MAY THE ACCUSED (MINISTER OF SAFETY AND SECURITY) PLEASE RISE BEFORE THE COURT: POLICE LIABILITY VERSUS PARTIAL IMMUNITY

*By Kenneth K. Sithebe**

1 Introduction

This article is written in light of the increasing number of civil actions brought against the South African Police Service (SAPS). Among the most recent cases is that of a Witbank woman and her daughter who instituted an action for damages because an escaped prisoner shot and killed the woman's husband with a service pistol that the prisoner had stolen from the police.[1] Another related claim is that of Mr Gerber who was shot during an armed robbery at his home in a security complex. Mr Gerber claimed R5.6 million from the Minister of Safety and Security for failing to protect South African citizens.[2]

In this article I analyse cases brought against the SAPS. I further illustrate that the state is liable for any delictual act committed by the SAPS, and that the state has a legal duty to protect its citizens and prevent them from harm or any form of violence. However, this does not justify the increasing number of civil actions instituted against the SAPS. My submission investigates whether there is any form of defence on which the state can rely – not to escape liability, but to uphold the functions, duties and reputation of the SAPS. I will argue that the monetary amounts claimed in these civil actions are not in the best interest of the public or that of the SAPS.

2 Constitutional provisions related to police liability

Section 7(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) states that the state 'must respect, protect, promote and fulfil the rights in the Bill of Rights'. In addition to this, section 8(1) of the Constitution also puts emphasis on the duty that is imposed on the state and all its organs to meet the requirements of

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1 *The Citizen* 16 May 2008 11.

2 *Pretoria News* 8 August 2008 2.

section 7(2) and to refrain from performing any act that will infringe the abovementioned rights.[3]

These sections imply that the state and its organs must provide appropriate protection to everyone through the law and other structures in order to effect such protection. Section 12 of the Constitution stresses that everyone in the Republic has the right to freedom and security of the person, and to be free from all forms of violence, either from public or private sources.[4] Therefore, these provisions in the Constitution place a burden on the state to prevent the violation, and to take preventative measures to ensure, the right to safety. In relation to these stipulations in the Constitution, section 205(3) of the Constitution states that:

> [T]he police service is mandated to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.

The Constitution and the South African Police Service Act[5] (the Act) contain provisions that impose a legal duty on the police and the state to prevent crime and protect everyone in the Republic. Failure to uphold such provisions as stipulated in the Constitution and the Act are discussed in *Minister van Polisie v Ewels* 1975 3 SA 590 (A), *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA), and *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).[6]

In *Minister van Polisie v Ewels,* an off-duty police officer assaulted an ordinary citizen at a police station. The assault took place in the presence of other police officers. In addition, one of the officers enjoyed a higher rank than the off-duty police officer. The respondent claimed that the police officers failed to perform their duty to prevent the assault. The Court held that section 5 of the Police Act[7] (applicable at the time) stipulated that it is the primary functions of the police, *inter alia*, to prevent crime and to maintain law and order.

3 Sec 8(1) reads: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State'.

4 The Constitution of the Republic of South Africa, 1996 sec 12(1)(c); M Pieterse 'The right to be free from public or private violence after Carmichele' (2002) 119 *South African Law Journal* 27.

5 South African Police Service Act 68 of 1995.

6 See also *Makhubela v Minister van Polisie & 'n Ander* 1977 1 SA 420 (T); *Mhlongo v Minister of Police* 1977 2 SA 800 (T); *Ramsay v Minister van Polisie & Andere* 1981 4 SA 802 (A); *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); *Moses v Minister of Safety and Security* 2000 3 SA 106 (C); *Ntamo and Others v Minister of Safety and Security* 2001 1 SA 830 (TkH); *Dersley v Minister van Veiligheid en Sekuriteit* 2001 1 SA 1047 (T); *Geldenhuys v Minister of Safety and Security & Another* 2002 4 SA 719 (C); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA); *Minister of Safety and Security v De Lima* 2005 5 SA 575 (SCA); *Minister of Safety and Security v Luiters* 2006 4 SA 160 (SCA); *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C).

