IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 23/06

In the matter between:

THE MINISTER OF SAFETY & SECURITY Applicant

and

ALLISTER ROY LUITERS Respondent

SUBMISSIONS ON BEHALF OF RESPONDENT

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1. MAIN SUBMISSIONS ON BEHALF OF RESPONDENT

1.1 It is respectfully submitted that this honourable Court has thoroughly developed the common law regarding vicarious liability arising from delicts committed by policemen, whether they are on or off duty.

1.2 It is further submitted that the facts of this case do not warrant interference by the Honourable Court. The fact that the policeman was off duty was never an issue. An unconvincing attempt is now made by Applicant to categorise this as a new constitutional issue.

1.3 There is no indication that Applicant's constitutional rights were disregarded.

1.4 Accordingly, the application for leave to appeal should be refused with costs.

2. **BACKGROUND**

2.1 It is common cause that Mr Allister Roy Luiters (referred to herein in his original capacity, namely *"Plaintiff"*) was shot twice by Constable Lionel Siljeur with the latter's service pistol on 14 October 1995,[1] thereby rendering Plaintiff a tetraplegic.

2.2 Plaintiff instituted action against the Minister of Safety and Security (*"Defendant"* or *"Applicant"*) and constable Siljeur in the Cape Provincial Division[2]. When the trial commenced the claim against constable Siljeur was withdrawn[3].

2.3 Thring, J., was requested by agreement to decide whether the Defendant was liable for the damages suffered by plaintiff[4]. On behalf of Defendant it was eventually admitted that the appropriate notice had been correctly[5] given.

2.4 Only three witnesses testified. The two witnesses called on Plaintiff's behalf were Plaintiff[6] himself and a Mr William Richard

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1 Vol 8:698:17; Vol 1:22:para 2; Vol 1:25:para 2
2 Vol 1:1 to 8
3 Vol 1:36:5; Vol 1:54:24
4 Vol 1:55:15; Vol 1:18: para 5
5 Vol 2:179:15; Vol 3:249 and 250
6 Vol 2:147 to 174

Davidse.[7] After an unsuccessful application for absolution from the instance[8] Defendant called a single witness, namely Captain André Steenkamp[9] who was on duty at Kuilsrivier Police Station that night and was called to the scene at about 10pm.

2.5 As a result of what occurred on the evening of 14 October 1995 constable Siljeur was found guilty of attempted murder in the Parow Regional Court and sentenced to a period of imprisonment. Although the criminal record is voluminous[10] its evidential value is limited as a result of the basis on which it was admitted as an exhibit.[11]

2.6 Constable Siljeur was subpoenaed by Plaintiff's attorney to attend the proceedings. Although he refused to consult with Plaintiff's Counsel[12] he was available to the Defendant[13] to discharge the onus on the State alluded to in the **Mhlongo** case.[14] (It is submitted that reference in the case **at p 567E** to

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7 Vol 1:57 to Vol 2:140
8 Vol 2:182 to 183
9 Vol 2:185 to Vol 3:243
10 Vol 3:251 to Vol 7:686
11 Vol 1:53 *"sal dit geen getuieniswaarde hê nie"* (will have no evidential value); Section 17 Civil Proceedings Evidence Act No 25 of 1965; *"unless the parties consent it cannot be used as evidence of the facts stated"* – LH Hoffmann & DT Zeffert – The South African Law of Evidence (4th Edition) at p 152; Vol 8:699:12
12 Vol 2:141:5
13 Vol 2:141:25
14 Mhlongo v Minister of Police 1978 (2) SA 551 (A) at 567E

"the course and scope" of a policeman's employment applies with equal force to a policeman who has *"placed himself on duty"*).

2.7 In the absolution judgment the lines were clearly drawn by Thring, J.

"In my view the evidence which I have outlined, in brief outline is sufficient, would be sufficient to justify a reasonable court in coming to the conclusion that the Second Defendant was indeed engaged in pursuing the persons who had robbed or attempted to rob him, and that his object in pursuing them was so that he could arrest them. The pursuit of criminals and their arrest is a function essentially of the police force."[15]

2.8 Nevertheless, Defendant elected only to call Captain Steenkamp. In effect Captain Steenkamp confirmed that there is no distinction to be drawn between an on- and off-duty policeman's duties:-

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[15] Vol 2:183:18 to 24

2.8.1 In terms of standing orders policemen must at all times (*"te alle tye"*) enforce law and order.[16]

2.8.2 When fulfilling this obligation it will vary in degree depending on the enthusiasm and effectiveness of the policeman concerned.[17]

2.8.3 Together with the Police Act and Standing Orders the provisions of the Criminal Procedure Act are also emphasized during training and must be taken into consideration when the use of a firearms by a policeman is considered.[18]

2.8.4 A policeman who is off duty will be busy with police-work if he attempts to apprehend a criminal.[19]

2.8.5 A policeman can place himself on duty at any stage.[20]

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16 Vol 3:217:17; Vol 7:687:para 251.1
17 Vol 3:218:18; Vol 7:687:para 251.3
18 Vol 3:218:10; Vol 3:219:4
19 Vol 3:222:13 - 24
20 Vol 3:227:20 – 228:7; Vol 3:228:10 - 20; Vol 7:691:para 251.15.5.2.2 and .3

3. THE TRIAL COURT'S JUDGMENT

It will be argued that this appeal is not on an unresolved constitutional point in which *"the law is in flux"*[21] but against the factual findings of the Trial Court and the Court *a quo* and that that has adverse costs implications for the Applicant. For that reason more attention is devoted to the approach of both courts below in dealing with the facts (and the test to be applied in adjudicating upon them) than might ordinarily be warranted.

3.1 The Cape Provincial Division correctly accepted that the criminal record did not constitute evidence before it.[22]

3.2 Davidse impressed the honourable Court as a totally impartial and credible witness.[23]

3.3 The policeman's comments to Davidse that he was looking for certain robbers or persons who had attempted to rob him was accepted by the Court as a strong indication that he was engaged in police work.[24]

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21 Applicant's submissions, p 31, par 47
22 Main judgment CPD, Vol 8:699:12
23 Main judgment CPD, Vol 8:706:20
24 Main judgment CPD, Vol 8:707:10

3.4 The Court accepted that it was an important duty of members of the police force to pursue criminals or suspects, track them down and apprehend them.[25]

3.5 It is not so ordinarily the duty of a member of the public to involve himself in such activities.[26]

3.6 *Prima facie* thus, what the policeman said to Davidse was a strong indication that the policeman was at that stage performing his duties as a member of the police force. It was for that reason that the Court had dismissed the application for absolution from the instance.[27]

3.7 The Court carefully analysed the evidence of Applicant's only witness, Captain Steenkamp.[28]

3.8 It took into account that, according to the evidence of Captain Steenkamp, a policeman is, in a sense, on duty for 24 hours a

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25 Main judgment CPD, Vol 8:707:14 to 18
26 Main judgment CPD, Vol 8: 707:17 - 19
27 Main judgment CPD, Vol 8:707:19 to 708:2
28 Main judgment CPD, Vol 8:708, 709 and 710

day and can place himself on duty at any time to prevent crime or to perform an arrest.[29]

3.9 It was placed on record that the policeman refused to consult with Plaintiff's Counsel and that the Defendant's Counsel was given the opportunity to consult with him which she elected not to do.[30]

3.10 One of the main arguments on behalf of Defendant was that what the policeman told Davidse was inadmissible hearsay evidence. Thring, J. rejected this submission[31] based on the contemporaneousness and spontaneity of the statement.[32]

3.11 To establish whether the constable subjectively regarded himself as involved with police activities, the Court took into consideration, with reference to authority, what he had said spontaneously and by and large contemporaneously with his actions. [33]

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29 Main judgment CPD, Vol 8:710:6 to 11
30 Vol 2:141:3 to 9 and 25
31 Main judgment CPD, Vol 8:711:8
32 Main judgment CPD, Vol 8:711:22; Vol 8:713:10; Titus v Shield Insurance Co Ltd 1980 (3) SA 119 (A)
33 Main judgment CPD, Vol 8:712:4 – 713:12; Estate de Wet v De Wet 1924 CPD 341 at 342

