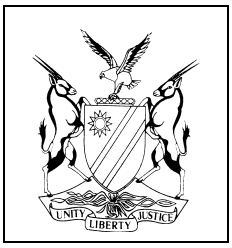

"REPORTABLE"

CASE NO.: (P) I 155/2007

SUMMARY

FRANSINA YOLENI SHAANIKA & ANOTHER versus THE MINISTER OF SAFETY AND SECURITY

DAMASEB, JP

15/07/2008

(i) **Apportionment of Damages Act, 34 of 1956**

- applicability of s1 (1)(a) in respect of dependant's claim where deceased breadwinner commits suicide while in police custody as a result of police negligently failing to secure firearm which was then used by the deceased breadwinner to take his own life.

(ii) **Dependant parent's claim based on indigence**

- A parent relying on own indigence to bring a dependant's action for loss of support owing to the police's negligence which causes death of child who supported parent. Requirements for success of such claim discussed.

CASE NO.: (P) I 155/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FRANSINA YOLENI SHAANIKA	**FIRST PLAINTIFF**
LUSIA NEPUNDA	**SECOND PLAINTIFF**

and

THE MINISTER OF SAFETY & SECURITY	**DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: 29th - 30th May 2008

Delivered on: 15th July 2008

JUDGMENT

[1] **DAMASEB, JP**: In these proceedings, the Minister of Safety and Security (the ''defendant'') is being sued in his representative capacity for the admitted negligence of a member of the Namibian police force who, at all relevant and material times, was acting

within the course and scope of his employment with the police force - when a certain Sam Nepunda (the "deceased'') while in police custody at the Windhoek Central police station - used a pistol in the possession of the police to kill himself. The mother of the deceased (the "second plaintiff'') and his illegitimate minor son represented by the mother (the "first plaintiff''), now bring dependants' claims against the defendant for loss of support on the basis that it was the negligence of the employees of the defendant which resulted in the death of the deceased, causing damages to the plaintiffs.

[2] The first plaintiff sues in her representative capacity on behalf of her minor son, Benson Silvanus Nepunda, born of a relationship with the deceased. It is alleged that Benson was in need of maintenance and was being maintained by the deceased when the latter died. The second plaintiff also claims for loss of support on the basis that the deceased allegedly supported her financially when he was alive and that, being indigent, she is in need of such support. The second plaintiff alleges in her particulars of claim that during the deceased's lifetime he had a legal duty to maintain her because of her indigence and in fact contributed towards her maintenance and support. To the second plaintiff's particulars of claim that she was *"at all material times and still is indigent since she is a pensioner and has no source of support and maintenance other than her monthly government pension in the sum of N$300, 00''*, the defendant pleaded that he *"has no knowledge of these allegations and puts second plaintiff to the proof thereof''*.

[3] The material facts in this case are common cause. The deceased died on 29 January 2004 in police custody. The deceased committed suicide using a firearm (kept in the

office of the police) while undergoing interrogation in connection with the death of his girlfriend, Mathilda Agnes Immanuel. It is admitted on behalf of the defendant that the Namibian police were negligent in not locking away the firearm in a safe place and that there is a causal link between the failure to lock the firearm away, and the death of the deceased. The parties agreed that the trial proceed only on the merits and that the issue of quantum stand over for later determination.

[4] At the end of the plaintiff's case I granted absolution from the instance at the defendant's request. The plaintiffs appealed against that order which was then abandoned by the defendant before the appeal was heard by the Supreme Court. The matter then returned to me for the defendant's case. Before leading the defendant's evidence, Mr. Marcus admitted on behalf of the defendant that:

(i) the defendant accepts the Namibian police's responsibility for the safety of people in their custody and that the police's operations manual and standing instructions show that members of the police force are aware of the dangerous nature of weapons, hence the requirement that firearms be locked away at all times or be kept in a safe where no unauthorized persons can have access to them. The relevant portions of the manual read as follows:

> **"H.8. Procedure after arrest**
> …
> 1. Upon the arrest of a person, a duty is placed on the member involved in the arrest and transport of the arrested person, to ensure the safety of that person.

J.7. Storing and Safe keeping of Firearms

5. All firearms in the charge office or any other office must be kept in a safe, or a safe place, where no unauthorized person have access to them.''

The above provisions should be read with those which require that once a person has been arrested, he must be searched to look for concealed weapons that may be used by that person to harm himself or others (vide: **H.8.d: Search of the arrested person**.)

(ii) based on the above, the defendant accepts that members of the Namibian police force are aware that persons in their custody may inflict injuries or death on themselves or others and that it is why the duty is there to lock away firearms and to safeguard persons in custody at all times. The police therefore owe a duty of care towards persons in their custody so that such persons do not cause harm to themselves.

(iii) a reasonable person in the position of members of the Namibian police force would foresee the reasonable possibility that a firearm that is not properly secured may be used by a person in police custody to injure themselves and the police would therefore take reasonable steps to guard against such an occurrence.

(iv) the duty of care by the police towards a person in custody not to harm themselves is important because of the public interest that a person

suspected of the commission of a crime eventually stands trial for the offence that he is suspected of committing.

