REPORTABLE

CASE NO: SA 40/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CROWN SECURITY CC **Appellant**

and

JOHANNES HERMANUS AUGUST GABRIELSEN **Respondent**

Coram: SMUTS JA, CHOMBA, AJA and HOFF AJA

Heard: **2 July 2015**

Delivered: **8 July 2015**

APPEAL JUDGMENT

SMUTS JA (CHOMBA AJA and HOFF AJA concurring):

[1] The respondent was shot and severely injured by a security guard employed by the appellant. As a result of this shooting, the respondent was rendered paraplegic and sustained extensive damages. The sole question for determination in this appeal is whether the appellant is vicariously liable for those damages.

Background facts

[2] The facts are shortly these. The respondent proceeded fairly late one evening in March 2004 to an apartment block in suburban Windhoek. He went

there to check up on a woman friend who worked for him in a nightclub business he had at the time. He had developed a romantic interest in her and was concerned about her well-being as she had apparently left the business in the company of her former partner after the latter two had been involved in a row.

[3] The apartment block where the respondent's woman friend stayed was guarded by a security concern, the appellant. It had an armed guard stationed outside the fenced perimeter of those premises to protect the premises and its occupants from crime.

[4] Upon arrival, the respondent stood outside the perimeter fence and called out to his friend. This elicited no response from her. He decided to leave those premises. When he returned to his motor vehicle to do so, the armed security guard approached him, recognising him from the respondent's visit to his female friend the previous night. The guard then encouraged the respondent to scale the perimeter palisade fencing to gain access to the premises so that he could physically knock upon his friend's door. The respondent gladly accepted this cooperation. He scaled the fence and knocked upon her door and also called out to her. When this likewise drew no response, the respondent finally turned to egress the premises in the same way he had entered them.

[5] The respondent again proceeded to climb up the fence and at its summit, he saw the security guard take out his firearm and discharge a shot at him. It struck him in the chest. The bullet lodged near his spinal column, causing severe injuries and resulting in paraplegia and other complications. The respondent underwent

surgery and further medical treatment which were unable to arrest or alter his paraplegic condition. A number of expert witnesses testified at the trial concerning the nature, ambit and extent of the injuries and their consequences for the respondent. They testified as to the extent of damages to be awarded. Their evidence was, for the large part, uncontested. The appellant did not lead any expert evidence to controvert the opinions expressed by the expert witnesses called by the respondent.

[6] The sole witness to the shooting was the respondent. This summary is drawn from his testimony.

[7] The security guard remained in the employ of the appellant for nearly a year after the shooting incident and then resigned. It was accepted at the trial that he had died from natural causes after leaving the appellant's employ and before the trial commenced.

[8] A former detective in the employ of the Namibian Police testified that he had investigated the matter and opened a docket which was then referred to the Prosecutor-General for a decision. At the time of the death of the security guard, no such decision had as yet been taken.

[9] The respondent instituted an action against the plaintiff, seeking to hold it liable on the basis of vicarious liability for the delict of the security guard and claiming extensive damages. It was initially pleaded in the particulars of claim that the security guard had been negligent in his handling of the firearm and in aiming

in the direction of the plaintiff without taking precautionary steps to avoid shooting the plaintiff. The particulars of claim were subsequently amended at the time of the trial to allege that the shooting had been intentional on the part of the security guard.

[10] In a closely reasoned judgment, the court below found that the appellant was vicariously liable and awarded damages in the sum of N$8.647 million in favour of the respondent.

[11] The appellant's appeal is confined to the finding of vicarious liability and does not take issue with the quantification of the damages award.

Common law principles of vicarious liability

[12] An early authoritative formulation of the principle of an employer's vicarious liability for a delict committed by an employee acting in the course and scope of his or her employment under common law was set out in *Mkize v Martens*[1] by Innes JA. After a discussion of common law writers and American and English authorities, he concluded:

> '. . . (W)e may, for practical purposes adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment'.

[1] 1914 AD 382 at 390.

[13] This test became known as the 'standard test'. As was already then acknowledged by Innes JA, the difficult part of the enquiry remains the application of this legal principle to the facts[2] and especially determining whether the employee was 'engaged in the business of his master'.[3] In *Estate van der Byl v Swanepoel*[4] the test set out in *Mkize* was expanded to mean:

> 'It is clear therefore that this Court in applying the general principle that a master is liable for the torts of his servant acting within the scope of his employment has taken the extended view of the master's liability to third parties [rather] than the narrower one which would confine his liability strictly to acts done within the instructions or necessarily incidental thereto'.[5]

[14] As was much later explained by that court in *Ngobo*:

> 'The critical consideration is therefore whether the wrongdoer was engaged in the affairs or business of his employer. (I shall refer to it as the "standard test" or "general principle".) It has been consistently recognised and applied, though - since it lacks exactitude - with difficulty when the facts are close to the borderline.
>
> The problem of application presents itself particularly in what have become known as "deviation cases": instances in which an employee whilst in a general sense still engaged in his official duties deviates therefrom and commits a delict. *SA Railways & Harbours v Marais* 1950 (4) SA 610 (A) and *African Guarantee & Indemnity Co Ltd v Minister of Justice* 1959 (2) 437 (A) are perhaps the best known examples of such cases. The former case involved an engine driver who, acting contrary to instructions, allowed a passenger to travel in the locomotive. As a result he was killed. On appeal the decision allowing his widow to sue in *forma pauperis* was reversed. At 617B-D Watermeyer CJ pointed out that:

---

[2] *Supra* at 391.
[3] As was emphasised in *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 826J-827B.
[4] 1927 AD 141.
[5] *Supra* at 147 as approved in *Ngobo* at 827.

> "[T]he test is not whether the act or omission complained of occurred whilst the servant was engaged in the affairs of his master but whether it constituted a negligent performance of the work entrusted to the servant. The act or omission may occur whilst the servant is engaged in the affairs of his master and yet the master may not be liable. For instance a servant may, whilst engaged in the affairs of his master, assault a third person in order to satisfy a grudge of his own such assault being quite unconnected with his master's work. In such a case the master would not be liable, for the servant in committing the assault was not performing the work entrusted to him, or doing anything ancillary to it."

The general principle as expressed in this passage, if considered in isolation, may be said to have been too narrowly stated but words used in a judgment are not to be construed as though they were carefully selected by the draftsman of a statute. Be that as it may, the illustration given in the quoted passage is for present purposes instructive.

In the other case, the *African Guarantee* decision, Ramsbottom JA concluded (at 447E-F):

> "[T]he constables [after deviating from their police duties] did not entirely abandon their employer's work but continued, partially, at any rate, to do it while they were devoting attention to their own affairs; they were still exercising the functions to which they were appointed. Their employer, therefore, is liable"'.[6]

[15] In what has rightly been termed a seminal judgment of the (South African) Constitutional Court,[7] O'Regan J, writing for a unanimous court in *K v Minister of Safety and Security,*[8] conducted a careful and comprehensive survey of both earlier decisions and other jurisdictions. In the course of her judgment, she referred

[6] *Supra* at 827C
[7] By Yacoob J in *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 152.
[8] 2005 (6) SA 419 (CC).

at some length to an earlier leading case (of *Feldman v Mall)*[9] in her discussion of 'deviation cases':

