



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 1624/2019

In the matter between:

SIKHANYISO SYDNEY LUNYAWO

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Govindjee J

The issues

[1] The plaintiff instituted an action for damages against the defendant, based on the principle of vicarious liability. He alleges that he was wrongfully, unlawfully and intentionally assaulted by members of the South African Police Service on 9 December 2018 between 23h00 and 01h00 at Emabomvini Locality, Ngqeleni. The plaintiff also claims that he was unlawfully arrested without a warrant subsequent to his assault, and then released.

[2] The particulars of claim detail the alleged assault in the following terms:

- a. The plaintiff was pointed with a firearm;
- b. He was handcuffed;
- c. He was hit with open hands on his face;
- d. He was tripped, landing on the floor with his shoulder;
- e. He was trampled upon;
- f. He was throttled; and
- g. He was hit with a stick.

[3] The plaintiff suffered various injuries as a result. During the course of the plaintiff's evidence, it became apparent to counsel that further medical reports, relating to the psychological effects of the plaintiff's condition, might be required. An order was sought and granted separating the merits of the dispute from the issue of quantum in terms of Uniform Rule 33(4). The main issue to be determined at this stage is whether the plaintiff has proved, on a balance of probabilities, that employees of the defendant, acting in the course and within the scope of their employment, perpetrated the assault that resulted in the plaintiff's injuries. A finding as to the alleged unlawful arrest of the plaintiff is also required.

The plaintiff's evidence

[4] The plaintiff, a 33-year-old male, testified that he had been woken by the sound of wind on the night in question. He looked through the window and saw a van parked nearby with bright lights on. He went back to bed to lie down. He then heard a strong knock at the door and the door being kicked. He immediately went to open the door.

[5] There were three people at the door. A person he would later identify as Mr Mvunyiswa ('Mvunyiswa') was the only person holding a firearm, which he pointed at the plaintiff. It was a rifle of sorts. Mvunyiswa was not in uniform but was wearing a bulletproof vest displaying the word 'Police', together with a shirt, jeans and boots. The two other people were in uniform.

[6] Mvunyiswa instructed the plaintiff to take out a pill or tablet. When the plaintiff informed him that he had no such thing, Mvunyiswa instructed the other two policemen to search the house. While they did so, Mvunyiswa pointed the firearm at his back, grabbed him, pulled his arms behind his back and handcuffed him. He was then hit with a flat hand repeatedly, his legs were kicked, he was thrown down and kicked on his neck. He was also throttled around his neck.

[7] This occurred repeatedly according to the plaintiff. Mvunyiswa, in the absence of the other policemen, asked him to take out 'the tablet', kicked him, pushed him down when he rose, and throttled him while his hands were cuffed. His face was also trampled. At some point Mvunyiswa tightened the handcuffs and assaulted him twice with a broomstick, hitting him on his shoulders as he lay face down.

[8] The other policemen returned and advised Mvunyiswa that they had not found anything. He instructed the taller policeman to grab the plaintiff and place him on his back. Mvunyiswa then hit him with the broomstick twice on his soles, before searching the house himself. Nothing was found. He returned and removed the handcuffs.

[9] The plaintiff was able to describe certain physical features, commenting on the height, weight and complexion of the persons who entered his home. He felt weak after the attack and noticed injuries on his body. His arms were swollen, he struggled to swallow and his waist was painful. Mvunyiswa left the premises at some stage and he was left with the two individuals in uniform. The shorter of the two, a person dark in complexion, asked him about a girl being educated with his assistance and supposedly at UNISA. He replied that the person in question was not his girlfriend, but was a relative studying engineering at Walter Sisulu University. Thereafter he was informed that he was being arrested. He changed his trousers as they were torn, put on his shoes and walked behind the two towards the police van, which was marked as such. The person who had been assaulting him exited the vehicle. The taller of the two told him to open the door and enter the van. He replied that he could not do so given his pain. He was then told to return to his home and the three individuals drove off in the police van. He returned to bed and noticed that the time was 01h13.

