

**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

CASE NO: 7333/2003

In the matter between:

AARON JONATHAN BROOKS

Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT DELIVERED ON 20th SEPTEMBER 2007

HJ ERASMUS, J

Introduction

[1] This case arises from the same events that gave rise to the claim for damages in *Minister of Safety and Security v Van Duivenboden*.¹ On 21st October 1995 Neil Brooks (“Brooks”), the natural father of the plaintiff in

¹ 2002 (6) SA 431 (SCA).

this case, opened fire on a number of people, killing three of them, including his wife and daughter, and wounding five others, including the plaintiff, who was fourteen years old at the time, and Van Duivenboden, a neighbour. As a result of this shooting incident, Brooks was charged and convicted of various crimes, including murder, and was sentenced to twenty years' imprisonment. He is serving his sentence at present. Van Duivenboden's subsequent claim for damages against the Minister of Safety and Security was upheld by the Supreme Court of Appeal.

[2] Arising from the shooting incident and the incarceration of his father, the plaintiff instituted a claim for damages against the Minister of Safety and Security. The plaintiff alleges that prior to the shooting incident on 21st October 1995 there were several incidents from which a number of police officers obtained direct knowledge of the fact that Brooks was unfit to possess a firearm. They took no steps to have him declared unfit to possess a firearm.

[3] The plaintiff further alleges that the police officers "owed all persons who may be prejudicially affected should ... Brooks use his weapons to kill or injure others", a legal duty to initiate the procedure contemplated in section 11 of the Arms and Ammunition Act 75 of 1969 to have Brooks declared unfit to possess a firearm. The plaintiff alleges that he was a person who would be prejudicially affected by such conduct in that –

1. he was dependent for support on his father (Brooks), who was under a legal obligation to, and did, support him;
2. his father's ability to support him could be affected by such an incident as he might be convicted of a crime and be

incarcerated;

3. should his mother be killed or injured in such an incident, he would likewise lose her support which she was under a legal obligation to, and in fact did provide, the plaintiff; and
4. the plaintiff witnessed the incident and was injured therein.

[4] The plaintiff further alleges that the police officers breached their duty of care by failing to initiate the procedure contemplated in section 11 of the Arms and Ammunition Act 75 of 1969. The consequence of the breach was that –

1. on 21st October 1995 Brooks had firearms readily available to him with the result that the shooting incident took place which would not have occurred but for the breach;
2. Brooks was charged and convicted of various offences, including murder, as a result of which he was given a sentence of twenty years' imprisonment, which he is serving at present;
3. Brooks has been rendered permanently unable to support the plaintiff, as he would otherwise have done;
4. the plaintiff has been permanently deprived of the support of his mother.

[5] The plaintiff accordingly claims damages in the amount of R2 824

000.00 which is calculated as follows:

- | | | |
|----|---|---------------|
| 1. | Emotional shock and trauma arising from the
the fact that he witnessed the incident, and
from the permanent loss of his parents | R90 000.00 |
| 2. | General damages for pain and suffering as a
result of the injury he sustained in the
incident | R40 000.00 |
| 3. | The loss of support of his father | R168 000.00 |
| 4. | The loss of support of his mother | R126 000.00 |
| 4. | The loss of a proper education opportunity
as a result of the loss of support and
accordingly a lesser income from a lower
level of employment | R2 400 000.00 |

[6] The plaintiff's claim for loss of support thus has three components:

1. The claim for loss of support arising from the death of his mother.
2. The claim for loss of support arising from the incarceration of his father.
3. The claim for "loss of a proper education opportunity as a result of the loss of support"; that is, a claim which arises from both the death of his mother and the incarceration of his father.

The exception

[7] The defendant excepted to the plaintiff's claims for loss of support and the loss of a proper education opportunity as a result of the loss of support. The grounds of exception are the following:

- a) The defendant's servants did not commit any delict against the plaintiff's breadwinner;
- b) The plaintiff has not suffered damage.
- c) The defendant's servants did not act wrongfully towards the plaintiff's breadwinner.
- d) The defendant's servants did not act negligently towards the plaintiff's breadwinner.
- e) The omission on the part of the defendant's servants was not the cause of the plaintiff's loss.

[8] In paragraphs 5 and 6 of the Notice of Exception it is made clear that Brooks is the "breadwinner" to whom reference is made. Neither in the Notice of Exception, nor in argument before me, was the legal foundation of the plaintiff's claims for loss of support due to the death of his mother placed in dispute. In argument it was submitted that the exception should be upheld in respect of the claim for loss of support arising from the incarceration of Brooks, and in respect of the claim for loss of an education opportunity as a result of the loss of support in so far as it applies to Brooks.

[9] Mr Van Riet, SC, who appeared with Mr Roux, SC for the plaintiff, submitted that seeing that the plaintiff's claim for loss of a proper education opportunity results from the combined effect of the loss

of support from his mother and from his father, the efficacy of the claim cannot be determined on exception without the hearing of evidence. In particular, it is submitted, part of a claim cannot be expunged by way of exception, for an exception is raised not against a claim but against a pleading which does not disclose a cause of action.

