

The Application of the Principles of Vicarious Liability in *Minister of Safety and Security v Morudu*: A Critical Analysis

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Abstract

The past twenty years of South Africa's constitutional democracy have been challenging for the courts. However, the courts have managed to develop the common-law principle of vicarious liability in conformity with the spirit, purport and objects of the Constitution. What is concerning, though, is that the courts are still grappling with the application of the law of vicarious liability, despite this area of the law having been developed by the Constitutional Court. A case in point is *Minister of Safety and Security v Morudu* 2016 (1) SACR 68 (SCA), where the Supreme Court of Appeal (SCA) incorrectly rejected the decision of the High Court that the state was vicariously liable. This article argues that the SCA should have upheld the decision of the High Court on the basis of the factors that point to a close connection between the conduct of the policeman and his employment. The factors include that the actions of the policeman violated the rights of his victims and that the nature of his employment presented him with an opportunity to commit the crime. The failure of the SCA to consider these factors and uphold the decision of the High Court is therefore at odds with the Bill of Rights and contrary to the law of vicarious liability as developed by the Constitutional Court.

Keywords: vicarious liability; Constitution; Bill of Rights; normative considerations; employment; deviation

Introduction

During the past twenty years, the South African Constitution has played a pivotal role in the development of the common law of vicarious liability.¹ The law of vicarious liability imposes vicarious liability on an employer for a delict committed by its employee while the employee acted within the course and scope of his or her employment.² It is therefore a strict no-fault secondary liability in respect of an employer and against the general approach of the common law that a person is liable for his or her own acts.³ The standard test is whether the delict in question was committed by the employee during the performance of the duties attached to his employment.⁴ The difficulty with the application of this principle arose in cases of deviation⁵ involving intentional wrongs⁶ as they did not automatically exempt an employer from being vicariously liable.⁷ In the case of *Feldman (Pty) Ltd v Mall*, the Appellate Division formulated the rationale for holding the employer liable in such cases as follows:

If the servant's abandonment of his master's work amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master will naturally be legally responsible for that harm ... If, on the other hand, the harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master will not be responsible. (b) If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs.⁸

The same court rephrased this rationale in the case of *Minister of Police v Rabie* as follows:

¹ Section 39(2) of the South African Constitution, 1996 (hereinafter 'the Constitution').

² *K v Minister of Safety and Security* [2005] 3 All SA 519 (SCA) para 4.

³ Chuks Okpaluba and Patrick Osode, *Government Liability: South Africa and the Commonwealth* (Juta 2010) 293–294, citing the case of *Majrowski v Guy's and St Thomas' NHS Trust* [2006] 3 WLR 125 (HL) para 8.

⁴ *ibid* 381.

⁵ These are cases where an employee commits a delict while acting outside the course and scope of his or her employment.

⁶ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 20.

⁷ *ibid* para 21. Okpaluba and Osode (n 3) 335 argue this as follows: '[it is] not every act of an employee committed during the time of his employment in the advancement of own personal interests or for the achievement of own goals that necessarily falls outside the course and scope of employment.'

⁸ *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 742.

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.⁹

Despite the presence of this test, the courts have found it very difficult to determine, in cases of an employee's deliberate or criminal misconduct, whether an employee was acting within the course and scope of his employment.¹⁰ This was evident in the 'lack of exactitude' in the application of vicarious liability and the conflicting conclusions of the courts in different cases.¹¹ It was for this reason that the Constitutional Court developed the principle of vicarious liability in conformity with the Bill of Rights in the case of *K v Minister of Safety and Security*.¹² The following paragraph is instructive:

The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well ... Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.¹³

It is against this background that this article analyses the application of the principle of vicarious liability in the case of *Minister of Safety and Security v Morudu*.¹⁴ The first part sets out the development and application of the law of vicarious liability and the second part explores the application of the law of vicarious liability in the case of *Minister of Safety and Security v Morudu*. The argument this article advances is that the failure of the SCA to uphold the decision of the High Court on the basis of the factors that point to a close connection between the conduct of the policeman and his employment offends the Bill of Rights and is contrary to the law of vicarious liability as developed by the Constitutional Court.

⁹ *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134C–E.

