

# STATE LIABILITY FOR MUTINOUS ACTS OF POLICE AND MILITARY OFFICERS: A CRITIQUE OF LESOTHO AND ZIMBABWE CASES IN LIGHT OF THE MODERN TEST FOR VICARIOUS LIABILITY IN SOUTH AFRICA

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## SUMMARY

A mutiny by soldiers or police officers is no doubt, a serious criminal offence. So is the rape of a young girl or woman by police officers, or shooting someone by the police or military personnel without lawful authority, or supplying military hardware by a defence official charged with guarding the armoury to those who use them for armed robbery purposes? However, if the State as the employer is held vicariously liable for these acts of misconduct, why should it be absolved from liability for the wrongful acts of the soldiers or police officers for injuries caused in a situation of mutiny? It seems clear from the case law that an argument that the State is vicariously liable in such circumstances is bound to hit a dead end if it is based on the old "standard test" which contemplated only negligent, at most, reckless conduct of the employee. This was the beginning of the collapse of the arguments of the plaintiffs in the Lesotho Court of Appeal in *Chabeli v Commissioner of Police*,<sup>1</sup> the High Court in *Seoane v Attorney General*,<sup>2</sup> and the Harare High Court in *Munengami v Minister of Defence*,<sup>3</sup> where the question of the liability of the State was canvassed on the basis of the old "standard test" for determining vicarious liability. It is submitted that if these cases were argued around the "close connection" test as enunciated by the Constitutional Court in *K v Minister of Safety and Security*<sup>4</sup> and affirmed in *F v Minister of Safety and Security*,<sup>5</sup> the outcomes might have been different. It seems compelling, therefore, that in analysing these Lesotho and Zimbabwean cases, one must do so with the hindsight of the modern test for determining vicarious liability in South Africa, where the conduct of the employee is not merely negligent in character but deliberate or dishonest in nature.

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<sup>1</sup> LAC (2005–2006) 72.

<sup>2</sup> [2009] LSHC 23 (4 March 2009).

<sup>3</sup> 2007 (2) SA 320 (ZHC).

<sup>4</sup> 2005 (6) SA 419 (CC).

<sup>5</sup> 2012 (1) SA 536 (CC).

## 1 INTRODUCTION

A perusal of the existing case law involving wrongful arrest, unlawful detention and malicious prosecution, the acts of which the police and army personnel in Lesotho carried out, will reveal that what was often in issue was the liability of the State<sup>6</sup> and the quantum of damages.<sup>7</sup> The pattern, in that context, is that the State very readily admitted liability<sup>8</sup> while the trial court embarks upon quantification of damages as the only issue for determination. It would appear that there had been no question of the State denying liability because the acts of the police or army personnel were carried out beyond the course or scope of their employment as servants of the State. What seems a discernible pattern for pleading purposes is that the plaintiff states that when acting as he or she did, the police officer or military personnel in question did so within the course and scope of his or her employment as a servant of the Government. The issue whether the State was vicariously liable hardly arose in any of those cases.<sup>9</sup> These claims normally fall to be determined simply as direct liability claims without any contestation as to whether the State was vicariously liable in the process or not. However, the vicarious liability aspect of the problem of rampant police and army brutality in Lesotho<sup>10</sup> has arisen in the circumstances of mutiny by soldiers and police officers and the question, in simple terms, is who should bear the loss: the State, the soldier whose involvement in the mutiny caused the injury, or the soldier or civilian victim of the military or police violence?

Without re-opening the discussion as to the rationale behind the common law of vicarious liability or the debate for or against it;<sup>11</sup> the traditional problematic scope and course of employment as the factor determining whether vicarious liability should be imposed;<sup>12</sup> or to engage in any detail in discussing the new test for vicarious liability since all of these have

<sup>6</sup> Okpaluba “Establishing Liability of the State for Personal Liberty Violations arising from Arrest, Detention and Malicious Prosecution in Lesotho” 2017 17(1) *AHRLJ* 134–162.

<sup>7</sup> See eg, *Mohlaba v Commander, Royal Lesotho Defence Force* LAC (1995–1999) 184; *Letsie v Commander, Royal Lesotho Defence Force* LAC (2009–2010) 549; *COP v Neo Rantjanyana* [2011] LSCA 42 (22 October 2011); *Senior Inspector Sepinare Mudupha v Trooper Nyolohelo Tae* [2014] LSCA 13 (17 April 2014).

<sup>8</sup> Okpaluba 2017 17(1) *AHRLJ* par 3 where the State’s admission of liability was discussed in some detail.

<sup>9</sup> See eg, *Mohlaba v Commander, Royal Lesotho Defence Force* LAC *supra* 184; *Letsie v Commander, Royal Lesotho Defence Force* LAC *supra* 549; *Mokaka v Commissioner of Police* [2014] LSHC 47 (11 February 2014); *Morobi v Commissioner of Police* [2012] LSHC 1 (9 February 2012); *Kopo and Kopo v Commander LDF* [2011] LSHC 122 (9 March 2011); *Malatsi Lebajoa v Commissioner of Police* [2010] LSHC 99; *Lephatsoe Lebajoa v Commissioner of Police* [2007] LSHC 156 (31 May 2007).

<sup>10</sup> See the judgments of Peete J on the “Sub-culture of Brutality” in *Kopo and Kopo v Commander LDF* *supra* par 38–41; *Jobo v Commander LDF* [2015] LSHC 25 (18 June 2015) par 7–8.

<sup>11</sup> See Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* (2010) Ch 13.

<sup>12</sup> For the meaning and implications of the phrase “scope and course of employment” see: Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* Ch 14.

previously been discussed elsewhere;<sup>13</sup> it is intended to restrict the discussion to the novel points involving vicarious liability of the State in mutinous circumstances raised by the two Lesotho cases, which triggered this inquiry in the first instance – *Chabeli v Commissioner of Police*<sup>14</sup> and *Seoane v Attorney General*.<sup>15</sup> Also discussed alongside these cases are some Zimbabwe decisions where the issue of the vicarious liability of the State for the violent acts of rampaging soldiers and other security agents were contested. However, the underpinning commonality in both jurisdictions is that the courts appear content with the old test for vicarious liability, which, for all practical purposes, imposes liability on the employer for acts of the employee that fall within the realm of negligence.<sup>16</sup> By that approach, a court would not impute liability to the employer for the employee's dishonest or criminal conduct hence it proved problematic applying the test to the circumstances of the employee's criminal conduct.<sup>17</sup> On the contrary, the new approach adopted in Canada almost two decades ago and subsequently in England and South Africa extends vicarious liability to those circumstances once a causal connection between the employee's conduct and the employer's business can be shown to exist.

Given the fact that the mutiny cases were decided on the old course or scope of employment basis, the question posed in this context is: if the "sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer" test of the South African vintage were employed in the circumstances of the military or police mutiny, could the result have been any different? On the other hand, would the courts have maintained that those employees of the State were acting in their own and not the employer's interests and thus, their acts were such a radical deviation from their regular duties that the employer must be absolved from liability? In an attempt to tackle these issues, a number of cases decided based on the new test for vicarious liability in South Africa has been brought in to add value to the present discussion. However one looks at the matter, the law of delict in Lesotho and Zimbabwe is Roman-Dutch as much as there are elements deriving from the English common law just as the South African law of delict and, it is only logical that developments in one jurisdiction must, of essence, be of interest to the other. This is borne out by the fact that the cases from Lesotho and Zimbabwe under this investigative searchlight are primarily decided on the basis of South African precedents found inappropriate to deal with modern developments in the employer-employee relationship in the twenty-first century.<sup>18</sup> To the extent that this observation goes, the Namibian Supreme

<sup>13</sup> See Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* Ch 15.

<sup>14</sup> *Supra*.

<sup>15</sup> *Supra* par 16, 21–22.

<sup>16</sup> *Ratladi v Attorney General* 2010 (3) BLR 635 (HC); *Van der Merwe-Greef Inc. v Martin* [2005] NAHC 18 (27 June 2005).

<sup>17</sup> This is the test enunciated by the Appellate Division in *Feldman (Pty) Ltd v Mall* 1945 AD 733 742–745 and 756–757 and carried forward in *Minister of Police v Rabie* 1986 (1) SA 117 (A) 134C–E.

<sup>18</sup> See further: *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A); *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA); *Mkhatswa v Minister*

Court approach in *Crown Security CC v Gabrielsen*<sup>19</sup> produced a more satisfactory outcome than the Lesotho and Zimbabwe decisions. The Namibian Supreme Court did not only thoroughly examine the developments in South Africa and Canada but it also made its stand on the matter very clear.

When soldiers carry out a mutiny, they are in effect, rising against lawful or constituted authority; they are engaged in acts of insurrection against the authority of their commanders, a sort of revolt<sup>20</sup> against the Government they are supposed to serve. It means in terms of Lesotho legislation that they are in “a combination of two or more” seeking to “overthrow or resist lawful authority in the defence force” or “to disobey such authority in such circumstances as to make disobedience subversive of discipline” or “impede the performance of any duty or service in the defence force”.<sup>21</sup> When groups of soldiers are so engaged, they cannot be said to be carrying out the instructions of the employer or doing something within the scope and course of their employment in line with the traditional test for vicarious liability. If anything, they will in employment terms, be involved in acts of insubordination, and in the language of vicarious liability, they would be on a frolic of their own, and in deviation from the scope and course of their employment. However, the criminal aspects of the soldiers’ conduct is a serious matter for military law with which we are not concerned for the present moment but can an argument that the employer could not be held vicariously liable on account of the soldiers’ unlawful conduct be sustained in the face of the changed attitude of the courts in the law of vicarious liability? As embedded in the Constitutional Court judgment in *K v Minister of Safety and Security*,<sup>22</sup> would the liability be imposed in this type of case if it could be shown that the acts of the employees were sufficiently closely connected with the business of the employer? If the argument is that the Lesotho Court of Appeal judgment was handed down prior to the Constitutional Court judgment in *K*, then, would the argument probably be any different in the face of that court’s lack of mention of the developments in Canada<sup>23</sup> and

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*of Defence* 2000 (1) SA 1104 (SCA); *Van Drimmelen and Partners v Gowar* [2004] 1 All SA 175 (SCA); *Maxalanga v Mpela* 1998 (3) SA 970 (Tk); *Contra Moghamat v Centre Guards CC* [2004] 1 All SA 221 (C); *Isaacs v Centre Guards CC t/a Town Centre Security* (2004) 25 ILJ 667 (C); *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* [2005] 3 All SA 583 (SE); Grogan “Labour Law” in *Annual Survey of South African Law* (2005) 584 606.