(v) the defendant accepts a causal link between the failure to lock away the firearm and the suicide of the person in the police's custody. In Mr. Marcus' own words "… *the occurrence of the very thing that the police was supposed to guard against cannot break the cause of events…*'' (sic). (I think he meant the 'chain of causation').

(vi) the defendant accepts that the police were negligent in failing to lock the door to the office in which was kept the firearm used by the deceased to commit suicide.

[5] On the basis that the defendant fully accepts delictual liability towards the plaintiffs, I will next summarize the evidence that was led in support of the plaintiffs' case in support of their claims for loss of support. The first witness was the 32 year –old first plaintiff (F Shaanika) who confirmed that the deceased fathered a child with her and regularly maintained the child and that since his death the maintenance had ceased. As far as school goes, she had gone only up to grade 9 and is not permanently employed although she occasionally assists in a shop and receives N$200 for her effort. She has four children, including Benson, the minor son of the deceased who is 14 years –old. Shaanika testified that the deceased regularly paid her maintenance for the minor child in the

amount of between N$250 and N$300 per month. Benson is attending school at the moment.

[6] The second witness was 72 year-old Lucia Nepunda (the second plaintiff) who confirmed that she was the mother of the deceased. Being unemployed and without any source of income and bereft of the deceased's support, she testified that she is "starving''. Lucia Nepunda testified that the deceased paid the school fees of the six children who live with her and sent her N$2000 twice a year. Lucia Nepunda's testimony made it clear that the children whose school fees the deceased allegedly paid were not his children. This witness further testified that she lives on a government old-age pension of N$370 per month. She said that the deceased also gave her soap and blankets when he visited her. Her husband, with whom she is married in community of property and have a joint estate, is also an old-age pensioner receiving N$370 per month. The husband owns 200 cattle and 40 goats. She testified that the husband also owns a business from which he earns between N$300 and N$400 per month. Lucia Nepunda testified that she has six living children but that since they are all married with own homes and families, they do not support her to the extent that the deceased did as he was unmarried. She testified that some of the children send her money at Christmas – up to N$300 per year- while others support her with groceries. Referring to the support from her children she said on cross examination:

> "Q. Do they send you money sometimes?
> A. Yes, at Christmas time, some of them send for me money and the others bread and sugar and food.

> Q. How much money, can you estimate, do you get from your children in a year?
> A. One can send three hundred Namibian Dollars (N$300.00) or if you calculate by the end of the year, it's just a two hundred Namibian Dollars (N$200.00) that I have received from them.''

This clearly confusing and vague answer was not even clarified under re-examination as there was none.

[7] The third witness was Sylvanus Nepunda, the brother of the deceased, working for the Namibian police as a 'legal advisor'. In his evidence –in- chief, Ms Conradie did not elicit any evidence at all from this witness bearing on support to his mother. Considering his mother had testified that he was one of the children who also gave some financial assistance to her, I found this very strange and certainly a factor adverse to the second plaintiff in the consideration of the probabilities of the case. As far as his evidence is relevant to the issue of maintenance elicited on cross-examination, Sylvanus testified that he sometimes financially assists his mother to the extent of N$500 to N$600 and depending on her needs (say during the ploughing season) gives her financial support . Sylvanus' evidence does not take the case very far as regards the issue of maintenance to his mother because he was evasive about just how much financial assistance and at what intervals he gives to his mother. In the same way that his mother did, he tried very hard to downplay what support, and the significance thereof, he provided to his mother and it was not possible to establish at what intervals he provided the support he said he provided. I got the distinct impression that the second plaintiff's advisors preferred to be as vague as possible about such support.

[8] The only witness called by the defendant is inspector Michael Booysen who is a senior detective in the Serious Crime Unit of the police force with 19 years experience. He testified that on 24 01 2004 he received a report and immediately proceeded to Lister Street in Windhoek. When he came there he found a female lying on a footpath with a black top on the upper part of her body and only a panty on the lower part of her body. A trouser which presumably was her's, was lying next to her. He established that the person he thus found lying was dead. A nokia cellphone also lay next to the dead female whose identity he later established to be Matilda Agnes Immanuel (the "late Matilda"). Booysen also found two spent 9mm cartridges at the scene where the body of Matilda was found. He then took the nokia cellphone he found at the scene to the cellular phone network provider, 'MTC', and with their help established that the nokia cellphone belonged to the late Matilda. With MTC's help he also established the identity of two males who had last called late Matilda's number on 24 January. He made contact with these two males who denied killing Matilda but confirmed that they were in her company some time on 24th January, meaning that Matilda was still alive on that date.

[9] Booysen then approached the relatives of Matilda from whom he established that she was amorously linked to the deceased who, according to the relatives, had previously threatened to kill her. Armed with this information, Booysen called in the deceased who then reported to the police station on 28 01 2004 in the presence of one Simon, apparently his uncle.

