IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE
CASE NO: 3688/07

In the matter between:

DIANE ELIZABETH BEWICK (nee MILLER)	Plaintiff
and	
ROBERT WARREN DE VILLIERS-ROUX	First Defendant
AIRTEAM	Second Defendant
ADVENTURE AFRICA CC	Third Defendant
THE SOUTH AFRICAN HANG AND PARAGLIDING ASSOCIATION	Fourth Defendant
THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY	Fifth Defendant
THE MINISTER OF TRANSPORT	Sixth Defendant

JUDGMENT: 20SEPTEMBER 2013

GAMBLE, J:

INTRODUCTION

[1] The sport of paragliding is a popular leisure time activity in certain parts of the Cape Peninsula and beyond. When the wind is in the west or the south west paragliders may be seen taking off from the western slope of Lions Head and can be

observed from afar as they drift aimlessly along on thermals before landing in one of several open areas or sports fields on the Atlantic Seaboard. When the wind is blowing gently from the north, a launch site on the northern slope of Signal Hill is preferred. Further afield, there are launch sites on the Dasklip Pass to the north of Porterville and along Rotary Way, a public road that meanders along the ridge of the mountain range to the north of the popular holiday resort of Hermanus.

[2] To the lay person, a paraglider is similar in looks to a parachute. It consists of a rectangular wing made of a synthetic material to which a series of nylon chords are attached. The chords are anchored in a harness in which the pilot is enclosed. The pilot then operates the wing by pulling or adjusting the nylon chords.

[3] In the expert summary of Mr. Marc Asquith (an experienced international pilot of both hang gliders and paragliders) filed on behalf of the Plaintiff in these proceedings [1],the following description is given:

> *"6…A paraglider is a development of a ram air parachute. It is a non-rigid structure that relies upon being pressured by its passage through the air in order to adopt the aerofoil shapes that allow it to fly. It is not a parachute, it is a flying wing. The structure of such wings can be imagined as a row of socks stitched together side by side. As they fly, air flows into the mouth*

[1] Mr. Asquith was not called to testify in this matter but his general observations regarding the technical aspects of the sport do not appear to be open to serious challenge

of each sock, becoming trapped and inflating the socks. Each sock, or cell, is carefully tailored to inflate to a specific shape such that the hole becomes an aerofoil.

7…In essence a paraglider is of lighter construction, is more 'wingy' and is lighter to control than a parachute. From these differences a paraglider benefits from performance gains which allows it to climb in rising air such as is found over hillsides and in thermals and so subsequently glide greater distances.

8…The launching of a paraglider in any wind is relatively simple. The pilot always seeks to launch by advancing directly into the oncoming wind. Initially the wing is placed on the ground lying on its back with its trailing edge on the upwind side. The pilot, linked to the wing via the lines which attach to his harness at about his shoulder, stands upwind of the wing. He then moves into the wind. Because of the geometry, the first lines that go tight are those attached to the front of the wing, the leading edge. As this is pulled forward the cell mouths are presented to the wind. Air enters each cell as they inflate and form a wing, the paraglider rises in an arc from the ground to a position of the pilot's head. The pilot then accelerates into the wind and is lifted off the ground. The take-off run is usually initiated at a point appropriately far back from the edge of the hill, such that the pilot

is lifted off the ground at about the same point where the ground falls away. When flying a paraglider, the pilot is attached to the lines by two karabiners, one at the termination of each set of lines, the left and right sets. These attach, one each, to the shoulders of the pilot. The attachment point is just below the collarbone on the pilot. When two people fly a paraglider, a short divider strip is used to multiply the one karabiner into two, one in front of the other. In order to provide extra comfort a spreader bar keeps the two separate. The passenger always flies in the front position, the rear position allowing better control and an ability to monitor the passenger. The front position is usually slightly lower than the rear position allowing the pilot visibility over the passenger's head. This usually places the passenger's hips between the pilot's knees. As a result of this setup, on landingthe passenger usually contacts the ground first."

[4] As avisitor to the precincts of the Western Cape High Court would observe, there are a number of businesses offering so-called "*adventure sports*" to those in need of an adrenalinboost. These range from abseiling, white-water canoeing and mountain biking, to shark-cage diving and paragliding. And, those who drive along the scenic tourist route from Kloof Nek to Signal Hill on a weekend may note vehicles parked at the side of the road garishly adourned with advertising material offering one the excitement of a tandem flight on a paraglider from one of the nearby launch sites.

THE PLAINTIFF'S VISIT TO CAPE TOWN

[5] Over the Easter weekend of 2004, the Plaintiff, Diane Elizabeth Bewick (neé Muller), a 34 year old specialist radiographer from the north of England, visited Cape Town on holiday. She was accompanied at the time by her partner, Michael Bewick, the man she later married.

[6] The Plaintiff, Mr. Bewick and friends were at a dinner during the weekend and the talk turned to paragliding. The Plaintiff expressed a passing interest in taking a tandem paragliding flight, thinking that she may enjoy seeing Cape Town's Waterfronf from the air. As matters turned out Mr. Bewick made the necessary arrangements and on Monday 12 April 2004 the Plaintiff and her group were picked up at their hotel in Cape Town by a Mr. Greg Hamerton, evidently one of the aforementioned adventure sports proponents.

[7] The Plaintiff understood that Hamerton had some form of association with the Second and Third Defendants, two firms which arranged paragliding trips. The group was driven out to Hermanus by Hamerton in a minibus where they were to undertake tandem flights from the local launch site referred to earlier.

[8] The Plaintiff was paired with the First Defendant, Mr. Rob De Villiers-Roux – evidently a very experienced paragliding pilot[2] - and after donning the

[2]Documents in the Court bundle show that he had flown extensively both locally and abroad - as co-incidence would have it also in Turkey.

necessary flight gear, and receiving some perfunctory advice on safety issues, they proceeded to take off from the launch site which would have propelled them out over the golf course and rugby fields of the local high school, a couple of hundred metres below the ridge.

[9] The flight was short-lived. Just after take-off the paraglider experienced a so-called "*wing collapse*" which affected the control and maneuverability of the craft. Instead of soaring off over the town towards Walker Bay and beyond, De Villiers-Roux swung the paraglider back towards the cliff face in an effort to keep it aloft. The Plaintiff was seated in the harness in front of De Villiers-Roux and as the craft headed towards the cliff face below the launch site, the Plaintiff pushed her legs out in front of her to cushion the blow of an impending collision.

[10] The pair came to rest on a ledge on the cliff face but in the process the Plaintiff had suffered catastrophic injuries which left her with two broken legs and permanent paralysis from the waist down. Casualty evacuation took an age and some four hours later the Plaintiff was eventually airlifted off the ledge by helicopter to an ambulance waiting on the rugbyfields below. She spent three weeks in hospital in Cape Townand another three months in orthopaedic rehabilitation in her hometown of Middlesborough. When the Plaintiff returned to Cape Town to testify in this trial in 2012 she did so in a wheelchair.

THE BASES OF THE PLAINTIFF'S CLAIMS

[11] The Plaintiff issued summons in March 2007 against sixth defendants. The First Defendant, De Villiers-Roux, was sued in his capacity as the pilot who conducted the flight, while the Second Defendant (a firm described as "*Airteam*") and the Third Defendant (Adventure Africa CC) were alleged to have been parties to an oral agreement with the Plaintiff to conduct the paragliding flight for a fee.

[12] It was alleged that the First Defendant had been negligent in a number of respects, both in relation to pre-flight procedures and advice to the Plaintiff, as well as in the manner in which he piloted the craft on the fateful flight. It was also suggested that the First Defendant was associated with the Second and/or Third Defendants, either as a partner or an employee.

[13] The Fourth Defendant, the South African HangandParagliding Association (SAHPA), an association not for gain incorporated under sec. 21 of the 1973 Companies Act, was cited in its capacity as the body responsible for, *inter alia*, the licensing and control of paragliding and paragliding pilots in South Africa. The Fifth Defendant, the South African Civil Aviation Authority ("the CAA") was cited in its capacity as the statutory body responsible, *inter alia*, for the control of aviation activities and the promotion of aviation safety in the country. Similar allegations were made in respect of the Sixth Defendant, the Department of Transport.

[14] When the trial commenced on Wednesday 28 November 2012, the Court was informed that the Plaintiff had settled the case against the First to Third Defendants, and had withdrawn the claim against the Sixth Defendant. The matter then proceeded against only SAHPA and the CAA.

[15] The Plaintiff was represented in these proceedings by advocates S.P. Rosenberg SC and P.A. Corbett. SAHPA was represented by advocates S.J. Bekker SC and J. du Plessis. The CAA was represented throughout by Adv.M.B. Legoce.Initially, the Court was informed that Adv. M. Moerane SC would be leading Mr. Legoce but it later turned out that Adv.P.M.G. Beltramo SC was the lead counsel for the CAA. Mr. Beltramo SC took ill during the Christmas recess and when the matter continued in the newyear, Adv. P.L. Mokoena SC stepped into the breach. The Court is indebted to counsel for the detailed heads of argument filed and the most helpful arguments advanced in Court. The Court is indebted too to the attorneys for the efficient presentation of the papers and the various bundles used during the trial.

DETAILS OF THE PLAINTIFF'S CLAIM AGAINST SAHPA AND THE CAA

[16] Due to the settlement of the claim against the First to Third Defendants, the generalquestion of pilot error was not an issue before the Court. In broad terms, the claim against SAHPA and the CAA, said Mr. Rosenberg SC in his opening address, was that as a controlling body and a statutory authority in the field of aviation respectively, they had permitted a situation to develop where tandem paragliding for reward was rife, despite the illegality thereof. It was contended that despite repeated warnings over the years, these two bodies had failed to take the necessary steps to stop an illegal and unlawful activity, in circumstances where they were duty bound to do so.

[17] In her particulars of claim, as finally amended during the trial, the Plaintiff makes the following allegations in respect of her cause of action against SAHPA and the CAA:

> *"14. At all material times:*
>
> *14.1 paragliding, hang gliding and powergliding activities within South Africa fell under the direction, control and jurisdiction of Fourth, Fifth and Sixth Defendants;*
>
> *14.2 Fourth. Fifth and Sixth Defendants were obliged to promote aviation safety;*
>
> *14.3 Fourth, Fifth and Sixth Defendants were obliged to reduce the risk of aircraft accidents and incidents and related matters;*
>
> *14.4 Fourth, Fifth and Sixth Defendants were aware, alternatively ought reasonably to have been aware, that persons such as First, Second and Third Defendants offered paragliding flights to members of the public for commercial gain;*

14.5 Fourth, Fifth and Sixth Defendants were aware, alternatively ought reasonably to have been aware, that First, Second and Third Defendants regularly conducted paragliding flights, such as the one undertaken by Plaintiff, for commercial gain.

15. In the circumstances Fourth, Fifth and Sixth Defendants and their employees and/or agents and/or other persons, acting within the course and scope of their employment with Fourth, Fifth and Sixth Defendants, alternatively under Fourth, Fifth and Sixth Defendants' direction and control, owed a duty of care to, inter alia, persons engaging in paragliding, hang gliding and powergliding activities, such as Plaintiff, to act with due skill, care and diligence as is reasonable (sic) required in the circumstances.

16. Without derogating from the generality of the duty of care referred to in the immediately preceding paragraph, Fourth, Fifth and Sixth Defendants and their aforesaid employees and/or agents were under a duty:

16.1 to ensure that tandem paragliding flights did not take place for commercial gain;

16.2 to ensure that all persons piloting paragliders, in particular tandem paragliders, were sufficiently experienced, qualified and competent to do so;

16.3 to ensure that all persons engaged in paragliding were fully trained and briefed regarding all relevant safety and emergency procedures and precautions;

16.4 to ensure that all persons engaging in paragliding flights were provided with the necessary protective clothingand equipment;

16.5 to ensure that all hang gliding (sic) flights were carried out in safe and appropriate weather conditions;

16.6 to ensure that the risk of accidents during paragliding flights was reduced, and

16.7 to act with due care and in compliance with all relevant statutory provisions.

17. On 12 April 2004 and at Hermanus, Western Cape an accident occurred when a paraglider, piloted by First Defendant and on which the Plaintiff was a tandem passenger at the time, collided with the mountain slope.

18….

19. In breach of the duty of care owed by Fourth, Fifth and Sixth Defendants to Plaintiff, they:

19.1 failed to ensure that the paragliding flight undertaken by Plaintiff was not for commercial gain;

19.2 failed to ensure that First Defendant was sufficiently experienced, qualified and competent to undertake a tandem paragliding flight;

19.3 failed to ensure that First Defendant was properly trained and briefed in regard to all relevant safety and emergency procedures and precautions;

19.4 failed to ensure that Plaintiff was provided with the necessary protective clothing and equipment;

19.5 failed to ensure that the flight in question was carried out in safe and appropriate weather conditions;

19.6 failed to act with due care by neglecting to enforce or have regard to Fourth Defendant's Operations and Procedures Manual (2000), in particular clauses 1.16 and 2.8; the Air Navigation Regulations, 1976, in particular part 2.25; and the Civil Aviation Regulations, 1997, in particular proposed parts 24, 94, 96, read with Aeronautical Information Circular (AIC) 18.2.3."

