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REVIEW ARTICLE

REFLECTIONS ON THE HISTORICAL EVOLUTION OF VICARIOUS LIABILITY AND ITS IMPLICATIONS ON THEFTUOUS EMPLOYEES

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ABSTRACT

The doctrine of vicarious liability has reached its pinnacle during the 19th century at the clarion call of economic and technological advances. During this time span, the English model for testing vicarious liability on the conduct of theftuousemployees, was the so-called "close connection" test. The latter test suggests that where an action is closely connected with an employee's duties, an employer can be found vicariously liable. South Africa, influenced by the English laws of tort, jettisoned its own test, the standard test in favour for the "close connection" test. The standard test for vicarious liability is expressed as whether the employee was acting in the course and scope of his or her employment at the time the delict was committed. The latter test, as adumbrated later in the text, makes the theftuousemployee the focal point for liability as per case law *ABSA Bank v Bond Equipment, Ess Kay Electronics, Phoebus Apollo and Columbus Joint Venture.* Such approach is not economically feasible. The impracticability of the standard test actuated the South African Courts and particularly the Constitutional Court to adopt and emulate the English "close connection" test. The Constitutional Court in addition to the close connection test, developed the principle of vicarious liability to be in sync with the fundamental constitutional rights of the citizens. By doing so, the Courts make the pendulum swinging against employers in favour of third parties - a dichotomy to the standard test. Examples of the decisions in which the "close connection" test reign superior are thecase laws of *Gore, TFN Diamond Cutting Works* and *Greater Johannesburg Transitional Metropolitan Council*. The Courts by following the "close connection" test have also been influenced by the fact that an employer is usually more able than an employee to satisfy claims and is in a better position to pass the burden of liability by way of insurance. Because of the similarity between the two tests, a transition would be seemed smooth. But, one can also conclude that although the acceptance of the close connection test, the South African law does not rule out an employer's liability for wilful delicts of theftuousemployees committed in the course and scope of the latter's employment.

INTRODUCTION

The idea of liability for the delict of others may be traced back to Roman law. For example, the liability of a superior for the wrongful acts of an inferior. In other words, the head of the family (the *paterfamilias*) is liable for the delicts of his child or slave. The *paterfamilias* would be liable to pay damages on their behalf, unless he chose to hand over the culprit to the victim (the doctrine of noxal surrender). It seems that a delict in the Roman period is mostly confined to the private domain. It is so, because of the demands of the time and the historical set-up of the period.This idea of liability for the delicts of others as derived from Roman law, may have paved the way for the modern day principle of vicarious liability. The paper aims to disagree with Giliker (Vicarious Liability in Tort 2010: 7) who holds that Roman law has no influence on the modern day doctrine of vicarious liability. She further contends that the whole notion of a master's liability for the wrongs of his free servant committed in the course and scope of his employment is alien to Roman ideas.[1] Unfortunately, she has not envisaged the scholarly works of J.A.C. Thomas(Textbook of Roman law, 1976: 292) and (Zimmermann and Visser, 1996: 390) to mention but a few. In these authoritative sources, the employment relationships (employer/employee) in Roman law have been discussed under the viaticum of *locatio conductio operarum* and *locatio conductio operis.* The former principle will form the gist of the paper; the latter concept deals with the independent contractor, which falls outside the scope of the paper. *Locatio conductio operarum* was the letting of one's service for reward. The workman being the locator and the employer, the conductor.*Locatiooperarum* concerned subordinate and menial activities at the time. The person,

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[11]Giliker, P. 2010. Vicarious Liability in Tort. 7.

whether skilled or not, who let out his services was one who worked under direction with no real independent responsibilities. He was regarded as letting himself. Not all services could be hired though. Although the liberal professions (*artesliberales*) could be the object of *locatio conductio operarum*, there were some professions which lay outside the scope of any contract. Under Roman law class distinctions, which were the key, foiled the efficiency of the *locatio conductio operarum*. The question then was not so much, what kind of work was involved, but what was the status of the person doing it.[2]The reflection on the *potestas* (powers) of the archaic paterfamilias *vis-à-vis* child and slave and the renditions on *locatio conductio operarum* are indicative that there are some similarities to the principle of vicarious liability. Although the Romanic era postulates only an inchoate view of the vicarious liability concept, it enabled scholars to develop the principle for future references. The dynamics of the principle of vicarious liability has reached its pinnacle during the nineteenth century, centuries after the *locatio conductio operarum*. Economic and technological advances of the modern era behooves a growing importance of the employer/employee relationship vis-à-vis vicarious liability, distinct from its earlier focus on the Roman and even the medieval times.[3]

The legal basis for the principle of vicarious liability

As the principle of vicarious liability has been established firmly in law, we are now in a position to canvass about its operation under an employer/employee relationship and the implications this principle holds for the wilful and theftuous conduct of the employee.Liability on one party for the acts of another is explained as a principle of justice. Vicarious liability is imposed on employers which, in pursuit of profit, have wrongfully placed confidence in employees who have harmed others. There exist two legal bases for the doctrine of vicarious liability in law. The first basis is that it is liability imposed on one person for the wrongful act of another. The second holds that the master is liable for the delict of the servant by reason of the attribution of the servant's fraudulent act to the master. Under the principle of vicarious liability, the law deems the master to have committed the wrongful act.[4]Vicarious liability on an employer will be attached where his or her employee commits a delict, whilst engaged in the affairs or business of his or her employer. In the cases that we will discuss later in this paper, three requirements have crystallized in this regard:

- (i)The employee must have committed a delict;
- (ii) there must be an employer/employee relationship at the time the delict is committed;
- (iii) and the employee must have acted within the scope of his or her employment when committing the delict.[5] These requirements invoke the standard test approach followed by the South African Courts.

[2] Thomas, J.A.C. 1976. Textbook of Roman Law. 297-8.
[3]Giliker, P. 2010. Vicarious Liability in Tort.7.
[4]Giliker, p. 2010. Vicarious Liability in Tort.13
[5] Scott, T.J.&Visser, D. (eds). 2000. Developing Delict.266.