[10] The plaintiff's claim in paragraph 17.5 of the Particulars of Claim for "loss of a proper education opportunity as a result of the loss of support" in an amount of R2 400 000.00 is a quantification of a loss that derives from two separate and distinct sources; namely, from the claims for loss of support arising from the death of his mother and from the incarceration of his father. These are separate and distinct claims, and each may be the target of an exception if warranted by rule 23(1).

[11] In his argument, Mr Schippers, SC, who appeared with Mr Jaga for the defendant, did not deal with (b) and (d) above in paragraph [7] as separate grounds of exception. He dealt with the matters in issue under three heads; namely, (i) whether the defendant's servants committed a delict against the plaintiff's breadwinner; (ii) whether the particulars of claim establish wrongfulness, and (iii) the issue of causation. Those are the issues which pertinently arise from the exception and I shall deal with them under the same heads.

[12] It is perhaps necessary to point out, as Mr Schippers did at the outset of his argument, that while it is trite that grounds of exception raise questions of law which fall to be decided on the particulars of claim as they stand,² this case is unique in that the Supreme Court of Appeal in *Minister of Safety and Security v Van Duivenboden*³ has already made factual findings regarding the incident of 21st October 1995 and other incidents referred to in the plaintiff's particulars of claim, as well as certain findings in regard to wrongfulness, negligence and causation.

² This is subject to the exception that the correctness of the facts stated in the pleading must not be clearly untrue or so improbable that they cannot be accepted (*Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E—F; *Voget v Kleynhans* 2003 (2) SA 148 (C) at 151G—H; *TWK Agriculture Ltd v NCT Co-operative Ltd* 2006 (6) SA 20 (N) at 23B—C).

³ 2002 (6) SA 431 (SCA).

No delict against the plaintiff's breadwinner

[13] The defendant's case, in a nutshell, is that the defendant's servants did not commit any delict against Brooks, and that the plaintiff's claim is, therefore, not actionable under a dependant's common law action for loss of support. Mr Schippers submitted that on this ground alone, the exception should be upheld.

[14] The defendant says that the dependant's action for loss of support in our law is anomalous and *sui generis*: the dependant's action is based on a delict committed against the breadwinner. The defendant further says that although the dependant's action for loss of support has been extended to cater for new situations, the principles upon which it is based have survived.

[15] The plaintiff's stance is that the dependant's action arises from a breach of a legal duty owed to the dependant and not a wrongful act as against the breadwinner. In other words, the delict that is required to be committed to trigger the dependant's action is one against the dependant and not the breadwinner.

[16] In *Jameson's Minors v Central South African Railways* 4 Innes CJ pointed out that the origin of the dependant's remedy "must be looked for in the early German laws, and not in the laws of Rome". The learned Chief Justice continued:⁵

But whatever the early foundation of this action, it is clear that the Dutch writers came to regard it as a remedy embraced within the scope of the *utilis actio* under the *lex Aquilia*. It was a right concerning the existence of which there could be no doubt; it was founded on delict, and they very naturally regarded it for practical purposes as a form of relief depending upon the

⁴ 1908 TS 575 at 584.

⁵ At 584—585.

existence of *culpa* and flowing from the extended operation of the equitable Aquilian action. That Voet was of this opinion is manifest (*Ad Pandectas*, 9, 2, 11), and there are other writers who agree with him. In that form it has come down to us. But while on the one hand it resembles the ordinary action for personal injury in that it is based upon *culpa*, and while the breach of duty essential to its existence is the breach of a duty owed at the time of the wrongful act to the injured man; yet, on the other hand, the compensation claimable under it is due to third parties, who do not derive their rights through his estate, but on whom they are automatically conferred by the fact of his death. The action is one *sui generis*; and probably its anomalous character may be accounted for by reference to its original source ...

[17] This exposition of the nature and scope of the dependant's action for loss of support in our law was subsequently expressly endorsed by the Appellate Division.⁶ Thus in *Suid-Afrikaanse Nasionale Trust en Assuransiematskappy Bpk v Fondo*⁷ Botha AJA (as he then was) referred with approval to the above statement of Innes CJ saying that –

... 'n kenmerk van die regsmiddel [ie the dependant's action for loss of support], wat dit terloops ook van 'n suiwer aksie onder die *lex Aquilia* onderskei, die anomalie is dat dit gebaseer is op 'n versuim om sorg te dra, nie teenoor die aanleggers nie, maar teenoor die oorledene, terwyl die vorderingsreg nie aan die oorledene of sy boedel ontleen word nie, maar regstreeks aan sy afhanklikes op grond van hul eie vermoënskade wat vloei uit hul verlies van onderhoud as gevolg van die dood van die oorledene waarvoor die wandader aanspreeklik is, verleen word.

⁶ *Hulley v Cox* 1923 AD 234; *Milward v Glaser* 1949 (4) SA 931 (A) in which the action is described as “peculiar” (at 941); *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 (2) SA (A) at 471H—472A; *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614B—G..

⁷ 1960 (2) SA 467 (A) at 471H—472A.