7 The Police Act 7 of 1958 (repealed by the South African Police Service Act 68 of 1995).

Therefore, the appeal by the Minister was dismissed on the grounds that the police failed to perform a duty imposed on them by section 5 of the Police Act. The Minister was thus held vicariously liable.

In the *Van Eeden v Minister of Safety and Security,* the appellant was sexually assaulted, raped and robbed by one Mohamed, a known dangerous criminal and serial rapist who escaped from police custody through an unlocked security gate approximately two and a half months before the assault on the appellant. The appellant instituted an action against the Minister for delictual damages suffered as a result of the attack. The appellant relied on sections 7 and 12(1)(c) of the Constitution, which imposes a duty on the state to respect her right to freedom and security. Further, she stated that the above sections place a positive duty on the police to protect everyone from violent crimes. She additionally submitted that section 39(1)(b)[8] of the Constitution obliges the state to protect women against violent crimes under international law. The Court held that the police had a legal duty to act positively, in accordance with the above mentioned sections and section 205(3)[9] of the Constitution, to prevent Mohammed's escape. The Court found that the police acted wrongfully. The state was held liable for damages suffered by the appellant.

In *Carmichele v Minister of Safety and Security* (*Carmichele* case),[10] the Constitutional Court changed the South African law relating to wrongfulness. Carmichele, the applicant, was attacked by Coetzee, who had previously attacked and sexually assaulted a woman in the area around his residence. At the time Coetzee was also appearing in court on a number of other charges against him. On one such occasion, the investigating officer stated that there was no reason to deny him bail and recommended that he be released on a warning. In another court, the prosecutor omitted to inform the magistrate of Coetzee's previous convictions and charges and did not oppose Coetzee's release. Before the assault on the applicant, numerous appeals were made to a police officer at the Knysna police station for Coetzee to be kept in custody as he was likely to commit his habitual crimes again. All the attempts were in vain. The police officer in question stated that there was no law to protect the complainants, and that the authorities' hands were tied unless Coetzee committed another offence. On these facts, the Constitutional Court held that the interim Constitution[11] and the final Constitution have provisions that illustrate that the officer in question

8 Sec 39(1)(b) reads: 'When interpreting the Bill of Rights, a Court, tribunal or forum must consider international law'.

9 Sec 205(3) reads: 'The objects of the police service are to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law'.

10 2001 4 SA 938 (CC).

11 Act 200 of 1993.

was negligent and had failed to uphold the duty to protect and the duty of care toward members of the public. The officer omitted to provide the prosecutor with all the relevant information that could have led to Coetzee's being remanded in custody, and therefore the respondent was liable for delictual damages incurred by the applicant.

Various authors have also attempted to address the matter relating to police liability. Leinus and Midgley[12] discussed the liability of the police and the prosecutors in relation to the *Carmichele* case. The authors highlighted that the Constitutional Court went on to state that immunity absolving the police from liability would be inconsistent with our Constitution and its values. They outline the liability of police and prosecutors by *inter alia* noting that the interim Constitution, the final Constitution and the Act each contains provisions which impose a duty on the police to carry out their functions. They argue that the investigating officers had been aware of the allegations of rape levelled against Coetzee and that Coetzee admitted to perpetrating a violent sexual attack on his previous victim. The authors further contend that the investigating officers knew that the prosecutor relied on their recommendations regarding bail, and that they had a duty to inform the prosecutor of all factors relevant to bail. They are of the opinion that prosecutorial liability is not coextensive with that of the police, and that whilst prosecutors do not have specific constitutional duties imposed upon them in the same way as the police, they nevertheless owe the public the duty to execute their functions and mandate independently and in the best interests of the public,[13] as per section 41(1)(b) of the Constitution.[14]

Subsequent to the article by Leinus and Midgley, Pieterse writes about the inherent right to be free from either public or private violence in relation to the *Carmichele* case,[15] discussing section 12(1)(c) of the Constitution which guarantees a right to be free from public and private violence.

