

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/06

In the matter between:

THE MINISTER OF SAFETY & SECURITY

Applicant

and

ALLISTER ROY LUITERS

Respondent

APPLICANT'S SUBMISSIONS

TABLE OF CONTENTS

INTRODUCTION.....	3
THE FACTS	7
THE DELICTS OF OFF-DUTY POLICE OFFICERS.....	12
The constitutional and statutory framework	12
The common law before K.....	13
The significance of K	19
The common law after K.....	20
THIS CASE	23
CONCLUSIONS	31
LIST OF AUTHORITIES.....	33

INTRODUCTION

1. On the evening of 14 October 1995 an off-duty policeman Mr Lionel Siljeur, opened fire with his service pistol on three groups of people in Jacaranda Street, Eerste River, Western Cape. He shot at some nine people. He wounded two of them. The most seriously wounded was the respondent Mr Allister Luiters. He suffered two gunshot wounds which rendered him a tetraplegic.
2. Mr Siljeur was prosecuted in the Parow Regional Court and convicted on 24 August 1998 on eight counts of attempted murder. He was sentenced to an effective period of imprisonment of eleven years.
3. Mr Luiters instituted action for damages against Mr Siljeur and the state nominally represented by the Minister of Law and Order. He sought to hold the state vicariously liable for the assaults committed by Mr Siljeur. His claim against the state was confined to one based on vicarious liability.¹
4. Although Mr Luiters instituted action in October 1996, the matter only went on trial in the High Court in October 2004.² At the commencement of the

¹ Particulars of claim 1:3:5; Rule 37 particulars 1:29:1.1 to 1.6

² Trial record 1:34

trial Mr Luiters withdrew his claim against Mr Siljeur.³ By agreement between the parties, the court ordered in terms of rule 33(4) that the initial hearing be confined to the merits of the claim.⁴ The only real issue was whether the shooting took place in circumstances which rendered the state vicariously liable for Mr Siljeur's conduct. Mr Luiters himself gave evidence and he called a Mr William Davidse to give evidence on his behalf. Mr Davidse was one of the other people on whom Mr Siljeur had opened fire on the night of the incident. The state's only witness was Captain Andre Steenkamp who was the detective responsible for the initial investigation of the shooting incident.

5. The High Court handed down its judgment on 6 April 2005.⁵ It held that Mr Siljeur had acted in his capacity as a policeman on the night in question and that the state was consequently vicariously liable for his conduct.⁶
6. The state appealed to the SCA. It dismissed the appeal on 17 March 2006.⁷

³ Trial record 1:36:4 to 13

⁴ Trial record 1:55:10 to 19

⁵ CPD judgment 8:697

⁶ CPD judgment 8:715:1 to 6

⁷ SCA judgment 9:735

7. The state now applies for leave to appeal to this court. We will submit with respect that it has made out a case both for leave to appeal and on the appeal itself. The scheme of our submissions is as follows:

7.1. We first give an outline of the facts.

7.2. We address the law that governs the vicarious liability of the state for the delicts committed by off-duty police officers. This court did not address this particular issue in its judgment in K⁸ but we submit that the test it endorsed, developed and explained in that case should be further developed by making it applicable to cases of this kind as well.

7.3. We address the application of the law developed in this way to the facts of this case. We submit with respect that both the High Court and the SCA erred in their application of the test to this case. They should have concluded that the circumstances were not such as to render the state vicariously liable for Mr Siljeur's conduct.

7.4. We submit in conclusion that this application gives rise to significant and important constitutional issues and that it is in the

⁸ K v Minister of Safety and Security 2005 (6) SA 419 (CC)

interests of justice that leave to appeal be granted. We also describe the relief the applicant seeks.