[10] The plaintiff telephoned his girlfriend who came to collect him so that he could sleep at her home. She helped him to wash and he hitchhiked to the clinic, informing the nurse there that he had been assaulted by police. He was advised to go to the hospital to lay a charge, which he did. He was subsequently informed by a doctor to bring a J88 form from the police station, which he did the following day. Initially the police refused to provide the form, but he managed to obtain this with a captain's assistance. He informed a policeman that he had been assaulted by other policemen. That person noticed the marks around his wrist and asked if they had been caused by handcuffs. The plaintiff returned to the hospital with the J88 form, which the attending doctor completed.

[11] A J88 report on a medico-legal examination, completed by Dr Hart at Canzibe Hospital, was accepted into evidence. It is clear from the report that the plaintiff communicated to the doctor, via an interpreter, that he had been assaulted by policemen and that they had tried to find drugs at his home. The doctor's clinical findings, which were depicted graphically as well, included the following:

'Neck – bilateral hematoma and abrasion lateral to the larynx;

Wrist – abrasions circular probably due to cuffs

Abrasions to lower back

Feet: no defects noted.'

[12] The plaintiff also explained how his aunt became involved in the matter. He had telephoned her and explained that he had been assaulted by the police. She had insisted on accompanying him to the police station because she was concerned that they would not pay sufficient attention to the plaintiff if he proceeded on his own. When they visited the police station, they were advised to obtain names of suspects, failing which a docket would not be opened. His aunt then arranged for them to meet with the station commander. When they returned to the police station for that purpose, the plaintiff observed one of the people that had entered his home standing at the door of the station. The plaintiff, assisted by his aunt, explained what had happened to the station commander, a charge was laid and a docket was opened. The plaintiff's signed statement, according closely with his evidence regarding his assault, was included in the trial bundle and accepted into evidence. The plaintiff

explained that he did not know the names of his alleged attackers at that point in time, so that no names appear in that statement.

[13] The plaintiff says he identified Mvunyiswa when Mvunyiswa visited his workshop to have his tyre pumped. A name tag identified him. This was the stouter, lighter person he had described during his evidence, and the person who had not been wearing a uniform on the day in question. He subsequently identified one of the other persons as 'Malombo' with the assistance of his aunt, who is a councillor. Based on his description, she had investigated the matter and indicated that the person's real name was 'Pilisa Yolwa'. The plaintiff had then observed that person's profile on Facebook and identified him as the 'Malombo' he had seen. His aunt had also provided a name for the other person ('Madyibi'), but the plaintiff had not been able to verify this. He had subsequently explained to the Independent Police Investigative Directorate (IPID) that he would be able to identify two of the persons who had entered his home. He further explained to them how he had come to identify Mvunyiswa.

[14] That evidence is partially supported by an undated statement made by the plaintiff to the police, which explains Mvunyiswa's identification at the tyre repair centre, and the reason that the plaintiff was able to remember his face. The statement also indicates, however, that the plaintiff would not be able to identify the other two persons, 'even in an identification parade'. The plaintiff testified that he had made the statement during February 2022.

[15] The plaintiff's injuries are clearly visible in a series of colour photographs taken approximately a week after the incident. The plaintiff explained that the first two show markings seemingly consistent with the application of tight handcuffs, with scabs having formed in some places. The third and fourth photos indicate neck wounds allegedly caused by Mvunyiswa's throttling, and the final photo shows marks on the plaintiff's back from when he had been tripped and had fallen. Those injuries accord with the J88 medical report.

[16] The plaintiff demonstrated in court that some of those scars remain visible. He had taken pain medication for two months and experienced discomfort in his throat,

which had now passed. For a month he had to eat soft food or watery porridge. He also had difficulties sleeping after the incident and his outlook towards the police had changed. The events were described as 'emotionally painful' but no counselling had been sought. The plaintiff had managed to continue with his business with full-time assistance.

[17] Under cross-examination, the plaintiff testified that he had been scared when he saw the vehicle outside his bedroom window and heard the rough knock on the door. He thought the door was going to be broken but had not asked who was outside. He was shocked and scared when his arms were pulled back, he was handcuffed and subsequently assaulted by the person he would later identify as Mvunyiswa.

[18] The plaintiff disputed the part of his statement to IPID stating that he would not be able to identify the other two police officials. He had only been asked two questions. The rest of the statement had been based on information taken from the docket. The plaintiff had, however, signed the statement. His highest level of education was grade 11.