It is the crystallisation of all the factors that I have discussed that renders the SAPS open to civil actions. Yet, is there not any form of relief at their disposal with which to defend themselves against further civil actions, taking into account the resources available to them? It is worth noting that South Africa is under-policed: In South Africa there is an approximate average of 260 police per 100 000 of

12 B Leinus & JR Midgley 'The impact of the Constitution on the law of delict: Carmichele v Minister of Safety and Security' (2002) 119 *South African Law Journal* 17.
13 Leinus & Midgley (n 11 above) 22-23, 25-26.
14 *Carmichele* (n 10 above) para 72.
15 Pieterse (n 4 above).

the population, in comparison with the international average of 380 police per 100 000 people.[16]

3 Possible defences

3.1 Immunity

As discussed above, affording blanket immunity to the SAPS against civil actions is inconsistent with the Constitution. 'The principle of English constitutional law that "the king can do no wrong" does not form part of the law of the Republic of South Africa.'[17]

3.2 The Saaiman case

In order to start laying the foundation for a defence — sometimes referred to as 'partial immunity' — for the SAPS, the case of *Saaiman and Other v Minister of Safety and Security and Another*[18] (*Saaiman* case) must be analysed.

In the *Saaiman* case, the plaintiffs were travelling in a motor vehicle on a national road when they stumbled onto an armed robbery. The prime target of the robbers was a cash carrier belonging to the second defendant, a provider of cash transportation services. During the robbery shots were fired resulting in bodily injuries as well as traumatic, emotional and psychological shock suffered by the plaintiffs individually. The plaintiffs instituted a civil action in the Orange Free State Provincial Division for the recovery of damages totalling R776 000 against the defendants, with the first defendant cited as the Minister of Safety and Security. The plaintiffs averred that there was a legal duty on the Minister of Safety and Security to see that vehicles carrying money are escorted by police, and to see that signboards and/or warnings are erected to warn the public to act reasonably. Among the legal questions before the Court, the following could be identified which are pertinent to this article:

(1) Was there a legal duty of care owed by the defendant?
(2) Were the damages or injuries suffered not too remote from the alleged duty?

There should be a recognised relationship between the duty of care and the remoteness of damages or injuries. In totality, the plaintiffs alleged that the failure of the defendant to put in place these safety measures constituted a breach of a legal duty which was owed to the plaintiffs.

16 D Welsh 'Crime and punishment' (2006) 16 *Without Prejudice* 17.
17 M Demdy 'Law of delict' (1994) *Annual Survey of South African Law* 291.
18 2003 3 496 (O).

The Court held that whether a legal duty existed *in casu* or not entails a careful and analytical judicial assessment of numerous factors. There must be a balancing of competing interests of an individual delictual claim on one hand, and that of the community on the other hand.[19] Further, the relationship of the parties involved is a vital factor to be considered. These factors have two aspects. Firstly, where the relationship between the victim and the defendant suffering the action is a general relationship, an ordinary duty of care exists but no binding legal duty arises. Failure by the defendant to prevent harm is not regarded as wrongful conduct that translates into an actionable omission giving rise to delictual liability attached to the defendant in question. Secondly, where the relationship between the victim and the defendant is a special relationship, a particular duty exists. From this a binding legal duty may arise — failure by the defendant to prevent harm might be regarded as wrongful conduct, translating into an actionable omission and giving rise to delictual liability attached to the defendant in question.[20] It is suggested that the only instance where a special relationship arises is when the plaintiff hires the services of a private security company, in terms of Private Security Industry Regulation Act,[21] to complement the inherent security provided by the State through the SAPS.

