divisions in judicial opinions. This shows that very often judicial unanimity is a rarity in cases of vicarious liability. In the *Rabie* case itself there was a split in the Appellate Division when the *Rabie* test was adopted.

[96] In the circumstances it is in the interests of justice that leave to appeal be granted.

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<sup>57</sup> *Id* at para 26.

<sup>58</sup> *Id*.

<sup>59</sup> *Loureiro* above n 31 at para 37.

*The appeal*

[97] It is accepted that to determine whether the Minister is vicariously liable for Mr Mongo's wrongful conduct, the test to be applied is the *Rabie* test. In *Rabie* the test was formulated in these terms:

“It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. . . . 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.”<sup>60</sup>

It is accepted that the applicant's case does not meet the first leg of the test. Whether or not the Minister is vicariously liable will depend upon whether the second leg of that test is satisfied. The second leg of the *Rabie* test is covered in the last two sentences of this passage.

[98] It is true that in both *F* and *K* the feature of trust was present although more so in *K* than in *F*. I say more in *K* than in *F* because in *F*, when Ms F alighted from the vehicle driven by Mr van Wyk, she did so because she did not trust him anymore. When, out of desperation, she entered the same car again, although she still must have had some trust in Mr van Wyk, it must have diminished considerably. It is important to discuss the judgments of this Court in *K* and *F*.

*The judgment of this Court in K*

[99] Ms K, a young woman, was stranded in the early hours of the morning after she had been at a club with a boyfriend who later refused to take her home. She went to a petrol station to look for a telephone booth to call home but found that outgoing calls

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<sup>60</sup> *Rabie* above n 2 at 134.

could not be made from the telephone in the petrol station. While she was not sure what to do, a marked police vehicle arrived at the petrol station. A police officer in uniform alighted from the police vehicle. After hearing Ms K's story, the police officer offered Ms K a lift home. Ms K accepted the offer and jumped into the police vehicle. There were two other police officers in the police vehicle. They were also in uniform. The three police officers drove off with Ms K. After some time, the vehicle drove in a wrong direction and Ms K protested. The three police officers told her to "be quiet" and stopped somewhere and raped her. They left her there and drove off. The police officers were subsequently convicted of rape and kidnapping and sentenced to life imprisonment for the rape. Ms K subsequently sued the Minister on the basis that he was vicariously liable for the wrongful conduct of the police officers who had raped her.<sup>61</sup>

[100] In *K* this Court had this to say about the obligations of the police officers involved in that case towards Ms K:

"The question of the protection of Ms K's rights to security of the person, dignity, privacy and substantive equality are of profound constitutional importance. *In addition, it is clear and it was conceded by the respondent that it was part of the three policemen's work to ensure the safety and security of all South Africans and to prevent crime.* These obligations arise from the Constitution and are affirmed by the Police Act. In the light of these obligations, the court said in *Carmichele*:

...

'The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.'<sup>62</sup>

[101] The effect of the first judgment is that, when a policeman who is on duty and in uniform uses his service firearm to shoot his wife or his girlfriend at home, the doors of this court are shut to the woman concerned if she seeks refuge and relief in this the

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<sup>61</sup> *K* above n 3 at paras 2-8.

<sup>62</sup> *Id* at para 18.

highest court because the lower courts have wrongly applied the vicarious liability test since this court will say there is nothing constitutional about the injustice she may have suffered at the hands of the man. This means that the wife or girlfriend would be unlikely to recover any damages from the Minister for that wrongful conduct by the police officer. Whether or not the Minister may be held vicariously liable in any particular case will depend on the circumstances of each case and the presence or absence of the trust element is not decisive. The Minister may be held vicariously liable even when the trust element does not feature provided that a consideration of all other relevant factors leads to the conclusion that there is a close connection between the wrongful conduct of the police officer and his employment as a police officer. That connection may be established on the strength of other factors of the case such as how the police officer's employment as a police officer facilitated the commission of the wrongful conduct. What must also be made clear is that a police officer's obligation to protect the people also applies to members of his or her family and loved ones, particularly when he is on duty. A police officer's obligation to protect the people of South Africa and to prevent crime covers the family members of the police officer at home as well.

