

# The Law of Delict and Gender-Based Violence in South Africa

André Mukheibir

*BMus BJuris LLB BA Hons HDE DJuris PG Dip  
Labour Law Practice*

*Professor, Faculty of Law, Nelson Mandela  
University, Port Elizabeth, South Africa*

<https://orcid.org/0000-0002-7277-2910>

## SUMMARY

South Africa's law of delict has undergone much development, most of which has taken place by virtue of the Constitution of the Republic of South Africa, 1996, and its predecessor, the Constitution of the Republic of South Africa, Act 200 of 1993. This has been particularly important in the context of gender-based violence (GBV) and police liability for omissions and commissions. In a number of groundbreaking cases, the courts developed the common law by casting the net of the law of delictual liability wider to ensure that there is accountability for serious instances of GBV. The question of whether this development has been successful in abating the scourge of GBV is complicated. While the police have been held liable over a period of two decades for failures to protect the vulnerable, specifically women and children, statistics paint a sad picture of violence continuing unabated. Moreover, the amounts of damages that are being paid out to individual plaintiffs could be utilised to prop up an ailing police force.

**KEYWORDS:** Constitution; delict; omissions; rights; vicarious liability, gender-based violence

## 1 INTRODUCTION

South Africa celebrated 30 years of democracy in 2024. This democracy has been informed by the Constitution of the Republic of South Africa, 1996 (the Constitution), and its predecessor, the Constitution of the Republic of South Africa,<sup>1</sup> also known as the interim Constitution. Each of these documents contains a Bill of Rights that entrenches fundamental rights, including the right to life, the right to dignity, and the right to freedom and security of the person. These and other rights have been violated by a myriad of instances, *inter alia*, also in cases of gender-based violence (GBV). This is despite the fact that South Africa became a signatory to the Convention on the

---

<sup>1</sup> 200 of 1993.

Elimination of All Forms of Discrimination against Women in 1993, and the obligations of the police to ensure the safety and security of all citizens.<sup>2</sup>

Sexual violence and GBV has been described as “The Preventable Pandemic.”<sup>3</sup> South Africa has participated in the International 16 Days of Activism against Gender-Based Violence campaign for 25 years.<sup>4</sup> Despite this, the levels of GBV in the country are at an all-time high. In the first quarter of 2022, 10818 rape cases were reported.<sup>5</sup> Many women and children continue to suffer violations of their basic rights and, in many instances, death.<sup>6</sup>

In 2020, the Constitutional Court held as follows in *Tshabalala v S; Ntuli v S*:<sup>7</sup>

“This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. **This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security.**”<sup>8</sup> (own emphasis)

The court in *AK v Minister of Police*<sup>9</sup> recognised the duty of the police to take “reasonable and appropriate measures” to ensure that the enjoyment of fundamental rights is not impaired.<sup>10</sup> The court furthermore recognised the fact that courts also have a duty to “send a clear message to perpetrators of gender-based violence that they are determined to protect the equality, dignity, and freedom of all women.”<sup>11</sup>

As will be seen from the cases discussed below, the courts have on numerous occasions spoken out and have found the Minister of Police<sup>12</sup> liable in delict for misconduct or omissions on the part of the police (and the

<sup>2</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) fn 67.

<sup>3</sup> United Nations “The Preventable Pandemic: Sexual and Gender-Based Violence” (undated) <https://www.un.org/en/academic-impact/preventable-pandemic-sexual-and-gender-based-violence#:~:text=Violence%20against%20women%20and%20girls,sexual%20violence%20in%20their%20lifetime> (accessed 2024-07-06).

<sup>4</sup> South African Government “16 Days of Activism 2025” (undated) <https://www.gov.za/16DaysOfActivism2025> (accessed 2025-12-08).

<sup>5</sup> Gouws “Violence Against Women is Staggeringly High in South Africa. A Different Way of Thinking About it is Needed” (29 November 2022) <https://theconversation.com/violence-against-women-is-staggeringly-high-in-south-africa-a-different-way-of-thinking-about-it-is-needed-195053#:~:text=South%20Africa%20has%20notoriously%20high,rape%20incidence%20in%20the%20world> (accessed 2024-07-06).

<sup>6</sup> See Mpako and Ndoma “South Africans See Gender-Based Violence as Most Important Women’s-Rights Issue to Address” (24 November 2023) <https://www.afrobarometer.org/wp-content/uploads/2023/11/AD738-South-Africans-see-gender-based-violence-as-a-top-priority-Afrobarometer-24nov23.pdf> (accessed 2024-04-10).

<sup>7</sup> 2020 (5) SA 1 (CC).

<sup>8</sup> *Tshabalala v S; Ntuli v S supra* par 63.

<sup>9</sup> 2023 (2) SA 321 (CC).

<sup>10</sup> *AK v Minister of Police supra* par 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> Formerly the Minister of Safety and Security.

prosecutors). In attributing liability to the Minister, the common law of delict has been developed, based on the particular facts of each case. Whether this has borne fruit in practice remains to be seen. Only a very small number of victims have managed to claim compensation for acts of violence perpetrated against them. Thousands of victims of rape are left without compensation, and in many cases, there is a silent majority that does not report instances of rape, either out of fear for reprisal or because of feelings of shame.<sup>13</sup> As early as 2000, Statistics South Africa reported that just over half of victims reported incidents of rape to the police, mainly due to fear of reprisal, embarrassment, and other factors.<sup>14</sup>

## 2 THE DEVELOPMENT OF THE COMMON LAW – THE CONSTITUTIONAL IMPERATIVE

Before discussing case law, it is necessary to say something about the development of the common law, in particular, the common law of delict. The development of the law of delict in South Africa is unique. It entails an incremental development rather than a revolutionary reform. It has happened and will continue to do so at the behest of the impact of the Constitution<sup>15</sup> and its predecessor<sup>16</sup> on the South African legal landscape. These two Constitutions have sought to transform the South African political and social landscape after years of fundamental rights such as equality and human dignity being undermined.<sup>17</sup>

The Constitutional Court recognised the imperative to develop the common law in *Carmichele v Minister of Safety and Security*:<sup>18</sup>

“Section 173 of the Constitution gives to all higher courts, including this Court, the inherent power to develop the common law, taking into account the interests of justice. In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect, promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. **It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.**”<sup>19</sup> (own emphasis).