[18] In *Legal Insurance Co Ltd v Botes*⁸ Holmes JA says that dependant's action for loss of support –

... has continued its evolution in South Africa – particularly during the course of this century – through judicial pronouncement, including judgments of this Court, and it has kept abreast of the times.

The continued evolution of the remedy through judicial pronouncement concerned mainly the extension of the class of dependants entitled to bring the action. Thus in *Union Government (Minister of Railways and Harbours) v Warneke*⁹ the action was extended so as to give an action to a husband who had suffered loss through the death of his wife. In *Abbott v Bergman*¹⁰ the action was extended so as to enable a husband to claim for patrimonial loss he sustained through non-fatal injury to his wife. In *Santam Bank v Henery*¹¹ the action was extended to cover a divorced woman entitled to maintenance from the deceased in terms of an order granted under section 7 (2) of the Divorce Act 70 of 1979. In *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*¹² a contractual right of support arising out of a marriage in terms of Islamic law was, within defined parameters, recognised for purposes of the dependant's action. In *Du Plessis v Road Accident Fund*¹³ it was held that the same-sex partner of the deceased in a permanent life relationship similar in other respects to marriage, in

⁸ 1963 (1) SA 608 (A) at 614.

⁹ 1911 AD 657.

¹⁰ 1922 AD 53. The judgment in this case should, however, be read in the light of the analysis thereof by Greenberg J (as he then was) in *De Vaal NO v Messing* 1938 TPD 34. Also see *Plotkin v Western Assurance Co Ltd* 1955 (2) SA 385 (W) and *Erdmann v Santam Insurance Co Ltd* 1985 (3) SA 402 (C).

¹¹ 1999 (3) SA 421 (SCA).

¹² 1999 (4) SA 1319 (SCA).

¹³ 2004 (1) SA 359 (SCA).

which the deceased had undertaken a contractual duty of support to him, was entitled to claim damages for the loss of that support.

[19] In *Santam Bank v Henery*¹⁴ Nienaber JA expressly declined¹⁵ to embark on a jurisprudential analysis of the nature of the dependant's action, the only question before the Court being whether the class of dependant entitled to claim should be extended to a divorced woman. The learned Judge of Appeal adds that –

[d]ie geleentheid om opnuut oor die dogmatiese kwelvrae te besin, sal te pas kom wanneer die uitslag van 'n geding pertinent daarvan afhang – wat hier nie die geval is nie.

In the present matter, the issue arises pertinently for decision.

[20] The view that the dependant's action for loss of support is in our law a *sui generis* and anomalous remedy has through the years elicited strong criticism.¹⁶ The late Prof PQR Boberg's criticism was brief and to the point: he refers to "the jurisprudential monstrosity of an action based upon a wrong to someone else (if one has a remedy, it can only be because one's *own* right has been invaded)".¹⁷

[21] Both parties rely on the following dictum of Corbett JA (as he then was) in *Evins v Shield Insurance Co Ltd* 18:

¹⁴ 1999 (3) SA 421 (SCA).

¹⁵ At 430A—B; and see the remarks of Cloete JA in *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at 369D.

¹⁶ Full reference to the literature in this regard is given by Davel *Skadevergoeding aan Afhanklikes by die Dood van 'n Broodwinner* (1987) at 49 fn 19. See also Neethling Potgieter Visser *Law of Delict* (5th ed) 256—257.

¹⁷ *The Law of Delict* vol I 728.

An essential and unusual feature of the remedy is that, while the defendant incurs liability because he has acted wrongfully and negligently (or with *dolus*) towards the deceased and thereby caused the death of the deceased, the claimant (the dependant) derives his right of action not through the deceased or from his estate but from the facts that he has been injured by the death of the deceased and that the defendant is in law responsible therefore. Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue and in such action the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner. These principles are trite and require no citation of authority. They demonstrate the basic differences between this remedy and that given to a plaintiff who has suffered bodily injury or sustained damage to his property as a result of the wrongful and negligent (or intentional) conduct of the defendant. In the latter case the action lies for a wrongful act committed in respect of the plaintiff's person or property and with *culpa* (or *dolus*) vis-à-vis the plaintiff.

The judgment can, obviously, not be supportive of two radically opposed points of view. For a proper understanding thereof it is necessary to evaluate the passage cited above, not in isolation, but within the context of the judgment as a whole.

[22] The question which arose for decision in *Evins v Shield Insurance Co Ltd*¹⁹ (within the context of a plea of prescription) was whether at common law a claim for damages by a plaintiff for bodily injury and the claim for damages by the same plaintiff for loss of support caused by the death of the breadwinner (where both the bodily injury and the death result from the same accident) are separate causes of action or simply facets of a single cause of action.

¹⁹ 1980 (2) SA 814 (A) at 837H—838B.

