CASE NO.: SA 35/2008

REPORTABLE

IN THE SUPREME COURT OF NAMIBIA

In the matter between

FRANSINA YOLENI SHAANIKA **APPELLANT**

And

THE MINISTRY OF SAFETY AND SECURITY **RESPONDENT**

Coram: Shivute, CJ, Strydom, AJA *et* Mtambanengwe, AJA.

Heard on: 22/06/2009

Delivered on: 23/07/2009

APPEAL JUDGMENT

STRYDOM, AJA:

[1] I shall refer herein to the parties as they appeared in the Court *a quo*. As there was no appeal launched by the second plaintiff I will refer to the first plaintiff as the plaintiff.

[2] The plaintiff issued combined summons in the High Court of Namibia in her capacity as mother and natural guardian of her minor son, Benson Sylvanus Nepunda, in terms of which she claimed an amount of N$60 012.00 being loss of support. The Particulars of Claim alleged that Sem Shahalohamba Nepunda (the

deceased) was the father of the minor son and that he, whilst under the control and supervision of the Namibian police, committed suicide. It was further alleged that the Namibian police owed him a duty of care and that they negligently or deliberately made it possible for him, when so under their control and supervision, to obtain a pistol with which he shot and killed himself.

[3] As previously set out the second plaintiff, the mother of the deceased, likewise claimed loss of support as a result of the death of the deceased as aforesaid. This claim was dismissed by the Court *a quo* and no appeal lies in this regard.

[4] From the plea of the defendant it seems that at the time when the summons was issued the responsible Minister was the Minister of Home affairs. However at the time when the plea was filed the Namibian police had their own Minister namely the Minister of Safety and Security. Nothing turns on this change of Minister as the situation was thereafter correctly set out in an amended Particulars of Claim filed by the plaintiff in answer to an exception launched by the defendant concerning lack of certain allegations made in the original Particulars of Claim.

[5] In its plea the defendant admitted that the deceased was under its custody and control on the 29 January 2004 as he was being interrogated in connection with the killing of one Mathilda Agnes Immanuel.

[6] Although the defendant admitted that there was a general duty of care on the Namibian Police towards persons in their custody it was denied that in the

particular circumstances of this case that the police were under a duty of care towards the deceased to keep him from inflicting harm upon himself. It was further pleaded that the suicide of the deceased was unforeseen and that the firearm with which the deceased had killed himself was in a closed wardrobe.

[7] The defendant further denied liability and pleaded that the proximate cause of the deceased's death was his own deliberate act of suicide. It was however admitted that the police, at the time, acted as they did, within the course and scope of their duties as such.

[8] At the Rule 37 conference the defendant admitted that the deceased was the father of the minor child, Benson Sylvanus Nepunda, and that he was under a legal duty to maintain the said child according to the common law and relevant legislation.

[9] At the start of the trial the parties requested the Court *a quo* to hear evidence only in regard to liability and to let the issue of quantum stand over. The Court acceded to this request and the following "Statement of Agreed Facts" formed the basis of the proceedings before that Court, namely:

"1. That the trial will proceed only on the merits and that the question of *quantum* stands over for later determination

2. ADMISSIONS:

The following facts have been admitted and will accordingly require no evidence:

2.1 That Benson Silvanus Nepunda is the minor son of Sem Nepunda (the deceased)

2.2 That first plaintiff is the mother and natural guardian of the said Benson Silvanus Nepunda and sues in her representative capacity;

2.3 That the deceased died on 29 January 2004 at Windhoek Central Police Station whilst under the custody and control of the Namibian Police;

2.4…

2.5 That the members of the Namibian police were acting in the course and scope of their employment as police officers in the Namibian Police at all relevant times;

2.6 That proper notice of Plaintiffs' claims has been given."

[10] From questions asked by the Court it seems that it was not the intention that the "Statement of Agreed Facts" should replace admissions made in terms of the pleadings and the trial then proceeded on this basis.

[11] Apart from the plaintiff herself, whose evidence was merely formal and not contested, the plaintiff also called one Sylvanus Nepunda, a brother of the deceased, who testified that he was a legal advisor to the Namibian Police. He testified about the Police Operational Manual and stated that when the police took control of a suspect they had to search such person for any dangerous weapons in his or her possession and any such weapons had to be confiscated and kept under lock and key. The purpose is to keep the suspect from harming himself or herself or harming other persons. Non-compliance with these orders may result in an enquiry of misconduct in regard to the offender.