[18] In its plea Fourth Defendant (SAHPA) makes the following relevant allegations in response to the particulars of claim:

"3…

3.2 the Fourth Defendant is, and at all material times hereto, was the governing and co-ordinating body for the sports of hang gliding and paragliding in South Africa…

6. *Ad paras 14.1, 14,2 and 14.3 thereof:*

6.1 *The Fourth Defendant hereby repeats the content of para 3.2 above.*

6.2 *At the material time (12 April 2004) and in terms of Government Notice R92 of 26 January 2001, read together with Regulation 149.01.2(1) of the Civil Aviation Regulations ("the regulations"):*

6.2.1 *The sport of paragliding was an aviation recreation as referred to in the regulations; and*

6.2.2 *The power to establish safety standards relating to aviation recreation resorted with the Commissioner of Civil Aviation;*

6.3 *Save as aforesaid, the Fourth Defendant denies each and every allegation contained in each of these paragraphs insofar as such allegations relate to the Fourth Defendant, as if each such allegation were specifically traversed.*

7. *Ad paras 14.4 and 14.5 thereof:*

7.1 At all material times and in particular on 12 April 2004, the Fourth Defendant was aware of the fact that tandem paragliding flights were offered by persons including the First Defendant to members of the public for commercial gain;

7.2 Save as aforesaid, the Fourth Defendant denies each and every allegation contained in each of these paragraphs insofar as such allegations relate to the Fourth Defendant, as if each such allegation were specifically traversed.

8. Ad paras 15 and 16 thereof:

8.1 The Fourth Defendant hereby repeats the content of paras 6.1 and 6.2 above;

8.2 Save as aforesaid, the Fourth Defendant denies each and every allegation contained in each of these paragraphs insofar as such allegations relate to the Fourth Defendant, as if each such allegation were specifically traversed.

9. Ad para 17 thereof:

This is admitted.

10….

11. <u>Ad para19 thereof</u>:

11.1 The Fourth Defendant hereby repeats the content of paras 6.1 and 6.2 above.

11.2 Save as aforesaid, the Fourth Defendant denies each and every allegation contained in this paragraph insofar as same pertains to the Plaintiff's claim against the Fourth Defendant, as if each such allegation were specifically traversed.

11.3 More particularly, but without thereby derogating from the generality of the aforegoing denial, the Fourth Defendant denies having owed a duty of care to the Plaintiff either as alleged by the Plaintiff or at all, alternatively (in the event that the above Honourable Court should find that the Fourth Defendant owed a duty of care to the Plaintiff as alleged, which is still denied by the Fourth Defendant) denies having negligently breached such duty.

11.4 Cumulatively with, alternatively in the alternative to, the aforegoing, the Fourth Defendant pleads as follows:

11.4.1 Before the Plaintiff embarked on the tandem paragliding flight in question, the Plaintiff was warned about the risks inherent in paragliding;

11.4.2 Cumulatively with, alternatively in the alternative to 11.4.1 above, when the Plaintiff embarked on the tandem paragliding flight, the Plaintiff was by virtue of her own appreciation, aware of the risks inherent in paragliding;

11.4.3 Despite the aforegoing knowledge and whilst appreciating the aforementioned risk, the Plaintiff nevertheless embarked on the tandem paragliding flight.

11.4.4 The incident occurred as a result of the materialization of risks inherent in

paragliding, and in particular it occurred as a result of unexpected air turbulence.

11.4.5 The Fourth Defendant therefore pleads that the Plaintiff consented to be subjected to the risk which materialized, and that in the premises, even if the Fourth Defendant owed the Plaintiff a duty of care as alleged by the Plaintiff (and which is still denied by the Fourth Defendant), the Fourth Defendant cannot in law be held liable for any loss or damage suffered by the Plaintiff."

[19] The material part of the Fifth Defendant's plea (as consequentially amended) to the amended particulars of claim as amended is the following:

"3…

3.2 The fifth defendant pleads that:

3.2.1 It is a juristic person duly established in terms of sec. 2 of the South African Civil Aviation Authority Act, 40 of 1998, as amended ("the Act").

3.2.2 It has the statutory responsibility to, amongst others, control and regulate civil aviation in the Republic of South Africa ("the Republic"), and in particular, control, regulate and promote civil aviation safety in the Republic.

3.2.3 It is also responsible for the administration of the laws described in schedule 1 of the Act, and regulations made thereunder, including –

3.2.3.1 The Aviation Act, 74 of 1962;

3.2.3.2 The Civil Aviation Offences Act, 10 of 1972;

3.2.3.3 The Convention on the Recognition of Rights in Aircraft Act, 59 of 1993.

3.3 The facts and grounds upon which the plaintiff's cause or causes of action are founded, as are described in paras 8 to 12, and also 14, 16 and 19 of the particulars of plaintiff's claim do not fall

within the statutory functions and duties of the fifth defendant, pursuant to the Act, the Acts referred to in the preceding paragraphs, and the regulations made thereunder.

3.4 *In the event it is held that any or all of the facts and grounds upon which the plaintiff's cause or causes of action are founded, as are described in paras 8 to 12, and also 14, 16 and 19 of the particulars of plaintiff's claim, fall within the statutory functions and duties of the fifth defendant, then, the fifth defendant pleads that it is indemnified from any liability in relation to its acts and/or omissions by virtue of the provisions of sec. 19 of the Act.*

4. . .

5. . .

6. . .

7. *<u>Ad paras 14 to19</u>*

7.1 *The fifth defendant denies each and every allegation made in these paragraphs as if specifically traversed.*

7.2 Without limiting the generality of the fifth defendant's denial:

7.2.1 The fifth defendant repeats paras 3.2, 3.3 and 3.4 of its plea; and

7.2.2 The Air Navigation Regulations 1976 and in particular Part 2.25 has no application to paragliding."

[20] During argument Mr. Rosenberg SC informed the Court that the Plaintiff relied only on two breaches by SAHPA and CAA of their respective duties of care to the Plaintiff *viz*. those set out in paras 19.1 and 19.6 of the particulars of claim as amended. The crux of the Plaintiff's case is that tandem paragliding for reward was illegal at the time, while SAHPA and the CAA contend otherwise. The latter point out (and the Plaintiff accepts) that it was not unlawful in 2004 for a suitably qualified pilot with a tandem rating to take a passenger on a so-called "*joy ride*" (a phrase which to some might seem a contradiction in terms in the circumstances). It is when a fee was paid for the conveyance, says the Plaintiff, that the activity became illegal.

THE EVIDENCE

[21] The parties were in agreement that the Plaintiff's damages and the quantum thereof were to stand over for later determination. The Court accordingly

made an appropriate order in terms of Rule 33(4) and heard evidence only in relation to the merits of the Plaintiff's claim. The Plaintiff testified herself and adduced the evidence of two witnesses *viz*. **Mr. Robert Manzoni** and **Mr. Jozua Cloete**, while SAHPA called **Ms. Louise Liversedge** as a witness. The CAA adduced no evidence. In addition, the parties placed a large number of documentary exhibits before the Court by agreement, to which reference will be made in due course.

[22] I have already related some of the Plaintiff's evidence above and do not intend to traverse the evidence of the witnesses for the Plaintiff in any great detail. My failure to do so arises not from any disrespect or disbelief of the witnesses, but rather from the fact that many of the issues in this case are common cause and, since the case essentially turns on points of law, much of the evidence, as interesting as it was, has little legal relevance.

THE PLAINTIFF

[23] The Plaintiff explained that she had visited Turkey in 1996 and had then undertaken a tandem paragliding flight for which she paid about GBP70 (currently about SAR1050). The Plaintiff said that she enjoyed the flightwhich was uneventful and decided to try it again in Cape Town. She described the experience as "*peaceful, quiet and exhilarating*" and thought that a flip would be a pleasant way to see the city, believing that the flight would take off from a launch site that would enable her to view the Waterfront. While she was not in need of an "*adrenalin rush*", as she put it, the

Plaintiff said that she was excited at the prospect of participating in "*a bit of a walk on the wild side*". [3]

[24] The Plaintiff said she was a bit surprised when they were driven all the way out to Hermanus (about an hour and a half by road from Cape Town) but went along with the group. She told of the brief pre-flight explanation of procedures by De Villiers-Roux but could not recall whether she was warned of the potential risk of the flight. She recalled being handed, very casually she said, a piece of paper to sign before take-off, which she said she signed without reading, having been told by Hamerton that she would not need it. The document, of course, turned out to be an indemnity from the Plaintiff in which she exempted (in the very finest of print, it must be said) the Second Defendant from any liability for any damages that she may suffer as a consequence of participating in an activity which was said to embrace "*risks and hazards*" which could include "*death or disabling injury*".

[25] As a consequence of the settlement of the case against First to Third Defendants, the indemnity did not feature significantly in the case. But, whatever the Plaintiff'sunderstandingof the consequences of placing her signature on the indemnity form may have been, there can be no doubt whatsoever that she must have appreciated that she was embarking on an inherently dangerous activity. The very practice of running off the side of a mountain to embark on an episode of manned flight without the advantage of propulsion, or the protection of a fuselage, is inherently

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[3]The phrase was understood by the older persons present in Court to be a reference to an anthem to Hedonism performed by the American Rock Singer, Lou Reed, in the 1970's.

dangerous. The Plaintiff is an intelligent woman and she knew this, whatever her previous experience in Turkey may have been.

[26] The Plaintiff described how two earlier tandem flights had been undertaken that morning by Messrs Hamerton and De Villiers-Roux with other members of her party, and how the passengers had been safely delivered to the field below. She was not concerned in any way about the ability of the pilots, nor of the equipment, or the launch site. She was, as she put it, "*happy to take off with them*". And, whatever the impact of the indemnity may have been, she was intent on flying that morning.

[27] The Plaintiff said that she did not know at the time that paragliding for reward was an illegal activity and that no one had mentioned this to her prior to the flight. Had she known that the activity was unlawful, she would probably not have participated therein because she was not one who engaged in illegal activities, she said. The Plaintiff went on to say that if it was illegal she should not have been there in the first place and so exposed to danger. However, she did add that if De Villiers-Roux had not charged her for the flight, her safety concerns would have been no differrent.

[28] As to the accident, the Plaintiff was unable to say what the cause thereof was, although she did refer the Court to certain photographs taken by a friend

of the flight itself. From these photographs it can clearly be seen that the wing lost its shape and began to fold in on itself shortly before the pair collided with the mountain.

[29] The Plaintiff explained that after colliding with the cliff face she and De Villiers-Roux lay there for several hours while attempts were made to arrange for a helicopter to lift them off the mountain. It seems from this evidence that the event organizers were hopelessly under-prepared for a calamity of this nature. The first helicopter that was called in did not have a winch with which to lift the Plaintiff, and eventually an Air Force helicopter was called in to do the necessary.

ROBERT MANZONI

[30] **Robert Manzoni** was the principal witness for the Plaintiff. He is an avid and experienced hang gliding and paragliding pilot and has participated in these sports since 1992. Manzoni was previously on the executive of SAHPA and at one stage was its National Vice Chairperson. Currently, Manzoni owns a guesthouse in Porterville from where he co-ordinates, *inter alia*, paragliding activities. So, for example, foreign paragliding pilots will arrive with their own equipment, stay at his guesthouse from where they will be transported to the Dasklip Pass launch site, and later be picked up by Manzoni wherever they may eventually land.

[31] Manzoni earns a living from paragliding in this manner but he is resolutely opposed to conducting tandem paragliding flights for reward, and has for many years set his face against this activity. The fervour with which he opposed those who advanced the cause of commercial tandem paragliding eventually resulted

in Manzoni being ostracized and led to him ultimately resigning from the committee of SAHPA. It would not be unfair to say that for those now in charge of SAHPA, Manzoni is regarded as a maverich and a lone voile . So much was evident from the cross-examination of this witness by Mr. Bekker SC, who used strong language to criticize what was termed the "*crusading*" conduct of Manzoni.

[32] It is not difficult to understand how Manzoni may have lost the respect of those he once served. He is a forthright individual who does not mince his words. He formed a view early on in his involvement with SAHPA that commercial tandem paragliding was unlawful and has ever since remained of that view. The view held by Manzoni (and it was suggested to him by Mr. Bekker SC that his was a lone, disparate voice in the wilderness) was founded on two bases. Firstly, he believed that through an interpretation of the relevant statutory regime, the activity was proscribed. Secondly, he was of the view that when those participating in the activity purely for pleasure started charging a fee to convey others for a flip, safety became compromised. When there are passengers who are prepared to pay upwards of R800,00 for a flight, there is pressure, said Manzoni, on the pilots to fly. And, he went on to say, the decision as to whether to fly or not is driven by money and not aviation safety.

