A CRITICAL ANALYSIS OF THE MAJORITY JUDGMENT IN *F v MINISTER OF SAFETY AND SECURITY* 2012 1 SA 536 (CC)

JA Linscott[*]

SUMMARY

The majority judgment of Mogoeng CJ in *F v Minister of Safety and Security* 2012 1 SA 536 (CC) purports to be a straightforward application of the reasoning of the Constitutional Court in *K v Minister of Safety and Security* 2005 6 SA 419 (CC), in which the court updated and constitutionalised the "standard test" for vicarious liability in deviation cases originally set out in *Minister of Police v Rabie* 1986 1 SA 117 (A) by holding that constitutional and other policy norms now play an important role in deciding questions of vicarious liability. However, it is respectfully submitted that a close reading of the majority judgment in *F* reveals that the judge misconstrues several key concepts related to the doctrine of vicarious liability. In particular, the judge seems to suggest that there are separate and different tests for vicarious liability in instances where an employee has plainly committed a delict in the course and scope of his employment, and where he has to some extent deviated from his employment duties. In fact, there is a single overarching test for vicarious liability - the course and scope rule - but various subsidiary tests are used by the courts to address difficult or borderline cases. It is also questionable whether *F* truly is a "typical deviation case", as the judge asserts. The judge then applies the constitutionalised test for vicarious liability originally set out in *K* in a manner which is subtly, but significantly, different from how it was deployed in that case. In particular, Mogoeng CJ's implication that it is not necessary for a court to consider the second leg of the Rabie test in circumstances where the employee wrongdoer has clearly subjectively intended to further the interests of his employer is undesirable and should not be supported. Furthermore, the judge identifies the question of whether or not there is an "intimate link" between the conduct of the employee wrongdoer and the business of his employer as one of the normative issues to be canvassed in order to determine the outcome of the second leg of the

[*] James Linscott. MA LLB (Natal) LLM (Cantab). Lecturer in Law, University of KwaZulu-Natal. Email: linscott@ukzn.ac.za.

Rabie test. In fact, the "intimate link" question is the overall one to be decided in terms of the second leg of the Rabie test, which, in terms of the approach set out by O'Regan J in *K*, is to be answered by considering a range of factual and normative considerations in conjunction with one another. Moreover, the judge appears to construe the "intimate link" question in primarily factual terms. The discrepancies between the approaches of the courts in *K* and *F* are significant because they lead Mogoeng CJ to place a far heavier reliance on factual considerations in deciding whether the conduct of the employee wrongdoer was sufficiently closely related to the employer's business than would have been the case if he had more faithfully applied the test for vicarious liability set out in *K*. Although the judge devotes a considerable portion of the judgment to the normative issues which point to the need for the court to make a finding of vicarious liability, these do not seem to have been the immediate driver of his ultimate decision to impose vicarious liability in this instance. The reasoning of the majority in *F* becomes all the more problematic when one considers that the factual considerations linking the employee wrongdoer's conduct to the business of the SAPS are far more tenuous in this case than in *K*. A more compelling justification for imposing vicarious liability in *F* would have lain in the normative constitutional considerations that point towards the need to impose vicarious liability in this instance.

KEYWORDS: Delict; vicarious liability; course and scope rule; deviation cases; "sufficiently close connection" test; fundamental rights; state liability; development of common law in terms of *Constitution of the Republic of South Africa*, 1996; Constitutional Court.