

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 393/2015

In the matter between:

REBECCA MOSEPELE

Applicant

AND

CONSTABLE J K MOKGETHI

1st Respondent

MINISTER OF POLICE

2nd Respondent

DATE OF HEARING : 17 MAY 2019

DATE OF JUDGMENT : 23 MAY 2019

FOR THE APPLICANT : ADV. ZWIEGELAAR

FOR THE RESPONDENT : ADV. MMOLAWA

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

HENDRICKS J

Introduction

- [1] This is an application for leave to appeal to the Full Bench of this division **alternatively** to the Supreme Court of Appeal (SCA) against the “*whole of the judgment and order*” by **Gutta J** delivered on the 15th November 2018 in which it was ordered that “*plaintiff’s (applicant’s) claim against the first defendant for judgment is granted with costs on an undefended scale; plaintiff’s claim against second defendant is dismissed with costs for second defendant.*” The applicant claimed damages as a result of being assaulted and raped by **J.K. Mokgethi**, an off-duty police constable. The claim was instituted against both Mokgethi (1st defendant) and the Minister of Police (2nd defendant/respondent) jointly and severally. Merits and quantum were separated and the trial proceeded on merits only.
- [2] It is contended by the applicant that there exist a reasonable possibility of success on appeal and that another court would come to a different decision than what the trial court had arrived at. Furthermore, there are also compelling reasons why the appeal should be heard in terms of Section 17 of the Superior Courts Act 10 of 2013.
- [3] It became common cause between the parties that Mokgethi was off-duty when he allegedly assaulted and raped the applicant. However, the question that begs an answer is whether there was a close link between his conduct and his employment with the respondent. The trial court stated:

“[41] *The question for consideration is whether the objective factors created a sufficiently close connection between the deceased delict and his employment. I am of the view, when considering the facts in casu, that plaintiff failed to show a real and sufficiently close link between the conduct of the deceased and his employment for the following reasons:*

- a) *The deceased and plaintiff were known each other before the time of the incident.*
- b) *The deceased's meeting with plaintiff was solely for his own purposes and interests He offered to give her a lift to the taxi rank Hence this was not related in any way to his work-1 as a police officer.*
- c) *Although he was wearing his police uniform he was in a private vehicle and he was off duty.*
- d) *When he met with plaintiff, the deceased was not there in his capacity as a police officer, nor was he there to carry out any official duties as a police officer. He was not engaged in the business of second defendant. There was no situation which called upon the deceased to act as a police officer when he met with the plaintiff.*
- e) *Plaintiff testified that she knew the deceased from the police station and she trusted him as he was a police officer. She said she did not know if he was on duty or not. There is no evidence that the deceased employment facilitated the abuse of trust.*
- f) *Plaintiff was neither a vulnerable woman nor a child. She voluntarily accepted a lift from the deceased."*

and

"[46] In casu, as stated supra, the facts adduced by plaintiff are in my view not sufficiently close or real 'to find second defendant vicariously liable in circumstances when the deceased was off duty."

The application for leave to appeal is premised on the aforementioned *dictum* of the trial court.

[4] I am of the view that there are reasonable prospects of success on appeal based on the dicta of **K v Minister of Safety and Security** 2005 (6) SA 419 (CC) and **F v Minister of Safety and Security** 2012 (1) SA 536 (CC). Another court as court of appeal could (would) come to a different decision than what the trial court arrived at. In my view, the appeal does not warrant consideration by the SCA. The factual findings of the trial court can be considered by a Full Bench of this division. Consequently, I am inclined to grant leave to appeal to the Full Bench of this division.

Order:

[5] Resultantly, the following order is made:

- (i) **Leave to appeal is granted to the Full Bench of this division against the whole of the judgment and order granted by Gutta J on 15 November 2018.**
- (ii) **The costs of the application for leave to appeal shall be costs in the appeal.**

R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG