

## THE ROLE PLAYED BY TRUST IN IMPOSING VICARIOUS LIABILITY ON THE STATE FOR THE INTENTIONALLY COMMITTED VIOLENT CRIMES OF POLICE OFFICERS

### 1 *Introduction*

In recent years the state's delictual liability has been expanded to a significant degree. Although the state has been held liable in delict for harm arising from a diverse array of factual scenarios (see *eg* the South African Law Reform Commission "Medico-legal Claims" Paper 33, Project 141 (2017)), the overwhelming number of the state-liability cases appear to deal with harm arising from violent crime. In this context, courts have held the state (mostly the minister of safety and security or, as the office is now known, the minister of police) vicariously liable in two types of circumstances. On the one hand liability has followed where state employees (mostly police officers, but also other state employees such as public prosecutors) negligently and wrongfully failed to prevent the plaintiff's harm arising from a crime (*eg Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) and *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA)). In other instances vicarious liability has been imposed on the state for the harm that was intentionally and wrongfully caused by its employees (*eg K v Minister of Safety and Security* 2005 6 SA 419 (CC) and *F v Minister of Safety and Security* 2012 1 SA 536 (CC)). This note focuses on aspects related to the judicial expansion of the state's liability for harm arising from crime in the latter situation. It does so for the following reason.

Two recent judgments by the supreme court of appeal have been criticised as undermining the stability that was introduced into this area of the law by the leading judgment of the constitutional court in the *K* (CC) case (Scott "Intentional delicts of police officers: a hiccup from the supreme court of appeal" 2017 *TSAR* 872 874-875). In *Minister of Safety and Security v Morudu* ((1084/13) 2015 ZASCA 91 (29 May 2015)) and *Minister of Safety and Security v Booyens* ((35/2016) 2016 ZASCA 201 (9 December 2016)), where state employees respectively assaulted and murdered members of the public, the supreme court of appeal declined to hold the state vicariously liable for the harm arising from these intentionally committed crimes of its employees. Scott has argued that these judgments raise "the question of a possible turning-point in the approach towards application of the *K* test for establishing a sufficiently close link between an employee's delict and his or her employment" (Scott 876). The judgments in the *Booyens* and *Morudu* cases therefore call for a fresh evaluation of the reasoning espoused in the *K* case and subsequently entrenched in the *F* (CC) case. Such an analysis may assist in better understanding the reasons for the court's perceived deviation from the dispensation introduced by the *K* and *F* cases.

This article, however, does not aim to engage solely with the judgments in the *Morudu* and *Booyens* cases (for such an analysis, see Scott), but attempts to provide an explanation for the court's decision to deny vicarious liability in both cases. In particular, critical attention will be paid to the absence or presence of a relationship of trust between the victim of a crime and the perpetrator. Ever since the judgments in the *K* and *F* cases, this factor has played a central role in holding the state vicariously liable for the intentionally committed violent crimes of police officers.

It will be argued that the supreme court of appeal's treatment of this consideration explains the court's respective decisions in the *Morudu* and *Booyens* cases.

## 2 *Establishing vicarious liability in the context of intentional delicts*

Before continuing, however, it would be worthwhile to emphasise the particular difficulty involved with establishing vicarious liability within the context of intentional delicts and to summarise the development of the legal principles that has seemingly been challenged by the recent judgments of the supreme court of appeal (Scott 876).

Although it is well-established that employers may be held vicariously liable for delicts committed by their employees during the course and within the scope of their employment (even in the event that employees perform tasks authorised by employers in an unauthorised manner – see eg *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 4 SA 34 (SCA)), it is problematic to determine whether a delict occurred within the course and scope of employment in so-called deviation cases (Scott 2017 TSAR 872-874; Loubser and Midgley (eds) *The Law of Delict in South Africa* (2017) 476-480; Neethling and Potgieter *Neethling-Visser-Potgieter Law of Delict* (2015) 395-396). Typically, these are cases where employees intentionally engage in conduct that could be described as a departure from the tasks for which they were appointed. Moreover, it is especially challenging to establish whether a deviation in the form of an intentionally committed crime may be regarded as having occurred within the course and scope of employment, because such conduct may be described as “the very antithesis of an act in the course and scope of employment” (Neethling and Potgieter 395).

To deal with this problem, courts have devised different approaches over time. For a considerable period *Feldman (Pty) Ltd v Mall* 1945 AD 733 was the leading case in determining the third prerequisite for vicarious liability in deviation cases (establishing if a delict was committed within the course and scope of employment) (Scott 2017 TSAR 878; Wagener *An Assessment of the Normative Bases for the Doctrine of Vicarious Liability in South African Law, and the Implications for its Application* (2011 thesis SA) 107-108). In ascertaining whether this requirement has been met, the then appellate division focused on the nature of the employee's duties and the degree of deviation therefrom. The approach adopted in the *Feldman* case has been described as the so-called abandonment of duty approach (Scott *Middelllike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) 159-160; Wagener 105-106, 117-118) and is essentially focused on determining whether “the employee, despite deviating for his own interest, completely distanced him from his obligations” (Scott (1983) 159-160 (own translation); see also Watermeyer CJ in the *Feldman* case 735-736).