[12] The plaintiff closed her case after Mr Nepunda gave evidence and thereupon the defendant's counsel applied for absolution from the instance. After consideration the Court *a quo* granted the application.

[13] As a result of the finding of the Court at that stage of the proceedings the plaintiff launched an appeal to this Court. This caused the defendant to abandon the order in his favour and the case subsequently continued in the High Court where the defendant presented evidence.

[14] The only witness called by the defendant was Detective Inspector Booysen. On 27 January 2004 the witness received a report of a body which was found in Lister Street. The body was that of a female who was later identified as Matilda Agnes Immanuel. The body had two chest wounds similar to wounds caused by bullets. At the scene of the crime the police also found two 9 millimeter spent cartridges and a Nokia cellphone.

[15] Booysen took the cellphone to the firm MTC who was able to provide him with a printout of calls received by means of the phone. Armed with this information Booysen was able to trace two persons who had phoned the murdered woman on the 24th of January. These persons admitted that they were with the woman on the 24th January but both denied that they had killed her. Booysen nevertheless detained the two suspects.

[16] Further investigation however brought to light that the dead woman had a relationship with one Sem Nepunda and that he had on occasion threatened to kill

her. Nepunda was brought in for interrogation but he also denied having killed the woman. On further questioning he admitted possessing a 9 millimeter pistol. Booysen obtained the pistol from the uncle of the deceased, one Simon, and together with the spent cartridges found at the scene of the crime, as well as two live cartridges still in the pistol, Booysen went to the forensic laboratory where it was, on the same day, namely the 29th January, 2004, established that the two spent cartridges were fired by the pistol obtained from Nepunda.

[17] Back at his office Booysen put the pistol together with the forensic report in an unlocked wardrobe. The deceased was then further interrogated by the witness. He, i.e. the deceased, admitted, after being warned, that he did not during the period 24 to 27 January 2004 lend or give or hire out the said pistol to anybody else.

[18] Booysen then confronted the deceased with the result of the forensic report but the deceased still denied having killed the woman. Booysen then tried to contact his senior officer but could not get hold of him. He then ordered the deceased to wait outside the office in the corridor. There were nine or ten other suspects waiting there as well. Booysen left his office and whilst in the office of a sergeant Ilundwa he heard a shot fired. He immediately realised where the shot came from and when he entered his office he saw the deceased lying on the floor with a pistol in his hand. He was dead. He estimated the time that he was gone from his office as maybe two to three minutes.

[19] Asked why the deceased had shot himself the witness said that the

deceased was cornered and that he may have realised that he would have to go to prison for a long time. The witness further stated that the deceased did not know beforehand that the pistol was in the unlocked wardrobe.

[20] During the trial, various admissions were made by counsel for the defendant. On the basis of these admissions the Court *a quo* found that the plaintiff had proved that the negligence of the police contributed to the death of the deceased.

[21] The plaintiff was not satisfied with the outcome, more particularly the apportionment made by the court in regard to the damages, and Notice of Appeal was given against that part of the judgment and order which related to the plaintiff. In turn the defendant filed a cross-appeal in which he attacked the finding of the Court that rejected the possibility of the deceased having to go to prison for a very long time and holding the respondent liable for 20% of the damages suffered as a result of the loss of support of the minor child of the deceased.

[22] Ms Conradie appeared on behalf of the plaintiff and Mr Marcus on behalf of the defendant.

The main findings by the Court *a quo*

[23] These findings were the following:

(i) In regard to liability and with reference to the various admissions made by the respondent the Court concluded "(i)t 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."

(ii) The Court found that the Apportionment of Damages Act, Act No. 34 of 1956 applied and more particularly sec. 1(1)(a) thereof.

(iii) In regard to the defendant's argument that the estate of the deceased was a joint wrongdoer the Court declined to decide the issue because it found application of sec. 1(1)(a) of the Act in the circumstances. The Court expressed doubt whether it could deal with the issue of joint wrongdoers without the estate of the deceased being joined.

(iv) Dealing with the argument that the deceased would spend a considerable time in prison, the Court found that such a defence would have been a complete answer to the claim of the plaintiff but it was neither pleaded nor was there sufficient evidence to substantiate it. The Court consequently rejected the respondent's reliance on this issue.