<sup>19</sup> 2015 (4) NR 907 (SC).

<sup>20</sup> Black *Black’s Law Dictionary* 6ed (1990) 1020.

<sup>21</sup> S 48(3), Lesotho Defence Force Act No 4 of 1996.

<sup>22</sup> 2005 (6) SA 419 (CC) (hereinafter “*K*”).

<sup>23</sup> See *Bazley v Curry* (1999) 174 DLR (4<sup>th</sup>) 45 (SCC) where the Supreme Court of Canada held that rather than be bugged down by the semantic expressions: “scope of employment” and “mode of conduct”, the fundamental question to be posed is whether the wrongful act of the employee is sufficiently related to the conduct authorised by the employer to justify the imposition of vicarious liability since vicarious liability will generally arise where there is a significant connection between the creation or enhancement of a risk and the wrong that accrued from it even if unrelated to the employer’s desires. Where this is so, vicarious liability will serve the policy considerations of the provision of an adequate and just remedy and of deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. The *Bazley* principle was immediately applied in *Jacobi v Griffiths* (1999) 174 DLR (4<sup>th</sup>) 71 (SCC) and has since been discussed, applied or rejected in

England<sup>24</sup> where principles similar to that in *K* were already operational at the time *Chabeli* was decided?

## 2 THE CHABELI CASE

In *Chabeli v Commissioner of Police*,<sup>25</sup> the appellant's colleagues shot his father who was a Major in the Royal Lesotho Mounted Police (RLMP). The trial judge held that the police officers responsible for killing the deceased were, by their actions "engaged in functions which *pro hac vice* took them out of the category of 1<sup>st</sup> respondent's servants". In determining whether the Commissioner of Police was vicariously liable for the death of the deceased police officer in the circumstances, the Court of Appeal approached the matter from the point of view of employee-deviation from the instructions of the employer. Ramodibedi JA resorted to the old and rigid test for determining employer's vicarious liability in Lesotho with regard to the so-called "deviation cases," which is in accord with those cases decided by the Appellate Division,<sup>26</sup> and the Supreme Court of Appeal of South Africa in *K v Minister of Safety and Security*,<sup>27</sup> *Minister van Veiligheid and Sekuriteit v*

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the following, among other cases: *671122 Ontario Ltd v Sagaz Industries Canada Inc.* [2001] 2 SCR 893; *Rumley v BC* [2001] 3 SCR 184; *EDG v Hammer* [2003] 2 SCR 459; *KLB v British Columbia* [2003] 3 SCR 403; *John Doe v Bennett* [2004] 1 SCR 436; *HL v Canada (Attorney General)* [2005] 1 SCR 401; *EB v Order of the Oblates of Mary Immaculate in the Province of BC* [2005] 3 SCR 45; *Blackwater v Plint* [2005] 3 SCR 3; *Fullowka v Pinkerton's Canada Ltd* [2010] 1 SCR 132; *Reference re Broome v PEI* [2010] 1 SCR 360.

<sup>24</sup> In *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (HL) par 24 and 29 Lord Steyn held that the better approach was to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort for the question is whether the employee's torts were so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. On the other hand, as Lord Clyde would put it, it is about "stressing the importance of finding sufficient connection between the actions of the employee and the employment". See also *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 (HL); *Majrowski v Guys and St Thomas's NHS Trust* [2007] 1 AC 224 (HL); and the Privy Council judgments from the West Indies: *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273 (PC); *Bernard v Attorney General of Jamaica* [2005] IRLR 398 (PC); *Brown v Robinson* [2004] UKPC 56. Two important Supreme Court judgments were recently delivered on the same day by the UK Supreme Court on the law of vicarious liability, namely: *Mohamud v MW Morrison Supermarkets* [2016] UKSC 11, which affirms the *Lister v Hesley (supra)* "close connection" test and reject a new formulation based on "representative capacity" test; while *Cox v Ministry of Justice* [2016] UKSC 10 extends the sorts of relationships where a defendant can be held liable for the conduct of an individual and evaluates *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 50. In *Cox v Ministry of Justice, supra* par 2, Lord Reed held that the scope of vicarious liability depends upon the answers to two inter-connected questions, namely; what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual. The appeal in the present case is about unravelling this question. Then, there is the second question, which asks, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant? It is this question that the *Mohamud* judgment sought to deal with.

<sup>25</sup> *Supra*.

<sup>26</sup> *Viljoen v Smith* 1997 (1) SA 309 (A) 315D–317A; *Feldman (Pty) Ltd v Mall supra* 774.

<sup>27</sup> 2005 (3) SA 179 (SCA) 183D–G par 4.

*Phoebus Appollo Aviation BK*,<sup>28</sup> *Minister of Safety and Security v Japmoco BK h/a Status Motors*,<sup>29</sup> *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport*<sup>30</sup> prior to the reconstruction of the test by the Constitutional Court in *K v Minister of Safety and Security*.<sup>31</sup> The Justice of Appeal stated that:

“Now, it is well-settled principle, which hardly requires authority, that an employer will be vicariously liable for the delict of an employee if the delict is committed by such employee in the course and scope of his or her employment. It requires to be stressed at the outset that whether or not an employee has acted in the course and scope of his or her employment is a question of fact to be determined on the facts of each individual case. In some cases, the evidence will be clear-cut as going to show that the delict of an employee was committed in the course and scope of his or her employment or that it was committed outside the course and scope of such employee’s employment as the case may be. In other cases, however, the evidence will not be clear-cut. This is more so in cases commonly referred to as “deviation cases”.<sup>32</sup>

The court then reverted to the so-called “standard test” established over the years by the courts by which employees’ acts of deviation were tested to determine whether the delict committed by them fall within or outside the course and scope of their employment.<sup>33</sup> It was held that the police officers in question were engaged in mutinous conduct that raised very real concerns about their loyalty to the State and commitment to maintaining order and discipline<sup>34</sup> inconsistent with the course and scope of their employment. And applying that test as reiterated by Scott JA in *K v Minister of Safety and Security*,<sup>35</sup> to the facts of *Chabeli*, Ramodibedi JA held that the Crown cannot be held vicariously liable for the unlawful and criminal acts of the deceased’s killers. Otherwise, the court would be imposing absolute liability on the Crown in circumstances where the delict of its servants clearly fall within or outside the course and scope of their employment or inconsistent with their duties.<sup>36</sup> Although the mutineers had engaged in actions, which *pro hac vice* took them out of the category of servants acting in the course and scope of their employment as public officers but not as the trial court found, they did not cease to be public officers because of their actions.<sup>37</sup>

The conclusion of the Lesotho Court of Appeal that it could not be said that in committing the unlawful acts in question the police officers were still exercising the functions to which they were appointed, or that their actions

<sup>28</sup> 2002 (5) SA 475 (SCA) par 8–18.

<sup>29</sup> 2002 (5) SA 649 (SCA) par 11–16.

<sup>30</sup> *Supra* par 5.

<sup>31</sup> 2005 (6) SA 419 (CC).

<sup>32</sup> *Chabeli v Commissioner of Police supra* par 18.

<sup>33</sup> See Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* Ch 14.

<sup>34</sup> See the court’s earlier decision on the criminal aspect of the police conduct in *Molise v R* LAC (2000–2004) 491 par 28.

<sup>35</sup> 2005 (3) SA 179 (SCA) par 4.

<sup>36</sup> *Chabeli v Commissioner of Police supra* par 20.

<sup>37</sup> *Chabeli v Commissioner of Police supra* par 22.

took them out of the scope and course of their employment and that the deceased's killers deviated from their normal police duties to such a degree as to constitute a deviation were based on certain findings of fact. Such facts pointed to the following:

- (a) Self-interest in the teachers' strike motivated the police officers, which interest had nothing to do with their duties as police officers. Otherwise, why would they challenge Col. Penane so vehemently in his approach to putting an end to the strike in question? Why would they eliminate him? Why would PW1 receive an anonymous letter shortly before the attack on him to desist from working with the Government if not to advance their personal and private agenda outside their police duties?
- (b) They defied, through force of arms, orders of their senior officers. In this regard, it must be noted that the employer, in this case, can only control the police officers through their senior management officers.
- (c) They committed premeditated criminal acts falling outside the ambit of their employment or inconsistent with their duties as police officers. These, in turn, included the kidnapping of PW1, pointing firearms at a number of police officers, murdering the deceased, fatally shooting Col. Penane and unlawfully wounding three other police officers seriously as well as detaining their senior officers at gunpoint.
- (d) They unlawfully engaged in mutiny.
- (e) They unlawfully besieged the Maseru Central Charge Office and cut communication from its precincts with the outside world by unlawfully taking control of the radio room.<sup>38</sup>

## 2.1 Comparing the *Temar* case from Vanuatu

The doctrine of the course and scope of employment as a test for determining whether vicarious liability should or should not be imposed on the police authorities played a prominent role in the decision of the Lesotho Court of Appeal in *Chabeli v COP*.<sup>39</sup> A common thread runs through *Chabeli* and *Temar v Government of the Republic of Vanuatu*<sup>40</sup> where the question was, like in *Chabeli*, whether the Government of the Pacific Island Republic was vicariously liable for the wrongful arrests, false imprisonments and malicious prosecution against police officers who had committed the wrongs in obedience to the orders of four of their superior police officers. Like in *Chabeli*, these acts were committed in mutinous circumstances and the question turned on whether the State was vicariously liable thereby. The point of departure is that in *Temar*, the police officers sought to take advantage of the statutory immunity vested in the police for their conduct<sup>41</sup> while no such claim arose in *Chabeli*. Another commonality in the two cases is that the appellate courts denied vicarious liability in both cases.