<sup>13</sup> Statistics South Africa “Quantitative Research Findings on Rape in South Africa” (2000) 14 <https://www.statssa.gov.za/publications/Rape/Rape.pdf> (accessed 2024-07-09).

<sup>14</sup> Statistics South Africa <https://www.statssa.gov.za/publications/Rape/Rape.pdf> 14. See also *Maila v S* [2023] ZASCA 3 par 1.

<sup>15</sup> 1996 (In terms of the Citation of Constitutional Laws Act 5 of 2005, “From the date of commencement of this Act, no Act number is to be associated with the Constitution of the Republic of South Africa, 1996”).

<sup>16</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>17</sup> Post-amble “National Unity and Reconciliation” of the interim Constitution; Preamble of the Constitution.

<sup>18</sup> 2001 (4) SA 938 (CC).

<sup>19</sup> *Carmichele v Minister of Safety and Security supra* par 33.

Section 8(1) provides that “[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

In terms of section 39(2) “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

Section 173 provides that “[t]he Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

In *K v Minister of Safety and Security*,<sup>20</sup> O’Regan J noted the following with regard to the development of the common law:

“The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. **The normative influence of the Constitution must be felt throughout the common law.** Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.”<sup>21</sup>

In all the cases discussed below, the courts were confronted with the development of the common law and the application of section 39(2) of the Constitution. In some instances, development was unnecessary, as the existing law already aligned with the Bill of Rights.<sup>22</sup>

### 3 LIABILITY FOR GENDER-BASED VIOLENCE

Selected cases, dealing with liability for omissions and the “course and scope” requirement in the case of vicarious liability, are discussed below.

#### 3.1 Liability for omissions

While the criminal justice system is responsible for apprehending, prosecuting, and sentencing perpetrators of criminal acts, state organs have also been held liable for omissions in the execution of their duties. Two cases are discussed in this regard.

##### 3.1.1 *Alix Carmichele’s case*

In *Carmichele*,<sup>23</sup> the plaintiff, after having been viciously assaulted, claimed damages based on omissions by the police and prosecutors. The

<sup>20</sup> 2005 (6) SA 419 (CC) par 17.

<sup>21</sup> *K v Minister of Safety and Security supra* par 17.

<sup>22</sup> *AK v Minister of Police supra* par 24.

<sup>23</sup> 2001 (4) SA 938 (CC).

perpetrator (Coetzee) had been well-known in the community as a sex offender, and also to the police and the prosecutors, but was released on bail despite having allegedly raped a young woman. Several people had repeatedly expressed their concern to the police and prosecutors about the dangers posed by the perpetrator's absence from custody, but to no avail. The plaintiff was staying at a friend's (Gosling) house in Noetzie, and Gosling had also gone to the police after the perpetrator was seen snooping around the house. Despite this, nothing happened. On a later occasion, Gosling again went to the police, and the investigating officer again stated that he could do nothing. The perpetrator returned again, broke into the house, and this time he attacked the plaintiff with a pick handle and stabbed her with a knife. She managed to escape and find help.<sup>24</sup>

The case was originally heard in the High Court,<sup>25</sup> which granted absolution from the instance. The Supreme Court of Appeal (SCA) dismissed Ms Carmichele's appeal.<sup>26</sup> She then appealed to the Constitutional Court. In her particulars of claim, she contended that "the relevant members of the South African Police Services", as well as the prosecutors, owed her a legal duty, which was to

"ensure that she enjoyed her constitutional rights of inter alia the right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy and the right to freedom of movement."<sup>27</sup>

It was further submitted that both the High Court and the SCA had erred by not relying on the relevant provisions of the Constitution when they determined whether or not the police or the prosecutors owed her a legal duty to protect her.<sup>28</sup> The applicant in her submission placed reliance on the constitutional obligation of the courts to "develop the common law" with due regard to the "spirit, purport and objects" of the Bill of Rights.<sup>29</sup> She further submitted that, if the lower courts had developed the common law, they would have recognised the existence of a legal duty to act.<sup>30</sup>

It was also submitted that the common-law duty to act should be developed in the light of certain rights, namely equality, life, dignity, freedom and security of the person, and privacy.<sup>31</sup> The interim Constitution placed a duty on the state to protect women against "violent crime in general and sexual abuse in particular."<sup>32</sup>

The plaintiff relied on section 39(2) of the Constitution, which neither of the lower courts had considered, and in terms of which courts have to

---

<sup>24</sup> See *Carmichele v Minister of Safety and Security* *supra* par 5–24.

<sup>25</sup> Unreported case.

<sup>26</sup> *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA).

<sup>27</sup> *Carmichele v Minister of Safety and Security* *supra* par 27.

<sup>28</sup> *Carmichele v Minister of Safety and Security* *supra* par 28.

<sup>29</sup> *Ibid.* See also s 39(2).

<sup>30</sup> *Carmichele v Minister of Safety and Security* *supra* par 28.

<sup>31</sup> Counsel for the applicant referred to the rights as contained in the interim Constitution.