3.12 The Court concluded that the words used by the policeman were more indicative of an intention to perform police duties than exact revenge.[34]

3.13 Accordingly, the Court found that it was probable that Siljeur had fired shots at the Plaintiff because he regarded him as one of the robbers or an accomplice of the robbers and that Siljeur acted in this manner in order to apprehend Plaintiff and take him into custody.[35]

3.14 The Court found that Plaintiff had succeeded in proving on a preponderance of probabilities that the constable acted within the scope of his employment as a policeman[36] and that the Defendant was thus *prima facie* liable for the constable's delict. Consequently the onus shifted to the State to demonstrate that Siljeur was occupied with some activity which placed him outside the scope of his appointment as servant of the State. No such evidence had been adduced.[37]

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34 Main judgment CPD, Vol 8:713:15
35 Main judgment CPD, Vol 8:713:16 to 21
36 Main judgment CPD, Vol 8: 714:5
37 Main judgment CPD, Vol 8:714:1 to 14; Mhlongo v Minister of Police 1978 (2) SA 551 (A)

3.15 The Court took the subsequent conduct of Siljeur into consideration and was of the opinion that neither his subsequent non-compliance with Standing Orders, nor his denial the following day of involvement in the incident, were sufficient reasons to refute the *prima facie* case against the Defendant.[38]

3.16 Thus, to summarise, the judgment of Thring, J. is based on a strong credibility finding, careful evaluation of the facts and probabilities, and application of the correct tests as to onus and State accountability.

4. THE GROUNDS OF APPEAL AGAINST THE CPD JUDGMENT

4.1 The attack against the CPD judgment had nothing to do with an off-duty policeman or the test applicable in this regard.

4.2 It was factual considerations, the substance of which is repeated in paragraph 44 of Defendant's submissions to this honourable Court, that were relied upon.[39]

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38 Main judgment CPD, Vol 8:714:14 to 25

39 Notice of Appeal, Vol 8:727: paras 6 and 9

5. THE JUDGMENT OF THE SUPREME COURT OF APPEAL AND EVIDENCE RELATED THERETO

5.1 The judgment of the honourable Court *a quo* again considered whether the policeman was acting within the course and scope of his employment as a member of the South African Police Service.[40]

5.2 The evidence of the material witness, Mr Davidse, was reconsidered. Siljeur came running to the vehicle with his service pistol in his hand. He told Davidse and his two friends - passengers in the car - that someone had attempted to rob him and asked them whether they had seen where the robbers had run to. He said he was looking for the robbers who had run into premises nearby. Davidse's impression was that he wanted to arrest people.[41]

5.3 When one of Davidse's passengers informed him that only policemen had this type of firearm he was relieved to hear it. (The honourable Court erred in saying that this remark was passed before Siljeur spoke to them, it appears to have been

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40 Vol 9:736:6
41 Vol 9:737: para 5

made while he was speaking to them, but it is submitted that nothing turns on this).[42]

5.4 The admissibility of what the policeman told Davidse was not challenged in the SCA.[43]

5.5 It is respectfully pointed out that, during the policeman's enquiry no attempt was made by him to shoot any of the occupants of the motor-vehicle. The policeman was thus not simply *"running amok*".

5.6 Captain Steenkamp's evidence that an off-duty policeman can in terms of Standing Orders place himself on duty when an offence is committed in his presence was not in dispute[44] and the honourable Court quoted a Standing Order to which Steenkamp was referred which enjoins members of the police force performing duties *"in circumstances perilous to life"* to be adequately armed and not to hesitate to make use of such

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42 Cf: Vol 9:737:11 – 14 with Vol 1:61:16 – 62:7

43 Vol 9:741:17 - 23

44 Vol 9:738: para [10]

firearms for *"self-preservation or the protection of life and property"*.[45]

5.7 The Court referred to the fact that the policeman, despite his availability during the trial, was not called as a witness by Defendant.[46]

