



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

CASE NO: 1084/2013

In the matter between:

MINISTER OF SAFETY AND SECURITY

APPELLANT

and

MAPULA PAULINE MORUDU

FIRST RESPONDENT

Neutral Citation: *Minister of Safety and Security v Morudu* (1084/2013) [2015]
ZASCA 91 (29 May 2015).

Coram: Navsa ADP, Brand, Saldulker & Mbha JJA and Dambuza AJA

Heard: 12 May 2015

Delivered: 29 May 2015

Summary: Vicarious liability – test to be applied in deviation cases – spirit, purport and objects of the Bill of Rights to be considered – acts of policeman not sufficiently close to give rise to vicarious liability.

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Molefe AJ sitting as court of first instance).

The following order is made:

1. The appeal is upheld and no order is made as to costs.
2. The order of the court below is set aside and substituted as follows:
„The plaintiffs“ claims are dismissed and no order is made as to costs.“

JUDGMENT

Navsa ADP (Brand, Saldulker & Mbha JJA and Dambuza AJA concurring):

[1] The events of the morning of the day before Christmas 2001 will, no doubt, continue to haunt the respondents, Mrs Mapula Pauline Morudu and her four children for the rest of their lives. On that fateful day Inspector Frans Duba (Duba), then employed by the appellant, the Minister of Safety and Security, drove to their home situated at 22 Zone 5, Seshego Township in the Limpopo Province. Upon arrival he called out the name of Mr Mothibi Elias Morudu, the first respondent“s husband and the father of the other respondents. Duba asked about the whereabouts of Mrs Duba, his wife. Shortly thereafter he pursued Mr Morudu, through the house and ultimately shot and killed him.

[2] At the time of the events referred to in the preceding paragraph, Duba was attached to what is now known as the Polokwane Criminal Record and Crime Scene

Management Unit of the South African Police. Simply put, he was a fingerprint investigator and a member of a police unit that attended crime scenes for investigative purposes when called upon to do so. Duba drove to the house where he shot Mr Morudu (the deceased) in an unmarked police vehicle that had been assigned to his unit. At that time, he and another colleague were on call to attend crime scenes, should the need arise. The firearm which he used in perpetrating the awful deed was his own and not of official issue. The question on appeal, as in the court below, is whether, following on the death of the deceased, the appellant should be held vicariously liable for the respondents' alleged loss of support sustained as a result of Duba's actions. The details that follow have been distilled from the evidence adduced in the Gauteng Division, Pretoria,¹ following on an action instituted by the respondents in which they claimed damages flowing from the unlawful killing of the deceased.

[3] During the morning of Monday, 24 December 2001, shortly after she awoke, the first respondent, in preparing to start her daily household chores, took the youngest of her three children to the room where her other children slept. She returned to her bedroom when suddenly, Duba appeared from behind the curtains, calling out her husband's name and asking about the whereabouts of his wife, Mrs Duba. The first respondent was terrified. Duba, who was armed, fired shots in her bedroom. The first respondent managed to escape from the room and whilst fleeing grabbed one of her children who was standing in a passage of the house. The first respondent exited through the kitchen door and sought refuge in a neighbouring house. From the neighbour's premises she saw a white unmarked motor vehicle, which Duba had used to travel to the scene. It was parked around a corner close to her house. When she returned to the house she found the deceased lying close to the kitchen door. He had been shot and killed by Duba.

[4] The first respondent had encountered Duba for the first time on a prior occasion when he had visited her home on a Sunday afternoon and had sought the deceased.

When she informed Duba that her husband had gone to church he, in turn, told her that

¹Formerly known as the North Gauteng High Court, Pretoria (GNP) between 1 March 2009 and 23 August 2013 in terms of the Renaming of High Courts 2014 (3) SA 319 and has since been renamed the Gauteng Division of the High Court Pretoria.

the deceased had been intimate with his (Duba's) wife. This came as a surprise to the first respondent. When the deceased returned and was confronted by the first respondent about the accusation made by Duba, he had denied it.

