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A CRITICAL ANALYSIS OF THE MAJORITY JUDGMENT IN *F v MINISTER OF SAFETY AND SECURITY* 2012 1 SA 536 (CC)

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1 Introduction

In this note I seek to analyse and critique the majority judgment of Mogoeng CJ in *F v Minister of Safety and Security*,¹ in which the judge purports to apply the constitutionalised test for vicarious liability set out by O'Regan J in *K v Minister of Safety and Security*.² However, it is respectfully submitted that a close analysis of the majority judgment in *F* reveals that Mogoeng CJ to a certain extent misconstrues some of the key conceptual underpinnings of the doctrine of vicarious liability. Furthermore, Mogoeng CJ subtly alters the constitutionalised test for vicarious liability originally propounded in *K*. In applying the "standard test" for vicarious liability originally set out in *Minister of Police v Rabie*,³ the judge appears to misconstrue the second leg of the enquiry, which calls for an objective assessment of whether or not the conduct of the employee was sufficiently closely linked to the business of his employer to justify the imposition of liability on the employer. The judge seems to overlook the fact that, in terms of *K*, both factual and normative considerations must be considered *in conjunction with one another* in deciding whether or not it can be said that, considered overall, there is a sufficiently close link between the employee's delictual conduct and the business of his employer. Instead, Mogoeng CJ appears to consider the question of whether or not there is an "intimate link" between the delictual conduct of the employee and the business of his employer as a separate and subordinate element of the second leg of the standard test, and seems to conceive of this element in primarily factual terms. The judge then, despite making express reference throughout the judgment to the importance

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

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

³ *Minister of Police v Rabie* 1986 1 SA 117 (A) (hereafter *Rabie*).

of normative considerations in the enquiry into vicarious liability, appears to base his ultimate findings in the case on this "intimate link" element, understood largely in factual terms, with the result that the final decision to hold the Minister vicariously liable appears to be based primarily on the factual links between the employee's delictual conduct and the business of his employer. This approach is unusual and problematic, as the factual links in this case are, in fact, rather tenuous, and on their own would arguably not justify the imposition of vicarious liability in this situation. It is submitted that a more compelling justification for the imposition of vicarious liability in this instance would have lain in the normative constitutional and policy considerations pointing towards a finding of vicarious liability on the part of the state. In other words, the court should have held that, despite the weak factual links between Van Wyk's conduct and his employment, public policy, informed by relevant constitutional norms, dictates that the link between his conduct and his employment should be deemed to be sufficiently close to justify the imposition of vicarious liability on the state. Such an approach would, it is submitted, comport better with the general thrust and import of the decision in *K*.

2 Facts

The appellant was one Ms F ("F"), who was 13 years old when the delict giving rise to the litigation was committed. The first respondent was the Minister of Safety and Security ("the Minister"), while the second respondent was one Allister Claude van Wyk, who was employed as a police officer by the SAPS at the time of the attack on F.

F went to a nightclub one night. In the early hours of the morning, she accepted a lift home from Van Wyk. Two other persons, one of whom was known to her, were also passengers in Van Wyk's car, an unmarked police vehicle. Before accepting the lift from Van Wyk, F noticed that the vehicle was fitted with a police radio, and from this inferred that he must be a police officer.

Van Wyk dropped off the two passengers in the vehicle at their respective homes. He then invited F to get into the front passenger seat, which she did. She then

noticed a pile of what she believed to be police dockets in the car. At some point prior to the rape, Van Wyk also told F he was a "private detective", and F understood this to mean he was a police officer.

Crucially, Van Wyk was not on duty on the night in question; however, he was on standby duty, which meant he could be called upon to attend to any crime-related incident if the need arose. He was paid an hourly tariff by the SAPS for being on standby, and had been provided with an unmarked police vehicle for this purpose.

After Van Wyk had dropped off the two passengers, he drove the vehicle in a direction away from F's home, whereupon she became fearful for her safety. When the car slowed down in a dark, secluded spot, she got out of the vehicle, ran away and hid herself. She waited for Van Wyk's vehicle to drive off, and then stood next to the road and attempted to hitchhike home. However, Van Wyk returned to the scene while she was attempting to do this. She reluctantly got into his car again, owing to her desperation. F testified that she got into the car again because she believed Van Wyk was a police officer, because he had told her he was a private detective, and because this statement had been corroborated by the police radio and dockets she had seen in the vehicle. While ostensibly taking F home, Van Wyk turned off the road. F again attempted, this time unsuccessfully, to escape. Van Wyk then assaulted and raped her.

F sued the Minister for damages arising out of the attack, alleging that the Minister was vicariously liable for Van Wyk's conduct. She claimed that the fact that she had believed Van Wyk to be a police officer had played a crucial role in allaying her fears. She alleged that she had trusted him, despite her suspicions, because she believed he was a police officer.

F was successful in her action in the court *a quo*,⁴ but this decision was overturned by the Supreme Court of Appeal ("the SCA").⁵ The decision of the SCA was then

⁴ *F v Minister of Safety and Security* 2010 1 SA 606 (WCC). This decision is supported by Neethling 2011 *Obiter* 430, who writes that "... this authoritative and well-reasoned decision of Bozalek J

taken on appeal in the Constitutional Court, where she was successful. Mogoeng CJ wrote the court's majority judgment, in which he ostensibly applied the test for vicarious liability set out in *K. Froneman* J wrote a separate concurring judgment, in which he expressed the view that liability should have been imposed on the Minister on the basis of direct state liability.⁶ Yacoob J wrote a dissenting judgment. He applied the test for vicarious liability set out in *K*, but was of the view that there was not a sufficiently close link between Van Wyk's delict and the business of the Minister.

3 Vicarious liability

Generally speaking, an employer is vicariously liable for a delict committed by an employee, provided that the employee was acting within the course and scope of his/her employment when the harm was caused.⁷ Thus, vicarious liability is essentially a form of strict liability (liability without fault), as the employer is held liable without himself having acted culpably.⁸ In circumstances where it is clear that

[the trial judge] deserves full support". Neethling 2011 *TSAR* 189 expresses similar sentiments. See, also, Scott 2011 *TSAR*, who is also broadly supportive of the decision.

⁵ *Minister of Safety and Security v F* 2011 3 SA 487 (SCA). However, the minority dissenting judgment of Maya JA held that vicarious liability should be imposed on the Minister.

⁶ Section 1 of the *State Liability Act* 20 of 1957 (hereafter the SLA) provides that the state can be held vicariously liable for delicts committed by officials employed by the state: "Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant." The SLA thus endorses vicarious liability as the means by which damages can be recovered from the state. However, the SLA does not expressly preclude a claim for damages brought against the state on the basis of direct liability.

⁷ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA). The phrase "course and scope of employment" is an import from English law, and has been held to have the same meaning as "exercise the functions to which he was appointed" (see the judgment of De Villiers AJA in *Mkize v Martens* 1914 AD 382 400), the term originally used in South African law. Watermeyer CJ writes in *Feldman (Pty) Ltd v Mall* 1945 AD 733 735-736 (hereafter *Feldman*) that "... the general principle has been accepted that a master is liable for harm caused to third parties by the wrongful acts of an agent if such agent is a servant and such acts are done in the exercise of the functions to which the servant has been appointed". *Feldman* 735 also confirms in this case that the doctrine of vicarious liability in South African law has its origins in English law.