[33] Manzoni illustrated his point with reference to the present case [4]. He said that he knew the Hermanus launch site well and had often flown there himself.

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[4]The witness was qualified as an expert in terms of Rules 36(9)(a) and (b)

Take-off at Hermanus is in a southerly direction into the prevailing wind in that area. However, he said that a dangerous condition arose when the wind moved from the south to the east causing extreme turbulence and presented a danger to pilots. Manzoni referred in this regard to a cautionary note in an authoritative book written by Hamerton on the various launch sites for paragliding throughout South Africa.

[34] Manzoni suggested in evidence that the accident on that Easter Monday in 2004 was attributable to an Easterly wind which caused the paraglider's wing to collapse. His view was that the weather conditions at the time of the Plaintiff's flight were dangerous and that De Villiers-Roux should not have taken off. Manzoni suggested that, having driven all the way from Cape Town with a party of adventure-seeking tourists keen on flying, the urge to fly and so finance the trip would have been greater than the need to observe safety standards and apply the so-called "*no fly"* option.

[35] In light of the fact that the Plaintiff no longer relied on pilot error as her cause of action, the evidence of Manzoni on this point was not strictly relevant and Mr. Bekker SC, applying the "*safety first*" approach did not cross-examine on the point, other than to suggest that Manzoni himself had exhibited poor judgment on a number of occasions by flying when he should not have. None of these flights were for reward and Mr. Bekker SC suggested that Manzoni's central thesis was fundamentally flawed. Of course, Manzoni refused to accept this.

[36] While the point is not at the heart of this case, I consider that Manzoni's approach is logically sound. His theory that "*the payment of money compromises safety"* will of course apply in some situations, and in others not. However, as a general proposition, it was a view genuinely held by someone who had the interests of the paragliding community and the general public at heart.

[37] Manzoni took the Court through a host of documents, mostly SAHPA Committee minutes and correspondence, which showed that from the late 1990's SAHPA, under Manzoni, regarded commercial tandem paragliding as unlawful. For example, at a meeting of the Western Cape Committee of SAHPA on 1 February 1998, at which members of the Aero Club of South Africa [5] and inspectors from the CAA were present, it was recorded that the authorities regarded the activity as unlawful although they were sympathetic towards finding a way to legitimise it.

[38] The various minutes referred to by Manzoni reflect a measure of ambivalence on the part of the Committee members of SAHPA towards the legal standing of commercial tandem paragliding. There was clearly a lobby in favour thereof and it seems that this group eventually held sway on the Committee.

[39] But what neither SAHPA nor Manzoni did do was to obtain either a definitive legal opinion or a declaratory order from the Court as to the legitimacy or not of the activity. They relied on casual advices from the CAA from time to time and on

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[5] As appears more fully hereunder, the Aero Club was the body delegated by the CAA to supervise recreational aviation.

their own interpretation of the relevant statutory and regulatory instruments applicable to SAHPA and paragliding in general. I shall deal with these instruments later in this judgment but no doubt the readers thereof at the time perused the relevant documents with spectacles tinted according to their respective viewpoints.

JOZUA CLOETE

[40] The Plaintiff's last witness was **Mr. Jozua Cloete**, a retired South African Air Force pilot who was employed by the CAA from March 1999 until April 2005 as an inspector of flight operations. Cloete has an intimate knowledge of the various statutory and regulatory instruments applicable to so-called NTCA's [6] and explained these to the Court with reference to the discovered documents.

[41] Once again, I shall deal with these separately in this judgment. Suffice it to say at this stage that the thrust of Cloete's evidence was to demonstrate that commercial tandem paragliding was unlawfulduring the Easter weekend of 2004.

LOUISE LIVERSEDGE

[42] **Louise Liversedge** was the sole witness called to testify on behalf of SAHPA. She stated that she had been employed as SAHPA's secretary since 1996. Liversedge explained that SAHPA Committee meetings were usually conducted by way of teleconference and that she would record the deliberations on a dictaphone during the meeting. Afterwards, Liversedge would draft the minutes and circulate

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[6]Non-Type Certificated Aircraft, under which paragliders resort

them amongst Committee members for vetting. Both hard and electronic copies of the minutes were stored.

[43] The purpose of Liversedge's evidence was to confirm the correctness of para 7.1 of the minutes of a SAHPA Committee meeting held on 25 November 2002. The interpretation which SAHPA sought to place on this paragraph was that as of that date, commercial tandem paragliding was no longer unlawful. The witness confirmed that although extensive reference was made in those minutes to the views of Manzoni he was no longer on the Committee and did not participate in the meeting.

[44] The CAA called no witnesses and closed its case.

THE STATUTORY AND REGULATORY FRAMEWORK

[45] It would be fair to say that the applicable framework is a complex web of Acts of Parliament, regulations promulgated thereunder and directives issued by the CAA from time to time. I must confess that navigating one's way through this collection of statutes is much like flying in dense cloud and hopingthat the instrument landing system will safely take one to the right airport.

[46] At the time of the Plaintiff's accident the Aviation Act, 74 of 1962 ("the 1962 Act") was still in force. In 2009 it was repealed and replaced by the Civil Aviation Act, 13 of 2009 ("the 2009 Act'). Under section 1(3) of the 1962 Act, an

"*aircraft*" was defined as *"any vehicle that can derive support in the atmosphere from the reactions of the air."* It was common cause that a paraglider resorted under this description of aircraft.

[47] Prior to the establishment of the CAA in 1998, civil aviation in South Africa was regulated by means of the Air Navigation Regulations of 1976 ("the ANR's"). The ANR's covered a wide spectrum of issues, from the operation of aircraft to the issuing of pilot's licences, including glider pilots. However, since paragliding was an unknown entity when the ANR's were promulgated it was not dealt with thereunder.

THE CIVIL AVIATION REGULATIONS ("THE CARS'S")

[48] On 26 September 1997 the Minister of Transport issued, under sec. 22 of the 1962 Act, the Civil Aviation Regulations ("the CAR'S"). The CAR's are divided up into some 187 Parts, each of which deals with a specific topic e.g. Aviation Accidents and Incidents - Part 12;Pilot Licensing – Part 61;General Operating and Flight Rules – Part 91; Air-transport Operations – small aeroplanes – Part 135; Aviation Recreation Organizations – Part 149 and Aeronautical Information Services – Part 175.[7] The CAR's are an unwieldy but dynamic set of documents which are updated from time to time to make provision for progressive changes in aviation. They have also had to be amended on occasion to take into account legislative changes. So, for example, the Commissioner of Civil Aviation under the 1998 Act is

[7]A "Part" is a section of the CAR'S also sometimes just referred to as "Regulation". e.g. "Part 61" or "Regulation 61".

now known as the Director of Civil Aviation under the 2009 Act. One finds, too, in earlier additions of Part 1 of the CAR's definitions of aircraft such as gliders, hang gliders, gyroplanes and helicopters but nothing in regard to paragliders.

[49] The seven volume loose-leaf collection by Cor Beek, **AviationLegislation in South Africa** (Lexis Nexis) has been updated to November 2012. It now contains the following description of "*paraglider*" in Volume 2 Part 1 – 40:

> *"paraglider means a non-power-driven, heavier-than-air aircraftt without a rigid primary structure, comprising a flexible drag, or drag and ram-air type lift surface, from which the pilot and passengers are suspended by shroud lines, which is foot-launched, and of which the descent is partly controlled by the pilot by means of two steering lines, and which for the purposes of Parts 24, 94 and 96 includes a paratrike and a powered paraglider;"*

It is not clear exactly when this definition was added to the CAR's but it would appear to be as late as 2007, when Issue 17 of the updates to Beek was added to volume 2 of the collection.

[50] When one looks at the Pilot Licensing Provisions in Part 61 of the CAR'S, one finds, for example, licensing criteria for private aeroplane pilots, private

helicopter pilots, micro light aeroplane pilots, glider pilots, gyroplane pilots, powered paraglider pilots, hang glider pilots and paraglider pilots (which resort under Sub-Part 18 of Regulation 61) and so, by way of further example, the requirements for a paraglider pilot licence are set out in Part 61.18.1.(b) to (g).

[51] The CAR'S also define an "*Aeronautical Information Circular*" ("AIC")as a "*circular containing information which does not qualify for the origination of a NOTAM or for inclusion in the AIP, but which relates to flight safety, air navigation, technical, administrative or legislative matters, issued by the Commissioner in terms of Regulation 11.01.2*".

[52] A "NOTAM" ("Notice to Airman") is defined as a "*notice containing information concerning the establishment, condition or change in any aeronautical facility, service, procedure or hazard, the timely knowledge of which is essential to personnel concerned with flight operations, distributed by means of telecommunication by or with the authority of the Commissioner*".

[53] An "AIP" ("Aeronautical Information Publication') is defined as *"a publication containing aeronautical information of a lasting character essential to air navigation, issued by the Commissioner in terms of Regulation 11.01.2."*

THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY

[54] In September 1998 the CAA was established in terms of sec. 2 of the South African Civil Aviation Authority Act, 40 of 1998 ("the 1998 Act"). This legislation was repealed *in toto* with the passing of the 2009 Act, which has been brought into

operation incrementally with the promulgation, from time to time, of various Parts thereof. For the purposes of this case, however, the provisions of only the 1998 Act are applicable.

[55] In terms of the 1998 Act the objects of the CAA were described as follows:

> *"To control and regulate civil aviation in the Republic and to oversee the functioning and development of the civil aviation industry, and, in particular to control, regulate and promote civil aviation safety and security."*

In terms of the 2009 Act (which is far more comprehensive and extensive than the 1998 Act) the objects of the CAA (as set out in sec. 7(2) of the 2009 Act) are substantially the same.

[56] Amongst the functions of the CAA set out in sec. 4 of the 1998 Act are the administration of certain laws referred to in Schedule 1 to the 1998 Act and the duty to recommend to the Minister of Transport. *"The introduction or amendment of civil aviation safety and security legislation."*Included in the laws referred to in Schedule 1 to the 1998 Act is the Aviation Act of 1962. Accordingly, with the passing of the 1998 Act, the CAA became responsible for the administration of the CAR'S.

[57] As Mr. Bekker SC pointed out in argument, when the CAR'S were published in the Government Gazette on 26 September 1997, various Parts thereof

came into operation on 1 January 1998, whilst other Parts were promulgated in subsequent years and others, not at all. So, for example, Part 61 of the CAR'S on pilot licencing to which reference is made above, was never put into operation pursuant to the provisions of Government Notice R1664 of 14 December 1998. Instead, a new part 62 containing materially different provisions was promulgated and put into operation in December 2008.

[58] As Mr. Rosenberg SCobserved in argument there are two distinct criteria for the operating of a commercial flight. On the one hand the pilot must be properly qualified (or *"rated*") to fly a particular class of aircraft, while on the other hand the aircraft itself must comply with specific requirements for airworthiness.

[59] Airworthiness is dealt with in Part 21 of the CAR'S and, as could be expected, is a complex and comprehensive part of the regulations. For present purposes it is only then necessary to deal with airworthiness in relation to NTCA's.An NTCA is defined in volume 2 of Beek as –

> "*Any aircraft that does not qualify for the issue of a certificate of airworthiness in terms of Part 21 and shall include any type certificated aircraft that has been scrapped, of which the original identification plate should have been removed and returned to the applicable aviation authority and is rebuild (sic) as a full-scale replica"…*

I may be wrong, but as I understood counsel, an NTCA refers essentially to any aircraft that is not made and assembled in an aircraft factory and which must therefore

meet airworthy standards fixed by the manufacturers. An NTCA would include a hang glider, a micro light, a paraglider and any of the "*kit*" forms of aircraft which are assembled locally.

DOCUMENT LS/1

[60] Prior to November 2002 the operation of NTCA's was regulated by a document known as "*Document LS/1*" ("LS/1"). It was a document issued by the erstwhile Commissioner of Civil Aviation and governed the "*General Conditions Regarding the Registration, Construction, Operation and Maintenance of Aircraftwhich do not qualify for the issue of a South African Certificate of Airworthiness."*

[61] In paragraph 2 of LS/1the relevant aircraft covered are said to be the following:

> *"61.1 amateur-built aircraft;*
>
> *61.2 production-built aircraft;*
>
> *61.3 research aircraft;*
>
> *61.4 limited aircraft; and*
>
> *61.5 veteran aircraft."*

[62] Amateur- and production-built aircraft are further classified into the following sub groups in LS/1:

> *"62.1 Fixed wing power-driven aeroplanes;*

62.2 Gliders;

62.3 Motorised gliders;

62.4 Microlight aeroplanes;

62.5 Paraplanes;

62.6 Helicopters;

62.7 Gyroplanes;

62.8 Manned Free balloons;

62.9 Non-rigid Airships; and

62.10 GasturbinePowered Aircraft."

Each of the aforementioned category of aircraft is fully described in LS/1.