[5] At the time of the incident, the first respondent's youngest child was 18-months-old. Another was 10-years-old. A third was 12-years-old and the eldest was 22-years-old. They are the second to fifth respondents respectively.

[6] The first respondent had discovered only after Duba's arrest that he was a policeman. On the two occasions that Duba had visited the deceased's house, he was dressed in civilian clothing. The first respondent was uncertain about whether the deceased had indeed, been intimately involved with Duba's wife. The first respondent did, however, recall finding a letter, which she identified in court, ostensibly written by Duba's wife and addressed to the deceased. The letter was suggestive of a romantic relationship between the deceased and Duba's wife.

[7] Ms Tebogo Portia Khumalo (Tebogo), the fifth respondent, the eldest daughter of the deceased and the first respondent, testified about the events of the day in question. At that time she was a student enrolled at the Pretoria Technikon. She recalled her mother bringing her youngest sibling to her bedroom and then departing. Shortly thereafter she heard shots being fired. She went towards her mother's bedroom and saw sparks flying and heard her mother screaming. Tebogo was petrified. Her mother ran into the passage, picked up her brother and ran out of the house. Tebogo then made her way towards her own bedroom and saw the deceased running into a passage. Duba pursued the deceased and when he encountered Tebogo in the passage, asked her where her father was. She answered that she did not know and re-entered her bedroom where she hid between the window and the bed. The deceased went into the bathroom and locked himself in. She later heard a window being shattered and shots being fired. The deceased emerged from the bathroom and entered her bedroom. Duba tried to kick her bedroom door down. The deceased undertook to come

out and pleaded with Duba not to shoot, informing him that there was a child in the room. The deceased proceeded to open the door. More shots were fired and Tebogo heard the deceased physically struggling with Duba. When she emerged from her bedroom, she saw the deceased lying close to the kitchen door.

[8] Captain Viljoen (Viljoen), a member of the South African Police Service, presently employed at the Polokwane Criminal Record and Crime Scene Management Unit (the Unit), was stationed there during December 2001. At that time, the commanding officer was Lieutenant-Colonel Makafola (Makafola). Viljoen was the most senior officer after Makafola. The Unit was located on the corner of Schoeman and Bodenstein Street in Polokwane. Viljoen had worked with Duba. He testified that members of the Unit did not wear police uniforms. Members travelled to crime scenes in unmarked police vehicles assigned to them. The Toyota Hilux motor vehicle which Duba had used on the day in question was such a vehicle. It had a Northern Province registration reflected on the vehicle's number plate. Civilians would have no indication that it was a police vehicle. Viljoen had been the duty officer during the week when the deceased was shot and killed. With reference to official documents presented during the trial he confirmed that at the material time two members of the Unit were on standby to attend crime scenes within Polokwane and the surrounding areas of Mangkweng, Mogoadi and Malebogo. Duba was identified as one of the members on standby. The following part of Viljoen's evidence bears repeating:

„Being on standby means that you are responsible for standby activities during and after hours. The standby activities means that a person is allocated a state phone and a state vehicle where the vehicle is garaged at a specific place predetermined. Then whenever the person is activated by means of the cell phone to do standby activities he will then place himself on duty in his pocket book, he will move to the place where the activity is, finalise the activity, come back to the place which was determined for the garaging of the vehicle, garage the vehicle and then place [himself] off duty again in his pocket book."

[9] It is common cause that Duba had not made an entry in his pocket book before he drove out to the deceased's house. Furthermore, he had not, during that time, been

dispatched to do duty at any crime scene. The duty areas that Duba and his colleague were assigned to did not include Seshego, where the deceased resided.