[102] In *K* this Court relied, among others, on the factor of simultaneous omission and commission in determining whether the Minister was vicariously liable. This Court said in this regard:

“An employee can at the same time be committing a delict for his or her own purposes, and neglecting to perform his or her duties as an employee and this has been recognised by our courts, at the very least by Watermeyer CJ in *Feldman*. In this case it is clear that the delict for which the applicant seeks to hold the respondent liable is the rape by the three policemen. That rape was clearly a deviation from their duties. However, when committing the rape, the three policemen were simultaneously omitting to perform their duties as policemen.”<sup>63</sup>

[103] Later, this Court said:

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<sup>63</sup> Id at para 48.

“The question of the simultaneous omission and commission may be relevant to wrongfulness in a particular case, but it will also be relevant to determining the question of vicarious liability. In particular, it will be relevant to answering the second question set in *Rabie*: was there a sufficiently close connection between that delict and the purposes and business of the employer?”<sup>64</sup>

In this case, too, the question of simultaneous omission and commission arises. If the rape of Ms K by the three policemen was both an omission and a commission, the shooting of the applicant by Mr Mongo in this case was also both an omission and a commission. The presence of this factor points towards the existence of a close connection between Mr Mongo’s wrongful conduct and the “business” of the Minister.

[104] In regard to the question whether in *K* the three policemen’s conduct was sufficiently close to their employer’s business to render the Minister vicariously liable, this Court said:

“The next question that arises is whether, albeit that the policemen were pursuing their own purposes when they raped the applicant, *their conduct was sufficiently close to their employer’s business to render the respondent liable. In this regard, there are several important facts which point to the closeness of that connection. First, the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty is a duty which also rests on their employer and they were employed by their employer to perform that obligation. Secondly, in addition to the general duty to protect the public, the police here had offered to assist the applicant and she had accepted their offer. In so doing, she placed her trust in the policemen although she did not know them personally. One of the purposes of wearing uniforms is to make police officers more identifiable to members of the public who find themselves in need of assistance.*”<sup>65</sup>

[105] After the above paragraph this Court continued:

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<sup>64</sup> Id at para 49.

<sup>65</sup> Id at para 51.

Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. Where such trust is established, the achievement of the tasks of the police will be facilitated. In determining whether the Minister is liable in these circumstances, courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her.

*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.”<sup>66</sup>*

[106] Paragraphs 51 to 53 of the judgment of this Court in *K* show that this Court did not make its decision on the connection between the three policemen’s wrongful conduct and the Minister’s “business” solely on the basis of the element of trust in the police. This Court went on to specify the three factors which pointed to the closeness of the connection between the wrongful act and the police officers’ employment. The three factors were the following:

- (a) “The policemen all bore a statutory and constitutional duty to prevent crime and protect 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.”<sup>67</sup>

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<sup>66</sup> Id at paras 52-3.

<sup>67</sup> Id at para 51.



- (b) “. . . in addition to the general duty to protect the public, the police had offered to assist the applicant and she had accepted their offer. In so doing she placed her trust in the policemen although she did not know them personally. One of the purposes of wearing uniforms is to make police officers more identifiable to members of the public who find themselves in need of assistance.”<sup>68</sup>
- (c) “. . . 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.”<sup>69</sup>

[107] Referring to the above three factors, O’Regan J said on behalf of a unanimous Court in *K*:

*“In my view, these three interrelated 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.”*<sup>70</sup>

This passage shows, quite clearly, that in *K* the question of whether there was a close connection between the wrongful conduct of the policemen and their employment was not decided solely on the basis of whether the feature of trust was present. Trust was but one of the factors that the Court took into account together with the two other factors referred to above. Two of the three factors on which this Court relied to reach the conclusion in *K* that there was a close connection between the wrongful conduct of the three policemen and their employment are also present in this case. Those are that Mr Mongo bore a statutory and constitutional duty to (a) prevent crime and protect members of the public and (b) the simultaneous commission and omission.

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<sup>68</sup> Id.