> 'It is clear that an intentional deviation from duty does not automatically mean that an employer will not be liable. In the early leading case of *Feldman v Mall*, a driver of the appellant's vehicle had, after delivering the parcels he had been instructed to deliver, driven to attend to some personal matters of his own during which time he consumed enough beer to render him unable to drive the vehicle safely. On his way back to his employer's garage, he negligently collided with and killed the father of two minor children. The case concerned a dependant's claim for damages and the Court, by a majority, held the employer to be vicariously liable.
>
> In his judgment holding the employer liable, Watermeyer CJ captured the test for vicarious liability in deviation cases as follows ─
>
> > "If an unfaithful servant, instead of devoting his time to his master's service, follows a pursuit of his own, a variety of situations may arise having different legal consequences.
> >
> > (a) If he abandons his master's work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant's abandonment of his master's work amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master will naturally be legally responsible for that harm; there are several English cases which illustrate this situation and I shall presently refer to some of them. If, on the other hand, the harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master will not be responsible.

[9] 1945 AD 733.

(b) If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs"'.

In a later passage in the judgment, Watermeyer CJ continued as follows ─

> 'This qualification is necessary because the servant, while on his frolic may at the same time be doing his master's work and also because a servant's indulgence in a frolic may in itself constitute a neglect to perform his master's work properly, and may be the cause of the damage.'

Watermeyer CJ explained the reason for the rule as follows ─

> 'I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master's legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm.'[10]

[10] *Supra* at para [28]

[16] O'Regan J also cited with approval the slightly different formulation of the test for vicarious liability in the concurring judgment of Tindall JA in the *Feldman* matter:

> 'In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed'.[11]

[17] O'Regan J thereafter referred with approval to a later leading case of *Minister of Police v Rabie.*[12] In that matter, a plaintiff claimed damages for *inter alia* wrongful arrest and detention effected by a mechanic employed by the police pursuing his own personal interests. He was off duty at the time of the arrest and not in uniform. But he identified himself as a policeman to the victim and took him to a police station, filled in a docket and wrongfully charged him. This was a significant deviation from the usual tasks incidental to his employment with the police. The issue was whether the Minister of Police was vicariously liable for damages arising from his delictual conduct of the off duty police employee. The court found that the Minister was liable. The test for determining vicarious liability in that matter was formulated in the following way:

> '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 or

[11] *Supra* at 756-7
[12] 1986 (1) SA 117 (A).

> 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 (cf *Estate van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard 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'.[13]

[18] This approach, which has since been repeatedly applied,[14] was further explained by O'Regan J in *K v Minister of Safety and Security*[15] in the context of the adoption of the Constitution of South Africa and in the light of the values expressed in it:

> 'The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question 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'.

[19] O'Regan J in *K* also referred to the articulation of the test for vicarious liability in the House of Lords in *Lister v Hesley Hall Ltd*[16] by Lord Steyn as being

[13] *Supra* at 134C-E
[14] *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (A) para 11; *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA) para 10; *Absa Bank v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) per Zulman JA para 5; although *Rabie* was criticised in *Ngobo* at 832, this statement for the test was not directly criticised.
[15] *Supra* at para 32.
[16] [2002] 1 AC 215 (HL) (2001(2) All ER 769).

'whether the torts were so closely connected with [the warden's] employment that it would be fair and just to hold the employers vicariously liable'.[17] The approach adopted by the Canadian Supreme Court was also cited by O'Regan J in two matters which, like *Lister,* also dealt with sexual assaults of employees upon children within their care. In one of those cases, *Bazley v Curry*[18]*,* the unanimous conclusion of the Canadian Supreme Court was quoted with approval by O'Regan, J:[19]

> '[C]ourts should be guided by the following principles:
>
> (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 authorized 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:

[17]Para 28, quoted by O'Regan J in *K* para 36.
[18](1999) 174 DLR (4th) 45 (Con SC).
[19]Para 38 at p 39.

(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)

[20] O'Regan J in *K* concluded her survey of the common law and of other jurisdictions thus:

> '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'.[20]

[20] *Supra* para 44.