[23] In the judgment, the causes of action underlying the two claims are analysed.²⁰ In the case of the claim for bodily injury, the ingredients of the plaintiff's cause of action are (a) a wrongful act by the defendant causing bodily injury, (b) accompanied by fault, in the sense of *culpa* or *dolus*, on the part of the defendant, and (c) *damnum*, ie loss to the plaintiff's patrimony, caused by the bodily injury. In the case of an action for loss of support, the basic ingredients of the plaintiff's cause of action are (a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant *culpa* (or *dolus*) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) *damnum*, in the sense of a real deprivation of anticipated support. It is evident that the *facta probanda* in a bodily injury claim differ substantially from the *facta probanda* in a claim for loss of support.²¹ The learned Judge of Appeal points out²² that even though the two claims may flow from the same event or accident, the cause of action in each may arise at a different time. The following, in the present context, significant conclusion follows:²³

As I have said, the cause of action in respect of bodily injury will normally arise at the time of the accident, ie when the bodily injury and the consequent *damnum* are inflicted; in the case of the cause of action for loss of support, this will arise only upon the death of the deceased, which may occur some considerable time after the accident. Until such death there is, of course, no

²⁰ At 838H—839E.

²¹ At 839C—D: "Proof of bodily injury is basic to the one; proof of the death of the breadwinner is basic to the other. Proof of a right to support and the real expectation that, but for the breadwinner's death, such support would have been forthcoming is basic to the one, irrelevant to the other".

²² At 839D.

²³ At 839E.

wrongful act *qua* the plaintiff; only a wrongful act *qua* the person who is later to become the deceased.

[24] In other words, the causing of the death of a breadwinner through *culpa* or *dolus* is a wrongful act *vis-à-vis* the dependant which infringes the dependant's right of support. In my view, this is also what is conveyed in the passage cited in paragraph [17] above from the judgment in *Evins v Shield Insurance Co Ltd*²⁴ where it is stated that –

... the dependant derives his right of action ... from the facts that he has been injured by the death of the deceased and that the defendant is in law responsible therefor. Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue ...

This is the interpretation put on the passage by a Full Bench of the Zimbabwe High Court.²⁵ After citing the passage, the Court (Gubbay ACJ, McNally JA and Manyarara JA) continues²⁶ –

The action accrues to the dependant in consequence of his having been injured by the death of the deceased, and because the defendant is in law liable to *him* for *his* patrimonial loss through being deprived of benefits, whether in the form of maintenance or services. Put otherwise, the wrongful killing of the breadwinner is an infringement of the rights of the dependant.

[25] In *Santam Bpk v Henery*²⁷, *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*²⁸ and in

²⁴ *Supra*.

²⁵ *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC).

²⁶ At 830E.

²⁷ 1999 (3) SA 421 (SCA) at 430C.

²⁸ 1999 (4) SA 1319 (SCA) at 1326A—D.

*Du Plessis v Road Accident Fund*²⁹ it was held that a dependant's claim for loss of support resulting from the unlawful killing of another, being a claim for pure economic loss, will be valid if the deceased had a legally enforceable duty to support the dependant and if the right of the dependant to such support was worthy of protection by way of an action at the suit of the dependant against the wrongdoer. The existence of a right to support worthy of protection by the law must be determined by the criterion of *boni mores*.

[26] In each of these cases, the Court examined the question whether the dependant's right to support was worthy of protection. In *Santam Bpk v Henery*³⁰ Nienaber JA held that –

... daar [is] in my gemoed weinig twyfel dat die gemeenskapsbelang verg dat 'n geskeide vrou se aanspraak op onderhoud, net soos dié van enige ander afhanklike, beskermingswaardig is.

In *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*³¹ it was held that the *boni mores* of the community when the instant cause of action arose would have considered the contractual right of support arising out of a marriage in terms of Islamic law worthy of protection by the law. In *Du Plessis v Road Accident Fund*³² it was held that the legal duty of support owed to the same-sex partner of the deceased in a permanent life relationship similar in other respects to marriage, in which the deceased had undertaken a

²⁹ 2004 (1) SA 359 (SCA) at 370A.

³⁰ 1999 (3) SA 421 (SCA) at 430G.

³¹ 1999 (4) SA 1319 (SCA) at 1329H.

³² 2004 (1) SA 359 (SCA) at 376C.

contractual duty of support to him, was worthy of protection.

[27] The Court was in these cases not called upon to embark on a jurisprudential analysis of the nature of the dependant's remedy. What the Court did in each of the cases was to deal with the dependant's claim for loss of support as a claim for economic loss and applied the requisites of Aquilian liability. In each case, the Court enquired into the legal duty of support owed by the breadwinner (deceased) to the dependant, and whether the right of the dependant to such support was worthy of protection by way of an action at the suit of the dependant against the wrongdoer. In each case, the Court held that the right was worthy of protection and that wrongful infringement of that right was actionable.³³ Thus it is stated in *Du Plessis v Road Accident Fund*³⁴:

In *Henery* and *Amod* it was held that a dependant's claim for loss of support as a result of the unlawful killing of another, being a claim for pure economic loss, will be valid if the deceased had a legally enforceable duty to support the dependant and if the right of the dependant to such support was worthy of protection by way of an action at the suit of the dependant against the wrongdoer.