¹⁰ Okpaluba and Osode (n 3) 346–347.

¹¹ *ibid.*

¹² *ibid* 382; *K v Minister of Safety and Security* (n 6) para 33.

¹³ *K v Minister of Safety and Security* (n 6) para 44.

¹⁴ 2016 (1) SACR 68 (SCA).

Development and Application of Common-Law Principle of Vicarious Liability

The development of the common-law principle of vicarious liability was triggered, as already indicated, by the conflicting application of this principle by our courts.¹⁵ The Constitutional Court summarised the conflicting application of this principle by the courts as follows:

It is instructive to note, however, that the test applied in *Rabie*, although frequently applied, has not always been followed ... Variations of the test have proliferated, and have resulted in uncertainty. In my view, this is unsatisfactory ...¹⁶

Consequently, relying on sections 39(2) and 173 of the Constitution, which oblige the courts to develop the common law in conformity with the spirit, purport and object of the Bill of Rights and in the interests of justice, respectively, Justice O'Regan developed the foregoing common-law principle of vicarious liability in the case of *K v Minister of Safety and Security*.¹⁷ This case concerned a 20-year-old girl who was offered a lift in the early hours of the morning by three policemen who were on duty and in uniform. Instead of taking her home, they took her to a place where they all raped her. After they were convicted and sentenced for the rape, the girl instituted an action for damages, on the basis of vicarious liability, against the Minister of Safety and Security. Having applied the common-law principle of vicarious liability, both the High Court and the SCA found that the state was not vicariously liable. The basis for their finding was that the conduct of the policemen was not within the course and scope of their employment. The SCA provided three reasons for this finding: (1) the assertion that the policemen's deviation rendered the state vicariously liable as the degree of the deviation in determining the course and scope of employment was wholly irrelevant, was not the law and was therefore without merit;¹⁸ (2) the two policemen were not under a continuing duty to protect the girl while one policeman was raping her. The following excerpt is instructive:

To suggest, therefore, that one would have been acting in the course and scope of his employment while another physically raped the appellant, would cease to so act when it was 'his turn', and then resume acting in the course and scope of his employment while the third raped the appellant, borders on the absurd.¹⁹

¹⁵ Okpaluba and Osode (n 3) 382.

¹⁶ *K v Minister of Safety and Security* (n 6) para 33.

¹⁷ *ibid* paras 32, 49, 50–53.

¹⁸ *ibid* para 6.

¹⁹ *ibid* para 7.

And (3) developing the common-law principle of vicarious liability in conformity with the spirit, purport and object of the Constitution was the responsibility of the legislature and not the task of the court.²⁰

The girl then appealed to the Constitutional Court. On the same legal question – which was whether the conduct of the policemen was within the course and scope of their employment – the Constitutional Court found that their conduct was not within the course and scope of their employment. But, on the other hand, it proceeded to develop the principles of vicarious liability in accordance with the case of *Minister of Police v Rabie* 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.²¹

In applying the principles of vicarious liability, the Constitutional Court held that the policemen's conduct (rape of a young girl) was in pursuit of their own interests.²² However, it proceeded to find that there was a close connection between the conduct of the policemen and their employment on the basis of the objective standard. It reached this conclusion on the basis of three factors:²³ The first was that the policemen were constitutionally and statutorily obliged to prevent crime and to protect the public. This obligation also rested on the Minister who employed the policemen to discharge it. The second was that it was reasonable for the applicant to place her trust in the policemen because they were in uniform and identifiable as policemen and also because they had offered her a lift. The third was that the conduct of the policemen constituted simultaneous commission and omission. It was for these reasons that the Constitutional Court concluded that, viewed against the background of the Constitution, particularly

²⁰ *ibid* para 8.

²¹ *ibid* para 32. Okpaluba and Osode (n 3) 382 commended the Constitutional Court's approach of considering the mixed question of fact and law when determining the close connection between the conduct of the employee and their employment. They argue that this approach is necessary because appeals are usually entertained if they are based either on law or on facts and law and not on a finding of facts only.

²² *K v Minister of Safety and Security* (n 6) para 49.