⁸ See Neethling and Potgieter *Law of Delict* 365. See, also, *Stein v Rising Tide Productions CC* 2002 5 SA 199 (C) 205; *Minister of Safety and Security v F* 2011 3 SA 487 (SCA) para [15]. Loubser and Midgley *Law of Delict* 383 write that "... [t]he employer is held liable without fault for an employee's wrongdoing and the delictual liability of the employee is transferred to the

the employee has acted entirely contrary to his employer's directions and instructions, to the extent that his conduct has no relation to the duties he was appointed to carry out, the employer is not vicariously liable for the conduct of the employee.⁹ However, there is sometimes a tenuous link between the employee's conduct and the conduct for which he/she was appointed, especially in cases where the employee has to some extent deviated from his employer's instructions. Such instances are known as "deviation cases".¹⁰ In these situations, it can be difficult for a court to determine if the link between the delictual acts of the employee and the business of his employer is sufficiently close to justify the imposition of vicarious liability on the employer.¹¹ This problem becomes especially acute in circumstances where the employee intentionally deviates from his normal employment duties and engages in wrongdoing.¹²

In *Rabie*, the Appellate Division set out what has come to be known as the "standard test"¹³ for determining whether an employee's conduct falls inside or outside the scope of his employment in deviation cases:

employer". See, also, McKerron *Law of Delict* 89-90; Boberg *Delict: Aquilian Liability* 327-332; Van der Walt and Midgley *Principles of Delict* 24-26.

⁹ Tindall JA writes in *Feldman* 751 that Innes JA held in *Mkize v Martens* 1914 AD 382 that "... a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes and outside his authority, is not done in the course of his employment, even though it may have been done during his employment".

¹⁰ See *Minister of Law and Order v Ngobo* 1992 4 SA 822 (A) 827, where Kumleben J writes that "... [t]he problem of application presents itself particularly in what have become known as 'deviation cases': instances in which an employee whilst in a general sense still engaged in his official duties deviates therefrom and commits a delict".

¹¹ Watermeyer CJ writes in *Feldman* 750 that "... the dividing line which separates acts within the scope of a servant's employment from those without is one impossible to draw with certainty".

¹² See *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 2001 1 SA 1214 (SCA) and *Absa Bank v Bond Equipment (Pty) Ltd* 2001 1 SA 372 (SCA) for examples of cases where the courts refused to impose vicarious liability on an employer in instances where the employee engaged in intentional wrongdoing. In the fairly recent case of *Kasper v André Kemp Boerdery* CC 2012 3 SA 20 (WCC), the employee engaged in intentional wrongdoing when he disobeyed his employer's instructions with regard to how to dispose of weeds he had removed from a field. However, the court took the view that, in disobeying his employer's instructions, the employee was still acting within the scope of his employment. The prohibition pertained to the conduct within the scope of his employment, and did not place a limit on the scope of employment (as was the case in *Bezuidenhout v Eskom* 2003 3 SA 83 (SCA)).

¹³ Fagan 2009 SALJ 160-161 expresses the view that, as Jansen JA ultimately decided the question of whether or not the second defendant in *Rabie* had acted in the course and scope of his

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.¹⁴

The test is self-evidently both subjective (in that the employee's intention in engaging in the conduct in question is taken into account) and objective (in that the court will consider whether or not it can be said, objectively speaking, that there is a sufficiently close link between the employee's conduct and his employer's business).¹⁵ Moreover, the wording of the test plainly indicates that it is substantially factual, and therefore not primarily normative. The court is not required to consider whether or not it *should* impose liability on the employer on the basis of policy considerations (as is the case with the enquiry into wrongfulness),¹⁶ but rather to scrutinise the factual links that exist between the conduct of the employee and the business of his employer. If enough, or sufficiently significant, factual links exist, the imposition of vicarious liability on the employer will be justified.

However, our courts have in the past on occasion acknowledged that the policy reasons for the imposition of vicarious liability can have an impact on determining the limits of an employer's liability. For example, in *Feldman* Watermeyer CJ notes that "the reasons which have been advanced for the imposition of vicarious liability

employment in wrongfully arresting the plaintiff on the basis of risk (one of the policy considerations traditionally regarded as underpinning the doctrine of vicarious liability), the so-called standard test was not applied in deciding the matter (it was a mere *obiter dictum*), and therefore never became binding law.

¹⁴ *Minister of Police v Rabie* 1986 1 SA 117 (A) 134.

¹⁵ A similar "close connection" test is used by the English courts. See *Lister v Hesley Hall Limited* 2001 UKHL 22. Calitz 2007 *Stell LR* 455 points out that the close connection test has its origins in the "Salmond rule", which provides as follows: "A master is not responsible for a wrongful act done by his servant unless it is done by his servant in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master." The Salmond rule further provides that "... [a] master is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they might rightly be regarded as modes – although improper modes – of doing them". The Canadian courts have also applied a close connection test, with an emphasis on the issue of risk. See *Bazley v Curry* 1999 2 SCR 534 and *Jacobi v Griffiths* 1999 2 SCR 570.

¹⁶ Boberg *Delict: Aquilian Liability* 30.

upon a master may give some indication of the limits of a master's legal responsibility".¹⁷ However, the judge then goes on to say 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 the harm. (my emphasis)

Thus, while Watermeyer CJ clearly conceives that the normative underpinnings of the doctrine of vicarious liability have *some* role to play in determining vicarious liability, it would appear that he is of the view that such considerations are subordinate to the factual link which *must* exist between the employee's conduct and his employment in order for vicarious liability to be imposed on the employee.¹⁸ This primarily factual approach was followed in several important later decisions on vicarious liability.¹⁹

As pointed out above, in *K* the Constitutional Court revisited the question of vicarious liability in the context of South Africa's constitutional democracy,²⁰ in which organs of state such as the SAPS are subject to constitutional and statutory obligations to protect the public, and especially vulnerable groups such as women and children,

¹⁷ Fagan 2009 *SALJ* 159-160, 173-178. Fagan writes that O'Regan J erred in stating in *K* para 22 that our courts have never allowed the policy considerations underpinning the imposition of vicarious liability to play a role in determining whether or not an employee was acting in the course and scope of his employment when he/she caused harm to another person.

¹⁸ In *Estate van der Byl v Swanepoel* 1927 AD 141 151, de Villiers JA stated that "... [w]hether the act then was done in the affairs or the business of the master to which the servant had been appointed is a question of fact in every case, and can only be answered by determining what was the business of the master, or viewed from a different angle, what was the servant's employment".

¹⁹ For example, see *Minister of Law and Order v Ngobo* 1992 4 SA 822 (A), *Viljoen v Smith* 1997 1 SA 309 (A), *Smit v Minister van Polisie* 1997 4 SA 893 (T); and *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 1998 4 SA 1102 (W).