THE FACTS

8. We merely give an outline of the facts because we will later deal with the pertinent facts in greater detail.

9. Mr Siljeur was a policeman who lived in Jacaranda Street, Eerste River. It is common cause that he opened fire on three different groups of people in Jacaranda Street shortly before 22h00 on the night of 14 October 1995. There is a road map⁹ and a photograph¹⁰ of the scene of the incident before the court. The photograph is probably most useful. Jacaranda Street is the street that runs vertically across the middle of the photograph. It forms a T-junction with Stratford Street towards the top of the photograph. If one moves along Jacaranda from Stratford down towards the camera, then the first cross-road is Stormkaap (parallel to Stratford in the middle of the photograph) and the second is Pen Duick (parallel to Stratford and Stormkaap just below the foot of the photograph). The shootings took place in Jacaranda between Stormkaap and Stratford.

10. It is not clear what triggered the shooting. Mr Siljeur made a comment to one of his victims Mr Davidse in the course of the incident that some unidentified people had earlier robbed or attempted to rob him and that he was looking for them. There is however no other evidence of such an

⁹ Road map 7:694

¹⁰ Photograph 7:696

incident and one accordingly does not know anything more about it. Mr Siljeur was not called as a witness in the trial.

11. Mr Siljeur was alone, in civilian dress and on foot at the time of the incident.
12. The first group of people upon whom he opened fire were Mr Luiters, Ms Magrieta Cloete and Ms Christina Eland. They were on their way to collect Mr Luiters's motorcar from someone who lived in Jacaranda Street. They were on foot. They walked along Pen Duick Street from where they turned into Jacaranda. The road was quiet, tranquil and peaceful. There seemed to be no one else around.¹¹
13. The women suddenly shouted that they should run because someone was shooting at them. This was the first indication of anything untoward. There had been no warning at all.¹² Mr Luiters ran up Jacaranda Street towards Stratford. The two women sought shelter in one of the houses along the way. Mr Luiters was struck down by two bullets shot from behind, the one in his leg and the other in his neck. He collapsed in the street and lost consciousness. He only came to in hospital.¹³

¹¹ Luiters 2:147:8 to 15; 2:149:4 to 14; 2:173:15 to 22

¹² Luiters 2:147:20 to 23; 2:149:18 to 150:2; 2:167:4 to 7; 2:173:23 to 25

¹³ Luiters 2:151:7 to 20; 2:153:8 to 11; 2:158:19 to 25

14. Very little is known about the second group of people on whom Mr Siljeur opened fire. It was common cause however that there was such a second group who also fell victim to Mr Siljeur's shooting that night. They were three men, Mr Percival McCarthy, Mr Abraham Petersen and Mr Jan Blom.¹⁴ One of them was also wounded but apparently less seriously than Mr Luiters.¹⁵
15. The third group of people on whom Mr Siljeur opened fire were Mr William Davidse and his friends Mr Warren Geldenhuys and Mr Lionel Arries. They were on their way to Mr Arries's sister who lived at No 2 Jacaranda Street close to the T-junction with Stratford. They travelled in a Toyota motor vehicle driven by Mr Davidse. They travelled along Stratford and turned into Jacaranda. As they did so, Mr Davidse noticed two things. The first was a wounded man lying in the road. We now know that it was Mr Luiters who had been shot and wounded. He also saw a man running around and waving a pistol in the air.¹⁶ It was Mr Siljeur.
16. Mr Davidse stopped. Mr Siljeur came over to his window. Mr Davidse asked him what the matter was. Mr Siljeur said that somebody whom he did not identify, had robbed or attempted to rob him and had run into the yard across the road. He asked whether Mr Davidse had perhaps seen

¹⁴ Luiters 2:156:22 to 158:2

¹⁵ Steenkamp 2:186:15 to 24

¹⁶ Davidse 1:59:1 to 18; 1:78:19 to 79:22; 1:87:3 to 8

where the robbers had gone.¹⁷ This was the critical bit of evidence upon which the High Court and the SCA based their ultimate conclusion that Mr Siljeur was acting in his capacity as a police officer at the time. He did however not at any stage identify himself as a police officer.¹⁸

17. Mr Siljeur initially pointed his firearm at Mr Davidse as if he was suspicious of them as well. Mr Davidse however ultimately reassured him that they were innocent and persuaded him to lower his pistol. He told him that the robbers had obviously disappeared and encouraged him to go home. Mr Siljeur moved away.