²³ *ibid* paras 50–53.

the rights of the applicant and the obligations of the policemen, there was a sufficiently close connection between the conduct of the policemen and their employment that warranted the court to find the state vicariously liable.²⁴

This case indicates that the determination of a close connection between the conduct of an employee and his or her employment is informed by both factual and normative considerations.²⁵ While the courts are yet to provide guidance on the amount of weight that should be attached to factual and normative considerations,²⁶ Linscott correctly argued that this case seemed to suggest that a weak factual consideration between the conduct of the employee and his employment may give rise to vicarious liability if there are sufficiently compelling policy and normative reasons.²⁷ The reason for this line of reasoning is that constitutional norms enhance the protection of the legal convictions of the community and that all laws and conduct of the people need to comply with the Constitution since it is the supreme law of the country.²⁸ It was for this reason that Linscott criticised the factual approach adopted by the Constitutional Court in the case of *F v Minister of Safety and Security*.²⁹ Briefly, the facts were these: a standby policeman in an unmarked police vehicle which was equipped with a radio offered a lift to a 13-year-old girl in the early hours of the morning, as in the case of *K v Minister of Safety and Security*. Instead of driving the girl home, though, he drove to a dark place and stopped the vehicle. Realising that she was in danger, the girl alighted, fled and hid herself from him. However, that was not the end of her ordeal, because the policeman waited for her to emerge and when he saw her hitchhiking, he stopped alongside her and once again offered to transport her to her home. She apprehensively accepted the offer because she was desperate. After driving for a short distance, he turned off the road and raped her.

²⁴ *ibid* para 52.

²⁵ James Linscott, 'A Critical Analysis of the Majority Judgment in *F v Minister of Safety and Security* 2012 1 SA 536 (CC)' 2014 (17) 6 Potchefstroom Electronic Law Journal 2925.

²⁶ *ibid* 2926.

²⁷ *ibid*.

²⁸ This point was affirmed by the SCA in the case of *Van Eeden v Minister of Safety and Security* [2002] 4 All SA 346 (SCA) para 12, in which it argued as follows: 'The concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution ... The Constitution cannot, however, be regarded as the exclusive embodiment of the delictual criterion of the legal convictions of the community ... The entrenchment of fundamental rights and values in the Bill of Rights, however, enhances their protection and affords them a higher status in that all law, State actions, court decisions and even the conduct of natural and juristic persons may be tested against them and all private law rules, principles or norms, including those regulating the law of delict, are subjected to, and thus given content in the light of the basic values in the Bill of Rights.'

²⁹ 2012 (1) SA 536 (CC) para 78.

Although the Constitutional Court found the state vicariously liable for the actions of the policeman, Linscott criticised the following statement that influenced the decision of the Constitutional Court:

These constitutional duties resting upon the state, and more specifically the police, are significant in that they suggest a normative basis for holding the state liable for the wrongful conduct of even a policeman on standby duty, provided a sufficiently close connection can be determined between his misdeed and his employment. This leads to the discussion of the trust that people are entitled to repose in the police.³⁰

Linscott correctly argues that the use of the word ‘provided’ in this statement seems to indicate that the state cannot be found vicariously liable on the basis solely of normative considerations.³¹ This criticism finds justification in both local and foreign case law, which is considered later in this article.

It is now opportune to analyse critically the manner in which the SCA applied the aforementioned principles of vicarious liability in the case of *Minister of Safety and Security v Morudu*.

Minister of Safety and Security v Morudu

The Facts

This case concerned the respondents: a child who had attained the age of majority and Mrs Morudu. Mrs Morudu was acting, first, in her personal capacity as the surviving spouse of the deceased and, secondly, in a representative capacity as a mother on behalf of three minor children who brought an action against the Minister of Safety and Security for loss of support and maintenance. This action arose from the unlawful killing of Mr Morudu (a businessman and a priest in the Zion Christian Church) by a policeman in the morning of 24 December 2001. While on standby, the policeman (an expert criminalist stationed at the Polokwane Local Crime Record Centre) travelled with a police vehicle, without authorisation, to Mr Morudu’s home in Seshego. When he arrived there, he shot and killed Mr Morudu with his private firearm. It turned out that he had not been allocated to the Seshego district to render standby services and that, prior to the murder, he had used the same police vehicle to travel to the deceased’s home to inform the deceased’s wife (Mrs Morudu) that her husband (Mr Morudu—the deceased) was allegedly having an extra-marital affair with his wife.