[24] The action of dependants against a person who has wrongfully killed the breadwinner who was legally liable to support them is not based on the *Lex Aquilia*. In *Jameson Minors v Central South African Railways* 1908 TS 575, Innes CJ said the following:

> "Our law…gives to those dependent a direct claim enforceable in their own names, against a wrongdoer. This is a right not derived from the deceased man or his estate, but independently conferred upon members of his family." (p583-584)

Further, on page 585, the learned Chief Justice stated:

> "(T)he 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*; probably its anomalous character may be accounted for by reference to its original

source."

Negligence

[25] With regard to the issue of negligence of the defendant's employee the following admissions were placed on record during the trial. These admissions were conveniently summarised by the learned Judge-President in his judgment. They are:

(i) 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.

(ii) 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 (sic) and the police would therefore take reasonable steps to guard against such an occurrence.

(iii) The duty of care by the police towards a person in custody not to harm themselves (sic) is important because of the public interest that a person suspected of the commission of a crime eventually stands trial for the offence he is suspected of committing.

(iv) The defendant accepts a causal link between the failure to lock away the firearm and the suicide of the person in the police custody.

(v) 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.

[26] I agree with the learned Judge-President that the admissions constitute negligence on the part of the employee of the defendant and that such negligence materially contributed to the death of the deceased which in turn gave rise to the claim by the dependants.

[27] The admissions amount thereto that a *bonus paterfamilias* would have foreseen the reasonable possibility that not locking the firearm away could cause harm and that it would therefore have guarded against such harm by taking adequate steps and that it failed to do so. (*Kruger v Coetzee* 1966 (2) SA 428 (AD).)

[28] In stating the above I am mindful that in more recent times South African Courts, dealing with the difficult question of causation, have divided the enquiry into two stages namely factual causation and legal causation. (See *Minister of Police v Skosana* 1977 (1) SA 31(A); *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); *Gibson v Berkowitz and Another* 1996 (4) SA 1029, *Sea Harvest Corporation (Pty) and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) and *Road Accident Fund v Russell* 2001 (2) SA34 (SCA).)

[29] I have no doubt that applying these two distinct enquiries the answer would be the same as set out above. In the present matter the defendant went so far as to admit a causal link between the failure to lock away the firearm and the suicide

of the person in the police custody. Although it could have been formulated with greater clarity I have no doubt, taking into consideration the whole tenor of the admissions made, that it was intended to be a complete admission that the harm caused wrongfully by the employee of the defendant was causally linked to the damages suffered by the dependants. Mr Marcus, who appeared on behalf of the defendant, did not argue otherwise, nor did the defendant appeal against the finding of negligence by the Court *a quo.* Initially counsel argued that the admissions were made in relation to a duty of care towards the deceased but, relying on the case of *Brooks v Minister of Safety and Security* 2008 (2) SA 397 (CPD), he submitted that the duty of care should be towards the dependants and that therefore the issue was still alive and arguable. Counsel abandoned this argument, correctly in my view, because the liability arose once there was proof that the defendant's employee negligently contributed to the death of the deceased who was under a legal duty to maintain his minor child and would have continued to do so had he not been killed. (See *Constantia Versekeringsmaatskappy Beperk v Victor NO* 1986 (1) SA 601 (AA) at 611H and *Jameson Minors v Central South African Railways, supra,* 583 – 585).

[30] The learned Judge-President expressed some misgivings in regard to allowing a claim in the particular circumstances of this case but found that he was bound by the admissions made on behalf of the defendant. I share those misgivings. In the present instance there was no proof that the deceased was suicidal or was suffering from some or other mental impairment. The deliberate action by the deceased to kill himself may very well have been met by a plea of *volenti non fit injuria* or that the act had broken the chain of causation in which

case his claim could have been met by a defence of *novus actus interveniens.* Because I am bound by the admissions made I need not decide whether these pleas would have succeeded.

[31] For the reasons set out above I agree with the learned Judge-President that liability on behalf of the defendant was accepted.

The Apportionment of damages Act, Act No 34 of 1956

[32] Ms Conradie submitted that the provisions of the Act, and more particularly sec. 1(1)(a) of the Act, do not apply where the claim is one on behalf of a dependant where the breadwinner's death was wrongfully contributed to by the defendant's employee.