[19] The plaintiff accepted that the SAPS register at Ngqeleni indicated that Mvunyiswa had not been on duty on the day of the incident. He steadfastly maintained that Mvunyiswa had been at his home and assaulted him between 23h00 and approximately 01h15. When the plaintiff had been weakened by the assault, Mvunyiswa had told the others to take off his handcuffs as he was to be arrested. He had then gone to the van. The plaintiff's hands had swollen but he had managed to change his trousers and shoes before following the other two outside to the van. He had observed that it was a police van based on the writing on the vehicle, but had not seen the registration number. When told to open the van and enter, the plaintiff had indicated that he was unable to do so and asked them to open it for him. He had then been left behind and told to go to bed.

The defendant's case

[20] Mvunyiswa testified that he was a police sergeant. He had been a constable during 2018. He repeatedly denied the allegations of assault. He had been at home at the time, far away from the plaintiff's home and off-duty.

[21] The witness explained the proper protocol if the police had decided to pursue an operation, with reference to the applicable SAP books. Such an operation would have to be approved by the commander. No SAP 15 book was available. That document would have contained the duties for the day, including the persal number, surname and initial of the person and whether they would be a driver or crew. From the SAP 10 book it was clear that there was no scheduled operation on the night in question. The witness was off-duty and his name would not appear on that form.

[22] Mvunyiswa explained the procedure for signing out a large firearm. This would be written in the SAP 10 by the commander and signed out. An off-duty officer would never be given permission to carry a rifle. Police officers not in uniform were not permitted to wear a police vest, unless they were working with investigations. In that case the colour of the bullet vest would be a different colour. Any authorised operation would involve officers in full uniform. It was not permitted for an off-duty police officer to wear a bullet vest. These vests were, however, given to police officers to keep and would contain an infantry number for tracing purposes.

[23] The witness testified that he could not have handcuffed the plaintiff as his handcuffs were not working at the time. A bakkie canopy had fallen and the cuffs he had been issued had twisted and would not work. In any event, he was not at the place of the assault on the day it was alleged to have occurred. The matter had been investigated by Mr Ndlovu from IPID and he had made a statement denying the allegations.

[24] Mvunyiswa admitted knowing the plaintiff from the tyre repair centre where he worked. He suggested that his own work with crime prevention in Ngqeleni might have caused the false allegation. He had once been part of a search of people sitting close to the plaintiff's place of work that had resulted in confiscation of knives. The

plaintiff had claimed that he used the knife for his work, even though he had been seated with other people close to a house some distance away from the tyre repair centre. Mvunyiswa had advised him that he could not claim to use the knife for work when he was not actually at the workplace, but seated next to this house. The confiscation of the knives had not been well-received by the civilians present.

[25] During cross-examination, Mvunyiswa explained the purpose of a pocket book. No pocket books had been included in the trial bundle. The senior IPID investigating officer had made mention of a 'SAPS register at Ngqeleni' when confirming that Mvunyiswa had not been on duty. This would likely refer to the SAP 10 and 15 books. The entries in those books had to be considered together. The commander might, for example, have indicated in the SAP 10 that all members of 'Relief C' were present and on duty that evening. Those names would appear on the SAP 15.

[26] The documentation available did not reflect the police commander or relief commander on the day in question. As to rifles, these had handles and must be held on the side of the body, pointing down. Police-issue rifles often did not have slings. When a firearm was requested, the commander would make an entry in the SAP 10. The occurrence book serial number, contained in that book, would be required for the firearm register. The commander would counter-sign before the weapon was handed over to the police officer concerned. The witness explained that the entries contained in the copies of the SAP 10 included in the bundle should be read with the occurrence book register, but that that register had not been included as part of the discovered documentation.

[27] The SAP 10 reflected those firearms that had been booked out at 18h32 to Cst Madyibi, Adam and Ntaka. These could be either their personal firearms, which might have been kept at the station for safe-keeping, or separate state-issued firearms. The SAP 10 reflected that Cst Madyibi had booked out a motor vehicle with Sgt Ceba at 19h00 in order to patrol around the Ngqeleni central business district and surroundings. It is evident from the document that Ceba and Madyibi only concluded their patrol and booked the vehicle back at 04h45, and that the vehicle was inspected at that time by Captain Mfono. The firearms signed out by Madyibi, Adam and Ntaka were not reflected in the list of firearms signed in at 05h35. Various rifles, all starting

with reference numbers '354...' were noted. The witness indicated that not every rifle necessarily was numbered with that number. One of the firearms signed out by Madyibi, Adam and Ntaka at 18h32 had a reference number commencing with '354...' and the witness accepted that this would have been a rifle.

