CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 30/11
[2011] ZACC 37

In the matter between:

F	Applicant
and	
MINISTER OF SAFETY AND SECURITY	First Respondent
ALLISTER CLAUDE VAN WYK	Second Respondent
and	
INSTITUTE FOR SECURITY STUDIES	First Amicus Curiae
INSTITUTE FOR ACCOUNTABILITY IN SOUTHERN AFRICA TRUST	Second Amicus Curiae
TRUSTEES OF THE WOMEN'S LEGAL CENTRE	Third Amicus Curiae

Heard on : 4 August 2011

Decided on : 15 December 2011

JUDGMENT

MOGOENG J (Moseneke DCJ, Cameron J, Khampepe J, Nkabinde J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment of the Supreme Court of Appeal.[1] It raises the question whether the Minister of Safety and Security[2] (Minister) should be held vicariously liable for damages arising from the brutal rape of a thirteen year old girl by a policeman who was on standby duty.

[2] In the determination of that question, the state's constitutional obligations to respect, protect and promote the citizen's right to dignity, and to freedom and security of the person[3] would have to be taken into account. Equally relevant is the state's establishment of a police service for the efficient execution of its constitutional obligations to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.[4]

[3] The trust that the public is entitled to repose in the police also has a critical role to play in the determination of the Minister's vicarious liability in this matter.

[4] In the event of the Minister being held liable, it would be necessary to ensure that that decision does not effectively give rise to state liability for all delictual acts committed by the police.

[1] *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA) (*SCA judgment*).

[2] The Minister of Safety and Security, as cited in these proceedings, has been renamed the Minister for Police.

[3] Sections 10 and 12 of the Constitution.

[4] Section 205(2) and (3) of the Constitution.

Parties

[5] The applicant is Ms F. She was 13 years old at the time of the delictual act that gave rise to this litigation, and has since reached the age of majority.

[6] The first respondent is the Minister. The second respondent is Mr Allister Claude van Wyk, who was employed as a policeman by the South African Police Service[5] (police service) at the time of the attack on Ms F.

[7] Three amici curiae were admitted. The first is the Institute for Security Studies, the second is the Institute for Accountability in Southern Africa Trust and the third is the Trustees of the Women's Legal Centre.

Background

[8] Ms F went to a nightclub in George on 14 October 1998. In the early hours of 15 October 1998, she needed, and was offered, a lift home by Mr van Wyk, which she accepted. There were two other passengers in the vehicle. One of them was known to her.

[9] At the time, Mr van Wyk was on standby duty.[6] This means that he could, at any time of that night, have been called upon to attend to any crime-related incident if

[5] Established under section 5 of the South African Police Service Act 68 of 1995 (SAPS Act).

[6] Standing order 6 issued by the National Commissioner, South African Police Service in June 1997, which was in force at the time, provided as follows:

the need arose. He had been given possession of an unmarked police vehicle to enable him to discharge any police functions that he might have been required to perform whilst on standby duty. It may be added that he was paid the prescribed hourly tariff for being on standby duty. The vehicle was equipped with a police radio, which Ms F noticed before she accepted the lift from Mr van Wyk.

[10] When they left the nightclub, Ms F was seated on the back seat of the vehicle with one of the other passengers. 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

---

"6. **STAND-BY ALLOWANCE**

6.1 A non-pensionable Standby Allowance at a tariff of R16-80 is payable to officials who must be available for 24 hours per day for the performance of duty. (This must not be regarded as payment for overtime duties performed.)

6.2 **CONDITIONS OF PAYMENT**

6.2.1 As this allowance may vary from month to month, as a result of the number of days on which Standby duties were performed by an official during a specific month, the allowance is payable monthly on a retrospective basis and payment is based on the total number of completed 24-hour cycles worked during a month.

6.2.2 The allowance is payable at the daily tariff for each completed 24-hour cycle worked by an official. The fact that personnel are placed on standby for a week (for example) has the effect that Standby duties and usual office duties are frequently worked simultaneously. . . .

. . .

6.3 **PROCEDURES TO CONTROL, KEEP RECORD AND CLAIM**

. . .

6.3.8 Standby must be limited to actual services/tasks in which the availability, on a full time basis, of personnel with certain field expertise is of the essence and where the absence of these personnel at short notice will hold serious consequences for the provision of core SAPS services. The number of personnel needed to be on standby as well as the actual call outs must also be taken into account. The need and extent of standby duties must also be reviewed on a regular basis.

. . .

6.3.10 The Standby Allowance was instituted to compensate for the restriction of movement placed on personnel on Standby duty and their households. This implies that these personnel have to be available at their dwelling in order to be available for duty at short notice unless where special alternative arrangements have been made. The mere fact that some personnel have been issued with cell phones and are thus 'available' does not, in itself, imply that these personnel are on Standby. The measures outlined in the above paragraphs must still be adhered to."

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 policeman.

[11] Contrary to his undertaking to drive Ms F home, Mr van Wyk drove towards Kaaimansrivier, away from her home. He told Ms F that he wanted to see his friends first. This detour caused Ms F to become suspicious of Mr van Wyk's true motives. When they approached Kaaimansrivier, Mr van Wyk stopped the vehicle at a dark spot. As a result of her suspicions, Ms F alighted from the vehicle, ran away and hid herself from him. After a wait, Mr van Wyk left.

[12] Ms F later emerged from hiding, stood next to the road and hitchhiked. A vehicle stopped next to her. It turned out to be the same vehicle she had just alighted from. Mr van Wyk again offered to take her home. Ms F relented, albeit reluctantly, owing to her desperate situation.

[13] In her evidence, she 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) 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.

[14] While on their way to her home, Mr van Wyk unexpectedly turned off the road near Kraaibos. Ms F attempted to escape again. This time Mr van Wyk was able to prevent her from fleeing. He then assaulted and raped her. Thereafter, he took her to her home. In an attempt to secure her silence, he threatened to harm or even kill her should she report the attack to anybody.

[15] Despite these threats, Ms F laid criminal charges against Mr van Wyk. He was convicted of assault and rape and sentenced to undergo 12 years' imprisonment, of which five years were suspended.

[16] In December 2005, Ms F reached the age of majority. Thereafter she instituted an action for damages against the two respondents in the Western Cape High Court, Cape Town (High Court).

In the High Court

[17] By agreement between the parties, the merits and the quantum of damages were separated and the High Court was asked to pronounce itself only on the merits.

[18] The Court, per Bozalek J,[7] found the Minister vicariously liable for the damages suffered by Ms F as a result of Mr van Wyk's delictual conduct. It applied the test laid down in *K v Minister of Safety and Security*[8] and held that there was a sufficiently strong link between Mr van Wyk's actions and his employer's business to justify the

[7] *F v Minister of Safety and Security and Another* 2010 (1) SA 606 (WCC) (*High Court judgment*).

[8] [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) (*K*).

imposition of vicarious liability. It relied on the following factors in support of its conclusion:

a. Mr van Wyk was in possession of a police vehicle. This provided him with the means to commit the offences and was the "single most important connection"[9] between the business of the employer and the commission of the crime.

b. The fact that Ms F understood Mr van Wyk to be a policeman to some extent operated to lull her suspicions that he might be a danger to her. In other words, it gave her some basis for trusting Mr van Wyk, in spite of her suspicions.

c. The coincidence between the nature of the assistance that Mr van Wyk pretended to offer and the normal obligations of members of the police service, which is, in particular to protect vulnerable groups such as women and children.

[19] Bozalek J was alive to the Minister's fear that a finding in favour of Ms F could open the floodgates to the state's strict liability for delictual acts committed by the police. He dealt with this concern on the basis that the *K* test was sufficiently flexible to allow a case-by-case determination of the issues. The Minister took the matter on appeal to the Supreme Court of Appeal, which reversed the High Court decision for the reasons set out below.

[9] *High Court judgment* above n 7 at para 43.

In the Supreme Court of Appeal

[20] Nugent JA, writing for the majority,[10] held that the state was not liable because—

a. The conclusion in *K* that the state was liable was based only on the delictual omission of the on-duty policemen involved.

b. An intentional delictual commission like rape cannot attract the state's vicarious liability. Accordingly, *K*, properly understood, held that the state was not vicariously liable for the positive delictual acts of the police officials, but only for their acts of omission. And the same should obtain in this case. Because Mr van Wyk was not on duty,[11] he, unlike the policemen in *K*, could not be considered to have been engaged in the business of the police service and to have breached his duty to protect Ms F when he committed the rape.

c. An off-duty police official has no duty to protect members of the public and cannot therefore be held personally liable for his or her failure to protect a victim of crime from the harm that occurs in his or her presence. This is so because the police do not have an ongoing duty to protect members of the public. And in the absence of a duty on Mr van Wyk to protect Ms F from harm while he was off duty, there could be no personal liability on him for omitting to do so.

[10] With Snyders JA and Pillay AJA concurring.

[11] In determining this, the majority held that standby duty means that a police official is off duty until called upon to resume duty. In relation to the claim that a police official is under duties of a "continuing nature" the majority maintained that the fact that police officials may exercise police powers whilst off duty, and have a discretion to determine whether or not to do so, is not equivalent to having an obligation to exercise powers.

[21] The majority's reasoning was thus based on an understanding that the finding of vicarious liability in *K* was premised only on the fact that the policemen in that case had committed a delict of omission. This they did by failing to protect Ms K while they were on duty and under an obligation to do so.

[22] The majority judgment rejects any notion that a policeman could be said to be "engaged in the affairs or business of his employer"[12] when he commits rape or that rape could even be regarded as an "improper mode"[13] of exercising the authority conferred on him by his employer.[14] The majority also reasoned that the positive delictual act of rape was not one of the bases for the outcome in *K*. That is how the majority judgment distinguished *K* from this case. The decision of the High Court was, for these reasons, set aside.

[23] Maya JA, writing for the minority,[15] said that although the rape had nothing to do with the performance of Mr van Wyk's official duties, there was a sufficiently close link between his acts for personal gratification and the business of the police service. Ms F was induced to trust, and accept a lift from, Mr van Wyk because he was a policeman. The minority found that he had placed himself on duty when he undertook to take Ms F home.

[12] *SCA judgment* above n 1 at para 16.

[13] Id at para 37.

[14] Id.

[15] With Bosielo JA concurring.

[24] The minority observed that policy considerations underpin vicarious liability in matters of this kind. These include the employer's duty to ensure that no one is injured as a result of the employee's improper conduct or negligence in carrying out his or her duties.