Further, the powers, functions and duties of the police, as set out in section 13 of the South African Police Service Act read with section 205(3) of the Constitution, in brief boil down to maintaining public order, protecting citizens, and preventing and combating crime. Failure to perform any of these statutory duties does not necessarily give rise to civil liability on the part of the police. This is so because the legislative organ — a parliament which represents the beneficiaries of the police service, the country's inhabitants — does not consider it appropriate to hold members of the police service delictually liable to every member of the general public who suffers damages on account of omissions on the part of any member of the police service who neglects a public duty.[22]

Judge Rampie[23] goes on to quote Judge Hefer in the case *Minister of Law and Order v Kadir*[24] who said:

> The police force is first and foremost an agency employed by the State for the maintenance of law and order, and the prevention, detection and investigation of crime with the view to bringing criminals to justice.

Judge Rampie continues to say that:

19 *Saaiman* (n 18 above) 504.
20 *Saaiman* (n 18 above) para 14.
21 Act 54 of 2001.
22 *Saaiman* (n 18 above) para 17.
23 *Saaiman* (n 18 above) 509.
24 1995 1 SA 303 (A) 319.

> [O]ur society is a civilised and a reasonable society. In all civilised nations of the world, it is reasonably recognised and accepted that every human endeavour under the sun has two inherent aspects: namely, the possibility of success on the one hand and the possibility of failure on the other hand. These public servants who do their bit in very trying circumstances but fail, deserve our society's appreciation instead of condemnation and delictual anxieties for the slightest dereliction of their public duties. Moreover our society also recognises that our police service is an agency with limited financial and human resources expected to perform their policing duties with reasonable diligence and not absolute perfection.[25]

He further states that:

> [E]very day women are exposed to the risk of rape, banks to the risk of robberies, cargo carriers to the risk of ... [being hijacked], police to the risk of ... [being murdered], so are the farmers. The risk of crime is shared by all the members of the general public.[26]

The Judge acknowledges that recognising delictual liability based on omissions, as contended *in casu*:

> [C]an have crippling and adverse effects on the State *fiscus* to run a police service. Such an action will be too general and rangeless. Every single member of the general public will instantly become a potential claimant against the police service. It will diminish drastically the morale of the police. It will discourage young men and young women from serving the country as peace keepers. The protection of the inhabitants of this country by investigating, combating and preventing crime is by no means an easy task. Ideally we all would like to live in a virtually crime-free country. But that remains an ideal. Certainly there is virtue in being idealistic. But we must also be realistic about our limited resources as a nation and human limitations. The fact of the matter is that our police service is run by human beings, but like any other human beings, they make mistakes from time to time. Our law does not require them to be punished by visiting every mistake they make with the sword of delictual liability. The advent of the Constitution has not changed that sound common-law principle. It seems to me that the circumstances of the instant case do not call for the extension of the omission rule.[27]

Further, the Judge says:

> [M]y assessment of all the circumstances of this case leads me to the conclusion that the social ideas of the community are that the loss of the plaintiffs should fall on the criminals involved where it delictually belongs, and not on the defendants.[28]

The Judge rightfully distinguishes the *Carmichele* case from the *Saaiman* case. This distinction is drawn on the grounds that the *Saaiman* case lacks the organic and compelling substance which is the

25 *Saaiman* (n 18 above) para 18.
26 *Saaiman* (n 18 above) 509.
27 *Saaiman* (n 18 above) 510 - 511.
28 *Saaiman* (n 18 above) 511.

core matter of *Carmichele*. The Judge states that, in the *Carmichele* case, liability was based on the grounds that the police, in light of all the circumstances, recommended that Coetzee be released, which amounted to wrongful conduct because the State was obliged by the Constitution and international law to prevent gender discrimination and to protect the dignity, freedom and security of women.[29] Finally, the Court held that the plaintiffs had failed to prove that the Minister had the legal duty to protect them, and consequently that the Minister breached that legal duty by negligently failing to implement safety measure. The Court concluded that there was no proximate *nexus* between their damages and the alleged omission by the Minister.[30]

3.3 The Mpongwana case

In *Mpongwana v Minister of Safe and Security*[31] (*Mpongwana* case), the plaintiff was a passenger in a minibus taxi belonging to a certain taxi organisation when it was fired upon by persons, allegedly members of a rival taxi organisation. The plaintiff was seriously injured and thus instituted an action against the defendant on the basis that the police, knowing the circumstances that prevailed on the day in question and the volatile and violent relationship between the two rival taxi organisations, had owed her a duty of care and had failed negligently to discharge that duty, resulting in the injuries she sustained.