[10] The Toyota vehicle which Duba had used had been assigned to the Unit and was required to be garaged at the South African Police barracks in Seshego. This, according to Viljoen, meant that the vehicle had to remain at the barracks until Duba and the other member of the unit were „activated“ to attend a crime scene. After completing their tasks they were obliged to return the vehicle to the barracks. At the material time, Duba and his standby colleague were residing at the barracks. This was a requirement when a member was on standby duty.

[11] Duba and his colleague were required to attend a daily inspection at the Unit’s offices in Seshego between 07h00 and 07h30. They would thereafter be required to attend at police stations where they might collect cases for investigation. The distance between the barracks and the Unit’s Seshego office is 22 kilometres.

[12] During the morning of 24 December 2001, just before 07h00, Viljoen received a phone call from Duba, who informed him that he had shot someone and that he was presently at the Seshego police station where the barracks are also situated. He required Viljoen to come and collect the police cellular telephone which had been assigned to him. Viljoen travelled to the police station and was told that Duba did not want to see him. At that time the Toyota motor vehicle was parked at the police station. According to Viljoen the distance from the Seshego police station to the deceased’s house is approximately six kilometres. Upon checking the vehicle’s official record, Viljoen found that Duba had used it to travel a distance of 431 kilometres, the purpose of which was not noted. Viljoen recorded that usage as being unauthorised. Under cross-examination he conceded that perhaps not all of it was unauthorised. He had arrived at the prior conclusion on the basis that the travelling had not been accounted for. He could not investigate that aspect any further because Duba was in custody.

[13] Viljoen testified that Duba had never been issued with an official police firearm. Viljoen explained that being a fingerprint investigator, like Duba, was the first step towards becoming a fingerprint expert. As far as Viljoen was aware, no one had „activated“ Duba to attend a crime scene during the morning of the events in question.

[14] The last witness to testify was Warrant Officer Selepe (Selepe). He was the colleague on standby duty with Duba during the week in which the deceased was killed. The duty week stretched from Friday to Friday. Selepe was adamant that the Toyota vehicle assigned to them could only be used for official duties and not for private errands. Like Duba, Selepe slept at the barracks during the duty week. He confirmed that he and Duba had been issued with an official cellular telephone which was used to contact them in the event that they were to be placed at a crime scene.

[15] Selepe described the events of the morning during which the deceased was killed. He was in his room preparing to go to work when Duba came to make arrangements for them to travel to the office together. They agreed at 06h00 that they would leave at 07h00. Approximately 45 minutes later Duba came to him holding a bleeding arm. He informed Selepe that he had shot someone and handed over the car keys and the official cellular telephone. Duba’s private firearm was on his hip. He did not see Duba thereafter. Under cross-examination Selepe was adamant that the work of the Unit was confined to dealing with fingerprints and taking photographs of crime scenes. He insisted that the uniform branch were the principal crime fighters tasked with arresting criminals. Selepe resisted attempts by counsel on behalf of the appellant to have him concede that his primary duty as a member of the South African Police Service was to actively protect citizens. He repeatedly stated that the Unit’s function was an investigative one. According to Selepe the unauthorised kilometres recorded by Viljoen were due to Duba and not to him. He testified that he had accounted for all of his official travels and that he had handed the keys to Duba, with an odometer reading 432 kilometres less than that ultimately recorded by Viljoen. According to Viljoen, given its closeness to the barracks, Duba could quite easily have travelled to the deceased’s house using public transport. For completeness, it is necessary to record that Viljoen’s

testimony was ultimately unchallenged that an hourly allowance of R16.80 payable to officials of the South African Police Service who are on standby duty per 24 hour period is not paid to members of the Unit because of a statutory exemption.

[16] The court below (Molefe AJ) had regard to two decisions of the Constitutional Court, namely, *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC) and *F v Minister of Safety and Security* [2011] ZACC 37; 2012 (1) SA 536 (CC), and stated that in adjudicating whether there should be vicarious liability, the focus is now on whether the connection between the conduct of the policeman and his employment was sufficiently close to render the Minister liable. Molefe AJ said the following (in para 8):

„The establishment of this connection is assessed by explicit recognition of the normative factors that point to vicarious liability.“ (Footnote omitted.)