<sup>32</sup> *Carmichele v Minister of Safety and Security* *supra* par 29.

develop the common law in line with the “spirit, purport and objects” of the Bill of Rights.<sup>33</sup>

The court opined that the lower courts, in granting absolution from the instance, had applied the pre-constitutional test for wrongfulness and, in the process, did not consider section 39(2).<sup>34</sup> The court stressed that the development of the common law in terms of section 39(2) was not purely discretionary; instead, there was a “general obligation” on the courts to develop the common law where the common law “is deficient in promoting the section 39(2) objectives”.<sup>35</sup> The obligation is referred to as “general” because the court has to develop the common law only when it needs development, not in every instance where the common law is involved.<sup>36</sup>

Referring to the decision in *Minister of Police v Kadir*,<sup>37</sup> the court held that the determination of whether there was a legal duty on the police officers to act involved a weighing of interests and striking a balance between the interests of the parties and those of the community.<sup>38</sup> Both Constitutions entrench the rights to life, human dignity, and freedom and security of the person.<sup>39</sup> There is a positive duty on all organs of state not to infringe these rights, and in some instances, there would be a positive obligation on the state to “provide appropriate protection to everyone through laws and structures designed to afford such protection.”<sup>40</sup>

Weighing up the interests of the parties involves a proportionality exercise. That exercise has to be carried out in accordance with section 39(2), namely taking into account the “spirit, purport and objects” of the Bill of Rights. Moreover, “the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.”<sup>41</sup>

Looking at the interim Constitution<sup>42</sup> and the Police Act,<sup>43</sup> the court found that there were positive obligations on the police, *inter alia*, to combat crime and to maintain law and order. The court, in addressing these obligations in relation to dignity and freedom and security of the person, found that few things can be more important to women than freedom from the threat of sexual violence.

The court, moreover, recognised the fact that under international law, South Africa is obliged to prohibit all gender-based discrimination that has

<sup>33</sup> *Carmichele v Minister of Safety and Security supra* par 31 and 32.

<sup>34</sup> *Carmichele v Minister of Safety and Security supra* par 37.

<sup>35</sup> *Carmichele v Minister of Safety and Security supra* par 39. See also s 2 above.

<sup>36</sup> *Carmichele v Minister of Safety and Security supra* par 39.

<sup>37</sup> 1995 (1) SA 303 (A).

<sup>38</sup> *Carmichele v Minister of Safety and Security supra* par 43.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> S 215 – in the 1996 Constitution, the analogous provision is s 205(c) “3. The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

<sup>43</sup> 68 of 1995.

the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.<sup>44</sup>

The matter was remitted back to the High Court<sup>45</sup> to continue with the trial.<sup>46</sup> The court found for the plaintiff, and the Minister appealed to the SCA,<sup>47</sup> but the appeal was dismissed. Eventually, after five court cases and eight years, the plaintiff received compensation for the harm she had suffered.

### 3 1 2 AK's case

A recent case where the Minister of Police was held liable for GBV is that of AK.<sup>48</sup> The plaintiff was robbed, held in captivity, and raped repeatedly in the bushes on a beach. She eventually escaped and came upon some people who took her to the police station. In the interim, she had been reported missing. The police's extensive search for her proved unsuccessful. The subsequent police investigation also proved to be fruitless, as at the time of the trial, nobody had been apprehended and convicted. As a result of the incident, the plaintiff suffered from post-traumatic stress syndrome and sued the Minister of Police for damages.<sup>49</sup> She claimed that the fact that she had not been found caused her trauma to be prolonged, and the experts held that this was significant.<sup>50</sup>

The High Court, having established that negligence, wrongfulness, and causation had been proven, found that the Minister of Police was liable for her damages.<sup>51</sup> On appeal, the SCA overturned the decision of the High Court. It found that there was no negligence, because the police had taken all reasonable measures to find her.<sup>52</sup> Insofar as causation was concerned, the SCA held that factual causation between the conduct of the defendant and the plaintiff's harm had not been established.<sup>53</sup> The court furthermore found that legal causation had also not been established.<sup>54</sup> With regard to the element of wrongfulness, the SCA held that the High Court had erred

---

<sup>44</sup> *Carmichele v Minister of Safety and Security* supra par 62. South Africa is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women. The United Nations Committee on the Elimination of Discrimination Against Women, established in terms of the Convention, in terms of the latter, "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) fn 67.

<sup>45</sup> *Carmichele v Minister of Safety and Security* 2003 (2) SA 656 (C).

<sup>46</sup> *Carmichele v Minister of Safety and Security* supra par 83 and 84.

<sup>47</sup> *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA).

<sup>48</sup> *AK v Minister of Police* supra.

<sup>49</sup> See *AK v Minister of Police* supra par 101 and further for discussions of the harm that she suffered.

<sup>50</sup> *AK v Minister of Police* supra par 104.

<sup>51</sup> *AK v Minister of Police* supra par 26–28.

<sup>52</sup> *AK v Minister of Police* supra par 29–36.

<sup>53</sup> *AK v Minister of Police* supra par 41.