High Court’s Judgment and Reasoning

Having considered the facts and the principle of vicarious liability as developed by the Constitutional Court, the High Court found that the state was vicariously liable. It took

³⁰ *F v Minister of Safety and Security* (n 29) para 61.

³¹ See Linscott (n 25) 2937.

into account the following normative considerations: (1) Mr Duba was employed as a policeman by the South African Police Service (SAPS); (2) he was on standby duty; (3) he had been given possession of an unmarked police vehicle to enable him to discharge any police functions that he might have been required to perform while on standby duty, and (4) he travelled from the Seshego barracks with the unmarked police vehicle to the deceased's home.³²

Further, the court also considered that the fact that the policeman, prior to the murder, had used the same police vehicle for mobility and had informed Mrs Morudu that Mr Morudu was allegedly having an extra-marital affair with his wife.³³ This factor, according to the court, was disturbing because it indicated that the state did not control or supervise the unauthorised use of its vehicles.³⁴ Furthermore, the court reasoned that the use of a police vehicle was instrumental in the commission of the murder and crucial in providing the required connection between the policeman's employment and the crime.³⁵

It was on the basis of these factors that the High Court concluded that the fact that the policeman was not allocated to the Seshego district to render standby services and that he used an unauthorised police vehicle did not remove the connection between the crime and his employment.³⁶

Supreme Court of Appeal's Judgment and Reasoning

Based on the High Court's judgment, the Minister of Safety and Security approached the SCA. The Minister required the SCA to decide whether the reasoning and the conclusion of the High Court were correct. Having set out the principle of vicarious liability, the SCA found that this is a case of deviation.³⁷ It then proceeded to determine an objective element of this principle, which is whether 'there was a sufficiently close link between Duba's acts for his own interests and purposes and his duties as a policeman.'³⁸ On the basis of the following factors, it found that there was no sufficiently close link between Duba's actions for his own interests and his duties as a policeman:

None of the respondents identified Duba as a policeman. None reposed trust in him. The only police accoutrements were the radio and the vehicle. The radio was not visible or seen and the vehicle was unmarked. It is true that he used the police vehicle to travel to

³² *Morudu v Minister of Safety & Security* 2013 JDR 1761 (GNP) para 16.

³³ *ibid* para 22.

³⁴ *ibid*.

³⁵ *ibid*.

³⁶ *ibid* para 19.

³⁷ *Minister of Safety and Security v Morudu* (n 14) para 33.

³⁸ *ibid* para 34.

their home but he could just as easily have used public transport. The area to which he travelled was not an area to which he had been assigned.³⁹

In addition to these factors, the SCA also took into account that the policeman was a member of a fingerprint unit which interfaced with the public after a crime had already been perpetrated.⁴⁰ These factors, according to the SCA, were sufficient for it to find the state not vicariously liable for the unlawful killing of the respondents' breadwinner.

A Critical Analysis

The manner in which the SCA dealt with the objective element of vicarious liability is not as convincing as the manner in which it applied the subjective element of this principle. On the subjective leg of the inquiry, it correctly found that Mr Duba (the policeman) was pursuing his own interests when he murdered Mr Morudi. However, the same cannot be said about the manner in which it grappled with the objective leg of the inquiry and on the basis of which it found the state not vicariously liable. This is because the *ratio* for its judgment, contrary to the cases of *K v Minister of Safety and Security* and *Minister of Defence v Von Benecke*, totally disregarded the normative and factual considerations that point to the closeness of the conduct of the employee and the employment in instances such as the present case.⁴¹

In the case of *K v Minister of Safety and Security*, the Constitutional Court emphasised the role of the normative considerations when determining the close connection between the conduct of the employee and their employment when it argued:

If one looks at the principle of vicarious liability through the prism of section 39(2) of the Constitution, one realises 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 ...⁴²

Having considered the constitutional and statutory obligation of the National Defence Force to protect the public from violations of their constitutional rights, the SCA proceeded to find the Minister of Defence vicariously liable in the case of *Minister of Defence v Von Benecke*.⁴³ This case concerned an action by one Von Benecke against the Minister of Defence. Von Benecke was shot and injured during an armed robbery. It turned out that one Motaung (an employee of the Defence Force who was responsible for, among other things, the safekeeping and storage of various dangerous infantry weapons, including those parts, ammunition and magazines), while on duty, stole and

³⁹ *ibid.*

⁴⁰ *ibid* para 35.