<sup>38</sup> *Chabeli v Commissioner of Police supra* par 21.

<sup>39</sup> *Supra*.

<sup>40</sup> [2006] 2 LRC 33.

<sup>41</sup> S 40 of the Police Act Chapter 105, Laws of the Republic of Vanuatu Consolidated Edition 2006 provides that there could be no liability on police officers for acts done in good faith in the performance of their duties.

The Court of Appeal of Vanuatu unanimously upheld by the Chief Justice of the Supreme Court to the effect that the Government was not vicariously liable for the actions of the police officers directed against the appellants. The Chief Justice had based his decision on the persuasive authority of the House of Lords ruling in *Racz v Home Office*<sup>42</sup> where it was held that if the unauthorised and wrongful act of the servant is not connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it. It was, therefore, held that the arrest, detention and prosecution of the claimants were unauthorised acts by the police involved; they were so unconnected with their duty to uphold and enforce the law of Vanuatu that the Government cannot be held responsible for the actions of those involved. These officers acted unlawfully; their acts constituted a mutiny. The Court of Appeal held that once the four senior police officers had been found guilty of inciting mutiny under section 46 of the Police Act,<sup>43</sup> it followed that any acts performed by other officers in furtherance of the orders issued by them, whether or not those officers or persons were in uniform or using Government vehicles or property, were tainted with illegality or unlawfulness resulting from or arising out of the illegal or unlawful orders in the first place. It necessarily followed that all the police officers who had taken part in the operation either acted unlawfully and committed criminal acts outside their legal rights and responsibilities or followed orders in good faith, in which case they had statutory immunity. In neither category was there any responsibility on the Government.

### 3 **SEOANE V ATTORNEY GENERAL**

The subsequent judgment of the Lesotho High Court in *Seoane v Attorney General*<sup>44</sup> arose from circumstances similar to those in *Chabeli*. It was decided four years after *K* and could have provided the answer to the question posed above. Yet, like *Chabeli*, it did not. The inevitable inference to be drawn in the circumstances is that the courts in Lesotho seem not prepared to bring the law to reflect the prevailing trends in the common law in this field. This much could be inferred from the judgment of Monpathi J in *Seoane*, which further confirms that the courts in Lesotho still cling to the old standard test to the effect that by committing the unlawful acts of kidnapping, assaulting and unlawfully detaining and asking the plaintiff, a Major General of the National Security Services of Lesotho (NSS) to resign, the junior officers' conduct were not furthering their employer's interests. They were supposed to be the guardians of national security; a duty statutorily imposed which naturally flowed from the very character of their work. Here, they did the contrary.<sup>45</sup> On the question, whether they could, in all fairness, be acting within the scope and course of their employment, the Judge answered in the negative. The conduct of the junior officers was "a clear-cut deviation case",

<sup>42</sup> [1994] 1 All ER 97 (HL).

<sup>43</sup> Chapter 105, Laws of the Republic of Vanuatu Consolidated Edition 2006.

<sup>44</sup> *Supra*.

<sup>45</sup> *Seoane v Attorney General supra* par 16.



and the question was whether the said deviation was of such a degree that it could be said that they were still carrying out the instructions of the employer.<sup>46</sup> The “compelling logic and irresistible conclusion” reached by the Judge was that the unlawful acts committed by the NSS junior officers *pro hac vice* placed them far outside the category of employees acting within the course and scope of their employment as public officers entrusted with the protection of national security. According to the learned Judge: “There is not even the slightest shred of evidence indicating that they might have been performing their duty though they performed it negligently. They were, as is commonly referred to, on a ‘frolic’ of their own. Once this finding is made, it follows that the employer would not be liable for the damage suffered by the plaintiff and the claim ought to be dismissed.”<sup>47</sup>

It has been observed that in *Chabeli*, the Court of Appeal had referred to the Supreme Court of Appeal judgment in *K*, which represented the current state of the law at that material time but Monapathi J did not refer to either that or the Constitutional Court judgment that had been decided and reported four years before he determined *Seoane*. Monapathi J, however, referred to the “obiter dictum” of the Supreme Court of Canada in *Bazley v Curry*,<sup>48</sup> which appeared to be “logically irresistible to address” the issues, raised in the case before the court. The Supreme Court had said in *Bazley* that:

“Servants may commit acts, even on working premises and during working hours, which are so unconnected with the employment that it would seem unreasonable to fix an employer with the responsibility for them. For example, if a man assaults his wife’s lover (who coincidentally happens to be a co-worker) in the employees’ lounge at work, few would argue that the employer should be held responsible. Similarly, an employer would not be liable for the harm caused by a security guard who decides to commit arson for his or her own amusement.”<sup>49</sup>

The court further said that an incidental or random attack by an employee that merely happens to take place on the employer’s premises during working hours will scarcely justify holding the employer liable.<sup>50</sup> Again, the mere fact that the wrong occurred during working hours or on the job site may not standing alone, be of much importance; the assessment of the material increase in risk cannot be solved by the mechanical application of spatial and temporal factors.<sup>51</sup>

Consequently, Monapathi J held that it would be absurd to impose liability on the employer solely on the basis that though his employees’ unlawful acts did not have any connection to what they were employed to do, he would be liable if his property was used in committing the said acts. To do so would be tantamount to burdening the employer with absolute liability for acts that he

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<sup>46</sup> *Seoane v Attorney General supra* par 21.

<sup>47</sup> *Seoane v Attorney General supra* par 22.

<sup>48</sup> *Supra*.

<sup>49</sup> *Bazley v Curry supra* par 35.

<sup>50</sup> *Bazley v Curry supra* par 42.

<sup>51</sup> *Bazley v Curry supra* par 45.

would otherwise not be liable, and that would open unnecessary floodgates for unscrupulous employees to commit unlawful acts unconnected with their duties, with impunity hiding under the cloak of “use of employer’s property”. The evidence that the NSS junior officers were out of control when committing all the alleged unlawful acts was not controverted.<sup>52</sup> Surely, the close connection test is designed to jettison the line of reasoning embedded in the Monpathi approach. Apart from the circumstances where junior officers are in revolt, there can be no doubt that the use of employer’s property remains an important factor. Suppose the junior officers had harmed a member of the society who sees them as uniformed soldiers of the National Army in their official vehicle and firearm. What difference would it make to that member of the society that the soldiers committed their wrongful acts in mutinous circumstances? Ironically, liability has been imposed,<sup>53</sup> and in instances admitted by the State,<sup>54</sup> and damages<sup>55</sup> have been recovered against the Lesotho Government for injuries sustained at the hands of soldiers in circumstances of mutiny or *coup d’etat* whether the injured were military personnel or civilians and where the injured individuals have sued the State directly and no issue of vicarious liability arose. In spite of the reference to the dictum in the Canadian Supreme Court judgment, it is still safe to say that these cases have not in fact discussed the contemporary developments in the law of vicarious liability for criminal wrongs of employees in Canada, England and South Africa<sup>56</sup> in order to either confirm that those developments apply or do not apply to the law in Lesotho or that the cases dealt with by the courts in those jurisdictions were distinguishable from those before the courts in Lesotho.

#### 4 ZIMBABWE CASES

The Zimbabwe jurisprudence in this regard is similarly aligned to the South African case law prior to the Constitutional Court judgment in *K*. To that extent, the cases of the drunken police officer posted to guard ministerial quarters<sup>57</sup> and the rogue security guard<sup>58</sup> who steals the goods he was employed to protect from thieves were, at the time they were decided, reflective of the mood of the existing South African common law. The same, however, could not be said of the subsequent cases<sup>59</sup> of the violent and rampaging soldiers of the Zimbabwe defence force, which were decided oblivious of the contemporary South African approach to the vicarious

<sup>52</sup> *Seoane v Attorney General supra* par 20.

<sup>53</sup> See Okpaluba 2017 17(1) *AHRLJ* 134–162.

<sup>54</sup> *Kopo and Kopo v Commander, LDF supra*.

<sup>55</sup> *Letsie v Commander, Royal Lesotho Defence Force LAC supra* 549.

<sup>56</sup> See Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* Ch 15.

<sup>57</sup> *Biti v Minister of State Security* 1999 (1) *ZLR* 165 (S).

<sup>58</sup> *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1991 (2) *SA* 441 (ZH).