[28] The witness confirmed that his handcuffs, uniform and issued bullet vest were kept at his home. The handcuffs were definitely broken throughout 2018, and were replaced only during the past year. When arresting somebody he would typically use the handcuffs of a colleague, but this was infrequent. When confronted with the pictures demonstrating the plaintiff's injuries, the witness stated that he had never seen marks of this nature caused by handcuffs, even those that had been secured very tightly. He maintained that it was possible for rope to have caused such marks. While he accepted that handcuffs could be tightened, he was unconvinced that they could cause such injuries. He acknowledged that it was possible for an off-duty police officer to commit acts of misconduct without his name appearing in the SAP records. Being off-duty, that person's name would simply not appear in the documentation for the day in question.

[29] In response to questions from the court, Mvunyiswa stated that his navy bullet vest, containing the inscription 'Police', did not fit him during 2018. Only recently had he received a vest that fitted him, following the retirement of a colleague. He testified that he lived more than 45 km away from work and did not see his colleagues when off-duty. His vehicle would be parked at the police station in Mthatha and police transport would take him to work. He had checked his records following the IPID enquiries and ascertained that he had been off-duty at the time for a period of four days.

Analysis

[30] Two irreconcilable versions have been placed before court, the defendant's plea constituting a bare denial. To arrive at an outcome, findings must be made on the credibility of the factual witnesses, their reliability and the probabilities, applying the approach detailed in cases such as *Stellenbosch Farmers' Winery Group Ltd and*

*Another v Martell et Cie and Others ('Stellenbosch Farmers' Winery')*¹ and *Dreyer and another NNO v AXZS Industries (Pty) Ltd.*²

[31] The plaintiff made a generally favourable impression in the witness box. His testimony was, on the whole, measured and convincing, and supported by the photographs and medical report. I appreciate that there was the potential of bias in his narrative, given that the outcome of his claim for damages rested on his performance as a witness. But this concern was ameliorated by the clear manner of his testimony, which did not seek to exaggerate his experience or injuries. The major external contradiction in his evidence related to his ability to identify any of the uniformed police officers he alleges entered his home. His signed statement submitted to IPID suggested that he could not identify either of these men, yet he testified that Yolwa had subsequently been identified with the assistance of his aunt and social media. His recollection of events was good and his explanation for identifying Mvunyiswa plausible, particularly considering that Mvunyiswa acknowledged having noted his presence during the incident that occurred at the plaintiff's workplace. It is also apparent that the plaintiff had gone to some lengths to lay charges at the time of the incident, and in travelling to the clinic, hospital and police station to seek assistance and to lay a charge. This is consistent with his version of events and an ordeal at the hands of the police.

[32] Mvunyiswa was also steadfast under cross-examination, maintaining that he had not been anywhere near the scene of the assault and arrest as he had been off-duty. He appeared, however, to be keen to embellish matters in order to proclaim his innocence. For example, he made much of his handcuffs having been broken at the time, even though it would have been a relatively simple matter to utilise the handcuffs of another officer. He only mentioned belatedly that his bullet-vest, containing the inscription 'Police', did not fit him during 2018 and that he had only recently received a vest that fitted. He refused to concede that the wrist abrasions suffered by the plaintiff could possibly have been caused by tight handcuffs, offering instead the suggestion that those injuries might have been caused by rope. That

¹ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) pp 14, 15.

² *Dreyer and another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA).

outright rejection of the possibility of handcuffs causing the injuries is unwarranted when all the evidence, including the medical report and photographic evidence, is considered. Mvunyiswa's credibility as a witness is further affected by his inherent bias and his demeanour in the witness box. As to the former consideration, he has already been questioned by IPID and denied all allegations. There would be serious repercussions in the event that this court found in favour of the plaintiff. As to the latter, he adopted a condescending, somewhat sardonic approach and tone to the allegations levelled against him and his performance as a witness was not completely convincing.