[21] The normative content of the objective stage of the enquiry posited by *Rabie* as further explained and developed by O'Regan J was, albeit differently, also stressed in the High Court by Maritz J in *Van der Merwe-Greeff Inc v Martin & Others*[21] where he referred to a court taking into account 'compelling reasons relating to social policy or the tenets of fairness', which may militate in favour of or against a finding of vicarious liability.[22]

[22] O'Regan J in *K*, distilled the test to be applied in the light of the South African Constitution as follows:

> '[45] The common-law test for vicarious liability in deviation cases as developed in *Rabie's* case and further developed earlier in this judgment needs to be applied to new sets of facts in each case in the light of the spirit, purport and objects of our Constitution. As courts determine whether employers are liable in each set of factual circumstances, the rule will be developed. The test is one which contains both a factual assessment (the question of the subjective intention of the perpetrators of the delict) as well as a consideration which raises a question of mixed fact and law, the objective question of whether the delict committed is "sufficiently connected to the business of the employer" to render the employer liable.'

[23] The lucid exposition of the common law principles as further developed by O'Regan J in my view also reflects the position in Namibia, taking into account the values embodied in the Namibian Constitution and the need for the common law of Namibia to be developed in the light of those values.

Application of the facts of this case

[21] 2006 (1) NR 72 (HC).
[22] *Supra* at p 82G.

[24] The only evidence given of the shooting was that of the respondent, as I have said. The security guard had died after the incident and prior to the commencement of the trial.

[25] There was thus no direct evidence from him as to his subjective state of mind. There is only the respondent's account which Mr Tötemeyer, SC for the appellant conceded the court below could not be faulted for accepting. That account included:

- the respondent being recognised by the security guard as having visited his woman friend at the apartment the previous evening;
- an exchange taking place with the security guard indicating that the woman should be in her apartment because the light was on and encouraging the respondent to try again to raise her;
- this he did by calling her name in the presence of the security guard;
- the security guard encouraged him to scale the fence to go inside the premises to knock at the door;
- after no-one answered the door, the respondent set about climbing over the palisade fencing;
- while he was doing so, the guard took out his pistol and shot at him, striking the respondent in the chest.

[26] The evidence of the respondent was not to the effect that the guard sought to rob him or to overtly act in some way for his own purpose. The security guard was approximately 2 meters from the respondent when the shot was discharged.

The respondent testified that the guard pointed the pistol at him at a position of 10 cm above the height of the guard's belt with a bent arm. After the shot was fired and the respondent had fallen to the ground, the guard said to him 'I am a koevoet and you must not mess with me'. When the respondent tried to say something, the guard told him in Afrikaans to 'shut up'.

[27] The court below found the account of initial friendliness and co-operation on the part of the security guard and subsequently pointing the firearm and discharging a shot to be improbable and puzzling. But these comments are to be viewed in their context – of submissions made on behalf of the appellant at the trial that the guard's actions were lawful. The court below nevertheless accepted the plaintiff's version. The court below referred to the 'so called deviation cases' which presented 'both policy and jurisprudential difficulties'. The court *a quo* found that the guard was at the time acting within the course and scope of his employment with the appellant. What weighed heavily with the court was the fact that he was on duty at the time and had acted 'unlawfully and wrongfully, acted in his capacity *qua* servant of the (appellant)' and that it would be too narrow to confine the meaning to 'scope of employment' to acts done on express instructions on an employer. The court below concluded that vicarious liability had been established.

[28] Mr Tötemeyer submitted, with reference to three theories or tests underpinning the principle of vicarious liability, namely the 'risk theory', the 'sufficient connection' test and the 'scope of authority' test, that these were misapplied by the court below and that it erred in holding the appellant vicariously liable.

[29] As was correctly pointed out in the context of vicarious liability in *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd,*[23] the rule and reason for it should not be confused.[24] This was also stressed by O'Regan J in *K*.[25] This reference to a 'risk theory' in my view would appear to be based upon a misreading of the dictum in *Rabie*. The approach in that matter is placed in its proper perspective by O'Regan J in her distillation of its reasoning in the test laid down in *K* and set out in para [20] above.