²⁰ In Du Bois 2010 *Tul Eur & Civ LF* 139, the author writes that "... [n]o area of South African law has been left unaffected by the post-apartheid constitutional revolution. Tort liability, which has long been a crucial mechanism for ensuring that government, its officials and institutions, do not escape responsibility when they violate the rights of individuals, was always likely to be at the vanguard of these changes". In Roederer 2005 *Tulsa J Comp & Int'l L* 96, the author makes the point that *K*"... brings out the contrast between a conservative, libertarian approach to vicarious liability, which favors minimal responsibility of employers, including the state, for the conduct of employees, and the constitutionally inspired approach, which places greater responsibility for the safety of the public and accountability of employers and the state for the risks and harms they impose on the public. [K]... fosters a culture of public accountability and of protecting the rights of vulnerable members of its society".

from violent crime.²¹ In *K* three police officers - on duty, in uniform and driving a marked police vehicle - had assaulted and raped a woman to whom they had offered a lift. In essence, the Constitutional Court held that the test for vicarious liability in the context of South Africa's constitutional democracy has both a factual and a normative component.

The court endorsed the "standard test" set out in *Rabie*, holding that the enquiry into vicarious liability has both a subjective and an objective element to it. However, the court significantly extended the *Rabie* test by holding that, in applying the objective leg of the test, the court must consider both the factual link²² between the conduct of the wrongdoer employee and the business of his employer and the normative question of whether or not the court *should* impose liability on the state in that instance, taking into account relevant constitutional, statutory and policy considerations.²³ Taking into account both the factual and the normative considerations, considered together, the court must then make a value judgement

²¹ Sections 7(2), 8(1) and 205(3) of the *Constitution of the Republic of South Africa*, 1996. The preamble to the *South African Police Service Act* 68 of 1995 (hereafter the SAPS Act) provides that the SAPS is established to (a) ensure the safety and security of all persons and property in the national territory; (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the (Interim) Constitution; (c) ensure co-operation between the SAPS and the communities it serves in the combating of crime; (d) reflect respect for victims of crime and an understanding of their needs; and (e) ensure effective civilian supervision over the SAPS. The SAPS Act therefore complements and reinforces the previously mentioned constitutional provisions.

²² In this regard, Calitz 2007 *Stell LR* 454 writes: "The Court did not go into the question of what would factually be a close connection. Presumably this is the easy part of the close connection, meaning closeness to the employment or authorised acts of the employee. It would probably include acts which on the surface are similar to the employment of the employee, such as doing the wrongful act while doing authorised acts, or acts closely resembling authorised acts, and in the time and the place where the employee has to do his or her job."

²³ The court extended the test for vicarious liability largely on the basis of s 39(2) of the *Constitution*, which provides that "... when developing the common law ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". Fagan 2009 *SALJ* 178-192 has criticised the manner in which this section has been interpreted as a justification for the court *mero motu* revising common-law rules to bring them into line with the values of the Bill of Rights or the *Constitution* more generally. His view appears to be that the court should engage in this process only when the common law has been shown to be wanting, and the court is therefore already in the process of developing it.

as to whether or not it can be said that there is a sufficiently close link between the wrongdoer's conduct and the business of his employer.²⁴

The court in *K* also expressly rejected the notion that the "standard test" for vicarious liability set out in *Rabie* was exclusively a factual enquiry. O'Regan J held that "characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct". The judge added that "... [s]uch an approach appears to be seeking to sterilise the common-law test for vicarious liability and purge it of any normative or social or economic considerations". Accordingly, O'Regan J held that the test for vicarious liability now has both a factual and a normative component, which requires the court to consider a broad range of constitutional and statutory duties imposed on a state agency such as the SAPS, as well as other policy considerations, in deciding whether or not to impose vicarious liability on an employer.²⁵ This approach was groundbreaking²⁶ and contrary to the general import of past decisions on vicarious liability,²⁷ which had stressed that the enquiry into vicarious liability was principally a factual one which should not be unduly confused with the normative basis of the test (the policy reasons underpinning why vicarious liability was in some circumstances to be imposed on persons who had not directly and culpably caused the damage/harm).²⁸ In contrast, O'Regan J holds that the objective component of the standard test set out in *Rabie* "... is sufficiently flexible to incorporate not only constitutional norms, but other norms as well".²⁹

²⁴ *K* paras 32, 51-53.

²⁵ *K* para 22.

²⁶ Scott 2013 *TSAR* 349-350 writes that "... the judgment of O'Regan J in *K* will in future always be of paramount importance in determining the scope and ambit of the activities performed by an employee for which his or her employer will have to accept delictual liability of a vicarious nature".

²⁷ Wagener 2008 *SALJ* 674 writes that *K* constitutes "... an about-face from South African law's traditional reluctance to impose vicarious liability for delicts involving an intentional abandonment by the employee of her employment duty".

²⁸ See *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 2001 1 SA 1214 (SCA) paras 9-10; *Minister of Law and Order v Ngobo* 1992 4 SA 822 (A) 831G; *Carter & Company (Pty) Ltd v McDonald* 1955 1 SA 202 (A) 211H.

²⁹ *K* para 44.

In applying the constitutionalised concept of vicarious liability to the facts of the matter, the judge accepted that, from a subjective standpoint, the police officers in question had acted purely selfishly in raping K. With regard to whether or not it could be said that there was a sufficiently close link between their conduct and the business of their employer, the court held that there was such a close connection. The court arrived at this conclusion for three main reasons.³⁰ First, the police officers were under a statutory and constitutional duty to protect the applicant, and this was a duty which also rested on their employer. Second, the police had offered to assist the applicant, and she had accepted their offer, reasonably placing her trust in them. Third, the conduct of the police officers constituted simultaneously an act of commission (the rape of K) and one of omission (a failure to perform their statutorily and constitutionally mandated role of protecting the public). O'Regan J held that, cumulatively:

... these three inter-related factors make it plain that viewed against the background of our constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.³¹

Thus, the decision to impose vicarious liability on the state in *K* was essentially based on an intricate blend of factual and normative considerations. The court did not make any general comments regarding the weight that should be accorded to normative, as opposed to factual, considerations in deciding the objective leg of the enquiry.³² It would therefore seem that each case will have to be decided on its own merits.³³ However, the general import of *K* would seem to be that even a fairly weak factual link between the conduct of the employee wrongdoer and the business of his

³⁰ *K* paras 51-53.

³¹ *K* para 53.

³² It is also unclear, as pointed out by Calitz 2007 *Stell LR* 461, how the constitutionalised vicarious liability test set out in *K* applies in cases that do not directly or obviously involve constitutional issues or fundamental rights.

³³ O'Regan J in *K* para 45 writes that "... [t]he common-law test for vicarious liability in deviation cases ... 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 the courts determine whether employers are liable in each of set of factual circumstances, the rule will be developed".

employer could give rise to vicarious liability's being imposed on the employer,³⁴ provided that sufficiently compelling policy reasons exist for the imposition of liability in that instance.³⁵ As such, the test for vicarious liability in South Africa has shifted from one that was once principally factual to one which is now substantially normative, policy-based, evaluative and flexible.³⁶

4 Constitutional Court majority judgment

Writing for the majority, Mogoeng CJ framed the key issue to be determined by the court as "... 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".³⁷ After considering Watermeyer CJ's observations regarding the nature and limits of vicarious liability set out in his majority judgment in *Feldman*, Mogoeng CJ considered *Rabie* and *K*, and made the following pronouncement:

³⁴ This interpretation of the impact of the constitutionalised approach to vicarious liability appears to be endorsed by Heher JA in *Minister of Defence v Von Beneke* 2013 2 SA 361 (SCA), where the judge writes: "In answering the question [of vicarious liability] the normative values of the constitution direct the policy that must influence the decision and they do so in relation to the objective element of the test, ie the closeness in relationship between the conduct of the employee and the business of the employer. ... It is no longer necessary, if the constitutional norms so dictate, to limit the proximity to those cases where the employee, although deviating from the course or scope of employment, is nevertheless acting in furtherance of the employer's business when the deviation occurs."