[25] The test formulated in *K* was accepted as being applicable to deviation cases.[16] The minority would, applying that test, have found for Ms F.

Issues

[26] There are three preliminary issues and one substantive issue to be addressed. The preliminary issues are:

a. Condonation for the late filing of the application for leave to appeal.

b. Condonation for the late filing of the Minister's written submissions.

c. The application for leave to appeal.

[27] The substantive issue is whether the state is vicariously liable for damages arising from the rape of a young girl committed by a policeman who was on standby duty.

Condonation: leave to appeal

[28] It is now trite that condonation will be granted if it is in the interests of justice to do so, and if there appear to be reasonable prospects of success on appeal. Factors

[16] See [49] and [50] below.

to be considered with regard to the interests of justice include the reason for the delay, and the extent of the prejudice, if any, that was suffered by the other party.

[29] The application for leave to appeal to this Court was filed slightly over three weeks late. The applicant had, however, within the time period provided for in the Rules of this Court, informed the State Attorney[17] of her intention to launch the application. The state was thus not left to assume that when the dies expired it could conduct its affairs on the basis that the applicant had no intention to challenge the decision of the Supreme Court of Appeal.

[30] The reasons proffered for the delay are that: (i) the applicant was waiting for an opinion from counsel on whether there were prospects of success; and (ii) the delays in relation to settling the papers for her application for leave to appeal were caused by problems experienced by her legal representatives but not by any fault on her part. This explanation is, in my view, reasonable.

[31] The Minister suffered no prejudice as the state had been informed, within the prescribed time period, of the intention to launch the application for leave to appeal. In addition, the delay was not overly long and the Minister does not oppose the granting of condonation. It is in the interests of justice to grant condonation for the late filing of the application for leave to appeal. I deal next with the late filing of the Minister's submissions.

[17] The State Attorney is the attorney for the Minister.

Condonation: submissions

[32] The Minister filed submissions, apparently prepared by junior counsel, on time. More detailed submissions prepared by both senior counsel and her junior were filed three days before the date of the hearing.[18] Affidavits filed in support of the application for condonation were deposed to by people who have personal knowledge of only some of the issues surrounding the delay sought to be condoned.[19] Hearsay evidence is thus relied on in an attempt to explain why the Minister's submissions were filed late. At least one of the two counsel should have explained the delay. The manner in which this matter was handled by the legal representatives of the Minister is unacceptable.

[33] What ameliorates the failure to observe practice and the rules is that the late submissions do not really differ substantially from the shorter submissions. They merely elaborate on what had already been raised. For this reason, nothing raised therein could be said to have taken any of the other parties by surprise, and to have prejudiced them.

[34] It is trite that the interests of justice require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as possible. Additionally, none of the parties opposed this

[18] In terms of the directions issued by the Court on 9 May 2011, the Minister's written submissions were to have been lodged by 12 July 2011.

[19] The affidavits submitted were that of the Assistant State Attorney and that of his secretary, the latter being a confirmatory affidavit.

application for condonation. Accordingly, I would grant condonation for the late filing of the Minister's submissions. I would do so mindful of the explanation given for the delay and the unacceptable conduct of the Minister's legal representatives in this regard.

Application for leave to appeal

[35] The requirements for granting leave to appeal to this Court are that the application must raise a constitutional issue and that it must be in the interests of justice to grant leave. Factors to be considered in determining whether it would be in the interests of justice to grant leave to appeal include the public interest in the matter, the importance of the constitutional issue raised and the prospects of success.

[36] The right of a citizen to be protected by the state, and the claim for damages based on the state's alleged antecedent liability for the delictual conduct of its employees, implicate sections 7(2), 12(1), 28 and 205 of the Constitution. The Constitution also enjoins 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."[20] This matter therefore raises constitutional issues of importance.

[20] Section 39(2) of the Constitution. The importance of this section is highlighted in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*) at para 54 and in *K* above n 8 at paras 15-7.

[37] The abuse of women and girl-children is rife in this country. The police service is constitutionally required to combat these, and other, crimes.[21] This was aptly articulated in *Carmichele*:

> "'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.' . . . South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. 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."[22] (Footnote omitted.)

This is a matter of great public interest. And it is in the interests of justice to explore the bounds of the test for vicarious liability laid down in *K*. This exercise should be undertaken to determine the state's liability in circumstances where a police official on standby duty deviates from his or her employer's constitutional obligation to protect the public and engages in conduct that constitutes "the single greatest threat to the self-determination of South African women",[23] namely rape.

[38] In the light of the substantially different approaches of the majority and minority decisions in the Supreme Court of Appeal,[24] it is necessary for this Court to address these issues. In addition, the applicant has reasonable prospects of success.

---

[21] Section 205(3) of the Constitution.

[22] *Carmichele* above n 20 at para 62.

[23] Id.

[24] *SCA judgment* above n 1.

[39] For these reasons leave to appeal stands to be granted. By way of background, it is necessary to highlight the general principles of vicarious liability and how they evolved until *K* was decided. I do so below.

Vicarious liability in general

[40] Vicarious liability means a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct. This would arise where there is a particular relationship between those persons, such as employment.[25] As a general rule, 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 reasonably incidental to it.[26]

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

[25] Neethling et al *Law of Delict* 6 ed (Lexis Nexis, Durban 2010) at 365-71.

[26] See for example *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) (*Ess Kay Electronics*) at para 7; and *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) at para 5.

[42] *Feldman (Pty) Ltd v Mall*[27] is a pivotal common law authority on deviation cases. In that case an employee drove his employer's vehicle to deliver parcels as instructed by his employer. Thereafter, he attended to his personal matters. He then consumed alcohol, which significantly impaired his capacity to drive. On his way back to his employer's premises, he negligently collided with, and killed, a man who had two minor dependants. By a majority, the Appellate Division held the employer vicariously liable for the minor children's claim for damages.

[43] This is the classic pre-constitutional common law position on vicarious liability in deviation cases, like *K* and this one. The breath of fresh constitutional air that courts are enjoined by section 39(2) of the Constitution to infuse into our common law requires that the parameters of vicarious liability in deviation cases be developed to accord with the dictates of the Bill of Rights. As appears later in this judgment,[28] this was done in *K*.

[44] Watermeyer CJ explained the rationale behind holding the employer liable even if the employee has intentionally deviated from his or her duty as follows:

> "I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master's legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this

[27] 1945 AD 733.

[28] At [49] below.

> risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm."[29]

[45] 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 employers' core business, some link between the employers' business and the delictual conduct must be established before the employers may be held vicariously liable.

[46] A positive development of common law vicarious liability in deviation cases that accords with the preceding observations occurred in *Minister of Police v Rabie.*[30] This was a claim for damages arising from the wrongful arrest, detention and assault of the plaintiff. The arrest was effected by a mechanic employed by the police service, in pursuit of his personal interests. At the time of the arrest, he was not wearing police uniform and he was off duty. He identified himself as a policeman to

[29] *Feldman* above n 27 at 741.

[30] 1986 (1) SA 117 (A) (*Rabie*). Compare *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) (*Ngobo).*

the victim, took the victim to the police station, filled out a docket, wrongfully charged him with attempted housebreaking and locked him up.

[47] That case is an example of an employee's radical deviation from the tasks incidental to his or her employment. The issue was whether the Minister of Police was vicariously liable for damages arising from the delictual conduct of the off-duty policeman. The test for determining vicarious liability 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."[31] (Citation omitted.)

[48] What flows from this test and the test in *K*, is that even if the nature of the conduct giving rise to the delictual claim suggests that the employer did not or could not have authorised that conduct, and even if the deviation is great in respect of space and time, that would not necessarily exempt the employer from liability. The employer could still be held vicariously liable if a connection exists between the conduct complained of and the business of the employer. That link must, however, be a real and sufficiently close one. The test was met in *Rabie* and the state was held vicariously liable.[32]

[31] *Rabie* above n 30 at 134C-E.

[32] *Rabie* above n 30 was not followed in *Ngobo* above n 30 and *Ess Kay Electronics* above n 26 as well as several other cases.

[49] The *Rabie* formulation of the test provided the basis for the test laid down by this Court in *K* as follows:

> "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 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. 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."[33] (Footnote omitted.)

[50] 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.[34] This requires "explicit recognition of the normative content" of this stage of the test.[35] The pivotal enquiry is therefore whether "there was a close connection between the wrongful conduct of the policemen and the nature of their employment."[36] That is the question that must be asked in determining the state's vicarious liability in this matter.

---

[33] *K* above n 8 at para 32.

[34] Id at para 44.

[35] Id.

[36] Id at para 57.

The application of the K *test*

[51] 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.

[52] As O'Regan J stated in *K*, the second question "does not raise purely factual questions, but mixed questions of fact and law."[37] 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. I deal with them in the same order below.

The state's constitutional obligations

[53] The state has a general duty to protect members of the public from violations of

[37] Id at para 32.

their constitutional rights. In grappling with the question of the state's vicarious liability, the constitutional obligations to prevent crime and to protect members of the public, particularly the vulnerable, must enjoy some prominence. These obligations, as well as the constitutional rights of Ms F, are the prism through which this enquiry should be conducted.

[54] Ms F has a constitutional right to freedom and security of the person, provided for in section 12(1) of the Constitution.[38] She also has the constitutional right to have her inherent dignity respected and protected.[39] This, and the right to freedom and security of the person, are implicated by the assault and rape which were perpetrated against her person.

[55] Many men of our society, not unlike the policeman who raped Ms F, continue to force themselves on women and on girl-children. Often, with impunity, men forcibly violate women's bodies, privacy, dignity and self-worth, freedom, and the right to be treated with equal regard. In short, rape of women and children violates a cluster of interlinked fundamental rights treasured by our Constitution.

---

[38] Section 12 provides:

"(1) Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

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

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way."

[39] Section 10 of the Constitution.

[56] The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of the subordination of women in society.[40] It entrenches patriarchy as it imperils the freedom and self determination of women. It is deeply sad and unacceptable that few of our women or girls dare to venture into public spaces alone, especially when it is dark and deserted. If official crime statistics are anything to go by, incidents of sexual violence against women occur with alarming regularity.[41] This is so despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl-children.

[57] It follows without more that the state, through its foremost agency against crime, the police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes. Courts, too, are bound by the Bill of Rights. When they perform their functions, it is their duty to ensure that the fundamental rights of women and girl-children in particular are not made hollow by actual or threatened sexual violence. They must acknowledge the policy-drenched nature of the common law rules of vicarious liability, that it is the courts that have in the past fashioned and favoured them, and that now the rules must be applied through the prism of constitutional norms.