[63] In para 1.3 of LS/1, under the heading "*General"*, the following is said regarding the commercial use of LS/1 aircraft:

"Aircraft which do not qualify for a …(South African Certificate of Airworthiness)…and are required to meet the conditions of this document shall hereinafter be referred to as LS/1 aircraft. LS/1 aircraft shall not be operated for remuneration, unless when otherwise authorized by the CAA or when compliance with para 25 [of the LS/1] has been shown."

[64] In paras 4.1 and 4.3 of LS/1, under the heading "*Exemption from the Need to have Standard or Restricted Certificate of Airworthiness",* the following is said:

> *"4.1 LS/1 aircraft are exempted in terms of Part 11 of the CAR'S from the requirement of having a valid certificate of airworthiness and may still be operated subject to the conditions set out in these conditions…*
>
> *4.2……*
>
> *4.3 LS/1 aircraft shall not be operated unless an authority to fly has been issued to the aircraft. These aircraft shall not be operated in either of the categories for transportation of paying passengers or cargo for reward."*

As I understand the position then, as of November 2002, all NTCA aircraft (which, it was common cause included paragliders):

> 64.1 were exempted from the necessity to hold valid certificates of airworthiness;
>
> 64.2 could only fly if an "*authority to fly*" in respect of the particular aircraft had been issued; and

64.3 could **not** be operated for reward under **any** circumstances.

The term "*authority to fly*" is not defined in LS/1, but each of the categories of LS/1 aircraft referred to above had specific requirements that had to be met before such authorization could be given.

[65] Although the parties were in agreement that a paraglider was generally classifiable as an NTCA, there is no mention anywhere in LS/1 of that form of aircraft. This omission is most likely due to the fact that paragliders only became popular in South Africa in the 1990's.[8]

[66] Flowing from the aforegoing, I understood SAHPA to be of the view that, as of November 2002, commercial tandem paragliding was not expressly prohibited. The contrary argument advanced for the CAA in the heads of argument drawn by Messrs. Mokoena SC and Legoce was that the CAA held the view that such prohibition persisted right up until the present.

[67] The Plaintiff's argument was that a developing aviation sport like paragliding could not operate in a legislative vacuum, given the safety concideration s

[8]The Plaintiff testified that she flew tandem in Turkey in about 1996 and Manzoni said paragliding started as a sport in 1987 and that he migrated from hang gliders to paragliders in about 1992.

implicit in the activity. It was suggested by the Plaintiff that, as an NTCA, paragliders were subject to LS/1, even though they were not expressly referred to therein.

[68] It is useful to note at this stage that it was common cause that tandem paragliding*per se* was not prohibited. So, a pilot who wished to take a family member or friend for a flip could do so quite lawfully. The Plaintiff's case was that as soon as the tandem flight was undertaken **for reward**, it became illegal.

THE AERO CLUB OF SOUTH AFRICA

[69] I turn then to set out the role of SAHPA in relation to this complex web of do's and dont's. In terms of LS/1, it is recorded that:

> *"1.5. The CCA (i.e. the Commissioner for Civil Aviation) has designated to the Aero Club of South Africa authority to act on behalf of the CAA in certain areas.*
>
> *1.6 The Aero Club may only act in accordance with its CCA approved manual of procedure. Any revision to the manual shall first be submitted to the CCA for approval before it may be incorporated in the manual.*
>
> *1.7 The CCA may, depending on the circumstances withdraw, suspend or revise the designated authority to the Aero Club."*

[70] The Aero Club is a sec. 21 company originally incorporated in 1936, whose Memorandum of Association describes its main business as:

> *"The National governing and co-ordinating body for the following South African National Sport Aviation Associations (Member Associations) and similar associations acceptable to the AC of South Africa:*
>
> *… Hang Gliding Association of South Africa.*

[71] In terms of para 2.3 of its memorandum the Aero Club is authorized:

> *"To act as the body officially recognized by the South African Government as the parent body responsible for sport aviation activities within the Republic of South Africa and to liase with the Government and other authorities where necessary to promote the objectives of the AC of South Africa."*

[72] Included in the main objects of the Aero Club is its intention to:

> *"Diligently strive for the safe practice of sport aviation in South Africa."*

[73] The Court was referred to a Memorandum of Agreement dated November 2003 in which the CAA formally delegated to the Aero Club certain of its powers and functions contained in the CAR'S. Included in this (in para 3.3.10) was the responsibility for issuing hang glider and paraglider pilots' licences. The Aero Club was directed to have regard to the manuals of procedure for the respective constituent bodies when, *inter alia*, issuing licences. It is common cause that the Aero Club retained these delegated powers in April 2004.

[74] SAHPA, a separate juristic entity incorporated under sec. 21 of the 1973 Companies Act, is responsible for all issues of governance in the sports of hang gliding, powergliding and paragliding. It is an affiliate of the Aero Club and, in that capacity, is ultimately under the control of the CAA.

[75] Members of SAHPA are bound, *inter alia*, by its "*Operations and Procedures Manual"*("the Ops Manual"). This is a document of some 50 pages which has been effective since October 2000 and which deals with a myriad issues relevant to the sport of paragliding, from pilot licencing and airworthiness to safety, accident reporting and disciplining of its members.

[76] Of importance at this stage are the provisions of the following clauses in SAHPA's Operations and Procedures Manual: (Revision 1) effective as of April 2004:

> *"1.16 <u>Tandem flights</u>*
>
> *No person may fly with a passenger without being in possession of a current TANDEM pilot rating.*

No more than two persons may fly in a hang glider or paraglider.

No member may carry tandem passengers for reward, unless they have the appropriate carrier's licence from the Civil Aviation Authority.

It is recommended that tandem pilots get signed indemnities from their passengers before undertaking flights and advise them that they are not insured by SAHPA for third party liability."…

2.8 *Licence privileges*

Members may exercise the privileges of a licence from the time of payment of the prescribed fee and submission of all required documents, to the designated body.

Licences issued by SAHPA are for recreational purposes, i.e. not for commercial gain."

It bears mention that para 1.16 was substantially changed in Revision 2 of the Ops Manual effective from 1 June 2007 so as to permit commercial tandem paragliding in certain defined circumstances.

CARRIER'S LICENCE

[77] In termns of Section 12 of the Air Services Licencing Act, 115 of 1990 ("the Air Services Act")

> *"No person shall operate or attempt to operate on air services, unless it is or is to be operated under and in accordance with the terms and subject to the conditions of an air service licence issued to that person in terms of this Act."*

[78] In terms of Section 1 of the Air Services Act, an "air service" is defined as "any service operated by means of an aircraft for reward". The definition excludes 5 categories of aircraft operation from the definition of "air service", none of which is applicable here. The word "service" is not further defined in the Air Services Act and it must therefore be interpreted according to its ordinary meaning.

[79] In terms of Section 2 thereof, the Air Services Act only applies to the operation of a "domestic air service" which in turn is defined as"an air service excluding an international air service". The latter phase carries its own detailed definition.

[80] An air service licence is issued by the Air Services Licencing Act after receipt of an application for such licence and the adjudication thereof under that Act.

[81] It was common cause that a paraglider is an aircraft. It follows therefore that as of November 2002 the provision of a tandem flip on a paraglider as against payment of money was an air service as defined. The provider of such a service was accordingly required to be licenced under Section 16 of the Air Services Act and had to hold what was colloquially referred to as a "carrier's licence". Para 1.16 of the SAHPA Ops Manual (Revision 1) stressed this requirement.

PROPOSED AMENDMENTS OF PARTS 24, 94 AND 96 OF CARS

[82] On 11 January 2002 (in Government Gazette No. 23009) the Chairperson of the Civil Aviation Regulations Committee (CARCOM), purportedly acting under Regulation 11.03.2 (1)(a) of the CAR's published for comment certain proposed amendments to the CAR's. Written comments and/or representations to the chair of CARCOM were invited by 11 February 2002.

[83] The details of the proposed amendments were set out in various Government Notices contained in the said Gazette:

83.1 In Government Notice R22, Schedule 1 contained a number of new definitions which it was said were necessary to give content to certain words and phrases used in the proposed new Parts 24, 94 and 96 of the CAR's. Of note here is the introduction of a definition of

"*paraglider"*, which accords with the definition referred to in Beekabove, as well as certain other NTCA's.

83.2 In Government Notice R23, Schedule 2 sought to introduce Part 24 of the CAR's (which did not exist at that stage) to replace LS/1. The purpose of Part 24 was to establish minimum standards of airworthiness for NTCA's. Included in the sub-group of NTCA's subject to Part 24, were paragliders.

83.3 In Government Notice R24, Schedule 3 sought to introduce Part 94 of the CAR's, also then not in existence and also to replace LS/1. Part 94 was intended to set the operational requirements for NTCA's. Of importance at this juncture are the provisions of Parts 94.01.1 (1)(a), (3) and (4) which read as follows:

"94.0.1. (1) This Part shall apply to –

(a) *non-type certificated aircraft operated within the Republic;…*

(2) …

(3) *The provisions of the various other Parts of*

these Regulations shall apply mutatis mutandis to any non-type certificated aircraft unless specifically exempted by the provisions of this Part.

(4) Non-type certificated aircraft operated in terms of this Part are prohibited to carry passengers or cargo for reward."

83.4 In Government Notice R25 Schedule 4 sought to introduce Part 96 of the CAR'S which similarly did not exist at the time and which was also intended to replace LS/1. The invitation for public comment in respect of the proposed changes contained the following by way of motivational explanation:

"The requirements contained in the proposed Part 96 are to address the South African and universal trend towards the use of non-type certificated aircraft for commercial purposes and establish standards that will permit commercial operation within parameters that maintain adequate levels of safety."

83.5 Of relevance here are the provisions of Parts 96.01.1(1)(a)

and (2):

"*96.01.1 (1) This Part shall apply to –*

(a) *non-type certificated aircraft engaged in commercial air transport operations within the Republic…*

(2) No non-type certificated aircraft shall be used in commercial air transport operations unless the operator is the holder of the appropriate air service licence issued in terms of the Air Services Licensing Act, 1990 (Act 115 of 1990)…"

[84] *"Commercial Air Transport Operation*" is defined in Part 1 of the CAR'S as "*an air service as defined in sec. 1 of the Air Services Licencing Act, 1990, including -*

"(a) The classes of air service referred to in regulation 2 of the Domestic Air Services regulations, 1991."

[85] From the aforegoing, it is clear that as of January 2002 the CAA (which is cited in the various Government Notices as the "*proposer*" of the intended amendments to the CAR's), regarded tandem paragliding for reward as unlawful: the wording of Parts 94.01.1(4) and 96.01.1(2) are unequivocal in that regard.

AIC NO. 18.23

[86] On 15 November 2002 the Commissioner for Civil Aviation published an AIC, No. 18.23, in which an attempt was made to explain and give content to the proposed amendments set out in the Government Gazette of 11 January 2002 and to which referencehas been made above. AIC18.23 is a long and somewhat garbled document in which members of the aviation fraternity are given details of the exemption concerned, background information leading up to the exemption, an explanation regarding the proposed development of Parts 24, 94 and 96, the motivation for the proposed amendments, the safety implications thereof and the period of the intended exemption.

[87] The argument advanced by SAHPA for the legality of commercial tandem paragliding after November 2002 is based, to a large extent, on this document. Accordingly, before considering the contents of AIC18.23 and the import thereof for commercial tandem paragliding, it is necessary to examine what the legal status of such an AIC is. Coupled with that is the standing in law which can be given to the publication of the intended amendments to the CAR's in the Government Notices of 11 January 2002 as referred to above.

[88] I would remark in passing that an argument could be advanced that the exemption is confusing to the extent that it could be regarded as void for vagueness. However, no such argument was advanced by either Mr. Rosenberg SC or Mr. Bekker SC, and I leave the matter there.

THE VALIDITY AND ENFORCEABILITY OF THE EXEMPTION

[89] The procedure for effecting changes to the CAR's, or for the introduction of proposed new regulations is governed by Part 11 of the CAR's. In its current form that Part is significantly different to its predecessor. The parties were in agreement, however, that the provisions of Part 11 which were applicable in 2002 are those contained in the LegislationBundle handed to the Court at p29 *et seq*.

[90] In terms of the erstwhile Part 11.03.1(1) any interested party could submit to CARCOM a duly motivated proposal to introduce, amend or withdraw a regulation or technical standard. Upon receipt, the Chairperson of CARCOM was required to publish a proposal to vary a regulation in the Government Gazette, call for comments and afford any other interested persons the opportunity to respond to the proposal (Parts 11.0.3.2(1)(a), (2) and (3).)