Some 41 years after the *Feldman* case, the court formulated a different approach for vicarious liability in deviation cases in *Minister of Police v Rabie*:

“It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention.... The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test” (1986 1 SA 117 (A) 134).

The law was further developed by the constitutional court in the *K* (CC) case, where the so-called standard test set out in the *Rabie* case was reformulated so as to reflect and conform to the rights and values set out in the constitution:

“This [second] question [identified in the *Rabie* case] does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is ‘sufficiently close’ 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” (the *K* (CC) case par 32).

Scott has correctly labelled this judgment “a Copernican turning-point in the history of cases dealing with employers’ liability for the intentional delicts of their employees in general and, more specifically, state liability for intentional wrongs committed by members of the South African Police Service” (Scott 2017 *TSAR* 873).

In the next section more attention will be paid to the reasoning of the court in the *K* and *F* cases (which subsequently approved the *K* decision) as well as the specific factors identified in applying the developed vicarious liability test in those cases.

### *3 The reasoning by the constitutional court in the K and F cases*

Before turning to the judgments in the *Morudu* and *Booysen* cases, attention will first be given to the reasoning of the constitutional court in the *K* and *F* cases. This is important because it illustrates the development of the law relating to the state’s vicarious liability for the intentionally committed violent crimes of police officers and provides the background against which the supreme court of appeal’s recent judgments must be properly evaluated.

In the *K* case three on-duty police officers, driving a marked police vehicle and wearing their official uniforms, gang-raped the plaintiff after having offered her a lift home, and the question for consideration was whether the minister of safety and security, as employer of the police officers, could be held vicariously liable for the harm caused by its employees. Writing for the majority of the supreme court of appeal, Scott JA interpreted this to be a deviation case, but did not apply the *Rabie* case’s test to determine vicarious liability. Instead, he adopted the approach set out in the *Feldman* case and focused on the question whether the police officers’ deviating conduct could be regarded as the execution of the duties for which they were appointed (*K v Minister of Safety and Security* 2005 3 SA 179 (SCA) par 4). Holding that the police officers’ deviation was of such an extreme degree that it could not be said that they were still exercising the functions for which they were appointed (the *K* (SCA) case par 5), the court refused the imposition of vicarious liability on the state. The judgment was primarily based on the view that the police officers’ conduct had been entirely self-serving and unauthorised, and that it could therefore not be said that they were discharging their employment duties (the *K* (SCA) case par 5).

On appeal to the constitutional court, O’Regan J confirmed that this was a deviation case but applied the standard test, as developed in the *Rabie* case. Despite the fact that the intentional committing of a heinous violent crime like rape may be described as the very antithesis of a police officer’s employment duty (the *K* (SCA) case par 15), the court nevertheless held the employer vicariously liable. It did so because, in its view, although the police officers’ conduct was subjectively in their own interest, there was, objectively regarded, a sufficiently close connection between their wrongdoing and their employment so as to hold the minister vicariously liable in terms of the *Rabie* case’s test (the *K* (CC) case par 51). The following factors were identified in justifying this conclusion.

First, the court emphasised that the constitutional rights to security of the person, dignity, privacy and equality are of paramount importance (the *K* (CC) case par 51). It also reaffirmed the police officers' constitutional duty to promote safety and to protect members of the public and highlighted women's right to be free from sexual violence (the *K* (CC) case par 52). Secondly, the fact was highlighted that the employees were on-duty, uniformed police officers driving a marked police vehicle (the *K* (CC) case par 52). O'Regan J accordingly held that it had therefore been objectively reasonable for the victim to accept their offer of assistance and to place her trust in them as police officers (the *K* (CC) case par 52). Thirdly, although the three police officers had each acted positively in raping the plaintiff, the court held that each of them individually also failed to perform their constitutional duties to protect the plaintiff from harm and that such a failure, together with the other two factors, provided a sufficient basis for establishing the necessary link between their intentional wrongdoing and their employment as policemen (the *K* (CC) case par 53).

In the *F* case the plaintiff instituted a delictual claim against the minister of safety and security after one of the state's employees, a police detective in plain clothes and on standby duty, raped the plaintiff in the process of giving her a lift home in an unmarked police vehicle. Nugent JA, who wrote the majority judgment of the supreme court of appeal, sought to distinguish this case from the constitutional court's judgment in the *K* case in the following way. First, he interpreted O'Regan J's *omissio-commissio* argument as identifying two delicts: the positive, intentional delict of rape and, on the other hand, the wrongful and negligent failure on the police officers' part to fulfil their legal duties in preventing the rape of the victim. According to Nugent JA, the constitutional court's reasoning in the *K* case was based on the latter delict (*Minister of Safety and Security v F* 2011 3 SA 487 (SCA) par 30-37). Against this background, he held that the supreme court of appeal would be bound to that judgment only if it could be said that the police detective was under a similar legal duty as the police officers in the *K* case and that he similarly failed to comply with such a duty (the *F* (SCA) case par 37-46). In this regard, Nugent JA stated that a police detective cannot be said to have duties capable of being breached when he is on standby duty (the *F* (SCA) case par 37-46). Therefore, he decided that there was no possibility of maintaining that the police detective had breached a constitutional duty in raping the plaintiff, which wrongdoing could form the basis for drawing the necessary link with his employment (the *F* (SCA) case par 37-48). In reaching this conclusion, the court therefore noted the judgment of the constitutional court in the *K* case, distinguished it on significant factual differences and accordingly did not apply the reasoning in that case. In short, the court held that there was no possibility of vicarious liability.