<sup>54</sup> *AK v Minister of Police* supra par 42.

when it tested for wrongfulness, in that it did not consider whether it was reasonable under the circumstances to hold the defendant liable.<sup>55</sup>

The SCA also found that imposing liability would expose the police to a “flood of civil litigation” every time it was negligent with regard to search and rescue operations, and also where, irrespective of the degree of negligence, there was no successful arrest and conviction.<sup>56</sup>

AK appealed to the Constitutional Court. The question before the court was whether the police took “reasonable and appropriate measures” to ensure that the applicant’s rights, which she “should at all times enjoy”, were not violated.<sup>57</sup>

In its judgment, the court, like it had done in *Carmichele*, referred to the fact that South Africa was a signatory to several international treaties that enshrine the rights of women, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Taken together, these international law treaties “regard gender-based violence as a pernicious form of discrimination against women and undermines their rights to equality and sexual autonomy.”<sup>58</sup>

The court, per Tlaetsi AJ (as he was then), also referred to the European Convention on Human Rights, which imposes a “positive obligation” on parties to “conduct an efficient and effective investigation” into infringements of articles 2 and 3 (the right to life and the prohibition of torture, respectively). This positive obligation has been applied in respect of GBV in circumstances where the police had failed to conduct a proper investigation in rape cases.<sup>59</sup>

The court held that the police have a duty to act “promptly and expeditiously” and the duty also extends to them taking “all reasonable measures that are available to them in the circumstances”.<sup>60</sup> They “must act with haste, they must take appropriate steps to secure the available evidence, including eyewitness accounts, potential leads and suspects, and they must subject relevant evidence to forensic analysis. They must never act in a cavalier manner or display indifference to the plight of women in the position of the applicant.”<sup>61</sup>

In applying the elements of delict, in particular wrongfulness, negligence, and causation, the court per Tlaetsi AJ found that the Minister was liable for damages. The test for negligence adopted by the court was that of the

---

<sup>55</sup> *AK v Minister of Police supra* par 43.

<sup>56</sup> *Ibid.*

<sup>57</sup> *AK v Minister of Police supra* par 3.

<sup>58</sup> *AK v Minister of Police supra* par 88. Wessels “Confusion in the Law of Delict: A Close Analysis of State Liability, Negligence, Wrongfulness, and Factual Causation in *AK v Minister of Police (2)*” 2024 *THRHR* 82–104 91 is of the opinion that an international duty does not relate in a legal duty for the purpose of wrongfulness.

<sup>59</sup> *AK v Minister of Police supra* par 90.

<sup>60</sup> *AK v Minister of Police supra* par 95.

<sup>61</sup> *Ibid.*

reasonable organ of the state,<sup>62</sup> rather than the reasonable person test.<sup>63</sup> It was held in *Mashongwa v Passenger Rail Agency of South Africa*<sup>64</sup> that the Constitution was “replete with the phrase that the state must take reasonable measures to advance the realisation of rights in the Bill of Rights”.<sup>65</sup>

With regard to causation, the court relied on *Lee v Minister of Correctional Services*<sup>66</sup> where it was held that the test for factual causation, the so-called “but for” test, has always been flexible and did not require “proof equivalent to a control sample in a scientific investigation”.<sup>67</sup>

Insofar as wrongfulness is concerned, the court reiterated the rule that liability for negligent omissions depends on the legal convictions of the community informed by the Constitution.<sup>68</sup> The court then repeated the test applied by the SCA, namely that the wrongfulness of an omission will depend on whether it is reasonable to impose liability under the circumstances.<sup>69</sup> Referring to *Carmichele*, the court noted that the police had an obligation to take “take effective steps to eradicate all forms of gender-based discrimination and accepted that this is a relevant consideration in the wrongfulness enquiry”.<sup>70</sup> The court further opined that it is indisputable that GBV constitutes “one of the most pernicious and systematic forms of discrimination against women in our society”.<sup>71</sup>

The Minister raised the “chilling effect” argument in terms of which allowing the applicant’s claim “on its ability to conduct investigations and carry out its constitutional mandate”.<sup>72</sup> He referred in particular to the English case of *Hill v Chief Constable of West Yorkshire*.<sup>73</sup> In that case, the police refused to impose liability for negligent police work. The court, per Tlaletsi AJ, noted that the English case was contrary to the position taken by the court in *Carmichele* regarding the scope of state liability.<sup>74</sup> The English courts have subsequently criticised the approach followed in *Hill*. Furthermore, the “chilling effect” argument is incompatible with the “importance that the norm of accountability has played in the wrongfulness enquiry in our courts”.<sup>75</sup> Referring to *Minister of Safety and Security v Van Duivenboden*<sup>76</sup> the court noted that in that case, “the state has a positive

<sup>62</sup> *AK v Minister of Police supra* par 70. This test was first used in *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) par 20–21.

<sup>63</sup> The *locus classicus* for the reasonable person test in South Africa is the case of *Kruger v Coetzee* 1966 (2) SA 428 (A).

<sup>64</sup> 2015 (3) SA 528 (CC).

<sup>65</sup> *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) par 20–21 quoted in *AK* par 70.

<sup>66</sup> 2013 (2) SA 144 (CC).

<sup>67</sup> *AK v Minister of Police supra* par 99 quoting *Lee* par 56.

<sup>68</sup> *AK v Minister of Police supra* par 117.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *AK v Minister of Police supra* par 116.

<sup>73</sup> [1987] 1 All ER 1173 (CA).

<sup>74</sup> *AK v Minister of Police supra* par 120.