[33] Section 1(1)(a) of the Act provides as follows:

> "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 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." (My emphasis)

[34] In the matter of *Greater Johannesburg Transitional Metropolitan Council v Absa Bank Ltd T/A Volkskas Bank* 1997 (2) SA 591 (WLD) the Court, Goldstein, J, set out the common law prior to the enactment of the Act. At p609 A-B the learned Judge stated:

> "It would seem that our common law approached fault by both the plaintiff and the defendant in two possible ways and that, for present purposes, I need not decide which is correct. Our common law either non-suited the plaintiff without further ado or it weighed up the fault of each of the parties against that of the other. If it could not be said that the defendant's fault was greater than that of the plaintiff, the plaintiff was non-suited."

(See further *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (WLD) at 620 B – D)

[35] From what is set out above it follows that, prior to the enactment of sec 1(1)(a) of the Act, a plaintiff who was shown also to be at fault was either non-suited without more or if it could not be said that the fault of the defendant was greater than that of the plaintiff he was likewise non-suited. Sec. 1(1)(a) brought about a change of the common law by allowing such a claim subject to the power of the Court to reduce it to what is just and equitable bearing in mind the degree to which such plaintiff was himself at fault in causing the damage.

[36] Where the person claiming is not the plaintiff, or someone representing him or her or where there is not a relationship amounting to a vicarious liability, sec. 1(1)(a) of the Act does not apply and contributory negligence cannot be a defence against the claim of a third person. In the present instance the plaintiff claimed as mother and natural guardian of the minor child in respect of which the deceased had a legal duty to support him. Neither the plaintiff nor the minor child was at fault and consequently sec. 1(1)(a) cannot apply to them. The person at fault was the deceased but he is not the claimant in these proceedings.

[37] In the matter of *Grove v Ellis* 1977 (3) SA 388 (CPD) the wife of the plaintiff, to whom he was married in community of property, was involved in a motor-car accident. The plaintiff instituted a claim in the magistrate's court for the damages suffered. The court found that the wife contributed towards the damages suffered and, applying the Act, awarded the plaintiff 20% of his claim. On appeal the judgment was reversed. Vivier, J, (as he then was) stated the law as follows:

> "Sec. 1(1)(a) only allows an apportionment in those cases where the 'claimant was at fault', and in my view it cannot be said, in the present case, that the claimant was in any way at fault.
>
> Ordinarily one spouse is not responsible for the delicts of the other, and the negligence of the one would not be imputable to the other, save in those cases based on vicarious responsibility. (p390 C-E)"

The learned Judge went on to say that the proper remedy of the defendant was to claim a contribution from the negligent wife as a joint wrongdoer. (p 390 H). (See further *Van Oudtshoorn v Northern Assurance Co. Ltd* 1963 (2) SA 642 (AA) at 648 A – E).

[38] The concession made by Mr Marcus that the defendant could not claim a contribution from the plaintiff on the basis of the Act was therefore correctly made.

[39] I have therefore come to the conclusion that the Court *a quo* erred when it applied the Apportionment of Damages Act, Act No 34 of 1956, and more particularly sec. 1(1)(a) thereof, to the present case. It also follows therefore that no apportionment of damages was possible.

Joint wrongdoers

[40] In the Court *a quo* counsel for the defendant argued that the estate of the deceased was a joint wrongdoer and the defendant claimed an apportionment on the basis thereof. Although this argument was also foreshadowed in counsel's Heads of Argument, Mr Marcus conceded that he could not support such a claim in the present proceedings.

[41] Again I am satisfied that this concession was correctly made. Sec. 2 of the Act deals with joint and concurrent wrongdoers. Sec. (1B) provides that the estate of a deceased person shall, in the circumstances mentioned in the section, be regarded as a joint wrongdoer. (See however the proviso set out in sub sec (6)(a).) It seems to me that it was therefore open to the defendant to join the estate of the deceased as a joint wrongdoer.

[42] In terms of subsec (2) the plaintiff or any joint wrongdoer who is sued in the proceedings may, before the close of pleadings, give notice of the action to any other joint wrongdoer who is not sued, and that wrongdoer may then intervene as a defendant in those proceedings.

[43] Subsec (4)(a) provides that if a joint wrongdoer was not sued in the action instituted against another joint wrongdoer and no notice was given to him or her the plaintiff could not thereafter issue summons against such wrongdoer without leave of the Court where good cause must be shown why notice was not given as aforesaid. Likewise a joint wrongdoer who did not give notice to another joint

wrongdoer in terms of subsec (2)(a) or (b) cannot thereafter claim a contribution from such wrongdoer without leave of the Court on good cause shown why notice was not given in terms of subsec (2)(b).