5.8 Against this factual background the Supreme Court of Appeal, mindful of the need *"not to cause future confusion and to ensure an orderly development of our jurisprudence"*, proceeded to examine the relevant authorities, including the very case which forms the pivot of Appellant's attack upon the judgment in the Court below, namely **K v Minister of Safety & Security**, in paragraphs [13] to [19] of its judgment.[47]

5.9 In succeeding paragraphs the honourable Court *a quo* considered the judgment of the Trial Court, agreed with it,[48] and went on to deal with the submissions made on behalf of

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45 Vol 9:739: para [11]
46 Vol 9:739: para [12]
47 Vol 9:738 / 741; 2005 (6) SA 419 (CC)
48 Vol 9:741 / 2: pars [20] and [21]

Applicant.[49] It rejected such submissions and provided reasons for such rejection.

5.10 It is respectfully submitted that none of the reasoning of the Court *a quo* can be faulted and that it, like the Trial Court, handed down a judgment entirely in accord both with the authorities on vicarious liability in cases such as this, and with the facts of this particular case. The topic is dealt with more fully when the nature of Applicant's criticism of the conclusion reached by the two courts below, as it appears from the submissions filed on Appellant's behalf, is analysed and answered.

6. THE APPLICATION FOR LEAVE TO APPEAL TO THIS COURT

6.1 In the light of the fact that written Submissions have now been filed on Applicant's behalf, setting out the case which is to be presented in this honourable Court, there does not seem to be any purpose in dealing with the contentions put forward in the supporting affidavit to the application for leave to appeal as to why such leave should be granted.

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[49] Vol 9:742 / 4: pars [22] to [28]

6.2 The fact is, though, that it was on the basis of what was said in that application that the honourable Chief Justice provided directions for the hearing. Consequently, misleading factual statements in the affidavit supporting such application are relevant in considering, at least, the appropriate costs order to be made in the matter. The following averments on oath are indeed misleading.

6.3 Mr Truter says in paragraph 2.2.1 that *"… respondent was shot and injured <u>before</u> Davidse and his two passengers arrived in Jakaranda Street. The time between the shooting of the respondent and Davidse's arrival in Jakaranda Street is not known."*[50]

6.3.1 Plaintiff testified that the incident occurred at approximately 21h50.[51]

6.3.2 Davidse testified that he entered the street between 21h00 and 22h00.[52]

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50 Vol 9:762:6
51 Vol 2:149:12 - 13
52 Vol 1:59:1 - 5

6.3.3 It was thus not many minutes before Davidse's arrival that the shooting occurred.

6.4 Secondly, it is misleading to say, as is done in paragraph 22.2.2 of the affidavit, that *"There is no evidence on record as to the time period which elapsed after Davidse brought his motor-vehicle to a standstill and Siljeur coming to speak to him."*[53] The inference from the record is inescapable that no more than minutes elapsed between Davidse bringing his vehicle to a standstill and Siljeur coming to speak to him. His evidence is that when he turned into Jacaranda Street he saw both Plaintiff lying in the road and a man running, swinging a handgun in the air. It was this that made him stop to prevent *"worse things perhaps happening";* and it was after he had done so that the person with the weapon who caused him to stop came around his vehicle and the conversation between them ensued.[54]

6.5 Thirdly, deponent states that *"There was nothing which prevented the respondent from calling Siljeur to confirm*

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53 Vol 9:762:8
54 Vol 1:59.5 – 60.11

Davidse's evidence that Siljeur has been (sic) *robbed or people attempted to rob him."*[55]

It is difficult to see how this statement can be made on oath when, in open Court, Plaintiff's counsel placed on record that Siljeur had refused to consult with him, that in the circumstances he did not intend to call him as a witness, but that he was available as a witness if Defendant's counsel wished to call him. Immediately thereafter Defendant's counsel told the Court that she did not wish to call Siljeur.[56] No explanation is given as to why Defendant's counsel refused even so much as to consult with Siljeur, let alone as to why she did not call him on Defendant's behalf.