18. Mr Davidse went further along Jacaranda Street to where Mr Luiters was lying. His passengers Mr Geldenhuys and Mr Arries got out to see if they could assist Mr Luiters. They heard a woman shouting his name. The next moment Mr Siljeur opened fire on them. Mr Arries and Mr Geldenhuys sought shelter and, because they were armed, returned Mr Siljeur's fire. Mr Davidse drove off towards Pen Duick. At the intersection he however made a U-turn and drove back to what he called "*the danger zone*". He saw Mr Siljeur walking towards him, gun in hand and shooting at them. When Mr Siljeur noticed Mr Davidse coming towards him however, he ran off.

¹⁷ Davidse 1:60:11 to 17; 1:61:2 to 4; 1:72:9 to 15; 1:87:9 to 88:21; 1:90:3 to 91:25

¹⁸ Davidse 1:81:18 to 20; 1:84:7 to 9; 2:114:4 to 5; Luiters 2:171:1 to 3; 2:173:15 to 174:4

19. Mr Davidse and his companions remained on the scene until the police arrived. Mr Siljeur never returned to the scene.

20. Captain Steenkamp arrived on the scene within minutes after the shooting shortly after 22h00. He found both Mr Luiters and the other wounded victim on the scene.¹⁹ He was there for an hour or more. Mr Siljeur never reported to him.

21. The next morning he received information about the identity of the person responsible for the shooting. He went to Mr Siljeur's home in Jacaranda Street where he found him in the company of two other men. Mr Siljeur however denied knowing anybody by that name, denied that he was a police officer, and denied that he had been involved in the incident at all. Captain Steenkamp went back to his informant from whom he obtained a description of the suspect. It was evident that it was Mr Siljeur. He returned to the house and confronted Mr Siljeur who confessed that it was him. Captain Steenkamp arrested Mr Siljeur. He asked him to produce his service pistol. Mr Siljeur initially denied that he had it with him but then retrieved it from a cupboard where he had hidden it away.

¹⁹ Steenkamp 2:186:15 to 24

THE DELICTS OF OFF-DUTY POLICE OFFICERS

The constitutional and statutory framework

22. The constitutional and statutory regime has changed somewhat since the incident on 14 October 1995.

23. In terms of s 215 of the Interim Constitution the powers and functions of the South African Police Service were,

- “(a) the prevention of crime;*
- (b) the investigation of any offence or alleged offence;*
- (c) the maintenance of law and order; and*
- (d) the preservation of the internal security of the Republic.”*

24. The old Police Act 7 of 1958 had been repealed by the South African Police Service Rationalisation Proclamation R5 of 1995. The proclamation was in turn repealed by the South African Police Service Act 68 of 1995 but only with effect from 15 October 1995, that is, from the day after the incident. The proclamation was accordingly in force at the time of the incident. It was silent on the general powers of the police. It did not add to or detract from s 215 of the Interim Constitution.

25. Sections 39 to 53 of the Criminal Procedure Act 51 of 1977 governed the general powers of arrest of the police and the use of force in doing so.

Some of those provisions have been amended since the incident. The particular provisions and their amendments are however not germane to this inquiry.

26. Section 1 of the State Liability Act 20 of 1957 was still in force. It provided the statutory basis for the liability of the state for the delicts committed by police officers in the pre-constitutional era.²⁰

The common law before K

27. The “*standard test*” for the vicarious liability of an employer for the delict of its employee is “*whether the delict was committed by the employee while acting in the course and scope of his employment*”. It is also said to be whether at the relevant time the employee was “*about the affairs or business or doing the work of the employer*”.²¹
28. In K²² this court reviewed and developed this rule insofar as it applied to “*deviation cases*”. We will later deal with the impact of K. Before doing so, we will briefly discuss the jurisprudence of the SCA on the circumstances in which the state incurs liability for the delicts of off-duty police officers.