[40] *Carmichele* at [37] above, also referred to in *K* above n 8 at para 18.

[41] The South African Police Service, *Crime Report 2010/2011* (September 2011) http://www.saps.gov.za/statistics/reports/crimestats/2011/crime_situation_sa.pdf, accessed on 5 December 2011.

[58] These are rights the state is under a constitutional obligation to respect, protect, promote and fulfil.[42] As stated,[43] a vital mechanism through which this is to be done is the police service. The Constitution provides for its establishment in section 205(1) and (2):

> "(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
> (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces."

[59] The objects of the police service are stated in section 205(3) as—

> "to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[60] In compliance with this constitutional injunction, the police service was established and clothed with the power and authority to be the hand through which the state would discharge these duties. This was done in terms of the national legislation contemplated by the Constitution.[44] The assurance of protection and crime prevention given to the South African public by the supreme law, and the consequential establishment of the police service, understandably raised hopes and some expectation that dependable help is available.

---

[42] Section 7(2) of the Constitution.

[43] At [57] above.

[44] The police service was established under section 5 of the SAPS Act above n 5, which refers to section 214 of the Interim Constitution, Constitution of the Republic of South Africa Act 200 of 1993.

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

Trust

[62] A further factor connecting the wrongful act at issue here with the policeman's employment is trust. This factor operates both normatively, in laying the basis for holding the state liable for the misdeed of even an off-duty policeman, provided there is a sufficient connection with his employment, and factually, in that it creates the connection between the employment and the wrongful conduct.

[63] The police service relies on its individual members to execute its constitutional mandate to the public. This mandate—

> "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."[45]

[45] *K* above n 8 at para 52.

[64] Accordingly, the employment of someone as a police official may rightly be equated to an invitation extended by the police service to the public to repose their trust in that employee. When a policeman abuses the trust placed in him by a vulnerable woman or girl-child, by raping her, a link may well be established between the employee's employment and the delict flowing from the rape. This was articulated as follows in *K*:

> "In sum, the opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that mandate is successfully fulfilled."[46]

[65] Counsel for the second amicus curiae submitted, correctly in my view, that for the purpose of vicarious liability, the focus on trust avoids the 'on-duty-off-duty' debate that was central to the Supreme Court of Appeal judgments. Once we accept that our Constitution assures the public that it is safe to repose their trust in the police, we must also accept that that constitutional aspiration is undermined when that trust is breached.

[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.[47] Additionally, if his employment as a policeman secured the trust the vulnerable person placed in him, and if his

[46] Id at para 57.

[47] These observations would generally apply to any kind of rape recognised in our law. They are now being confined to the rape of a woman or girl-child by a man because of the facts of this case.

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.

[67] I accept that the distinction between a policeman who is on duty and one who is 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. Could we say that because a policeman is not on duty, he has no obligation as a policeman to protect a child against rape? I do not think so. The on-duty-off-duty discussion in this case is rendered less significant by the fact that a vulnerable young girl was led to believe that a policeman, whether on or off duty, assumed the responsibility to protect her or secure her safety. This was sufficient to cause her to let her guard down and place herself in his 'capable hands'. Generally, that would weigh in favour of rendering the state vicariously liable in the event of that trust being betrayed.

[68] In addressing the question of Mr van Wyk's personal liability and his employer's vicarious liability, it should make little difference that he was on standby duty, for which he was being paid. What matters is whether the trust placed in him as a policeman by a vulnerable member of the public, creates a sufficiently close

connection between his delictual conduct and his employment. This I address later in this judgment.

The interplay between the commission and the omission

[69] The Supreme Court of Appeal dealt with the significance of the simultaneous commission and omission in the determination of the employer's vicarious liability. It is therefore necessary that this matter be addressed. The majority held that vicarious liability cannot be imposed on the state for the rape committed by its employee. It can only be held vicariously liable for the omission of a policeman who was on duty and therefore under an obligation to protect the victim who was harmed in his presence.

[70] The role of a police official's commission of a delictual act and the failure to prevent it were addressed in *K*. After dealing with the policemen and their employer's general duty to protect the public, the policemen's offer to assist the rape victim and the trust that moved the victim to accept the offer, the following was added as the third ground for holding the state liable:

> "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 backdrop 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."[48]

[48] *K* above n 8 at para 53.

It follows from the judgment, read as a whole, and from this passage in particular, that this Court in *K* did not impose vicarious liability on the state only for the omission of its employees. Both the commission and the omission had an equally important role to play in finding the state liable for what had happened to the rape victim.

[71] In *K*, the roles of the commission and omission were addressed in relation to the constitutional obligations of the employer. The commission is relevant to the determination of liability by reason of its intimate connection to the employment of the employee. More importantly, the employment provided the means to commit the crime.[49] The omission is relevant to the extent that the police officials failed to protect the victim from harm.

[72] In the context of vicarious liability, when a policeman rapes a woman instead of protecting her, his failure to protect the victim who has placed her trust in him is inseparable from the act of commission. They are two sides of the same coin and both stem from and revolve around the same incident. In this case they are both about the employer and the employee's constitutional obligations to safeguard the well-being of members of the public.

[73] I do not understand the state's liability in *K* to have been based solely on the policemen's omission to the exclusion of their commission. I am therefore in respectful disagreement with the majority in the Supreme Court of Appeal with regard

[49] See the discussion on the sufficiently close link at [74]-[82] below.

to the distinction they drew between the role of the commission and the omission and the significance they attach to the fact of being on or off duty.

Sufficiently close connection

[74] The Minister's vicarious liability will arise only if a sufficiently close connection exists between the policeman's delictual conduct and his employment. The relevant part of the *K* test raises a question which is central to the determination of vicarious liability in cases of this kind, and—

> "[t]hat question is whether, even though the 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."[50]

[75] This question 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.

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

> "the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable."[51]

[50] *K* above n 8 at para 32.

[51] Id at para 53.

The establishment of this connection must be assessed by 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.

[77] This position was articulated in *K* as follows:

> "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."[52]

[78] In keeping with an apparent appreciation of the police service's obligation to protect her, Ms F looked to Mr van Wyk for protection. 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 constitutional mandate. Sadly, he betrayed the trust she reposed in him, by raping her. She was very young, stranded in the middle of nowhere at night, and very vulnerable when Mr van Wyk abused her trust by taking advantage of her helplessness.

[52] Id at para 57.

[79] 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.

[80] It is so that Mr van Wyk was not in uniform, that his police car was unmarked and he was not on duty but on standby. But his use of a police car facilitated the rape. That he was on standby is not an irrelevant consideration. His duty to protect the public while on standby was incipient. But it must be seen as cumulative to the rest of the factors that point to the necessary connection. He could be summoned at any time to exercise his powers as a police official to protect a member of the public. What is more, in that time and space he had the power to place himself on duty. I am therefore satisfied that a sufficiently close link existed to impose vicarious liability on Mr van Wyk's employer.

[81] 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 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.

[82] For these reasons the Minister is vicariously liable.

Direct liability

[83] None of the parties raised the issue of the state's direct liability. I therefore do not deal with it.

Absolute liability

[84] The Minister contended that the application of the *K* test to police officials on standby duty might give rise to absolute liability. I do not think so. The sufficiently close connection requirement is adequate to prevent this.

Costs

[85] The applicant is successful and therefore entitled to an order for costs.

Order

[86] In the result, the following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is allowed and the order of the Supreme Court of Appeal is set aside.

4. The Minister of Safety and Security is liable for damages suffered by the applicant as a result of the conduct of Mr van Wyk on 15 October 1998.

5. The Minister of Safety and Security is ordered to pay costs of the applicant in this Court, the Supreme Court of Appeal and the High Court.

FRONEMAN J:

[87] In *K v Minister of Safety and Security* this Court extended the traditional requirements of vicarious liability to include situations where—

> "even though the 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." [1]

K was a case involving the rape of a woman by policemen. This case also involves a rape by a policeman. It is no part of the work of policemen to rape women, but it is part of their duty to protect women from being raped. At issue here is whether the state should be held responsible, in the particular circumstances of this case, for the conduct of the policeman (Mr van Wyk) who raped the applicant.

[1] [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) (*K*) at para 32.

[88] The main judgment holds the state liable on the basis of vicarious liability, as in *K*. There can be little doubt that *K* was written in the language of vicarious liability. I also accept that if vicarious liability is the only way in which the normative 'close connection' test in *K* may be applied, then I am bound by its exposition and application in the main judgment. To that extent I thus concur in its reasoning and outcome. In my respectful view, however, the normative considerations expounded in *K* are also capable of supporting a similar outcome based not on vicarious liability, but on direct liability.

[89] It should be recognised that the bold, important and necessary steps taken in *K* are unduly constrained by the language of vicarious liability.[2] We should recognise that state delictual liability in circumstances where the state has a general constitutional and statutory duty to protect people from crime is usually 'direct', and not 'vicarious' in the sense traditionally understood by that term. This is because the state invariably acts through the instrument of its organs – state officials performing public duties. The difficult normative issue of when the state is liable in delict for their conduct should in my view no longer be dealt with as an aspect of vicarious liability but rather as part of the normal direct enquiry into whether the elements of our law of delict are present when instruments of the state act. To do so would still be

[2] The decision in *K* attracted much comment, both critical and favourable. See, for example, Neethling and Potgieter "Middellike Aanspreeklikheid van die Staat vir Verkragting deur Polisiebeamptes" (2005) *TSAR* 595; Scott "*K v Minister of Safety and Security* 2005 6 SA 419 (CC)" (2006) *De Jure* 471; Wagener "*K v Minister of Safety and Security* and the Increasingly Blurred Line Between Personal and Vicarious Liability" (2008) 125 (4) *SALJ* 673; Fagan "The Confusions of *K*" (2009) 126 (1) *SALJ* 156; and Du Bois "State Liability in South Africa: A Constitutional Remix" (2010) 25 *Tulane European and Civil Law Forum* 139.

true to the substance of *K*. Of particular relevance, in relation to the "sufficiently close link" issue referred to in *K*, will be the enquiry into wrongfulness.