Following the Constitutional Court’s lead, she held that the fact that a member of the South African Police was on standby, rather than active duty, and the question of payment for that duty was not determinative.

[17] The following paragraph of the judgment of the court below sets out the *ratio* for its conclusion that the appellant was vicariously liable (in para 20):

„Although the Second Defendant’s murdering of the deceased had nothing to do with his official duties, I am of the view that there is a sufficiently close link between his act for his own personal gratification and the business of the First Defendant. In *casu*, the Second Defendant was on standby duty as instructed by his employer, the First Defendant. He utilized the employer’s vehicle to attend to his personal matters by going to murder the deceased, which action was an intentional deviation from his duties.“

[18] The question in this appeal is whether that reasoning and the conclusion are correct. The judgment of the Constitutional Court in *F* is instructive. In para 40, Mogoeng J, as he then was, restated the general rule in relation to vicarious liability, namely, that an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment, or whilst the employee was engaged in any activity incidental to it. He went on to record that two tests apply in determining vicarious liability: The first applies where an employee

commits a delict when going about the employer's business, this is referred to as the standard test. The second is where the wrongdoing occurs outside the course and scope of employment, those are referred to as „deviation cases“. This matter, as in *F*, is a deviation case.

[19] With reference to the decision of this Court in *Feldman (Pty) Ltd v Mall* 1945 AD 733, the Constitutional Court in *F* examined the rationale behind holding an employer liable where an employee had deviated from his or her duties. In para 45 of *F* the following appears:

„Central to this passage is the proposition that employees are extensions of their employers. This is indeed so because, figuratively, employees are the hands through which employers do their work. Employers could therefore be held to have created a risk of harm to others should their employees prove to be inefficient or untrustworthy. That potential risk imposes an obligation on employers to ensure that the employees they hold out as the hands through which they would serve or do business with others, would not do the opposite of what they are instructed and obliged to do. Should they, however, act inconsistently with the employer's core business, some link between the employers' business and the delictual conduct must be established before the employers may be held vicariously liable.“

[20] In *Minister of Police v Rabie* 1986 (1) 117 (A) this Court was dealing with a claim for damages arising from the wrongful arrest, detention and assault of an individual. The acts complained of had been perpetrated by an off-duty mechanic employed by the South African Police Service. At the time of the arrest, he had not been wearing a police uniform. He had, however, identified himself as a policeman, took the person he had arrested to the police station, filled-out a police docket and wrongfully charged his victim with attempted housebreaking and then detained him. At 134C-E the following appears:

„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 (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master

may yet be liable. This is an objective test. And it may be useful to add that according to the *Salmond* test . . . :

“a master . . . is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them . . .”

[21] In *K*, decided before *F*, the Constitutional Court was intent on explaining that the application of this test is not merely fact based. In our constitutional order, the test for vicarious liability cannot be shorn of normative content and social policy. In *K*, the Constitutional Court appreciated that the application of the test on the aforesaid basis will be difficult and will involve courts drawing difficult lines. Utilising the test in *Rabie* as a basis, the Constitutional Court formulated the test for determining vicarious liability in deviation cases as follows (Para 32):

„The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee’s state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee’s acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is “sufficiently close” to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.” (Footnote omitted.)

[22] At this stage, it is necessary to have regard to the facts in *K* and *F* and to reflect on how, applying the test referred to above, the Constitutional Court arrived at a conclusion in terms of which the State was there held vicariously liable.