The english and the south african jurisdiction on the principle of vicarious liability

Although South African judicature on the law of delict and specially the principle of vicarious liability are congruent with the standard test, vicarious liability law bears the stamp of the principles of English tort law, whichpertainto the liability of a master for the torts of his servant. The reason for this historical reliance on English law is to be attributed to the fact that the South African law of delict is firmly based on the general principle of no liability without fault.Courts in common law countries have struggled with the question under which circumstances an act would be within the scope of employment. Case law in several jurisdictions like Canada, UK and Australia has aborted the strict interpretation of the scope of employment (standard test) and had embraced the "close connection" test of England. This trend has been followed in South Africa by the Constitutional Court's attempts of couching vicarious liability into its constitutional mould to afford to victims the right to dignity and equality before the law.[6]The situation where atheftuousemployee causing misfortune to third parties represents a threat to employers. The employer is most likely be liable for paying the heavy financial cost of dealing with the problem, unless, it takes a proactive stance and implements comprehensive precautionary measures in order to avoid such liability by employing honest employees. The law of delict (vicarious liability) dictates that harm suffered must be remedied. In terms of the common law, employers will be held vicariously liable for the act of their employees if it can be shown that the act(s) occurred within a valid working relationship; if the act(s) actually occurred through a delict, and if the acts occurred within the course and scope of employment.[7] These threefold requirement for delictual principle of vicarious liability behooves a look at the "close connection" test, whichis utilised in most common law countries like South Africa, England and Canada for example.[8] The other test for determining vicarious liability is the standard test in South Africa. The standard test is a Roman-Dutch law invention and its validity has with the growing importance or influence of English law withered away gradually. But nevertheless, the standard test is still been used in South African judicature with regard to employment relationships.But the Constitutional Court of South Africa has in its aims to develop the law of delict and to bring it into the constitutional dynamics of its judicature, opted for the "close connection" test as its experimental subject.

"Close connection" test – an offshoot of english law on vicarious liability

The "close connection" test as formulated in the United Kingdom entails that the courts ask, whether a close link exists

[6]Van Eede, A. J. 2014. The Constitutionality of Vicarious Liability in Context of South African Labour Law.5.
[7] Van Eede. The Constitutionality of Vicarious Liability.8.
[8] Although the standard test is also practised in South Africa, they now appear under the authority of the Constitutional Court to move towards the English "close connection" test. Such a move has already been actuated and the Constitutional Court in South Africa has already decided on the practicability of the test for purposes of employer/employee relationships.

between the wrongful conduct of the employees and the business of the employer or the nature of the employment. The Constitutional Court of South Africa opined that this test is very similar to the one formulated in South Africa. The Constitutional Court relied on *Feldman (Pty) Ltd v Mall* 1945 AD 733 in holding that a deviation from authorised duties could in certain circumstances be closely connected to the employment. This would the case if the omission led to mismanagement of the master's affairs and this in turn led to damages to the third party. The employer could be liable for the intentional wrongdoing if this had a negative impact on the employee's duties, but not, if the third party suffered damages as a result of an act of the employee unconnected to the work of his employer.[9]The "close connection" test as applied in *Lister v Hesley Hall*, House of Lords [2002] 1 AC 215; [2001] 2 WLR 1311; [2001] 2 All ER 769; [2001] UKHL 22, requires that the conduct must have a close link with authorised conduct. To come to a discussion on whether there was a close connection of the wrongful act to the risk, the court will have to take the employment or duties of the employee in consideration.[10]In this case, the House of Lords favour a close connection between the wrongful act of the employee and acts authorised by the employer.The*Lister*- case which serves as a harbinger for the "close connection" test, paved the way for two other English case law, namely *Lloyd v Grace, Smith and Co* [1912] AC 716 and *Morris v CW Martin and Sons Ltd* [1966] 1 QB 716. In the *Lloyd*-case a firm of solicitors were held liable for the dishonesty of their managing clerk who persuaded a client to transfer property to him and then disposed of it for his own advantage. The decisive factor was that the client had been invited by the firm to deal with their managing clerk. This decision was a breakthrough. It finally established that vicarious liability is not necessary defeated if the employee acted for his own benefit. The duties of the managing clerk entail property management of clients of the firms and liaison between them. The clerk has authorisation to do that as per the firm and by usurping property, a close link has been established. The close link scenario also spills over to the *Morris*-case. In the *Morris*-case a woman wanted her mink stole cleaned. With her permission it was delivered to the defendants for cleaning. An employee took charge of the fur and stole it. At first instance, the judge held that the defendants were not liable because the theft was not committed in the course of employment. The Court of Appeal reversed the judge's decision and held the defendants liable. Diplock LJ observed at pp. 736-737: "If the principle laid down in *Lloyd v Grace & Co* is applied to the facts of this case, the defendant cannot in my view escape liability for the conversion of the plaintiff's fur by their servant Morrissey. They accepted fur as bailees for reward in order to clean it. They put Morrissey as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. What he was doing, albeit dishonestly, he was doing in the scope or course of his employment in the technical sense of that infelicitous but time-honoured phrase. The defendants as his masters are responsible for his tortious act."

Palmer tried to contrive an analogy of the present case (Morris), when he stated that if a television repairman steals a television he is called in to repair, his employers would be liable for the loss occurred whilst he was performing one of the class of acts in respect of which their duty lay. He conceded further that that does not involve bailment.

The principle of vicarious liability and its interaction with the south african common law

The position in roman-dutch law

Like Giliker, Zimmerman and Visser (1996) dispelled any historical evolution of the principle of vicarious liability in South Africa. They exerted when the question of vicarious liability was considered for the first time in South Africa by the Appellate Division,thedoctrine as already well established. After the Appellate Division established in *Feldman (Pty) Ltd v Mall* that the doctrine of vicarious liability had become established by precedent, it held that South African law on the subject is the same as English law. Zimmermann and Visser (1996) stated: "[…] there can be little doubt that the fabric of the [doctrine of vicarious liability] as it exists in South African law today is decidedly English in orientation and derivation."[11] Two important features of English law with regard to vicarious liability are: the definition of an employee and the scope of his or heremployment. But in spite of its adherence to the principles of English law, South African courts have sought to find a basis for the doctrine of vicarious liability in Roman-Dutch law under case law, such as *Spencer v Gostelow* 1920 AD 617[12], *Bassaramadoo v Morris* (1888) 6 SC 28[13], *Smith v*

[99] Van Eede. The Constitutionality of Vicarious Liability. 12.