³⁵ As such, key constitutional considerations, such as the right to equality and the right to freedom and security of the person, will play an important role in deciding whether or not to impose vicarious liability, given that constitutional norms now inform the court's understanding of the legal convictions of the community/policy (see *Gardener v Whitaker* 1995 2 SA 672 (E) 684).

³⁶ In this respect, the considerations a court will be required to canvass in deciding whether or not to impose vicarious liability in any given instance will be very similar to those a court will consider in deciding the question of wrongfulness in an enquiry into personal liability. It is for this reason that Froneman J, in his separate but concurring judgment, feels that the cumbersome enquiry into vicarious liability can be replaced with a more straightforward one into wrongfulness based on direct state liability. Boonzaaier 2013 *SALJ* is supportive of this approach, given the many difficulties associated with imposing vicarious liability on state agencies in circumstances where institutional and system failures have led to harm being suffered by a member of the public, but where fault cannot be attributed to any particular employee or group of employees. Botha and Millard 2012 *De Jure* 252 believe that a plaintiff should have the option of choosing whether to institute an action against the state on the basis of vicarious or direct state liability. They write that "... Froneman J's judgment paves the way for recognising the possibility of direct liability and that the time is ripe for employing that particular cause of action".

³⁷ *F* para 27. This was how the matter was pleaded in both the Cape Provincial Division and the Supreme Court of Appeal. In his separate but concurring judgment, Froneman J was of the view that the matter could have been pleaded and argued on the basis of direct state liability.

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 place and time, that would not necessarily exempt the employer from liability. The employer could still be held vicariously liable if a connection exists between conduct complained of and the business of the employer. That link must, however, be a real and sufficiently close one.³⁸

Mogoeng CJ³⁹ further expressly referred to and relied on the test for vicarious liability in the context of South Africa's constitutional democracy set out by O'Regan J in *K*:

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 held 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 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.

Mogoeng CJ accepted and purportedly applied the above test to the facts of the matter at hand. As such, the judge accepted that whether Van Wyk had subjectively acted in furtherance of his own selfish interests would not be finally determinative of the outcome of the enquiry into vicarious liability. The court would also need to consider whether, objectively speaking, there was a sufficiently close link between Van Wyk's conduct and the business of his employer, taking into account both empirical and normative considerations, including relevant provisions of the Bill of Rights.⁴⁰

With regard to the second leg of the test for vicarious liability set out in *K*, Mogoeng CJ⁴¹ identified the following as the normative considerations that would have a

³⁸ *F* para 48.

³⁹ *K* para 32.

⁴⁰ *F* para 51. Ch 2 of the *Constitution*.

⁴¹ *F* para 52. Some of the issues identified by Mogoeng CJ as normative are, in fact, primarily factual in nature. It is therefore submitted that the contention of Barnes 2014 *SACQ* 34 that "... *F* has at last provided clarity and transparency on the normative bases for holding the state vicariously liable for the criminal acts of police officers" is questionable.

bearing on whether or not Van Wyk's conduct was sufficiently closely linked to his employer's business to justify a finding of vicarious liability:

- (a) the state's constitutional obligations to protect the public;
- (b) the trust the public is entitled to place in the police;
- (c) the significance, if any, of the policeman having been off duty and on standby duty;
- (d) the role of the simultaneous act of the policeman's commission of rape and omission to protect the victim; and
- (e) the existence or otherwise of an intimate link between the policeman's conduct and his employment.

4.1 The state's constitutional obligations to protect the public

Mogoeng CJ pointed out that the crime of rape violates a cluster of interconnected fundamental rights protected by the Bill of Rights, including the rights to equality (section 9), dignity (section 10), freedom and security of the person (section 12), and privacy (section 14).⁴² Thus, the judge concluded 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".⁴³ Mogoeng CJ emphasised that, in deciding questions of vicarious liability, the courts must apply the rules "through the prism of constitutional norms".⁴⁴ The judge held that the constitutional duties on the state, and especially the SAPS, to protect the public against crime:

... 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

⁴² *F* paras 54 and 55.

⁴³ *F* para 56.

⁴⁴ *F* para 57.

sufficiently close connection can be determined between his misdeed and his employment.⁴⁵

4.2 Trust

Mogoeng CJ held that "... [i]n 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". The judge held that "... [w]hat 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".⁴⁶ Mogoeng CJ thus appears to be of the view that the commission of the crime against F was facilitated by the fact that Van Wyk was employed by the SAPS. F testified that she had placed her trust in Van Wyk by virtue of the fact that she believed he was employed by the SAPS. Accordingly, even though he was not on duty or in uniform at the time of the commission of the rape, the fact that he was employed by the SAPS was nevertheless an integral factor in the commission of the crime/delict, and therefore intimately linked to it. Thus, the trust which F placed in Van Wyk created a factual link between Van Wyk's employment by the SAPS and his commission of the crime/delict, justifying the imposition of vicarious liability in this instance.

But the trust issue is also cited as a normative factor justifying the imposition of vicarious liability. Mogoeng CJ's judgment therefore suggests that there is also a normative component with regard to this issue.⁴⁷ The SAPS have a constitutional duty to protect the public, and especially women and children, from violent crime. In order to discharge this constitutional duty, the trust of the public, and especially women, in its activities and personnel is essential. In this instance, the trust that a member of the public had placed in the SAPS had been betrayed, thus impeding the discharge of the core constitutional duty to uphold the dignity and equality of women. Accordingly, imposing vicarious liability on the SAPS in this instance would

⁴⁵ *F*para 61.

⁴⁶ *F*para 68.

⁴⁷ Mogoeng CJ in *F*para 62 expressly acknowledges that the trust issue operates both factually and normatively in this instance.

accord with the sense of justice in the community and deter future such breaches of trust by the SAPS, thereby vindicating F's, and other women's, constitutional rights to dignity and equality. This, in turn, would facilitate better policing and the protection of the core constitutional rights in question.

4.3 *On duty/off duty*

Mogoeng CJ rejects the notion that whether Van Wyk was on or off duty is finally determinative of the question of whether or not vicarious liability should be imposed on the SAPS in this instance, largely on the basis that an ordinary member of the public, such as F, would place his/her trust in a policeman simply by virtue of the fact that he was a policeman, regardless of whether he was on or off duty.⁴⁸ In this regard, Mogoeng CJ rejects the emphasis placed on the on/off duty issue by the Supreme Court of Appeal. However, he accepts that whether a policeman was on or off duty at the time of the wrongful conduct is relevant to the question of whether, objectively speaking, there is a sufficiently close factual link between the wrongful conduct of the policeman and the business of his employer.⁴⁹ Here Mogoeng CJ appears impliedly to acknowledge that the fact that Van Wyk was not on duty at the time of the commission of the crime weakens the factual link between his actions and the business of his employer, although it does not destroy it altogether.⁵⁰

4.4 *Act of commission/omission*

Mogoeng CJ rejects the finding of the majority in the SCA that the imposition of vicarious liability on the SAPS in *K* was based solely on the failure on the part of the SAPS to act to protect K from harm. Quoting from *K*, Mogoeng CJ points out that the imposition of vicarious liability was based on three interrelated factors - the act of rape (commission), the general failure on the part of the SAPS to act to protect the public, and the specific failure on the part of the SAPS officers in question to protect

⁴⁸ *F* paras 65-68.