[91] The proposal was thereafter to be considered by CARCOM which was required to make an appropriate recommendation to the Commissioner (Part 11.03.3(2)). If the Commissioner, after considering the recommendation of CARCOM, was satisfied that giving effect to the proposal would be in the interests of aviation

safety, the proposal was to be submitted to the Minister for approval. The Minster then exercised the power to make the amendment or withdraw, or introduce a new regulation in terms of sec 22 of the 1962 Act. (See Part 11.03.4)

[92] In order to have the effect of law, any such ministerial decision made in terms of Section 22 of the 1962 Act would have to have been published in the Government Gazette in terms of Section 16 of the Interpretation Act, 33 of 1957. [9] It is common cause that this did not take place in respect of the introduction of Parts 24, 94 and 96 before at least 2008.

[93] Part 11.01.2 (both in the 1997 and 2011 CAR's) permitted the Commissioner (now the Director) to publish AIC's which contained "*information on technical standards, practices and procedures which the Commissioner …found to be acceptable for compliance with the associated regulation.*"

[94] Part 11.04 of the CAR's contained detailed provisions to enable the Commissioner to grant an exemption "*from any requirement prescribed in the Regulations*" on such conditions and for such period of time as the Commissioner "*may determine*", provided always that the exemption did not jeopardise aviation safety (Parts 11.04.03(3); 11.04.04(1)). In the event that the exemption exceeded a period of 90 days, full particulars thereof were required to be published in an AIC.

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[9] Van Rooy v Law Society (OFS) 1953 (3) SA 580 (O) at 584A-585B.

[95] As I have pointed out on15 November 2002 the Commissioner published an exemption in AIC no. 18.23. The exemption itself is contained in para 2 of that AIC and reads as follows:

> "*2.* ***Details of exemption***
>
> *The Commissioner for Civil Aviation has granted all operators of aircraft that do not qualify for the issue of a certificate of airworthiness, an exemption from the Divisions of Regulation 11.04.6 insofar as the aforementioned regulation authorizes the operation of aircraft that are unable to comply with Regulation 21.08.1A, on condition that the requirements of the Document LS/1, are complied with."*

The effect of the exemption is then set out in para 3 of the AIC:

> *"3. This exemption will nullify the content of the aforementioned regulation enabling the Commissioner to withdraw Document LS/1 and impose the requirements contained in proposed Parts 24, 94 and 96 (and associated technical standards) as conditions for the operation of aircraft that do not qualify for the issue of a certificate of airworthiness (Non-Type Certificated Aircraft)."*

[96] As I have said AIC18.23 is a lengthy, rambling document and I shall refer only to certain parts thereof in an attempt to give some content to the exemption. In para 13 of AIC18.23 the Commissioner notes that the proposed changes to Parts 24, 94 and 96 were approved by CARCOM on 27 February 2002. Ordinarily, and given that the proposed development of these Parts originated from the Commissioner, one would have expected that the recommendation of the publication thereof by the Minister would have followed without ado. However, it appears from AIC18.23 that there were problems with the translation thereof into Zulu and that delays were inevitable.

[97] As an interim measure, the Commissioner was of the view that the CARCOM-approved proposals could be given immediate effect by incorporating them as conditions attached to the exemption contained in AIC 18.23. The Commissioner was satisfied that there would be no compromise of safety standards in the process. Accordingly, the Commissioner exempted NTCA's from the requirements of Part 21.08.1A in relation to certificates of airworthiness on condition that Parts 24, 94 and 96 were complied with.

[98] It was common cause that the revised part 96, which eventually legitimized commercial tandum paragliding was only promulgated in March 2008. In the interregnum said Mr. Rosenberg SC, the old Part 96.01.1(2), whIch had been promulgated in Government Gazette No. 23009 of 11 January 2002, and which proscribed the said activity, prevailed. Mr. Bekker SC on the other hand argued in

favour of legitimacy by virtue of an alleged variation/amendment to the Part in question by the introduction of Part 96.01.01(6) prior to April 2004.

[99] I would also observe, at this stage, that in the written heads of argument Mr. Mokoena SC sought to heap the blame for any administrative short-comings on the Aero Club which, in terms of its delegated functions, was said to have failed to police and enforce a patently illegitimate operation. His argument makes it clear. There was no doubt on the part of the CAA that commercial tandem paragliding was unlawful in April 2004 and the CAA did not seek to place any argument before the Court in support of the legality thereof.

THE VALIDITY OF PART 96.01.01 (6)

[100] In Government Gazette No. 30908 of 28 March 2008 (under Notice 395 of 2008), CARCOM published for comment various intended amendments to the CAR's of 1997. Included in this was the addition of sub-regulation (6) to Part 96.01.1 which read as follows:

> *"(6) For the purpose of sub-regulation (2), tandem operations with hang gliders, paragliders or parachutes, even if carried out for remuneration or reward, shall not be considered to the providing of an air service as defined in the Air Services Licensing Act, 1990 or International Air Services Act, 1993 nor to be a commercial air transport operation, as defined in Part 1 of these Regulations."*

[101] It was common causebetween the parties that sub-regulation (6) did not form part of the proposed regulations as approved by CARCOM on 27 February 2002. However, as pointed out above, Mr. Bekker SC sought to demonstrate through argument that when the Commissioner issued AIC18.23 in November 2002, and attached *inter alia* Part 96 as a condition to the exemption so granted, that sub-regulation (6), was already a part of Part 96.01.1 at that stage (i.e. October/November 2002).

[102] Mr. Rosenberg SC disputed this assertion and argued that the substance of Part 96.01.1, which was incorporated as a condition of exemption in November 2002 (effective from 14 October 2002) did not included sub-regulation (6). The effect of this, said Mr. Rosenberg SC, was that the complete prohibition of commercial tandem paragliding set out in the proposed Part 96.01.1 (2) of the CAR's formed part of the conditions of exemption.

[103] The dispute as to the inclusion of sub-regulation (6) or not, has to be resolved at the level of evidentiary proof. For his submission, Mr. Rosenberg SC relied on the Government Gazette of 11 January 2002 in which there was no sub-Part (6). This Gazette contained the proposed regulation advertised for comment and this was the proposed regulation approved by CARCOM at its meeting on 27 February 2002, said Mr. Rosenberg SC.

[104] Mr. Bekker SC accepted that SAHPA could not produce a Government Gazette which incorporated sub-regulation (6) other than that of 28 March 2008. However, SAHPA sought to rely on secondary evidence to substantiate its claim in that regard. The evidence of Ms. Liversedge was adduced to confirm the minutes of a SAHPA Committee meeting held on 25 November 2007. Under para 7.1 of those minutes the following was recorded:

> *"7.1* ***COMMERCIAL TANDEM ISSUE****:*
>
> *The law currently removes the requirement to register in terms of the air licenses act (sic) and the law says that for the purpose of sub-regulation (2) tandem operations for HG, PG or parachutes, even if carried out for remuneration or for reward it (sic) shall not be considered to be the providing of an air service nor to be a commercial operation.*
>
> *R. Manzoni believes that it is commercial and does not accept the exemption that SAHPA has achieved. This was stated in an information circular, which was passed on 15 November 2002. It is now no longer illegal. SAHPA"*

[105] While Liversedge confirmed the correctness of these minutes, SAHPA adduced no evidence from any of its committee members to explain the minute. Such evidence was in my view necessary to explain the import of the minutes and the

source documentation before the Committee which lead to it holding this view. What the minute suggests is that someone from the Committee had had insight into a document (possibly AIC18.23) and, further, that there was a document in existence which incorporated, some of the contents of sub-regulation (6) as it was finally promulgated for comment in March 2008.

[106] The reference in the minute to "*the exemption that SAHPA has achieved"* suggests that SAHPA may have lobbied the CAA to effect an exemption incorporating either sub-regulation (6) or words similar to those contained therein, as part of the conditions of exemption. One can therefore infer that SAHPA was in a position to provide reliable, first-hand evidence on this score. But in the absence of evidence from a SAHPA Committee member explaining how he/she came to hold the views recorded in para 7.1 of the minutes, the evidence of Liversedge is, and remains, inadmissible hearsay.

[107] But even assuming that there was a draft copy of sub-regulation (6) in existence as at 25 November 2007, there is no evidence to establish that such draft sub-regulation was included in the proposed Part 96 which the Commissioner included as part of his conditions of exemption.

[108] It was open to SAHPA to adduce evidence from a responsible official from the CAA to explain that the Part 96 which had been approved by CARCOM in

February 2002 had, by November 2002, been lawfully augmented to incorporate what was later to become known as Part 96.01.1 (6). It did not adduce any such evidence.

[109] Rather, the Plaintiff presented the evidence of Mr. Cloete, who as stated above, was employed by the CAA in its NTCA flight operations division until April 2005. Mr. Cloete was asked to explain certain issues pertaining to AIC18.23. He was referred to the Government Gazette of 11 January 2002 and confirmed that the version of Part 96 that was given effect to by way of the exemption in November 2002 was the version contained in the Government Gazette, i.e. with the exclusion of sub-regulation (6). Mr. Cloete said further that in April 2004 his understanding of the position relating to NTCA's was as follows:

> *"Your Lordship, if you don't have a Part 96 license issued by the Department of Transport and an air operator certificate issued by the CAA, you could not operate for remuneration, period…"*

[110] When asked by Mr. Rosenberg SC whether any air service operators licence had been issued by the CAA by the time he left in 2005 so as to ligitimise the commercial operation of tandem paragliding, the witness answered in the negative. Mr. Cloete pointed out, too, that an application for such a licence is a costly, long and complicated process. One of the factors that the Air Service Licensing Council would consider in evaluating such an application was, he said, the issue of safety which played a major part in the application.

[111] The cross-examination of this witness by Mr. Bekker SC traversed the ultimate inclusion of sub-regulation (6). Cloete was referred to AIC18.23 and asked to consider the version of Part 96 published in the Government Gazette of February 2002 with reference to the extent of the exemption granted by the Commissioner. When shown the version of Part 96 which incorporated sub-Part (6) and asked to comment whether that was included in the exemption as of November 2002, the witness gave the following reply:

> *"Mr. Bekker: Part 96 that was eventually incorporated contained in paragraph sub (6) as well- - - I don't know what happened. To be quite honest, I saw this document for the first time yesterday.*
>
> *Mr. Bekker: Yes. As a matter of fact - - - And what happened to para 6 I don't know.*
>
> *Mr. Bekker: Well, let me put it to you like this and you can admit it or deny it. Even as at January 2004, even prior to the accident in question, the version of Part 96 that was distributed for comment already had a sub-paragraph 6 in? - - - That is correct.*
>
> *Mr. Bekker: Is it correct? - - - Ja. When I said I never saw it, I never saw the Government Gazette issue of this one. We saw the part that was in the blue books. The …(indistinct) Nexus."*

[112] The reference by Mr. Cloete to "*the blue books*" is evidently a colloquialism in the aviation industry for Beek's loose leaf binders referred to above.

[113] The Court then sought clarity regarding the witness's answer on this issue and the following evidence emerged:

> *"Court: Mr. Cloete, do you know when – first of all, are you familiar with this sub-paragraph (6) of Section whatever it is – 96.01, which referred to tandem paragliding for reward? - - - Yes, I've seen it, M'Lord. Yes.*
>
> *Court: You are familiar with the section?- - - Yes, I've seen it.*
>
> *Court:Now, the question is, as I understand it, was that by 15 November 2002 to your knowledge part of Section – Part 96? - - - No.*
>
> *Court:It wasn't. Did I perhaps put the wrong date to the witness? - - - I said November 2002.*
>
> *Mr. Bekker:November 2002 is the correct date, M'Lord. That's the date of the AIC.*
>
> *Court: And the witness says it was not – sub (6) was not part of it. Was not part of the…Fine - - - It was not promulgated at that stage.*
>
> *Mr. Bekker: I think His Lordship's question refers to this. When the AIC of 15 November 2002 went out, what was then the current version or the version of Part 96 that had accompanied that? Do you know or do you not know? - - - As far as I can remember, M'Lord, it was – you're not allowed to do any flying for reward.*

> *Mr. Bekker: No, the important thing is this, Sir. The question is, when in November 2002 the AIC was sent out, do you know what version of the proposed Part 96 was circulated for comment? - - - Sorry, I can't give a definite answer on that because I don't – I can't remember."*

[114] Mr. Bekker SC then referred Cloete to an AIC issued fortuitously on the date of the accident – 12 April 2004 – in which there was reference to *"Regulation 96.06.1 (7)".*On the strength of this document, Mr. Bekker SC suggested to the witness that as at that date Part 96.06.1 (6) must have been part of the regulation because the following regulation (Part 96.06.1(7)) was part of the CAR's. This document served only to confuse the matter further as the following part of the cross-examination of Cloete demonstrates:

> *"Mr. Bekker:So clearly - - - As I have said, it could have been, because at that stage already there was a lot of work in progress to simplify the use of Part 96 and this is exactly what was discussed, if I remember correctly, at that stage.*
>
> *Mr. Bekker:So is your evidence based on what your personally recollect occurred so many years ago when you were there? - - - According to this AIC, Yes.*

> *Mr. Bekker:You haven't taken the trouble of finding out what versions of Part 96 were circulated from time to time and when and how it changed, did you?- - - Not personally, yes. No.*
>
> *Mr. Bekker:M'Lord, with respect, then it would not serve a purpose in taking it up with this witness."*

[115] When all is said and done, SAHPA was not able to adduce admissible evidence (whether by way of documentary or *viva* voce evidence or cross-examination of Cloete) of the status of the CAR's, and in particular Part 96.06.1 thereof, to conclusively establish that Sub-Part (6) was included therein when the Commissioner granted the exemption in AIC18.23.