[10] The Canadian case of *Bazley v Curry*1999 2 SCR 534 concerned a warden of a school for troubled boys who sexually abused some of them. The question which the Supreme Court of Canada had to answer was whether the employer could be held liable for these acts, which were the antithesis of what a person in the position of the warden was employed to do. The Canadian Supreme Court held that the employer was not vicariously liable as the employee was not placed in a special position of trust and power with respect to the children. In *B(E) v Order of the Oblates of Mary Immaculate (British Columbia)* 2005 SCC 60, the Canadian Supreme Court found that the educational authority was not vicariously liable for the sexual abuse of a pupil by an employee working in the bakery at the school. The Court held that the connection between the job conferred authority and the sexual assault was not sufficiently close. The employee, although residing on the premises of the school where the pupils also lived, had no position of power, trust or intimacy with respect of the children.

[11]Zimmermann, R. and Visser, D. 1996.Southern Cross.400.

[12] The Appellate Division held that an employee dismissed for serious misconduct did not forfeit his wages for services rendered prior to his dismissal. The Court left open the question whether deserters forfeited their wages for services rendered up to the date of their desertion. There was no general rule of forfeiture of wages in the event of desertion or dismissal for serious misconduct in Roman-Dutch law. In English law since the early part of the nineteenth century, the position has been that am employee who deserted or who was justifiably dismissed for breach of contract forfeited his wages for the period during which he had in fact rendered his

Federal Cold Storage Ltd 1905 TS 734[14], *Hutchinson v Ramdas* (1904) 25 NLR 165[15], *Stewart Wrightson (Pty) Ltd v Thorpe* 1974 (4) SA 67 (D) 77[16], *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T)[17], *Boyd v Stuttaford& Co* 1910 AD 101[18] and *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W).[19] This remains the case today. Certain rules of English law were rejected where relevant principles of Roman-Dutch law were found to be both clear and fair.The original sources of the Roman-Dutch law are important for the principle of vicarious liability, but preoccupation with them is like trying to return an oak to its acorn. It is looking ever backwards. But fortunately our national judicature has moved forward and has brought in its wake a myriad of case law to deal with the issue of vicarious liability and dishonest employees – by form an alliance with the "close connection" test of England.The "close connection" test *a fortiori*, the wrongful act of the employee excites a judge to investigate the employee's specific duties and determine whether they gave rise to special opportunities of wrongdoing. There must be a strong connection between the created risk and the wrongful act ("close connection" test)." If such connection is absent the employer will not be held vicariously liable. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to abide by certain conditions through the services of an employee and that there is a very close connection between the delict of the employee and his employment. Once this is established the employer can be held vicariously liable.

Course and scope of employment: the issue of theftuous employees and the interchange of the standard and close connection test

English law had, in the tenor of this study, been an influence on the decisions of South African courts in the field of vicarious liability *via* the "close connection" test. English Courts, at one time, held that an employer could never be liable for a theft committed by his employee on the grounds that the act of theftmust necessarily be an act outside the scope of his employment. This approach has changed. The position is now that theft by an employee to whom goods were entrusted, is in fact an improper mode of performing what the employee was employed to do with the result that his employer could be held liable to third parties for such theft. The Privy Council in a bailment case involving the loss of a third party's goods

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services. It was the English rather than the Roman-Dutch approach which became established in South African law.

[13] This case concerned the claim for wages by a hotel waiter who had deserted his employer's service. De Villiers CJ found that under the common law, an employee who deserted or deliberately misconducted himself "with the object of inducing his master to dismiss him" was not entitled to wages for the period of service preceding desertion or dismissal. De Villiers CJ would have had to conclude that the employer still had to pay the deserting employee his wages for services rendered up to date of his desertion.

[14] The employee's services had been taken over by the defendant company after the latter had acquired the business. Refusing to obey an instruction to transfer to another location, the employee was dismissed. His claim for arrears of wages and damages for wrongful dismissal was turned down. Innes CJ held that his refusal to obey the order amounted to a refusal to do any of the work which he had been employed to do and therefore constituted misconduct "equivalent to desertion." Accordingly, he was not entitled to wages for the period preceeding his dismissal. As his dismissal had been justified, he was also not entitled to any damages.

[15] The employee refused to obey an instruction to clean a door, in spite of having spent some time in goal for refusing to obey a similar instruction. He was dismissed and thereafter sued his employer for wages to the date of dismissal. The trial magistrate, after indicating that in English law the claim would have been disallowed, was nevertheless prepared to grant it on the basis that this would better conform to the spirit of South African law. However, the decision was overturned on appeal on the strength of Bassaramadoo. Finnemore ACJ recognized that the analogy drawn in Bassaramadoo between the deserting employee and the position of the lessee ejected without good cause should have led to the conclusion that the latter be entitled to payment for his services rendered.

[16] An employee who is unlawfully dismissed by his employer would not be able to claim an order ad factum praestandum. The rule against granting of specific performance prevented the unlawfully dismissed employee from enforcing benefits such as the right to remain in occupation of the employer's premises and the right to a hearing before dismissal. The unlawfully dismissed employee's sole remedy was a claim for damages.

[17]This case which dealt with the dismissal of employees contrary to the provisions of a statute. As a general rule a party to a contract which has been wrongfully rescinded by the other party can hold the other party to the contract if he so elects. The policy considerations adduced in support of the refusal to grant specific performance were: the inadvisability of compelling someone to continue employing a person whom he does not trust in a position involving a close relationship. ; the absence of mutuality; and the fact that it would be difficult for the courts to ensure compliance with an order of specific performance. In National Union of Textile Workers it was held that these were practical considerations rather than legal principles and therefore could not fetter the Court's discretion of whether to grant an order of specific performance or not. Subsequent decisions have consistently followed this approach.

