CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/06

MINISTER OF SAFETY AND SECURITY Applicant

versus

ALLISTER ROY LUITERS Respondent

Heard on : 17 August 2006

Decided on : 30 November 2006

JUDGMENT

LANGA CJ:

Introduction

[1] What are the limits of the liability of the state to pay damages for the actions of the police? Mr Allister Roy Luiters, the respondent in this matter, was severely injured when he was shot in 1995 by an off-duty policeman, Constable Lionel Siljeur, who was in the employ of the South African Police Service (SAPS). Mr Luiters is now a tetraplegic. The Cape High Court (the High Court) held that the Minister of Safety and Security (the Minister), who is the applicant in this matter, was in law liable for the injuries suffered by Mr Luiters. This decision was confirmed on appeal

by the Supreme Court of Appeal. This is an application by the Minister for leave to appeal against the judgment of the Supreme Court of Appeal.

Factual background

[2] The incident occurred on Jacaranda Street in Eersterivier late in the evening on 14 October 1995 while Mr Luiters was walking along in the company of two women. They were suddenly fired upon from behind by Constable Siljeur and they began to run away. Mr Luiters was however hit as he ran, sustaining gunshot wounds in the leg and neck. It was later established that on the same night and on Jacaranda Street, Constable Siljeur fired at two other men, Mr Percival Makati and Mr Abram Pietersen, hitting Mr Pietersen in the back and the ankle.

The proceedings in the High Court

[3] A civil claim for damages, instituted by Mr Luiters in the High Court against the Minister, followed. The parties however agreed that the Court should concern itself with the resolution of the issue of liability only and not the amount of damages to be paid. In the hearing, the High Court (per Thring J) accepted the account of events given by Mr William Davidse who testified in support of Mr Luiters.

[4] According to his account, Mr Davidse was driving a car in the area on the night in question, in the company of two passengers, Mr Warren Geldenhuys and Mr Lionel Arries. When the car turned into Jacaranda Street, they saw Mr Luiters lying motionless in the street and they drove towards him. They were then confronted by

Constable Siljeur. As their car stopped, the Constable, who was not in uniform and who looked nervous and bewildered, pointed the firearm he was brandishing at Mr Davidse. Mr Davidse tried for several minutes to calm him down, asking him repeatedly to lower his firearm, which the policeman eventually did. When asked what the problem was, Constable Siljeur replied that he was looking for people who had robbed him and who had disappeared into the nearby houses. He asked whether Mr Davidse and his passengers had seen the robbers. Mr Davidse was under the impression that the policeman wanted to arrest the robbers. This he had inferred from the type of gun that Constable Siljeur was carrying which, he was told by Mr Arries, was of a type carried only by police officers.

[5] Constable Siljeur eventually walked away. The car then moved closer to where Mr Luiters was lying and Mr Davidse's two passengers got out of the car and went to assist Mr Luiters. Suddenly Mr Davidse heard gun shots from behind and drove off down Jacaranda Street. He later turned the vehicle around to return to what he described as "the danger zone". He saw Constable Siljeur shooting at Mr Geldenhuys and Mr Arries. The two men were returning the fire and Constable Siljeur then fled. The police arrived a short while later but Constable Siljeur was at that stage nowhere to be seen.

[6] Captain Andre Steenkamp told the Court that he was one of the police officers who arrived at the scene after the shooting. He found Mr Luiters lying motionless in the street. A second person, who had been shot in the ankle, was lying nearby.

Nobody volunteered any information when Captain Steenkamp enquired from the people there who had shot the two men. The following day, Captain Steenkamp was directed to a house where he found and eventually arrested Constable Siljeur. The latter initially denied that he was a policeman. When asked by Captain Steenkamp to hand over his service revolver, he first denied that he had it but later retrieved it from a cupboard in the house and handed it over to Captain Steenkamp.

[7] Captain Steenkamp further testified that in terms of the relevant police standing order[1] a police officer who has discharged a firearm is obliged to report that he or she has done so immediately. No such report was made by Constable Siljeur.

[8] The record indicates that Constable Siljeur was convicted in the Parow Regional Court on eight counts of attempted murder and sentenced to an effective 11 years' imprisonment on account of the events of the night in question.[2] Although he was no longer in prison at the time of the High Court trial, neither the Minister nor Mr Luiters called him as a witness.

[9] From the fact that Constable Siljeur told Mr Davidse that he wanted to arrest the robbers, the High Court concluded that although he was off duty, Constable Siljeur had subjectively placed himself on duty at the time of the shooting and was accordingly acting in his capacity as a policeman. In the Court's view, apprehending criminals was an important police function and it was unlikely that a member of the

[1] Police Standing Order G251.15.1.