²⁰ Mhlongo v Minister of Police 1978 (2) SA 551 (A) 566 para 1

²¹ Absa Bank v Bond Equipment (Pretoria) 2001 (1) SA 372 (SCA) 378 para 5. Also see Mkize v Martens 1914 AD 382 at 390; Minister of Law and Order v Ngobo 1992 (4) SA 822 (A) 826 to 833; Ess Kay Electronics v First National Bank of SA 2001 (1) SA 1214 (SCA) para 7

²² K v Minister of Safety and Security 2005 (6) SA 419 (CC)

They are unusual because employers are generally not liable for the delicts committed by their employees while they are off-duty. It has always been accepted however that off-duty police officers may in appropriate circumstances “*place themselves on duty*” and perform their functions as police officers despite the fact that they are formally off-duty. The state may then incur vicarious liability for their conduct. The question is in what circumstances it does so. We confine our discussion to the more recent and important judgments of the SCA on this question.

29. Rabie was a case about an off-duty policeman.²³ Jansen JA who delivered the majority judgment, formulated the “*Rabie test*”²⁴ discussed and endorsed in K.²⁵ Jansen JA however did not apply the Rabie test to decide the case. He explained that the Rabie test was more apposite to deviation cases.²⁶ He said that in the case of an off-duty police officer on the other hand,

“the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing (the police officer) as a member of the Force, and thus clothing him with all the powers involved, the State created a risk of harm to others, viz the risk

²³ Minister of Police v Rabie 1986 (1) SA 117 (A)

²⁴ 134

²⁵ Paras 31 to 33 and 44

²⁶ 134

*that (the police officer) could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. (The police officer's) acts fall within this purview and in the light of the actual events it is evident that his appointment was conducive to the wrongs he committed.*²⁷

30. In *Tshabalala*²⁸ the court was concerned with the question whether a municipality was vicariously liable for the wrongful shooting of the appellant by a municipal police officer. The police officer had been off-duty when he shot the appellant. The court posed the question whether he was “*acting as a policeman when he shot the appellant*”²⁹. It reviewed the evidence and concluded that he was “*from the time of the incident ... purporting to act as a policeman*” from which it also inferred that “*he also intended to act as a policeman*”.³⁰ It accordingly concluded that he was acting in the course and scope of his employment and that the municipality was liable for his conduct.³¹ In the light of this conclusion the court held that it was not necessary to reconsider *Rabie*.³²

²⁷ 134 to 135

²⁸ *Tshabalala v Lekoa City Council* 1992 (3) SA 21 (A)

²⁹ 29B to C

³⁰ 31H to I

³¹ 31I

³² 31J to 32A

31. In *Wilson*³³ the court again declined to reconsider *Rabie*. It held that on any basis the state was not liable for the conduct of an off-duty police officer despite the fact that he had purported to act as police officer at the time of the delict. It said that this was merely a smokescreen to disguise his wrongful conduct pursued for his own purposes.³⁴

32. In *Macala*³⁵ the court seemingly approved, explained and applied the *Rabie* test to the conduct of an off-duty police officer. Goldstone JA who gave the judgment of the court referred to *Rabie* with approval and said that it followed that,

*“the cardinal question is always whether the policeman is acting in the course and scope of his employment as such and, in order to find that he was so acting, his acts must have some connection with police work, whether subjectively or objectively viewed.”*³⁶

He went on to hold that in that case the municipality was not liable for the conduct of the police officer because the latter had not acted as a police officer:

“In the present case Mthembu said nothing at all, when he shot at the plaintiff, to the effect that he was acting as a policeman. There is no evidence to suggest that in acting as he did he subjectively intended to exercise police powers. The only objective facts

³³ Minister van Wet en Orde v *Wilson* 1992 (3) SA 920 (A)