<sup>59</sup> *Munengami v Minister of Defence supra*; *Teera v Minister of Defence* [2007] *ZWHHC* 21 (28 March 2007); *Nyandoro v Minister of Home Affairs* [2010] *ZWHHC* 196 (7 September 2010).

liability of the employer for offences of a criminal nature perpetrated by their employees.<sup>60</sup>

#### 4 1 Drunken police officer on guard duty

In addition to the Zimbabwe Supreme Court judgment in *Biti*,<sup>61</sup> which was on the side of a finding of vicarious liability, there was also the earlier case of *Witham v Minister of Home Affairs*<sup>62</sup> involving the vicarious liability of the Government for the acts of a police officer based on which the trial judge in *Munengami* found solace in coming to the conclusion he did. In *Witham*, a police officer known to have a history of alcohol-related psychiatric problems was detailed to guard the residence of a Government Minister in a Harare suburb. He was issued with a rifle and ammunition. He deserted his post during the night and had gone on a shooting spree, ending up in the servant's quarters at the plaintiff's house in the same suburb. Unaware of the presence of the police officer, the plaintiff and his wife went to their servant's quarters early in the morning to check whether their servant had come to work. The police officer fired at them killed the plaintiff's wife and severely injured the plaintiff.

Although Ebrahim J found the defendants liable for negligence on two accounts, he was unable to find them liable on the ground of vicarious liability. The police authorities were negligent, first, by permitting an officer known to have drinking-related problems to carry a firearm and ammunition and to guard a Minister's premises in a populated residential area. Secondly, they were negligent in failing to take steps to restrain the police officer when they knew he was at large, dangerous and armed. The injuries were reasonably foreseeable in the circumstances. Ebrahim J was not, however,

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<sup>60</sup> The facts of *Gweshe v Minister of Defence* [2006] ZWHHC 28 (1 March 2006) were different from those of the foregoing cases, in that the soldiers who carried out the assaults on the plaintiff in the former case were seconded to assist the police under the Public Order and Security Act (Chapter 11:17) some of who were in uniform, all were wielding their official firearms. Makarau J held that the defendant was vicariously liable for the assault perpetrated by members of the Defence Force on the plaintiff because the soldiers were not deployed in terms of s 37 of the Act, and even if they were, the defendant remained vicariously liable for the delicts of members of the Defence Force so deployed. No cases – Zimbabwean, South African or any other – were cited except *Biti v Minister of State Security supra* that was referred to in the footnote in the quantification of damages. On the contrary, Mutema J was not persuaded in *Ndlovu v Debshar (Pvt) Ltd* [2012] ZWHHC 28 (7 December 2012) that the injury inflicted on the plaintiff by the defendant's farm guard was caused in the duty or service of his employer despite the use of employer's weapon. "There was a distinct break in the chain between his employer's calling and what he was doing at Fair field farm. The only link between the second defendant and his going to Fair field farm was transport which was taking Munkuli there to pursue his own police mission and thereafter to take the second defendant and other guards to Debshan Ranch to formerly knock off duty having already finished his tour of duty prior to going to Fair field. It cannot by any stretch of the imagination, be said that the second defendant's presence at Fair field farm was in furtherance of his employer's cause. The cases of *Monday Bopoto Nyandoro v Minister of Home Affairs supra* and *Kerina Gweshe v Minister of Defence supra* sought to be relied upon by the plaintiff are distinguishable on the facts." Therefore, the defendant was not vicariously liable for the second defendant's shooting of the plaintiff.

<sup>61</sup> *Biti v Minister of State Security supra*.

<sup>62</sup> 1989 (1) SA 116 (ZH).

persuaded by the argument that the police officer was acting within the course of his employment when the shootings took place. On the contrary, the shootings occurred during the time the constable was on duty and that it could not be disputed that they did not occur at a place where he was supposed to be on duty. The constable in question was appointed to guard the premises of a Government Minister. For that purpose, he was issued with the FN rifle. The Minister's house was a distance of 700-800m away from where the plaintiff and his wife lived. In those circumstances, the police officer was far removed geographically from his appointed place of duty. Therefore, there was no sufficiently close link between his conduct and his duties that he could reasonably be said to have been exercising his assigned function. His actions constituted a complete relinquishment and abandonment of his master's business. The judge, therefore, concluded: "I cannot find fault with [the] contention that [the constable's] digression from his appointed duty was so great in respect of space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed. I agree with [the] submissions [of counsel] that [the constable's] digression was a complete relinquishment or abandonment of his master's business in favour of some activity of his own."<sup>63</sup> On the concept of creation of risk in assigning the police officer to carry out his appointed functions, the trial judge held that the constable fired accidentally at the premises he was meant to be guarding or in trying to prevent an intrusion, even in error, then such would have been within the risk created. Since this was not the case, the Minister was not vicariously liable.

## 4.2 The rogue security guard

The claim for vicarious liability similarly failed in *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd*<sup>64</sup> where a security guard along with his friends stole the same goods he was engaged to secure and to prevent thieves from stealing. The employers were under contract with the plaintiff to provide security against theft in plaintiff's business premises. Greenland J was not prepared to countenance the claim for employer's vicarious liability for the delict of the guard since there was neither logic nor common sense or justification for holding an employer liable in respect of acts the employee was specifically charged and paid to prevent. The submissions of counsel, particularly persuaded the judge for the defendant that it would be wrong, illogical and unjust to pillar the employer with liability in respect of acts, which the employee was simply not employed to do and which, in fact, he was employed to prevent. By parity of this line of reasoning, when the employee steals the goods he is employed to guard, he has ceased performing his master's business in every sense and embarked on his own criminal enterprise. Factually, held the judge, when he steals, he is acting

<sup>63</sup> *Witham v Minister of Home Affairs supra* 125J-126B.

<sup>64</sup> *Supra*. See the discussion by Madhuku "Vicarious Liability of an Employer for Delictual Acts of his Servant under Zimbabwe Law" 1994 38(2) JAL 181.

neither in the course of his master's business nor within the scope of his employment.<sup>65</sup>

After an analysis of the existing English and South African cases on the subject at the time, Greenland J held that while the employer in the present case would, under English law, not be held vicariously liable unless it could be shown that the theft constituted a dishonest management of his master's business, in Zimbabwe, the law is that liability accrues if the act complained of could properly be regarded as a mode – although improper mode – of doing that which was authorised by the employer.<sup>66</sup> In his ruling, Greenland J then proceeded to lay down five propositions. Firstly, the test for vicarious liability is whether, in all the circumstances, it is a fact that the employee acted in the course and within the scope of his employment. Secondly, this test may be satisfied and vicarious liability may accrue despite lack of blame or fault on the part of the employer. Thirdly, the test is satisfied even where the employer specifically prohibits the act of the employee or by the terms of the employment contract, provided that the act in question is so connected with the employer's business and authorised acts that it constitutes a mode, though an improper mode, of carrying out such business and acts. Fourthly, an employee who steals goods that the employer is contractually obliged to guard, and who has been delegated the contractual obligation performs or perpetrates such an act and renders his master vicariously liable to the goods' owner suffering loss. Finally, such owner pleads, against the employer, that the latter was contractually obliged to prevent such loss and that such loss was caused by the latter's negligence in employing a thief, dishonest or unreliable guard, the issue raised is that of the negligence of the employer which issue is not determinable on the basis of vicarious liability.<sup>67</sup>

### 4 3 The case of the violent and rampaging soldiers

One of the most stunning applications of the standard test in recent times is the judgment of Patel J of the High Court of Zimbabwe in *Munengami v Minister of Defence*.<sup>68</sup> Although this judgment was handed down in April 2006, ten months after the Constitutional Court of South Africa delivered its judgment in *K v Minister of Safety and Security*,<sup>69</sup> it would appear from the reports that the South African case was neither cited nor referred to in *Munengami*. Again, neither the English nor the Canadian case law was cited, referred to, applied or distinguished in the Zimbabwe case. Rather, *Munengami* was decided on the old common law approach embedded in the standard test known to the courts prior to its reconstruction in *K*.

It was established that the plaintiff in *Munengami* was violently assaulted several times, robbed and abducted by members of the Zimbabwe national army on the night when there were political demonstrations in the urban

<sup>65</sup> *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd supra* 442J–443C.

<sup>66</sup> *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd supra* 446H–I.

<sup>67</sup> *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd supra* 448G–449A/B.

<sup>68</sup> *Supra*.

<sup>69</sup> 2005 (6) SA 419 (CC).

areas aimed at ousting the head of State. It was also established that the plaintiff was able to show that the assaults and the other wrongful acts of the soldiers resulted in very serious injuries and psychological trauma to her. The soldiers had been stationed in a suburban area to protect and assist the police to maintain law and order. The plaintiff claimed damages for injuries sustained by her when the soldiers burst into her house and committed the nefarious acts. She contended that the Minister of Defence was vicariously liable for the acts of the soldiers who were, at the time, acting within the course and scope of their employment.

Although Patel J made it clear that, the approach of the courts in Zimbabwe<sup>70</sup> to the proper parameters of vicarious liability has generally been *ad idem* with that adopted by the South African courts, this, however, was a reference to pre-South African Constitutional Court jurisprudence.<sup>71</sup> It is from such cases that the judge distilled five principles that guided the judgment of the court. Those principles gleaned from the case law existing in South Africa before the timely intervention of the Constitutional Court as summarised by Patel J were as follows:

- An employer is clearly liable for those acts of his employee that have been authorised by the employer. The employer is also liable for those acts he has not authorised but which are so connected with authorised acts as to be regarded as improper or wrongful modes of doing them.<sup>72</sup>
- On the creation of risk approach, the master can be held liable for his servant's negligence or inefficiency as well as his abuses and excesses. However, for liability to attach to the master such conduct must still be within the scope of the servant's employment or closely connected therewith.
- The fact that the servant uses equipment or material provided by the master in carrying out his wrongful action is irrelevant.<sup>73</sup> The critical enquiry is whether or not the servant was exercising the functions to which he was appointed and whether there was a close link between his conduct and his duties.<sup>74</sup>
- If the servant was acting for his own interests and purposes, the master is not liable. However, if there is a sufficiently close link between the servant's acts for his own interests and the business of the master, the latter may be liable. This is so if the servant's acts are connected with the master's business, whether subjectively or objectively viewed.