[33] Mvunyiswa's testimony, also in relation to the contents of the docket and police standard operating procedures, contribute to the probabilities favouring the plaintiff's version. The docket reflects that two motor vehicles had been booked out for patrol around Ngqeleni central business district and surroundings. In the case of the vehicle booked out by Sgt Ceba and Cst Madyibi at 19h00, this vehicle was only booked back at 04h45 the following morning, with no report apparent from these officers at all between 22h00 and this time. Madyibi also appears to have signed out a rifle. There is no information apparent from the docket whatsoever as to the movements of the occupants of the other vehicle. The docket also reflects that Mvunyiswa was not on duty, supporting the plaintiff's version that he had not been uniformed during the assault.

[34] Assessing the probabilities arising from the evidence presented, in the light of my assessment of the credibility of the witnesses and the circumstances of the case, results in the conclusion that the plaintiff's version of events must, on the whole, be accepted. In particular, I find that he was, on balance, handcuffed and assaulted on the day in question by Mvunyiswa as alleged. The injuries he suffered appear to be consistent with this version, as reflected by the medical report and the photographs taken approximately a week after the incident. The single inconsistency between his statement and testimony, relating to his ability to identify the other police officers present, is insufficient to tilt the balance in favour of the defendant when considered

in the light of the evidence as a whole.³ It remains the task of this court to consider all the evidence, to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.⁴ As indicated, I am satisfied that the plaintiff was truthful in his testimony.

[35] The defendant failed to call any witnesses to support its case other than Mvunyiswa. As indicated, and based on my assessment of the two opposing versions in accordance with the approach advocated by *Stellenbosch Farmers' Winery*, it is my view that the probabilities favour the plaintiff's evidence as to what occurred, including his assault, the manner in which his injuries were suffered and his arrest. In support of this conclusion, it may be added that the defendant failed to discover the SAP 15 form, the firearm register and the logbook associated with each vehicle and that the defendant satisfied itself with a bare denial and the testimony of Mvunyiswa. Neither Madyibi nor Yolwa were called to testify on behalf of the defendant. Furthermore, the efforts and outcome of the IPID investigation were referenced only tangentially.

[36] It is true that there is no fixed rule to the effect that the failure to call every available witness must result in an adverse inference being drawn. Each case depends on its own facts and circumstances.⁵ One of the circumstances that must be taken into account and given due weight is the strength or weakness of the case which faces the party who refrains from calling the witness.⁶ In this case the plaintiff has made out a case that he was assaulted by Mvunyiswa in the presence of other police officers and placed under arrest for a short period of time. As explained, his version is supported inter alia by his identification of Mvunyiswa courtesy of his interaction with him at the tyre repair centre, his description of Mvunyiswa having been in civilian clothing, his subsequent identification of Yolwa, the SAP 10 documentation seemingly confirming aspects of his allegations and the nature of the injuries suffered, as evinced by the photographic evidence and the medical report.

³ See, for example, the judgment of Neppen J in *S v Govender and Others* 2006 (1) SACR 322 (E) on the challenges associated with police statements and the approach to adopt in evaluating such inconsistencies.

⁴ See *S v Mafaladiso and Others* 2003 (1) SACR 583 (SCA) at 593e-594h.

⁵ See *Magagula v Senator Insurance Company (Ltd)* 1980 (1) SA 717 (N) at pp721-2.

⁶ *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133D-E.

[37] An adverse inference is drawn because of the likelihood that the witness has not been called out of fear that they would have testified in a manner that exposed facts unfavourable to that party. The inference would, however, only be proper if the evidence is available and if it would elucidate the facts.⁷ As I understood the plaintiff's evidence, he had not personally claimed that Madyibi had been one of the policemen involved in the incident. His aunt had suggested this for an unknown reason and was not called to testify. Leaving aside the signing out of the rifle, there is no basis for believing that Madyibi's testimony would have elucidated the facts any more than the testimony of any of the other police officers who had been patrolling Ngqeleni town that evening. It would, in my view, be inappropriate to draw an adverse inference from the failure to call Madyibi.

[38] The position of Yolwa is, however, somewhat different. The plaintiff testified that he was the 'Malombo' that he had identified with the assistance of Facebook, who was one of the police officers present at the time of the incident. He was a witness more readily available to the defendant and, having been identified by the plaintiff, his testimony may have shed light on what occurred. As a result, an adverse inference should be drawn from the failure to lead his evidence.⁸ I reiterate that these remarks simply add to the findings on the probabilities which, on their own, are sufficient to find for the plaintiff on the facts. Having considered the plaintiff's credibility as part of testing his allegations against the general probabilities, I am satisfied that his version of events is true and accurate and therefore acceptable. The evidence of Mvunyiswa, in so far as it conflicts with the plaintiff's version, is rejected as false.