[44] No joint wrongdoer was joined in the present proceedings nor was any notice given and consequently the defendant is liable *in solidum* and the plaintiff is entitled to claim her full damages from him. See in this regard *Kleinhans v African Guarantee and Indemnity Co. Ltd* 1959 (2) SA 619 (ECD) at 626E – 627C. The right of a claimant to claim the full amount of damages from any joint wrongdoer is recognised by subsec (6)(a) of sec 2. This subsec provides that where judgment is given against a joint wrongdoer for the full amount of the damages suffered by the claimant, and the full amount was paid by him or her, such wrongdoer may recover from any other wrongdoer a contribution having regard to the degree that the wrongdoer was at fault in causing the damages suffered by the claimant. See in this regard *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank (Pty) Ltd t/a Nedbank* 1998 (2) SA 667 (WLD) at 673F – 674E. The case went on appeal and it was confirmed that joint wrongdoers were also liable *in solidum* at common law. See *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) at 923 A-C.

[45] Mr Marcus, relying on the case of *Wright v Medi-Clinic Ltd* 2007 (4) 327 (CPD), submitted that the Court must nevertheless determine what damage was caused by each of the tortfeasors (in this instance the deceased and the defendant's employee) and then apportion the degree to which each tortfeasor is liable to the claimant.

[46] In the *Wright* case the plaintiffs sued the obstetrician and the hospital for damages suffered as a result of negligence by both the doctor and the staff of the hospital causing the child born to suffer from extensive brain damage. The tortfeasors were properly before the Court. The Court in first instance made an apportionment which then led to an appeal. On appeal the respondent, the hospital, argued that it was impossible to determine to what extent each of them attributed to the brain damage caused to the child. The Court found that the damage caused was divisible and then continued to make an apportionment in terms of the provisions of the Act.

[47] In the *Wright* case all the relevant parties were before Court and the issue was, as between the two joint wrongdoers, whether the damage caused to the child was divisible. That is not the issue here and the plaintiff, having established the negligence by the defendant's employee, is, in terms of the law, entitled to full payment of the damages suffered by the minor child. *Wright's* case has therefore no application to the present instance.

Respondent's Cross-Appeal

[48] A father's duty to maintain and support his minor child is dependent on what he is able to afford. (See Boberg: **The Law of Persons and family;** 5th Ed. P249.) Every aspect which can increase the minor's prospects or may reduce them is therefore relevant in determining the damages suffered by a minor child on the death of his parent. One such issue which the Courts take into consideration is the fact that the death of a breadwinner may accelerate the inheritance

prospects of a child. See generally *Minister of Police, Transkei v Xatula* 1994 (2) SA 680 (Tk AD) at 684 C – D where it was stated:

> "Of course in determining the *quantum* of damages, adjustments are made for contingencies which could have increased or reduced his liability to fulfill his obligation to support his family."

[49] Mr Marcus, on the one hand, argued that the evidence of the State concerning the possible murder charge is so strong that it was inevitable that the deceased would have been convicted and sentenced to prison for a long time during which he would not have been able to maintain his minor child. Counsel therefore submitted that it was not shown that the deceased would have any income with which to maintain the child and that the claim should therefore have been dismissed.

[50] Ms Conradie on the other hand supported the finding of the Court *a quo* and pointed out that the investigation was, at the time the deceased killed himself, still at a very early stage, that it was based partly on hearsay evidence and that it was not certain that a conviction would follow.

[51] None of the parties have given thought to the possibility that the conviction and imprisonment of the deceased was, on the evidence, at least a possible factor which the Court should consider as a contingency as it might have influenced the ability of the deceased to maintain his minor child.

[52] It seems to me that a contingency is an event which is based on evidence

which is not altogether conclusive and which may or may not happen sometime in the future and which would, if realised, have an influence, one way or the other, on the claim of the plaintiff.

[53] When the Court requested counsel to address us on this issue, Mr Marcus was still of the opinion that the deceased, had he not committed suicide, would have been sent to prison for a long time and because he would have had no source of income would not have been able to maintain his minor child. Counsel therefore submitted that in applying the contingency the claim of the plaintiff should be reduced by a 100%.

[54] Ms Conradie argued that the evidence was not sufficiently cogent to be elevated into a contingency and Counsel submitted because of the uncertain nature of the evidence the Court should not see it as a factor which would reduce the claim of the plaintiff. However, she stated that if the Court should come to the conclusion that the possible imprisonment of the deceased, had he not committed suicide, was a factor to be considered, the Court should not reduce the claim of the plaintiff by more than 50%.