<sup>70</sup> See eg, *Witham v Minister of Home Affairs supra*; *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd supra*; *Rose NO v Fawcett Security Operations (Pvt) Ltd* 1998 (2) ZLR 114 (H); *Standard Chartered Finance Zimbabwe Ltd v Georgias* 1998 (2) ZLR 547 (H); *Biti v Minister of State Security supra*.

<sup>71</sup> *HK Manufacturing Co (Pty) Ltd v Sadowitz* 1965 (3) SA 328 (C); *Feldman (Pty) Ltd v Mall supra*; *Minister of Police v Rabie supra*; *Macala v Maokeng Town Council* 1993 (1) SA 434 (A); *Romansrivier Koöperatiewe Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd* 1993 (2) SA 358 (C).

<sup>72</sup> See the Supreme Court decision in *Biti v Minister of State Security supra* 169G and 170B-C.

<sup>73</sup> Per Tebbutt AJ, *HK Manufacturing Co (Pty) Ltd v Sadowitz supra* 337G.

<sup>74</sup> Per Watermeyer CJ and Greenberg JA, *Feldman (Pty) Ltd v Mall supra* 741 and 774 respectively; per Jansen JA, *Minister of Police v Rabie supra* 1341-135B.

- In the final analysis, the question resolved itself into one of degree. Was the employee's digression from his appointed duty so great in space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed? To put it differently, did the employee's departure from the path of duty constitute such an abandonment or deviation from the prescribed task as to dissociate his wrong from the risk created by his employment and to exonerate his employer from liability?<sup>75</sup>

Applying the above principles to the facts of the case, Patel J held that although the assailants were members of the army, under command, they had been pursuing their own nefarious inclinations and objectives beyond their assigned mandate. There was no evidence that these soldiers "who gratuitously assaulted, robbed and abducted the plaintiff had been authorised by their superiors to do so, or that what they did was simply an improper or wrongful mode of doing what they had been authorised to do".<sup>76</sup> The soldiers were certainly not exercising the functions to which they had been appointed. Nor was their conduct closely linked to their employer's business or to the performance of their duties, whether subjectively or objectively viewed.<sup>77</sup> Patel J further held that the soldier's digression was so great in time and space that it could not reasonably be held that they were exercising their appointed functions within the course and scope of their employment when they assaulted the plaintiff. Their conduct constituted a complete abdication of their prescribed task, disassociating their wrongful conduct from the risk created by their employment. Accordingly, the Minister of Defence was not vicariously liable for the injuries suffered by the plaintiff. Ironically, the court thought that the result of this matter might conceivably have been different had the plaintiff averred negligence in that the army owes a duty of care to the public to avert the reasonably foreseeable possibility of harm eventuating from the stationing and deployment of the military within the civilian areas. No further explanation was offered for this distinction between the negligent act and criminal conduct for both could be foreseen in deviation cases.

Of the cases investigated, the courts in Lesotho and Zimbabwe show apparent reluctance in stepping up to the new approach to determining vicarious liability for intentional and dishonest acts. However, in the more recent judgment in *Teera v Minister of Defence*<sup>78</sup> involving army deserters, the Harare High Court appeared partially prepared to embrace the wind of change, that is, the movement away from policy to principles that have gripped the common law in the last two decades. The preparedness appears however to be half-hearted since the court did not interrogate the philosophy or rationale for moving from the old law, which did not recognise that the employer can be held accountable for the employee's deliberate and intentional wrongs to the new approach that sets the test within the bounds

<sup>75</sup> *Munengami v Minister of Defence supra* 332.

<sup>76</sup> *Munengami v Minister of Defence supra* 333.

<sup>77</sup> See the judgment of Goldstone JA, *Macala v Maokeng Town Council supra* 441B; *Smit v Minister van Polisie* 1997 (4) SA 893 (T).

<sup>78</sup> *Supra*.

of the closeness of the employee's wrongful conduct and the business of the employer. Hungwe J merely rejected the defendant's argument that the assailants, a group of soldiers in military fatigue, who broke into the plaintiff's home at midnight and severely brutalised her person were army deserters, and so there could be no basis for holding the defendant vicariously liable since, by acting the way they did, they were on a frolic of their own. This is because there is a line of cases, which indicate that public policy considerations underlying the principles of vicarious liability required that the employer be held liable for the delicts of the employee even if those acts benefited only the employee.<sup>79</sup> The Judge cited the *Minister of Finance v Gore*,<sup>80</sup> a Supreme Court of Appeal case from South Africa, which though decided along the line of the new test for vicarious liability, did not involve the police or military personnel in any way. It was a case of fraud committed in a purely bureaucratic setting by persons who were charged with conducting the employer's business but who did so not for the employer but for their own personal interests.

It is even more surprising that in *Nyandoro v Minister of Home Affairs*<sup>81</sup> where the defendants had admitted arresting and detaining the plaintiff but denied assaulting him in the course of the arrest and detention, Patel J had used the expression "closely connected" without any elaboration. In the absence of any explanation forthcoming from the trial judge, one may wonder whether the ruling was an attempt to align with the approach of the Constitutional Court in *K*. Alternatively, whether it was purely an accidental ruling of sorts. Perusing through the nine-page judgment, one could infer that the "closely connected" sentiment expressed by the trial judge was devoid of any link with *K* of which the trial judge showed no awareness in the judgment. Consequently, the opportunity to do so was lost in this circumstance. The trial judge simply held that there was no doubt that the assaults committed upon the plaintiff's physical integrity were unlawful in that members of the Zimbabwe Republican Police perpetrated them without lawful authority. They were also patently wrongful as being demonstrably incompatible with the *boni mores* and the legal convictions of the community concerning the exercise of police powers. The trial judge's ruling on vicarious liability was very brief indeed. It is contained in two short but unnumbered paragraphs of this judgment as follows:

"As regards the responsibility of the defendants for the actions of its employees, it is trite that an employer is vicariously liable for the conduct of his employees within the course and scope of their employment, even where such conduct has not been authorised, so long as it is closely connected with conduct which has been authorised. The employer's liability extends to such unlawful actions of his employees, including assault, as may reasonably be regarded as modes, although improper modes, of doing what he has authorised.<sup>82</sup> In the instant case, the assaults on the plaintiff were carried out

<sup>79</sup> *Feldman (Pty) Ltd v Mall supra*; *Minister of Police v Rabie supra*; *Minister of Police v Mbilini* 1983 (3) SA 705 (A); *Nott v Zimbabwe African National Union (Patriotic Front)* 1983 (2) ZLR 208; *Biti v Minister of State Security supra*.

<sup>80</sup> 2007 (1) SA 111 (SCA).

<sup>81</sup> *Supra*.

<sup>82</sup> See *Feldman (Pty) Ltd v Mall supra* 742–743; *Zungu v Administrator Natal* 1971 (1) SA 284 (D and CLD) 285.



by members of the ZRP acting within and in the course of their employment, albeit improperly, in performing their duties and powers of arrest and detention. It follows that the defendants must be held vicariously liable for those assaults.<sup>83</sup>

## 5 COMPARING THE MUTINY CASES IN LIGHT OF THE CURRENT TEST FOR VICARIOUS LIABILITY

Briefly stated,<sup>84</sup> the test in *K* is to the effect that two separate but related questions need be asked, namely: (a) 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, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively; (b) 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 question of law, it raises relates 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.<sup>85</sup> In other words, "the pivotal enquiry is therefore whether there was a close connection between the wrongful conduct of the police officers and the nature of their employment."<sup>86</sup> It is suiting also to bear in mind the cute summary of the test as the authors of the current edition of Neethling, Potgieter and Visser, *Law of Delict* put it:

"The employer may accordingly only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests but, viewed objectively, has also completely disengaged himself from the duties of his contract of employment. In this respect, it is particularly important that a *sufficiently close connection* did not exist between the employee's conduct and his employment. The commission of the delict during the performance of a *forbidden* act should also be seen in this light. If the *forbidden* act is connected to the general character of the employee's and thus falls within the scope of his employment, the employer will still be liable."<sup>87</sup>

Since the new test for vicarious liability was enunciated in *K* and carried through in *F* as representing what may be termed, the police rape cases, the principles thereby established have been applied to sexual harassment of an employee at the Municipal Office<sup>88</sup> and of a pupil by a teacher at the school.<sup>89</sup> However, and more directly in issue, is that the Constitutional Court

<sup>83</sup> See pages 5–6 of the transcript of the judgment.

<sup>84</sup> See generally Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* par 15 7 1–15 7 2.

<sup>85</sup> Per O'Regan J, *K v Minister of Safety and Security* 2005 (6) SA 835 (CC) par 32.

<sup>86</sup> Mogoeng J, *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) par 50.

<sup>87</sup> 6ed (2010) 369–370.

<sup>88</sup> *PE v Ikwezi Municipality* 2016 (5) SA 114 (ECG).