[30] In the objective portion of the two stage enquiry, it is for a court to ask whether there is a sufficiently close connection between the wrongful conduct and the wrongdoer's employment. As was subsequently stressed by the Constitutional Court[26] in applying the test articulated in *K*:

> 'The pivotal enquiry is therefore whether there was a close connection between the wrongful conduct of the policemen and the nature of their employment'.[27]

[31] In the course of his oral argument, Mr Tötemeyer accepted that the test developed in *K* reflected the legal position. In his heads of argument Mr Tötemeyer relied upon the exposition of the test in the latest edition of Neethling, Potgieter, Visser*, The Law of Delict*[28] where the learned authors conclude their discussion of authorities as follows:

---

[23] 2001 (1) SA 1214 (SCA).
[24] Para 10.
[25] Para 22.
[26] In *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).
[27] *Supra,* para 50.
[28] 6th ed, (2010) at 369 – 370.

> ‘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. In this respect it is particularly important that a *sufficiently close connection* did not exist between the employee’s conduct and his employment. The commission of a delict during the performance of a *forbidden* act should also be seen in this light. If the forbidden act is connected to the general character of the employee’s work and thus falls within the scope of his employment, the employer will still be vicariously liable’.

[32] Applying the test articulated in *K*, it would seem that there was a sufficiently close connection between the wrongful conduct of shooting the respondent at the guarded premises and the security guard’s employment with the appellant. This conclusion arises upon an application of the test developed in *K* but would also and in any event arise upon the approach articulated by Neethling *et al* relied upon by Mr Tötemeyer. It would also appear to arise upon an application of the principles embodied in the similar test articulated by the Canadian Supreme Court in *Bazley*.

[33] The security guard was on duty at the time the respondent was shot. He was also at his place of duty when that occurred, guarding the apartment block which the appellant was engaged to protect. He was armed by his employer, the appellant, to perform his guard duties at those premises in pursuit of the appellant’s mandate. This included being supplied with live rounds of ammunition by the appellant for his guard duties. As Mr Heathcote SC, counsel for the respondent, pointed out, the appellant provided the firearm to the guard to use at the latter’s discretion in guarding the premises.

[34] The appellant accepted that arming guards in this way amounted to risk in the conduct of its business. But its principal as well also its manager testified that guards underwent training in their guarding functions.

[35] The respondent attended at the guarded premises in a bid to visit a woman friend inside its fenced perimeter. He had been approached by the guard performing his functions there. He had been recognised by the guard and encouraged by the guard to scale the perimeter palisade fencing so as to knock on his friend's apartment door. But after no answer was forthcoming, the guard took out his pistol and pointed it at and shot the respondent as he was climbing over the fence to exit from the premises. There is no direct evidence of the guard's subjective state of mind discharging the shot. Mr Tötemeyer said his subsequent statement to the respondent was one of aggression and that he had no business to shoot at the respondent whose intentions were innocent. He argued that the guard was thus engaged in a frolic of his own – an intentional act bent on murdering the respondent. Mr Tötemeyer urged us to infer a direct intention to kill from his conduct.

[36] Mr Heathcote however countered that the position of the firearm when the shot was fired – just above belt height after it was taken out – and the close proximity of the respondent to the guard (2 meters) and the latter's training in firearms and prior police experience would not lead to such an inference. Had he directly intended to kill the respondent, Mr Heathcote argued that he would have

shot him in the head and made use of his second live round when he saw he was not successful.

[37] The police warrant officer who investigated the matter – and who attended upon the scene very shortly afterwards - did not arrest the guard that night. Nor was he arrested afterwards. The guard was in a state of shock when the detective warrant officer attended upon the scene and was ‘not very fluent’. The guard was requested by that detective to provide a statement subsequently which he did. The docket was referred to the Prosecutor-General for a decision.