[18] The employee in this case had fallen ill and thereafter claimed wages for the period of his absence. His contract of employment did not deal with the matter and he was also not covered by the provisions of the Masters and Servants Act of 1856, which provided for payment of one month's wages in the event of illness. In the Court a quo Hopley J, relying on Voet, rejected the approach adopted in English law and held that under South African law the employee was not entitled to payment during the period of his illness in the absence of a contractual or statutory provision to that effect.

[19] This is a leading South African case concerning the employee's duty to serve his employer in good faith. The Court referred with approval to the rule expressed in Robb v Green (1895) 2 QBD 1, that an employee must honestly and faithfully serve his master. He must not abuse his confidence in matters appertaining to his service and by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service.

entrusted to a bailee made it clear that it was incorrect to hold that an employer could never be liable for a dishonest act on the part of his employee.[20] It would seem that the English cases confine the employer's liability to situations where the goods of a third party were in some way entrusted to the employee and not to situations where the servant steals goods belonging to his master.[21] The mere factthat the employment provided the opportunity for the theft will not be sufficient. It would appear that in English law even today, there is no authority for holding the employer vicariously liable or responsible in a case as*ABSA Bank v Bond Equipment (Pretoria) (Pty) Ltd*2001(1) SA 372.

Standard test – case law

In *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* the respondent (the plaintiff), a customer of the appellant bank (the defendant), instituted an action for damages against the defendant. In its particulars of claim the plaintiff alleged that it was the true owner of 13 crossed cheques endorsed either "not transferable" or "not negotiable." Possession of the cheques was obtained by an employee of the plaintiff (Steyn), who unlawfully deposited them to an account conducted by Steyn under the name of Bond Equipment (Pretoria). The plaintiff's name is Bond Equipment (Pretoria) (Pty) Ltd. The cheques were collected for payment by the defendant not for the plaintiff but for Bond Equipment (Pretoria), notwithstanding the absence of any endorsement by the plaintiff. The defence was that the defendant was absolved from liability for its negligence, because the plaintiff was vicariously liable for Steyn's conduct.The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of the employer.[22] The affairs of the employer must relate to what the employee was employed or instructed to do. Provided that the employee was engaged in an activity reasonably necessary to achieve either objective, the employer will be liable, even where the employee acts contrary to express instructions.[23]It is not every act committed by an employee during the time of his employment, which is for his own benefit or the achievement of his own goals which falls outside the course and scope of his employment.[24] A master is not responsible for the private and personal acts of his servant, which is unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. In a *dictum* formulated by Jansen JA in *Minister of Police v Rabie* (supra at 134D-E) reads as follows: "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 scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's act for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."According to Greenberg JA in *Feldman (Pty) Ltd v Mall* a master is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper – of doing them…"The vicarious liability for the deeds of an employer is articulated in *Feldman (Pty) Ltd v Mall* (supra at 756-7) as follow: "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 the matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed."
An employer will only escape liability if his employee had the subjective intention of promoting solely his own interests, and that the employee objectively speaking, completely disassociated himself from the affairs of his employer when committing the act.

The nature and extent of the deviation is critical. Once the deviation is such that it cannot reasonably be held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable.Corbett JA remarks in *Mhlongo and Another v Minister of Police* 1978 (2) SA 551 (A) at 567H that it would not be a sound social policy to hold an innocent master liable or responsible to a third party where his dishonest servant steals the master's own property, as is the situation in this case (*ABSA Bank v Bond Equipment (Pretoria) (Pty) Ltd)*).With regard to the facts in *ABSA Bank v Bond Equipment (Pretoria) (Pty) Ltd* it cannot be said on both approaches (the subjective and the objective approach) that Steyn acted within the course and scope of his employment, in depositing the cheques into an account other than that of his employer. He wanted the proceeds of the cheques for himself. The classical phrase that had been utilised in *Joel v Morison* (1834) 6 C & P 501 (172 ER 1338), applied, namely that Steyn was engaged on a "frolic of his own." It is apt to allude that Steyn never subjectively intended to act on behalf of the plaintiff (his employer, the bank). There is no connection between the wrongful act of Steyn and his authorised functions. An act of a servant who steals his master's property whilst employed by his master, is antithetical of an act carried out in the course and scope of the servant's employment. Steyn misused his position to steal from an innocent plaintiff and to defraud the defendant. Steyn's duty is to deposit cheques collected for his employer into his employer's bank account. He is in fact empowered and authorised to perform such a duty. At the relevant time he was not performing his duties at all. In

[20]*Port Swettenham Authority v T W Wu and Co (M) SDN BHD* [1979] AC 580.
[21]*Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 (HL0* [1980] 1 All ER 556.
[22]*Minister of Police v Rabie* 1986 (1) SA 117 (A) at 132G
Minister of Law and Order v Ngobo 1992 (4) SA 822 (A) at 827B.
[23]*Estate Van der Byl v Swanepoel* 1927 AD 141 at 145-6, 151-2.
[24]*Viljoen v Smith* 1997 (1) SA 309 (A) at 315F-G.