³⁴ 928A to C

³⁵ *Macala v Maokeng Town Council* 1993 (1) SA 434 (A)

³⁶ 441B to C

*which could be relied upon (by the plaintiff) are that Mthembu was wearing a police uniform, and that he used an official firearm. It must be stressed that the involvement of the fellow policeman and the use of the police vehicle occurred prior to and was totally unrelated to the shooting of the appellant. In my judgment, in the circumstances of this case, the wearing of a police uniform and the use of an official firearm do not establish that Mthembu, in shooting the plaintiff ... was acting in the interests of or about the business of the respondent. His acts did not fall within the risk of harm created by the respondent in appointing him as a municipal policeman.*³⁷

33. In Ngobo³⁸ the court was severely critical of Rabie or at least of the suggestion made in that case that the employer's creation of risk by its employment of the delinquent employee could serve as benchmark for the determination of the scope of its vicarious liability. It held that,

*"Insofar as Rabie's case may be said to have replaced the standard test with one based on creation of risk, I am for the reasons stated of the view that it was wrongly decided".*³⁹

It held on the facts of the case before it that the state was not liable for the conduct of the delinquent police officer because the latter "at no

³⁷ 441F to G

³⁸ Minister of Law and Order v Ngobo 1992 (4) SA 822 (A)

³⁹ 832C to D

stage, whether genuinely or ostensibly, acted as (a police officer) or exercised any official function.”⁴⁰

34. Ess Kay Electronics⁴¹ was not a case about an off-duty police officer. We mention it however because the court reviewed the conflicting decisions of Rabie and Ngobo and expressed a clear preference for the latter.⁴²

35. Japmoco⁴³ was also not an off-duty police officer case but the court again reviewed the jurisprudence in some detail and seemed to prefer and apply Rabie.⁴⁴

36. In Phoebus Apollo⁴⁵ this court was concerned with a case of delinquent police officers who “*deliberately set about creating a smoke-screen of routine performance of their duties while actually pursuing their own different interests*”.⁴⁶ It said that cases of this kind “*often require nuanced weighing up of the wrongdoer’s subjective intention against the objective manifestations of his or her carrying out official duties.*”⁴⁷

⁴⁰ 832C to D

⁴¹ Ess Kay Electronics v First National Bank of SA 2001 (1) SA 1214 (SCA)

⁴² Paras 7 to 9

⁴³ Minister van Veiligheid en Sekuriteit v Japmoco 2002 (5) SA 649 (SCA)

⁴⁴ Paras 11 to 16. This part of the judgment of Nienaber JA was supported by all the members of the court as appears from para 26 of the judgment of Nugent AJA

⁴⁵ Phoebus Apollo Aviation v Minister of Safety and Security 2003 (2) SA 34 (CC)

⁴⁶ Para 7

⁴⁷ Para 7

The significance of K

37. K⁴⁸ was a quintessential deviation case and not an off-duty police officer case. It is nonetheless important firstly because this court reviewed the common law of vicarious liability generally and secondly because its development of the law applicable to deviation cases may be extended to or at least be helpful in the determination of off-duty police officer cases as well.
38. The court referred at the outset to “*the policy-laden character of vicarious liability*” and noted that the principles that govern it “*are imbued with social policy and normative content*”.⁴⁹ It meant that “*the existing principles of common-law vicarious liability must be understood and applied within the normative framework of our Constitution, and the social and economic purposes which they seek to pursue*”.⁵⁰
39. The court reviewed the common law at least insofar as it applied to deviation cases.⁵¹ It referred to,⁵² endorsed and developed⁵³ and

⁴⁸ K v Minister of Safety and Security 2005 (6) SA 419 (CC)

⁴⁹ Para 22

⁵⁰ Para 23

⁵¹ Paras 25 to 33

⁵² Paras 31 to 33

applied⁵⁴ the Rabie test. The test requires one to ask two questions. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts 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.⁵⁵ The court emphasized that, in addressing this latter question, "*a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights*".