⁴¹ *ibid* paras 34 and 35; *K v Minister of Safety and Security* (n6) and *Minister of Defence v Von Benecke* 2013 (2) SA 361 (SCA).

⁴² *K v Minister of Safety and Security* (n 6) para 22.

⁴³ *Minister of Defence v Von Benecke* (n 41) paras 16–24.

sold to Mahlangu various R4 rifle parts, ammunition and magazines from the South African Infantry Military Base. Mahlangu then assembled the R4 rifle parts and shot Von Benecke several times with it during the armed robbery.

In confirming the decision of the High Court that there was a close connection between the employee and his employment, the SCA relied on the following normative considerations: (1) Motaung was under a duty to preserve and care for the equipment and ammunition that he sold to Mahlangu;⁴⁴ (2) there was a reasonable inference that he could not have stolen the items that he sold to Mahlangu had he not been employed to take care of them. The SCA argued as follows:

it is the most probable inference that the opportunity to make away with them arose from the opportunity provided by the scope of his duties without which he would have possessed neither access to them nor knowledge of the means to avoid such security controls as the defence force must have put in place.⁴⁵

And (3) there is a well-known principle that

the risk should fairly fall on its creator when the public is exposed to weaknesses in its systems or frailties in its personnel is reciprocal to the powers that the defence force exercises ... and the duties that it bears to the public.⁴⁶

The normative consideration that was overlooked by the SCA in the case of *Minister of Safety and Security v Morudu* lies in the analysis of the rights of the victims which were violated by the conduct of the policeman. In the case of *K v Minister of Safety and Security*, Justice O'Regan stressed the importance of the rights of the victims when determining the close connection between the conduct of the employee and their employment when she argued:

In sum, the opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that mandate is successfully fulfilled. When the policemen – on duty and in uniform – raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their

⁴⁴ *ibid* para 25.

⁴⁵ *ibid*.

⁴⁶ *ibid* para 26.

employer. This close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.⁴⁷

This approach, by Justice O'Regan, finds justification in the following factors: (1) as already argued, the Bill of Rights enhances the protection of the legal convictions of the community as all laws and the conduct of natural people are tested against it, subjected to its values or interpreted in accordance with it;⁴⁸ (2) section 8(1) of the Constitution imposes an obligation on the courts to promote and protect the Bill of Rights when determining the close connection between the crime committed and their employment. In the same case, Justice O'Regan stressed the relevance of section 8(1) of the Constitution as part of the normative consideration in this regard when she argued that:

section 8 of the Bill of Rights makes it plain that the judiciary is bound by the provisions of the Bill of Rights in the performance of its functions. The cumulative effect of these constitutional provisions is to create an expressly normative legal system founded on the norms articulated in our Constitution.⁴⁹

The statement of the SCA that 'I am not unmindful that Duba was a member of the South African Police Service and that the police are required to serve and protect'⁵⁰ is, therefore, not sufficient. The SCA should have gone beyond this statement and engaged in an analysis of the respondents' spousal right to maintenance and children's right to receive support,⁵¹ as their violation by the conduct of Mr Duba points to a close connection between his conduct and employment. In the case of *Paixao & Another v Road Accident Fund*, the High Court stressed the importance of the right to maintenance when it argued that it seeks to place the dependants of the deceased in the same position, as regards maintenance, as they would have been had the deceased not been killed.⁵²

⁴⁷ *K v Minister of Safety and Security* (n 6) para 57. It is on this basis that Linscott (n 25) 2917 criticises the factual approach adopted by the court in the case of *F v Minister of Safety and Security* (n 29) when he argued that '[t]he 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.'

⁴⁸ *Van Eeden v Minister of Safety and Security* (n 28) para 12.

⁴⁹ *K v Minister of Safety and Security* (n 6) para 15. See also the case of *F v Minister of Safety and Security* (n 29) para 57.