The supreme court of appeal's judgment, which placed a strong emphasis on the factual dissimilarities between the *K* and *F* cases, was not followed by the constitutional court (the *F* (CC) case). The majority of the court adopted a line of reasoning which echoed that of O'Regan J in the *K* case. Mogoeng J confirmed that the standard test developed in the *Rabie* case should be used in the event of a deviation case. In its application of this test the court highlighted the following "normative components" (the *F* (CC) case par 52) relevant for establishing if a sufficiently close connection existed between the detective's employment and his wrongdoing.

First, the court emphasised the constitutional obligations of the state to promote the rights of members of society to freedom and security of the person and dignity as well as the police's duty to prevent, combat and investigate crime and promote

safety and security (the *F* (CC) case par 53-61). Secondly, the court underlined the role played by trust: “[t]he trust that the public is entitled to repose in the police also has a critical role to play in the determination of the Minister’s vicarious liability in this matter” (the *F* (CC) case par 3, 62-68). Furthermore, Mogoeng J took the view that, by focusing on trust, the distinction between on-duty and standby duty became “less significant” (the *F* (CC) case par 67). Because he found that there was convincing evidence on the basis of which to conclude that the victim indeed placed her trust in the detective as a police officer, there was seemingly no further need to analyse the nature of the detective’s duty (the *F* (CC) case par 62-68). Thirdly, Mogoeng J rejected the supreme court of appeal’s interpretation of the *K* case, namely that the delict was based only on the wrongful failure to comply with a legal duty (the *F* (CC) case par 69-73). Although the court did not explain exactly how the intentional delict of rape assisted in establishing a sufficiently close connection between wrongdoing and employment, Mogoeng J nonetheless emphasised that it is an important factor (the *F* (CC) case par 69-73). In conclusion, the majority applied the reasoning in the *K* case and held the state vicariously liable. In the following sections, the reasoning by the supreme court of appeal – and its application of the trust factor identified in both the *K* and *F* cases – will be evaluated.

#### 4 *The reasoning by the supreme court of appeal in the Morudu and Booyens cases*

In the *Morudu* case a fingerprint investigator employed by the state murdered the first respondent’s husband after having driven to their home in an unmarked police vehicle while on standby duty and in civilian clothing. While the court noted the reasoning of the court in the *K* case and recognised the judgment by the same court in the *F* case as instructive (the *Morudu* case par 18-32), it ultimately denied liability on the basis that the factual dissimilarities between this case and the *K* and *F* cases meant that none of the respondents trusted the perpetrator as a police officer at the time of the delict (the *Morudu* case par 33-35).

In the *Booyens* case the respondent had been shot by a police reservist in the employ of the state who had visited the victim’s home for supper while on duty, in a marked police vehicle and dressed in full police uniform. Like the *Morudu* case, the court regarded it as a “classic ‘deviation’ case” (the *Booyens* case par 5) and noted the development of the law relating to vicarious liability in the “seminal judgment” (the *Booyens* case par 8) by the constitutional court in the *K* case and the subsequent judgment in the *F* case (the *Booyens* case par 8-22). In the end, the court distinguished the facts from the circumstances in the *K* and *F* cases, and held that, “unlike the situation in both *K* and *F*, the [respondent and perpetrator] were not relating to one another as police officer and citizen, but as lovers in a domestic setting. *From the facts it is clear that Ms Booyens did not repose trust in the deceased due to his employment as a police reservist with the SAPS*” (the *Booyens* case par 19 (own emphasis)). Predominantly for this reason liability was denied (the *Booyens* case par 19-29).

Scott has raised concerns over the effect that these recent judgments by the court may have on the stability introduced into this area of the law. He points out that between 2005 and 2015 there was a series of judgments that followed the reasoning in the *K* case and in terms of which the state was held vicariously liable for harm arising from crime intentionally committed by state employees. Despite the judicial support for this line of development, it ought to be noted that the

"post-2005 judgments favouring state liability for intentional wrongdoing by state employees were in the main judgments delivered on appeal, which signifies that the trial courts and even the supreme court of appeal had denied the plaintiffs' claims on their interpretation of the original standard test, or O'Regan J's extended test for determining a sufficiently close connection between an employee's delict and his or her employment. This in itself provides evidence that the 'new dispensation' is not as ideal as one would wish" (Scott 2017 *TSAR* 875).

Despite such efforts by trial courts and the court to distinguish matters from the *K* and *F* cases in order to avoid the application of the constitutional court's *ratio*, one could nevertheless agree with Scott insofar as he states that "the period of ten years since the handing down of the judgment in the *K* case leading up to the supreme court of appeal's judgment in the *Morudu* case does in fact reflect adherence to the transformed standard test" (Scott 2017 *TSAR* 876). The *Morudu* case, being the "first final judgment ... in which the state was not found to be vicariously liable on the basis of the extended standard test developed by O'Regan J in the *K* case" (Scott 2017 *TSAR* 874), was followed by the court in the *Booysen* case. This, according to Scott, "raises the question of a possible turning-point in the approach towards application of the *K* test for establishing a sufficiently close link between an employee's delict and his or her employment" (Scott 2017 *TSAR* 876).