⁴⁹ *F* para 67.

⁵⁰ Later in his judgment, Mogoeng CJ in *F* para 79 expressly acknowledges that the factual link between Van Wyk's delictual conduct and the business of the SAPS is "more tenuous" than the link between the conduct of the three on-duty police officers in *K* and the business of the SAPS.

K in that instance. Thus, the *K* decision was based on both the acts of commission and the acts of omission of the SAPS.⁵¹ This finding is significant, as it enables Mogoeng CJ ostensibly to rely on the reasoning in *K* as a basis for imposing liability on Van Wyk in this instance, despite the significant factual incongruencies between the two cases.⁵²

4.5 *Sufficiently close connection*

Mogoeng CJ holds that vicarious liability will arise only if a sufficiently close connection, or what he also terms an "intimate connection",⁵³ exists between the policeman's delictual conduct and his employment. The judge goes on to point out that "... [t]his 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".⁵⁴ Mogoeng CJ acknowledges that the link between Van Wyk's conduct and his employment is "more tenuous" than was the case in *K*,⁵⁵ but nevertheless maintains that there is a sufficiently close link between his criminal actions and the business of the SAPS.⁵⁶ Mogoeng CJ also relies, apparently rather tangentially, on normative considerations for a finding that there was a sufficiently close connection in this instance.⁵⁷

5 Analysis

In his majority judgment, Mogoeng CJ purports to apply the juridical methodology employed by O'Regan J in *K*. However, in a number of key respects, the majority judgment in *F* is not precisely in alignment with *K*, despite the fact that the ultimate

⁵¹ *F* para[73].

⁵² These are discussed in more detail later in this note.

⁵³ O'Regan J uses the phrase "intimate connection" just once in her judgment in *K* (para 58). It is not clear whether Mogoeng CJ's use of the term "intimate link" is intended to have a different meaning from "intimate connection" or "sufficiently close link", the latter being the term used by O'Regan J throughout her judgment.

⁵⁴ *F* para 75.

⁵⁵ *F* para 79.

⁵⁶ *F* paras 80-81.

⁵⁷ *F* para 81.

finding of the court in *F* is the same as that in *K*.⁵⁸ In particular, the judgment illustrates the difficulty faced by courts in weighing and balancing factual and normative considerations when applying the constitutionalised test for vicarious liability, and also whether factual or normative considerations should be predominant in the enquiry.

A preliminary criticism of the majority judgment is that Mogoeng CJ appears to misconstrue the fundamental conceptual underpinnings of the doctrine of vicarious liability. Fairly early in his judgment, he makes the following statement:

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.⁵⁹

It is respectfully submitted that the above statement is not, strictly speaking, correct. There are not two or more tests for vicarious liability; rather, there is a single overarching test - whether the employee was acting in the course and scope of his employment when he committed the delict. Various subsidiary tests⁶⁰ have been devised by the courts over the years to assist in deciding difficult or borderline cases, such as where the employee has plainly deviated from the tasks assigned to him by his employment and the court needs to assess if the deviation is so great that he cannot reasonably be said to have been acting within the course and scope of his employment at the time he committed the delict.

⁵⁸ Barnes 2014 *SACQ* 30 writes that "*F* built on the judgement [sic] in *K* both in terms of the test for the imposition of vicarious liability in the deviation cases and the implications of this for state liability for the criminal acts of police officers".

⁵⁹ *F* para 41.

⁶⁰ Subsidiary tests include, for example, asking whether the employee had engaged in acts which had been authorised, expressly or impliedly, by his employer (*Costa da Oura Restaurant (Pty) Ltd t/a Umdhloti Bush Tavern v Reddy* 2003 4 SA 34 (SCA); Marx and Vrancken 2005 *Obiter, Rabie and Feldman*); considering whether the employee had used the tools and equipment of his employer (*Carter & Company (Pty) Ltd v McDonald* 1955 1 SA 202 (A)); and assessing whether or not it could be said that the employee was, at the time of committing the delict, exercising the functions to which he had been appointed (*Minister of Law and Order v Ngobo* 1992 4 SA 822 (A)). All these tests serve the purpose of answering the *overall question* of whether or not the employee was at the relevant time acting in the course and scope of his employment, notwithstanding the fact that he had to some extent deviated from it.

The main subsidiary test is the "standard test" set out in *Rabie*, which is to be used in circumstances where the employee has deviated to some extent from the normal tasks of his employment and was clearly not engaged in conduct that was authorised by his employer at the time he committed the delict. Mogoeng CJ is thus wrong to identify the "standard test" as the general or overarching test for vicarious liability. Perhaps what the judge meant was that questions of vicarious liability can arise in circumstances which are more or less straightforward (where the employee was clearly carrying out his employment duties when he caused harm) and those where it is difficult to say if he was still engaged in his employer's business when he committed the delict. However, in both instances the ultimate test for vicarious liability remains the same - whether or not the employee had acted in the course and scope of his employment at the time the harm was caused. It therefore stands to reason that, if the "wrongdoing takes place outside the course and scope of employment", vicarious liability cannot possibly ensue.

In addition, it is questionable whether *F* truly is a "typical deviation case". Given that Van Wyk was never actually on duty at the relevant time, it cannot really be said that he *deviated* from his employer's instructions, potentially moving outside the scope of his employment. It is submitted that *F* bears a far closer resemblance to *Rabie*, in which an off-duty police officer exercised his statutory powers of arrest in bad faith, resulting in a wrongful arrest. However, *F* and *Rabie* are distinguishable in that the police officer in *Rabie* plainly intended to exercise his powers as a police officer when he made the unlawful arrest. *F* is a more difficult case to decide because it seems unlikely Van Wyk in any sense intended to act as a police officer in giving *F* a lift from the nightclub,⁶¹ and in raping her he was clearly not carrying out the duties to which he had been appointed (as was the case in *Rabie*, where the police officer exercised powers granted to him and all other police officers by the Criminal Procedure Act 51 of 1977). However, if we accept the evidence given by *F*

⁶¹ Accordingly, there is an important factual discrepancy between *K* and *F*. In the former case, the police officers, in uniform and on duty, clearly in some sense intended to exercise their official police functions in giving *K* a lift. In *F*, the lift appears to have been given in the course of mere casual social interaction.

in this regard, as did the court, it would seem that Van Wyk at least *exploited* his position as a police officer to lull F's suspicions and gain her trust (as was the case in *K*).