[90] There are a number of reasons why it is necessary to move beyond the vicarious liability of the state as in *K*. It is necessary, first, to explain why, in *K*, the language of vicarious liability was used. The second reason is to acknowledge that the language of vicarious liability does give rise to some difficulty in cases where the state's constitutional and statutory obligations to protect people are implicated. The third is that the state invariably acts through its organs and employees, never distinctly or independently of them. The fourth is to examine whether the wrongfulness requirement in our law of delict provides a more appropriate vehicle for the limitation of state liability, rather than the "sufficiently close link" test of vicarious liability, especially in cases of intentional deviation from state obligations. The last will be to see what role the ultimate determination of negligence of the state in fixing the further contours of its delictual liability may play, in addition to wrongfulness.

[91] The main judgment does not deal with direct liability, on the ground that it was not argued before us. However, I consider the pleadings and evidence presented in this matter to lay an appropriate basis for consideration of the direct liability of the state. The possible prejudice that may have been caused by considering direct liability as the proper basis for deciding the case would have been adequately met by calling for further argument and, if that was the appropriate course, to refer the matter back to the High Court. That has not happened and, accordingly, I proceed without the

benefit of further argument on the issue.[3] The result I arrive at is, I believe, an application of the substantive normative considerations pioneered in *K*.

The traditional language of vicarious liability

[92] The conventional understanding of vicarious liability is described in the following terms by Nugent JA in the majority judgment in this matter in the Supreme Court of Appeal:

> "Vicarious liability has a long but uncertain pedigree. In essence it may be described as the liability that one person incurs for a delict that is committed by another, by virtue of the relationship that exists between them. There are two features of vicarious liability in its traditional form that are trite, but they bear repetition. The first is that vicarious liability arises by reason of a relationship between the parties and no more—it calls for no duty to be owed by the person who is sought to be held liable, nor for fault on his or her part. The second feature is that it is a secondary liability—it arises only if there is a wrongdoer who is primarily liable for the particular act or omission."[4] (Footnotes omitted.)

[93] This traditional formulation may imply that there is no normative link between the conduct of the innocent employer ("it calls for no duty to be owed by the person who is sought to be held liable, nor for fault on his or her part") and the culpable conduct of the employee ("a delict that is committed by another"), only a factual relationship ("by virtue of the relationship that exists between them"). But that is not correct. There must be some normative connection or link between the delict and that

[3] Although I am of the view that a direct liability enquiry will yield the same result in relation to wrongfulness, as that arrived in relation to "close connection" in the main judgment, the potential defence relating to an ultimate finding of negligence in a direct liability enquiry may require a referral to the High Court – see [125] and [148] below.

[4] *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA) (*Supreme Court of Appeal judgment*) at para 15.

relationship.[5] The traditional link imposed by law was that the delict had to be performed by employees in the course and scope of their employment with the employer. The true justification for imposing this link is what makes the pedigree of vicarious liability "uncertain". But the acknowledgment that it needs justification shows that its imposition is ultimately a normative issue.

[94] The shorthand 'course and scope' rule link, however, gave rise to two misleading assertions about vicarious liability. The first was that determining whether an employee's conduct fell within the course and scope of his employment was merely a question of fact, and the second was that the application of the course and scope rule thus invariably had to be treated as separate from the reasons or justification for the rule. The effect of these was to hide the deeply normative nature of the legal enquiry into the link between employee's conduct and the employment relationship in order to establish liability on the part of the employer.

[95] The judgment in *K* exposed both these fallacies:

> "The rationale for vicarious liability is to be found in a range of underlying principles. . . .
>
> 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. . . . Such an approach appears to be seeking to sterilise the

[5] Atiyah *Vicarious Liability in the Law of Torts* (Butterworths, London 1967) at 3, defines vicarious liability in the law of tort as "a liability imposed by the law upon a person as a result of (1) a tortious act or omission by another, (2) some relationship between the actual tortfeasor and the defendant whom it is sought to make liable, and (3) *some connection between the tortious act or omission and that relationship*." (My emphasis.)

> common-law test for vicarious liability and purge it of any normative or social or economic considerations. . . .
>
> 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."[6] (Footnotes omitted.)

[96] It was thus necessary to expose the normative character of vicarious liability before the state's delictual liability, in the light of the Constitution, could be developed further. The development in *K* was done upon an acceptance, for the purposes of the discussion in that judgment, that it was not a wrongfulness issue,[7] but one relating to the 'sufficiently close connection' enquiry of vicarious liability.[8]

[97] It is understandable why the language of vicarious liability was used in *K*, because this was traditionally the sole basis upon which state delictual liability had been approached in our law until then.[9] The delictual liability of the state is informed by the constitutional framework within which it operates. Prior to 1888 the position under the colonial framework was that of 'the king can do no wrong'.[10] That changed when "Crown Liabilities" legislation was introduced in the various colonies, starting in 1888.[11] On formation of the Union of South Africa the colonial legislation was

[6] *K* above n 1 at paras 21-3.

[7] Id at para 19.

[8] Id at paras 32, 45 and 49.

[9] See Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 624-9 and Wiechers *Administrative Law* (Butterworths, Durban 1985) at 315-26, for a critical discussion of the development of the vicarious liability of the state under that doctrine.

[10] Baxter above n 9 at 622 and *Binda v Colonial Government* (1887) 5 SC 284 at 290.

[11] Baxter above n 9 at 623.

replaced by the Crown Liabilities Act,[12] and then by the State Liability Act,[13] which still applies today. Within that pre-constitutional statutory framework the courts developed the delictual liability of the state from the total exclusion of liability when a public servant acted in the fulfilment of a statutory or common law duty,[14] through exclusion only when the state official had a discretion to perform the duty and was thus not under the control of the state,[15] to later decisions where the control test merely became one of the factors to be considered in determining liability.[16]

[98] The development of the law of state delictual liability is thus nothing new. The decision in *K* brought state delictual liability within the ethos of our new constitutional framework, but still within the traditional framework of vicarious liability.

[99] Is the language of vicarious state liability still necessary? I think not. Even before the advent of the Constitution cogent doubt was expressed about whether vicarious liability was appropriate:

> "The model of vicarious liability is completely inadequate to provide for public compensation when damage is caused by officials acting unlawfully and culpably because when exercising their powers officials are not acting on behalf of their employers (the executive) at all; at best (if we are to personify institutions) they act on behalf of the legislature. In short, an employer/employee situation *does not exist*

[12] 1 of 1910.

[13] 20 of 1957.

[14] See *British South Africa Co v Crickmore* 1921 AD 107 at 120-1.

[15] See *Union Government (Minister of Justice) v Thorne* 1930 AD 47 at 51 and 53.

[16] Starting with *Mhlongo and Another NO v Minister of Police* 1978 (2) SA 551 (A) (*Mhlongo*) at 567-8. See also *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A); *Minister of Police v Rabie* 1986 (1) SA 117 (A) and the cases referred to in n 26 and n 30 of the main judgment.

> and, when exercising statutory powers, those officials *are the state or public authority itself*".[17] (Footnote omitted.)

The difficulties of vicarious liability

[100] In *K*, O'Regan J considered three factors to be important in her conclusion that the state was vicariously liable in delict. They were that both the state and the policemen had a general statutory and constitutional duty to prevent crime and protect members of the public; that on the facts of the case the policemen had a specific duty to assist the applicant; and that the conduct of the policemen which caused harm constituted a simultaneous commission and omission, the omission being their failure to protect her from harm.[18]

[101] The majority in the Supreme Court of Appeal[19] understood the implications of that approach to be this:

> "There are three observations to make in relation to those findings. The first is that the court found that both the state and the policemen personally were under a duty to protect K, and that they omitted to fulfil those duties. It follows that in acting as they did the policemen committed two separate delicts—one was their positive delictual act of assaulting K, and the other was their delictual omission in failing to protect her. The second observation is that I think the inference is clear from the three reasons that were advanced by the learned judge, that the delict for which the state was held liable was not the positive acts of the policemen—for otherwise their omissions would have been immaterial—but instead their delictual omissions. And the third observation is that the conclusion in that case was expressly founded upon vicarious liability for the delicts of the policemen—and not upon direct liability of the state—

[17] Baxter above n 9 at 631-2.

[18] *K* above n 1 at paras 51-3.

[19] *Supreme Court of Appeal judgment* above n 4.

> from which it follows that the policemen must have been considered to be personally liable for their omissions (for otherwise there would have been no scope for vicarious liability)."[20] (Footnotes omitted.)

And further:

> "In view of [the] express finding of vicarious liability, it must be taken that the policemen were considered to be personally liable for their omissions, thus rendering the state vicariously liable, albeit that it might equally have held the state to be directly liable for its own omission."[21]

[102] If one accepts the correctness of the traditional assumption of a clear distinction between vicarious and personal, or direct, liability, it is difficult to fault this logic.

[103] There is another difficulty in delineating direct and vicarious liability where the existence of public duties and their breach are at stake. It is the notion of a secondary breach of a legal duty by the employer to establish vicarious liability.[22]

[104] The existence of a legal duty not to cause harm negligently to another and its breach are important aspects of the enquiry into the wrongfulness of the conduct of the state official for whose conduct the state is sought to be held liable. It is a question that does not fit comfortably into the second, objective, leg of the vicarious liability test, namely whether there is a sufficiently close link between the employee's acts for his own interests and the purposes and business of the employer.[23] Conceptually, the

[20] Id at para 32.

[21] Id at para 35.

[22] Id at para 47.

[23] *K* above n 1 at paras 32 and 49.

answer to the duty question should already have been dealt with in the primary enquiry to determine whether the employee's own conduct was wrongful, a determination upon which the secondary, vicarious, liability of the employer, traditionally understood, depends on.

[105] The explanation for the apparent overlap between direct and vicarious liability is, however, not only that it has suddenly been brought upon us by the decision in *K*, but rather that the distinction between direct and vicarious liability has never been as clear as traditionalists want us to believe.

[106] In *Vicarious Liability in the Law of Torts*,[24] Professor Atiyah remarks that the idea that a person is liable only for—

> "acts or omissions—for things which he has actually done or omitted to do—is in many ways a dangerous and misleading half-truth. It would be more accurate to say that a person is generally liable for an event or an occurrence causing loss to the plaintiff, for which the defendant bears some measure of responsibility."[25]

[107] There are many situations in the law where that responsibility arises from the fact that defendants have played some role in creating the risk that caused the loss, or because they have in some way associated themselves with the risk by "authorising, assisting or procuring its commission, or by ratifying it after it is done."[26] Liability for omissions also makes the line between personal and vicarious liability less clear,

[24] Above n 5.

[25] Atiyah above n 5 at 3-4.