6.6 Fourthly, the deponent in the application says, in paragraph 27, that *"Siljeur also appears to have had little confidence in the robbery story, hence its abandonment on the night of 14 October 1995"*. This is repeated in a somewhat different form in paragraph 31 where he says *"Siljeur had already jettisoned the robbery story on the night of the shooting, and refrained from*

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55 Vol 9:768:8 - 10

56 Vol 2:141:3 – 9 and 25

resurrecting it when he stood trial on the criminal charges in 1998".

6.6.1 These statements are simply untrue. Siljeur never abandoned what he had said to Davidse on the night in question. That is evident from the papers before this honourable Court. In the judgment of the honourable Magistrate the following passage occurs:

"Beskuldigde ontken dat hy gepoog het om die persone soos vervat in the klagstaat te vermoor. Hy ontken (sic) *dat hy op die aand van die voorval te Jakarandastraat was. Hy was op pad huis toe na hy by die plaaslike winkelsentrum gaan bel het. In Jakarandastraat het manspersone hom agtervolg. Hulle het hom van agter gegryp, sy hande probeer vashou en sy dienspistool, aangesien hy 'n polisiebeampte is, is geroof. Hy het egter dit reggekry om die vuurwapen terug te kry. Die persone het toe op hom gevuur. Hy het teruggeskiet en agter 'n muur gaan skuil."*[57]

[57] Vol 6:626:28 – 627:8

6.6.2 This statement in the judgment is borne out by the evidence of Siljeur in the criminal trial (in which the deponent alleges that Siljeur *"jettisoned the robbery story"*):

"Nou hierdie voertuig … wat het hulle … wat het daar gebeur by die voertuig? --- Ek het vroeër … die voertuig het stilgehou by my. Ek het vir die persone gewys … beduie hulle moet wegkom want daar's mense wat op my skiet.

Ek sien. Wat het u vir hulle gesê? --- Daar's ouens wat my wou beroof het."[58]

6.7 Fifthly, the deponent devotes two pages of his affidavit to a summary of the evidence of Captain Steenkamp and ends by saying that it is *"destructive of the notion that Siljeur executed police duties at the time of the shooting."* Again, it is inexplicable how, in a fair account of the proceedings, the deponent could neglect to mention Steenkamp's evidence that a police officer can, in the circumstances put forward on Plaintiff's

[58] Vol 5:500:23 - 29

behalf (Siljeur's statement that he had been robbed and was looking for the robbers) place himself on duty and function in that capacity.[59]

6.8 It is open to doubt whether Applicant would have been granted the right to address this honourable Court if these distortions in the application were not present.

7. THE CASE LAW REFERRED TO BY DEFENDANT

7.1 Defendant firstly refers to five cases where delicts were committed by off-duty policemen. The cases are dealt with hereinunder.

7.2 In **Rabie's** case[60] the policeman was a sergeant in the SA Police Force employed as a mechanic to repair police vehicles. He was off duty when he effected an arrest on the Plaintiff. Although *mala fide* the policeman was (mis)using his powers as a policeman. The subjective and objective tests were applied.[61] The Minister was held to be liable.

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59 Vol 9:766:4 – 768:2

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

61 at 134E

7.3 In **K's** case this honourable Court considered **Rabie's** case and embroidered on the abovementioned test by incorporating in the objective test the spirit, purport and objects of the Bill of Rights.[62]

7.4 What this Court thus eventually formulated was in respect of off-duty policemen as well.[63]

7.5 In **Tshabalala's** case[64] the Plaintiff was shot in the back by a municipal policeman who was off duty and in private clothes. He threatened to *"detain"* the Plaintiff. The threat to arrest and attempt to restore order were taken into consideration in holding that the person was acting as a policeman. It was held that the policeman had acted in the course and scope of his duties as a servant of the Defendant and that the Defendant was vicariously liable for the delict. This was based on *"factual findings"*.[65]

7.6 This Honourable Court referred with approval to **Tshabalala's** case in **K's** case.[66]

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62 K's case at 436C - E
63 K's case at 437A
64 Tshabalala v Lekoa City Council 1992 (3) SA 21 (A)
65 At 31J
66 Footnote 28 on page 433 when referring to the general principle of vicarious liability that holds an employer liable

7.7 **Tshabalala's** case is thus authority for the proposition that (as in the present instance) an off-duty policeman can, in appropriate circumstances, be regarded in exactly the same way as a policeman who is officially on duty. **Tshabalala** is not a deviation case.