stealing the cheques and subsequently depositing them for his own account,Steyn had abandoned and disengaged himself from his employment with the plaintiff. The plaintiff cannot therefore be held vicariously liable for Steyn's criminal acts.This notion has been bolstered in *Mkize v Martens* 1914 AD at 390 where CJ Innes stated: "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." The same sentiment is echoed by Malan J in *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W) at 512H-I: "What he did was unauthorised and criminal… It is not a case of an improper execution of his duties: he was not performing his duties at all." Willis AJ also came to the conclusion that the plaintiff is not responsible for the acts of Steyn. In this regard, he relied upon the so-called "control" test and concluded: "By reason of the fact that arising from the theft of the cheques by Steyn from the plaintiff, the plaintiff lost control over Steyn'sdealing with the cheques, I am of the view that the plaintiff cannot be held vicariously liable for Steyn's conduct after the theft of the cheques."In *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 the plaintiff had in its employ a group of legal advisers, one by the name of Alexander Bertolis ("Bertolis"), who was a salaried employee of plaintiff. It was the practice of plaintiff not to draw any cheques unless such cheques were crossed and marked "not transferable." It was also the practice of the plaintiff not to engage the services of its employees as independent contractors for reward other than their salary earned during the course and scope of their employment with plaintiff. During October 1993,Bertolis caused the Allied Bank division of the defendant (ABSA Bank) to open a current account for and behalf of Bertolis at its Dunkeld West branch. The account was opened not in the name of Bertolis personally, but in the name of "Stanbrooke and Hooper." Stanbrooke and Hooper is a firm of solicitors specialising in European Community law in Brussels, Belgium, and which Bertolis is an employee of.Bertolis was never authorised by any entity by the name of Stanbrooke and Hooper to conduct and to control a banking account under the name of Stanbrooke and Hooper. The account was an account which was conducted by Bertolis for his exclusive benefit.

Stanbrooke andHooper never entered into any agreement with Bertolis. During November 1993 to April 1996,Bertolis caused to be sent to plaintiff fictitious invoices by Stanbrooke and Hooper purporting to be for fees in respect of professional services of a legal nature purportedly rendered by Stanbrookeand Hooper in regard to plaintiff's legal affairs. In payment of such invoices,Bertolis caused plaintiff to draw 39 cheques on First National Bank of South Africa Ltd (FNB), totalling an amount of R777 302, 40 in favour of Stanbrooke& Hooper as named payee. In accordance with plaintiff's practice, the cheques were all crossed and marked "not transferable." These cheques were thereafter deposited at various branches of thedefendant in Mpumalanga and in Gauteng for collection and thereafter to credit the account.During 1999, attorneys for plaintiff (Columbus Joint Venture) telephoned Stanbrooke and Hooper. They were advised during the conversation that there was never a franchise agreement between it and Bertolis. It (Columbus Joint Venture) also alleged that it never engaged the services of Bertolis carrying on business as Stanbrooke and Hooper as an independent contractor or legal adviser for reward other than the salary that Bertolis earned from plaintiff. The fictitious invoices were originally received in plaintiff's organisation by one or more of the members of the department headed by Bertolis. The organisation would then make out cheque requisitions authorised by Bertolis.

The invoices thereafter, with the cheque requisitions, were received by one or more of the persons dealing with cheque requisitions in plaintiff's creditor's department, whereafter they were received by the duly authorised signatory of each cheque. By authorising the cheque requisitions,Bertolis falsely represented to plaintiff (his employer) that he verified the invoices and that the amounts reflected to therein were in fact owing and payable by plaintiff to Stanbrooke and Hooper. Bertolis' conduct enabled him to take possession of the cheques and to deposit them into the account. By this conduct,Bertolis falsely represented to the defendant that he was entitled to deposit the cheques and to receive the proceeds thereof. The cheques could only be collected for the account of Stanbrooke and Hooper. The account, however was not the account of Stanbrooke and Hooper but was an account for and on behalf of Bertolis, which was opened in the name of Stanbrooke and Hooper. Vivier JA held in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) that there could be no reason in principle why a collecting bank should not be held liable under the extended *lexAquilia* for negligence to the true owner of a lost or stolen cheque provided the requirements of liability have been met. Another Court in *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D) held that a collecting bank owed a duty to the true owner to display reasonable care in collecting the proceeds of a lost or stolen cheque. Moreover, the matter involves not primarily the duty in the collection of individual cheques, but the obligations of the collecting bank when an account is opened.

No one acting on behalf of defendant directed any enquiries in regard to Bertolis' entitlement to trade under the name of Stanbrooke and Hooper and to open a bank account in the latter's name. A bank opening an account for a customer would by the very nature of the relationship make inquiries concerning the customer, his status (i.e. whether a single or married person, whether a company or partnership or other entity), his home and work, his telephone numbers, the authority of signatories, etc.). The purpose of these inquiries would be to ascertain the trustworthiness or standing of the customer so as to prevent loss to the bank and to ensure that the customer conducts his account regularly and according to set principles. A credit risk may also be involved where the bank extends credit to the customer. The question is whether Bertolis acted within the course and scope of his employment with the plaintiff at the time of submitting the fictitious invoices, causing the plaintiff to draw the cheques, at the time of depositing them with the defendant. The duties of Bertolis entailed the verification of invoices submitted to the plaintiff (Columbus Joint Venture – his employer) after having satisfied himself that the amount invoiced was owing and payable by the

plaintiff. He also had to authorise payment of the requisitions. The fictitious invoices were received by the plaintiff by one or more of the employees in Bertolis' department, who then made out cheque requisitions authorised by Bertolis. The invoices with the requisitions were then sent to the plaintiff's creditor department and signed by an authorised signatory. By authorising the cheque requisitions,Bertolis falsely represented to the plaintiff that he had verified the invoices and the amounts reflected as owing. His deception of the plaintiff enabled him to take possession of the cheques drawn by the plaintiff and to deposit them into the Stanbrooke& Hooper account. It seems that neither on the subjective approach nor on the objective one that Bertolis acted within the course and scope of his employment in submitting the invoices, causing the plaintiff to draw the cheques and depositing them. Bertolis never, subjectively, intended to act on behalf of his employer. Like in *ABSA Bank v Bond Equipment (Pretoria) (Pty) Ltd* there was nolink between what Bertolis did and his authorised functions. There were never any real invoices, nor did he verify any. He misused his position and defrauded his employer and the bank. In *Ess Kay Electronics PTE Ltd v FNB of Southern Africa Ltd* 2001 (1) SA 1214, the plaintiffs were Singapore companies trading in electronic equipment and the defendant is a South African commercial bank. The evidence on the plaintiff's behalf was given by Mr Primalani, a director of first plaintiff, Mr Ishmael, a South African business associate of Mr Primalani's and Mr Wildig, the employee for whose wrongful conduct defendant was allegedly held vicariously liable.In April 1996, a South African business contact telephoned Primalani and intimated that someone by the name of Mynhard was interested in buying goods for import into South Africa. A man professing to be Mynhardt, telephoned Primalani and eventually placed orders with both plaintiffs. Terms were discussed and finalised. Payment was to be effected by a banker's draft in favour of each plaintiff.