[38] A further factor is that the guard continued with his employment until he left nearly a year later on his own accord. At the trial it was also argued on behalf of the appellant that he had not acted lawfully. But on appeal it is now contended that he had a direct intention to kill – a murderous intent. Mr Tötemeyer relied heavily on the guard’s words to the respondent which he said evidenced aggression. But they may have been a defensive response when realising the serious consequences of firing the shot. This would have been consistent with his state of shock. But importantly those words were not the subject of cross-examination or even evidence-in-chief for them to be placed in context by the guard himself.

[39] The inference most consistent with the totality of the evidence is in my view not that of a direct intention to shoot (and kill) the respondent but rather negligence or recklessness on his part.

[40] The shooting of a person is, in the absence of a justification, unlawful. No justification is pleaded. The guard either negligently or intentionally discharged the shot at the respondent. He did so with the firearm issued to him by his employer to guard the premises where the respondent was scaling the fence to leave the premises guarded by the appellant's security guard. The guard did so after there had been an earlier exchange between them which was not hostile but rather friendly. Whilst I agree that the motivation for this conduct may seem puzzling in the context of the undisputed evidence, the conduct itself is in my view not that of a direct intention to kill the respondent unrelated to his duties but was rather sufficiently closely connected to the guard's employment to result in vicarious liability on the part of the appellant.

[41] Even if the security guard sought in some way to promote his own interests which is in my view unlikely on the evidence, viewed objectively, the act of shooting a visitor to the premises he was guarding whilst that visitor was exiting them shows little sign on his part from disengaging himself from his duties under his contract of employment as a security guard – to cite the wording of the test as distilled in Neethling *et al* and argued for by Mr Tötemeyer. Vicarious liability would also and in any event seem to be fair and just, given the significant connection between the creation or enhancement of a risk of handling a firearm and the wrong which occurred therefrom, even if obviously unrelated to the appellant's desires, applying the similarly stated principles set by the Canadian Supreme Court.

[42] It follows that the court below was correct in its finding of vicarious liability attaching to the appellant.

Costs

[43] Both parties engaged senior counsel on appeal. The respondent's heads were prepared by two instructed counsel. Mr Heathcote sought an order reflecting the costs of two instructed counsel, where engaged. The issues involved in this appeal would in my view justify such an order.

[44] Mr Heathcote also complained that the costs of instructed counsel and the qualifying costs of the experts engaged at the trial by the respondent were not granted by the court below and that it had erred in not doing so. If successful on appeal, he contended that the order of the court below should be altered so that the respondent be granted these costs too. When the court enquired whether this should have been the subject matter of a cross-appeal, he accepted that the respondent could have cross-appealed, but that the court could also alter the order under s 18 of the Supreme Court Act, 1990.[29] No doubt reference was intended to s 19 which empowers this court to amend an order which the circumstances require.

[45] The general principle is that a court of appeal may not alter the judgment against an appellant to its detriment in the absence of a cross-appeal by a respondent.[30] I see no reason to depart from this general rule. In the absence of a cross-appeal to correct the order of court to the respondent's advantage and to the appellant's detriment, it would not be open for us to deal with the cost order of the

[29] Act 15 of 1990.
[30] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 692B–D; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 560G–H; *South African Railway and Harbours v Sceuble* 1976 (3) SA 791 (A) at 794C.

court below. This would not be an instance where s 19 of the Supreme Court Act would in my view find application.

Conclusion

[46] It further follows that the appeal is to be dismissed with costs. Those costs include the costs of one instructing and two instructed counsel.

_____

SMUTS JA

_____

CHOMBA AJA

_____

HOFF AJA

APPEARANCES

APPELLANT:	R Tötemeyer, SC
	Instructed by Chris Brandt Attorneys
RESPONDENT:	R Heathcote, SC
	Instructed by Van der Merwe-Greeff
	Andimba Inc