[116] It would seem that there was probably a document incorporating terms similar to Sub-Part (6) circulating in November 2002: there can be no other reason for the reference thereto in the SAHPA minutes produced by Liversedge. But that does not establish that the Part had been duly amended in terms of Part 11. After all, it would be required to have been advertised in the Government Gazette (as was done in January 2002 with the version which was placed before CARCOM in February 2002) and thereafter approved by CARCOM.

[117] SAHPA's inability to refer the Court to any Government Gazettes other than those of January 2002 and March 2008 presented to the Court by the Plaintiff (and it was eventually common cause that there were no such other Gazettes in existence) is, in my view, fatal to SAHPA's attempts to show that Sub-Part (6) was

incorporated in the Commissioner's exemption in AIC18.23. I must therefore concluded that Sub-Part (6) was not lawfully operative at the time of the accident and that commercial tandem paragliding was therefore still illegal.

[118] While I would have hoped to have been able to say that my finding in this regard is confirmed by the CAA in light of the concession made by Messrs. Mokoena SC and Legoce in paras 62 and 66 of the CAA's heads of argument, I am reluctant to do so because that concession is not made against the background of a detailed analysis of the interplay between the CAR's and the AIC's. Rather, it was premised on a reading of certain parts of Manzoni's evidence and an understanding of the CAA's stance at the time that he was still part of the SAHPA Committee. Still, we have the evidence of Cloete, a senior CAA employee at the relevant time, who, in the light of the evidence referred to above, seemed to be fairly confident of the continued illegality of the activity at the time of the accident.

EXEMPTION ULTRA VIRES?

[119] Whatever the position may have been as to the status of Part 96.01.1 (6), Mr. Rosenburg S.C. submitted that it was not competent for the Commissioner of Civil Aviation to purport to exempt the operators of commercial tandem paragliders from the provisions of the Air Services Act, by the issuing of an AIC under the 1962 Aviation Act. I am in agreement with this submission by the Plaintiff in the alternative for the reasons that follow.

[120] In issuing an AIC the Commissioner exercises a power conferred under the CAR's promulgated under the 1962 Aviation Act. No power is granted to the Commissioner under the 1962 Act to grant exemptions under other legislative enact – ments. Similarly, the powers granted to the Commissioner under the 1998 Act to administer the laws referred to in Schedule 1 to the 1998 Act (which include the Air Services Act) do not permit the Commissioner to grant exemptions to commercial operators from the provisions of the Air Services Act.

[121] The Air Services Act makes it clear that the responsibility for the issuing of an air service licence (or a "carrier's licence" as it is known in the industry) lies with the Air Service Licencing Council established under the Air Services Act. As that Act shows, the prerequisites for the issue of such a licence are extensive and complex. The room for an exception from the provisions of the Air Services Act is extremely limited[10] and will only be considered if the Applicant for exemption wishes to operate an air service *"on a non-profit basis for purposes incidental to social welfare, or for purposes of salvage on humanitarian grounds, or where the granting of the exception will assist in saving life".* Tandem paragliding for reward clearly does not fall into any of those categories for which an exemption may be granted.

[122] Finally an exemption from the provisions of the Air Services Act may only be granted by the Council established under that Act. No power was delegated to the Commissioner of Civil Aviation to do so. Accordingly, the power purportedly exercised by the CAA under AIC 18.23 to effectively exempt commercial tandem

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[10] See sections 12(2) and (3) of Act 115 of 1990.

paragliders from the requirement of holding valid air services licences under the Air Services Act was a power which did not vest in the CAA. The exemption was accordingly *ultra vires*the powers granted to the CAA in terms of Part 11.04 of the CAR's and commercial tandem paragliding remained unlawful.

WRONGFULNESS

[123] The finding that commercial tandem paragliding was illegal in 2004 is, however, far from the end of the matter. The Plaintiff still bears the onus of establishing that the conduct of SAHPA and the CAA was, firstly, wrongful, and then, causally related to her damages. As demonstrated above, the Plaintiff's case in relation to the former is that SAHPA and the CAA owed her a duty of care and that they breached that duty.

[124] Delictual liability arising from a negligent omission has enjoyed extensive consideration in the last two decades or so as our courts have sought to develop the principle, particularly in the constitutional era [11]. In Bakkerud[12], Marais JA described these developments as follows:

> *"[7] The legal literature on the wider topic of liability for omissions generally has burgeoned over the years and*

[11]See for example Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA); Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA); Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA); Malherbe v Eskom 2002 (4) SA 497 (O); Minister of Safety and Security v Van Duivenboden2002 (6) SA 431 (SCA); Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA); Jacobs v Chairman, Governing Body, Rhodes High School and Others 2011 (1) SA 160 (WCC); McCarthy Limited t/a Budget Rent-a-Car v Sunset Beach Trading 300 CC t/a Harvey World Travel and Another 2012 (6) SA 551 (GNP).

[12]At 1054D

has by now reached formidable proportions. Nothing short of a doctoral dissertation can do justice to it all. What follows is a blend of my own observations and what can be gleaned from the more recent cases decided in this and other Courts in South Africa and elsewhere, and from the preponderance of legal writing in the text books and journals."

[125] In a masterful discussion of the topic, Marais JA pointed to various schools of thought that had emerged in relation to liability for an omission.His Lordship attempted to define a workable approach for the courts thus:

"[14] Was there a unifying link in the omissions considered in the cases which would provide a coherent and intelligibleprincipleby which to decide whether more than moralor ethical disapproval was called for or whether a legal duty to act should be imposed? It was not always easy to discern one.In the end, this Court felt driven to conclude that all that can be said is that moral and ethical obligations metamorphose into legal duties when 'the legal convictions of the community demand that the omission ought to be regarded as unlawful'(Minister van Polisie v Ewels 1975 (3) SA 590 (A)). When it should be adjudged that such a demand exists cannot be the

subject of any general rule; it will depend on the facts of the particular case. It is implicit in the proposition that account must be taken of contemporary community attitudes towards particular societal obligations and duties. History has shown that such attitudes are in a constant state of flux.

[15] While that attempt to devise a workable general principle by which to determine on which side of the moral/legal divide a duty to act falls has not been universally acclaimed, it has been welcomed by most. Those who welcome it do so because of its inherent flexibility and its liberation of Courts from the conceptual strait jacket of a numerus clausus of specific instances in which a legal duty to act can be recognized. Those who do not are distrustful of the scope it provides for equating too easily with the convictions of the community a particular Court's personal perception of the strength of a particular moral or ethical duty's claim to be recognized as a legal duty. That is a risk which is not peculiar to this particular problem. There are many areas of the law in which Courts have to make policy choices or choices which entail identifying prevailing societal values and applying them. But Courts are expected to be able to recognize

what the difference between a personal and possibly idiosyncratic preference as to what the community's convictions oughtto be and the actually prevailing convictions of the community. Provided that Courts conscientiously bear the distinction in mind, little, if any, harm is likely to result." (Footnotes otherwise omitted)

[126] In Van Duivenboden[13] Nugent JA (with whom Howie J, Heher JA and Lewis AJA concurred) suggested the approach as follows:

"[12] Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognizes the existence of a legal duty, it does not follow that an omission will necessarily attract liability – it will

[13] 441 E

attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this Court in Kruger v Coetzee(1966 (2) SA 428 (A) at 430 E-F) namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether the fault is capable of being legally recognized), nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable." (Footnotes otherwise omitted)

[127] In a forceful judgment in Van Duivenboden in which he concurred in the merits of the appeal Marais JA took issue with this approach of Nugent JA for the majority, suggesting that the majority had in fact conflated the two separate elements of liability for an omission.

[128] The majority (per Nugent JA) contextualized the preferred approach thus, rooting it in constitutionalism [14] :

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[14] 445B

"[19] The reluctance to impose a liability for omissions is often informed by a laissez faireconcept of liberty that recognizes that individuals are entitled to 'mind their own business' even when they might reasonably be expected to avert harm and by the inequality of imposing liability on one person who fails to act when there are others who might equally be faulted. The protection that is afforded by the Bill of Rights to equality, and to personal freedom, and to privacy might now bolster that inhibition against imposing legal duties on private citizens. However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others and its duty to do so will differentiate it from others who similarly fail to act to avert harm. The imposition of legal duties on public authorities and functionaries is inhibited instead by the percieved utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happened to act negligently and the spectre of limitless liability. That last consideration ought not to be unduly exaggerated, however, bearing in mind that the requirements for establishing negligence and a legally

causative link provide considerable practical scope for harnessing liability within acceptable bounds.

[20] *But while the utility of allowing public authorities the freedom to conduct their affairs without the threat of actions for negligence in the interest of enhancing effective government ought not to be overlooked, it must also be kept in mind that in the constitutional dispensation of this country the State (acting through its appointed officials) is not always free to remain passive. The State is obliged in terms of s 7 of the 1996 Constitution not only to respect but also to 'protect, promote and fulfill the rights in the Bill of Rights and s 2 demands that the obligations imposed by the Constitution must be fulfilled….While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights. The very existence of that duty necessarily implies accountability and s41(1) furthermore provides expressly that all spheres of government and all organs of State within such sphere must provide government that is not*

only effective, transparent and coherent, but also government that is accountable (which was one of the principles that was drawn from the interim Constitution)…

[21] When determining whether the law should recognize 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. When the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any 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. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process or through one of the variety

of other remedies that the courts are capable of granting. No doubt it is for considerations of this nature that the Canadian jurisprudence in this field differentiates between matters of policy and matters that fall within what is called the 'operational' sphere of Government, though the distinction is not always clear. There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However,where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweighs that norm….

[22] Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life and to security of the person are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them. It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy,

> *will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed…but I can see none that do so in the present circumstances."*(Foot-notes omitted)

I intend to approach this matter in the manner suggested by Nugent JA in Van Duivenboden.

DUTY OF CARE

[129] The issue that then and firstly falls to be considered is whether SAHPA and the CAA as a "public functionary" and a "public authority" respectively, had a duty of care to the public in general and the participants in paragliding activities in particular, to ensure that the sport was practiced in such a way that the constitutional rights of those groups of citizens were respected and not infringed. Did these bodies demonstrate and meet the "norm of accountability" to which Nugent JA referred in Van Duivenboden.In my view, the potential liability of SAHPA and the CAA on this basis needs to be considered, firstly, with regard to the statutory duties imposed on the CAA by virtue of the extensive statutory framework referred to above, and, then, to have regard to its decision to delegate certain of those functions to the Aero Club, which willingly and contractually accepted such responsibilities and, in turn, passed certain of them on to SAHPA, which also accepted its responsibilities in that regard.

[130] Turning to the CAA, its objects were set out in sec 3 of the 1998 Act:

"3. The objects of the Authority are to control and regulate civil aviation in the Republic and to oversee the functioning and development of the civil aviation industry, and, in particular, to control, regulate and promote civil aviation safety and security."

In sec 4 of the 1998 Act of the functions of the CAA included the following:

"4(1) The functions of the Authority are to –

(a) *administer the laws referred to in sub-section (2);*

(b) *recommend to the Minister the introduction or amendment of civil aviation, safety and security legislation;*

(c) *…*

(d) *perform any other functions as are conferred on it by or under any other law;*

(e) *…*

(f) *performfunctions incidental to any of the previously mentioned functions.*

(2) The administration of the laws mentioned in Schedule 1, as amended in accordance with the provisions of the third column thereof, is transferred to the Authority.

(3)…

(4) The Authority must perform its functions in a manner consistent with –

(a) *the objects mentioned in sec 3;*

(b) *…*

(5) The Authority must not discriminate unreasonably against or among various participants or categories of participants in civil aviation safety and security."

The laws in Schedule 1 referred to in sec 4(2) include the 1962 Aviation Act and, by implication, the CAR's promulgated in terms of sec 22 of the 1962 Aviation Act.

[131] It is clear from the structure of the 1998 Act read in conjunction with the 1962 Act and, *inter alia*, the CAR's, that the ultimate responsibility for the control and enforcement of civil aviation safety and security in South Africa vests in the CAA. Through its various functionaries, including an inspectorate and licensing office, it is responsible for the licensing of all civilian aircraft, the testing, rating and licensing of

civilian pilots and the enforcement of the myriad safety measures which are such an integral part of the broader civil aviation sector.