[28] Wrongful infringement of the dependant's right to support is a wrongful act committed against the dependant and not the breadwinner; it

³³ In this regard, the following statement by Law J in *Ismail v General Accident Insurance Co of SA Ltd* 1989 (2) SA 473 (D&CLD) at 479C—D is apposite:

It is a fundamental principle of our law that where the law imposes an obligation upon one person in respect of another it also confers a right upon that other. Equally fundamental is the principle that where a right exists so too does a corresponding remedy. (*Ubi jus ibi remedium*). Accordingly, if the law imposes an obligation upon a mother to support her children it also confers upon them the right to receive such maintenance and the remedy with which to enforce that right.

³⁴ 2004 (1) SA 359 (SCA) at 370A.

is an infringement of the rights of the dependant. Put differently, the legal duty lies in favour of the dependant and not the breadwinner.³⁵ The following conclusion by Davel³⁶ is, in my view, a correct statement of the law:

Waar 'n derde dus 'n broodwinner onregmatiglik dood, begaan hy daarmee ook 'n onregmatige daad teenoor die afhanklikes as gevolg waarvan hulle vermoënsverlies ondervind. Hiermee word voldoen aan al die vereistes vir deliktuele aanspreeklikheid en die vermoënskade is verhaalbaar by die *actio legis Aquiliae*.

The law is stated in similar terms in *LAWSA*:³⁷

Dependants sue for pure economic loss resulting from the death of the person who owes them a duty of support. A dependant's right is not derivative. In causing the death of the breadwinner, the defendant violates a separate and independent right of the dependant, the right to maintenance. If the deceased's death was caused in a legally-unacceptable manner, for example, without justification, the defendant's conduct was unreasonable in the circumstances. The violation of the dependant's right to maintenance occurred contrary to accepted norms.

35 This view finds support in section 2(1B) of the Apportionment of Damages Act 34 of 1956 which provides that if the negligent act of the deceased breadwinner and the third party contributed to the breadwinner's death and consequently to the dependant's loss of support, they are regarded as joint wrongdoers, and therefore both have committed delicts against the dependant. Seen in this light, the dependant's claim is based on a delict committed against the dependant (see Neethling Potgieter Visser *Law of Delict* (5th ed) 257 fn 32).

36 *Skadevergoeding aan Afhanklikes by die Dood van 'n Broodwinner* (1987) at 51. In an article written thirteen years later, Prof Davel poses the question, "Hoekom die afhanklikes se aksie dus steeds as a *actio sui generis* bekend staan, bly onverklaarbaar". She adds that one would have thought that "ons begrip van hierdie remedie oor die jare so toegeneem het dat die afhanklikes se aksie die *sui generis* stadium ontgroeie het" ("Die ontwikkeling van die Aksie van Afhanklikes" 2000 *Acta Juridica* 158 at 159—160).

37 (2nd ed) Vol 8 Part 1 Par 75.

The effect of the independent nature of the action is that any defence which is personal to the deceased does not operate against the dependant.³⁸

[29] The cause of action pleaded by the plaintiff, a negligent breach of a legal duty owed by the Police to the plaintiff (as dependant), is in accordance with the principles applicable to the dependant's action for loss of support. The defendant's first ground of exception cannot, therefore, be sustained.

Wrongfulness

[30] The defendant submits that the allegations of fact in the plaintiff's Particulars of Claim, accepting that they are correct, are not susceptible in law of sustaining a finding that the defendant was under a legal duty to avoid loss of support being caused to the plaintiff. In other words, the defendant in its exception pertinently raises the question whether the defendant's negligent omission can be "wrongful" in the delictual sense.³⁹ The nature of exception proceedings requires that for present purposes the presence of negligence should be presumed.⁴⁰ In other words, when it is said that the defendant owes the plaintiff no legal duty and that there was thus no wrongfulness, it means that, despite the existence of blameworthy conduct, the plaintiff cannot be liable for damages resulting from the conduct⁴¹ -- the fact that an act is negligent

³⁸ See *Jameson's Minors v Central South African Railways* 1908 TS 575.

³⁹ The present is a matter in which, in my view, the issue of wrongfulness can be decided on exception (see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465F; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318H—J; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 801A—C; *Trustees, Two Oceans Aquarium Trust v Kantey & Templar (Pty) Ltd* 2006 (3) SA 138 (SCA) at 143I.

⁴⁰ *Trustees, Two Oceans Aquarium Trust v Kantey & Templar (Pty) Ltd* 2006 (3) SA 138 (SCA) at 143I—J.

⁴¹ *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at 138I—139A; *Trustees, Two Oceans Aquarium Trust v Kantey & Templar (Pty) Ltd* 2006 (3) SA 138 (SCA) at 143I.

does not make it wrongful.⁴²

[31] The test for determining wrongfulness was set out as follows in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)*:⁴³

Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based⁴⁴, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.⁴⁵

42 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 468B.

43 2003 (1) SA 389 (SCA) at 395H—396A; the passage is cited with approval in *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at 229E—H.

44 In an oft-cited passage from Fleming *The Law of Torts* (4th ed) at 136) it is succinctly stated that “the recognition of a duty of care is the outcome of a value judgment”. The passage is cited in full in, *inter alia*, *Minister of Safety and Security v Hamilton* 2004 (2) SA 218 (SCA) at 230D.