The particulars of claim by the plaintiff did not suggest that the shots fired were fired by a policemen either in the course of their duty or otherwise. The particulars of claim by the plaintiff pleaded that in the circumstances which prevailed on the day in question, the police owed her a duty of care to avert the harm which befell her and that the police negligently failed to discharge that duty. Therefore, had the police fulfilled their duty, she would not have been injured.[32]

Before the Court could reach a decision, the defendant's counsel submitted exceptions to the plaintiff's particulars of claim to the following effect:[33]

> (9) A failure on the part of defendant and/or members of the South African Police Service (the police) to perform their statutory duties does not give rise to liability.
> (10) The defendant and/or the police did not owe plaintiff a duty of care either as alleged in Para 9 of plaintiff's particulars of claim, or at all.

[29] *Saaiman* (n 18 above) para 23.
[30] *Saaiman* (n 18 above) 512.
[31] 1999 2 SA 794 (C).
[32] *Mpongwana* (n 31 above) 796.
[33] *Mpongwana* (n 31 above) 797.

> (11) The foreseeability of plaintiff suffering harm is not decisive of the question as to whether liability should be imposed upon [the] defendant.
> ...
> (13) The dictates of public policy militate against liability being extended in the circumstances of this case and holding [the] defendant liable for plaintiff's damages in that:
> (13.1) The duties of the police are not exhaustive;
> (13.2) The police would be inhibited in their functions should acts or omissions (as alleged in the present matter) give rise to potential claims against the police;
> (13.3) The energy and financial resources of the police would be directed towards guarding against potential claims rather than combating crime;
> (13.4) A multiplicity of actions against the police would ensue.

Therefore, in these circumstances, did the police owe the plaintiff the alleged duty to care?

Amongst other issues in question, the Court held that the activities of the SAPS during the time the incident happened on 30 October 1995 were governed partly by the Act, particularly section 13 read with section 205(3) of the Constitution. The latter emphasises that the functions of the police service shall be to 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.

The Court held that the above emphasis does not differ materially from section 5 of the previous Police Service Act of 1958, of which it was held did not *per se* impose upon the police a legal duty in favour of the civilians.[34] The Court goes on to address some issues in relation to prosecutorial liability which were the contention in the *Carmichele* case.[35] Matlala notes that the Judge acknowledged the fact that the plaintiff had an arguable case on the issue of the duty to care.[36] Neethling also points out that the Court was of the opinion that placing a legal duty on the police *in casu* 'would tend to be counterproductive'.[37]

Neethling is of the opinion that the majority of delictual acts committed by the police are done so in their personal capacity. This contention strengthens the possible defences for the SAPS. To substantiate this, one should look at the cases where a complainant was raped, assaulted, intimidated, harassed, discriminated against or

34 *Mpongwana* (n 31 above) 800.

35 The main issue at hand was that prosecutorial services owed no duty of care to those whom it was prosecuting. See further *Carmichele v Minister of Safety and Security And Another* 2001 1 SA 489 (SCA) para 19.

36 D Matlala 'The law reports: Delict' (2003) 19 *De Rebus* 39-40.

37 J Neethling 'Delictual protection of the right to bodily integrity and security of the person against omissions by the State' (2005) 122 *South African Law Journal* 585.

unlawfully dealt with by members of the SAPS contrary to what the Constitution or any other statute mandates. Consequently, the case of *K v Minister of Safety and Security*[38] (*K* case) will be discussed.