The common law after K

40. This court did not have to consider in K whether "*the K test*", that is, the Rabie test as developed in K, was applicable only to deviation cases or should also be extended more broadly to some or all cases of vicarious liability for the conduct of employees. It is in this case at least necessary

⁵³ Para 44

⁵⁴ Paras 50 to 53

⁵⁵ Para 32

to consider whether the K test should also be extended to the state's vicarious liability for the conduct of off-duty police officers.

41. When this issue is addressed, the court is required in terms of s 39(2) of the Constitution, to develop the common law in a manner which promotes the spirit, purport and objects of the Bill of Rights. We submit with respect that it can be achieved by extending the K test to the state's vicarious liability for the conduct of off-duty police officers:

41.1. The constitutional principle of accountability⁵⁶ must take account of the fact that off-duty police officers may and should in appropriate circumstances "*place themselves on duty*" and perform their functions as police officers. When they do so, the state should be vicariously liable for their conduct in the same way as it is liable for the conduct of police officers on duty.

41.2. Police officers who place themselves on duty in good faith and subjectively intend to perform their functions as police officers, should be treated as police officers on duty.

41.3. Police officers who place themselves on duty with an ulterior purpose should be treated in the same way as police officers on duty who pursue their own interests. Their conduct should not

⁵⁶ Rail Commuters Action Group v Transnet 2005 (2) SA 359 (CC) paras 73 to 78

render the state vicariously liable unless there is a sufficiently close link between it and the affairs of the state to render the latter liable. This basis of liability is a flexible one which the courts will apply by considering the need to give effect to the spirit, purport and objects of the Bill of Rights.⁵⁷

⁵⁷ K para 32

THIS CASE

42. We submit that in this case the proper application of the K test makes it clear that the state should not be held vicariously liable for the conduct of Mr Siljeur. He never intended to act as a police officer. Mr Luiters has in any event not discharged the onus of proving that he did. There was also objectively no link between his conduct and the affairs of the state at all. On the contrary, he seemed to have run amok for reasons which remain unclear. Whatever they may be however, Mr Siljeur did not subjectively or objectively act as a police officer on the fateful night.

43. Both the High Court and the SCA based their findings to the contrary entirely on the evidence of Mr Davidse that Mr Siljeur told him that unidentified people had robbed or attempted to rob him and asked him whether he had seen where the robbers had gone.⁵⁸ We submit with respect that, in doing so, both courts made two fundamental errors:

43.1. The first is that they failed to distinguish between legitimate inference on the one hand and impermissible speculation on the other.⁵⁹ The SCA for instance proceeded from this one bit of evidence to speculate,

⁵⁸ CPD judgment 8:707:9 to 23 and 2:713:13 to 714:6; SCA judgment paras 23, 24 and 26

⁵⁹ S v Essack 1974 (1) SA 1 (A) 16D to E; AA Onderlinge Assuransie-Assosiasie v De Beer 1982 (2) SA 603 (A) 620G; Motor Vehicle Assurance Fund v Dubuzane 1984 (1)

- that Mr Siljeur “*appeared to be acting with the authority of a policeman*”,⁶⁰
- that Mr Siljeur “*could hardly be unmindful of his authority as a policeman*” because he was after all “*using his service pistol*”,⁶¹
- that it is “*not unlikely that Siljeur considered (Mr Luiters and his companions) to be associated with those who had attempted to rob him*”,⁶² and
- that Mr Siljeur’s failure to tend to Mr Luiters and his subsequent approach to Mr Davidse “*cumulatively indicate that he was concerned about the presence of ‘other’ would-be robbers, whom he associated with (Mr Luiters)*”.⁶³

43.2. They secondly failed to have regard to the overwhelming evidence that pointed the other way. We deal with that evidence below.