[10] Booysen testified that he then interrogated the deceased about the killing of Matilda which he denied. Booysen testified that the deceased admitted to owning a Makarov and said that between the 24th and 25th of January 2004 he had not parted possession of the firearm. When asked where the firearm was, the deceased said it was with his uncle Simon. Booysen thereupon made contact with Simon, retrieved the firearm and together with the two spent cartridges found at the scene, sent it to the forensic lab for ballistic tests. The forensic lab then confirmed to Booysen that the cartridges found at the scene where Matilda's body was found, were fired from the Makarov pistol belonging to the deceased. Booysen then proceeded to the police station and confronted the deceased with this evidence. Booysen testified that when confronted with these facts the deceased seemed worried and felt "cornered".

[11] Based on the positive forensic match between the spent cartridges and the firearm belonging to the deceased, the deceased's admission that he had not loaned, or handed the firearm, to anyone between the 24th and 25th January, and the allegation of Matilda's relatives that the deceased had in the past threatened to kill Matilda, Booysen stated under oath that he had a strong case of murder against the deceased. Booysen testified that the deceased would have been convicted of murdering Matilda and was destined to serve a long prison sentence. The clear implication of Booysen's testimony is that the deceased realized this and killed himself.

[12] According to Booysen, the suicide happened in this way: After confronting the deceased in his office at the police station with the incriminating evidence, he asked the

deceased to wait outside the office in the corridor where there were also other suspects. He had then placed the Makarov pistol and live ammunition in the wardrobe in his office, unsecured. He went to another office along the same corridor where his office is to make a phone call. While there he heard gunshots and returned to his office and found the deceased had shot and killed himself.

[13] On cross-examination, Booysen conceded that he could have done more than what he did, e.g. by separately putting away the ammunition and the firearm, to make sure that the deceased did not have access to the firearm in his absence. Booysen also conceded that he could not completely exclude the possibility (which he felt remote) that the deceased killed himself for a reason other than his fear of conviction and a long prison term. Ms Conradie sought to place great store by the concession that the deceased might have killed himself for a reason other than his fear of conviction or incarceration. However, she did not even as much as suggest what that reason could be. Firstly, Booysen was at pains to stress he considered any other reason very remote. Secondly, on the facts of this case the most natural and acceptable inference is that the deceased killed himself because he was confronted with evidence pointing to his knowledge , at the very least, that his Makarov pistol was the instrument that caused the death of late Matilda at a time when he was in possession of it. See *Govan v Skidmore*, 1952 (1) SA 732(N) at 734 where it is said:

> "… in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed., para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one." That conclusion be not the only reasonable one."

[14] The defendant's case is not that the wrongful contributory intention of the deceased in taking his own life deprives the plaintiffs of the right to claim damages for loss of support. In the way the defendant's case has been conducted since the order granting absolution was abandoned, it is accepted that the defendant is liable towards the plaintiffs because the defendant's employee negligently made it possible for the deceased to kill himself.

[15] It is not my place to comment whether, on the facts of this case, the concession had been properly made. I will, however, discuss the state of the law as I find it on the dependants' claim arising from the death of a breadwinner in police custody owing to the negligence of the police. Before I consider the position under Roman- Dutch law, I will first discuss the law on this issue as it applies in England and Wales.

[16] Mr. Marcus referred me to two English cases which have greatly elucidated the issue in England and Wales on the twin questions:

(i) In what circumstances will death by suicide in custody give rise to tortuous liability on the part of the police?

(ii) Should there be a bar to the defendant police force (in whose custody a prisoner kills himself) from placing reliance on s 1(1) of the Law Reform (Contributory Negligence) Act 1945 which provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …"

Section 4 defined 'fault' as:

> '… negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence …'

[17] In view of the concessions made by the defendant, the first issue does not fall for decision in this case but it would be instructive all the same to examine the state of the law.

The position in England and Wales

[18] The English decisions emanate from the two highest courts of that jurisdiction. The first is from the Court of Appeal in *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 ALL ER 246. The second is from the House of Lords in *Reeves v Commissioner of Police of the Metropolis* [1999) 3 All ER 897. As we shall see presently, the common denominator in both these cases was the awareness on the part of the defendant police forces that the deceased were suicide risks at the time they were placed in custody. I shall return to these decisions presently, but I prefer to first sketch the position under the law of England and Wales before the two decisions. As the law stood in England and Wales before 1961, suicide was a crime at common law but the

Suicide Act 1961 abolished both crimes of suicide and attempted suicide in England and Wales.

[19] Lord Denning MR had to confront a dependant's claim based on suicide in a medical facility in the Court of appeal in the case of *Hyde v Tameside Area health Authority* CA (1981) Times, 16 April CA Transcript 130, where he said the following with characteristic eloquence:

> "Before 1961 I cannot think that any such claim would have succeeded. Suicide was then a crime. So was attempted suicide. And no one was allowed to benefit from his own deliberate crime. Nor were his personal representatives… Is it any different now? Under the Suicide Act 1961 suicide is no longer a crime. Nor is attempted suicide. But it is still unlawful. It is contrary to ecclesiastical law, which was, and is still, part of the general law of England… The suicide's body was not buried in the churchyard with Christian rites. You will remember the gravediggers' scene in Hamlet Act v.i.i: "Is she to be buried in Christian burial that willfully seeks her own salvation?" I know this all sounds very out of date, but it has a useful lesson for us in modern times. I feel it is most unfitting that the personal representatives of a suicide should be able to claim damages in respect of his death. At any rate, when he succeeds in killing himself.''