The goods were to be shipped to Durban and would be released only when the plaintiff's South African agent received the drafts in exchange for the bill of lading. Primalani invoiced the plaintiffs, organised the shipment and took out insurance for the goods while in transit. After the ship left Singapore, he received the bill of lading and sent it, with the invoices and insurance documentation by courier to Ismael in South Africa. Primalani instructed Ismael not to hand over the documents without first faxing him a copy of the drafts so that he could satisfy himself that they were in order.Primalani received in due course from Ismael two faxes purporting to be copies of bank drafts. He checked that the names of the payees and the amounts payable were correct and noted that the drawer was FNB of Southern Africa Ltd. Primalani testified that when he had done business with South African purchasers in the past, he was told that the defendant was one of a number of South African banks with which it would be safe to deal. Relying on that assurance and also on the contents of the faxes, he was satisfied that the drafts received by Ismael were in order and that the plaintiff would be paid in terms of them. He therefore telephoned Ismael and told him to exchange the bill of lading for the drafts. When the drafts later reached Singapore they were deposited at the plaintiff's respective banks, but subsequently dishonoured.Wildig, acting in the course of employment with the defendant (FNB), forged the drafts, knowing that they would be presented to the plaintiffs as payment for the goods and that upon the drafts being dishonoured, the plaintiffs would suffer damages by reason of non-payment. By causing the drafts to be presented to the plaintiffs, Wildig falsely represented that the drafts were regular, had been issued by the defendant and would be dishonoured on presentation of payment. Acting on this misrepresentation, the plaintiffs caused the goods to be delivered to their customer, who had failed to pay for them. The plaintiffs were defrauded. Wildig was a party to the fraud and was responsible for the making of the forged drafts. The question is whether Wildig's actions render the defendant (FNB) liable. Wildig was head of foreign exchange department in Johannesburg. His work included the issue to customers of bankers' drafts payable in foreign currency to their creditors abroad.

During March 1996 and May 1996 Wildig received several approaches from an acquaintance named Jerome Clack. Clack divulged to Wildig that the former needs to obtain drafts or draft forms to use for fraudulent purposes. Wildig was initially reluctant, but relented later when Clack undertook to pay him R10000 for his efforts. It was agreed that in return for that sum Wildig would prepare two drafts. They were to reflect the respective plaintiffs' name and the US dollar amounts payable to each, all of these details being supplied by Clack. Wildig then forged two signatures on each draft.Wildig was only authorised to take draft forms to complete and issue them to a customer who presented the necessary proof of indebtedness requiring payment in foreign currency. And a customer, moreover, who either pad for the drafts or the debiting of whose account was authorised by way of a signed Form A. Clack met none of these requirements. It follows that everything Wildig did relative to the drafts which deceived plaintiffs, was outside the scope of his actual authority and the course of his employment. The wrongdoer in this case is the person whom his employer had authorised to effect or oversee the issue of drafts. The defendant (FNB) is thus liable. But, there was no dealing between the plaintiffs and Wildig and nothing about him or his authority was conveyed to them by the defendant. Wildig has acted outside the scope of his actual authority and outside the course of his employment.The crux of the case is that an act done solely for the employee's own interests and purposes, and outside the employee's authority, is not done in the course of employment even if done during such employment. The act of Wildig was unconnected to the work of his employer and the former is held personally liable for his wrongdoing. There is no liability when the employee has been carrying out tasks wholly unauthorized by the employer. In *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK*2002 (5) SA 475, the appellant (*Minister van Veiligheid en Sekuriteit*) appealed against the judgment of a Provincial Division in an action in which the respondent (*Phoebus Apollo Aviation BK*) had claimed damages of R600 000 from the appellant. The Court *a quo* had held the appellant liable. The respondent was a close corporation and its only member, one D, and his family were attacked by armed robbers in November 1998. A large amount of money and other items were stolen. A portion of the stolen money was taken to Tzaneen where it was buried on the plot of the father of two of the robbers. Three detectives in the employ of the South

African Police Service obtained information regarding the robbery, more specifically where a portion of the money was buried. They travelled in an official police vehicle to Tzaneen, identified themselves as police officers to the robber's father and showed him their certificates of appointment. They then attached the money. The money was never returned to the respondent or handed in at any police station. There was no direct evidence as to the exact amount of money attached by the detectives, but certain information indicated that the bag given to the relevant robber, which was later buried, had contained about R600000.The questions that had to be answered by the Court *a quo* were whether the three dishonest detectives had acted within the course and scope of their employment by the appellant and whether the appellant was accordingly vicariously liable for the theft committed by the detectives.The Appeal Court found that the judgment of the Court *a quo* was founded on the finding that the three detectives were clearly busy with police work. This finding was based on the nature of the work, the police vehicle and the certificates of appointment. The reference by the Court *a quo* to the detectives' clothing as support for its finding that the detectives had been operating within the course and scope of their duty was, however, erroneous. According to the evidence, the three had not been in uniform when they stole the money in Tzaneen. The Appeal Court held further that the actions of the three dishonest policemen had not, fallen within the course and scope of their duties. They had embarked on an unauthorised jaunt for their own benefit with the intention of stealing from their own employer. The three policemen had by their theftuous and fraudulent conduct not caused vicarious liability to devolve upon their employer.