[2] There was also an unrelated charge of assault in respect of which he was convicted.

public would attempt such activities. The Court held that the subsequent failure by the policeman to report his use of the firearm and his denial of the incident were compatible with a realisation after the fact that he had gone too far and wished to distance himself from the incident. It held that the Minister had not discharged the onus to show that Constable Siljeur was in fact performing a function that took him outside the "kader van staatsdienaar" (cadre of civil servant) and concluded that he had acted as a servant of the state. The Minister was accordingly held to be vicariously liable for the injuries that had been inflicted on Mr Luiters.

The proceedings in the Supreme Court of Appeal

[10] On appeal, the Supreme Court of Appeal[3] (per Navsa JA) unanimously held that in light of the judgment of this Court in *K v Minister of Safety and Security*[4] the appropriate test to be applied in cases where employees had deviated from their normal duties is one that requires two questions to be asked. These questions had been formulated in *K* as follows:

> "The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of

[3] The judgment is reported as *Minister of Safety and Security v Luiters* 2006 (4) SA 160 (SCA).

[4] 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC).

> law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights."[5] (footnote omitted)

[11] Addressing the first question, the Supreme Court of Appeal considered Constable Siljeur's state of mind at the time of the shooting. Relying on the testimony given by Mr Davidse, the Court agreed with the factual inferences drawn by the High Court and concluded that Constable Siljeur had been looking for robbers and had acted with the authority of a policeman when he approached Mr Davidse and his companions. The Court reasoned that the Constable could not have been unmindful of his authority as a policeman, especially in light of the fact that he was using his service pistol. When he approached Mr Davidse, his behaviour indicated that he was not completely certain that the occupants of the car were not in some way connected to the robbery. This might have been the reason why he decided to fire on the two men when they stopped to help Mr Luiters. If Constable Siljeur had merely been on a shooting spree, he would not have been cautious in the manner in which he approached the car which was driven by Mr Davidse.

[12] The Supreme Court of Appeal rejected the suggestion by the Minister that Constable Siljeur's conduct after the incident indicated that he was not subjectively acting as a policeman. On the contrary, it found that his conduct was equally consistent with an attempt to distance himself from the shooting incidents because he realised that he had acted unlawfully. The Court concluded that the High Court had

[5] Id at para 32.

been correct in its finding that the policeman had intended to act in the course and scope of his employment. The Minister's appeal was dismissed with costs. It is against these findings that the Minister now appeals.

Which Constitution is applicable?

[13] The cause of action occurred in October 1995 while the interim Constitution was in operation and the proceedings were pending when the Constitution (the 1996 Constitution) came into force in February 1997. According to Item 17 of schedule 6 of the 1996 Constitution,[6] it shall have no application to pending proceedings unless the interests of justice require otherwise. The question that arises is which of the two Constitutions is applicable to this case.

[14] Section 35(3) of the interim Constitution requires a Court developing the common law to have regard to the spirit, purport and objects of the Bill of Rights. Section 39(2) of the 1996 Constitution contains an identical provision. Unlike the interim Constitution, however, the 1996 Constitution expressly provides that this Court has the power to develop the common law.[7] In *Du Plessis and Others v De Klerk and Another,*[8] the precise nature of the jurisdiction of the Constitutional Court

[6] Item 17 reads:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

[7] Section 173 of the Constitution reads:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[8] 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

under the interim Constitution was not determined,[9] but Kentridge AJ held that the jurisdiction of the Constitutional Court to develop the common law extended only to the power to ensure that the spirit, purport and objects of the Bill of Rights were taken into account by other courts. What seems clear from the judgments in that case is that the power of the Constitutional Court to develop the common law under the interim Constitution was far more limited than under the 1996 Constitution.

[15] The question then is whether this Court has the power to develop the common law or merely to set out the principles which another court should follow, or whether, in light of Item 17 of schedule 6 to the 1996 Constitution, it should deal with the matter on the basis that the interests of justice require this Court to apply the 1996 Constitution.

[16] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[10] this Court had to consider whether it would be in the interests of justice to maintain the limited constitutional jurisdiction of the Supreme Court of Appeal under the interim Constitution for cases which were pending when the 1996 Constitution came into force. The Court held that the interests of justice required that the jurisdiction of the Supreme Court of Appeal should not be restricted. The Court reasoned that

[9] Kentridge AJ at paras 63-64 and Mahomed DP at paras 86-87.