[20] Writing in 1951 in his seminal work *Joint Torts and Contributory Negligence*, the late Professor Glanville Williams opined (at p199) that contributory intention should be a defence. The views of the author in the same work are neatly summed up thus by McKerron, *The Law of Delict* 7th ed at 58, 297:

> "As Glanville Williams, 354, observes, although there can be little doubt that the common-law rules relating to contributory negligence applied *a fortiori* where the plaintiff was guilty of contributory intention, the question would seem to be an academic one, since it is most unlikely that the court would exercise its discretion to give the plaintiff any part of his damages."

[21] This view enjoyed partial support of the House of Lords in *Reeves*. In that case, Lord Hoffmann took the view (at 904b) that the question of liability arising against someone

else on account of someone killing himself '' *…can arise only in the rare case such as the present , in which someone owes a duty to prevent , or take reasonable care to prevent the plaintiff from deliberately causing injury to himself. Logically it seems to me that Professor Glanville Williams is right.''* Lord Hoffman therefore disapproved the contrary view by the Court of Appeal in *Kirkham infra.* (See Reeves at 904c-j, 905a-j).

[22] In *Kirkham*, the plaintiff's husband with suicidal tendencies was admitted to hospital but was discharged the next day. He was a day later arrested and charged. The plaintiff informed the police that the deceased recently tried to kill himself. Based on that information, the police opposed his attempt at bail and he was remanded in custody for his own protection. The police however failed to follow a standing procedure which required them to inform the prison authorities about the prisoner's suicidal tendencies. At the remand centre the deceased was treated like an ordinary prisoner and placed alone in a cell where he committed suicide. The plaintiff brought an action against the police for negligently causing the death of her deceased husband by failing to pass on the information about his suicidal tendencies to the prison authorities. The decision of the Court of Appeal is succinctly captured in the head note to the report (at 247c-g) as follows:

> "[1] When the police took the deceased into custody they assumed certain responsibilities towards him, in particular the responsibility to pass on information which might affect his well-being when he was transferred from their custody to the prison authorities, and hat assumption of responsibility imposed on the police a duty to speak. By failing to complete the form for exceptional risk prisoners and thereby pass on to the remand centre information relating to the deceased's suicidal tendencies the police had been in breach of that duty.

(2) Since the deceased had been suffering from clinical depression and his judgment impaired at the time of his suicide his act had not been truly voluntary and he could be said to have waived or abandoned any claim arising out of his suicide. The defence of volenti non fit injuria accordingly failed.

(3) Having regard to the changing public attitude to suicide, as evidenced by the abolition of the crime of suicide by the Suicide Act 1961, the plaintiff's claim was not an affront to the public conscience nor would it shock the ordinary citizen. The defence of ex turpi causa non oritur actio therefore did not apply; dictum of Lord Denning MR in Hyde v Tameside Area Health Authority (1981) Times, 16 April doubted.

Per Lloyd LJ. Where a man of sound mind commits suicide his estate will be unable to maintain an action against the hospital or prison authorities if he is in their care because the maxim volenti non fit injuria will provide them with a complete defence; dictum of Lord Denning MR in Hyde v Tameside Area Health Authority[1981) Times, 16 April doubted.

Per Farquharson LJ. The defence of volenti non fit injuria is inappropriate where the act of the deceased relied on to support the defence is the very act which the duty cast on the defendant required him to prevent.''

[23] In *Reeves* the police also knew that the person in their custody was a suicide risk. He was largely left unsupervised and hanged himself in the cell. A *quo* the court held he was of sound mind but the police owed him a duty of care because he was a suicide risk. The trial judge also said that the defendant could rely on *volenti non fit injuria and novus actus interveniens*. On contributory negligence the trial judge assessed the deceased's responsibility at 100% and dismissed the claim. The Court of Appeal reversed the trial judge's assessment of 100% responsibility against the deceased and assessed it in equal proportions (50/50) between the defendant and the deceased. In *Reeves*, the House of Lords did not support the conclusion by the Court of Appeal in *Kirkham* (per Lloyd LJ) that a dependant's action must fail if the person who killed himself in custody does so while of sound mind. As Lord Hoffman put the matter (at 903a-b):

"The difference between of sound mind and unsound mind, while appealing to lawyers who like clear-cut rules, seems to me inadequate to deal with the complexities of human psychology in the context of the stress caused by imprisonment. The duty …is a very

> unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives.''

[24] Lord Hoffman went on to hold (at 904j) that:

> "Because the police were under a duty to take care not to give [the deceased] the opportunity to kill himself, the commonsense answer to the question whether their carelessness caused his death is Yes. Because [the deceased] also had the responsibility for his own life, the commonsense answer to the question whether he caused his own death is Yes. Therefore both causes contributed to his death and the 1945 act provides the means of reflecting this division of responsibility in the award of damages.''