45 The Court refers to *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) at 494B—D; *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1056E—1057G; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) at 1256F—1257B and 1263C—F; *BOE Bank Ltd v Ries* 2002 (2) SA 29 (SCA) at 46H—47A; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 444B—E.

In *Minister of Safety and Security v Van Duivenboden*⁴⁶ it is stressed that when determining whether the law should recognise the existence of a legal duty in any particular circumstances –

... what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.

[32] The application of the test of the legal convictions of the community must necessarily be informed by the norms and values of our society as they have been embodied in the Constitution.⁴⁷ In *Minister of Safety and Security v Van Duivenboden*⁴⁸ it is further emphasised that the State's constitutional duty to act in protection of the Bill of Rights necessarily implies the norm of public accountability, and that the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in a particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages for there will be cases in which other appropriate remedies are available for holding the State to account.⁴⁹

[33] It was submitted on behalf of the defendant that in this case there are other constitutional norms and considerations of public policy that outweigh the norm of accountability. The constitutional norms in question are:

⁴⁶ 2002 (6) SA 431 (SCA) at 446F.

⁴⁷ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) at 396H; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 444E—G.

⁴⁸ 2002 (6) SA 431 (SCA) at 446F—G.

⁴⁹ In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) Marais JA in a minority judgment held that in the particular circumstances of that case the police were under a legal duty to act even on application of the traditional test for delictual wrongfulness and that it was not necessary to have regard to the Constitution.

1. the norm imposed under both the Constitution and the common law which requires parents and families to care for children;
2. the constitutional norm in terms of which the State is required to provide social services to everyone and children in particular, and includes providing grants to children in need of support, whose parents are imprisoned;

[34] In regard to the first of these norms, parental and family responsibility for children, it was submitted that the common law duty of parents and families to provide shelter, clothing and medical care to children has now been entrenched in section 28(1) of the Constitution which provides *inter alia* as follows:

Every child has the right –

- (a)
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment
- (c) to basic nutrition, shelter, basic health care services and social services
- (d) to be protected from maltreatment, neglect, abuse or degradation.

These norms in the Constitution and the common law in terms of which children are entitled to parental and family care, and to the basic necessities of life and education, far outweigh, so it was submitted, the norm of accountability.

[35] Further in regard to the first norm, the defendant also referred to section 29(1) of the Constitution which provides:

Everyone has the right –

- (a) to a basic education, including adult basic education;
and
- (b) to further education, which the State, through reasonable measures, must make progressively available and accessible.

In terms of section 3(1) of the South African Schools Act 84 of 1996 a parent must cause every child for whom he or she is responsible to attend school from age seven years to fifteen years, or the ninth grade, whichever occurs first. The plaintiff is an apprentice motor mechanic who has passed the tenth grade at school. It was submitted on behalf of the defendant that the plaintiff is seeking damages for the loss of an education opportunity beyond that which parents are statutorily obliged to provide.

[36] The second constitutional norm which is said to outweigh the norm of State accountability, is the norm in terms of which the State is required to provide social services to everyone and children in particular. In this regard, reference was made to sections 27(1) and 28(1) of the Constitution, and to the provisions of the Child Care Act 74 of 1983 and the Social Assistance Act 13 of 2004.

[37] The defendant's contentions regarding the constitutional norms which are said to outweigh the norm of State accountability lose sight of the fact that the support which parents at common law owe their children is by no means confined to the bare necessities of life. The scale upon which parents must provide for their children is determined by the standard of living of the parents, as seen against the background of the family generally, and their social and economic standing in the community.⁵⁰ In appropriate circumstances, a child may be entitled to university or other post-school education.⁵¹ The alternative sources of

⁵⁰ *Boberg's Law of Persons and Family* (2nd ed by Belinda van Heerden *et alii*) 243—244.

⁵¹ *Mentz v Simpson* 1990 (4) SA 455 (A); and see the further authorities cited in *Boberg's Law of Persons and Family* (2nd ed by Belinda van Heerden *et alii*) 244 fn 60.

support relied on by the defendant do not find application to the plaintiff's claims because the kind of social support provided by the State (basic food and shelter) would not have served to ameliorate the plaintiff's losses. To the extent that it may do, this is a matter of evidence and will only serve to reduce the plaintiff's losses. Despite the constitutional norms, a dependant's common law claim for support has not been abrogated and continues to exist.

[38] The legal interest in issue in this case is the plaintiff's right to support as against his father (Brooks), who was obliged to provide such support. The duty of parents to support their children was established in Roman and Roman-Dutch law, and has been affirmed in many decisions of our courts.⁵² The right of a dependant to such support is obviously a right worthy of protection and wrongful infringement of the right is actionable. The plaintiff's counsel contended that the considerations relied upon by the Supreme Court of Appeal in *Minister of Safety and Security v Van Duivenboden*⁵³ to hold in favour of the existence of a legal duty in the circumstances of that case, apply with equal force in this matter:

Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity [section 10], to life [section 11], and to security of the person [section 12] are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them

We are not in this case concerned with the duties of the police generally in the investigation of crime. I accept (without deciding) that there might be

⁵² See *Boberg's Law of Persons and the Family* (2nd ed by Belinda van Heerden *et alii*) 240. In *In re Estate Visser* 1948 (3) SA 1129 (C) at 1133 it is stated: "Die aanspreeklikheid van 'n vader, gedurende sy leeftyd, om sy kinders te onderhou is natuurlik buite twyfel".