7.8 In **Wilson's** case[67] the Plaintiff was involved in a relationship with the policeman's ex-wife.[68] She was not fully clothed and with Plaintiff in his flat when the off-duty policeman paid them a visit. The policeman assaulted Plaintiff and threatened to kill him. The policeman did not attempt to arrest Plaintiff.[69]

7.9 Van Heerden JA (who delivered a dissenting judgment in **Rabie's** case) explains how the Rabie test should be applied. The policeman in **Wilson's** case never intended to act as a policeman and the Minister was successful.[70] It is clear that the policeman in **Wilson's** case was dealing with his own personal matters.

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67 Minister van Wet en Orde v Wilson 1992 (3) SA 920 (A)
68 923D
69 924A
70 928A

7.10 In **Macala's** case[71] an off-duty policeman shot the Plaintiff in an incident that had nothing to do with his work. A woman was involved. There was no evidence to suggest that the policeman subjectively intended to exercise police powers.[72] It was explained how the Rabie test should be applied.[73]

7.11 The **Ngobo** case[74] was also considered in **K's** case[75]. In **Ngobo** an off-duty policeman shot a person who had attended a wedding reception. They had a late night altercation. At no stage did the constable attempt to effect an arrest or purport to be acting in his official capacity. The State was absolved of liability.[76]

7.12 The Court found that the standard test adequately served the interests of society. It was held that to the extent that "***Rabie's*** *case may be said to have replaced the standard test"* (for vicarious liability), it was wrongly decided.[77]

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71 Macala v Maokeng Town Council 1993 (1) SA 434 (A)
72 at 441E
73 at 440H
74 Minister of Law and Order v Ngobo 1992 (4) SA 822 (A)
75 Footnote 20 on page 431
76 at 826C and 828B
77 832C

7.13 It is thus submitted that the off-duty policeman does not warrant a special category for this Court to deal with. It has sufficiently been covered in **K's** case. It was never an issue in the CPD or SCA in the present case. This Court had these decisions in mind when the common law was developed in **K's** case. This Court furthermore was aware of how the Rabie test or standard test had been applied over the years.

7.14 The other cases referred to by Defendant (not pertaining to off-duty policemen) were all considered by this Court in **K's** case, i.e. **Ess Kay Electronics[78], Phoebus Apollo[79]** and **Japmoco[80].**

8. THE MERITS OF THE APPLICATION

8.1 It is submitted that the application for leave to appeal is not only without merit on the facts and the application of accepted legal principles to them, but contrived, in the sense that under the pretext of seeking development of the law of vicarious liability with reference to off-duty policemen, the real object of the

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78 Ess Kay Electronics v First National Bank of SA 2001 (1) SA 1214 (SCA) (considered in footnote 28, page 433 in K's case)

79 Phoebus Apollo Aviation v Minister of Safety & Security 2003 (2) SA 34 (CC) (footnote 28, page 433)

80 Minister van Veiligheid & Sekuriteit v Japmoco 2002 (5) SA 649 (SCA) (footnote 25 on page 432 of K's case)

intended appeal is to challenge the factual findings of the Court below.

8.2 As to the facts and the application of accepted legal principles to them:

8.2.1 In the light of what has gone before it is submitted that there is no merit in the application, because the judgment of the Court of Appeal had regard to facts which were not in dispute, applied the standard test for vicarious liability to them as expounded in the very latest decision on the topic by this honourable Court (**K's** case) and correctly held Applicant liable.