SA 700 (A) 706C; Bates & Lloyd Aviation v Aviation Insurance Co 1985 (3) SA 916 (A) 939F to H

⁶⁰ Para 23

⁶¹ Para 23

⁶² Para 24

⁶³ Para 24

44. We submit that the following fifteen factors make it clear that Mr Siljeur never subjectively intended to act as a police officer and never objectively did so:

44.1. His statement to Mr Luiters upon which the High Court and SCA based their judgments, was merely that unidentified people had robbed or attempted to rob him and that he wished to know whether Mr Siljeur had seen where they had gone.⁶⁴ He made it clear that he was looking for the culprits but he did not say or even suggest that his purpose was to arrest them. His statement to Mr Davidse was equally consistent with an intention to pursue the culprits to get his own back on them. In other words, in the inquiry whether his purpose was arrest or revenge, his statement was neutral and did not suggest the one or the other.

44.2. Before Mr Siljeur started shooting at people, the scene was quiet, peaceful and tranquil.⁶⁵ In other words, if it is true that Mr Siljeur had been the victim of a robbery or attempted robbery, it either did not take place at the scene of the shooting or must have taken place some time earlier. There was no commotion at the scene at the time when Mr Siljeur started shooting.

⁶⁴ Davidse 1:60:11 to 17; 1:61:2 to 4; 1:72:9 to 15; 1:87:9 to 88:21; 1:90:3 to 91:25

⁶⁵ Luiters 2:173:15 to 174:4

- 44.3. Mr Siljeur was off-duty, in plain clothes, on foot and alone.⁶⁶ He did not look and behave as police officers usually do.
- 44.4. Mr Siljeur never identified himself as a policeman.⁶⁷ This is a most significant fact. A police officer who acts as a police officer but does not look like one because he is in plain clothes, on foot and alone, would go out of his way to tell everybody with whom he interacted that he was a police officer. He would at the very least identify himself as a police officer to anybody whom he wanted to arrest. Mr Siljeur's failure to do so in this case is incompatible with an inference that he acted and intended to act as a police officer.
- 44.5. Mr Siljeur made no effort to call the police or to ask bystanders like Mr Davidse and his companions to do so.⁶⁸
- 44.6. He did not ask the bystanders for help as he would probably have done if his intention was to find and arrest the culprits rather than to take revenge on them.⁶⁹

⁶⁶ Davidse 1:81:14 to 17

⁶⁷ Davidse 1:81:18 to 20; 1:84:7 to 9; 2:114:4 to 5; Luiters 2:171:1 to 3; 2:173:15 to 174:4

⁶⁸ Davidse 2:123:9 to 11

⁶⁹ Davidse 1:88:22 to 24; 2:123:6 to 8

- 44.7. He started shooting at Mr Luiters and his companions without warning and without first making an attempt to arrest them.⁷⁰ This feature strongly suggests that he had either simply gone beserk or that his intention was to take revenge on the robbers and not to arrest them.
- 44.8. He did the same with Mr Davidse and his companions. He again started shooting at them without warning and without first making any attempt to arrest them.⁷¹ In their case his conduct was even more bizarre because he had already had a conversation with them and had apparently been satisfied that they had no connection with the robbers.⁷² This conduct was also incompatible with any intention merely to bring Mr Davidse and his companions to book.
- 44.9. Mr Siljeur shot at some nine people altogether. They were three different groups who arrived on the scene at different times and from different directions. None of them was on the scene when the robbery occurred, if there was one. One of the groups included two women.⁷³ It is inexplicable how Mr Siljeur could conceivably have thought that all these people had been

⁷⁰ Luiters 2:149:18 to 25; 2:171:1 to 3; 2:173:15 to 174:4

⁷¹ Davidse 1:66:8 to 12; 2:102:9 to 17

⁷² Davidse 1:63:5 to 7; 1:85:16 to 21

⁷³ Luiters 2:156:13 to 158:2; Steenkamp 2:186:15 to 18; 2:206:5 to 15

involved in or connected with his robbery if there was one. But even if he somehow thought that to be the case, his intention was clearly not merely to arrest them to bring them to book.