[10] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

> "[t]here is no logical reason why the SCA should be considered competent to enforce the interim Constitution in proceedings which were not pending on 4 February 1997, but precluded from doing so if the proceedings were pending. . . . The continued application of the jurisdictional provisions of the interim Constitution to cases pending before the SCA leads to disruptions, delays and unnecessary costs in the process of disposing of appeals."[11]

[17] Similarly, it would not be in the interests of justice to continue to enforce the limited jurisdiction of this Court in terms of the interim Constitution to develop the common law. It would mean that matters would be sent back by this Court, even where there is no need to do so, to the High Court or the Supreme Court of Appeal to develop the common law. This would, as was said in *Fedsure*, cause "disruptions, delays and unnecessary costs in the process of disposing of appeals". That, together with the fact that there is no substantial difference in the rights which are implicated in this case in both the interim and 1996 Constitutions, leads to the conclusion that it is in the interests of justice for the 1996 Constitution to be applied to cases where the development of the common law by this Court is necessary, even where the facts may have arisen during the operation of the interim Constitution.

Does the case raise a constitutional issue?

[18] This Court may decide only constitutional matters and issues connected with decisions on constitutional matters.[12] In *K* this Court explicitly recognised that questions relating to vicarious liability are not always purely questions of fact but that

[11] Id at paras 110 and 111.

[12] Section 167(3)(b) of the Constitution which reads: "The Constitutional Court . . . may decide only constitutional matters, and issues connected with decisions on constitutional matters". See also *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

policy and constitutional considerations are inherent in all questions of vicarious liability. Vicarious liability, it was stated, requires the

> "courts, bearing in mind the values the Constitution seeks to promote, [to] decide whether the case before it is of the kind which in principle should render the employer liable."[13]

The point was made that generally people should not be held liable for delicts they did not commit and the policy considerations that convince a court to depart from that principle prevent vicarious liability from ever being described as a purely factual issue. It is necessarily a mixed determination of policy and fact. The Court however made a distinction between the first, subjective leg and the second, objective leg of the test established and held that the policy considerations only become relevant in the second, objective leg of the test.[14] The first, subjective leg remains a purely factual inquiry.

[19] It was also held in *K* that the development of the rules governing vicarious liability in light of the spirit, purport and objects of the Bill of Rights is a constitutional issue.[15] The question is whether the applicant in this case seeks such a development.

[20] The submissions presented in oral argument on behalf of the Minister constituted the high water mark of his contentions. What was suggested was that the

[13] *K* above n 4 at para 23.

[14] Id at para 32, quoted above at para 10.

[15] Id at para 18.

test formulated in *K* should be varied in respect of off-duty police officers who put themselves on duty. The variation suggested is that the Minister should not necessarily be held vicariously liable even if the police officer subjectively acted as if he or she were on duty, but that an additional component should be added which would render the Minister liable only if the conduct of the police officer was, in addition, objectively closely related to the interests of the Minister. In other words, unlike the rule expounded in *K* in respect of on-duty police officers, subjective intent on the part of an off-duty police officer who places himself or herself on duty would not alone be sufficient to render the Minister vicariously liable.

[21] This would prevent the Minister from being held liable for those incidents where an off-duty police officer, though subjectively intending to fulfil his or her duties, acts in a manner which is completely unrelated to the purposes for which the officer was employed. It was argued that in these circumstances, the police officer would not objectively be fulfilling those duties. The main justification proffered for drawing the distinction between on-duty and off-duty police officers lay in the different levels of control exercised over on- and off-duty police officers respectively.

[22] What this submission amounts to is that the current common law test is wrong and must be developed. Quite apart from the manner in which the submission was introduced and its timing, it will be relevant to ask whether the development contended for is appropriate. That depends on whether there is a material distinction between police officers who are on-duty and those who, although off-duty, place

themselves on duty. The implication of this submission was that there is a difference and that the test in *K* does not accommodate this difference.

[23] When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will ultimately be successful. In the case of the development of the common law under section 39(2) of the Constitution, the question is whether the argument forces us to consider constitutional rights or values. Whether or not the submission is ultimately found to be sound is of course another matter altogether, and, at the level of an application for leave to appeal, that concerns the question whether the appeal on that ground has reasonable prospects of success. I find that the Minister's main contention does indeed raise a constitutional matter since it seeks the development of the common law of vicarious liability.[16]

[24] The next question is whether it is in the interests of justice to hear the matter. The answer to that question depends in part on the Minister's prospects of success. This is a matter to which I return later.