Although there are many theoretical aspects of the constitutional court's reasoning in the *K* and *F* cases that deserve critical attention (see Wessels *Developing the South African Law of Delict: the Creation of a Statutory Compensation Fund for Crime Victims* (2018 thesis SA) 48-105), this article focuses only on one, namely the identification of a trust relationship between the perpetrator and the victim as basis for imposing vicarious liability on the state for the intentionally committed crimes of police officers. The reason for this is that the absence of such a relationship proved to be the deciding issue in the judgments handed down by the court in the *Morudu* and *Booysen* cases. Moreover, as argued below, the treatment and application of this factor accounts for the supreme court of appeal's ostensible deviation from settled precedent in rejecting the victims' claims in both instances.

##### 5 *Trust in the perpetrator as a police officer as basis for the decision to hold the state vicariously liable for intentionally committed crimes of police officers*

In the *K* case O'Regan J held that, "viewed objectively, it was reasonable for the [victim] to place her trust in the policemen who were in uniform and offered to assist her" (the *K* (CC) case par 52). This conclusion was reached on the basis that the police officers were on duty, uniformed, drove a marked police vehicle and offered the plaintiff a lift home in their capacity as police officers (the *K* (CC) case par 52). In turn, establishing a trust relationship greatly assisted the court in justifying the conclusion that a sufficiently close connection could be established between the delicts of the police officers and their employment. It is important to emphasise that the court clearly adopted an objective approach in determining whether a trust relationship existed between the victim and the perpetrators as police officers. Indeed, as the supreme court of appeal noted in the *Booysen* case: "Ms K had trusted [the police officers] *in their capacity as police officers, in circumstances where it was reasonable for her to do so*" (the *Booysen* case par 11 (own emphasis)). Significantly, the court did not identify a relationship of trust merely based on the subjective experience of the plaintiff. Equally important, O'Regan J also did not impose vicarious liability on the state simply on the basis that, after the events had

taken place, it transpired that the wrongdoers were employees of the minister of safety and security.

In the *F* case Mogoeng J attached even greater value to the role that trust may play in the application of the *Rabie* case's test for vicarious liability (see the *Morudu* case par 31 and the *Booysen* case par 20). He refers to trust as the factor that "creates the connection between the employment and the wrongful conduct" (the *F* (CC) case par 62). Furthermore, "if his employment as a policeman secured the trust the vulnerable person placed in him, and if his employment facilitated the abuse of that trust, the State might be held vicariously liable for the delict" (the *F* (CC) case par 66). He also stated:

"A further factor connecting the wrongful act at issue here with the policeman's employment is trust. This factor operates both normatively, in laying the basis for holding the State liable for the misdeed of even an off-duty policeman, provided there is a sufficient connection with his employment, and factually, in that it creates the connection between the employment and the wrongful conduct ... [T]he employment of someone as a police official may rightly be equated to an invitation extended by the police service to the public to repose their trust in that employee. When a policeman abuses the trust placed in him by a vulnerable woman or girl-child, by raping her, a link may well be established between the employee's employment and the delict flowing from the rape" (the *F* (CC) case par 62-64).

To impose vicarious liability it was therefore crucial for Mogoeng J to conclude that a relationship of trust existed between the victim and the perpetrator as a police officer. To do so, he turned to the facts. He noted that, according to the victim's testimony, she joined the perpetrator – who was not on duty and in plain clothes – and two other men (one of whom she was casually acquainted with), who were standing nearby the unmarked police vehicle. Furthermore, it was accepted that, after the parties had left the nightclub and the other passengers had been dropped off at their respective homes, the victim moved to the front passenger seat, at which time she "saw a pile of police dockets bearing the name and rank of [the perpetrator]" (the *F* (CC) case par 10). In response to her asking why they were in the vehicle, the perpetrator replied that he was a private detective (the *F* (CC) case par 10). The victim testified that she understood this to mean that he was a policeman, which was accepted as evidence by both the supreme court of appeal and the constitutional court (the *F* (CC) case par 10). It ought to be noted that the victim became aware of the fact that the perpetrator was a policeman only after she had already accepted an offer for a lift home and while he was driving. Indeed, as Froneman J stated in the minority judgment, by the time she was in the vehicle, "he had not yet told her he was a private detective and the fact that he was a policeman had nothing to do with her decision to board the car in the first place. She did this because she knew one of the people with [the perpetrator]" (the *F* (CC) case par 168).

During the course of the ride home, the victim grew suspicious of the perpetrator's true motives and, after he had stopped the vehicle at a dark spot, she decided to climb out of the vehicle, ran away and hid herself from him (the *F* (CC) case par 11). She later emerged from hiding and started hitchhiking next to the road. After a while the perpetrator returned to the area where the victim had climbed out and although she did so reluctantly, she once again decided to accept a lift and got into the car for a second time (the *F* (CC) case par 12). Froneman J pointed out a further important distinction between the *K* and *F* cases, namely that, unlike in the *K* case, the perpetrator in the *F* case did not offer a lift to the victim, "and even if he did, he did not do so in his capacity as a police officer" (the *F* (CC) case par 169). In fact, there

“was no official police promise of safe carriage. Indeed, he behaved foolishly [...] A far cry from the conduct of a policeman who even if not in uniform assures someone that he is a policeman, that she will be safe with him and that he as a policeman will do his duty and take her home” (the *F* (CC) case par 169).