44.10. Mr Siljeur shot, wounded and incapacitated two of his victims.⁷⁴

But even then he made no attempt to arrest them. Even after he had had a discussion with Mr Davidse and his companions and had satisfied himself that they were innocent, he did not tend to the plaintiff who was seriously wounded and in need of emergency care.

44.11. The SCA speculated that he might have disappeared off the scene because of some fear that Mr Davidse and his companions were in some way associated with the robbers. But the police arrived a few minutes later and even then Mr Siljeur did not emerge. He apparently went into hiding.⁷⁵ Any speculation that he acted and intended to act as a policeman must accordingly speculate yet further that he changed his mind within minutes and went into hiding instead.

⁷⁴ Davidse 1:59:6 to 25; 1:63:20 to 22; Steenkamp 2:186:15 to 18

⁷⁵ Davidse 1:69:5 to 6; 1:70:14 to 19; 2:111:3 to 14; 2:132:1 to 3; Steenkamp 2:196:25 to 197:6

44.12. Mr Siljeur failed to make a report to his superiors of the shooting incident as he was obliged to do in terms of police standing orders.⁷⁶

44.13. Captain Steenkamp made it clear that Mr Siljeur never made any report of the incident at all.⁷⁷ It means that Mr Siljeur did not even lay a charge of robbery as he would have done if there had been one.

44.14. When Captain Steenkamp confronted him the following day, he denied any involvement in the incident and denied that he was a police officer at all.⁷⁸

44.15. When Captain Steenkamp asked him for an explanation for his conduct, he refused to give one.⁷⁹

45. We submit in the light of these circumstances as follows:

45.1. We submit with respect that the High Court and SCA erred in their evaluation of Mr Siljeur's conduct. They ought to have concluded that he did not subjectively intend to act as a police

⁷⁶ Steenkamp 3:204:12 to 205:15; Standing order 7:689:251.15.1

⁷⁷ Steenkamp 3:205:11 to 15

⁷⁸ Steenkamp 2:198:9 to 199:8; 2:200:13 to 201:8; 3:230:1 to 20

⁷⁹ Steenkamp 3:199:9 to 15

officer and that there was no connection between his conduct and the affairs of the state. He acted as a breaker of the law and not an enforcer of it.

45.2. The K test should in any event be applied in a manner which gives effect to the spirit, purport and objects of the Bill of Rights. Its application by the High Court and SCA does not do so. So fleeting a connection between the conduct of the wrongdoer on the one hand and the affairs of state on the other as the comment of Mr Siljeur on which they base their conclusion, is an insufficient basis for holding the state liable for Mr Siljeur's delinquent conduct.

45.3. We submit that on a proper application of the K test the state is not vicariously liable for the misconduct of Mr Siljeur.

CONCLUSIONS

46. We have submitted that this application raises constitutional issues within the jurisdiction of this court. It does so because the Constitution guides the determination of this case at two levels. The first is at the level of the development of the common law by the extension of the K test at the very least to the conduct of off-duty police officers.⁸⁰ The second is at the level of the application of the K test.⁸¹

47. We submit that it is in the interests of justice for the applicant to be granted leave to appeal for two reasons. First, his prospects of success are good. Secondly, the central issue in this case is an important one on which the law is in flux. It is important that this court brings clarity and certainty.

48. The applicant asks for an order in the following terms:

48.1. The applicant is granted leave to appeal to this court.

48.2. The order of the SCA is set aside and replaced with an order upholding the appeal.

⁸⁰ K v Minister of Safety and Security 2005 (6) SA 419 (CC) paras 12 to 20

⁸¹ Phumelela Gaming and Leisure v Gründlingh and others, unreported judgment of this court delivered on 18 May 2006 in case CCT 31/05 paras 23 to 29 and the authorities quoted in para 23 footnote 16

48.3. The order of the CPD is set aside and replaced with an order that the plaintiff's claim is dismissed.

Wim Trengove SC

R T Williams SC

Applicant's counsel

Chambers
Cape Town and Johannesburg
22 June 2006

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