

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: 2915/2013
DATE HEARD: 7/9/2015
DATE DELIVERED: 6/10/15
NOT REPORTABLE**

In the matter between:

MINISTER OF SAFETY AND SECURITY

APPLICANT

and

ELSA BOOYSEN

RESPONDENT

JUDGMENT

PLASKET J

[1] This is an application for leave to appeal brought by the defendant, the Minister of Safety and Security against my judgment in favour of Ms Elsa Booysen, the plaintiff. The action for damages that she instituted against the Minister arose from a tragic event that occurred at her home in Pearston on the evening of 22 March 2013 when her boyfriend, one Johannes Mongo, a police reservist, shot her in the face before turning his firearm on himself and taking his own life.

[2] The ambit of the trial before me, on the merits only, was narrow. The defendant conceded all of the elements of liability but denied that he was vicariously liable for the damage suffered by the plaintiff as a result of Mongo's conduct. I found

that he was indeed vicariously liable for whatever damages the plaintiff may prove in due course.

[3] The facts were largely common cause. Mongo was, at all material times, a reservist with the rank of constable in the employ of the South African Police Service (SAPS).¹ He was on duty working night shift on 22 March 2013, dressed in a SAPS uniform and armed with a 9mm Parabellum semi-automatic pistol issued to him by the shift commander at the commencement of his shift. He had been assigned crime prevention duties and was required to attend to complaints made by members of the public.

[4] On the day of the incident, Mongo was dropped off by a marked police vehicle at the home of the plaintiff so that he could have dinner there. The plaintiff testified that this was his routine when he was on duty on Friday and Saturday nights. When he had eaten, the police vehicle would return and collect him, and he would continue with his duties.

[5] The plaintiff testified that after Mongo had eaten his dinner he sat outside with her. Without warning, he drew his pistol, shot the plaintiff in the face and turned the pistol on himself.

[6] An employer may be vicariously liable for damage caused by an employee in one of two types of cases: first, where the employee has performed the duties assigned to him or her by the employer but has done so negligently; and secondly, where the employee has deviated from the duties assigned to him or her. This is a case that falls into the second category – a so-called deviation case.

[7] It was argued by Mr Ford who, together with Mr Bester, appeared for the Minister that I had erred in applying the test postulated in cases such as *K v Minister of Safety and Security*² and *F v Minister of Safety and Security & others*³ in that I had

¹ Section 48(6) of the South African Police Service Act 68 of 1995 provides: 'A member of the Reserve shall be deemed to be in the employ of the Service while on duty, notwithstanding the fact that such member may not be remunerated by the Service.'

² *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

³ *F v Minister of Safety and Security & others* 2012 (1) SA 536 (CC).

ignored the fact that the evidence of Booyesen was that she did not regard Mongo on that fateful evening as a policeman and did not repose trust in him in that capacity. A subjectively held trust in the member of the SAPS who commits a delict is, Mr Ford argued, an essential element for the establishing of vicarious liability in a deviation case. Mr Niekerk, who appeared for Booyesen, argued that the test in this case is objective and that a subjectively held trust on the part of the victim is not a requirement that a plaintiff must prove in order to hold an employer vicariously liable for the delict of his or her employee.

[8] In order to determine this issue, it is necessary to consider the two cases referred to. In the first, the *K* matter,⁴ O'Regan J, after discussing the leading deviation cases set out the proper approach 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.'

[9] O'Regan J had made the point in *K* that the rules of vicarious liability are policy-laden and that it would not be correct, especially when viewing them through the prism of s 39(2) of the Constitution, to ignore their normative content.⁵ In the *F* matter,⁶ Mogoeng J set out what he termed the 'normative components that point to [vicarious] liability' as being '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

⁴ Note 2, para 32.

⁵ Note 2, paras 22-23.

⁶ Note 3, para 52.

victim; and the existence or otherwise of an intimate link between the policeman's conduct and his employment'.

[10] What emerges clearly from these cases is that the test when an employee has deviated from his or her duties and committed a delict is an objective one. It is so that in both cases, involving the rape of a woman by on-duty policemen and an off-duty policeman on stand-by respectively, the court took into account that the victim had reposed trust in her attacker. That, it seems to me, was an additional factor to the objective factors that pointed towards the imposition of vicarious liability. It was also a factor that was specific to the facts of each of these cases.

[11] I do not read either case to hold that a subjective trust in the wrongdoer is an essential element whenever it is sought to hold an employer liable for the delict of an employee. That factor was certainly absent in *Minister of Police v Rabie*:⁷ the plaintiff did not even know that the second defendant was a policeman when he was grabbed by him as he walked past a shop window, asked why he wanted to break in to the shop and struck on the forehead with a wheel spanner before being arrested. Yet, the Minister was held to be vicariously liable for the delicts committed by the second defendant, who was off duty at the time.

[12] If subjective trust in the wrongdoer is an essential element for vicarious liability, it would mean that only the delicts of policemen in certain circumstances and perhaps a relatively small number of other State functionaries in similar positions could ever result in the State being vicariously liable. The delict committed by a clerk employed by the State, for instance, could never result in vicarious liability if subjective trust in the wrongdoer was an essential element.

[13] And what of employees who are not employed by the State? A private employer could only be held vicariously liable in very rare and unusual cases if Mr Ford's argument is correct because it is difficult to imagine the circumstances in which an employee in private employment would be in a position of trust in the same sense as a policeman. The leading case of *Feldman (Pty) Ltd v Mall*⁸ is a good

⁷ *Minister of Police v Rabie* 1986 (1) SA 117 (A).

⁸ *Feldman (Pty) Ltd v Mall* 1945 AD 731.

illustration that the argument is incorrect. A driver employed by a private company had, after delivering goods as instructed by his employer, gone on a frolic of his own and imbibed alcohol. In a state of unfitness to drive safely resulting from his intake of alcohol, he had collided with and killed a person whose dependants sued the employer for loss of support. In these circumstances there can be no question of the deceased reposing trust in the wrongdoer, if he was even aware of him; and there certainly would have been no evidence to that effect. Despite this, the Constitutional Court in both of the cases relied upon by Mr Ford, namely *K⁹* and *F*,¹⁰ cited the case with approval and applied its test.

[14] For these reasons I am satisfied that there are no reasonable prospects of a court of appeal concluding that I erred in my application of the appropriate test.

[15] The application for leave to appeal is dismissed with costs.

C Plasket

Judge of the High Court

APPEARANCES

For the applicant: B Ford SC and J Bester instructed by Whitesides

For the respondent: D Niekerk instructed by NN Dullabh & Co

⁹ Note 2, paras 26-30.

¹⁰ Note 3, paras 42-45.