[26] Id at 4.

because those responsible for the omission are difficult to identify, or there may be several people responsible. Atiyah points out that "[t]his is particularly relevant in dealing with the liability of groups of persons associated together in corporations, public authorities and such like."[27]

[108] Given this inherent tendency for overlap and potential conceptual difficulty, is there a different way forward for the delictual liability of the state, other than vicarious liability?

Direct liability

[109] The state is, in our law, a legal person.[28] It can only act through the instrumentality of its organs and officials forming part of those organs.[29] Organs of state may only perform those functions that they are empowered to do by the Constitution and by legislation in conformity with it.[30] The police service is an organ of the state and its members are subject to the specific constitutional and statutory

---

[27] Id.

[28] See, in general, Rautenbach and Malherbe *Constitutional Law* 5 ed (LexisNexis, Johannesburg 2009) at 105-7.

[29] Section 239 of the Constitution states in relevant part:

> "'**organ of state**' means—
>
> (a) any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) any other functionary or institution—
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation,
>
> but does not include a court or a judicial officer".

[30] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.

duties that apply to the police. The acts of state organs are at the same time acts for which the state is liable, because they are the state's own acts.[31]

[110] In *Mhlongo*[32] Corbett JA dismissed direct delictual liability on the part of the state on the basis that although it was "an interesting theory", the view that all members of the police force are *prima facie* servants of the state was "too well entrenched in decisions of this Court" to justify discarding vicarious responsibility as the basis for state liability.[33]

[111] But that was before the advent of the Constitution. In a candid assessment of criticism directed at the application of vicarious liability in *K*,[34] the majority in the Supreme Court of Appeal re-appraised the state of affairs:

> "I think that [the] criticism is only partly correct. I have pointed out that both the state and the policemen personally were held to be under a duty to protect K. In those circumstances it might be that the court could justifiably have found that the state, acting through its employees, was directly liable for its own delictual omission. That would have been consistent with a line of cases that have been decided in this court . . . that purport to be founded upon vicarious liability, but might better be said to have been founded upon direct liability of the state, acting through the instrument of its employees."[35] (Footnotes omitted.)

---

[31] See D'Oliveira, *State Liability for the Wrongful Exercise of Discretionary Powers* (Doctoral Thesis) 1976 at 477-88; and compare Wiechers above n 9 at Chapter 7 and Baxter above n 9 at 631-2.

[32] Above n 16.

[33] *Mhlongo* above n 16 at 566H-567A. The provisions of the State Liability Act (above n 13) formed the sole basis of state liability then. That is no longer necessarily the case: sections 2 and 8(1) of the Constitution make the state subject to the Constitution and in particular the Bill of Rights.

[34] Wagener above n 2.

[35] Above n 4 at para 34.

[112] The question arises whether it is appropriate to develop *K* further by acknowledging that direct, rather than vicarious, state delictual liability is called for in this matter. In my view it is. The decision in *K* was ground-breaking in many respects. It lifted the veil behind which vicarious liability in its traditional formulation sought to hide substantive social and policy choices in adjudication. It clarified the importance of constitutional values in those choices. In doing so it enriched our law. Further development will only deepen and enhance our understanding of the inevitability of evaluative choices when we apply and develop the rules of our common law. We are fortunate that we have, in our law of delict, a vehicle for that development – the requirement of wrongfulness.[36]

Wrongfulness or "sufficiently close connection"?

[113] Both the wrongfulness requirement in direct delictual liability and the requirement of "a sufficiently close connection" in a vicarious liability enquiry involve mixed questions of fact and law. Does it then really make any difference whether a court makes the value assessment in respect of wrongfulness or as part of the second, objective, "close connection" question? I think it does.

[36] It is important to bear in mind that there is a crucial difference between the enquiries into wrongfulness and negligence in the South African law of delict, and the English tort of negligence and its reliance on a 'duty of care'. The concept of 'duty of care' straddles both negligence and wrongfulness, while South African law clearly distinguishes these two elements although it sometimes uses language (such as 'legal duty' and 'imposing liability') which might suggest an overlap. See Brand "Reflections on Wrongfulness in the Law of Delict" (2007) 124 *SALJ* 76 at 80. The difference between the position in South African law and the English 'duty of care' has been pointed out and discussed in *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) (*Knop*) at 26I-27H; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) (*Telematrix*) at para 14; and *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) (*Two Oceans*) at para 11. See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (*Steenkamp*) at paras 37-9.

[114] As we have seen, there are general difficulties in delineating direct and vicarious liability.[37] It is the conceptual difficulty of introducing the notion of a legal duty and its secondary breach by the entity sought to be held vicariously liable, that merits further discussion here.

[115] In the case of a policeman – a state employee – the existence of a public duty which was breached by that policeman would make the state directly liable for the reasons already discussed.[38] If the breach was not of a public duty, but a purely private one unconnected to his or the state's public obligations, the traditional understanding of vicarious liability, based on the short-hand 'course and scope' rule, may result in the state being secondarily liable without more – "it calls for no duty to be owed by the person who is sought to be held liable, nor for fault on his or her part."[39] But how could the breach of public duties by *other* state organs constitute *vicarious* liability in that situation? If there was a breach of public duties by them it would amount, again, to direct liability of the state.

[116] Given these difficulties, the creation of risk, vulnerability of young people and women, public trust in the police and the accountability of the state appear to me to be somewhat at odds in determining the secondary, vicarious state liability where they are insufficient to establish a public duty on the primary wrongdoer. These are factors

[37] See [104]-[105] above.

[38] See [109] above. Whether the merely negligent breach of a public duty by a state official would make the official personally liable as well, is something that need not be considered here. Compare Neethling "Liability of the State for Rape by a Policeman: The Saga takes a new direction – *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA)" (2011) 32 *Obiter* 428 at 437.

[39] In the words of Nugent JA, *Supreme Court of Appeal judgment* above n 4 at para 15.

that may, however, legitimately be assessed in determining the primary wrongfulness of the conduct of the state, through its officials, in a delictual action based on direct liability.

Wrongfulness in delict

[117] The development of wrongfulness as a criterion for determining the boundaries of delictual liability found its primary input in *Minister van Polisie v Ewels*.[40] In that case the then Appellate Division found that our law had reached the stage of development where an omission is regarded as unlawful conduct when the circumstances of the case are of a nature that the legal convictions of the community demand that the omission should be considered wrongful.[41] This open-ended general principle has since evolved into the general criterion for establishing wrongfulness in all cases, not only in omission cases.[42]

[40] 1975 (3) SA 590 (A) (*Ewels*).

[41] Id at 597A-C.

[42] See *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833A (*Administrateur, Natal*); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) (*Van Duivenboden*) at para 12; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) (*Gouda*) at para 12; *Two Oceans* above n 36 at paras 10-2; *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) at para 7; *McIntosh v Premier, Kwazulu-Natal and Another* 2008 (6) SA 1 (SCA) at para 12; *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA) at para 5; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) (*Fourway Haulage*) at para 12; and *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at para 38. See also Du Bois "Getting Wrongfulness Right: a Ciceronian Attempt" in Scott & Visser (eds) *Developing Delict: Essays in Honour of Robert Feenstra* (Juta, Cape Town 2000); Fagan "Rethinking Wrongfulness in the Law of Delict" (2005) 122 *SALJ* 90; Du Bois "State Liability in South Africa: A Constitutional Remix" above n 2; and Price "The Impact of the Bill of Rights on State Delictual Liability for Negligence in South Africa", paper presented at the 'Obligations V Conference: Rights and Private Law', St Anne's College, Oxford University (2010).

[118] Wrongfulness is established where there is a breach of a legal duty not to cause harm to another by one's negligent conduct.[43] If the conduct consists of a positive act causing physical damage to another's person or property, both the existence of the duty not to cause harm and its breach are self-evident. The duty arises because the positive act infringes upon the recognised interests of property and security of the person. It is for that reason that the law recognises these invasions as *prima facie* wrongful.[44] In these cases public and legal policy issues surrounding wrongfulness are already settled and wrongfulness can be avoided only by pleading some form of justification for the breach of the duty or, put differently, for the infringement of the recognised right or interest.

[119] Where a court is requested to accept the existence of a legal duty in the context of the wrongfulness enquiry in the absence of legal precedent "it is in reality asked to extend delictual liability to a situation where none existed before."[45] Examples of where a court has done this are liability for negligent omissions and for negligently caused pure economic loss. In these kinds of cases the imposition of a duty is determined with reference to considerations of public and legal policy, consistent with

[43] See *Ewels* above n 40 at 597B–C; *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 570J; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 797F; *Knop* above n 36 at 28A; *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) at para 27; *Van Duivenboden* above n 42 at para 12; *Gouda* above n 42 at para 12; *Two Oceans* above n 36 at para 12; *Hirschowitz Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) at paras 27-8; and *MV MSC Spain; Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) at para 14. See also Corbett "Aspects of the Role of Policy in the Evolution of our Common Law" (1987) 104 *SALJ* 52 at 59; Fagan "Rethinking Wrongfulness in the Law of Delict" above n 42 at 110-2; Nugent "Yes it is Always a Bad Thing for the Law: A Reply to Professor Neethling" (2006) 123 *SALJ* 557 at 560-561; and Brand above n 36 at 80. See however Neethling "The Conflation of Wrongfulness and Negligence: Is it Always Such a Bad Thing for the Law of Delict?" (2006) 123 *SALJ* 204 at 212-3 and Neethling and Potgieter "In (Self-)Defence of the Distinction Between Wrongfulness and Negligence" (2007) 124 *SALJ* 280 at 282-4.

[44] *Two Oceans* above n 36 at para 10.

[45] Id at para 12.

constitutional norms.[46] It is apparent from this that the general criterion of "reasonableness" in the wrongfulness enquiry concerns the reasonableness of imposing liability on the defendant and not the reasonableness of the defendant's conduct, which is an element of the separate negligence enquiry in our law of delict.[47]

[120] The wrongfulness requirement in our law of delict is thus a normative or policy-based enquiry to decide whether new rights and duties should be recognised and whether old ones should be extended, restricted or abolished.[48]

Wrongfulness and constitutional values

[121] Decisions of this Court[49] and the Supreme Court of Appeal[50] have recognised that constitutional values must now inform this evaluative assessment, in particular the value or norm of accountability.[51]

---

[46] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele* (CC)) at para 43; *Van Duivenboden* above n 42 at para 21; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) (*Van Eeden*) at paras 9-12; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) (*Hamilton*) at paras 16-9; *Gouda* above n 42 at para 12; *Two Oceans* above n 36 at para 10; and *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) (*Gore*) at para 82.