Against this factual background, and with the view to establishing if – in accordance with the approach outlined in the *K* case – a relationship of trust existed between the victim and the perpetrator as a police officer, the court therefore had to determine whether, objectively viewed, it was reasonable for the victim to trust the perpetrator as a police officer. Objectively viewed, the pertinent facts were the following: the perpetrator was in plain clothes, driving an unmarked police vehicle while not on duty. The perpetrator and the victim met while at a nightclub: he was drinking beer and she went there to play pool and dance (the *F* (CC) case par 157). The victim decided to accept the perpetrator’s offer for a lift because she knew one of the people who accompanied the perpetrator to the club and who also accepted a lift home. The victim grew suspicious of the perpetrator to such a degree that she jumped out of the vehicle, ran away and hid. She later again accepted a lift. However, based on the circumstances, it is unlikely that this could have been motivated by her subjective trust in the perpetrator as a police officer. But even if it was, it would be insufficient to pass muster based on the objective approach adopted in the *K* case.

Essentially, it cannot be said that, viewed objectively, it was reasonable for the victim to trust the perpetrator as a police officer. Indeed, based on the reasoning of the same court in the *K* case, one may justifiably conclude that this factor was absent and that it could not have been used to impose vicarious liability in this instance.

However, the constitutional court did not follow the approach outlined in the *K* case and Mogoeng J held that a relationship of trust existed between the victim and the perpetrator as a police officer. Unlike in the *K* case, the court focused on the victim’s subjective experience rather than on ascertaining whether the surrounding evidence supports the conclusion that it was objectively reasonable for the victim to trust the perpetrator as a police officer. Mogoeng J may have realised that it might not be convincing, fair or reasonable to reach this conclusion purely on the basis of the victim’s subjective experience. Therefore, after pointing out that the victim subjectively trusted the perpetrator as a police officer, he added that this was also determinable *ex post facto*: “She made [the] deduction [that he was a policeman] from the dockets and the police radio in the vehicle. In other words, he was identifiable as a policeman. *And, in fact, he was a policeman*” (the *F* (CC) case par 81 (own emphasis)). And importantly, he added: “Beyond her *subjective trust* in [the perpetrator] is the fact that any member of the public, and in particular one who requires assistance from the police, is entitled to turn to and to repose trust in a police official” (the *F* (CC) case par 81 (own emphasis)).

The conclusion that a person in plain clothes, in an unmarked, ordinary vehicle and on standby duty could inspire trust that he was a member of the police and thus clothed with certain legal duties is far-reaching (see further Wessels 95-96). It is arguable that the majority inferred trust in the absence of convincing evidence and on the basis of knowledge that crystallised only after the event, namely that the detective was employed by the minister of safety and security (Wessels 95-96; 98-105). It would seem as if this factor was then retrospectively applied in order to justify the compensation of an innocent victim (Wessels 95-96; 98-105; 123-126). However, if the harm occasioned by a criminal who, in plain clothes and an unmarked vehicle, is pursuing his self-centred interests in a reprehensible manner may be shifted towards the criminal’s employer on the basis of the fact that it later

became apparent that the employer was the minister of safety and security, it may potentially expose the state to near absolute delictual liability for any intentional and criminal wrongdoing by its employees (Wessels 95-96; 98-105; 123-126 and Price *The Influence of Human Rights on State Negligence Liability in England and South Africa* (2012 thesis Cambr Univ UK) 136-137).

Before continuing and for the sake of clarity, the difference between the approaches of the court in the *K* and *F* cases as regards establishing a trust relationship may be summarised as follows. In the *K* case the court sought to determine whether, based on available evidence, it could be said that it was objectively reasonable for the victim to have trusted the three perpetrators as police officers. In the *F* case, however, the constitutional court seems to have adopted a new approach in accordance with which it is sufficient to point out that the victim subjectively thought that the perpetrator was a police officer and establishing, after the fact, that this was indeed the case. This means that, in the *F* case, the court went much further than in the *K* case in its willingness to find a relationship of trust (see further Wessels 95-96; 98-105).

It now falls to be determined what the implications are of this step in the development of the law relating to the state's vicarious liability for harm arising from intentionally committed violent crime. The next section will attempt to provide an answer to this question and also explain how it relates to the judgments of the supreme court of appeal in the *Morudu* and *Booysen* cases.

## *6 The implications of the constitutional court's approach in the F case regarding trust*

The court's reasoning in the *F* case suggests that, to establish a relationship of trust between the victim and perpetrator as a police officer, it is sufficient to show subjective trust and that the perpetrator was indeed employed as a police officer. Adopting this approach makes it easier to establish a relationship of trust, at least in those cases where the violent crime was intentionally committed by a police officer. This is because, where the crime has been committed by a police officer, the application of the *F* case's approach apparently simply boils down to the *ipse dixit* of the victim – if he or she subsequently purported subjectively to have trusted the perpetrator as a police officer, a relationship of trust must be regarded as having been established, because the remaining factor (employment as a police officer) is obviously present.