Later in his judgment, Mogoeng CJ again appears to confuse the overall question for determining vicarious liability with the various subordinate tests which have been devised by the courts over the years to determine vicarious liability in deviation cases:

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.⁶²

The above statement seems to suggest that the course and scope rule has been abandoned in deviation cases and replaced by the *Rabie* "standard test".⁶³ However, the test for vicarious liability remains in all cases, including deviation ones, whether or not the employee acted in the course and scope of his employment when he committed the delict.⁶⁴ The question of the closeness of the connection between the employee's acts and the business of his employer is a subsidiary test used by the courts to answer this general overarching question in cases where there plainly has been a deviation by the employee from the business of his employer.⁶⁵ If there is a

⁶² *F* para 76.

⁶³ Barnes 2014 *SACQ* 33 writes that "... [s]everal commentators who have written about *F* do not appear to have appreciated that the judgement finally does away with the requirement that the employee must be acting within the course and scope of her employment for vicarious liability to be imposed in the deviation cases". It is submitted that this interpretation of Mogoeng CJ's pronouncement is wrong. It does not appear from the judgment that the chief justice intended to make this drastic and far-reaching change to the law of vicarious liability. In any event, the course and scope rule is the foundational principle of the doctrine. To abandon it would render the law of vicarious liability meaningless, in this and other contexts.

⁶⁴ In fact, in the opening paragraphs of his judgment, Mogoeng CJ in *F* para 40 acknowledges this fact, stating that "... [a]s 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". He cites *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 2001 1 SA 1214 (SCA) para 7 and *Absa Bank Ltd v Bond Equipment (Pty) Ltd* 2001 1 SA 372 (SCA) para 5 in support of this point, although the reasoning behind these judgments has been substantially superseded by the constitutionalised understanding of the doctrine set out in *K*.

⁶⁵ It is usually not necessary for a court to look at the closeness of the link between the conduct of the employee and the business of the employer in cases where the employee has plainly caused

sufficiently close link, the employee will be regarded in law as having committed the delict in the course and scope of his employment, and the liability of the employer will ensue.

Mogoeng CJ goes on to state that the first step of the process in determining vicarious liability is ascertaining the subjective state of mind of the employee wrongdoer at the time he/she caused the harm. In terms of his application of the first leg of the *Rabie* enquiry, Mogoeng CJ correctly identifies that Van Wyk acted purely selfishly, and that he did not seek subjectively to promote the interests of the SAPS in raping F:

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.⁶⁶

This statement appears to suggest that vicarious liability will be *conclusively* established where it can be shown that the employee, in causing the harm, subjectively sought to further the interests of his employer, and that, if this were the case, it would not be necessary for the court to go further and examine the objective closeness of the link between the employee's conduct and the business of his employer. However, it is submitted that, when a court is dealing with the application of the *Rabie* standard test, both the subjective and the objective components of the test must be addressed in all cases, even when the employee wrongdoer subjectively intended to act in the interests of his employer. It is not inconceivable that an employee could subjectively intend to further his employer's interests, but in fact engage in conduct which had no relation whatsoever to the duties he was employed to discharge. In such an instance, it would plainly be inappropriate and unreasonable for a court to impose vicarious liability on the employer. In other words, it is submitted that in all cases the court must consider the matter both subjectively and objectively to decide whether or not to impose vicarious liability. It

⁶⁶ the harm while performing the duties for which he was appointed. In such cases, the link is self-evident.

⁶⁶ F para 51.

is especially important to do so given that the standard test now incorporates constitutional/normative considerations, making the test for vicarious liability inherently evaluative and policy-based.⁶⁷ As pointed out above, subsequent to the decision in *K*, the ultimate question for a court in deciding on a deviation case is whether the court *should* impose liability on the employer, taking into account both the strength of the factual link between the employee's conduct and the business of his employer and the constitutional norms and other policy considerations in issue. This question can obviously not be properly addressed unless the second, objective leg of the *Rabie* test has been fully canvassed.

When one considers Mogoeng CJ's treatment of the second leg of the enquiry, several conceptual difficulties become apparent. In this regard, Mogoeng CJ appears to blur the second leg's *overall* question of the closeness of the link between the employee's wrongful conduct and the business of the employer with the various subordinate factual and policy questions⁶⁸ which the court is required to examine in order to decide this overall question. Mogoeng CJ identifies the question of whether or not there is an "intimate link" between the conduct of the employee and the business of his employer as *one of the normative issues* to be examined in order to decide whether or not vicarious liability should be imposed on the employer. In fact, this is the *overall* issue which needs to be determined by means of the second leg of the *Rabie* test.⁶⁹ This "intimate link" issue receives its own heading,⁷⁰ and is dealt

⁶⁷ In this regard, it is submitted that the Supreme Court of Appeal did not approach the question of vicarious liability from a purely subjective standpoint in *Minister of Safety and Security v Luiters* 2006 4 SA 160 (SCA). In this case, Luiters had been shot by an off-duty police officer. The SCA held that the police officer had placed himself on duty when he shot Luiters, and had therefore subjectively intended to further the interests of the Minister at the time of his delictual conduct. However, it is clear from the judgment that the court also considered objective factors in deciding that the police officer in question was acting in the course and scope of his employment at the relevant time.

⁶⁸ For example, the state's constitutional duty to protect the public from violent crime, the trust the public is entitled to place in the police, and the factual links between the delictual conduct of the employee and the business of his employer.

⁶⁹ Scott 2012 *TSAR* 552 picks up on this issue by pointing out that the last of the "... normative factors" identified by Mogoeng CJ in his judgment is not really a normative component in its own right, but rather concerns the concrete application of the preceding normative factors to the facts of the case under consideration. This point is reiterated in Scott 2013 *TSAR* 359-360.

⁷⁰ Mogoeng CJ initially uses the term "intimate link" to identify this issue, but then later uses the phrase "sufficiently close link" as the heading to the section dealing with this issue.

with separately from the other constitutional/policy issues considered in terms of the second leg of the *Rabie* test.⁷¹ In contrast, O'Regan J's judgment clearly conceived of the closeness of the link as the *overall* question to be decided when looking at the second leg of the *Rabie* test. In terms of O'Regan J's reasoning, the court would be required to look at a whole range of factual and normative considerations in order to answer this overarching question.

Mogoeng CJ also writes, in discussing the role of the state's constitutional obligations to protect the public in deciding the question of vicarious liability, that:

... [t]hese 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.⁷²

The use of the word "provided" in this statement would appear to indicate that the judge considers the question of whether or not there is a "sufficiently close connection between [the employee's] misdeed and his employment" as a condition precedent for the imposition of vicarious liability, and that normative considerations on their own cannot justify imposing vicarious liability on an employer. Furthermore, as will be shown later in this note, the judge conceives of the "sufficiently close connection" in primarily factual terms, with the result that his conception and application of the constitutionalised vicarious liability test is heavily weighted in favour of factual considerations. In fact, it is the normative considerations, considered together with the factual considerations, that determine whether or not it

⁷¹ The confusion is evident also in Mogoeng CJ's consideration of the issue of trust as one of the factors pointing to the closeness of the link between Van Wyk's conduct and the business of the SAPS. After pointing out that the issue of trust operates both factually and normatively to indicate the closeness of the link, the judge then states that "... [w]hat 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" (*F* para 68). It is not clear why this issue needs to be addressed again, and separately, under the "intimate link" heading, unless Mogoeng CJ conceives of the "intimate link" criterion as a separate and additional factor justifying the imposition of vicarious liability. As pointed out above, the "intimate link" issue is really the general and overall question the court needs to assess in deciding the second leg of the *Rabie* standard test, after looking at the full range of factual and normative considerations - including the issue of trust - relevant to determining the overall question.