[47] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at para 25; *Telematrix* above n 36 at paras 12-3; and *Two Oceans* above n 36 at para 11.

[48] Compare Price above n 42 at 5 and at fn 38.

[49] *Carmichele* (CC) above n 46 and *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Rail Commuters*) at paras 73-8.

[50] *Van Duivenboden* above n 42 at para 21; *Van Eeden* above n 46 at para 12; *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) (*Carmichele* (SCA)) at para 43; *Hamilton* above n 46 at paras 16-9; *Two Oceans* above n 36 at para 10; *Gouda* above n 42 at para 12; and *Gore* above n 46 at para 82.

[51] Determining wrongfulness in these matters involves the balancing of identifiable norms (*Van Duivenboden* above n 42 at para 21). These identifiable norms will include constitutional norms. An important constitutional norm that will factor in cases such as these is the norm of accountability. For its development see *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) at para 31; *Van Duivenboden* above n 42 at para 20; and *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C) at 65B-H. For applications thereof see *Van Eeden* above n 46 and *Hamilton* above n 46. See also the favourable discussion of accountability by this Court in *Rail Commuters* above n 49 at 73-8. This norm was succinctly stated by Harms JA in *Carmichele* (SCA) above n 50 at para 43 as follows: "[T]he State is liable [in

[122] In order not to conflate the wrongfulness and negligence requirements of our law of delict, an assumption of negligently caused harm often assists in correctly focussing on what is relevant in deciding the reasonableness of imposing liability under the wrongfulness enquiry.[52] The assumption is necessary for the correct assessment of wrongfulness as a separate requirement of delictual liability, and obviously cannot be made when the further requirement of negligence is independently assessed. The wrongfulness enquiry would thus determine whether it is reasonable to impose liability or to withhold it for other public or legal policy reasons. It is within that context that the treatment of constitutional values as part of the wrongfulness enquiry in our case law should be assessed.

[123] From this perspective, reference to the constitutional norm of accountability in the determination of wrongfulness does not provide reasons independent of negligence to impose delictual liability.[53] It simply provides the proper context within which to determine whether the costs associated with the imposition of delictual liability for negligently caused harm should prevent the imposition of that liability or not.[54]

---

delict] for the failure to perform the duties imposed upon it by the Constitution unless it can be shown that there is compelling reason to deviate from that norm."

[52] *Van Duivenboden* above n 42 at para 12. See also *Knop* above n 36 at 24G-H.

[53] This is not the way in which some commentators view the effects of post-constitutional case law. They appear to assume that the discussion of the norm of accountability in the wrongfulness enquiry provides an independent, not additional, reason for imposing delictual liability. See Fagan "Rethinking Wrongfulness in the Law of Delict" above n 42 at 134-6; and Price above n 42 at 14-6.

[54] Compare Du Bois "Getting Wrongfulness Right: a Ciceronian Attempt" above n 42 at 31-2.

Generally, accountability concerns would favour delictual liability, but that is not always the case.[55]

[124] Factors that militate against the imposition of liability include the availability of an alternative remedy,[56] the possibility that imposing liability might undermine the functioning of the state organ in question,[57] the convenience of administering a rule that liability will be imposed in these circumstances,[58] the possibility of limitless liability[59] and whether the plaintiff is best placed to protect himself against loss.[60] It is generally only when all these concerns are met that the value of accountability and other constitutional values may require the recognition of a legal duty under the wrongfulness enquiry.

The ultimate determination of negligence

[125] Wrongfulness is determined on the assumption of negligent state conduct on the part of the official directly involved in the breach of a public duty. When one turns to the actual determination of negligence this assumption obviously falls away. The facts might show that there was no negligent conduct on the part of this official.[61] It is

[55] See *Steenkamp* above n 36 at para 86, *Van Duivenboden* above n 42 at para 21; and *Carmichele* (SCA) above n 50 at para 43.

[56] *Knop* above n 36 at 33B; *Van Duivenboden* above n 42 at para 21; and *Van Eeden* above n 46 at para 19.

[57] *Knop* above n 36 at 33C-D; *Van Duivenboden* above n 42 at para 22; *Van Eeden* above n 46 at para 21; and *Hamilton* above n 46 at para 35.

[58] *Administrateur, Natal* above n 42 at 833H-834A; *Van Duivenboden* above n 42 at para 13; and *Hamilton* above n 46 at para 17.

[59] *Van Duivenboden* above n 42 at para 19; *Van Eeden* above n 46 at para 22; and *Fourway Haulage* above n 42 at para 23.

[60] *Fourway Haulage* above n 42 at para 27.

[61] Where this is the case it will not be necessary to inquire into wrongfulness.

also conceivable that evidence could be presented by the state that it took reasonable steps, through the instrumentality of *other* state officials, to prevent the wrongful and negligent conduct of the state official directly involved, and that accordingly an ultimate finding of negligence is not warranted.[62]

[126] With these general comments in mind it is now necessary to return to the case before us in order to examine whether it should be decided on the basis of direct state delictual liability.

Issues on the pleadings

[127] At the start of this judgment,[63] I indicated that the pleadings and evidence justified deciding the case on the basis of direct liability, subject to further argument from the parties on the issue, which might have necessitated referring the matter back to the High Court.[64] Because this route has not been taken, I will refer to the facts and issues covered in the pleadings and evidence as briefly as possible.

[128] The case was pleaded in the conventional manner, namely that Mr van Wyk acted within the course and scope of his employment with the first respondent (Minister) and that this made the Minister liable for the damages sustained by the applicant. Although this is the conventional way of pleading vicarious liability, it is not necessarily the legal conclusion in the pleadings which determines the real issues

[62] This additional safeguard to the state appears not to be available if its liability is vicarious in the traditional sense.

[63] See [91] above.

[64] As was done in *Carmichele* (CC) above n 46 at para 84.

between the parties, but the facts upon which Ms F relies. If these facts also ground an action in direct liability against the Minister, without the Minister being prejudiced by the form of the pleadings[65] or any subsequent broadening of the issues during the course of the trial,[66] then there is no substantive reason why the case should not be determined on the basis of direct liability.

[129] A close examination of the applicant's particulars of claim shows sufficient averments that, if established, would ground direct liability. In particular, in her combined summons Ms F averred that Mr van Wyk was on duty or on standby duty. She averred that he used a police vehicle in order to drive Ms F around and eventually assault and rape her. Ms F's reply to the Minister's request for trial particulars emphasised that Mr van Wyk was under the command of a police captain, that he used a police vehicle to transport Ms F to the place where he raped her and that the Minister allowed the use of the vehicle without complaint, as evidenced by the refuelling of the vehicle at state expense.

[130] The applicant also alleged that the factual and legal grounds upon which the Minister was liable included: that Mr van Wyk had been found guilty and sentenced on charges of assault with intent to do grievous bodily harm, negligent discharge of a firearm, the use of a firearm whilst under the influence of liquor and assault; that the

[65] In *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198, Innes CJ held that "[t]he object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings." See also *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at paras 37-42.

[66] *Shill v Milner* 1937 AD 101 at 105 and *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290.

applicant had requested a lift from Mr van Wyk and that this was a function and duty of members of the police; that the applicant had witnessed police dossiers in the vehicle used by Mr van Wyk; and that the Constitution created a duty to prevent, combat and investigate crime and to protect the citizens of South Africa.

[131] The salient facts upon which the matter must be decided are set out in the majority judgment in the Supreme Court of Appeal and in the main judgment of this Court. It is not necessary to repeat them here.

Wrongfulness – a legal duty on Mr van Wyk and the Minister?

[132] The determination of wrongfulness involves questions of fact and law. The applicant needs to prove the facts upon which she relies for giving rise to the existence of a legal duty towards her on the part of Mr van Wyk and the Minister.[67] Whether those facts give rise to a legal duty is a question of law that is determined with reference to considerations of public and legal policy, consistent with constitutional norms.[68]

[133] For direct state liability to exist the legal duty must be a public one. In this case that translates into a public duty that must primarily have rested on Mr van Wyk. I will return to this aspect later. Before doing so, however, I need to state why I do not consider that either the particular or general 'creation of risk' arguments advanced on

[67] Compare *Two Oceans* above n 36 at para 9.

[68] See above n 46.

behalf of the applicant and the amici assist in establishing any public duty on the state in this matter.

[134] The particular form of the argument rested on the fact that Mr van Wyk had previous convictions and the assertion that the Minister had a legal duty to remove him from the police service for the reason that his continued service in the police created the risk of the kind of behaviour that he exhibited that night eventuating. It seems to me that this "duty" takes the matter no further. If no primary public duty rested on Mr van Wyk, or any other policeman in his position, not to rape the applicant or to prevent her rape, then that is the end of the enquiry. It would not matter whether Mr van Wyk had been properly vetted earlier, because in the circumstances there would have been no duty on any policeman, good or bad, to prevent Ms F's rape.[69]

[135] The general argument is that the existence of an organisation like the police service creates or increases the risk of rape by policemen. On balance I think we must accept that the existence of the police service reduces the risk of crime, including rape.[70]

[136] That brings us back to the possible existence of a public duty resting on Mr van Wyk. What would its nature and content be?

[69] In my view these considerations are more appropriate to determine whether the state was negligent in a direct liability enquiry. See [125] above and [148] below.

[70] See Fagan "The Confusions of *K*" above n 2 at 199-204.

[137] Mr van Wyk's conduct that night involved a simultaneous commission and omission. The commission consisted of the positive physical act of raping the applicant. The omission consisted of his failure to protect her.[71] The former is a delict for which Mr van Wyk is personally liable to the applicant, but not because of any duty flowing from public constitutional or statutory obligations. The wrongfulness consists of the breach of the general duty of all to refrain from infringing the physical integrity and security of person of another. No direct state liability can flow from that. The latter possibility, of omission, is more problematic.

[138] It is accepted in our law that there is a constitutional duty on the police to prevent, combat and investigate crime and to protect the inhabitants of the Republic.

[139] In *Van Eeden* this duty was stated in the following terms:

> "The fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism (section 1(a) and (b) of the Constitution). In terms of section 12(1)(c) everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. . . . Freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms (*S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) at para 13). Section 12(1)(c) requires the state to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the state to protect everyone from violent crime."[72]

[71] See *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 744 and *K* above n 1 at paras 48-9 and 53.

[72] *Van Eeden* above n 46 at para 13.