⁵³ 2002 (6) SA 431 (SCA) at 447F—448D.

particular aspects of which the public interest is best served by denying an action for negligence, but it does not follow that an action should be denied where those considerations do not arise. In this case, we are concerned only with whether police officers who, in the exercise of duties on behalf of the State, are in possession of information that reflects upon the fitness of a person to possess firearms are under an actionable duty to members of the public to take reasonable steps to act on information in order to avoid harm occurring. There was no suggestion by the appellant that the recognition of a legal duty in such circumstances would have the potential to disrupt the efficient functioning of the police or would necessarily require the provision of additional resources, and I see no reason why it should otherwise impede the efficient functioning of the police – on the contrary the evidence in the present case suggests that it would enhance it. There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of police officers in those circumstances is thus actionable and the State is vicariously liable for the consequences of any such negligence.

[39] In *Minister of Safety and Security v Van Duivenboden*, the question was posed whether police officers, who in the exercise of duties on behalf of the State are in possession of information that reflects upon the fitness of a person to possess firearms, are under an actionable duty to members of the public to take reasonable steps to act on information to avoid harm occurring? Van Duivenboden was a member of the public, and indeed a member of a class of people whom the State would have foreseen as being potential victims if Brooks were to go on a shooting spree.⁵⁴

⁵⁴ See *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) at 324E—H.

[40] We are in this case concerned with a different factual context, and the question is whether in the circumstances of this case, the failure on the part of the police to take action gave rise to an actionable duty to a person in the position of the plaintiff. The Court is asked to extend delictual liability by allowing the claim of a dependant where the breadwinner has by his own intentional act (Brooks was convicted of murder) rendered himself unable to support his dependant. The Court is in effect asked to extend delictual liability to a situation where none existed before. In *Trustees, Two Oceans Aquarium Trust v Kantey & Templar (Pty) Ltd*⁵⁵ it is said that the “crucial question in that event is whether there are any considerations of public or legal policy which require that extension”.

[41] The dependant’s claim for loss of support is a claim for pure economic loss and, when dealing with the negligent causation of pure economic loss, it is well to remember that whereas physical injury to the person or property is *prima facie* unlawful, causing economic loss is not.⁵⁶ One of the factors to be taken into consideration in determining the legal duty in regard to pure economic loss is whether the defendant knew or subjectively foresaw that his negligent conduct would cause damage to the plaintiff.⁵⁷ Such foreseeability is often an important, even a decisive factor in deciding whether wrongfulness has been established, but it is not in itself enough.⁵⁸

[42] It was clearly foreseeable that Brooks, if left in possession of his

⁵⁵ 2006 (3) SA 138 (SCA) at 145C.

⁵⁶ *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 46F—G; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 468C.

⁵⁷ Neethling Potgieter Visser *Law of Delict* (5th ed) 270 fn 162).

⁵⁸ *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 49C.

firearms, might embark on a shooting spree. In *Minister of Safety and Security v Van Duivenboden*⁵⁹ it was accordingly held that the police were under an actionable duty to members of the public (including Van Duivenboden) to take reasonable steps in order to avoid harm occurring. The question in this case is whether that duty is to be extended to a duty to ensure that Brooks did not act in a manner in which he rendered himself unable to fulfil his obligations towards his own dependants. The imposition of such a supervisory duty⁶⁰ would amount to the imposition on the police of legal duties which go beyond their primary, constitutional functions to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the country and their property and to uphold and enforce the law.⁶¹

[43] Counsel for the defendant submitted that allowing the claim in the present case would, for example, open the door to claims for loss of support by the dependants of breadwinners who by their own criminal acts render themselves unable to support their dependants.⁶² Brooks by his own criminal act rendered himself unable to support the plaintiff. One may pose the question whether the dependants of Brooks would have a claim for loss of support if Brooks had not committed a crime, but used the firearms the police had negligently left in his possession to commit suicide?

⁵⁹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 448B.

⁶⁰ See Du Bois "Getting Wrongfulness Right: a Ciceronian Attempt" 2000 *Acta Juridica* 1 at 42—43.

⁶¹ Section 205(3) of the Constitution.

⁶² Examples referred to by counsel are claims by the dependants of the rapist, housebreaker and thief in *Minister of Safety and Security and Another v Carmichele* 2004 (3) 305 (SCA) at 312C—313J; of the known dangerous criminal, armed robber and serial rapist in *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 394E; of the person suffering from paranoid personality disorder and paranoid psychosis in *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at 226G—228C, and of the murderer in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 437B—G.

[44] Finally, the Court is asked to extend the dependant's claim for loss of support to a situation where the breadwinner has neither been killed nor injured in a wrongful and culpable manner. It is settled law that the dependants of a person killed in a wrongful and culpable manner may claim damages for loss of support.⁶³ Whether the dependants of a person injured in a wrongful and culpable manner may claim damages for loss of support is controversial and by no means established.⁶⁴ The plaintiff asks the Court to extend the dependant's claim for loss of support beyond that which is as yet unsettled and controversial in our law.