[132] As already stated, the CAAconcluded an agreement with the Aero Club in 2003 in terms whereof the latter would render certain services to the CAA for a period of three years. That agreement records in its preamble that –

> *"A need exists for the Aero Club to perform the duties and exercise the powers in respect of the duties and powers set out in clause 3.4 below",* and that –
>
> *"The Aero Club possesses the necessary expertise to perform the duties and to exercise powers (sic) to perform the functions set out in clause 3.4 below".*

[133] The reference in the Preamble to clause 3.4 appears to be an erroneous reference since it is clause 3.3 which sets out in quite some detail the services to be rendered by the Aero Club under the agreement. Of particular relevance here is clause 3.3.10:

> *"3.3.10 The Aero Club shall be responsible for the issuing of sport aerobatic ratings, display ratings in accordance with the guidelines approved by the CAA and the*

internal issuing of hang-gliding and paragliding pilotcertificates."

In addition, Clause 3.4 provides as follows:

"3.4 The manner of oversight by the CAA of the activities listed in para 3.3 performed on its behalf by the Aero Club shall be set out in a Manual of Procedure drafted by the parties. This Manual of Procedure shall form part of this agreement and will be amended from time to time as required and agreed upon by the parties. The CAA shall conduct oversight inspections and audits regarding adherence to this agreement in terms of the Manual of Procedure on a regular basis, but with intervals not exceeding 3 (three) months."

[134] Regarding the delegation of the Aero Club's functions, the parties agreed as follows in clause 10:

"10. ***Non-assignment***

The Aero Club shall not have the right to assign or transfer any benefit, right or obligation in terms of this Agreement or any part thereof to any person, persons or body without the written consent of the CAA, which consent shall not be

withheld unreasonably. For the purposes of this clause the various sections of the Aero Club and their members shall be considered to be the Aero Club."

[135] As already noted SAHPA is a so-called "section 21 company" having been incorporated as such in April 1994. In its Articles of Association SAHPA's main business is described, *inter alia*, as follows:

"2.1 SAHPA is an Association incorporated under section 21 acting as the National Governing and Co-ordinating body for the sports of Hang-gliding and Paragliding in South Africa…

2.2 As the South African Representative (under delegation from the Aero Club of South Africa) of the International Hang-Gliding Commission (CIVL) the Governing and Co-ordinating Body of World Hang-gliding and Paragliding, to act for that body within the Republic of South Africa on all matters affecting the sport of Hang-gliding and Paragliding within the Republic.

2.3 To act as the body officially recognized by the South African Government as the body responsible for Hang-gliding and Paragliding within the Republic of South

African, and to liase with Government and other authorities where necessary to promote the objects of SAHPA.

2.4 To conduct whatever activities may be considered necessary to further the Main Objective."

[136] Under clause 3 of its Articles of Association SAHPA's main objectives are set out in some detail. They include:

136.1 the administration of hang-gliding and paragliding in South Africa,

136.2 the diligent pursuit of safe paragliding practices, and

136.3 the promotion of paragliding as a sport in South Africa.

[137] While no evidence was placed before the Court regarding the terms and conditions of the assignment by the Aero Club of its functions to SAHPA, the Ops Manual of SAHPA dated December 1992 was. According to the Ops Manual, authority for the application thereof was delegated to the Aero Club by the CAA in terms of "NOTAM AIC (sic) 22.4 of 15 September 1991." The Ops Manual further records that SAHPA "*is deputized by the Aero Club of South African to apply those aspects of the Manual of Procedures specifically identified."* It would appear therefore that the word "*deputise*" was intended to reflect an assignment by the Aero Club in

terms of the aforesaid clause 10 of the agreement between it and the CAAof certain functions to SAHPA.

[138] In AIC 22.4 on 15 September 1991 In AIC 22.4 issued on 15 September 1991 the erstwhile Director General of Transport issued the following Regulation in terms of Regulation 1.6 of the former ANR's of 1976. The relevant parts thereof read as follows:

> *"2. Aviation is a dynamic and changing activity which has grown extensively within the RSA. More than 20 % of all aircraft on the South African register are used exclusively for sporting activities i.e. gliders, microlite, amateur and veteran aircraft. The realistic procedure is that sporting bodies, supported by well-founded and orderly structures, control and regulate themselves.*
>
> *3. In terms of the above the Commissioner for Civil Aviation (CCA) has in terms of regulation 1.6 of the Air Navigation Regulations, 1976, as amended, ruled that all sport aviation activities will with effect from 1 December 1989 until further notice be controlled and regulated by the Aero Club of South Africa.*

4. *This ruling affects model aircraft, hang-gliding, gliding, microlite aircraft, parachuting and ballooning activities being practiced as a sporting activity.*

5. *The ruling has as effect that no aviation sporting activities may take place unless it (sic) is carried out strictly in accordance with the procedures of the appropriate manual as approved by the CCA.*

6. *The CCA does, however, reserve the right to revoke or amend this delegation at any time should it be deemed necessary.*

[139] Further, as the provisions of the initial delegation (AIC 22.4) suggest, the control of sport aviation was to be at club level. In the case of paragliding, this duty resorted with SAHPA. Notionally, then, a contravention of the CAR's by a member of SAHPA was to be dealt with by SAHPA in terms of its disciplinary code. It was SAHPA's duty to ensure that its members adhered to the various provisions of the Ops Manual, including the ANR's (and later the CAR's) and if the members failed to do so, SAHPA was required to take disciplinary action under the Ops Manual, which manual the CAA had sanctioned as part of the process of ultimate delegation to SAHPA.

[140] Finally, the introduction to the Ops Manual records that "the line of authority" in the control of paragliding was to be as follows:

- Firstly the Commissioner for Civil Aviation,
- Followed by the Directorate of Civil Aviation Safety of the National Department of Transport,
- Then the Aero Club, and
- Finally SAHPA.

[141] The original Ops Manual is peremptory in regard to the observation by SAHPA's members of the ANR's. When the ANR's were later replaced by the CAR's, a similar obligation arose. The Ops Manual was revised from time to time and the most recent version thereof (revision no. 2.1) was placed before the Court. This revision was effective from 1 March 2008. Prior to that revision no. 2 was effective from 1 June 2007. It appears, therefore, that the original Ops Manual issued in December 1992 was still applicable at the time of the Plaintiff's accident. The Ops Manual is a comprehensive document covering all aspects of paragliding. These range from requirements regarding safety equipment, licensing of pilots, rules of the air, the control of take-off sites, the reporting of accidents, the approval of training schools and the qualification of instructors, disciplinary procedures and rules relating to competitive paragliding. It would be fair to say that the Ops Manual would be regarded by a paraglider pilot as the "*Bible"* containing all the "*do's-and don'ts*" of the sport. There can be no doubt that strict compliance with the Ops Manual would be required of every paragliding pilot.

[142] As I have remarked, the original version of the Ops Manual required strict compliance with the ANR's [15]. A similar requirement is to be found in Revision nos. 1.2 and 2.1 [16], notwithstanding the fact that the ANR's were replaced by the CAR's in 1996. Given this substitution the reference thereto in the Ops Manuals must be taken to be a reference to the CAR's. The failure by a member of SAHPA to observe the provisions of, *inter alia*, the ANR's (and later the CAR's) would, under sec 9 of the Ops Manual, set in motion a reporting procedure leading to potential disciplinary action against such member. Under the original Ops Manual (applicable in 2004) disciplinary action was left up to the SAHPA Committee which was obliged to report the outcome thereof to the Directorate of Civil Aviation at the Department of Transport. Under the later Revisions, the applicable sanctions were more fully described and particular reference is made to the suspension of pilots' licences.

THE EXTENT OF THE DUTY OF CARE

[143] It goes without saying that civil aviation has become an integral part of daily life for most South Africans. From those who fly locally and abroad with scheduled air carriers, to those people who live in suburbs and in formal settlements close to airports where such carriers regularly take off and land, civil aviation safety

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[15] Rule 1.7: "Air Navigation Regulations shall be observed and complied with at all times."

[16] See rules 1.11 of each respective revision.

and, more particularly, the enforcement thereof by the relevant State agencies, is really something which the public has come to accept as a given. No doubt, the public would want to be assured that such aircraft flights were safe, both in respect of aircraft airworthiness and pilot qualifications. Those on the ground would similarly be entitled to assume that living in the vicinity of an airport or aircraft flight-path is safe and that they will not be unnecessarily be exposed to the danger of aircraft accidents or, for example, of parts falling off aircraft and injuring those on the ground or causing damage to their property.

[144] In my view, the position is no different in relation to recreational or sporting aviation. To revert to the analogy used at the beginning of this judgment, those residents who live along the Atlantic Seaboard in Cape Town would be entitled to assume that the plethora of daily helicopter flips which afford well-heeled tourists a spectacular view of the Peninsula are properly controlled by the authorities and that they (the residents) are not exposed to the risk of such aircraft literally dropping into their gardens. Similarly, those who take their daily stroll with their dogs in many of the public spaces below Lion's Head or Signal Hill would be entitled to assume that it is safe to do so and that they are not likely to be exposed to harm when an errant paraglider decides (or is forced) to land in such spaces.

[145] I would hasten to add that the remoteness of such an event occurring is not too distant. On 10 January 2013 (and during the recess while this matter was still being argued) the local media widely reported (and counsel later confirmed in Court) an aviation accident in which a German tourist who had launched his glider from the slopes of Signal Hill was killed when he crashed into the perimeter wall of a house in

Bantry Bay (a suburb on the lower slopes of the mountain)[17] . Fortunately, no innocent bystanders were hurt in this accident and the only damage to property was evidently the wall.

[146] In my view, an organization such as SAHPA, which has formally been charged with and has assumed the statutory responsibility of, *inter alia*, the licensing of hang-glider and paraglider pilots, of certifying the airworthiness of their aircraft, of establishing and then enforcing the relevant safety procedures and requirements contained in the Ops Manual, owes not only the general public but also the participants in the activities a duty of care to ensure that they are not exposed to any greater harm than participation in such an activity would ordinarily attract. In other words, as the statutory controlling body for a potentially dangerous leisure-time activity, it is duty bound to limit the risk of harm to both the public and to the participants to the extent that it is able to do so.

[147] This proposition may be illustrated by the following examples. As part of a public awareness campaign to promote the sport, free tandem paragliding flips are offered by member clubs of SAHPA to the general public at recognized launch sites. Such tandem flips are permissible under the current version of the Ops Manual, [18] and, I pause to mention such free tandem flips have been permissible since 1992 in terms of the original Ops Manual [19]. Under the current regime, clause 3.2.4 of the

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[17] www.iol.co.za/news/south-africa/western-cape/man-killed-while-paragliding-1.1449921; www.paraglidingforum.com/viewtopic.php?t=53435

[18] Revision 2.1 March 2008, clause 1.6

[19] Clause 1.4 of the SAHPA Operations and Procdures Manual of December 1992.

Ops Manual requires compliance with extensive minimum requirements before a pilot can be certified with a "*tandem rating*" to enable such flips to be undertaken.

[148] Were such free flips to be offered, SAHPA would be duty bound to ensure that the tandem pilots in fact held the requisite ratings. More importantly, should it come to SAHPA's attention that pilots offering free flips were not properly qualified, it would be duty bound to take appropriate steps under the Ops Manual to address the situation. The failure to take such steps in those circumstances would undoubtedly constitute a breach by SAHPA of its duty of care towards those participating in such tandem flights.

[149] A further example comes to mind. Were to come to the attention of SAPHA that one of its constitnent club's take-off sites was located in a dangerous place nearby exploring the pilots of paragliders (and their passengers in the case of ordinary tandem flights) to potential harm, SAPHA would without doubt be duty from as to act. Or, should pilots belonging to one of its clubs persistently land in an area, or in a manner, which would expose the general public to harm, it would similar be duty bound to act. The way in which it would be required to act would depend on the circumstances at hand.

[150] What then of its duty of care in relation to commercial tandem paragliding? I have found that as of April 2004 commercial tandem paragliding was illegal. In such circumstances SAHPA, as the mandated controlling body for the sport in South Africa, was obliged to see that the law was enforced. It was obliged to

inform its members of the very illegality of the activity and to take all reasonable steps within its power to ensure that its members observed the law. To this end it was empowered to take disciplinary steps against errant members and ultimately withdraw their licences or refuse to renew same.

[151] To the extent that there were pilots who were in breach of the law and were running illegal commercial tandem operations, and to the extent that SAHPA was aware thereof, in my view it was obliged not only to take the requisite disciplinary steps against such members but it was also required to bring this state of affairs to the attention of the public who might embark on flights with such illegal operators.This duty would, in the interest of general aviation safety, apply regardless of whether such pilots were members of SAHPA or not. Further, to the extent that such commercial flying constituted a criminal offence, SAHPA was duty bound to report contraventions to the CAA and to the S.A. Police for the consideration of criminal prosecution. Ultimately, if these avenues of reporting were unsuccessful, SAHPA could have approached the Courts for appropriate interdictory relief.

[152] SAHPA owed this duty of care principally to the passengers on such commercial tandem flightswho were being exposed to participation in a recreational activity that was not only inherently risky and dangerous but was ultimately illegal. It also owed that duty of care to the general public for the reasons referred to earlier and to its members who were in breach of the law.