[23] In *K*, three policemen who had offered Ms K a lift home raped her in a police vehicle and then threw her out. They were on duty at the time. The then prevailing police standing orders prohibited the transport of unauthorised passengers in police

vehicles. The Court considered it to be a matter of profound importance that Ms K's right to security of the person, dignity, privacy and substantive equality were implicated. As important, was the consideration that it was part of the work of the police to ensure the safety and security of all South Africans. The Constitutional Court was firm in its view that the vulnerability of women and children to sexual violence and South Africa's international obligations in that regard were factors that could not be ignored.

[24] In para 44 of *K* the following appears:

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

[25] Importantly, the Constitutional Court went on to state (in para 45):

„The common-law test for vicarious liability in deviation cases as developed in *Rabie's* case and further developed earlier in this judgment needs to be applied to new sets of facts in each case in the light of the spirit, purport and objects of our Constitution. As courts determine whether employers are liable in each set of factual circumstances, the rule will be developed. The test is one which contains both a factual assessment (the question of the subjective intention of the perpetrators of the delict) as well as a consideration which raises a question of mixed fact and law, the objective question of whether the delict committed is “sufficiently connected to the business of the employer” to render the employer liable.“

[26] In *K*, the Constitutional Court took into account that the rape perpetrated by the policemen was clearly a deviation from their duties but considered it significant that when they committed the rape, they were simultaneously omitting to perform their duties as policemen. That consideration was relevant in determining vicarious liability and will be particularly relevant in answering the second question posed in *Rabie*, namely,

whether there was a sufficiently close connection between the delict and the purposes and business of the employer.

[27] The Constitutional Court thought that in addition to the statutory and constitutional duty the police bore to prevent crime and protect members of the public, their victim in *K* had placed her trust in them when they had offered to assist her in getting her home safely. Paragraphs 52 and 53 of that judgment bear repeating:

„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.”

[28] In *F*, the relevant facts were as follows. At the material time Ms *F* was 13-years-old and had been to a nightclub in George. During the early morning hours she was offered a lift home by a member of the South African Police Service, who was on standby duty and entitled to the prescribed hourly tariff for being on standby duty. It meant that he could, at any time, be called upon to attend to any crime-related incident. He had been assigned an unmarked police vehicle to enable him to discharge police functions when required to do so. The police vehicle had been equipped with a police radio which Ms *F* noticed. After the policemen had dropped off two other passengers,

Ms F moved to the front passenger seat and noticed a pile of police dockets bearing his name and rank. When she asked about the dockets, he told her that he was a private detective which she understood to mean that he was a policeman.

[29] Instead of driving Ms F home the policeman drove to a dark spot where he stopped the vehicle. Realising that she was in danger she alighted and fled and hid herself from him. That was not the end of her ordeal. The policeman waited for her to emerge and when he saw her hitchhiking stopped alongside her and once again offered to transport her to her home. Even though she was apprehensive, she relented and accepted the offer because she was desperate. A short while thereafter he turned off the road and despite her efforts to flee, overpowered and raped her. He subsequently took her home and threatened to kill her if she reported the incident.

[30] The Constitutional Court considered the following parts of Ms F's testimony important (in para 13):

„[S]he said that the fact that she believed Mr Van Wyk to be a policeman played a role in allaying her fears, because she “trusted” him (hom vertrou het) as, at that stage, she thought he was a detective. She chose to repose her trust in a person of whom she was suspicious because she understood him to be a policeman.”

[31] The importance of members of the public considering it safe to repose their trust in members of the South African police was a particularly significant factor. In *F*, the Constitutional Court said the following (in para 66):

„Whenever a vulnerable woman or girl-child places her trust in a policeman on standby duty, and that policeman abuses that trust by raping her, he would be personally liable for damages arising from the rape. Additionally, if his employment as a policeman secured the trust the vulnerable person placed in him, and if his employment facilitated the abuse of that trust, the State might be held vicariously liable for the delict. The victim's understanding of the situation would presumably be that she is being protected or assisted by a law enforcement agent, empowered and obliged by the law to do so. Whether he is on or off duty would, in all likelihood, be immaterial to her. From where

she stands, he is a policeman, employed to protect her, and should therefore be trusted to uphold, and not to contravene, the law." (Footnote omitted.)