⁷² *F* para 61.

can be properly said that the link between the employee's conduct and the business of the employer is sufficiently strong to justify the imposition of vicarious liability. In other words, the court must make a value judgement regarding whether or not the link between the conduct of the employee and the business of his employer is close enough to warrant the imposition of vicarious liability must be made after considering both factual and normative considerations.

In contrast, O'Regan J's approach in *K* blends the factual and normative considerations without according a clear primacy to either. Her approach is therefore more flexible, constitutionally attuned and policy-based, although, as pointed out above, the judge does not provide any guidance as to how factual and normative considerations are to be weighted in applying the test. O'Regan J's approach appears to be that, in order to answer the objective question of whether or not there is a sufficiently close connection between the employee's conduct and the business of his employer, we need to look at *both* factual and normative issues. In essence, O'Regan J's judgment shows that, even though the factual connection between the conduct of the employee wrongdoer and the business of the employer may be rather weak, policy considerations can nevertheless strengthen the link and justify the ultimate imposition of vicarious liability on the employer. In essence, subsequent to *K*, the question the court needs to ask itself is, notwithstanding the fact that the factual link is weak, *should* the court nevertheless impose liability on the employer, taking into account the relevant constitutional and statutory obligations on the employer, as well as other policy considerations? It is through the incorporation of normative/policy questions into the enquiry into the closeness of the factual link that vicarious liability can be extended to circumstances where a strict (factual) application of the *Rabie* test would result in a finding of non-liability on the part of the employer.

Thus, Mogoeng CJ's approach is not properly in alignment with that set out by O'Regan J in *K*. Mogoeng CJ compartmentalises the test in a manner which is contrary to the approach adopted in *K*, where the factual and normative issues were considered together in order to decide whether, objectively speaking, the link should

be regarded as close enough to justify the imposition of vicarious liability. This discrepancy between the reasoning of the two judgments is significant in that Mogoeng CJ's approach ultimately results in greater emphasis being placed on factual considerations, because Mogoeng CJ seems to understand the question of whether or not there is an "intimate link" between Van Wyk's conduct and the business of the SAPS in primarily factual terms.⁷³ In the section of his judgment dealing with whether or not there is an "intimate link" between Van Wyk's conduct and the business of the SAPS, Mogoeng CJ appears to approach this issue from a largely factual standpoint, thereby treating it as an enquiry into whether it can be said that there is a sufficiently strong *factual* connection between Van Wyk's conduct and his employment as a police officer in the SAPS.

Mogoeng CJ, although expressly stating throughout the judgment that normative considerations must now play an integral role in deciding questions of vicarious liability, in fact refers to such issues only in passing in reaching his final conclusions, ultimately deciding the case on the plain (factual) meaning of the wording of the *Rabie* test.⁷⁴ For example, his key findings all appear to be factual in nature, and enquire into whether or not it can be said that there was a sufficiently close *factual* link between Van Wyk's conduct and his employment:

It is so that Mr Van Wyk was not in uniform, that his police car was unmarked and he was not on duty but on standby. But his use of a police car facilitated the rape. That he was on standby is not an irrelevant consideration. His duty to protect the public while on standby was incipient. But it must be seen as cumulative to the rest of the factors that point to the necessary connection. He could be summoned at any time to exercise his powers as a police official to protect a member of the public. What is more, in that time and space he had the power to place himself on duty. I am therefore satisfied that a sufficiently close link existed to impose vicarious liability on Mr Van Wyk's employer. ... In conclusion: the police vehicle, which was issued to him precisely because he was on standby duty, enabled Mr Van Wyk to commit the rape. It enhanced his mobility and enabled him to give a lift to Ms F. Further, when Ms F re-entered the vehicle, she understood Mr Van Wyk to

⁷³ The term "intimate link" is not defined, but it would appear from Mogoeng CJ's judgment that he understands it to be primarily the factual linkages between Van Wyk's wrongful conduct and the business of the SAPS. Thus, it would seem that whether or not it can be said that there was an "intimate link" between Van Wyk's conduct and the business of his employer is largely a factual question for the purposes of Mogoeng CJ's judgment.

⁷⁴ *F*paras 80-81.

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.⁷⁵

The above excerpt from the judgment stands in stark contrast with how scantily Mogoeng CJ addresses the normative aspect of the test, which appears tangential, rather than "pivotal", to the resolution of the issue:⁷⁶

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 repose trust in a police official.⁷⁷

Ironically, given Mogoeng CJ's emphasis on factual considerations in deciding the matter, the factual links between Van Wyk's conduct and his employment as a police officer were in this case rather insubstantial. He was on standby duty at the time of the assault and rape of F, and therefore was not on duty when he committed the delict. The fact that he was being paid an hourly tariff by the SAPS to be on standby does not mean that he was on duty at the relevant time - it simply means that he was being remunerated for agreeing in advance to go on duty if he was called upon to do so. In addition, the car in question was an unmarked police vehicle, he was not authorised to use it for social purposes,⁷⁸ and Van Wyk was not in uniform at the time of the incident. He also did not intend to act as a police officer in offering F a lift; he had met, interacted with and offered her a lift in a purely casual social context. It may also be argued that F did not act reasonably in accepting a lift from a man she did not know simply on the basis that she believed he was employed as a

⁷⁵ F paras 80-81.

⁷⁶ While Mogoeng CJ does extensively discuss a range of normative issues prior to this point of the judgment, it is clear from the contours of the judgment that they were, at best, only of background importance. They do not appear to be integrated into his final analysis of the issues, or to have been an important immediate driver of his ultimate conclusions.

⁷⁷ F paras 81.

⁷⁸ Bozalek J points out in his judgment in *F v Minister of Safety and Security* 2010 1 SA 606 (WCC) 621I-622B that Van Wyk's use of the unmarked police vehicle was unlawful and unauthorised.

police officer.⁷⁹ In contrast, K did act reasonably in trusting police officers who were clearly on duty, in uniform and driving a marked police vehicle.⁸⁰

However, notwithstanding the weak factual links between Van Wyk's conduct and the business of his employer, there are nevertheless a number of highly compelling constitutional and policy reasons in this instance which justify the imposition of vicarious liability on the Minister.⁸¹ It is submitted that the Minister should, as a matter of policy, be held accountable for the harm caused by police officers, whether on or off duty, in circumstances where fundamental rights such as the rights to equality, dignity, privacy and bodily integrity have been violated, given the importance and centrality of these rights in our constitutional dispensation.⁸² However, this should be the case only where there is evidence that the police officer in question in some way, and however minimally, exploited his office in order to cause the harm. Police misconduct and sexual violence against women are serious social issues which strike at the heart of the core values of our constitutional democracy, and the imposition of vicarious liability on the Minister for the misconduct of his employees is an important tool by which the courts can deter

⁷⁹ This is the view taken by Yacoob J in his dissenting judgment.

⁸⁰ Loubser and Midgley *Law of Delict* 395 query whether the court in *F* should have reached the same conclusion as the court in *K* when the factual links between the delictual conduct of the police officers and the business of their employer were in the former case so much weaker than in the latter: "The facts relevant to application of the 'close connection' test were different in *F* because the policeman was off-duty and not in uniform, and the car was not marked as a police car. Consider whether the outcome should nevertheless be the same."