[45] The State should not, in my view, as a matter of public and legal policy, be burdened by claims for loss of support by the dependants of persons who by their own acts have rendered themselves unable to support their dependants.

[46] For the above reasons I have reached the conclusion that there was, in the circumstances of this case, no legal duty on the members of the police as contended for by the plaintiff.

Causation

[47] One of the grounds of exception the defendant raises in his notice of exception is that "the omission on the part of the defendant's servants was not the cause of the plaintiff's loss". In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA65 Harms JA, in response to a contention that it is inappropriate to decide the issue

63 In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 839C—D it is stated that "proof of the death of the breadwinner is basic" to the dependant's claim for loss of support.

64 Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (6th ed) 336-339; Neethling Potgieter Visser *Law of Delict* (5th ed) 262. See also the authorities cited in footnote 10 above.

65 2006 (1) SA 461 (SCA) at 465G.

of wrongfulness on exception because the issue is fact-bound, remarked:

Some public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation.

After the hearing of oral argument, I requested that counsel make written submissions on the question whether issues of causation can be dealt with on exception.

[48] In their response, plaintiff's counsel submitted that the issues of causation in this matter should not be decided on exception. They rely on three contentions:

1. That the issue of factual causation has been resolved in *Minister of Safety and Security v Van Duivenboden*⁶⁶ and cannot be the subject of an exception in this case.
2. That a plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based on the evidence and what can be expected to occur in the ordinary course of human affairs.⁶⁷
3. That the issue of legal causation involves considerations of policy and policy conclusions are best drawn from proven facts.⁶⁸

⁶⁶ 2002 (6) SA 423 (SCA) at 448H—451A.

⁶⁷ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 449E—F; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at 240G.

⁶⁸ In this regard reliance is placed on what is said in LAWSA 2nd ed Vol 8 Part 1 par 132 in regard to decision of the issue of wrongfulness on exception, the submission being made that the principles set out there apply equally to causation.

[49] The defendant's counsel submit –

1. That if the plaintiff's amended particulars of claim cannot sustain a finding that the omission on the part of the police was a cause of the plaintiff's loss of support from his father, the plaintiff would not be able at the trial to discharge the onus of proving causation.
2. That the exception based on causation constitutes a self-contained, separate defence, and that the issue of causation in relation to the plaintiff's claim for loss of support from his father can be determined on exception.
3. That the legal and policy considerations that militate against imposing a legal duty on the police in the present case, apply equally in relation to the issue of legal causation.
4. That the issue of legal causation involves considerations of legal and public policy, and an inquiry –

In which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.⁶⁹

⁶⁹ Words of Fleming *The Law of Torts* 7th ed at 173 cited by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 701B.

[50] The answer to these submissions is threefold:

1. The issue of factual causation in respect of the plaintiff's claim was not resolved in *Minister of Safety and Security v Van Duivenboden*.⁷⁰ In that case, the Court dealt with the issue of factual causation in relation to Van Duivenboden's claim. Despite the fact that the factual issues overlap to a large extent, there are factual issues which pertain to the plaintiff's claim only which were not before the Court in that case.
2. In regard to factual causation there are issues of fact which need to be clarified by evidence in order to establish a "detailed factual matrix" for deciding causation.
3. It may well be that the same legal and policy considerations that militate against imposing a legal duty on the police would apply equally in relation to the issue of legal causation, but within the context of a detailed factual matrix, other policy considerations may also become relevant. Policy conclusions are best drawn from proven facts.

[51] In *First National Bank of South Africa Ltd v Duvenhage*⁷¹ it was held that it is useful at times to consider whether the loss for which damages are claimed is causally connected to the allegedly unlawful conduct before addressing the more abstract normative questions of wrongfulness and negligence. The present may be a case (I express no opinion thereon) in which the claim may fail for want of a causal

⁷⁰ 2002 (6) SA 423 (SCA) at 448H—451A.

⁷¹ 2006 (5) SA 319 (SCA) at 321E—F and 326E..

connection between the unlawful conduct and the loss and that it may be worth giving thought to causation at the outset, but that can only be determined on the basis of proven facts.

[52] I am accordingly of the view that the issue of causation raised in the defendant's exception should not be decided on exception.

Conclusion

[53] From the foregoing it follows that the exception to the plaintiff's claim for loss of support and for loss of an education opportunity arising from the incarceration of Brooks should be upheld. Though the defendant succeeded in only one of the three grounds of exception raised, the defendant was nevertheless the ultimate successful party and is entitled to his costs. There cannot be any doubt that the nature of the matter justified the employment of two counsel.

The following order is made:

1. The exception to the plaintiff's claim for loss of support and for loss of an education opportunity arising from the incarceration of his father, Neil Brooks, is upheld with costs, including the costs occasioned by the employment of two counsel.
2. The plaintiff is given leave, if so advised, to file amended particulars of claim within one month.

HJ ERASMUS, J