<sup>75</sup> *Ibid.*

<sup>76</sup> 2002 (6) SA 431 (SCA).

obligation to respect, promote and fulfil the rights in the Bill of Rights.”<sup>77</sup> Agreeing with the High Court, the court *in casu* held that not holding the police liable would have a chilling effect “on the ability of survivors of gender-based violence to vindicate their rights and hold the SAPS liable for any secondary victimisation it has caused.”<sup>78</sup>

The court furthermore held that the fear of limitless liability would be curtailed by the application of the elements of delict, which would in turn depend on the facts of each case. The court noted that the police shortcomings had occurred “in the context of the scourge of gender-based violence” and that this “helps tip the scales in favour of imputing delictual liability.”<sup>79</sup>

Tlaletsi AJ, moreover, found that, in this case, it was unnecessary to develop the common law, as it had already been developed to address cases like this.<sup>80</sup> Tlaletsi AJ thus found that the High Court’s decision was correct. The decision of the SCA was thus overturned.<sup>81</sup>

## 3 2 Vicarious liability for police conduct

A number of cases of police brutality feature in the South African jurisprudence of vicarious liability. These cases are so-called deviation cases in which the “course and scope” requirement became contentious, as the employees in question were deviating from the “normal performance of an employee’s duty.”<sup>82</sup> What becomes problematic here is whether it can still be said that the employee was acting in the course and scope of his employment. O’Regan J notes that this difficulty becomes more pronounced where the “deviation is intentional and even more pronounced where the deviation constitutes an intentional wrong ...”.<sup>83</sup>

### 3 2 1 The case of *Natasha Kerns*

In the first case, *K*,<sup>84</sup> the plaintiff, in good faith, entered a police vehicle under the impression that the policemen would take her home. Instead, after they had travelled some way, the vehicle came to a standstill, and the policemen raped Ms K.

Ms K sued the Minister of Safety and Security for damages. In both the High Court and the SCA, the finding was in favour of the Minister. The SCA, per Scott JA, dismissed Ms K’s appeal against the High Court decision, adding the following:

---

<sup>77</sup> *AK v Minister of Police supra* par 120. See *Minister of Safety and Security v Van Duivenboden supra* par 19 and 44.

<sup>78</sup> *AK v Minister of Police supra* par 121.

<sup>79</sup> *Ibid.*

<sup>80</sup> *AK v Minister of Police supra* par 124. Wessels is generally critical of this judgment and of those of the two lower courts, saying that all three courts made mistakes in how they applied the elements of delict. Wessels 2024 *THRHR* 82–104.

<sup>81</sup> *AK v Minister of Police supra* par 126.

<sup>82</sup> *K v Minister of Safety and Security supra* par 25.

<sup>83</sup> *Ibid.*

<sup>84</sup> *K v Minister of Safety and Security supra*.

"I have the deepest sympathy for the appellant, as I do for the thousands of women who are raped every year in this country. Ideally, they should all receive compensation, but that is something for the Legislature and beyond the jurisdiction of this court."<sup>85</sup>

This decision was disappointing. Apart from the fact that Ms K was left without a remedy, the SCA did not heed the constitutional imperative to develop the common law.

In her appeal to the Constitutional Court, Ms K submitted that the decision of the SCA that the Minister is not vicariously liable for the conduct of the police is not consistent with the spirit, purport, and objects of the Bill of Rights.<sup>86</sup> She further held that the principles of vicarious liability had to be developed in order that the Minister could be held liable.<sup>87</sup> The court, per O'Regan J, recognised that this argument raised a constitutional issue.<sup>88</sup>

In issue here was the plaintiff's rights to security of the person, dignity, privacy, and substantive equality.<sup>89</sup> These rights, according to O'Regan J, are of profound constitutional importance. Moreover, as conceded by the Minister, it is part of the police's mandate to ensure the safety of all citizens and to prevent crime. These duties flow from the Constitution<sup>90</sup> and the Police Act.<sup>91</sup>

The court, moreover, alluded to the duties that South Africa has under international law to prohibit gender-based discrimination, which infringes on the rights of women, as well as the role of the police in attaining this goal.<sup>92</sup>

The Constitutional Court, per O'Regan J, in referring to an earlier decision of the Appellate Division in *Minister of Police v Rabie*,<sup>93</sup> formulated the test for deviation cases by identifying two questions that needed to be asked. The first one, a purely factual question, which looks at the subjective state of mind of the employee, asks whether the wrongful conduct in question was perpetrated solely for the employee's purposes.<sup>94</sup> If the question is answered in the affirmative, the employer may still be held liable if the second question is also answered in the affirmative. The second question is an objective one and asks whether, despite the fact that the conduct was for the sole interests of the employee, there is not a "sufficiently close link" between the employee's own interests and the business of the employer.<sup>95</sup>

"This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is "sufficiently close"

---

<sup>85</sup> *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA) par 10.

<sup>86</sup> *K v Minister of Safety and Security supra* par 18.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> S 205(3) of the Constitution.

<sup>91</sup> Preamble to the South African Police Service Act.

<sup>92</sup> *K v Minister of Safety and Security supra* par 19.

<sup>93</sup> 1986 (1) SA 117 (A).

<sup>94</sup> *K v Minister of Safety and Security supra* par 32.

<sup>95</sup> *Ibid.*

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>96</sup> (own emphasis)

In answering the second question, the court referred to the fact that there was a constitutional duty on the police to protect members of the community and also to prevent crime.<sup>97</sup> This important mandate should “legitimately and reasonably” result in the trust of the police by members of the community. The establishment of this trust facilitates the achievement by the police of their tasks. The courts, when determining whether the Minister is liable, must take into consideration the

“importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her.”<sup>98</sup>

The court identified the following factors as important with regard to the “sufficiently close” connection, namely:<sup>99</sup>

- (i) The duties of police officers in terms of statute and the Constitution to protect members of the public.
- (ii) The trust placed by the victim in the police officers, given that they were in full uniform when they committed the delict.
- (iii) The fact that the conduct constituted a simultaneous omission and commission.