[25] In his written argument the Minister made two further submissions which, although not expressly abandoned, were superseded by the line of argument described above. It seems that the Minister continued to rely on them in the alternative and it is therefore necessary to consider whether those submissions raise constitutional issues.

[16] See *K* above n 4 at para 23.

[26] It was contended firstly that since *K* was a deviation case involving police officers who were on duty, the test for vicarious liability formulated in that case and on which the Supreme Court of Appeal had relied[17] should be extended to include the conduct of off-duty police officers. In my view, this argument does raise a constitutional issue. Leaving aside for the moment the question whether there is any doubt as to the application of the test to off-duty police officers, it is clear that the development of the rules of vicarious liability in the light of the values of the Constitution will ordinarily raise a constitutional issue.

[27] The Minister's further submission was directed at the application of the test formulated in *K*. The Minister queried the finding of the Supreme Court of Appeal that Constable Siljeur subjectively intended to act as a policeman at the time of the shooting. A number of reasons were given in support of the Minister's criticism of this finding by the Supreme Court of Appeal. The thrust of the Minister's submission, however, was to urge this Court to reconsider the facts as found by the High Court and the Supreme Court of Appeal. This submission does not raise a constitutional issue for as it was made clear in *K* the question whether a police officer has subjectively acted as a police officer is purely factual.

[28] To recap, I have found that the Minister's primary submission raised in oral argument does raise a constitutional issue, as does his second contention, while the

[17] See *Luiters* above n 3 at paras 19-26.

third submission relating to the factual finding of the Supreme Court of Appeal as to the subjective intention of Constable Siljeur does not. It is therefore necessary to consider whether it is nonetheless in the interests of justice to grant leave to appeal. Before I turn to consider that aspect, however, I should mention yet another string which counsel for the Minister had to his bow.

[29] It was argued on behalf of the Minister that once the Court assumes jurisdiction on one basis, it has the power to alter the findings of both the High Court and the Supreme Court of Appeal on factual issues even if we do not find it necessary to change the test. It may well be that the factual issues are issues that are connected to a decision on a constitutional matter in such circumstances.[18] But the question would remain whether it would be in the interests of justice for this Court to interfere with factual findings once it has decided that the common-law test needs no development. In reaching this conclusion, however, it should be borne in mind that very often a common-law rule is developed incrementally by application to a set of facts,[19] and therefore it is not always easy to distinguish sharply between findings of fact and findings of law.

[30] I turn now to the question of the interests of justice.

Interests of justice and prospects of success

[18] See *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at paras 29-30.

[19] *K* above n 4 at para 16.

[31] Even if a case raises a constitutional matter, this Court will only grant leave to appeal if it is in the interests of justice to do so. I have referred to the fact that the Minister only specifically raised the argument that a different test should apply to off-duty police officers for the first time in oral submissions to this Court. The Court has repeatedly stressed the importance of raising constitutional issues in the High Court.[20] It is a matter of fairness to the parties involved in the litigation and prevents this Court from sitting as a court of first and last instance. It is also especially important to have a judgment of the Supreme Court of Appeal in matters that concern the development of the common law.[21] The Court has also noted that when the constitutional issue at play involves the development of the common law, all courts have a responsibility to consider the impact of the Bill of Rights even if it has not been referred to by the parties.[22] Failure to raise a section 39(2) argument in the High Court or the Supreme Court of Appeal does not, therefore, invariably bar an applicant from this Court.[23] Each case will have to be evaluated on its own merits to determine what the interests of justice require.

[32] However, it is unnecessary to decide whether the Minister's tardiness in raising this argument should result in a denial of leave to appeal. It is trite that it will seldom be in the interests of justice to grant leave to appeal to this Court if there are no

[20] See, for example, *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 8-9; *S v Bequinot* 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) at para 15.

[21] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 58-59.

[22] *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2006 (8) BCLR 883 (CC) at para 26.

[23] Id at para 26.

reasonable prospects of success.[24] I remain unpersuaded that a variation of the test in *K* is required. In my view, the contention that the rules of vicarious liability should be different in respect of off-duty police officers who place themselves on duty to the rules governing on-duty police officers cannot succeed.

[33] What the Minister contended was that there is a difference in the level of control exercised over an off-duty police officer as compared to a police officer who is on duty. This is not necessarily so. But even if this contention were correct, that alone would not, in my view, warrant a different level of scrutiny. While vicarious liability is not based on the employer's control over an employee, the level of control exercised by the employer will obviously be a relevant factor in determining whether there was a sufficiently close link between the conduct and the employment when considering the second stage of the *K* test. The level of control is therefore already a relevant consideration. It does not seem necessary or desirable to elevate it to the status of a decisive factor which determines the test that applies.