<sup>89</sup> See the Kenyan case of *WJ v Amkoah* Petition No 331 of 2011 [2015] eKLR.

had held in *Minister of Safety and Security v Luiters*<sup>90</sup> that once off-duty police officers were found on the facts of a particular case to have put themselves on duty, as their employer empowered and required them to do, they were for the purposes of vicarious liability in exactly the same legal position as police officers who were ordinarily on duty. Although the cases discussed in the South African context are nowhere near the mutiny cases in terms of the level of violence and the degree of breach of legally constituted order they entail, they are nonetheless instances where the criminal conduct of the police or other security officers was carried out in such circumstances that the courts have found in some of them a close connection with the employer's business while in other a clear deviation from the employers' instructions. In these instances, one finds a closer analogy with the judgment in the mutiny cases not because the facts are similar but in the sense that the conduct in both instances constituted a radical deviation from the employee's official duties.<sup>91</sup>

## 5 1 Defence force employee supplying assault rifle for use in robbery

In *Minister of Defence v Von Benecke*,<sup>92</sup> the appellant in his capacity as head of the Department of Defence, was held vicariously liable by the North Gauteng High Court, Pretoria for the injuries sustained by the respondent when he was shot during an armed robbery with a stolen defence force issue of R4 assault rifle although the perpetrator was not the appellant's employee. The defence force employee had acted in the same manner as the security guard did in *Fawcett Security Operations*, in that, in his role as a person in charge of the safekeeping and storage of weapons and ammunition at the military base, he had stolen and handed over the rifle parts and ammunition that were used – together with a previously stolen rifle body – to assemble the weapon used in a robbery. Was the trial court correct in holding the appellant liable despite the fact that its employee had deviated from his normal course of employment?

The SCA was perfectly correct to have observed that the so-called *Feldman/Rabie* test for vicarious liability as Okpaluba and Osode describe it,<sup>93</sup> might not have provided the claimant in *Von Benecke* with a remedy. That test was designed to achieve a balance between imputing liability

<sup>90</sup> 2007 (2) SA 106 (CC).

<sup>91</sup> In addition to the three cases discussed in the present context, mention need be made the High Court judgment in *Giescke v Minister of Safety and Security* 2012 (2) SA 137 (SCA) par 39, Brand JA was considering the appellant's alternative claim to the effect that the police officers had failed to account for the money they recovered from the robbers they were investigating and that vicarious liability raised no difficulty. It would mean that the police officers were doing what they were employed to do, that is, investigate the robbery and to recover the money, but that they were doing so in a dishonest way. This would put the case on the dividing line as, for instance, *Minister of Safety and Security v Japmoco BK h/a Status Motors supra* par 16 – where the Minister was held vicariously liable – rather than, for eg, on the side of *Minister van Veiligheid and Sekuriteit v Phoebus Appollo Aviation BK supra* par 15, where he was not.

<sup>92</sup> 2013 (2) SA 361 (SCA).

<sup>93</sup> *Government Liability: South Africa and the Commonwealth* par 14 2.

without fault, which ran contrary to legal principle, and the need to make amends to an injured person who might not otherwise be compensated.<sup>94</sup> The facts of *Von Benecke* would have provided a perfect setting for a deviation case under that regime. In effect, the traditional test would have failed the claimant because, viewed from an objective perspective, the conduct of the employee of the Department of Defence fell outside the course and scope of employment being the determinant factor. This is best explained in the words of Heher JA:<sup>95</sup>

“Viewed from the subjective perspective of the employee Motaung: he deliberately turned his back on his employment and its duties, pursuing instead his own interest and profit in stealing components and ammunition for the rifle. Objectively considered, the theft and removal formed no part of his duties and there was no link between his own interests (as realised by the theft) and the business of his employer. In the standard terminology, the conduct fell outside both the course and scope of his employment; nor does the fact that Motaung was employed to safeguard the armoury provide the necessary connection – the submission of counsel being that the theft can be equated with a culpable neglect of his duties while in the course of carrying them out. There is, in my view, a clear distinction between a negligent performance of a task entrusted to an employee for which the employer must usually bear responsibility, and conduct which is in itself a negation of a disassociation from the employer/employee relationship. The theft committed by Motaung falls into the second category. I can find no reason to distinguish it from the facts and principles summarised by Harms JA in *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd.*”<sup>96</sup>

A court that found the test not met was nevertheless bound to ask itself, whether the rule did not require development and extension to accommodate the particular set of facts before it. In answering the question, the normative values of the Constitution directed the policy that influenced the decision and did so in relation to the objective element of the test, that is, the closeness in the relationship between the conduct of the employee and the business of the employer. If the constitutional norm, so dictated, it was no longer necessary to limit the proximity to those cases where the employee, although deviating from the course and scope of employment, was nevertheless acting in furtherance of the employer’s business when the deviation occurred.<sup>97</sup>

After a discussion of the constitutional foundations of the defence force and their statutory embodiment,<sup>98</sup> Heher JA held that the defence force was a special kind of employer that required a different approach to liability for the wrongful acts of its employees from that adopted in the case of ordinary civilian employers. Because of the enormous potential for public harm inherent in the inadequate preservation and control of arms, the appellant should not, in general, be able to avoid liability for wrongful acts of

<sup>94</sup> *Minister of Law and Order v Ngobo supra* 833G–H; *K v Minister of Safety and Security* 2005 6 SA 419 (CC) par 21.

<sup>95</sup> *Minister of Defence v Von Benecke supra* par 13. See also per O’Regan J, *K v Minister of Safety and Security* 2005 6 SA 419 (CC) par 16 and 23.

<sup>96</sup> 2001 1 SA 372 (SCA) 382I–383C.

<sup>97</sup> *Minister of Defence v Von Benecke supra* par 14.

<sup>98</sup> *Minister of Defence v Von Benecke supra* par 17–22.

commission or omission of employees that it had appointed to carry out its duties to preserve and control its arms.<sup>99</sup> There certainly was an intimate connection between the employee's delict and his employment. First, he had abstracted the equipment and ammunition while under a positive duty to preserve and care for the items in question. Second, it had been the most probable inference that the opportunity to do away with them had arisen from the opportunity provided by the scope of his duties, without which he would have possessed neither access to them nor knowledge to avoid security controls as the defence force must have put in place.<sup>100</sup>

## 5 2 Radical deviation from official task

*Von Benecke* clearly escaped being categorised as a deviation case. However, the recently reported case of *Minister of Safety and Security v Morudu*<sup>101</sup> was caught in that web. It is perhaps the first in that category in recent times where a police officer on duty shot and killed another with his (the police officer's) own personal firearm. It was canvassed based on vicarious liability as in the rape cases. It's facts somewhat resemble those of *the Attorney General of the British Virgin Islands v Hartwell*<sup>102</sup> only to the extent that in both cases, the police officers left their duty-posts and travelled some distance to where they shot at their alleged lovers' boyfriends. The firearm used in *Hartwell* was the police officer's official firearm but that was not the case in *Morudu* hence, the facts of the two cases are quite dissimilar.

In *Morudu*, the police officer in question was a fingerprint investigator and a member of the police unit that attended crime scenes for investigative purposes when called upon to do so. On the crucial day, believing that the deceased was his wife's lover, he drove to the deceased's home in an unmarked police vehicle that had been assigned to the unit, and shot the deceased. At that time, he and another colleague were on call to attend crime scenes should the need arise. The firearm, which he used in perpetrating the deed was his own and not for official issue. The trial court had ruled in favour of the plaintiffs, and having regard to the Constitutional Court judgments in *K* and *F*, the Judge held that in adjudicating whether there should be vicarious liability, the focus is now on whether the connection between the conduct of the police officer and his employment was sufficiently close to render the Minister liable. According to Molefe AJ, "the establishment of this connection is assessed by explicit recognition of the normative factors that point to vicarious liability" and the fact that a member of the SAPS was on standby duty, and the question of payment for that duty, was not determinative. The trial Acting Judge held that although murdering the deceased had nothing to do with the police officer's duty, there is a sufficiently close link between his act for his own personal gratification and the business of the employer. He utilised the employer's

<sup>99</sup> *Minister of Defence v Von Benecke supra* par 24.

<sup>100</sup> *Minister of Defence v Von Benecke supra* par 25.

<sup>101</sup> 2016 1 SACR 68 (SCA).

<sup>102</sup> *Supra*.

vehicle to attend to his personal matters by going to murder the deceased, which action was an intentional deviation from his duties.<sup>103</sup>

Even if one had to resort to the language of “course and scope” of employment, did the police officer in this case, truly act in the course and scope of his employment? Did he encounter the deceased in his fingerprint duty or at the scene of a crime on a call-out? By the time he drove out of where he was supposed to be on the day of the incident, was he onto the employers’ business or, on a frolic of his own? Could the employer be held vicariously liable for this police officer’s criminal conduct? The Supreme Court of Appeal answered these questions in the negative. The court held, first, that it was necessary to have regard to the subjective element in the present case where the police officer was convinced that he was being cuckolded and had travelled to the home of the respondents to kill a person he considered to be his wife’s lover. This was a radical deviation from the tasks incidental to his employment.<sup>104</sup> Second, in respect of the objective element and whether there was a sufficiently close link between the police officer’s acts for his own interests and purposes and his duties as a police officer, that none of the respondents identified the police officer as being a police officer and none reposed trust in him.<sup>105</sup> The only police accoutrements were the radio and the police vehicle. The radio was not visible and the vehicle unmarked.<sup>106</sup> Third, it was significant that the police officer was a member of a unit, which only interfaced with the public on a limited basis and mainly after a crime had already been committed. This unit was not a division of the police to which the public would intuitively turn for protection.<sup>107</sup> Finally, the court was unable to conclude that there was a sufficiently close link between the police officer’s actions for his own interests and his duties as a police officer. The appeal was thus upheld.<sup>108</sup> Navsa ADP quite rightly remarked:

“This is a difficult case because of the terrible consequences for the respondents. The trauma they suffered in witnessing a husband and father being gunned down in front of them is difficult to fully appreciate. Drawing a line that does not hold the Minister liable for loss of their breadwinner is in itself difficult. In *K* the Constitutional Court, in exhorting courts to keep in mind the values of the Constitution when adjudicating cases such as the present, stated that this does not mean that an employer will inevitably be saddled with damages simply because the consequences are horrendous.”<sup>109</sup>

Could it not be argued that the police vehicle assigned to the unit enhanced the mobility of the police officer, in this case, hence it would have enabled him to think of getting the job done and over with. This was a strong factor in *F*’s case. However, unlike in *K* and *F*, any other paraphernalia of office apart from mobility did not facilitate the deceased in *Morudu*, so that aspect of trust was not a factor. Another important issue is that the police officer in

<sup>103</sup> *Minister of Safety and Security v Morudu supra* par 16–17.