8.2.2 Even if there was an element of revenge present in Siljeur's efforts to find those who had tried to rob him, that would not affect the outcome in the court below if the test set out in **K's** case (and repeated in para [19] of the judgment of the Court *a quo*) were applied.[81]

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[81] Vol 9:741: para [19]

8.2.3 Moreover, it is respectfully pointed out that if the finding of the Court *a quo*, while applying the correct test, had been wrong, this Court would not interfere with such decision:

"This Court's jurisdiction is confined to constitutional matters and issues connected with decisions on constitutional matters. It is not for it to agree or disagree with the manner in which the SCA applied a constitutionally acceptable common-law test to the facts of the present case: …"[82]

8.3 As to the contrived nature of the application and its true import:

8.3.1 In the light of the history of the litigation in which Applicant's stand on legal points (such as the admissibility of Siljeur's statement to Davidse) has not always been consistent and of Applicant's failure, either in the Trial Court or the Court *a quo*, to put forward an argument for a different approach to the test for the vicarious liability of the State where an off-duty policeman is concerned, the best (indeed the only) source of information as to what is

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82 Phoebus Apollo Aviation CC 2003 (2) SA 34 (CC) at 38G and State v Boesak 2001 (1) SA 912 (CC) at para [15]

now contended on Applicant's behalf is the written argument filed in this honourable Court.

8.3.2 Reference is made to the *"development"* of the law by this honourable Court in two passages of the written submissions on Applicant's behalf. For convenience sake they are quoted. In paragraph 7.2 (page 5) the following is said:

> *"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 K but we submit that the test it endorsed, developed and explained in that case <u>should be further developed</u> by making it applicable to cases of this kind as well."*
>
> (Emphasis added)

8.3.3 There are two answers to this submission. The first is that no development of the law is required to cover the case of police officers who, while not on duty, are faced

with a situation which requires their official intervention, because their situation thereafter equates exactly with that of police officers who are on duty when faced with the same situation.

The second answer is that the judgment of the SCA amply demonstrates that the test it was developing was indeed that from **K**. It is, with respect, impossible to avoid that conclusion when regard is had to the reference to that case and to the cases cited in it, to the quotation of the tests outlined in them, and to the application of those tests to the facts of the present case, in the judgment of the Court *a quo (*Paragraphs [14] to [28] of the judgment).

8.3.4 There is reference to *"development"* of the common law again under the heading *"CONCLUSIONS"* in paragraph 46, page 31, which reads as follows:

"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. The second is at the level of the application of the K test."

(Emphasis added)

8.3.5 As to the development of the common law *"by the extension of the **K** test"* : the answer is, again, firstly that the **K** test does not need extension to be applicable to off-duty police officers; and, secondly, that it was demonstrably applied in the Court *a quo*. It is submitted once more that it was correctly applied. But even if it was not, on the basis of the authority quoted in paragraph 8.2.3 above, that would not justify this honourable Court's interference.

8.3.6 As to the Constitution guiding *"the determination of this case … at the level of the application of the **K** test,"* there is no indication in Applicant's submissions of what constitutional provisions or principles should govern such

"application". All that is to be found – at great length – is how the SCA's factual findings were wrong. This is dealt with in paragraph 8.4 below.

8.4 Where the present case is dealt with, under the heading *"THIS CASE"* from page 23 to page 30 of the written submissions by Applicant, it is the factual findings, not the principles which underlie them, which are criticised.

8.4.1 So, on page 42, it is submitted that:

(a) Siljeur never intended to act as a police officer;

(b) Plaintiff, in any event, did not discharge the onus of proving that he did;

(c) There was no objective link between his conduct and the affairs of State at all;

(d) Siljeur *"seemed to have run amok"* for reasons which remain unclear; and

(e) he did not act, either subjectively or objectively as a police officer that night.

8.4.2 The remaining submissions under this section of Applicant's Heads (running to some seven pages) deal with alleged fundamental errors by the SCA, including *"impermissible speculation"*, failure to have regard to *"overwhelming evidence that pointed the other way"* and erroneous evaluation of Siljeur's conduct.

8.4.3 None of these submissions are borne out by the record. But even if they were, they would not justify interference by this honourable Court.