⁸¹ Neethling and Potgieter 2012 *LitNet Akademies* 76 are supportive of the decision in *F*, arguing that the law of delict should be used in instances such as these to protect citizens against criminal conduct perpetrated by police officers. The authors write that "... [d]ie vertroue word uitgespreek dat die toenemende erkenning van deliktuele staatsaanspreeklikheid weens polisieverkragting sal bydra om die skynbaar onbeteuelde deelname van polisiebeamptes aan hierdie walglike optrede in toom te hou. Die algemene beginsels wat nou ten aansien van verkragting deur die konstitusionele hof neergelê is, behoort *de lege ferenda* na ander geweldsmisdade deur die polisie uitgebrei te word".

⁸² Barnes 2014 *SACQ* 34 writes that "... the Constitutional Court judgement in *F* is a highly significant and welcome development in the promotion of state accountability for the criminal acts of police officers". In this regard, *F* forms part of a line of cases, including *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA); *Minister of Safety and Security v Luiters* 2006 4 SA 160 (SCA); *Minister of Safety and Security v Luiters* 2007 2 SA 106 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA), in which the courts have imposed liability on the state for its failure to protect ordinary citizens from crime. For further discussion of this issue, see Von Bonde 2009 *Obiter*.

future breaches of these rights, improve standards of policing, and vindicate the values that underlie our constitutional democracy. In addition, making such a finding would offer a degree of "legal protection to a citizenry under the growing threat of a failing civil service".⁸³ Accordingly, the sense of justice in the community would dictate that the Minister should be held vicariously liable in instances where citizens suffer serious harm at the hands of the very officials entrusted to protect and uphold these fundamental rights. It is therefore submitted that a more compelling justification for the imposition of vicarious liability in this instance would have lain in the normative considerations, including constitutional and other policy norms, pointing towards a finding of state liability. Such an approach would also have accorded better with the updated and expanded test for vicarious liability set out by O'Regan J in *K*, in which the basis of the decision to impose vicarious liability was primarily a range of constitutional and policy norms, and not the factual links between the on-duty policemen's conduct and the business of the SAPS.

6 Conclusion

The constitutionalised approach to vicarious liability set out by O'Regan J in *K* has been justifiably described as revolutionary and groundbreaking. In providing that policy considerations and other norms must now play a direct and pivotal role in deciding questions of vicarious liability, the Constitutional Court gave the green light for courts to impose vicarious liability on employers in circumstances where the factual links between the conduct of the tortfeasor employee and the business of his employer were weak, but where compelling policy considerations existed to justify the imposition of vicarious liability on the employer. In the majority judgment in the *F*, Mogoeng CJ expressly emphasises the importance policy considerations now play in deciding questions of vicarious liability, and proceeds to set these out in some detail. However, a close reading of the judgment reveals that it was, in fact, the factual linkages that existed between the wrongdoer employee's conduct and the business of the SAPS which led the judge to make a finding of vicarious liability in this instance. This approach is unusual and contrary to the import of *K*, where the

⁸³ Scott 2013 *TSAR* 361.

principal basis of O'Regan's decision to impose liability on the state was the constitutional imperative for doing so. The majority judgment in *F* would have been more internally coherent and better aligned with *K* if Mogoeng CJ had acknowledged the weak factual link between Van Wyk's delictual conduct and the business of his employer, but justified his decision primarily on the basis of constitutional norms and public policy. Such an approach would have set a precedent for other judges to consider a broad range of policy considerations when deciding whether or not to impose vicarious liability on the state, instead of being circumscribed by the restrictive and somewhat artificial "intimate link" enquiry with its emphasis on factual connections.

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SACQ	SA Crime Quarterly
SALJ	South African Law Journal
SAPS	South African Police Service
SAPS Act	South African Police Service Act 68 of 1995
SLA	State Liability Act 20 of 1957

Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tul Eur & Civ LF	Tulane European and Civil Law Forum
Tulsa J Comp & Int'l L	Tulsa Journal of Comparative and International Law

A CRITICAL ANALYSIS OF THE MAJORITY JUDGMENT IN *F v MINISTER OF SAFETY AND SECURITY* 2012 1 SA 536 (CC)

JA Linscott*

SUMMARY

The majority judgment of Mogoeng CJ in *F v Minister of Safety and Security* 2012 1 SA 536 (CC) purports to be a straightforward application of the reasoning of the Constitutional Court in *K v Minister of Safety and Security* 2005 6 SA 419 (CC), in which the court updated and constitutionalised the "standard test" for vicarious liability in deviation cases originally set out in *Minister of Police v Rabie* 1986 1 SA 117 (A) by holding that constitutional and other policy norms now play an important role in deciding questions of vicarious liability. However, it is respectfully submitted that a close reading of the majority judgment in *F* reveals that the judge misconstrues several key concepts related to the doctrine of vicarious liability. In particular, the judge seems to suggest that there are separate and different tests for vicarious liability in instances where an employee has plainly committed a delict in the course and scope of his employment, and where he has to some extent deviated from his employment duties. In fact, there is a single overarching test for vicarious liability - the course and scope rule - but various subsidiary tests are used by the courts to address difficult or borderline cases. It is also questionable whether *F* truly is a "typical deviation case", as the judge asserts. The judge then applies the constitutionalised test for vicarious liability originally set out in *K* in a manner which is subtly, but significantly, different from how it was deployed in that case. In particular, Mogoeng CJ's implication that it is not necessary for a court to consider the second leg of the Rabie test in circumstances where the employee wrongdoer has clearly subjectively intended to further the interests of his employer is undesirable and should not be supported. Furthermore, the judge identifies the question of whether or not there is an "intimate link" between the conduct of the employee wrongdoer and the business of his employer as one of the normative issues to be canvassed in order to determine the outcome of the second leg of the

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Rabie test. In fact, the "intimate link" question is the overall one to be decided in terms of the second leg of the Rabie test, which, in terms of the approach set out by O'Regan J in *K*, is to be answered by considering a range of factual and normative considerations in conjunction with one another. Moreover, the judge appears to construe the "intimate link" question in primarily factual terms. The discrepancies between the approaches of the courts in *K* and *F* are significant because they lead Mogoeng CJ to place a far heavier reliance on factual considerations in deciding whether the conduct of the employee wrongdoer was sufficiently closely related to the employer's business than would have been the case if he had more faithfully applied the test for vicarious liability set out in *K*. Although the judge devotes a considerable portion of the judgment to the normative issues which point to the need for the court to make a finding of vicarious liability, these do not seem to have been the immediate driver of his ultimate decision to impose vicarious liability in this instance. The reasoning of the majority in *F* becomes all the more problematic when one considers that the factual considerations linking the employee wrongdoer's conduct to the business of the SAPS are far more tenuous in this case than in *K*. A more compelling justification for imposing vicarious liability in *F* would have lain in the normative constitutional considerations that point towards the need to impose vicarious liability in this instance.

KEYWORDS: Delict; vicarious liability; course and scope rule; deviation cases; "sufficiently close connection" test; fundamental rights; state liability; development of common law in terms of *Constitution of the Republic of South Africa, 1996*; Constitutional Court.