In considering these factors, the court concluded that the respondent was vicariously liable in delict for the harm suffered by the plaintiff.<sup>100</sup>

### 3 2 2 *The plain-clothes police officer*

Some time later, in the case of *F v Minister of Safety and Security*,<sup>101</sup> a similar scenario played itself out. A young girl accepted a lift from a plain-clothes police officer who was driving in an unmarked vehicle, and he raped her. The case went through the High Court and the SCA, the lower courts deciding that because the facts were different from those of *K*, the Minister could not be held liable. The Constitutional Court per Mogoeng CJ in applying the *Rabie-K* test, found that the objective leg, namely whether or not there was a sufficiently close link between the conduct and the business of the employer, was answered positively, in that there was a relationship of trust between the victim and the perpetrator because despite him being in plain clothes and driving an unmarked vehicle, there were police docketts in the vehicle, clearly pointing to the fact that he was a police officer.<sup>102</sup>

<sup>96</sup> *Ibid.*

<sup>97</sup> *K v Minister of Safety and Security supra* par 46.

<sup>98</sup> *K v Minister of Safety and Security supra* par 51.

<sup>99</sup> *K v Minister of Safety and Security supra* par 51–52.

<sup>100</sup> *K v Minister of Safety and Security supra* par 58.

<sup>101</sup> 2012 (1) SA 536 (CC).

<sup>102</sup> *F v Minister of Safety and Security supra* par 66 and 67.

“The normative components that point to liability must here, as *K* indicated, be expressly stated. They are: the state’s constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman’s commission of rape and omission to protect the victim; and the existence or otherwise of an intimate link between the policeman’s conduct and his employment. All these elements complement one another in determining the state’s vicarious liability in this matter.”<sup>103</sup>

In considering the second leg of the test, the court also had regard to the state’s duty to protect the people. Particular mention was made of the violence perpetrated against women and children in South Africa and the fact that “the threat of sexual violence to women is indeed as pernicious as sexual violence itself”.<sup>104</sup> The court went further by stating:

“[I]ncidents of sexual violence against women occur with alarming regularity. This is so despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl-children.”<sup>105</sup>

Mogoeng CJ noted that where a vulnerable woman or girl-child had placed her trust in a police officer on standby, and that police officer raped her, thus abusing the trust placed in him, he could incur personal liability. Moreover, if the trust was based on his employment as a police officer, the state could be vicariously liable. According to Mogoeng CJ, the victim would presume that someone in law enforcement is protecting her. It would not matter whether the person was on duty or on standby.<sup>106</sup>

“From where she stands, he is a policeman, employed to protect her, and should therefore be trusted to uphold, and not to contravene, the law.”<sup>107</sup>

He noted further the interplay between omission and commission. According to him, “[t]hey are two sides of the same coin and both stem from and revolve around the same incident.”<sup>108</sup> The conduct in question amounted to both a commission (rape) and an omission (failure to protect a member of the public).<sup>109</sup>

Insofar as the question of whether there was a “sufficiently close connection” between the delictual conduct is concerned, he held that the question had to be answered by “weighing normative factors that justify the imposition of liability on the policeman’s employer against those pointing the other way”.<sup>110</sup>

<sup>103</sup> *F v Minister of Safety and Security supra* par 52.

<sup>104</sup> *F v Minister of Safety and Security supra* par 55 and 56.

<sup>105</sup> *F v Minister of Safety and Security supra* par 57.

<sup>106</sup> *F v Minister of Safety and Security supra* par 66.

<sup>107</sup> *Ibid.*

<sup>108</sup> *F v Minister of Safety and Security supra* par 72.

<sup>109</sup> *Ibid.*

<sup>110</sup> *F v Minister of Safety and Security supra* par 75.

Even though the perpetrator had been in an unmarked vehicle and on standby, he was identifiable as a police officer, and this enabled him to rape the plaintiff. The plaintiff saw the police docket and the police radio and identified him as a police officer, which he, in fact, was. "Beyond her subjective trust in Mr van Wyk is the fact that any member of the public and in particular one who requires assistance from the police, is entitled to turn to and to repose trust in a police official."<sup>111</sup>

The court, per Mogoeng CJ, held that the Minister was vicariously liable for the conduct of the police officer.<sup>112</sup>

There were two other judgments in this case, one by Froneman J, who held that the matter could have been decided on the basis of direct liability,<sup>113</sup> and a dissenting judgment by Yacoob J.<sup>114</sup> Yacoob J was of the opinion that there was no sufficiently close connection between the delict and the employment of the police officer. According to him, there was no reasonable basis to trust the police officer as he had been in a nightclub "for his pleasure". He furthermore found that there was no commission or omission, as the police officer was off duty and had no duty to protect the public.

### 3 2 3 *Rogue boyfriend*

*Booyesen v Minister of Safety and Security*<sup>115</sup> deals with police misconduct in a different scenario. Ms Booyesen's boyfriend, a police officer, was dropped off at her home one evening for dinner by a fellow officer in a police vehicle. After dinner, he took out his service gun and proceeded to shoot Ms Booyesen in the face and then kill himself. Ms Booyesen then sued the Minister of Police for damages. The High Court held that, while trust did not arise in the same way as in *K* or *F*, it was not a prerequisite for vicarious liability.<sup>116</sup> It was one of many factors that may or may not be present.<sup>117</sup> Instead, the High Court focused on the risk factor, noting that the police officer had used a police issued firearm to commit the delict and that the Minister had created that risk by issuing him with the firearm and was thus responsible for any harm arising from its misuse.<sup>118</sup>

The SCA,<sup>119</sup> per Makgoka AJA, disagreed with this notion, holding that the Minister would be liable every time a weapon was issued, and this would amount to strict liability, which was not permissible.<sup>120</sup> He further held that, while there was a relationship of trust between the plaintiff and her boyfriend, the trust was not based on the fact that he was a police officer; rather, it was

<sup>111</sup> *F v Minister of Safety and Security supra* par 81.