8.5 Finally, it is submitted on Applicant's behalf (paragraph 45.2, page 30) that the **K** test should be applied in a manner "*which gives effect to the spirit, purport and objects of the Bill of Rights*". No specific provision of the Bill of Rights is invoked in aid of this submission. While the submission is accepted as being correct, it is respectfully submitted that the protection provided to ordinary citizens by the Bill of Rights far outweighs

that enjoyed by the State in circumstances such as this. The following considerations are relevant:

8.5.1 Plaintiff's right to life and security of the person were at the time protected by Sections 9 and 11 of the Interim Constitution, Act No. 200 of 1993 and were, no less than were the rights of the Applicant in **K's** case *"of profound constitutional importance"*[83];

8.5.2 The South African Police Service, under the same Constitution, was enjoined by the provisions of Section 215 to prevent crimes, investigate offences, maintain law and order and preserve the internal security of the Republic;

8.5.3 Bearing in mind what was described in **K** as *"… the policy-laden character of vicarious liability"*[84] it is submitted that Plaintiff's constitutional rights far out-weigh those of Applicant.

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83 K, 2005 (6) SA at 430A

84 K 432B

9. **COSTS**

While this honourable Court frequently does not order the unsuccessful party to pay the costs of the successful party, in order not to discourage access to the Court, it is submitted that this is a prime example of a case in which Applicant should be ordered to pay Respondent's costs. There are, of course, a number of cases in which, because of the circumstances, the honourable Court has done just that. See, for instance, **Motsepe v Commissioner for Inland Revenue, 1997 (2) SA 898 (CC) at 912, para [31]** and **Beinash & Another v Ernst & Young & Others, 1999 (2) SA 116 at 128, para [30]**. The following factors justify such an order:

9.1 The contrived nature of the application (in which an appeal on the merits is brought in the guise of constitutional development of the law of vicarious liability), is dealt with in paragraph 8 above.

9.2 The omissions from and misleading statements in the affidavit in support of the application for leave to appeal, which are dealt with in paragraph 6 above.

9.3 The nature of the parties. On the one hand, a paraplegic, bereft of the use of all four limbs as a result of the injuries he received more than 10½ years ago. The struggle which indigent litigants such as this have to obtain and retain legal representation could hardly be more graphically illustrated than in the affidavit by De Jongh which was supplied at the direction of the honourable Chief Justice.

9.4 On the other side there is the State, with its inexhaustible resources. Naturally the police cannot be expected to pay out claims *ad misericordiam*. But the nature of the present application could well send a message to those who represent such plaintiffs that the process will be drawn out.

9.5 It is respectfully submitted that the circumstances of this case could well, ordinarily, justify costs on the scale as between attorney and client. As was said in **In re: Alluvial Creek Ltd 1929 (CPD) 532 at 535** about costs on the attorney and client scale: *"Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any*

reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

9.6 Considering this honourable Court's attitude to the award of costs attorney and client costs are not sought. But it is submitted that costs, including those of two counsel should be awarded to Respondent.

10. **CONCLUSION**

In the premises it is respectfully prayed that the application be dismissed, with costs, including those of two counsel.

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HP VILJOEN S.C.

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H M RAUBENHEIMER S.C.
Respondent's Counsel
Chambers
Cape Town
30 June 2006

LIST OF AUTHORITIES

1. Mhlongo v Minster of Police 1978 (2) SA 551(A)

4. Titus v Shield Insurance Co Ltd 1980 (3) SA 119 (A)

5. Estate de Wet v De Wet 1924 CPD 341 at 342

6. K v Minister of Safety & Security 2005 (6) SA 419 (CC)

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

7. K v Minister of Safety & Security 2005 (3) SA 179 (SCA)

8. Tshabalala v Lekoa City Council 1992 (3) SA 21 (A)

9. Minister van Wet & Orde v Wilson 1992 (3) SA 920 (A)

10. Macala v Maokeng Town Council 1993 (1) SA 434 (A)

11. Minister of Law & Order v Ngobo 1992 (4) SA 822 (A)

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

13. Phoebus Apollo Aviation v Minister of Safety & Security 2003 (2) SA 34 (CC)

14. Minister van Veiligheid & Sekuriteit v Japmoco 2002 (5) SA 649 (SCA)

15. State v Boesak 2001 (1) SA 912 (CC)

16. Motsepe v Commissioner for Inland Revenue 1997 (2) SA 898 (CC)

17. Beinash & Another v Ernst & Young & Others 1999 (2) SA 116

18. In re Alluvial Creek Ltd 1929 (CPD) 532