[39] Although counsel for the defendant did not argue the point, and also did not address the issue in the heads of argument submitted, the remaining question is whether the defendant should be held vicariously liable for the conduct of its employees in the circumstances of this case.

⁷ *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A). Also see *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA).

⁸ See *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A)

Vicarious liability

[40] An employer is considered to be answerable for the delicts of an employee committed in the course of employment. The reason for this was explained by Innes JA, quoting Chief Justice Shaw, of Massachusetts, in *Mkize v Martens*:⁹

‘I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.’

[41] An employer has, however, not been held to be responsible for the acts performed by an employee solely for his own interests and purposes and outside his authority. Such acts are not considered to be ‘in the course of his employment’, even though they may have occurred during his employment.¹⁰ The difference between the two types of cases is notoriously difficult to determine. It is essentially a question of fact to be decided upon the circumstances of the particular case.

[42] The modern test for vicarious liability in cases of ‘deviation’ from authorised duties is based on the majority judgment of Jansen JA in *Rabie*:¹¹

- a. If an employee is seeking, albeit improperly, to advance his or her employer’s interests, the employer may be vicariously liable. This is a subjective test. On the subjective test there would be no vicarious liability if the employee were acting solely in his or her own interests.
- b. Even if there is no vicarious liability on the subjective test, the employer may still be liable if objectively there is a sufficiently close link between the employee’s acts for his own interests and the purposes and business of the employer.

⁹ 1914 AD 382 at 390.

¹⁰ *Ibid.*

¹¹ *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134C-F. See *Pehlani v Minister of Police* (2014) 35 ILJ 3316 (WCC) at para 23.

[43] The test has subsequently been considered by the Constitutional Court in a number of judgments.¹² Having regard to s 39(2) of the Constitution and comparative law, O'Regan J developed the law upon the foundation provided by *Rabie*, in *K v Minister of Safety and Security*, as follows:¹³

'From this comparative review, we can see that the test set in *Rabie*, with its focus both on the subjective state of mind of the employees and the objective question, whether the deviant conduct is nevertheless sufficiently connected to the employer's enterprise, is a test very similar to that employed in other jurisdictions. The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.'

[44] Various cases have confirmed an employer's liability to a third party for the act of an employee considered to be 'in the course of employment', even though the act itself is unlawful or prohibited.¹⁴ Courts have confirmed that the application of the general principle does not entail that every act of an employee committed during the time of employment, in the advancement of his personal interests or the achievement of his own goals, necessarily falls outside the course and scope of his employment.¹⁵

[45] It has also been held that whether an employee had indeed abandoned their employment was a factual question which had to be decided on the probabilities, mainly, if not exclusively, on the degree of digression.¹⁶ In answering this question, a court must have regard to all matters relevant to the question.¹⁷ Ultimately, a sufficiently close link must exist between the wrongful act of the employee, on the

¹² See, in particular, *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *F v Minister of Safety and Security and Another* 2012 (1) SA 536 (CC).

¹³ *K supra* at para 44. See *Stallion Security (Pty) Ltd v Van Staden* 2020 (1) SA 64 (SCA) ('*Stallion Security*') at para 18.

¹⁴ See, for example, *Estate van der Byl v Swanepoel* 1927 AD 141.

¹⁵ *Viljoen v Smith* 1997 (1) SA 309 (A) ('*Viljoen*') at 315E-G. Also see *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA).

¹⁶ *Viljoen supra* at 316J-317B.