<sup>112</sup> *F v Minister of Safety and Security supra* par 82.

<sup>113</sup> *F v Minister of Safety and Security supra* par 112.

<sup>114</sup> *F v Minister of Safety and Security supra* par 150.

<sup>115</sup> 2018 (6) SA 1 (CC).

<sup>116</sup> *Booyesen v Minister of Safety and Security supra* par 25.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Reported as *Minister of Safety & Security v Booyesen* (35/2016) [2016] ZASCA 20.

<sup>120</sup> *Booyesen v Minister of Safety and Security supra* par 17.

based on the fact that they were lovers.<sup>121</sup> With reference to *K* and *F*, the court emphasised the importance of a relationship of trust and held that the High Court had erred in holding that trust was not a prerequisite for establishing a sufficiently close connection.<sup>122</sup> The High Court had failed to establish a “strong and significant connection” between the deceased’s conduct and his employment by the police.<sup>123</sup> Accordingly, the Minister could not be held liable, and the decision of the High Court was overturned.<sup>124</sup>

The minority judgment of Bosielo JA agreed with the High Court and held that by giving the police officer a firearm, there was a serious risk that he could misbehave.<sup>125</sup> Absolving the Minister from liability in this case would, according to Bosielo J, be “subversive” of the constitutional duty of the police to protect the public.<sup>126</sup> In his opinion, the normative factors had to be viewed holistically, rather than in isolation.<sup>127</sup> He was further of the opinion that there was a sufficiently close connection between the wrongful shooting of the plaintiff and the employment of the deceased. Moreover, he held that this conclusion was in line with the “spirit, purport and objects of the Bill of Rights.”<sup>128</sup>

The plaintiff appealed to the Constitutional Court. The court had to determine whether the case had raised a constitutional issue and, therefore, whether it had the jurisdiction to hear the matter.<sup>129</sup> The majority, per Mhlantla J, therefore held that it lacked jurisdiction to deal with the case because it raised no constitutional issue.<sup>130</sup> Furthermore, because the applicant had not raised any new factor to be taken into consideration over and above those relied on in *K* and *F*, the court held that the appeal must fail.<sup>131</sup> As mentioned above, both *K* and *F* relied heavily on the trust factor. Mhlantla J did add, though, that:

“This outcome should not be perceived to detract from this Court’s grave concern about the abuse of official firearms by police officers, which has proven to be a pervasive issue in our country.”<sup>132</sup>

Zondo J, in his dissenting judgment, was of the opinion that the applicant should succeed. He granted leave to appeal and upheld the appeal. In his judgment, he held that the “sufficiently close” connection had been established, *inter alia*, because of the commission-omission factor.<sup>133</sup> Furthermore, he had been on duty and was carrying a police firearm

<sup>121</sup> *Booyesen v Minister of Safety and Security supra* par 19.

<sup>122</sup> *Booyesen v Minister of Safety and Security supra* par 20.

<sup>123</sup> *Booyesen v Minister of Safety and Security supra* par 34.

<sup>124</sup> *Booyesen v Minister of Safety and Security supra* par 35.

<sup>125</sup> *Booyesen v Minister of Safety and Security supra* par 51.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Booyesen v Minister of Safety and Security supra* par 50.

<sup>128</sup> *Booyesen v Minister of Safety and Security supra* par 52.

<sup>129</sup> *Booyesen v Minister of Safety and Security supra* par 47–61. *Booyesen v Minister Safety and Security* 2018 (6) SA 1 (CC).

<sup>130</sup> *Booyesen v Minister of Safety and Security supra* par 61.

<sup>131</sup> *Booyesen v Minister of Safety and Security supra* par 62 and 63.

<sup>132</sup> *Booyesen v Minister of Safety and Security supra* par 63.

<sup>133</sup> *Booyesen v Minister of Safety and Security supra* par 120.

because he was a police officer. According to Zondo J, the fact that they were meeting as romantic partners was “neither here nor there”.<sup>134</sup> He had a duty to protect all members of the public, including his girlfriend.<sup>135</sup>

Scott notes that in the ten years after *K*, the litigation, where employees had “subjectively disassociated themselves from their terms of employment, but whose actions could objectively be linked to the normal activities of their employer”, was successful.<sup>136</sup> After that, the tide turned away from holding the Minister of Police liable in cases such as *Minister of Safety and Security v Morudu*.<sup>137</sup> In the case of *Booyesen*, the plaintiff did not even succeed with an action for vicarious liability, because the perpetrator was dead and there was no recourse against him.<sup>138</sup> (Scott’s articles were written before the decision in *AK*, where the court found against the Minister.) In the meantime, the scourge of rape, assault (both sexual and otherwise), and femicide continues unabated in South Africa.

#### 4 THE WAY FORWARD

While it is laudable that the law of delict has developed to bring justice to victims, there are many thousands who have not been able to find succour for the attacks upon them and the violation of their rights. As mentioned above, almost half of rape incidents are not reported, for various reasons, fear of reprisal and shame being foremost. In the study of reported rapes, the following were given:<sup>139</sup>

“Of the 3 952 cases included in the study, an arrest was made in 2 283 (57%) cases and 2 579 (65%) were referred for prosecution. Prosecutors accepted 1 362 cases (34.4%) and these were enrolled for trial. Trials started in 731 (18.5%) cases and 340 (8.6%) cases were finalized, with a verdict of guilty of a sexual offence. In 80 of the 340 (23.5%) of cases the perpetrator pleaded guilty; 247/340 (72.6%) convicted perpetrators were imprisoned, 20.2% received suspended prison sentences, 2.4% were referred for correctional supervision and 4.1% were fined for lesser offences. Of the 247 who were sentenced to prison, 29 (11.7%) received a life sentence, 109 (44.1%) received the minimum sentence of 10 years, 91 (36.8%) received between 6 and 10 years, 62 (25.1%) received less than 5 years. Further analysis shows very little difference in the proportion of cases finalised with a conviction by victim age.”<sup>140</sup>

The question arises as to whether the message sent to the police ministers in the above cases has had any effect in practice. As GBV continues

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> Scott “Vicarious Liability of the State for Intentional Police Delicts: A Noteworthy ‘Concealed’ Deviation Case” 2020 1 *Journal of South African Law* 164–182 165. See also Scott “Vicarious Liability: A Positive Development in Resolving Deviation Cases” 2020 2 *Journal of South African Law* 338–35.