<sup>104</sup> *Minister of Safety and Security v Morudu supra* par 33.

<sup>105</sup> Contra in *F* par 79–81.

<sup>106</sup> *Minister of Safety and Security v Morudu supra* par 34.

<sup>107</sup> *Minister of Safety and Security v Morudu supra* par 35.

<sup>108</sup> *Minister of Safety and Security v Morudu supra* par 37–38.

<sup>109</sup> *Minister of Safety and Security v Morudu supra* par 36; *K* par 23.

*Morudu* never purported to be performing his duties as a police officer in any way similar to the manner the Jamaican police officer conducted himself in *Bernard v Attorney General of Jamaica*,<sup>110</sup> where an off-duty police officer announced to the people present that he was a police officer and had shouted instructions, which were not obeyed outright whence he shot the plaintiff with his official firearm.

### 5 3 On duty police reservist shooting partner with service pistol

This was the case in *Minister of Safety and Security v Booysen*<sup>111</sup> where Makgoka AJA rejected a statement in *Pehlani v Minister of Police*<sup>112</sup> because it would amount to saying that by issuing a firearm to a police officer, the Minister is thereby liable for any delict committed by that police officer using that firearm. This would amount to the imposition of strict liability and not a vicarious liability that is impermissible. Whereas, for liability to arise under such circumstances, held the Acting Justice of Appeal, there must be evidence that the police officer in question was, for one reason or the other, known to be likely to endanger other people's lives by being placed in possession of a firearm, and despite this, he or she was nevertheless issued with the firearm or permitted to continue to possess it. It will be recalled that in *F*, the police officer was retained in service even though he had previous convictions.<sup>113</sup> Reversing the trial judge, Makgoka AJA held that the liability of employers for the wrongs committed by their employees has always been vicarious, not direct or strict. As observed in *K*,<sup>114</sup> one of the principles underlying vicarious liability is the desirability of affording employers an opportunity to take active steps to prevent their employees from causing harm to members of the broader community. There is a countervailing principle too: that is, employers should not bear damages in all circumstances, but only in those circumstances in which requiring them to do so is fair. It was held that the normative factors relied on by the trial court did

<sup>110</sup> *Supra*. In *Jewel Thornhill v Attorney General* [2015] ECarSC 75 par 33 (16 April 2015) where PC Taliām, who rendered security services to a private business entity operating in St Lucia, based on what he saw, came out of the supermarket with his police-issued firearm, identified himself as a police officer and ordered everyone involved in the fracas to get their hands up. Sensing that the appellant pointed a gun at him, the officer shot at him, causing him to be wounded. Pereira CJ of the Eastern Caribbean Supreme Court held that the evidence was that PC Taliām acted on the premise that he was in every respect a police officer at the time he observed that a breach of the peace was imminent, and at which time he assumed the full character and responsibilities of a police officer and acted in a manner to prevent a breach of the peace. At the relevant time, there was no doubt that he was acting as a police officer and was therefore an officer of the Crown. His action in discharging the firearm was closely connected with the acts he was authorised to do which include his duty to preserve the public peace. On the facts and circumstances of this case, the Crown, barring any limiting circumstances in the St Lucia Civil Code, would be liable for PC Taliām's actions if the performance of the functions he performed or purported to perform amounted to a delict or quasi-delict.

<sup>111</sup> [2016] ZASCA 201 (9 December 2016).

<sup>112</sup> [2013] ZAWCHC 146 (25 September 2014) par 32.

<sup>113</sup> *Minister of Safety and Security v Booysen supra* par 17.

<sup>114</sup> *K supra* par 21.

not establish a strong and significant connection between the conduct of the deceased and his employment by the SAPS. Even the closest one, namely, the issuing of the firearm to the deceased by the SAPS, falls short. It does not suffice for vicarious liability to be imputed to the Minister in the circumstances of this case.<sup>115</sup>

Bosielo JA disagreed with the reasoning and conclusion reached by the majority led by Makgoka AJA.<sup>116</sup> In his view, this was, undoubtedly, a classic case of a police officer, clad in full police uniform and on duty, who unlawfully used a state-issued firearm, not to protect the public, as he was constitutionally obliged to do, but instead abused his constitutional powers and shot his partner, Ms Booyesen. This was clearly a deviation case, but does the fact that the deceased shot his girlfriend at her home while he had gone there „to have supper make any difference? Alternatively, posed Bosielo JA, „does the fact that the deceased was on break to eat his supper, sever his links as a police officer with the Minister to a point where it destroys any basis of a possible vicarious liability on the part of the Minister?“<sup>117</sup> Answering that question in the negative, the Justice of Appeal held that this is because Ms Booyesen, like all other citizens, is entitled to protection by members of the police service against any violation of her constitutional rights. It is worse that it is the same police officer who, instead of protecting her, violated her constitutional rights.

“To absolve the Minister from liability in the peculiar circumstances of this case would be subversive of the constitutional duty on the part of the police service to protect the public. It is clear to me that by allowing the deceased to go about in full police uniform, with police vehicle, armed with a police firearm and without any supervision, created a serious risk that he may misbehave. This case differs from *Minister of Safety and Security v Morudu*<sup>118</sup> where the police officer involved was using an unmarked car. He belonged to a unit from which the public would ordinarily not expect protection, as he was a fingerprint expert. His primary duty was merely to investigate crime scenes for fingerprints.”<sup>119</sup>

In conclusion, Bosielo JA held that the various normative facts attendant to this case constitute a sufficiently close or intimate connection between the unlawful shooting of Ms Booyesen by the deceased and his employment with the Minister, being to combat crime, and not to violate people’s constitutional rights. In the peculiar circumstances of this case, this is the finding that will accord with the spirit, purport and objects of the Bill of Rights, “in particular, the State’s obligation through the police service to protect and promote Ms Booyesen’s right to dignity and her bodily and psychological integrity. Furthermore, this is compatible with the constitutional mandate of the SAPS as set out in section 205(3) of the Constitution.”<sup>120</sup>

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<sup>115</sup> *Minister of Safety and Security v Booyesen supra* par 33–34.

<sup>116</sup> *Minister of Safety and Security v Booyesen supra* par 36.

<sup>117</sup> *Minister of Safety and Security v Booyesen supra* par 51.

<sup>118</sup> See the discussion at par 5 2 above.

<sup>119</sup> *Minister of Safety and Security v Booyesen supra* par 51.

<sup>120</sup> *Minister of Safety and Security v Booyesen supra* par 52.

In both *Booyesen* and *Morudu*, the police officers were technically not at a point where they were called upon to discharge their regular duties. At the same time, both officers left their places of work during the office hours and journeyed to where they committed the offences in question. There can be no doubt that the facts of *Booyesen* raised more difficult issues than *Morudu* in the sense that the officer in *Booyesen* appeared more like an officer on duty having regard to the paraphernalia of office that he adorned. Of course, the facts about *K*, *F* and *Von Benecke* are different from the present case as much as they differ from each other. It would seem that to distinguish the facts of those three cases from *Booyesen* and to hold that no vicarious liability would arise in the latter case, was to apply the principles rather rigidly. There can be no question that the police officer was under constitutional obligation while on duty to protect not only Ms Booyesen but also any person who would have seen him in his police uniform and beckoned to him for help. In that circumstance, he would easily have brought himself within the realm of *K*. It is submitted that the dissenting judgment of Bosielo JA should, in a future case, be preferred to that of the majority for, a perpetuation of that approach would, sooner than later, wipe away the gains of *K* and *F*.

#### **5 4 Other instances of misuse of firearm by police officers**

There are other criminal acts of police officers encountered in recent times involving the misuse of their official firearms to kill someone or themselves. Although vicarious liability of the State was an issue in the first case for discussion in *Pehlani*, it was not in the cases mentioned in par 5.4.2. In these latter circumstances, the claims were based on direct liability, albeit that in none of those cases could the police officers be said to have engaged in the assignments to which the employer detailed them. With respect to those claims based on wrongful omissions of police officers, the plaintiff must prove that the police owed him or her a legal duty to act; they breached that duty by acting negligently or intentionally; and that there was causal connection between the negligent breach of the duty and the harm suffered by the plaintiff.<sup>121</sup> Just as much as licensing authorities are under a duty not to issue firearm licences to drunks or to those who may shoot innocent persons, so too, “those in police management should demand exacting standards from their officers in the use and handling of firearms. Anything less, resulting in harm to innocent citizens, is to be met with indignation by members of the community, whose legal convictions dictate, in suitable circumstances, that liability should ensue”.<sup>122</sup>

<sup>121</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) par 25.

<sup>122</sup> Per Makgoka J, *Ramushi v Minister of Safety and Security* [2012] ZAGPPHC 175 (18 August 2012) par 35.