Right at the outset in *F*, the Constitutional Court pointed out that in adjudicating whether the Minister should be held vicariously liable, two related factors were critical: First is the State's constitutional obligation to respect, protect and promote the citizens' right to dignity and to freedom and security of the person, to which is related the establishment of a police service for the execution of the constitutional obligation to protect and secure the inhabitants of our country. Second is the trust the public was entitled to repose in the police.

[32] In *F*, as was found by the Constitutional Court, Ms F with an apparent appreciation of the police service's obligation to protect her, looked for protection to the policeman who had offered her a lift. She did so as a result of his employment as a policeman, which placed him in a position of trust. It is this trust that is necessary for the fulfilment of the police service's mandate. It was this trust that he violated. The following three paragraphs in *F* are important (paras 79-81):

„There are factual differences between this case and *K*. There the policemen were on duty and in uniform, driving a marked police vehicle. Ms K placed her trust in them for those clear reasons, which created the link between the policemen's employment and their subsequent misdeed. The factors here are admittedly more tenuous.

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, 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 docket 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 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."

[33] Returning to the present case, it is necessary, at inception, to have regard to the subjective element. In the present case, Duba was convinced that he was a cuckold. He travelled to the home of the respondents to kill the person he considered to be his wife's lover. That was the motivation for the tragic act that followed. It was a radical deviation from the tasks incidental to his employment.

[34] I now turn to the objective element, namely, whether there is a sufficiently close link between Duba's acts for his own interests and purposes and his duties as a policeman. None of the respondents identified Duba as a policeman. None reposed trust in him. The only police accoutrements were the radio and the vehicle. The radio was not visible or seen and the vehicle was unmarked. It is true that he used the police vehicle to travel to their home but he could just as easily have used public transport. The area to which he travelled was not an area to which he had been assigned.

[35] I am not unmindful that Duba was a member of the South African Police Service and that the police are required to serve and protect. However, it is not entirely without significance that Duba was a member of a unit which interfaced with the public on a limited basis and mainly after a crime had already been perpetrated. The Unit was not a division of the police to which the public would intuitively turn for protection. I hasten to add that this does not mean that, in appropriate circumstances, members of the public would not be entitled to repose trust in it and to look to it for protection, the breach of which might lead to vicarious liability being imposed on the appellant.

[36] This is a difficult case because of the terrible consequences for the respondents. The trauma they suffered in witnessing a husband and father being gunned-down in front of them is difficult to fully appreciate. Drawing a line that does not hold the Minister liable for the loss of their breadwinner is in itself difficult. In *K*, the Constitutional Court in

exhorting courts to keep in mind the values of the Constitution when adjudicating cases such as the present stated that this does not mean that an employer will inevitably be saddled with damages simply because the consequences are horrendous.²

[37] Considering the interplay between the factors set out by the Constitutional Court, I am unable to conclude that there is a sufficiently close link between Duba's actions for his own interests and his duties as a policeman.

[38] Counsel on behalf of the police accepted that, given the circumstances, it would not be appropriate to insist on a costs order against the respondents. It is necessary to record that before us, there was no appearance on behalf of the respondents, ostensibly because of a lack of funds. For the reasons aforesaid the following order is made:

1. The appeal is upheld and no order is made as to costs.
2. The order of the court below is set aside and substituted as follows:
'The plaintiffs' claims are dismissed and no order is made as to costs.'

M S NAVSA
ACTING DEPUTY
PRESIDENT

APPEARANCES:

²In para 23.

FOR APPELLANT:

Adv. S Joubert

Instructed by:

The State Attorney, Pretoria

The State Attorney, Bloemfontein

FOR RESPONDENTS:

Not presented

Abide the decision of the Court