Lord Hoffman held (906d-e) that the decision of the judge *a quo* to apportion 100% of the responsibility for his death on the deceased gave no weight at all to the policy of the law in imposing a duty of care upon the police. He said in very clear terms:

> "The apportionment must recognize that a purpose of the duty accepted by the commissioner in this case is to demonstrate publicly that the police do have a responsibility for taking reasonable care to prevent prisoners from committing suicide. On the other hand, respect must be paid to the finding of fact that [the deceased] was 'of sound mind''.

The Law Lords then upheld the Court of Appeal and apportioned responsibility at 50%/50% between the police and the deceased.

[25] All told, it is now settled in England and Wales that the defendant is entitled to apportionment of damages depending on the parties' relative degree of blameworthiness in circumstances where because of the police's negligence in complying with the duty of care towards a person in custody so that he does not harm himself, he in fact intentionally takes his own life. The suggestion by counsel in that case that contributory intent was not contemplated by the 1945 Act where the defendant had acted negligently was rejected by the House of Lords. It is significant to note that this was in the face of the definition in s4

of the 1945 Act which does not specifically list 'intention' while specifically mentioning 'negligence'.

The position in Roman-Dutch Law

[26] I now proceed to consider the position under Roman–Dutch Law. Except that under Roman Dutch law suicide had not been a crime (as to which see *Ex parte Die Minister van Justisie: In re S v Groljohn*, 1970(2) SA 355 (A)) the law on contributory negligence (both common law and statute) followed the same trajectory as English Law: See Neethling et al, Law of Delict, LexisNexis (Butterworths, 2006), at 144- 145.

[27] Curiously, neither of the parties referred me to the case of *Wapnick V Durban City Garage* 1984 (2) 414. In that case Booysen J said (at 418C – D):

> "It is clear that a defendant who has wrongfully and intentionally caused the plaintiff to suffer damages is not entitled to plead contributory negligence and equally clear that a plaintiff who has intentionally contributed to his own damage cannot claim his own damage or part of it from a defendant on the ground of the latter's negligent conduct.'' (My underlining for emphasis).

Goldstein J took the view in *Johannesburg Transitional Metropolitan Council v Absa Bank Ltd t/a Volkskas Bank* 1997 (2) SA 591 at 609F that the above *dicta* by Booysen J were *obiter*. See, however, *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W) 512J-513A where the principle is repeated. The principle stated in *Wapnick* enjoys a considerable chorus of academic support: See Neethling et al supra at 146; Visser et Potgieter, *Law of Damages*, Juta 1993 at 235 4.3; Van der Merwe and Olivier *Die Onregmatige Daad In die Suid-Afrikaanse Reg* 4th ed at 153, 171; *Lawsa* Vol 8 para 45.

[28] There is a lot to be said for the view that it is undesirable that a court of law should come to the assistance of a plaintiff who has intentionally contributed to his damage unless it be shown, in addition to the duty cast upon the police or the prison authorities, that they were aware of the special risk that the prisoner was at risk of taking his own life. As I have shown, the English cases are not authority for the proposition that awareness of the special risk that a prisoner might take his own life is an irrelevant consideration in holding there was a causal link between the negligence of the police and the suicide. In fact, the two cases that I have discussed were decided on the basis that the police were indeed so aware. True, it is accepted by the English courts that the fact of confinement or deprivation of liberty makes a person the more likely to commit suicide. I can only surmise that it is a premise accepted by those courts after the issue had been properly ventilated and debated. It is arguable that our own police's manual, which imposes an obligation on the police to safeguard prisoners against self-inflicted harm, recognises the potential risk of prisoners committing suicide. I still feel that the premise is untested in our jurisdiction and our courts must be slow in accepting the premise as absolute (unless admitted as in the present case) without it being properly ventilated by acceptable evidence sifted through the rigours of our own adversarial process. This is not a contradiction in terms. As was said by Holmes JA in *Ocean Accident and Guarantee Corp. Ltd. v. Koch*, 1963 (4) SA (AD) at 159D-E:

> "Judicial decisions reflect the particular facts and testimony of each case, and are not intended and cannot be regarded as scientific treatises. Accordingly, the possibility of future scientific disproof of the opinion of one or other of the expert medical witnesses is, judicially, a matter of no moment- the Court must do the best it can on the material presently before it in each case.'' (My underlining for emphasis.)

No doubt, in the fullness of time the matter will be properly debated and decided by our courts.

[29] In the present case the causal link between the death by suicide and the negligence of the defendant's employee is admitted, and I am therefore bound to proceed on the basis that he is delictualy liable to compensate the plaintiffs unless I uphold the partial defences put up. The bases on which the defendant now resists plaintiffs' case is set out by Mr. Marcus in paragraph 2 of his heads of argument as follows:

> 2.1 Second plaintiff failed to prove that she is indigent and her claim falls to be dismissed on this basis alone;
>
> 2.2 First and second plaintiff failed to show that but for the suicide the deceased would have been able to support them;
>
> 2.3 In the event that plaintiffs succeed with their claim, this Court should determine the extent of defendant's liability having regard to defendant's fault in causing the damages to plaintiffs."