3.4 Vicarious liability — and placing it where it delictually belongs

In *K v Minister of Safety and Security*, the applicant was raped by three uniformed and on-duty police officers after she was deserted by her companion in the early hours of 26 March 1996. The applicant was offered a lift by the policemen which she accepted in light that they were police officers, who bore the statutory and Constitutional duty to protect members of the public and to prevent crime. She thus thought they had her best interests at heart.

The Constitutional Court held that it was very difficult to apply the principles of vicarious liability to this case because the three policemen did not rape the applicant upon the instructions of the Minster, nor did they fulfil the legal duty imposed on them by the legislation and the Constitution. The basic principle to establish vicarious liability is whether the employee — police officer — has committed the delict in the course and scope of employment for the employer — the Minister of Safety and Security — to be held vicarious liable.[39]

The Constitutional Court articulated the obscurity in determining the phase where a delict committed by an employee involves or shifts to the employer. Justice O'Regan accepted that the police officers in question were on duty and in police uniform when the act was committed. She further states that the policemen possessed a duty to ensure the safety of the public and to prevent crime. The Constitutional Court discussed the outcomes of the High Court and the Supreme Court of Appeal that culminated in the application to the Constitutional Court.

The Supreme Court of Appeal held that a deviation from the scope and course of employment indemnifies the employer from the liability suffered as a result of such deviation. It was further held that on those grounds the Minister cannot be held liable for the rape. Further, an employer is only responsible for the wrongs committed by an employee during the course and scope of employment, engaged within the affairs of his master. Therefore, only in executing the provisions of the Constitution and the Act would the Minister be liable. These principles are found in both common law and customary law.[40]

[38] 2005 6 SA 419 (CC).
[39] J Neethling *et al Law of delict (5th edition)* (2006) 338.
[40] *K* (n 38 above) para 9.

In the Constitutional Court, Justice O'Regan continues to say, however, that the difficulties arise when the delict is committed in the course of a deviation from the normal performance of an employee's duties. The question the Constitutional Court had to answer was whether the employees were still acting within the scope of their duty or were still engaged within the affairs of their employer. The difficulty is predominantly pronounced where the deviation itself is intentional, and even more pronounced where the deviation constitutes an intentional wrong such as in the present case. The Court was cautious to note that an employee's intentional deviation from a duty does not *ipso facto* mean that an employer will be exempted from vicarious liability.[41]

Further, the Court analysed whether the wrong was solely attributable to the employee or whether it was sufficiently close enough to the employer to give rise to vicariously liability, taking into account the principles of vicarious liability and that it should be consistent and fair to the employer.[42] The Court considered the House of Lords decision in the case of *Lister & others v Hesley Hall Ltd* to determine the test that would be just and fair to hold an employer liable for the deviated conduct of his employee.[43] As stated by Lord Millet:

> The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys ... I would hold the school liable.

The Court considered other case law in order to establish a context to the set guidelines to follow when determining vicarious liability in relation to a deviation. In doing so, the Constitutional Court established a new test for liability. The test is narrated to the following effect:

> The principles of vicarious liability and their application had to be developed to accord more fully with the spirit, purport and objects of the Constitution, but that this did not mean anything more than that the existing principles of common law vicarious liability had to be understood and applied within the normative framework of the Constitution, and the social and economic purposes which they sought to pursue. This implied that the Court had to decide whether the case before it was of the kind that should in principle render the employer

41 *K* (n 38 above) para 25.
42 *K* (n 38 above) 437.
43 2001 2 All ER 769 (HOL).

> liable. Whether the principles of vicarious liability themselves required development beyond an acceptance of the normative character of their provenance and application was a different issue.