[140] In *K*, this Court expressed this general duty as follows:

> "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."[73]

[141] This Court has noted the duty on the state to take steps to prevent the violation of the rights of women and children:

> "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."[74]

[142] These factors, trust in the police and the special vulnerability of women and children, are also present in this case. The applicant was 13 years old at the time of the incident. And it was objectively established that the fact that Mr van Wyk was a policeman played a role in her decision to accept assistance from him.[75]

[73] *K* above n 1 at para 52.

[74] *Carmichele* (CC) above n 46 at para 62. See also *S v Baloyi (Minister of Justice and Another Intervening)* [1999] ZACC 19; 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 13.

[75] *Supreme Court of Appeal judgment* above n 4 at para 14.

[143] Mr van Wyk was in the position to offer the applicant a lift that night by virtue of his access to police resources, particularly the possession of a police vehicle. That occurred because of his status as a detective and the fact that he was on standby duty.[76]

[144] All these factors are relevant in objectively assessing whether there was a legal duty, arising from general and particular state obligations, to protect those who place their trust in the police (especially vulnerable children and women). The fact that Mr van Wyk did not consider himself to be on duty, and that he intentionally disregarded any possible obligation not to cause harm negligently to the applicant, makes matters worse, not better.

[145] In *Gore*,[77] Cameron JA and Brand JA examined the relevance of state of mind in the determination of wrongfulness:

> "We do not think that it can be stated as a general rule that, in the context of delictual liability, state of mind has nothing to do with wrongfulness. . . .
>
> In the language of the more recent formulations of the criterion for wrongfulness: in cases of pure economic loss the question will always be whether considerations of public or legal policy dictate that delictual liability should be extended to loss resulting from the conduct at issue. Thus understood, it is hard to think of any reason why the fact, that the loss was caused by dishonest (as opposed to *bona fide* negligent) conduct, should be ignored in deciding the question. We do not say that

[76] The High Court noted that Mr van Wyk confirmed during his testimony that "the unmarked vehicle had been allocated to him for the purpose of fulfilling his stand-by duties." *F v Minister of Safety and Security and Another* 2010 (1) 606 (WCC) SA at para 15.

[77] See above n 46.

> dishonest conduct will always be wrongful for the purposes of imposing liability, but it is difficult to think of an example where it will not be so.
>
> In our view, speaking generally, the fact that a defendant's conduct was deliberate and dishonest strongly suggests that liability for it should follow in damages, even where a public tender is being awarded."[78]

[146] Similar considerations apply here. I accept that there is no general obligation on the police to protect citizens from crime where they are not on duty.[79] But the converse, that they never have that obligation when not on duty, is not true either. While off-duty, they are entitled to arrest without a warrant.[80] They may place themselves on duty when the occasion warrants it.[81] When they are placed in possession of police resources by virtue of their status as police officials when they are off-duty, particular circumstances might oblige them to assume their protective duties towards the public. Those circumstances would arise where, objectively, vulnerable people place their trust in them because they are police officials. And intentional disregard of their protective duty in these kinds of circumstances may be the last straw for the courts to decide that it is reasonable to impose delictual liability.

[147] This is that kind of case. I consider that wrongfulness has been established.

---

[78] *Gore* above n 46 at paras 86-8.

[79] See *Supreme Court of Appeal judgment* above n 4 at paras 44-5.

[80] Section 40 of the Criminal Procedure Act 51 of 1977.

[81] Compare *Minister of Safety and Security v Luiters* [2006] ZACC 21; 2007 (2) SA 106 (CC); 2007 (3) BCLR 287 (CC) at para 35.

Negligence

[148] Mr van Wyk's omission to protect the applicant was deliberate, but also, obviously, negligent. There is no evidence that the state took other reasonable measures to prevent him from acting in the way he did. Despite knowledge of his previous convictions he was allowed to continue service. Harm was foreseeable. No steps were taken to prevent it from occurring. In view of the fact that the parties were not called on to make further submissions, however, the possibility of further evidence on this aspect may have changed the situation.[82]

Conclusion

[149] For these reasons I concur in the order of the main judgment.

[82] It is ironic that because the pleadings are of the 'course and scope' variety, this possible last line of defence for the state does not feature in a vicarious liability enquiry.

YACOOB J (Jafta J concurring):

Introduction

[150] This case requires us to decide whether the circumstances in which the applicant (Ms F) was assaulted and raped by an off-duty detective sergeant in the early hours one morning justify imposing vicarious liability on the Minister.[1] Mogoeng J holds that the Minister is vicariously liable. I am of the view that this conclusion is unwarranted. Hence this judgment.

[151] I agree with Mogoeng J's judgment (main judgment) that the applications for condonation by Ms F for the late filing of the application for leave to appeal and by the Minister for the late filing of written submissions should be granted. I would also agree that the application for leave to appeal should be granted. My difficulty with the main judgment lies in the manner in which the appeal is considered and disposed of, and this judgment will address the question whether Ms F should succeed in the appeal. I have found the approach propagated by Froneman J extremely interesting but am of the view that I need not go there.

The K test

[152] The test to determine vicarious liability in a case like this one was authoritatively, comprehensively, clearly and helpfully laid down in the seminal judgment of this Court in the case of *K*.[2] Unless we hold that *K* was wrongly decided

[1] The Minister of Safety and Security.

[2] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) (*K*).

this Court must apply the test. At one level therefore, the appeal is not a particularly complex one because all we need to do is to apply the *K* test to the facts at hand. However, because the test laid down in *K* is predictably flexible, its application could give rise to difficulty in particular circumstances.

[153] After conducting a thorough and careful examination of relevant cases in South Africa,[3] and abroad,[4] O'Regan J determined the test to be applicable:[5]

> "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."[6]

---

[3] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC); *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC); *Commissioner, South African Revenue Service v TFN Diamond Cutting Works (Pty) Ltd* 2005 (5) SA 113 (SCA); *Jordaan v Bloemfontein Transitional Local Authority and Another* 2004 (3) SA 371 (SCA); *Bezuidenhout NO v Eskom* 2003 (3) SA 83 (SCA); *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA); *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA); *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA); *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA); *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA); *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA); *Venter v Bophuthatswana Transport Holdings (Edms) Bpk* 1997 (3) SA 374 (SCA); *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A); *Tshabalala v Lekoa City Council* 1992 (3) SA 21 (A); *Minister of Police v Rabie* 1986 (1) SA 117 (A); *African Guarantee & Indemnity Co Ltd v Minister of Justice* 1959 (2) SA 437 (A); *Feldman (Pty) Ltd v Mall* 1945 AD 733; *Estate Van der Byl v Swanepoel* 1927 AD 141; *Mkize v Martens* 1914 AD 382; and *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D).

[4] *Lister and Others v Hesley Hall Ltd* [2002] 1 AC 215 (HL); 2001 (2) All ER 769; *Bazley v Curry* [1999] 2 SCR 534; (1999) 174 DLR (4th) 45; *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71; and *Primeaux v United States* 181 F 3d 876 (8th Cir 1999).

[5] The applicable test in our country in the constitutional context was determined after the evaluation of relevant cases both in South Africa and abroad. But it cannot be said that O'Regan J embraced the position articulated in the cases to which the judgment refers.

[6] Above n 2 at para 45.

[154] Concerning the relevance of the simultaneous wrongful commission and omission to the evaluation of the sufficiency of the required link, this Court held:

> "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."[7]

And

> "The question of the simultaneous omission and commission . . . [is] relevant to determining the question of vicarious liability. In particular, it will be relevant to answering the . . . question . . . [whether there was] a sufficiently close connection between that delict and the purposes and business of the employer."[8]

The case before this Court

[155] In this case, as in *K*, the question whether Mr van Wyk, the detective sergeant concerned, was subjectively on duty must be answered in the negative. A significant difference between this case and *K* is that there the policemen concerned were on duty immediately before the rape was committed, but the deviation occurred only when the rape was committed and the omission simultaneously perpetrated. Here, Mr van Wyk had not been on duty, either subjectively or objectively, for at least four hours preceding the rape. There has been a tendency to describe Mr van Wyk's position

[7] Id at para 48.

[8] Id at para 49.

during these hours as his having been on "standby duty". I consider this a contradiction in terms. Mr van Wyk was in fact on standby for duty in the sense that he had to be available to go on duty if called.

[156] The only question that must be determined in this case is whether, despite the fact that Mr van Wyk was not on duty at the time he committed the rape, the circumstances nonetheless lead to the conclusion that there was a sufficient connection between his wrongful acts and commissions and the business of the employer to render the employer liable. Something must now be said about the nature of the connection or link required. The connection must be reasonably strong, significant and relevant. A tenuous, irrelevant or insignificant connection will not do.

The facts

[157] The facts of this case are relatively straight-forward. Mr van Wyk, a detective sergeant in the South African Police Service in George, was responsible for investigating cases after police dockets had been compiled. He was on regular duty from 07:30 on the morning of 14 October 1998 until 16:00 that afternoon. He had to be on standby for duty from then until 07:30 on the morning of 15 October 1998. During the time 16:00 to 20:00 on 14 October, Mr van Wyk did go to the police station from time to time to collect new dockets that had been allocated for his attention. He stopped performing this function at 20:00 that evening and went home. Mr van Wyk then improperly used the police vehicle entrusted to him only so that he

may be able to go to work if that became necessary, to go to a nightclub. There he spent about two hours drinking beer and watching people dance.

[158] Ms F had gone to the same club to play pool and dance. She said that a difference she had with a friend resulted in her being upset, going outside, and wanting to go home. As it happened, a young man she knew was one of the two people who had been with Mr van Wyk at the nightclub. Mr van Wyk and his two friends were at or in the car when Ms F got there. She was ultimately offered a lift home.

[159] Mr van Wyk took each of his male friends home and then asked Ms F, who had been seated on the back seat of the car, to sit in front. Ms F obliged. Mr van Wyk then drove to a dark area in a direction away from her home. Mr van Wyk brought the car to a stop at a dark spot. Ms F became sufficiently uncomfortable and suspicious to open the car door, jump out and hide in the dark. Shortly afterwards, Ms F returned to the roadside to "hike" home.

[160] The car driven by Mr van Wyk returned and Ms F's evidence of her encounter with him at this stage is interesting:

> "Then he (Mr van Wyk) made as if he didn't know me, then he asked me what I was doing there. Then I said to him he knows what I am doing there, what is *he* trying to

> do, he must please just take me home. . . . Then I climbed into the car again and we drove away from Kaaimans back to George."[9] (My translation and emphasis.)