<sup>137</sup> 2016 (1) SACR 68 (SCA), Scott 2020 *Journal of South African Law* 165.

<sup>138</sup> See discussion above under 3 2 3.

<sup>139</sup> Gender and Health Research Unit, South African Medical Research Council “Rape Justice in South Africa” (2017) <https://www.samrc.ac.za/sites/default/files/attachments/2022-09/RAPSSAreport.pdf> (accessed 2024-07-09).

<sup>140</sup> Gender and Health Research Unit, South African Medical Research Council <https://www.samrc.ac.za/sites/default/files/attachments/2022-09/RAPSSAreport.pdf> 13.

unabated, the police seem to be overwhelmed and unable to cope with the scourge of violence against women. The law of delict has developed, but this development has not translated into a decrease in GBV.

Unfortunately, the reality is that funds that could be saved by not paying out large sums of damages will not be spent on improved policing. In an article in Daily Maverick last year, the newspaper reported that policing in South Africa is atrocious and marked by mismanagement and corruption, from the top down to the level of police stations.<sup>141</sup>

In the interim, the South African Government, realising the seriousness of the problem, has taken certain steps. In 2020, the National Strategic Plan on Gender-Based Violence and Femicide was published. Its aim was to create a “multi-sectoral strategic framework to realise a South Africa free from gender-based violence and femicide” where the government and civil society could work together to reduce this scourge.<sup>142</sup>

Emanating from this, the President signed the National Council on Gender-Based Violence and Femicide Act<sup>143</sup> into law on 24 May 2024. This makes provision for a multi-pronged approach towards reducing GBV and femicide.<sup>144</sup> The objects as delineated in the National Council on Gender-Based Violence and Femicide Bill include to:

- “(a) facilitate a co-ordinated multi-sectoral approach between the State and civil society to address challenges related to GBVF;
- (b) set short term, medium term and long term priorities, aligned with the National Development Plan outcomes, Medium Term Strategic Framework, Medium Term Expenditure Framework priorities and the NSP;
- (c) facilitate research on issues related to the prevention of, and response to, GBVF; and
- (d) ensure the establishment and maintenance of a platform for sharing of information and best practices on the prevention of, and response to, GBVF.”<sup>145</sup>

These steps have not yet materialised into concrete action. Mere promulgation is not enough; there must be implementation. Amnesty International South Africa has noted that the Act must be implemented “timeously, transparently and effectively”.<sup>146</sup> Without a concerted effort on

<sup>141</sup> De Haas “The Broken State of Policing is the Biggest Threat to South Africans” (11 January 2023) <https://www.dailymaverick.co.za/article/2023-01-11-the-broken-state-of-policing-is-the-biggest-threat-to-south-africans/> (accessed 2024-07-08).

<sup>142</sup> De Haas <https://www.dailymaverick.co.za/article/2023-01-11-the-broken-state-of-policing-is-the-biggest-threat-to-south-africans/> 3. This document can be accessed at <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf> (accessed 2024-07-08).

<sup>143</sup> 9 of 2024.

<sup>144</sup> [B31—2022].

<sup>145</sup> S 2.2.

<sup>146</sup> Amnesty International “South Africa: Signing of the National Council of Gender-Based Violence and Femicide Bill a Positive Step, But Implementation is Key” (24 May 2024) <https://amnesty.org.za/south-africa-signing-of-the-national-council-of-gender-based-violence-and-femicide-bill-a-positive-step-but-implementation-is-key/> (accessed 2024-07-08).

---

the part of the Government and civil society, the National Strategic Plan and the Act will be dead in the water.

## 5 CONCLUSION

The law of delict has undergone much development over the last few decades. Insofar as the law concerning the rights of vulnerable members of our community, particularly women, is concerned, the courts have expanded the interpretation of the elements of delict, in particular wrongfulness, to give effect to the constitutional imperative to develop the common law. Individual plaintiffs have been vindicated and compensated. These cases have normally taken a while to progress through the courts,<sup>147</sup> leaving the victims waiting for some years before they are compensated. More than two decades have passed since the decision in *Carmichele* and, while these cases developed the law of delict to hold the relevant minister liable, not much has changed on the ground.

Furthermore, the damages are paid from the public purse, and that money could be used to improve the service of an ailing police force. The Minister of Police raised this matter with the “chilling effect” argument in *AK*, but the Constitutional Court dispensed with this argument.<sup>148</sup> In this regard, Wessels notes that in many cases, crime victims are choosing to sue the state for damages. If there is no reduction in crime, more people will follow suit, with the state having to pay more damages and thus depleting the resources available for crime prevention. According to him, this will result in dire consequences and may “justify and require urgent law reform.”<sup>149</sup>

---

<sup>147</sup> See, e.g., *Carmichele v Minister of Safety and Security supra*.

<sup>148</sup> See the discussion of *AK v Minister of Police supra* at 3 1 2 above.

<sup>149</sup> Wessels 2024 *THRHR* 103.