In light of the above factors and other cases, the Constitutional Court reached a unanimous decision that the Minister will be vicariously liable despite the fact that the rape was clearly a deviation from the duties the officers were employed to execute.[44]

It is exactly that which I fail to comprehend — how can an employer be vicariously liable for an act not condoned, expressly prohibited, and explicitly excluded in the employee's employment contract? I would like to draw your attention to the English case of *Home Office v Dorset Yacht Co Ltd*. [45] Among other aspects discussed in this case, the aspect I agree with in particular is that expressed by Lord Diplock in an *obiter dictum*:[46]

> The risk of sustaining damage from the acts of criminals is shared by the public at large. It has never been recognised at common law as giving rise to any cause of action against anyone but the criminal himself. It would seem arbitrary and therefore unjust to single out for the special privilege of being able to recover compensation from the authorities responsible for the prevention of crime a person whose property was damaged by the [delicious] act of a criminal, merely because the damage to him happened to be caused by a criminal who had escaped from custody before completion of his sentence instead of by one who had been lawfully released or who had been put on probation or given a suspended sentence or who had never been previously apprehended at all.

The same issue is endorsed in *Hill v Chief Constable of West Yorkshire*[47] (*Hill* case). The following extracts, relevant to the issue at hand, are discussed by Lord Keith:[48]

> The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty.

By common law, police officers owe to the general public a duty to enforce the criminal law.[49]

44 *K* (n 38 above) para 44.
45 1970 2 All ER 294 (HOL) 334.
46 This opinion was also endorsed by Rampie J in the *Saaiman* case (n 18 above) 510-511.
47 1988 2 All ER 238 (HOL) 240.
48 *Hill* (n 47 above) 240.
49 *R v Metropolitan Police Commission, ex parte Blackburn* 1968 1 All ER 763 (HOL); *Hill* (n 47 above) 240.

> From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further, it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some actions might involve allegations of a simple and straightforward types of failure, for example that a police officer negligently tripped and fell while pursuing a burglar, others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do.[50]

It is further stated:[51]

> A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell LJ, in his judgment in the Court of Appeal in the present case, was right to take the view that the police were immune from an action of this kind on grounds similar to those which in *Rondel v Worsley* were held to render a barrister immune from actions for negligence in his conduct of proceedings in court.

In the same case, Lord Templeman holds the following view:[52]

> Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties. This action is in my opinion misconceived and will do more harm than good. A policeman is a servant of the public and is liable to be dismissed for incompetence. A police force serves the public, and the elected representatives of the public must ensure that the public get the police force they deserve. It may be that the West Yorkshire police force was in 1980 in some respects better and in some respects worse than the public deserve. An action for damages for alleged acts of negligence by individual police officers in 1980 could not determine whether and in

50 *Hill* (n 47 above) 243-244.
51 As above.
52 *Hill* (n 47 above) 245.

what respects the West Yorkshire police force can be improved in 1988. I would dismiss the appeal.

I believe that Kok supports the view and judgment of the Constitutional Court in the *K* case.[53] After the Supreme Court of Appeal dismissed the case, Kok writes about the appalling lack of judgment by the Court to develop the common law to align it with the values enshrined in the Bill of Rights. To support his argument, Kok tables how he is of the opinion that the *K* case is indistinguishable from the *Ewels* case. Accordingly, he argues:

> *Ewels* concerned an attack by one policeman while a number of other policemen watched and did nothing to prevent the assault; [*K*] concerned a rape by one policemen (*sic*) while two others watched and did nothing to prevent or stop the rape.[54]

He further outlines how the Supreme Court of Appeal should also have found these cases analogous. Kok presupposes that the Court suggested that the victim finds her remedy in a criminal charge against the perpetrators and not the Minister in a claim for damages. Kok remains convinced that the police officers who watched and did nothing were acting in the scope and course of their employment because they were on duty, in a police car (which they guarded), and in police uniform. Therefore, the Minister should be held vicariously liable.[55]

However, I do not share Kok's view, taking into consideration his interpretation of the case and the constitutional implications of the case, and I remain reluctant to endorse such views.[56] I find the cases of *Ewels* and *K* distinguishable on the grounds outlined by the Supreme Court of Appeal.[57] *Inter alia,* the primary reason for the author's contention in this regard is that, in the *Ewels* case, the officers were at a police station and were obliged and compelled by the situation to act within the course and scope of their employment; in contrast, in the *K* case, the officers had formed a common *mens rea* as that of criminals to rape the victim. In the *K* case, the officers pursued at all times a common intention, which was not present in the *Ewels* case.[58]