[161] Ms F did say elsewhere in her evidence that she got into the car because she believed he was a policeman and because she trusted him on that account. She inferred that he was a policeman, she said, because of the police radio in the car, the files which she thought were police dockets and because Mr van Wyk had told her that he was a private detective.

[162] The car was brought to a halt again. Ms F tried to escape once more but Mr van Wyk prevented her. He brutally assaulted and raped Ms F outside the car.

Sufficient connection?

[163] The policemen in *K*, while in uniform and performing their duties had offered to take a stranded young woman home in the fulfilment of their duties as policemen. Ms K had trusted them, because of their status as police officers, in circumstances where it was reasonable for her to do so:

> "In this case, and viewed objectively, it was reasonable for [Ms K] to place her trust in the policemen who were in uniform and offered to assist her."[10]

[9] "Toe maak hy of hy my nie ken nie, toe vra hy vir my wat doen ek daar. Toe sê ek hy weet wat ek daar maak, wat probeer hy doen, hy moet my net asseblief huis toe vat. . . . Toe het ek weer in die kar geklim en toe het ons van Kaaimans af gery terug George toe."

[10] Above n 2 at para 52.

On these facts, this Court found three bases for the conclusion that the delict (simultaneous omission and commission) bore a sufficient connection to the employment of the policemen:

a. The policemen and their employer all carried a statutory and constitutional duty to prevent crime and protect the members of the public.[11]

b. The police there had offered to assist Ms K and she had accepted their offer and by doing so displayed her trust in the policemen in uniform, in circumstances where it was reasonable for Ms K to do so.[12]

c. There had been a simultaneous commission and omission: the police had committed the brutal rape; and their simultaneous omission was that they failed "while on duty to protect her from harm" which, they had a general and a special duty to do.[13]

[164] It will have been noted that the fact that the policemen were on duty at the time of the simultaneous commission and omission was a significant factor in the evaluation in *K*. I accept without qualification that whether the policemen are on or off duty is not a decisive factor. This is because there may be circumstances in which the connection is sufficiently strong even though policemen are not on duty. A victim of the wrongful conduct of an off-duty police officer will necessarily have to go a longer way to establish the connection. I would say that the question of whether the

[11] Id at para 51.

[12] Id at paras 51 and 52.

[13] Id at para 53.

person who commits the delict is on or off duty, though not decisive, is important. A court should not lightly hold the employer vicariously liable for the conduct of an off-duty police officer. In that event, the other factors must, in my view, be sufficiently strong to make up for the absence of the duty element.

[165] An example will perhaps illustrate the point. Take the case where vicarious liability is asserted arising from the conduct of a mechanic employed by the police service who, on a jaunt of his own, arrested someone while he was off duty and not in uniform. Assume also that he claimed to be a policeman, hauled the victim to a police station, made a docket, wrongfully and unlawfully charged him with attempted housebreaking and locked him up.[14] There is a much greater possibility of the required link being established in a case of this kind in our constitutional order than in the case with which we are here concerned. The same would apply if the mechanic raped the victim at the police station.

[166] Mr van Wyk was not on duty at the time he committed the rape. The facts in this case must be carefully considered to ascertain whether a sufficient link had been shown.

[167] It is true that Mr van Wyk drove a police car, there were dockets in the car, and he said that he claimed to be a private detective. These three factors go some way towards establishing some kind of link. But whether the link is sufficient must be

[14] These facts are taken from the case of *Minister of Police v Rabie* above n 3.

ascertained by first looking at the countervailing factors and conducting a balancing exercise.

[168] The first factor to consider is that Mr van Wyk was off duty. Immediately before he raped Ms F, he had been engaged in activities that had nothing to do with his job. He had been decidedly on a frolic of his own since 20:00 on the evening of 14 October. He went home for two hours and there is nothing to suggest that any activity he engaged in there was even remotely connected with his work. He then used the official car allocated to him for work purposes to go to a nightclub. There he most certainly did not do his duty. He did nothing even remotely connected with his work. He drank beer and watched people dancing for about two hours. When Mr van Wyk first decided to give Ms F a ride home, he was admittedly doing nothing to further his employer's ends. Indeed, in doing so, he continued to use the official car improperly and to continue his own jaunt. Moreover by that time, he had not yet told her he was a private detective and the fact that he was a policeman had nothing to do with her decision to board the car in the first place. She did this because she knew one of the people with Mr van Wyk.

[169] From then until he committed the rape, the only conduct attributable to him which might point to the existence of the link was his untruthful statement that he was a private detective. He parked the car in a dark place and behaved suspiciously, went on ahead after Ms F had sprung out of the car, came back to the point where Ms F was, agreed to give her a lift once more and then assaulted and raped her. An

important distinction between *K* and this case is that here Mr van Wyk did not offer a lift to Ms F, and even if he did, he did not do so in his capacity as a police officer. There was no official police promise of safe carriage. Indeed, he behaved foolishly again by pretending not to recognise her and asking her what she was doing in that dark place. A far cry from the conduct of a policeman who even if not in uniform assures someone that he is a policeman, that she will be safe with him and that he as a policeman will do his duty and take her home.

[170] The next factor that must be considered is whether, like in *K*, there was a reasonable basis for Ms F to repose her trust in him by reason of the car, the dockets and his statement that he was a private detective. Even if Ms F thought that Mr van Wyk was a policeman, she could never have thought that he was doing official duty. This is because she must have known that he was in the nightclub for purposes of personal pleasure and nothing else. She also knew that he had consumed so much liquor that in her view Mr van Wyk was under the influence of liquor.[15] Mr van Wyk then, unlike a reliable policeman, acted sufficiently suspiciously by stopping the vehicle in the pitch dark, to warrant her getting out of the motor vehicle and hiding. We must remember that Ms F, at this stage, had all the information that may have led her to trust Mr van Wyk as a policeman. He had already behaved inconsistently with that office and, in my view, continued to do so. When he spoke to her after she came out of hiding, he lied, pretending that he did not know who she was and what she was

[15] In paragraph 10 of her statement to the police she said the following referring to Mr van Wyk "[h]y was onder die invloed."

doing there. She did not believe him. Above all, he gave Ms F no direct assurance that he was a policeman and that he would take her home.

[171] An important factor relevant to this question is the vulnerability of potential victims to the wrongful exercise of power or breach of trust that might occur in a particular case.[16] On the night of the assault and rape Ms F was vulnerable in two ways: she was a female child of 13 years. These characteristics rendered her vulnerable to the threat of sexual violence and sexual violence itself, including rape. As this Court rightly accepted in *Carmichele*,[17] and reaffirmed in *K*:[18]

> "Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women."

[172] This threat of intense violation is only aggravated by Ms F's tender years. In the application of the *K* test, courts are mandated to approach the objective evaluation of the sufficiency of the link with "explicit recognition" of its "normative content" and "with the spirit, purport and objects of the Constitution in mind".[19] I have no doubt that this Court is required to consider as a factor the relative vulnerability of Ms F to sexual violence, the more so because the wrongdoer is a policeman. The more vulnerable a person, the greater the need for that person to rely on police protection and trustworthiness. The question in this case therefore is whether in the light of her

[16] *Bazley* above n 4 at para 41 as quoted in *K* above n 2 at para 38.

[17] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62.

[18] Above n 2 at para 18.

[19] Id at para 44.

vulnerability Ms F needed to rely, and did rely, on Mr van Wyk's protection and trustworthiness as a policeman sufficiently to render her reliance reasonable. And we must factor into the analysis the central fact that Ms F was 13 years old.

[173] I have come to the conclusion that taking full account of the fact that Ms F was 13 years old, she did not, in the circumstances of this case, place enough reliance on Mr van Wyk's protection and trustworthiness as a policeman to warrant the conclusion that the grounds for trust were reasonable in the circumstances. The fact that Mr van Wyk was a policeman cannot in the circumstances be regarded as a central factor in Ms F's decision to board the car on the second occasion. It was a factor but not uppermost in her mind at the time. She probably on account of her age and because of her desperate situation understandably but naively thought that despite his earlier impropriety he would nevertheless take her home. But, in my view, the major factor which, objectively speaking, contributed to that decision was her desperate situation and incalculable fear. Her decision to get into the car cannot be said to be unreasonable but nevertheless it cannot be said in the circumstances that the fact that Mr van Wyk was a policeman played a sufficient role in her decision to render her trust in him as a policeman reasonable.

[174] Ms F cannot be said to have had reasonable grounds to trust Mr van Wyk as a policeman. On the contrary, she had compelling reason to distrust him.

[175] The next factor to consider is whether there was a simultaneous omission and commission. There was none. Mr van Wyk was not on duty. Nor had he, in his capacity as a policeman, offered Ms F safe conveyance home. The absence of a special duty leads inevitably to the conclusion that a simultaneous commission and omission was non-existent.

[176] An important factor to bear in mind in this regard is the nature of Mr van Wyk's employment. It is true that he was a policeman. But there are many, many police personnel who perform a variety of duties. It is important to assess the sufficiency of the connection by paying due attention to the precise nature of his employment. Mr van Wyk was not employed to perform public order maintenance functions nor was it his particular job to ensure the safety of the public. His work entailed the investigation of cases after dockets had been made by one or other of his colleagues.

[177] In the circumstances I conclude that there was not a sufficient connection between Mr van Wyk's heinous deeds and his employment with the South African Police Service as a crime investigator. It is undoubtedly so that the police service in our country must be structured so that the police are sufficiently well chosen and well trained to ensure that this kind of wrongful conduct is minimised. I fear however that evil conduct by police officers can never be completely eliminated. But the absence of sufficient training and careful choice have not been mooted in this case as factors relevant to the sufficiency of the link.

Costs and conclusion

[178] It is fair that there should be no order as to costs. Ms F was in the process of vindicating a right that is important to society as a whole and vital to her.

[179] I would accordingly dismiss the appeal and make no order as to costs.

For the Applicant:	Advocate L M Olivier SC instructed by Wheeldon Rushmere & Cole.
For the First Respondent:	Advocate R Williams SC and Advocate J van der Schyff instructed by the State Attorney, Cape Town.
For the First Amicus Curiae:	Advocate H Barnes and Advocate S Wilson instructed by the Institute for Security Studies c/o SERI Law Clinic.
For the Second Amicus Curiae:	Advocate M Chaskalson SC and Advocate D Smit instructed by Webber Wentzel Attorneys.
For the Third Amicus Curiae	Advocate K Pillay instructed by Counsel for the Women's Legal Centre Trust.