"Close connection test" – case law

In *Minister of Finance and Others v Gore* 2007 (1) SA 111 (SCA) the respondent, in his capacity as liquidator of a company in liquidation, claimed damages from the appellant (the National Government and Western Cape province) for the company's (pure economic) loss from not having been awarded a government tender as a result of fraud by certain provincial administration officials. They (officials of the Ministry of Finance and others) had manipulated the tender process in such a way as to ensure the award of the tender to a company in which they held an undisclosed interest. The appellant raised four defences to the respondents claim, but only one of them is of concern for the purpose of this study, namely the claim that the appellants ought not to be held vicariously liable for the fraudulent conduct of its employees as the latter were acting outside of the course and scope of their employment in perpetrating the fraud.The Supreme Court of Appeal held that there was no general principle that an employer could not be held vicariously liable for the intentional, wrongful conduct of an employer which caused loss to the employer. The Court proposed a two-pronged test to determine whether or not to visit the employer with liability for the deliberate dishonest conduct of his employees. The first test entails whether the conduct was committed solely for the employee's own interest and purposes. And, if not, the second test implies was there a sufficiently close link between the employee's conduct and the employer's business? The Court held that although the (first test) fraudulent conduct was committed only partly for the employee's own interest and purposes, (test two) it very closely resembled the duties they performed in the course and scope of their employment, and in those circumstances policy required that the employer be visited with vicarious liability for the conduct of its employees.In *Commissioner, South African Revenue Service and Another v TFN Diamond Cutting Works (Pty) Ltd*2005 (5) SA 113 (SCA), TFN Diamond Cutting Works purchases rough diamonds from a variety of sources in South Africa, which it then cuts and polishes for resale. On 20 October 2000 Mr Glowiczower, a diamond dealer and director of plaintiff, travelled to New York with a consignment of diamonds. The diamonds had been duly inspected and sealed by the South African Diamond Board in accordance with the prescribed practice of the South African customs authorities. The requisite documentation for the export of the diamonds had been lodged with the designated employees of the defendant (Commissioner, South African Revenue Service). Some of the diamonds were sold in New York. The remainder accompanied Glowiczower on his return to South Africa. Upon his arrival at the Johannesburg International Airport on 8 November 2000, Glowiczower declared the diamonds to the employees of the defendant. As a result of some miscommunication the original invoice for the diamonds could not be produced. A faxed copy did not satisfy the customs officials on duty and the diamonds were detained. The consignment was placed into a plastic pouch and sealed. Sadler, a clearing agency, accompanied two employees of the defendant to a strong room at the customs hall were the sealed pouch was placed in a locked safe. Sadler was issued with a detention slip and on entry recording the detention of the package in a bond book.Sadler went to the airport with the duly completed documentation on 10 November 2000 to secure the release of the diamonds. These documents were presented to an employee of the defendant, who was on duty then. Having accepted the documentation without any query, the employee returned from the safe and informed Sadler that the diamonds were missing.The plaintiff alleged that the diamonds had been stolen by one Joseph Matshiva, an employee of the defendant.On the evidence adduced on behalf of the defendant, the trial Court was satisfied that the diamonds had been stolen during Matshiva's shift, whilst he was in control of the strong room and safe. The defendant contended, first, that in stealing the diamonds Matshiva did not act within the course and scope of his employment and accordingly was not vicariously liable (reference to the decisions of the courts in *ABSA Bank v Bond Equipment, Ess Kay Electronics, Phoebus Apollo and Columbus Joint Venture*). The defendant means also that it is exempted from liability to the plaintiff by virtue of section 17(3) of the *Customs and Excise Act* 91/1964. The Act provides: "The State or any officer shall in no case be liable in respect of any loss or diminution of or damage to any goods in a State warehouse or in respect of any loss or damage sustained by reason of wrong delivery of such goods."The main thrust of the defendant's argument is that the words "any loss" in section 17(3) encompass theft as well. The Supreme Court judge disagrees. The Court held first, if the legislature had intended to include theft, it ought to have said so in express terms. The Court also held that the construction sought be placed on the section by the defendant is untenable. The section seeks to indemnify both the State and "any officer." Any officer in that context would include the person who perpetrated the theft.

That an officer who has been entrusted with the responsibility of safeguarding goods could with impunity steal and thereafter invoke the protection afforded by section 17(3) is plainly preposterous. Such an absurd result could not have been the intention of the legislature. The employer of Matshiva, the Commissioner, South African Revenue Services was held vicariously liable for the conduct of its theftuous employee.In *Greater JHB Transitional Metropolitan Council v ABSA Bank Ltd* 1997 (2) SA 591 (WLD) a certain T, who was employed by the Soweto City Council (SCC) had stolen eight cheques drawn by the Central Witwatersrand Regional Services Council (RSC) in favour of SCC and handed them to his accomplice, W, who was in the employ of the defendant bank at its Rosettenville branch and who had caused the proceeds of the cheques to be credited to accounts other than that of the SCC, causing SCC to lose the amounts reflected on each of the cheques.The Court has to determine whether the defendant was vicariously liable for W's conduct. W had been engaged in the precise work that her employer required her to carry out, namely to check the cheques and deposit slips presented to her employer, and having been satisfied that they were entitled to be presented on behalf of the depositors, to sort and bundle them for despatch purposes to the Automated Clearing Bureau in order that debits may be raised against the account of the drawer as its bank and a credit raised in favour of the defendant. From time to time while attending to that function, she inserted one of the cheques that had been stolen by T, thereby achieving her own objective. She pursued that objective further by performing precisely the functions for which she was employed, obviously in an improper fashion.