In contrast, it would be harder to advance convincing evidence arising from the particular facts of a case to justify the conclusion that, in the context, it was objectively reasonable for the victim to have trusted the perpetrator as a police officer. In accordance with the approach in the *F* case, and where the perpetrator is a police officer, the existence of a trust relationship will be denied only where the victim apparently did not subjectively trust the perpetrator as a police officer. Of course, where the perpetrator is a police officer, this might be very unlikely, although not impossible (eg the *Morudu* and the *Booysen* cases).

All of this means that one of the crucial normative components identified in the *K* and *F* cases may be proved with relative ease where a police officer has intentionally committed a violent crime. Of course, if the crime was committed by a police officer, the constitutional rights and obligations referred to by the constitutional court in the *K* and *F* cases will also be present. In addition, based on the court's reasoning in the *K* and *F* cases, where a police officer has intentionally committed such a crime,

it will also be possible to interpret it as constituting a breach of the duty to prevent crime, thereby satisfying the remaining consideration the court identified for the imposition of vicarious liability.

It follows therefore that the court's disinclination to adopt an objective enquiry into the existence of a trust relationship has expanded the state's potential liability for harm arising from intentionally committed violent crime to a significant degree (Wessels 75-105). Indeed, the failure to substantiate the conclusion that it was objectively reasonable to trust the perpetrator as a policeman means that the enquiry into trust may become superficial and that a court could conveniently use this factor to justify the imposition of vicarious liability after it became clear that the primary wrongdoer was employed by the state and somehow connected to the overall crime prevention efforts of the South African Police Services.

In turn, this may have potentially devastating practical and financial consequences for the crime prevention efforts and victim compensation (a full discussion of these consequences fall outside the scope of this article – see Wessels 15-19; 71-72; 103-105). Ironically, this is arguably what the court warned against in the *K* case when O'Regan J emphasised that the constitutional development and application of the vicarious liability principle should not be misunderstood to "mean that an employer will be saddled with damages simply because injuries might be horrendous" (the *K* (CC) case par 23).

A final point that may briefly be raised here is the following: if the underlying basis for the judgments in the *K* and *F* cases is indeed merely the fact that there was a police officer involved, then it has arguably established a *de facto* compensation fund for harm arising from certain crimes on the basis that the South African Police Service was somehow involved in the harm suffered by the victim of the crime (Wessels 101-105). It may be considered why the state should then not compensate all crime victims who have suffered harm at the hands of criminals in plain clothes, driving unmarked vehicles and acting in their self-interest (see generally Wessels). Therefore, although it may be said that the results produced by these specific judgments may be acceptable insofar as a victim of a violent crime received compensation, these results were reached by following an undesirable route, and has created equally undesirable consequences.

#### *7 The judgments in the Morudu and Booyens cases are not a turning point in the development of the law relating to the vicarious liability of the state*

As indicated above, it seems that, where a crime was committed by a police officer and the approach of the court in the *F* case is adopted, a trust relationship will not be found if the victim subjectively did not trust the perpetrator as policeman. Unless, of course, the court would be content to justify liability purely on the basis that it transpires, *ex post facto*, that the perpetrator is employed by the South African Police Service. However, such an approach would make a nonsense of the enquiry into trust altogether and would mean that the imposition of vicarious liability rests solely on the issue of employment. This would potentially expose the South African Police Service to absolute liability for harm arising from intentionally committed violent crime. It therefore appears that the only instance in which a court will deny a trust relationship where a violent crime was intentionally committed by a police officer is where the victim did not subjectively trust the perpetrator as a police officer. As indicated in further detail below, it is submitted that this is what happened in the *Morudu* and *Booyens* cases.

In the *Morudu* case the fingerprint investigator employed by the state had driven to the home of the respondent and her late husband in an unmarked vehicle, while on standby duty and in civilian clothing. The perpetrator was intent on achieving private vengeance: “He travelled to the home of the respondents to kill the person he considered to be his wife’s lover” (the *Morudu* case par 33). The firearm he used to murder the deceased was his own – he had never been issued with an official police firearm (the *Morudu* case par 2, 13). The first respondent, who had also met the investigator on a previous occasion (the *Morudu* case par 4: “when he had visited her home on a Sunday afternoon and had sought the deceased … told her that the deceased had been intimate with his … wife”), discovered that he was a police officer only after he had murdered her husband and had been arrested (the *Morudu* case par 6). When discussing the reasoning by the constitutional court in the *K* case, Navsa ADP quoted the following extract:

“Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. Where such trust is established, the achievement of the tasks of the police will be facilitated. In determining whether the Minister is liable in these circumstances, courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. *In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her*” (the *Morudu* case par 27 – own emphasis).

The court also referred to the way trust was dealt with by the constitutional court in the *F* case, noting the following statement:

“[S]he said that the fact that she believed Mr Van Wyk to be a policeman played a role in allaying her fears, because she ‘trusted’ him … as, at that stage, she thought he was a detective. She chose to repose her trust in a person of whom she was suspicious because she understood him to be a policeman .... Whenever a vulnerable woman or girl-child places her trust in a policeman on standby duty, and that policeman abuses that trust by raping her, he would be personally liable for damages arising from the rape. Additionally, if his employment as a policeman secured the trust the vulnerable person placed in him, and if his employment facilitated the abuse of that trust, the State might be held vicariously liable for the delict .... From where she stands, he is a policeman, employed to protect her, and should therefore be trusted to uphold, and not to contravene, the law” (the *Morudu* case par 30 and 31 – own emphasis).