[30] In support of the arguments covered by paras 2.2 and 2.3 aforesaid, Mr. Marcus submitted, in the first place, that the deceased killed himself because he came to the realization that he was going to be convicted of the murder of the late Matilda and would spend a very long time in prison; alternatively that the deceased was a joint wrongdoer in intentionally taking his own life and that the Court should apportion the damages to be paid to the plaintiffs in tandem with the Apportionment of Damages Act, 34 of 1956.

The claim based on second plaintiff's indigence

[31] I will now first consider if the second plaintiff proved on a balance of probabilities that she is 'indigent'. I had set out the evidence the second plaintiff relies on in support of her claim for loss of support. In my view, in a case where the indigence of parents is sought to be established and there is evidence to show , as in the present case, that they do have some income and assets that can be utilized in supporting themselves, one must have more cogent evidence of the parents' indigence than what was led before me. (*Compare Anthony and Another v Cape Town Municipality* 1967 SA (4) 445 at 456D-E). The evidence about the second plaintiff's inadequate means and the constraints on her living children in adequately supporting her, would have been very difficult for the defendant to contradict (as evidenced by the plea in that regard) and in such circumstances it behooved the second plaintiff to place adequate evidence before the Court to discharge the *onus* which rested on her (as to which see *Smith v Mutual & Federal Insurance CO. Ltd* 626 at 630A-D). No effort whatsoever was made to give the Court some idea of what the exact support is that the second plaintiff receives from her living children, what income she and her husband derive from the livestock they own, their total expenses per month compared to their own income, and how the loss of the deceased's support affected the family budget. In this regard it is to be noted that the support from the deceased was paid, on the evidence, twice per year. What was it used for? Was it invested and applied towards necessities on a monthly basis so as to ensure that she did not "starve''? These are questions that only the second plaintiff could have answered. She did not!

[32] A parent must prove that she is indigent in order to claim support from her child and she would not be so entitled if she is able to support herself. Whether a parent is indigent so as to attract liability on the child's part to support her, is a question of fact depending on the circumstances of each case: *Oosthuizen v Stanley* 1938 AD 322 at 328. It has been said, and I agree, that a parent claiming to be indigent "*must show that he or she is in want of what should, considering his or her station in life , be regarded as necessities''*: *Smith supra* at 629H.

[33] I am in complete agreement with the following observation in *Smith supra* at 631D-I:

> "…she did not explain to the Court what their lifestyle was whilst he deceased was alive and how his contribution was applied towards the running of the home. Put differently, she did not explain to the Court how the quality of their life had deteriorated since Melvyn's death and her not having the benefit of his weekly financial contribution. All that she was able to say was that she missed the R150 that Melvyn contributed towards the household expenses.
> …
> In order to prove indigence, a stringent criterion of need has to be established. Furthermore, when regard is had to the circumstances of the matter, particularly in a case such as this where the defendant is not able to challenge or contradict any of the testimony which the plaintiff tenders, the obligation upon the plaintiff to place all evidence before the Court which would enable it to evaluate the evidence as a whole to determine whether the plaintiff has discharged the onus it bears becomes greater.''

I find myself in a similar situation here. The second plaintiff has failed to tell me exactly how her lifestyle had changed except that she is ''starving.''

[34] I am most unsympathetic to the claim that a person who owns 200 cattle and 40 goats and in addition receives a monthly old-age pension which, at the time she testified was N$370, is 'indigent' in the sense that word is deployed by the courts in the law

reports. It did not seem sufficiently appreciated that a person is not 'indigent' because they say so or even belief so. Indigence is an objective condition. I accept that the second plaintiff may, on account of her son's death, now have less than what she used to have – but that does not make her necessarily indigent. The second plaintiff's husband is also on an old age pensioner. What this means is that we have here a woman, in rural Namibia who, together with her husband, has a total combined income of N$740 (and another N$300 at least) per month from the husband's business. In addition, they own 200 cattle and 40 goats and work the fields during the rainy season, presumably to produce staple cereal crops. She also receives some groceries from her children and some financial contribution from Sylvanus Nepunda although not regular. The second plaintiff has in my view not made out the case that she is indigent and in need of support from the deceased. Her dependant's claim based on her alleged indigence must therefore fail.

The first plaintiff's dependant's claim

[35] The first plaintiff's evidence that the deceased used to support her minor child Benson remains unchallenged. Paternity not being in dispute, the only inference to be drawn is that the deceased was in law obliged to maintain Benson. Therefore, the only issues that fall for determination are those raised in paras 2.2 and 2.3 of the heads of argument (*supra*) by Mr. Marcus. It is to that I now turn.