<sup>69</sup> Id at para 53.

<sup>70</sup> Id.

[108] In my view, the police statutory and constitutional duty to prevent crime and protect members of the public does not exclude members of a police officer's family or friends or romantic partner. A member of a police officer's family is owed a duty of protection by a police officer as is any member of the public. The fact that the police officer is a member of his or her family or is a friend or romantic partner does not mean that he or she is owed less or no protection by the police officer. As long as a member of the public is owed a duty of protection by a police officer in a particular case, a family member, friend or romantic partner of the police officer in the same situation as a member of the public is equally owed a duty by that police officer.

[109] In *K* it was conceded by Counsel for the Minister that, had Ms K been detained on reasonable suspicion that she had committed a crime and was then raped by a police officer while in police custody, the Minister would have been vicariously liable. This Court had this to say in regard to this concession:

“To conclude that, on the facts of this case, the Minister is not liable, when it is conceded he would have been liable should Ms K have been detained on a reasonable suspicion of having committed an offence and then raped, would be absurd. It would be a conclusion quite at odds with our constitutional values and the values of our community.”<sup>71</sup>

I can say exactly the same in respect of the present case. If the applicant had been detained by the police on reasonable suspicion of having committed an offence and Mr Mongo had visited her in police custody as a lover and shot and wounded her in the circumstances in which he shot her, except for the venue, could it be suggested in those circumstances that there was not a strong connection between Mr Mongo's wrongful conduct and his employment as a police officer?

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<sup>71</sup> Id at para 56.

[110] In my view, that suggestion could simply not be made. If, in that scenario, a close connection could be said to be present between Mr Mongo's wrongful conduct and his employment as a police officer, is the venue of where the shooting happens all that makes the difference? Another example. If Mr Mongo had negligently shot and injured the applicant while he was taking his pistol out to see how many rounds of ammunition were in it, could it be said that the Minister would not have been vicariously liable?<sup>72</sup> If the Minister would have been vicariously liable in such a case, how can the Minister not be vicariously liable when the shooting is deliberate?

[111] This Court also stated in *K*:

“When the policemen – on duty and in uniform – raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their employer. This close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.”<sup>73</sup>

In *K* the three policemen who raped Ms K were in police uniform, the vehicle in which they transported her to the place where they raped her was a marked police motor vehicle and the policemen were on duty. Like the policemen in *K*, in the present case, Mr Mongo was also on duty. Like the policemen in *K*, in the present case Mr Mongo was also in police uniform. Like in *K* where the policemen used a police vehicle to get to the spot where they raped Ms K, in the present case, a marked police vehicle was used to transport Mr Mongo to the scene where he committed the wrongful and criminal conduct against the applicant. In addition, Mr Mongo was to be picked up by a police vehicle at the end of his and the applicant's dinner. Furthermore, he was also carrying a service pistol which is the one he used to shoot

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<sup>72</sup> See also Johan Scott 'Intentional delicts of police officers: A hiccup from the Supreme Court of Appeal' 2017 TSAR 872: 889.

<sup>73</sup> *K* above n 3 at para 57.

the applicant. The Minister, as employer, issues service pistols to police officers so that they can use them in certain circumstances permitted by law. This time Mr Mongo used his service pistol in circumstances in which he was not authorised to use it. With all these factors being present, the conclusion that there was a close connection between Mr Mongo's wrongful conduct and his employment as a police officer is more than justified.

*The judgment of this Court in F*

[112] In *F* this Court said:

“As the Court stated in *K*, the objective portion of the two-stage test requires a court to ask whether there is a sufficiently close connection between the wrongful conduct and the wrongdoer's employment. This requires ‘*explicit recognition of the normative content of this stage of the test. The pivotal enquiry is therefore whether ‘there was a close connection between the wrongful conduct of the policemen and the nature of their employment.’ That is the question that must be asked in determining the State's vicarious liability in this matter.*”<sup>74</sup>

There are, at least, two things that are important about what this Court said in this passage. The first is that the “pivotal enquiry” that must be conducted in order to establish whether the second leg of the *Rabie* test is satisfied is whether “there was a close connection between the wrongful conduct of the [wrongdoer] and the nature of [his or her] employment”.<sup>75</sup> That is the overall inquiry. The question whether the trust element was present must be asked as one of a number of questions that need to be asked in order to determine the pivotal question referred to by Mogoeng J in the above paragraph. The presence or absence of the trust element is not the sole question that decides the overall inquiry to establish whether the second leg of the *Rabie* test has been satisfied.

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<sup>74</sup> *F* above n 4 at para 50.

<sup>75</sup> *Id.*

[113] The second important thing about the above passage is that Mogoeng J made it clear in the last sentence of the passage that the pivotal question to which he had just referred was the question that “[had to] be asked in determining the State’s vicarious liability in this matter.”<sup>76</sup> In other words, in *F* he did not say that the question to be asked was whether the trust element was present. After the passage quoted above, the Court proceeded to apply what it called the “*K* test”. In the next paragraph, this Court first dealt with the first leg of the *Rabie* test or, as it put it, the “*K* test”. The Court concluded that “[t]he first leg of the test, which is subjective does not establish State liability here”.<sup>77</sup> It then said: “What remains to be considered is whether the requirements of the second leg of the test are met”.<sup>78</sup>

[114] In the next paragraph this Court set out the approach it intended to adopt in determining whether the requirements of the second leg of the *Rabie* test had been met in *F*. It said:

“As O’Regan J stated in *K*, the second question ‘does not raise purely factual questions, but mixed questions of fact and law.’ Accordingly, several interrelated factors have an important role to play in addressing the question whether the Minister is vicariously liable for the delictual conduct of Mr van Wyk. 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.

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,

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at para 51.

<sup>78</sup> *Id.*

particularly the vulnerable, must enjoy some prominence. These obligations, as well as the constitutional rights of Ms F, are the prism through which this enquiry should be conducted.”<sup>79</sup>

[115] I draw special attention to the second last sentence in paragraph 52 where this Court said: “*All these elements complement one another in determining the State’s vicarious liability in this matter*”.

[116] In *F*, Mogoeng J also said:

“I accept that the distinction between a policeman who is on duty and one who was off duty is a relevant factor in determining the closeness of the connection between the wrongful act and the perpetrator’s employment. I do not accept, however, that it is determinative of whether the state may be held liable.”<sup>80</sup>

In *F* this Court considered various factors in deciding the question whether there was a close connection between the wrongful conduct of Mr van Wyk and his employment. These included the state’s constitutional obligations and the interplay between commission and omission. Under the heading of “Sufficiently close connection”, this Court, inter alia, said:

“[The question whether, even though acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee’s acts for his own interests and the purposes and the business of the employer] *must be answered by weighing the normative factors that justify the imposition of liability on the policeman’s employer against those pointing the other way.*”<sup>81</sup>

[117] This Court went on to say:

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<sup>79</sup> Id at paras 52-3.

<sup>80</sup> Id at para 67.

<sup>81</sup> Id at paras 74-5 referring to the judgment in *K* above n 3.

“Unlike before, when the test in deviation cases was whether the employee acted within the course and scope of employment, the focus now is on whether—

‘the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.’

*The establishment of this connection must be assessed by the explicit recognition of the normative factors that point to vicarious liability including the constitutional mandate of the State, to establish a credible and efficient police service on which the public ought to be able to rely for protection from and prevention of crime. That should be a police service worthy of the trust of the public and one to which vulnerable members of the public ought to turn readily for protection in times of need.*”<sup>82</sup>

[118] This Court then pointed out that Ms F had trusted Mr van Wyk but the latter had betrayed her trust when he raped her. It stated that in *K* the policemen were on duty and in uniform and driving a marked police vehicle. This Court said that the factors in *F* were “admittedly more tenuous”. It then said:

*“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.*

In conclusion: The police vehicle which was issued to him precisely because he was on standby duty, enabled Mr van Wyk to commit the rape. It enhanced his mobility and enabled him to give a lift to Ms F. Further, when Ms F re-entered the vehicle, she understood Mr van Wyk to be a policeman. She made this deduction from the dockets and the police radio in the vehicle. In other words, he was identifiable as a policeman. And, in fact, he was a policeman. Pivotal is the normative component of