According to Neethling *et al*, vicarious liability is when an employee (servant) acting within the scope of his employment commits a delict and his employer (master) is fully liable for the

53 A Kok 'An appalling lack of judgement by the Supreme Court of Appeal' (2005) 68 *THRHR* 506.
54 Kok (n 53 above) 508.
55 As above.
56 The author takes note of the hierarchy system of courts as stipulated in the Constitution, sec 166.
57 *K v Minister of Safety and Security* 2005 3 SA 179 (SCA).
58 *K* (n 57 above) paras 4, 6 & 7.

damage suffered. The authors discuss the requirements for vicarious liability. The three requirements are:[59]

> (1) There must be an employer-employee relationship at the time when the delict is committed.
> (2) The employee must commit the delict.
> (3) The employee must act within the scope of his employment when the delict is committed.

The authors are of the opinion that the decision in the *K* case directly contests the question that is often at hand in our courts, namely, whether employers should be vicariously liable for intentional wrongdoing (such as fraud, theft, assault, sexual assault, sexual harassment and rape) by their employees. The case law, according to the authors, shows that vicarious liability was excluded in such circumstances because the conduct of the employee could (understandably) not be brought within the boundaries of the standard test — not even as 'improper modes' of the execution of his duties.[60]

They further discuss the case *Phoebus Apollo Aviation CC v Minister of Safety and Security*,[61] wherein the Court said that the standard test was in agreement with the Bill of Rights. If a need exists in future to extend vicarious liability for intentional wrongdoing, the basis upon which this was done by the Constitutional Court in the *K* case must in analogous cases receive due consideration. It must further be remembered that employers, to a greater or lesser extent, run a risk that their employees may not be trustworthy (be dishonest or criminal), and many employees exploit the employment situation for their own benefit. This risk factor must at least be considered in answering the question whether the employee acted in the scope of his employment.

I am of opinion that, should any member of the police service assault, rape, damage property, kill or partake in any unlawful conduct that is determined by the Constitution to be outside the mandate issued to the SAPS, civil actions should be instituted against that member in his personal capacity so as to spare the SAPS the burden of having to preserve its reputation, no matter what the circumstances are. This appraisal is based on a thorough analysis of the different sources stated above.

The employer may accordingly only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but viewed objectively has also completely disengaged himself from the duties of his contract of employment.[62]

[59] Neethling *et al* (n 39 above) 339-343.
[60] Neethling *et al* (n 39 above) 342.
[61] 2003 2 SA 34 (CC).
[62] Neethling *et al* (n 39 above) 338.

4 Other case law

As stated by Demdy:

> There are many proverbial 'good cops', but also plenty bad ones. Few police forces in the world can combat crime effectively without the active support of the communities. The most vital source of information for the police, are members of the public. If this co-operation lacks, police work is hampered.[63]

By carefully analysing *Minister van Police v Ewels*, it was stated in an *obiter dictum* that the legislature did not intend that the respondent should have a civil action against the police if the latter should fail to carry out any duty imposed upon him under the relevant acts.[64] As stated by Lord Denning:

> We have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the police and not hinder them in their efforts to track down criminals.[65]

5 Conclusion

The given evaluation does not support the submission that the police should be totally indemnified from liability in all circumstances, but taking into account the number of civil actions levelled against them, legislative measures need to be taken to counter-act the situation. Partial immunity in certain cases should be sufficient to afford the police the opportunity to perform their duties without the fear of being prosecuted. The vicarious liability principles should be adhered to, but in such a way that they will lend some flexibility to an employer should his employee deviate beyond the boundaries of the employment contract.

63 Demdy (n 17 above) 291.
64 *Minister van Polisie v Ewels* 1975 3 SA 590 (A).
65 *Ghani and Others v Jones* 1969 3 All ER 1720 (D).