The court then applied the approach espoused in the *F* case regarding trust and emphasised the fact that “[n]one of the respondents identified [the perpetrator] as a policeman. None reposed trust in him” (the *Morudu* case par 34). As a result, the court denied the existence of a trust relationship on the basis that the victims did not subjectively trust the perpetrator as a police officer. It added the following:

“The only police accoutrements were the radio and the vehicle. The radio was not visible and the vehicle was unmarked. It is true that he used the police vehicle to travel to their home but he could just as easily have used public transport. The area to which he travelled was not an area to which he had been assigned” (the *Morudu* case par 34).

These facts were not highlighted with the view to consider whether it was objectively reasonable for the victim to have trusted the perpetrator as a police officer. Indeed, no mention was made of the need to ascertain whether the determination of trust was objectively reasonable in the circumstances. Rather, it appears that the court

merely mentions the factors in explanation for its conclusion that the victims did not subjectively trust the perpetrator as a police officer.

Interestingly, if the approach of the constitutional court in the *K* case had been applied, the court would arguably have reached a similar conclusion. That is because there were insufficient facts to justify the conclusion that it was objectively reasonable for the victims to have trusted the perpetrator as a police officer. This case therefore illustrates that sometimes the choice between the approaches in the *K* and *F* case will not necessarily make a difference to the outcome regarding the trust factor. Nonetheless, it is argued that the reason why the court failed to identify a trust relationship for the purposes of vicarious liability in this case was because it adopted and applied the reasoning of the court in the *F* case, at least insofar as this issue is concerned.

In the *Booysen* case the respondent had been shot and wounded by her boyfriend, who committed suicide afterwards. The deceased was a police reservist in the employ of the South African Police Service, worked night shifts and was assigned crime prevention duties. At the time of the incident, he was on duty, wearing a full police uniform and carrying a service pistol. He was dropped off by a marked police vehicle to visit the home of his girlfriend (the respondent) and have supper. This was a regular occurrence. While visiting, he did not perform any official police-related duties.

The court noted the importance of establishing a relationship of trust in establishing a sufficient link between the delict and employment of purposes of imposing vicarious liability (the *Booysen* case par 20). It went further to state that a

“careful and close reading of *K* and *F* reveals that the element of trust was central to the finding that there was a sufficiently close link connection between the acts of the police officers and their employment, hence, vicarious liability. It is indeed doubtful whether, without the element of trust, the outcome of the two cases would have been the same” (the *Booysen* case par 20).

In the present case, the court clearly applied the reasoning of the constitutional court in *F* regarding the issue of trust and therefore focused on the subjective experience of the victim as determinative in this context:

“To my mind, the weighty countervailing factor is that, when the deceased visited Ms Booysen, and when the shooting incident took place, unlike the situation in both *K* and *F*, *the two were not relating to one another as police officer and citizen, but as lovers in a domestic setting. From the facts it is clear that Ms Booysen did not repose trust in the deceased due to his employment as a police reservist with the SAPS*. She did not fall in love with the deceased because he was a policeman. She confirmed this much in her evidence. She testified that she and the deceased grew up together in the same community. Thus, the issue of trust that the public ordinarily reposes in the police, did not arise in this matter at all, unlike in *K* and *F*” (the *Booysen* case par 19 and 20 – own emphasis).

If the approach in the *K* case had been adopted in this case, it is arguable that a finding of trust could have been made. After all, the perpetrator was in police uniform, in a marked police vehicle and on duty. Nevertheless, although the court regarded these as “important normative considerations” (the *Booysen* case par 22), it held that, “in the context of this case, their significance is weakened by the absence of the element of trust, which, as explained above, was so pervasive in *K* and *F*. They do not ... alter the simple position that this was an unfortunate domestic occurrence, and the use of a service firearm by the deceased was more incidental than anything” (the *Booysen* case par 22).

Following from the above, it is argued that the judgments in the *Booysen* and *Morudu* cases do not deviate from the trend set by the constitutional court in the *F*

case – at least insofar as the issue of trust is concerned. Indeed, in both cases the supreme court of appeal has applied the reasoning in the *F* case in ascertaining whether the victim subjectively trusted the perpetrator as a police officer. Further, because the issue of trust played such a central role in the decision as to whether a sufficient link may be established between the policeman's delict and his employment in the *K* and *F* cases, it ultimately also had a deciding influence on the supreme court of appeal's decision as to whether vicarious liability ought to be imposed on the state.

*8 Has the establishment of a trust relationship been made a requirement for imposing vicarious liability on the state for violent crimes committed intentionally by police officers?*

As indicated above, the constitutional court outlined the following normative components that may play a role in establishing whether an intentionally committed violent crime is sufficiently closely connected with the perpetrator's employment for the purposes of imposing vicarious liability: certain constitutional rights and obligations; the fact that a police officer simultaneously committed a violent crime and failed to comply with his/her legal duty to prevent crime; and the existence of a trust relationship between the victim and the perpetrator as a police officer.