These contentions borne out of the facts, establish vicarious liability of the defendant. W did crucial acts in performance of her actual dutiesand the defendant was thus vicariously liable.
From these discussed cases not only one test for vicarious liability has been followed. Different tests have been utilised. The application of the standard test, which is an invention of Roman-Dutch law, is tailored so as to afford greater weight to the interests of third parties and to hold theftuous employees personally liable. The courts envisaged the notion that theftuous employees that causes damage to third parties represents a growing thread to South African employers. That is why the courts shift the blame to employees. This sentiment is governed by cases such as *ABSA Bank v Bond Equipment, Ess Kay Electronics, Phoebus Apollo and Columbus Joint Venture*. Under these cases employees were acting in the course and scope of his/her employment at the time the delict was committed and therefore are rendered liable. On the other hand, case law, which hinges upon the idea of the "close connection" test that has been adopted from England, suggests that where an action is closely connected with an employee's duties, an employer can be found vicariously liable. The general principle (as applied under the standard test) that an employer could not be held vicariously liable for the intentional wrongful conduct of an employee is struck down. An employer is therefore liable for the deliberate dishonest conduct of his employees. As adumbrated in this paper, case law such as *Minister of Finance v Gore, TFN Diamond Cutting Works and Greater JHB Transitional Metropolitan Council* is indicative of the "close connection" test. In support of the "close connection" test it is alluded that the employer is best suited to compensate the victim because of its broad financial shoulders and much deeper pockets.

Efforts to bring Vicarious liability into the Mould of the Constitution

anevaluation

The Constitutional Court in South Africa has developed the "close connection" test in *NK v Minister of Safety and Security*2005 26 ILJ 1205 (CC) in order to instill constitutional values in principles, such as vicarious liability in particular and in law of delict in general. In the *NK*-case (where a woman was rape by three police men) the Constitutional Court held that the doctrine of vicarious liability should be develop to reflect the spirit, purport and objects of the Constitution. The Constitutional Court stated that the most important policy considerations which form the basis of the vicarious liability of an employer are "efficacious remedies" for harm suffered and to "incite" employers to take active steps to prevent their employees from harming members of the broader community. The Court added that there is also a countervailing principle namely that damages should not be borne by employers in all circumstances, but only in those circumstances in which it is fair to require them to do so.[25] The Constitutional Court held in *Minister of Police v Rabie* 1986 1 SA 117 (A) that if the intention of the employee was not to further his or her employer's business, the master could still be vicariously liable if there was a sufficient close link (close connection tests) between the acts of the employee for his own interests and the purposes and business of the employer.

The case of *Phoebus Apollo Aviation CC v Minister of Safety and Security*(*supra*) deals with police men who stole money. The Constitutional Court held,though, that the case did not raise a constitutional matter. But in the *NK* case regarding police men who rape a woman, constitutional issues came to the fore. O'Regan opined that *Phoebus Apollo* case did not awaken the constitutionality rules of vicarious liability. Lewis attacked this contentment argued that there is in principle no difference between a police man who commits the crime of theft and a police man who commits the crime of rape. These two cases can be distinguished on the basis that the police men in the *Phoebus Apollo* case were not on duty, not wearing uniforms and were not investigating the original robbery. It could be argued that the connection between their employment and their acts was not sufficiently close to justify the vicarious liability of the employer. It was argued in the *NK* case that the state bears direct responsibility if it is in breach of its constitutional obligation to protect the complainant. In finding the decisions of the Supreme Court of Appeal repugnant to the constitution, the Constitutional Court relied on the development of the doctrine of vicarious liability and held the employer not liable. The question is what guidance can be derived from the test formulated by the Constitutional Court in the *NK* case, particularly in cases where constitutional rights and duties are less directly relevant. The Constitutional Court states that the principles of vicarious liability and their application need to be developed to accord more fully with the

[25] Van Eeden. The Constitutionality of Vicarious Liability. 10.

spirit, purport and objects of the Constitution. The Constitutional Court developed the test for vicarious liability to encompass constitutional values and applied this test to the specific case in which constitutional duties were breached and constitutional rights infringed.It is clear that the Constitutional Court purported to lay down a general test for all vicarious liability cases and not only those where constitutional issues are prominent. The Constitutional Court stated that the test is broad enough to include not only constitutional norms, but other norms as well. The problem with this test is that from now on a court will have to interpret and apply relevant norms in every case of vicarious liability to establish whether there will be a close connection. The question is which norms could be distilled from the *NK* and *Phoebus*judgment that would indicate a close connection and thus make it fair to hold the employer liable? The close connection test viewed through the prism of the Constitution could mean that the state would always be liable if it has a constitutional duty, as constitutional values would be better protected if compensation comes from the "deeper pocket" of the employer. The test has the potential to lead to liability for the state every time its duty is breached by its employees.The Constitutional Court emphasised the constitutional duty of the employer and the corresponding duties of the employees in the *NK* case. The fact that the employer had a duty towards the third person and had placed an employee in a position of authority to do the duty on its behalf, indicated by the wearing of uniforms, was an important factor in leading the Court to the conclusion that there was in fact a close connection. In*Lister v Hesley Hall* the duty of the employer to the pupils as well as the duty of the warden (bathing the children, putting them to bed and other intimate actions associated with parenting) as well as the abuse of the position of power and trust in which the employee was placed, indicated a close connection between the wrongful acts and the employment. In the *Gore*-case the Supreme Court of Appeal found that there was a close connection between the employee's actions and that which they were employed to do. The Court did not rely on constitutional or any other norms to reach its conclusion of whether there was a close connection. The Court stated then even in the case of a deliberate dishonest act, committed for the employee's own interests, the employer may be rendered liable. No constitutional rights or duties were raised in the case. The Court emphasised the duties of the employees and the fact that their employer placed them in a position of authority which gave them the opportunity to act fraudulently.

Conclusion

The article embraces the English close connection test because it is more in line with the economic reality of the community on the one hand and is very much alike to the Roman-Dutch standard test of South Africa. If the liability claims of third partiesbe filtered down to employees because of the latter's theftuous and wilful conduct, then not much justice will be afford to the former. It is envisaged in this paper that Courts found a certain test favourable because of the economic and financial capacity of one party to a delictual case of vicarious liability, namely the employer with the much deeper pocket and broad financial shoulders. Only when fault is mainly attributed to the theftuousemployee, then could he be held accountable with no vicarious liability attached to the employer.The preference for the close connection test is perfectly tailored for a country like South Africa where class and economic division is a stark reality and where an inclination to the development of delictual principles like vicarious liability can be developed in order to bring this neglected part of our law into the realm of constitutional execution of fundamental human rights.

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