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<sup>82</sup> Id at para 76.

the connection test. Beyond her subjective trust in Mr van Wyk, is the fact that any member of the public, and in particular one who requires assistance from the police, is entitled to turn to and to repose trust in a police official.”<sup>83</sup>

[119] In my view, if it could be held in *F*, as it was, that there was a sufficient connection between Mr van Wyk’s rape of Ms F and the Minister’s business, then surely, in the present case, there was a strong connection between Mr Mongo’s conduct in shooting the applicant and his employment as a police officer. After all, to shoot the applicant, Mr Mongo used a service pistol issued to him to use in certain circumstances in the performance of his duties but on this occasion he used it in circumstances in which he was not authorised to use it. In *F* this Court expressly said that the fact that Mr van Wyk was on standby “[was] not an irrelevant consideration”.<sup>84</sup> This Court continued: “His duty to protect the public while on standby was incipient. He could be summoned at any time to exercise his powers as a police official and protect a member of the public”.<sup>85</sup>

[120] In the circumstances I conclude that there was a close connection between Mr Mongo’s wrongful conduct and his employment as a police officer. Therefore, I hold that the Minister was vicariously liable for Mr Mongo’s wrongful conduct. In summary the following are the factors which justify this conclusion—

- (a) Mr Mongo was on duty at the time of the shooting;
- (b) Mr Mongo was wearing a police uniform at the time of the incident;
- (c) being a police officer facilitated Mr Mongo’s access to the service pistol he used to shoot the applicant;

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<sup>83</sup> Id at paras 80-1.

<sup>84</sup> Id at para 80.

<sup>85</sup> Id.



- (d) being on duty during the evening in question enabled Mr Mongo to have access to a police vehicle which transported him to the applicant's place of residence, where he committed the wrongful act;
- (e) the arrangement that a police vehicle would pick him up after he had had dinner with the applicant also facilitated his going to the applicant's place in the assurance that he would not be stranded when he had finished his dinner with the applicant;
- (f) the only reason why Mr Mongo was carrying the firearm that he used to shoot the applicant is that he was a police officer;
- (g) as a police officer, he was allowed to use the firearm under certain circumstances, but on this occasion he used it in circumstances in which he was not authorised or allowed to use it. In other words, he abused his right to carry the firearm. If a police officer who is on duty abuses or misuses his service firearm and shoots somebody in circumstances in which he should not have shot that person, the Minister should be held liable; there is no reason why in those circumstances it should not be said that there is a strong connection between the shooting and the police officer's employment as a police officer; and
- (h) Mr Mongo had constitutional and statutory obligations to protect the applicant and to prevent harm towards her (i.e. the simultaneous omission and commission factor).

[121] That the applicant and Mr Mongo were not meeting as a police officer and a member of the public but as romantic partners is neither here nor there because a police officer who is on duty has an obligation to protect not only members of the public but also members of his or her family and those close to him or her.

[122] Mr Mongo's employment as a police officer greatly facilitated the shooting. He carried a firearm because he was employed as a police officer. A police officer

has instructions to use his service firearm only in certain authorised circumstances but Mr Mongo used it in unauthorised circumstances by shooting the applicant. There is no evidence that Mr Mongo owned another firearm and would have had access to another firearm at all on that particular evening if he did not have access to the service pistol. The circumstances of this case establish a strong connection between Mr Mongo's wrongful conduct and his employment as a police officer. Therefore, the second leg of the *Rabie* test has been established. In my view, the Supreme Court of Appeal erred in concluding differently. In those circumstances I conclude that the appeal should succeed and the decision of the Supreme Court of Appeal should be set aside and that of the High Court restored.

[123] In the result I would have made the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The decision of the Supreme Court of Appeal is set aside and replaced with the following order:  
    "The appeal is dismissed with costs."
4. The order of the High Court is restored.
5. The respondent must pay the applicants costs in this Court.

For the Applicant:

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