Although the court did not expressly state that any of those factors were requirements for the state's vicariously liability in either the *K* or *F* cases, Mogoeng J seems to treat them as such in the *F* case (par 52 and see further Wessels 102-103). Moreover, in both cases, the court focused its attention on establishing a trust relationship, albeit along different avenues. Indeed, as the supreme court of appeal remarked in the *Morudu* case, “the element of trust was central to the finding that there was a sufficiently close link connection between the acts of the police officers and their employment ... It is indeed doubtful whether, without the element of trust, the outcome of the two cases would have been the same” (the *Booysen* case par 20). At one stage, Navsa ADP referred to the judgment of the court *a quo*, noting that it had reasoned that “the element of trust is not a prerequisite for vicarious liability [and that it] is merely one factor that may or may not be present” (the *Booysen* case par 20). In response hereto, he stated: “While I agree that this is only one of the normative factors to be considered, I do not share the court *a quo*'s relegation of that aspect to one that can be dispensed with” (the *Booysen* case par 20). In his analysis of the judgment in the *Morudu* case, Scott commented as follows on this line of argument by the supreme court of appeal: “Seemingly the court did not appreciate the fact that an aspect that cannot, in its own words, be dispensed with is an *indispensable* factor, which is tantamount to a prerequisite” (Scott 2017 *TSAR* 885). Following the judgment in the *F* case, and as illustrated by the reasoning of Navsa ADP, it has become necessary to ask whether the relationship of trust is a requirement for vicarious liability in cases dealing with the violent crime intentionally committed by police officers. In addition, one could also ask the following question:

“However, what would be the outcome in a future case where such a relationship of trust is clearly not present? Would the court be able to reach the same outcome as it does in *K* and *F*? It may be argued that, considering its treatment of the relationship of trust as a near requirement for vicarious liability, courts would be pressed to deny an otherwise deserving plaintiff a remedy where a relationship of trust is not present” (Wessels 103).

The judgments by the supreme court of appeal in the *Booysen* and *Morudu* cases, which adopted and applied the approach in the *F* case, have illustrated this point. This role of trust may therefore be questioned and, when granted the opportunity, the constitutional court should provide greater certainty on its future role in establishing vicarious liability within this context (Wessels 95-96).

In conclusion, it may be said that these judgments should not be interpreted as representing a “turning-point in the approach towards application of the *K* test for establishing a sufficiently close link between an employee’s delict and his or her employment” (Scott 2017 *TSAR* 876). Rather, the outcome of those cases is a result of the constitutional court’s approach to the issue of trust in cases where a victim suffered harm arising from an intentionally committed violent crime.

### 9 Conclusion

In this note the focus was placed on the judicial expansion of state delictual liability for the harm arising from the intentionally committed crimes of state employees (see *K* (SCA) case; *K* (CC) case; *F* (SCA) case and *F* (CC) case). The extension of state liability in this context was enabled by the development of the third requirement for vicarious liability, which holds that the employer’s delict must have been committed during the course and within the scope of employment. This development received significant impetus in the *K* case, where O’Regan J held that the so-called standard test set out in the *Rabie* case must be applied to give effect to constitutional rights, obligations and norms. This approach was entrenched in the *F* case. In both cases, the relationship of trust between the victim and the perpetrator played a central role in establishing whether a sufficiently close connection existed between the police officers’ wrongdoing and their employment. Indeed, the judgments by the constitutional court in the *K* and *F* cases bring into focus the question whether trust has developed into a prerequisite for vicarious liability in these types of cases.

It has been stated that the *Morudu* and *Booysen* cases appear to deviate from the approach taken by the constitutional court in the *K* and *F* cases regarding the trust factor. If this is correct, these judgments may be said to represent a turning-point in an area of the law where there has been relative stability in the recent past. To evaluate this statement, particular attention was given afresh to the way the constitutional court dealt with the issue of trust in both the *K* and *F* cases. In this regard, a notable difference was identified between the approaches the court adopted towards establishing a relationship of trust in those cases. In the *K* case O’Regan J considered whether there were convincing facts to conclude that, in the particular circumstances, it had been objectively reasonable for the victim to trust the perpetrators as policemen. In contrast, in the *F* case Mogoeng J focused on the subjective perception of the victim and held that, because she trusted the perpetrator as a police officer (and it later turned out that he actually was employed by the state), the necessary relationship of trust had been proven. If the court had applied the objective approach in the *K* case on the facts in the *F* case, it would arguably have led to the denial of such a relationship.

All of this means that, on the reasoning in the *F* case, and where the perpetrator of an intentionally committed violent crime is a police officer, trust will be established relatively easily unless the court finds that the victim did not subjectively trust the perpetrator as a police officer. It is contended that this is what happened in the *Booysen* and *Morudu* cases. Indeed, these cases do not signal a turning-point in the development of vicarious liability within this particular context. Rather, they illustrate the application of the reasoning in the *F* case. They also demonstrate the

consequences of treating trust as a prerequisite for vicarious liability and applying the subjective approach of the constitutional court in the *F* case. It is recommended that, when given the opportunity, the court should provide clarity as to whether trust is now a requirement for establishing vicarious liability within the context of violent crimes intentionally committed by police officers and also whether the approach in the *K* or *F* cases should be adopted in future cases.

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