The argument that the deceased would have been sent to prison for a long time

[36] On the facts of this case, to argue that the deceased (realizing he was going to prison) took his own life is, in my view, not a valid defence to the claim of loss of

support because the defendant admits that there is a causal link between his employee's negligence and the suicide of the deceased. The defence is not that, independent of what the deceased believed, the State had such a watertight case against the deceased that even if he did not kill himself, he was going to be found guilty and would spend a very long time in prison. That, in my view, would have been a complete defence to the claim for loss of support, but I needed more evidence about the strength of the State's case to satisfy me that a conviction was (at the very least) very probable. In any event, that is not the case which the defendant pleaded or proved. I agree with Ms Conradie's submission that the investigation of the murder case in which the deceased was implicated was at a very early stage and that although it was the deceased's firearm that was used to kill late Matilda, there was no direct admissible evidence that he fired the shot that killed Matilda. The deceased was presumed innocent and the State bore the onus to prove his guilt beyond reasonable doubt. The unconfirmed hearsay evidence that Matilda's relatives (who were not even identified) said that the deceased threatened to kill Matilda does not advance the strength of the case the police had against the deceased.

Apportionment of damages

[37] Section 1(1) (a) of Act 34 of 1956 provides as follows:

> "1(1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the Court to such an extent as the Court may deem just and equitable, having regard to the degree in which the claimant was at fault in relation to the damage."

[38] Section 2 (8) (a) (iii) of the 1956 Act provides that where a Court gives judgment jointly and severally against "joint wrongdoers", it may apportion the damages payable by the joint wrongdoers *inter se* in such proportions as the Court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damages suffered by the plaintiff(s). As is evident from the plea (vide para 11.2 and the heads of argument) Mr. Marcus relied on this provision instead of s1 (1) (a). This does not bar me from taking s1 (1) (a) into account: *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A); *Ndaba v Purchase* 1991 (3) SA 640(N). In the view that I take of this matter as regards s1 (1) (a), I need not decide whether the deceased and the police were joint wrongdoers *vis* a *vis* the plaintiffs. I also doubt if, without the estate of the deceased being cited as a co-defendant, it would be competent to make such an order.

[39] It is apparent that Act 34 of 1956 is different from its English counterpart in this respect: the former nowhere mentions ''negligence'' while the English counterpart specifically does so in its definition section. Otherwise the two sections are materially the same.

[40] 'Fault' in its Roman- Dutch common law sense includes both *culpa* and *dolus: Minister van Wet en Orde v Ntsane* 1993(1) SA 560 (A). As I understand this case (see page 570E), a defendant whose intentional conduct causes loss and damage to the plaintiff cannot rely on the contributory negligence of the plaintiff to escape liability and to seek apportionment of damages in terms of Act 34 of 1956. Similarly, a defendant

whose intentional conduct causes loss and damage to the plaintiff cannot say that he is not liable because the plaintiff had also intentionally contributed to his own loss and damage. The latter principle was laid down in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd.* In this case the intentional fraudulent conduct of an employee of the plaintiff, and the intentional fraudulent conduct of an employee of the defendant, resulted in the plaintiff suffering loss and damage. In that case Goldstein J said (at 606E-F):

> "In my view the word 'fault' and its Afrikaans counterpart 'skuld' clearly include dolus … It should be noted that I have to do with a situation of dolus on both sides since both the plaintiff's servant . . . and the defendant's [employee] intentionally caused the harm which befell the plaintiff . . . Where there is dolus on both sides there appears to me to be no reason not to give effect to the ordinary meaning of the words 'fault' and 'skuld'. "

[41] Ms Conradie submitted on behalf of the plaintiffs that the *Ntsane* case is authority for the proposition that the defendant who admits to being negligent cannot seek apportionment of damages from the plaintiffs on account of the deceased intentionally causing his own death. This submission is plainly wrong. In *Ntsane* it was the defendant who acted intentionally while the plaintiff acted negligently. I am here dealing with the converse position.

[42] It is important to understand the common law position on contributory negligence before Act 34 of 1956. At common law, fault on the part of the plaintiff precluded him or her from claiming damages from the defendant who was also to blame for causing the plaintiff damage. The result was that if two people were at fault, they could both not claim damages unless one was more to blame than the other. Act 34 of 1956 abolished

the common law position and made it possible for the court to apportion the damage of each party in accordance with their relative degrees of fault: See Neethling et al *supra* 144-146.

[43] Ergo, had it not been for Act 34 of 1956, in the present case the deceased's intentional own killing would have deprived the plaintiffs of a claim for damages. Ms Conradie's submission amounts to saying that Act 34 of 1956 changed the common law to the effect that where the plaintiff intentionally causes harm to himself while the defendant negligently contributed to the plaintiff's harm, the defendant would not be entitled to an apportionment. That is clearly an absurd result which the Legislature could not have intended and goes against the grain of the ordinary grammatical meaning of the word 'fault' as used in s1 (1) (a) of Act 34 of 1956. I am not persuaded by the proposition that a plaintiff can have his damages reduced if his negligent conduct contributed thereto, but not where he intentionally contributes to it. Both common sense and legal principle militate against such a result. As Lord Jauncey of Tullichettle put it in *Reeves* (at 910j-911a :)

> "To take an example, A working beside a tank of boiling liquid which is inadequately guarded negligently allows his hand to come in contact with the liquid and suffers damage; B for a dare plunges his hand into the same liquid to see how long he can stand the heat. It would be bordering on the absurd if A's entitlement to damages were reduced but B could recover in full for his own folly. B's responsibility for the damage which he suffered is undeniable. I see no reason to construe s 4 of the 1945 Act to produce such a result and I agree with Lord Bingham CJ that the word 'fault' in that section is wide enough to cover acts deliberate as to both performance and consequences. An individual of sound mind is no less responsible for such acts than he is for negligent acts and it is his share of responsibility for the damage which reduces the damages recoverable.''