[55] In my opinion counsel either over- or under-evaluated the evidence which gave rise to the contingency. If Mr Marcus is correct, namely that the deceased would have been convicted and would have gone to prison, then one is not dealing with a contingency but with a certainty which would have affected the source of income of the deceased. Ms Conradie on the other hand argued that the Court had to ignore the evidence of Booysen as the possible conviction and sentence of

the breadwinner was so remote that it could on the evidence not possibly have materialised.

[56] At this stage the Court need not find that the evidence was such that it would inevitably have resulted in a conviction and prison sentence. On the other hand it could also, in my opinion, not be said that such a possibility was so remote and so uncertain that it could completely be ignored.

[57] On the evidence given by Booysen it seems to me that the State would at least have been able to prove a relationship between the deceased and the murdered woman, that, on an occasion he, the deceased, threatened to kill her, that she died as a result of being shot by someone with a 9 mm pistol, that the deceased had such a firearm and that spent cartridges found on the scene was ballistically proved to be fired by this pistol. There is also the evidence that relevant to the possible date of the killing the deceased had stated that the pistol was all the time in his possession.

[58] In my opinion the evidence is such that the possibility of a conviction and incarceration of the deceased could not simply be ignored as if it could not have materialized. On the other hand at this stage the possible conviction of the deceased is not a certainty. Skillful cross-examination may reveal flaws in the ballistic evidence to such an extent that a Court may decline to accept it. I have therefore come to the conclusion that the Court must take into consideration the contingency that the deceased, had he not committed suicide, may have had to spend some unprofitable time in prison and that this should be reflected in the

damages recoverable by the plaintiff.

[59] In the case of *Minister of Police, Transkei v Xatula, supra,* the Appellate Division of the then Transkei was called upon to decide whether income derived from an illegal source disentitled dependants to claim compensation. The Court, Goldin, JA, referred with approval to what was stated by the authors *Kemp and Kemp*, **The Quantum of Damages,** 4th ed part II paras 2506 – 2508, where they discussed this problem, namely:

> "Only the third possibility remains – that the illegality of support should be substantially disregarded. That is in our submission the correct view. However, even on that basis, it does not follow that the award would fully reflect the amount of the dependency enjoyed prior to the deceased's death. For as was pointed out in *Bagge's* case the Court is entitled, in appropriate cases, to take into account the uncertainty of a criminal calling and the possibility of long and unprofitable spells in prison." (p 685 D – F).

[60] Considering all the evidence I am of the view that it would be fair and reasonable to reduce the plaintiff's claim by 50%, as was also suggested by Ms Conradie in the event that the Court found this to be a contingency.

Costs

[61] The issue of costs to be awarded where a claimant is represented by the Legal Assistance Centre is on appeal and due to be heard during the next session of this Court in the case of *Minister of Basic Education, Sport and Culture v Uirab*. Although the defendant is not claiming costs both plaintiff and the defendant, in regard to his cross-appeal, were to a certain extent successful. As the parties

could not anticipate the orders of the Court and given the fact that the appeal in *Minister of Basic Education, Sport & Culture v Uirab* is of relevance to the order of costs to be made in the present case it seems to me that it would be fair that the Court let the issue of costs stand over pending the outcome of the appeal in the *Minister of Basic Education* case and to afford any of the parties the right, thereafter, to set the matter down and argue the issue of costs if so advised.

[62] In the result the following orders are made:

1. The appellant's appeal succeeds to the extent set out herein before.

2. The order of the Court *a quo* is set aside and the following order is substituted therefor:

   "The defendant is liable to compensate the first plaintiff to the extent of 50% 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."

3. (a) The orders of costs in the proceedings before the High Court and before this Court to stand over pending the outcome of the appeal in the matter of *Minister of Basic Education, Sport & Culture v Uirab.*

   (b) Any of the parties may thereafter set the matter down for argument

in regard to costs.

4. The cross-appeal succeeds to the extent as set out herein before.

_____
STRYDOM, AJA

I agree.

_____
SHIVUTE, CJ

I agree.

_____
MTAMBANENGWE, AJA

COUNSEL ON BEHALF OF THE APPELLANT:	Ms L. Conradie
Instructed by:	Legal Assistance Centre
COUNSEL ON BEHALF OF THE RESPONDENT:	Mr N. Marcus
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