¹⁷ *Bezuidenhout NO v Eskom* 2003 (3) SA 83 (SCA) at para 23.

one hand, and the business or enterprise of the employer, on the other.¹⁸ Importantly, reference to a link with the duties, authorised acts or employment of the employee should, in this context, be avoided. This is because the purpose of the development of the law in *Rabie* and *K* was to provide redress to a victim against an employer ‘even though the wrongful act did not in any manner constitute the exercise of the duties or authorised acts of the employee, if it was objectively sufficiently linked to the business or enterprise of the employer.’¹⁹

[46] In *Stallion Security*, the principle that a ‘sufficiently close’ link would not be established when the business of the employer furnished the ‘mere opportunity to the employee to commit the wrong’ was considered to be a convenient place to start.²⁰ The example provided in that case explains the point: if, for example, an employee assaults a co-employee or customer whilst on duty and at the workplace over an entirely private matter, the employer would in the absence of any other consideration not be vicariously liable.²¹ As a result, something more than a mere opportunity or ‘but for’ causal link is required. This ‘something more’ depends on the factual circumstances and normative considerations relevant to each case and on whether, in the light thereof, the rule should be further developed.²²

[47] In *K*, the Constitutional Court reproduced the following important principles for determining whether an employer is vicariously liable for an employee’s unauthorised intentional wrong, relying on the unanimous judgment in *Bazley*:²³

‘Courts should be guided by the following principles:

¹⁸ *Stallion Security supra* at para 19.

¹⁹ *Ibid.*

²⁰ *Stallion Security supra* at para 20. See *Bazley* [1999] 2 SCR 534 (*‘Bazley’*).

²¹ Also see the nature of the examples where employers will not be vicariously liable cited in *Bazley supra* at para 35, including the harm caused by a security guard who decides to commit arson for his or her own amusement.

²² *Stallion Security supra* at para 21.

²³ It might be added that the court in *Bazley* indicated specifically that the principles enunciated were appropriate for application in instances where precedent was inconclusive (at p 535), and that in such cases the next step would be to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability (at para 15). While that case went on to apply the factors identified to the instances of sexual abuse applicable in that matter, these factors were specifically considered to be ‘general considerations’ applicable to ‘intentional torts’: at p 536.

- (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of “scope of employment” and “mode of conduct”.
- (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability.

Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires.

Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice.

- (3) In determining the sufficiency of the connection between the employer’s creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
 - (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
 - (b) the extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee);
 - (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise;
 - (d) the extent of power conferred on the employee in relation to the victim;
 - (e) the vulnerability of potential victims to wrongful exercise of the employee’s power.’ [Emphasis in original.]

[48] In *Minister of Safety and Security v Japmoco BK t/a Status Motors*,²⁴ policemen had intentionally issued false motor vehicle clearance certificates, knowing that innocent third parties could be misled to their detriment thereby. Subjectively speaking, their prime objective was to serve their own pockets. Objectively speaking,

²⁴ *Minister of Safety and Security v Japmoco BK t/a Status Motors* 2002 (5) SA 649 (SCA).

however, the Supreme Court of Appeal held that each of them was performing the exact task assigned to them. It could not be said that they had totally distanced themselves from their assigned duties.²⁵ There was a close connection between the employees' actions for their own interests and purposes and the business of the employer, so that the appellant was, in principle, responsible for its employees' actions.²⁶

[49] So too in this instance, as demonstrated by the purported search, arrest and release of the plaintiff by the police officers. Two officers were in uniform and the third wore a police vest over plain clothes. The officers attended the scene in a police vehicle. It must be accepted, on the probabilities, that two were on duty and at least one carried a rifle issued by their employer. The probabilities favour police-issued handcuffs being used to inflict harm on the plaintiff. Although the motive is uncertain, based on Mvunyiswa's testimony it is likely that this relates to friction and confrontation inherent in certain interactions between police and civilians. Police officers are placed in a position of power over ordinary citizens. Persons in the position of the plaintiff are vulnerable to such conduct and helpless in the face of it. For these reasons the link is, objectively, sufficiently close, going beyond the mere creation of an opportunity to cause such harm, so that the defendant must be held responsible for the conduct of its employees.

[50] The plaintiff has, in my view, succeeded in discharging the onus of proof and is entitled to a judgment on the merits, together with costs.

Order

[51] The following order will issue.

1. The plaintiff's claim for unlawful arrest and assault on 9 December 2018 succeeds on the merits. The defendant is liable for any resultant damages that the plaintiff is able to prove.

²⁵ At para 12. Cf the remarks of Malan J in *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W) at 512H-I.

²⁶ At para 16, 17.

2. The defendant shall pay the plaintiff's taxed or agreed costs on a party and party scale.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:20 July 2022

Delivered:20 September 2022

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