[44] I come to the conclusion, therefore, that a plaintiff whose intentional conduct contributed to his own loss can have the damages to which he might be entitled reduced in terms of s1 (1)(a) of the Apportionment of Damages Act, No. 34 of 1956. The contrary argument, as I have shown, was roundly comprehensively rejected by the English courts. I reject it too.

The extent of apportionment

[45] In 'contributory fault', the apportionment of the loss between the plaintiff and the defendant must be 'just and equitable'. It must take into account the relative effect of its side's fault as a factor causing the harm (and this is dependent on its dangerous character) as well as the parties' relative degree of blameworthiness. The second factor depends on how far each party's conduct fell below the standard of the reasonable man. See *South British Insurance Co Ltd v Smith* 1962 (3) SA 826 (A) and *Jones v Santam Bpk* 1965 2 SA 542 (A). The approach is the same in England: *Davies v. Swan Motor Co. (Swansea) Ltd* [1949] 2 K.B. 291,326.

[46] Mr. Marcus had submitted (and he is right) that there is a public interest in persons suspected of crime standing their trials and not kill themselves because of the negligence of the police. For that reason, as I understand him, the defendant is liable to compensate the plaintiffs. If this argument were to be followed through to its logical conclusion, we must accept that had the deceased not killed himself and his case proceeded to trial the possibility that he could have been acquitted cannot be excluded. Not only that, after taking legal advice either at his own expense or that of the State (which he was entitled

to) he might have realized that the State did not have a strong case against him. A reasonable policeman in the shoes of Booysen would therefore (and as admitted by the defendant), have taken reasonable steps to see to it the that the deceased, while in custody, did not take his own life and stood trial so that, in the public interest, the trial took place before a competent court to determine the guilt or innocence of the deceased. That is, in my view, an important consideration in apportioning a measure of responsibility on the police in the death of the deceased.

[47] That said there is something to be said for the contrary view that the evidence gathered by the police against the deceased and with which he was confronted called for an explanation on his part. The police were entitled to confront him with the evidence and, in the public interest, pursue the criminal investigation and, if justified, prosecute him. A reasonable person in the shoes of the deceased would not kill himself but would, if he were innocent, provide information to the police that would show he was not criminally responsible for the crime; and if guilty accept full responsibility for his actions, or provide some explanation that would excuse the crime. The public expect that those who commit crimes be brought to justice. That interest is paramount.

[48] Taking into account these two countervailing considerations - against, on the one hand the police, and, on the other, the deceased - both of which are rooted in the need for the due investigation and prosecution of criminal offences - I find that a just and equitable result is to substantially reduce the damages recoverable by the first plaintiff from the defendant in terms of s1(1)(a) of Act 34 of 1956, while pitching the degree of

responsibility on the defendant at a level that is not derisory but serves to remind the police force of the admitted duty of care owed to prisoners in police custody.

[49] In the case before me not only were the police not aware that the deceased had suicidal tendencies, but there is no evidence whatsoever that he was of unsound mind-factors which would, if they were present, have increased the degree of blameworthiness on the part of the police. Add to that the fact that a reasonable prisoner in the shoes of the deceased would, if improperly suspected of a crime (or has a valid explanation that excuses it) assist the police in arriving at the truth and lead to him being freed instead of taking his own life. He also bore the responsibility for taking care of his own life. The failure of the police to properly safeguard the firearm and to minimize the risk (not to put it any higher) of the deceased taking his own life, must be marked with disapproval as reasoned by the House of Lords in *Reeves*; but it is, in my view, mitigated by the lack of awareness on the part of the defendant's employee that the deceased was a suicide risk.

[50] In the circumstances, the deceased must carry a very substantial responsibility for his own death. I would hold him 80% responsible for the intentional act of killing himself.

[51] Mr. Marcus placed on record that in the event that any of the plaintiffs is unsuccessful, his client would not seek a costs order against such plaintiff.

[52] In the result I make the following order:

(i) In terms of s1(1) (a) of the Apportionment of Damages Act, 34 of 1956, the defendant is liable to compensate the first plaintiff to the extent of 20% of the damages resulting from loss of support occasioned by the death of Sam Nepunda on 29 January 2004 at the Windhoek Central police station. The first plaintiff is awarded the costs of suit.

(ii) The second plaintiff's claim for loss of support based on the death of Sam Nepunda as aforesaid is dismissed and the defendant is granted absolution from the instance as against second plaintiff. There shall be no order of costs as against the second plaintiff.

DAMASEB, JP

On behalf of the Plaintiffs: **Ms L Conradie**

Instructed by: **Legal Assistance Centre**

On behalf of the Defendant: **Mr N Marcus**

Instructed by: **Office of the Government-Attorney**