[34] It moreover seems to me that counsel for Mr Luiters is correct in suggesting that the variation to the rule, as suggested by the Minister, would have the effect of lessening the emphasis on the responsibility of the Minister to ensure that police officers are properly trained and carefully screened to avoid the risk that they will behave in a completely improper manner. What it would mean is that the more improper the conduct of the police officer, the less likely the Minister will be held

[24] See, for example, *Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 27; *S v Bierman* 2002 (10) BCLR 1078 (CC) at para 9.

liable. This result is not one that accords with a Constitution that seeks to render the exercise of public power accountable.

[35] It follows in my view that once off-duty police officers are found on the facts of a particular case to have put themselves on duty, as they are empowered and required to do by their employer, they are for the purposes of vicarious liability in exactly the same legal position as police officers who are ordinarily on duty.

[36] As far as the alternative submission which seeks an extension of the *K* test to off-duty police officers is concerned, it would similarly not be in the interests of justice to grant leave to appeal. In *K* the Court made it clear that the test is applicable to all deviation cases, regardless of the identity of the employer or the status of the employee.[25] It is relevant to note that the decision in *Minister of Police v Rabie,*[26] which developed the two-stage test originally and from which the test in *K* was derived, was concerned with the case of an off-duty police officer who had placed himself on duty. "Extending" the test to off-duty police officers, as we are being requested to do, would amount simply to making explicit what is already implicit in *K.* This is in fact the basis on which the Supreme Court of Appeal and the High Court had proceeded.

[37] It follows that it would not be in the interests of justice to grant leave to appeal in this matter.

[25] *K* above n 4 at paras 24-44.

[26] 1986 (1) SA 117 (A). See also *K* above n 4 at paras 31-32.

Delay in institution of proceedings

[38] Although eleven years have passed since Mr Luiters was rendered tetraplegic, the legal proceedings are still not over, and to date he does not appear to have received any compensation. Because of the length of the delay and the absence of any explanation for it on the record, I issued directions prior to the hearing calling upon the parties to give the reasons for the delay by way of affidavit. It appears from those affidavits that summons was issued in October 1996 (one year after the shooting incident). The plea was filed on 18 November 1996. Mr Luiters' attorneys then requested that the matter be kept in abeyance pending the criminal trial. Constable Siljeur was convicted on 24 August 1998. For various reasons which were explained by the attorneys for Mr Luiters, they took no further steps until the matter was recommenced in January 2004. It appears from this account that the delays arose largely from problems they encountered and not from any failure of diligence on the part of the Minister's attorneys. It remains only to be added that delay in litigation is deeply undesirable and that it is important for courts to investigate significant delays where possible.

[39] Delays in a case of this sort are of particular concern. The compensation to which three courts have now held he is entitled will only be awarded to Mr Luiters more than a decade after he was shot. In this connection two factors of special relevance to persons severely disabled by catastrophe should be borne in mind. The first is that the early period of recovery and rehabilitation is particularly stressful and

likely to require expensive medical attention. The need for some form of financial support is particularly intense at this stage. The second is that the very disability giving rise to the damages weakens the capacity of the injured person to pursue the claim with all the vigour required.

[40] These questions were barely touched upon in argument, and in this judgment it would not be appropriate to go beyond saying that the law in this area should wherever possible function in a manner that promotes justice to all concerned in as practical a manner as possible.

[41] As far as the present matter is concerned, final judgment on the merits has now at last been given. There can be no doubt, therefore, that Mr Luiters can immediately apply for interim payments, under Rule 34A of the Uniform Rules of Court, for medical costs and loss of income.[27] Furthermore, the High Court which must now determine the quantum of Mr Luiters' damages may prescribe the procedure for the further conduct of the action and in particular for an early trial.[28] The issue of the state's liability now having been settled once and for all, it is to be hoped that the question of quantum will be resolved in the speediest possible fashion.

Costs

[42] In my view, there is no reason to depart from the ordinary rule that costs should follow the result.

[27] Rule 34A(1)-(4).

[28] Rule 34A(7).

Order

[43] The following order is made:

The application for leave to appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, van der Westhuizen J and Yacoob J concur in the judgment of Langa CJ.

For the applicant:	W Trengove SC and RT Williams SC instructed by the State Attorney, Cape Town
For the respondent:	HP Viljoen SC and HM Raubenheimer SC instructed by Smith & De Jongh Attorneys