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*5 4 1 Where a police reservist had used the official firearm to shoot her estranged boyfriend*

In *Pehlani v Minister of Police*,<sup>123</sup> a police reservist threatened to kill her estranged boyfriend, tried to set him on fire, and eventually shot him dressed in SAPS uniform, using SAPS issued firearm and ammunition. Rogers J held that in certain circumstances the fact that a victim reposed trust in a police officer will be an important circumstance in determining whether the employee's deviant conduct was "sufficiently connected" with police business to justify the imposition of vicarious liability. "The significance of trust, as a connecting factor between deviant conduct and SAPS business in cases such as *F* and *K*, seems to me to be that it forges a causal link between the wrongdoer's position as a police official and the wrongful act. The factual finding in each case appears to have been that the complainant would not have got into the vehicle but for the trust, which the complainant reposed in the police official. Moreover, if the complainant had not got into the vehicle, she would not or might not have been raped. It is unnecessary to decide whether, in cases such as *F* and *K*, vicarious liability depends on showing that the complainant reposed trust in the delinquent police official. It may perhaps be sufficient that the complainant's trust facilitated the perpetration of the rape even though the wrongdoer would, in the absence of trust, probably have forced the complainant into the vehicle in any event." Although trust of the kind contemplated in *F* and *K*, that is, individual trust by the victim is not a factor in the present case, trust in a broader sense cannot be discounted.

*5 4 2 Where an off-duty police officer shot a member of the public using his service pistol*

It was common cause in *Ramushi v Minister of Safety and Security*<sup>124</sup> that between the period the police officer was assigned the service pistol and the shooting incident, there were four incidents and complaints against the police officer, all relating to the handling and use of a firearm. Among those, he had been internally found guilty for negligent handling of a firearm; and criminally convicted for being drunk in a public place and pointing a firearm for which he was sentenced to a fine or imprisonment. Makgoka J held that by not having investigated the officer's fitness to continue to possess a firearm and having not taken steps to withdraw the service pistol from the police officer involved, the Minister was accordingly negligent and that negligence causally led to the shooting of the plaintiff. The duty of the police to act positively with respect to the continued possession of the firearm by the officer in question accords with the legal convictions of the community and there were no considerations of public policy militating against the imposition of such duty.<sup>125</sup> This case reminds one of those situations as encountered in those pure delict cases from *Van Duivenboden* and *Van der*

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<sup>123</sup> *Supra* par 29–30 and 34.

<sup>124</sup> *Supra*.

<sup>125</sup> *Ramushi v Minister of Safety and Security supra* par 31.

*Spuy* where it was held that considerations of public or legal policy, consistent with the constitutional norms would demand the imposition of a legal duty; and *Minister of Safety and Security v Madbiyi*<sup>126</sup> where a police officer shot himself with his service firearm to both *Minister of Safety and Security v Hlomza*<sup>127</sup> and *Dlanjwa v Minister of Safety and Security*<sup>128</sup> where the authorities had failed to withdraw firearms from trigger-happy police officers who eventually committed suicide after shooting their wives.

## 6 SIGNIFICANT CONNECTION BETWEEN CREATION OR ENHANCEMENT OF RISK: A NAMIBIAN APPROACH

Unlike the Zimbabwe High Court, the Supreme Court of Namibia discussed in some detail the modern approach to the law of vicarious liability before arriving at the conclusion it did in *Crown Security CC v Gabrielsen*.<sup>129</sup> In view of the approach it adopted in this case, it could be argued that the modern law of vicarious liability in Namibia is founded on firmer ground<sup>130</sup> than the Harare High Court's half-hearted attempt in *Nyandoro*. In *Gabrielsen*, a security guard, employed and armed by the appellant, had allowed the respondent to scale over a fence to visit a friend in a property where he was posted as a security guard outside the fence perimeter. When the respondent sought to exit the same way he came in, the guard shot him in the chest, resulting in his becoming paraplegic. The respondent claimed that the employer was vicariously liable for the delict committed by its employee. After discussing the common law of vicarious liability – old<sup>131</sup> and new<sup>132</sup> including the modern Canadian<sup>133</sup> and English<sup>134</sup> cases – the Supreme Court unanimously adopted the approach of the Constitutional Court of South Africa in *K* and held that the objective portion of the two-stage enquiry was for a court to ask whether there was a sufficiently close connection between the wrongful conduct and the wrongdoer's employment.<sup>135</sup> On the evidence before the court, there was a sufficiently close connection between the wrongful conduct of shooting the respondent at the guarded premises and

<sup>126</sup> 2010 (2) SA 356 (SCA).

<sup>127</sup> 2015 1 SACR 1 (SCA).

<sup>128</sup> [2015] ZASCA 147 (01 October 2015).

<sup>129</sup> *Supra*.

<sup>130</sup> Even in the earlier case of *Van der Merwe-Greeff Inc. v Martin* [2005] NAHC 18 (27 January 2005) which was a clear case of negligent performance of which Maritz J was within his right to decide it according to the well-known test in *Feldman/ Rabie*, yet the learned Judge concluded his judgment by holding that the driving of the first defendant's vehicle by the second defendant at the time of the collision was, on a balance of probabilities, sufficiently connected to the purpose of the second respondent's engagement and the scope of his employment in the service of the first defendant that the latter is vicariously liable for the delict of second defendant.

<sup>131</sup> See *Crown Security CC v Gabrielsen supra* par 12–17.

<sup>132</sup> *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

<sup>133</sup> *Bazley v Curry supra*.

<sup>134</sup> *Lister v Hesley Hall Ltd supra*.

<sup>135</sup> *Crown Security CC v Gabrielsen supra* par 30–31.

the security guard's employment with the appellant.<sup>136</sup> The security guard was on duty at the time the respondent was shot. He was also at his place of duty apparently guarding the apartment block he was employed to guard and armed with the firearm provided by the employer for use at his discretion.<sup>137</sup>

Smuts JA for the court held further that the shooting of a person was, in the absence of justification, unlawful. The guard either negligently, recklessly or intentionally discharged the shot at the respondent with the firearm issued to him by the employer to guard the premises. The guard did so after there had been an earlier friendly exchange between himself and the victim. Admittedly, the motivation for the conduct of the guard might be puzzling, if not bizarre, given the available evidence, but such conduct did not lead to a conclusion of "a direct intention to kill the respondent unrelated to his duties but was rather sufficiently closely connected to the guard's employment to result in vicarious liability on the part of the appellant".<sup>138</sup> Even if the security guard sought in some way to further his own interests which was most unlikely in the circumstances, viewed objectively, the act of shooting a visitor to the premises he was guarding while that visitor was exiting shows "little sign on his part from disengaging himself from his duties under his contract of employment as a security guard ... Vicarious liability would also and in any event seem to be fair and just, given the significant connection between the creation or enhancement of a risk of handling a firearm and the wrong, which occurred therefrom, even if obviously unrelated to the appellant's desires, applying the similarly stated principles set out by the Canadian Supreme Court".<sup>139</sup>

## 7 CONCLUSION

As Lord Phillips recently said in *Various Claimants v Catholic Child Welfare Society*,<sup>140</sup> "the law of vicarious liability is on the move" and has not yet come to a stop. It has moved from the persistent element of control rampant in the old-fashioned master and servant era to the scope and course of employment as a determining factor in imposing vicarious liability in an employer-employee relationship down to the current movement away from policy to principles which is the latest development in the Canadian, English and South African law of vicarious liability. Simply put, vicarious liability is imposed upon a person in respect of the act or omission of another individual, because of his relationship with that individual, and the connection between that relationship and the act or omission in question.<sup>141</sup> The development and re-definition of the scope of the subject is designed to incorporate the employee's deliberate or dishonest conduct of a criminal nature. In order to accommodate the prevailing trend, the courts in Lesotho

<sup>136</sup> *Crown Security CC v Gabrielsen supra* par 32.

<sup>137</sup> *Crown Security CC v Gabrielsen supra* par 33.

<sup>138</sup> *Crown Security CC v Gabrielsen supra* par 39–40.

<sup>139</sup> *Crown Security CC v Gabrielsen supra* par 41; see *Bazley v Curry supra*.

<sup>140</sup> [2012] 2 AC 1 (UKSC) par 9.

<sup>141</sup> Per Lord Reed, *Cox v Ministry of Justice supra* par 15.

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and Zimbabwe must abandon, just as the Supreme Court of Namibia has jettisoned, the so-called “standard test” which stops short of recognising that the criminal nature of the employee’s conduct is not enough to absolve the employer from being vicariously liable for the acts complained of. It is not enough to stumble onto a preferable outcome as the High Court of Zimbabwe did in *Teera v Minister of Defence*<sup>142</sup> without stating the reason(s), articulating the rationale for coming to the conclusion that the State was vicariously liable while, in other cases with similar facts, they were not found liable. The absence of a thorough interrogation of the issue, and a clear articulation as to why Zimbabwe’s law of vicarious liability must be on the move or why it should remain static, is to sow the seed for confusion rather than enabling a formulation of a philosophical or theoretical basis or an understanding of the underpinning principles and rationale behind the judgment. It is most likely that if the mutiny cases of Lesotho and the cases of the rampaging military and police officers of Zimbabwe were subjected to the modern closer connection test, the result might be the imposition of vicarious liability even in those circumstances where the courts in the two jurisdictions found otherwise having relied on the “standard test” with its inherent limitation in its scope of operation. The similarity in the acts is violence, and violence by whatever means remains painful to the human being, especially when those charged with the security of the human person perpetrate it. The fact that an act of violence is caused by mutinous soldiers or police officers literally changes nothing and with the application of the proper test, the State ought to be held vicariously liable on account of such criminal conduct.

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<sup>142</sup> *Supra*.