⁵⁰ *Minister of Safety and Security v Morudu* (n 14) para 35.

⁵¹ While these are common-law rights, they are also recognised by section 39(3) of the Constitution.

⁵² *Paixao & Another v Road Accident Fund* 2012 (6) SA 377 (SCA) para 12.

Children's right to receive support, which can be read together with other rights of children guaranteed by section 28 of the Constitution, was expressed by the Constitutional Court in the case of *Bhe & Others v Khayelitsha Magistrate & Others*:

Our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all. The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by section 28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children ...⁵³

The SCA should also have considered that Mr Duba's employment presented him with an opportunity to have access to a police vehicle, which the High Court regarded as an instrument in committing the crime.⁵⁴ In the United Kingdom case of *Lister & Others v Hesley Hall Limited*⁵⁵ and which served as a precedent in the case of *K v Minister of Safety and Security*,⁵⁶ Lord Millett found the school vicariously liable on the basis that the scope of employment of a warden presented him with an opportunity to commit indecent assaults as follows:

In the present case the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself is not enough to make the school liable ... But there was far more to it than that. The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys ...⁵⁷

In addition to the fact that Mr Duba's employment presented him with an opportunity to have access to a police vehicle which was used as an instrument to commit the crime, other factors that the SCA should have considered are these: the Minister entrusted Mr

⁵³ *Bhe & Others v Khayelitsha Magistrate & Others* 2005 (1) SA 580 (CC) para 52.

⁵⁴ *Morudu v Minister of Safety & Security* (n 32) para 22.

⁵⁵ [2002] 1 AC 215 (HL). The same principle was applied a year later in the case of *Dubai Aluminium Company Limited v Salaam & Others* [2003] 2 AC 366 (HL).

⁵⁶ *K v Minister of Safety and Security* (n 6) paras 36 and 43.

⁵⁷ *Lister & Others v Hesley Hall Limited* (n 55) para 82. This means, as Alan Barron in the article entitled 'The Impact of Post-Lister Vicarious Liability on the Licensed Trade in the United Kingdom' (2016) 4 (3) Entertainment and Sports Law Journal 1 <<http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume4/number3/barrona/barrona.pdf>> accessed 29 May 2016, correctly argues, the vicarious liability test is no longer concerned with whether or not the employee was authorised to perform a delictual act as the employer may still be found vicariously liable for the unauthorised actions of his or her employee provided they are connected to employment.

Duba with the responsibility to use the police vehicle so as to protect the public; he was on standby; he abused his position when he used the police vehicle to travel to Mr Morudu's home not once but twice, and the Minister of Safety and Security did not control or supervise the unauthorised use of the vehicle.

The facts that Mr Duba was assigned to the fingerprint unit, was required to act only when called out to a crime scene or to the fingerprint office and that he used his private firearm to kill Mr Morudu do not break the aforementioned normative considerations that point to a close connection between his actions and employment. As already indicated, while the courts are yet to provide guidance as to the amount of weight that should be attached to factual and normative considerations,⁵⁸ the case of *K v Minister of Safety and Security* suggests that a weak factual consideration between the conduct of the employee and his or her employment may give rise to vicarious liability if there is a sufficiently compelling normative reason.⁵⁹ Therefore, key constitutional considerations such as the spousal right to maintenance and children's right to support, discussed above, play a crucial role in determining vicarious liability.⁶⁰

Conclusion

The contradictory nature of the judgments of the High Court and the SCA is indicative of the fact that our courts are still grappling with the application of the principle of vicarious liability as developed by the Constitutional Court. This article is in favour of the *ratio* and the decision of the High Court that the state was vicariously liable. This assertion is based on the presence of the factors that point to a close connection between the conduct of the policeman and his employment. They include that the actions of the policeman violated the rights of the victims and the nature of his employment presented him with an opportunity to commit the crime. Therefore, the failure of the SCA to uphold the decision of the High Court on the basis of these factors offends the Bill of Rights and is contrary to the law of vicarious liability as developed by the Constitutional Court.

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⁵⁸ See Linscott (n 25) 2926.

⁵⁹ *ibid.*

⁶⁰ *ibid* [emphasis added].

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