[153] As to the foreseeability of a calamity of the kind which befell the Plaintiff one need only to have regard to the prophetic warning issued to SAHPA by Ms Vicky Buxton of the CAA in an email in 2000 to the following effect:

> *"Thank you very much for copying your emails to me…I sincerely appreciate your efforts to stop these illegal activities [i.e. commercial tandem paragliding].*
>
> *I think it is vital to work as quickly as possible towards a commercial licence – as you rightly point out a tandem accident will cause huge ructions and problems with insurance etc. It may be worth pointing out that in certain countries if a pilot is found to be not appropriately licenced to train/fly he can be charged with culpable homicide!*

[154] And in March 2001 in response to a generally circulated comment by Manzoni about the damages of "the frenzy of commercial tandem activity" which he had recently witnessed on Lion's Head, Mr. Tony Gibson of SAHPA was chillingly close to the truth when he issued the following words of caution:

> *"Tandem flying should remain non-commercial or we are going to end up in some legal battles from injured passengers. Especially if they start to investigate the fact that the flight was not to be charged for in our country".*

BREACH OF THE DUTY OF CARE

[155] In my view SAHPA failed hopelessly to discharge this duty of care in the present case. The evidence conclusively established that the SAHPA Committee initially held the firm view that commercial tandem paragliding was unlawful. Minutes of its meetings during the period 1998 to 2000 reflect an unequivocal stance in this regard at first, but a decidedly ambivalent attitude later.I will .just a few examples.

[156] On 23 February 1998 the erstwhile chairperson of SAHPA, Mr. Hunter, wrote to his fellow committee members in the following forthright terms:

> "● *Regardless of the statement made by Dennis Judd of CAA, we believe that we are entitled to* ***license and instruct*** *for reward, according to our current operations and procedures manual, which was approved by the Commissioner of CAA several years ago. Until such time as SAHPA receives official notification to the contrary we will disregard this unofficial comment.*
>
> ● *This notwithstanding it would appear that we are* ***at variance with the Air Services Act*** *and Mr. Judd is recommending to his superiors that we are offering services for reward without first having obtained the proper licensing and permits from the Department of Transport,*

and that it should be stopped until such time as we comply with the law.

- ***The association would like to inform you that the carrying of passengers for reward ith a SAHPA licence is illegal and we in no way condone this practice.***

- *In order to comply with the legal requirements for carrying passengers for reward you are* ***required to obtain a Carriers Licence from CAA****. Unfortunately this has not been done before for paragliding and CAA have not yet drawn up the requirements necessary.*

- *We do not believe the practice of tandem flying passengers under the pretext of carrying out demonstration flights for instruction purposes as legal and* ***would advise you to stop this practice*** *until this can be clarified." (Emphasis added)*

This letter followed a meeting between SAHPA members and representatives of the CAA (including Mr. Dennis Judd) who held the view that commercial tandem paragliding was unlawful and who told SAHPA this in no uncertain terms.

[157] In a letter to the Aero Club dated 10 January 1999 Mr. Manzoni expressed concern about the "*frenzy of flips*" in Cape Town over the previous Christmas season of 1998/1999 and reiterated his and the CAA's view of the illegality of commercial tandem paragliding:

> *"As I understood things, Mr. Judd and Mr. Hattingh made the law quite clear. The commercial tandem enterprise contravened the law and was instructed to cease its activities. The lack of any follow-up written statement from the Aero Club or CAA is used as reason enough to continue as before…"*

[158] The counter view regarding the legality of commercial tandem flights enjoyed some support amongst SAHPA members, but these appear to have been in the minority.Nevertheless, the SAHPA Committee seems to have been concerned about establishing a legal framework for the operation of commercial tandem flights. So, for example, on 24 October 2000 Mr. Manzoni said the following to his fellow committee members in a document which was also copied to the CAA:

> *"I am about to approach the CAA with a proposal that we investigate the possibilities of a commercial licence structure for hang-gliding and paragliding.*
>
> *I have some idea of the framework within which this is likely to be possible, but since the approach will be on behalf of SAHPA, and*

considering that I do not fly commercially, I need some input from those who have more experience in this area.

What I would like to see is a setting of standards which are considered sensible and safe. These would dictate the type of experience which would qualify a pilot to undertake training, as well as the structure of the actual training program and the method and standard of the examination (both practical and theory).

We would also need to define the various types of commercial activities envisaged."

[159] It appears that those in favour of commercial tandem paragliding eventually held sway and people like Manzoni were openly castigated for their unpopular views and treated like pariahs. Ultimately, Manzoni resigned from the SAHPA Committee in 2002 bemoaning the fact that commercial tandem paragliding was on the increase despite the very illegality thereof.

[160] The views of the "*pro commercial*" lobby in SAHPA (some of whom accused Manzoni of launching a "*cancerous attack*" on SAHPA) reflected a somewhat superficial and self-serving interpretation of the relevant legislation and the CAR's.

The following crude remarks by Mr. Anthony Allan [20] in March 2001 are illustrative thereof:

> *"The flip side of the anti-commercial ops flying argument is this: The pilot who makes a living out of commercial tandem paragliding* ***cannot afford to crash and injure himself or pax and therefore will not fly in "questionable conditions".*** *What many of the finger-pointers overlook is the fact that these commercial operators are out there on the slopes EVERY DAY and know the conditions far better than the tongue waggers who choose to sit back and knit-pick (sic).*
>
> *The entire issue can easily be resolved if the paragliding end of the equation could work together. Every time CAA gets dragged into this argument it irritates them a little more and eventually the big bear will get pissed off by the quizzy little mosquito and SWAT it – hey ho – end of commercial tandem ops.*

[20]For the record it should be mentioned that Mr. Allan was a SAHPA Committee member and later succeeded Mr. Manzoni as Chairperson. He was also the SAHPA "investigation official" who filed the accident report in respect of the Plaintiff's accident. Given that pilot negligence is no longer an issue in this matter, his apparent exoneration of the First Defendant in that report, does not fall to be considered in this judgment.

Been there, done that, got the T-shirt. Carry on flying guys, but tailor the law to suit US. Quit the in-fighting, because all it will do is DISADVANTAGE the bigger picture of paragliding."

[161] Ultimately, the interpretation placed on the status of the purported amendment toPart 96 of the CAR's in AIC18.23 and the addition of sub-paragraph 6 thereof in November 2002, was viewed by many as a vindication of the commercial tandem paragliding lobby and the practice blossomed thereafter.

[162] The on-going accusations and counter-accusations between Manzoni on the one hand and the SAHPA Committee and its officials on the other hand (which are fully documented in the various letter and emails placed before the Court) demonstrate that SAHPA was fully aware of the claims of its flagrant disregard of its own roules (the Ops Manual), the legislation and the CAR's by various of its members (including the First Defendant). The list of various incidents to which Manzoni referred both in his evidence before Court and in this correspondence, demonstrates a failure by SAHPA to take steps to enforce its own rules and the provisions of the relevant legislation and regulatory framework governing paragliding. Ultimately, I am of the view that the breach of the duty of care by SAHPA was not seriously disputedin argument by Mr. Bekker SC: his acceptance of such breach was, of course predicated on a finding by the Court that commercial tendem paragliding was unlawful in 2004. I am satisfied in the circumstances, that SAHPA's omission was wrongful.

THE LIABILITY OF THE CAA

[163] As indicated earlier in this judgment, the Plaintiff's case against the CAA is advanced upon essentially the same basis as her claim against SAHPA viz. that the CAA bears the statutory responsibility to control and regulate civil aviation in South Africa, and to control regulate and promote civil aviation **safety** in the Republic. It was argued that the evidence showed that the CAA was aware (over a protracted period of time) of allegations of illegal paragliding activities in the form of commercial tandem flights, and that it took no steps to address this, either by implementing the existing framework, or preventing such activities in the general interests of aviation safety.

[164] The argument was further that the Plaintiff, as an unsuspecting passenger, required the State's protection from exposure to undertaking a commercial tandem flight with a pilot who did not have the requisite licence to undertake such a flight, and who did so flying in the face of clear provisions to the contrary. Had the CAA applied the relevant legislativeprovisions properly, it was argued that it was probable that the flight in question would not have taken place. It was accordingly contended that the CAA, as an organ of State responsible for ensuring aviation safety, was in breach of a duty owed to the Plaintiff.

[165] The argument advanced on behalf of the CAA unfortunatey did not address these points in any particular detail. It was suggested, firstly, that paragliding was under the control of the Aero Club and, ultimately, SAHPA. The argument seems to be that, having divested itself of its statutory duty to promote civil aviation safety by

delegating such power to the Aero Club (and then SAHPA), the CAA is off the hook, as it were. I regret to say that the issue is not as simple as that as I shall attempt to demonstrate shortly.

[166] Then, in reliance on the evidence of, *inter alia,* Manzoni, the CAA suggested that there was no credible evidence which demonstrated that it owed a duty of care to the Plaintiff or, that it acted negligently or that any such negligence was causally connected to the Plaintiff's damages.

[167] Somewhat surprisingly, through what appears to be a superficial assessment of the relevant legislation, the CAA sugggsts that a paraglider is **not** an aircraft – though it does not say what it is.

[168] In a brief concluding submission made in their heads of argument on behalf of the CAA counsel touched on the provisions of sec. 19 of the 1998 Act and sec 20 of the Aviation Act, 1962. In its plea, the CAA had relied on sec. 19 as exempting it from liability for the Plaintiff's damages [21]. No reliance was placed in the plea on sec. 20 of the Aviation Act [22].

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[21]"S19: **Limitation of liability**:

> No person, including the State, is liable in respect of anything done or omitted in good faith in the exercise of a power or the performance of a duty in terms of, or by virtue of this Act, or in respect of anything that may result therefrom.

[22]S20: **Indemnification of State and certain State employees:**

> Notwithstanding any legal provision to the contrary the State and its officers and employees acting in the performance of their duty shall not be liable for –

[169] I shall dispose of the statutory exemption points immediately. Firstly, as I have already said, reliance on secs. 20(a) and (b) of the Aviation Act was not pleaded by the CAA and it is strictly not permitted to raise the point in argument. But, to the extent that it now seeks to rely on the provisions of a statute, it will be seen that the section in question relates, firstly, to "*any aircraft owned, operated or chartered by the State".* That situation does not obtain *in casu,* where the paragliders are privately owned and operated. Secondly, the provisions of sec. 20(b) relate to the conveyance of goods. That situation is not applicable either in the present case.

[170] As far as the exception afforded to the CAA by sec. 19 of the 1998 Act is concerned, it will be observed that in order to enjoy the protection of that section, the CAA must establish that it acted in good faith in failing to discharge its duty to the Plaintiff. The CAA presented no evidence in an endeavour to bring itself within the ambit of the section, nor did it refer in argument before the Court to any facts which it suggested should be considered so as to afford the CAA protection under the section. Simply put, the CAA has advanced no evidence, nor argument to bring itself within the

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(a) Any loss or damage caused by the death of or injury to any person while conveyed in any aircraft owned, operated or chartered by the State through its Department of Transport or while entering or mounting or being in such aircraft for the purpose of being conveyed in it or while being in or alighting from such aircraft after having been conveyed in it, if that person was so to be conveyed otherwise than in the performance of his duty as an officer or employee of the State; or

(b) Any loss of or damage to any goods conveyed in such aircraft otherwise than in the interests of the State."

purview of sec. 19 of the CAA Act, and no reliance can therefore be placed by the CAA on the statutory exemption afforded by the section.

[171] I return to the question of statutory responsibility. In the heads of argument filed on behalf of the CAA its counsel sought to distinguish its functions and duties thus:

> *"88. Lastly, the Fifth Defendant is a creature of statute and cannot perform any functions beyond what is prescribed in the statute that established it and those which it administers. Nowhere in the various (sic) legislative framework describing the functions of the Fifth Defendant is the Fifth Defendant given an obligation to "ensure" safety. The Fifth Defendant "promotes" and "controls" civil aviation safety. This is different to "ensure". The functions of the fifth defendant do not include the "policing" or "prevention" of illegal activities. This distinction clearly appears in the Carmichele case which the plaintiff seeks to rely on".*

[172] The submission is striking at two levels. Firstly, there is the issue of the CAA's duties to "*police*" or "*prevent*" illegal aviation activities. I believe the point is effectively answered by referring the CAA to its own concerted efforts over a number of years to stop what it considered to be an unlawful commercial helicopter business

operated at the V and A Waterfront in Cape Town. The activity involved the use for leisure flips of the iconic "*Huey*" helicopter which had been operated by the US Army in the Vietnam war. A local businessman, Mr. Gary van der Merwe, had sought to offer the public flights in this aircraft by forming a club which persons could join. The CAA regarded this as an attempt to circumvent the provisions of Parts 24, 94 and 96 of the CAR's, and took positive steps to ground Van der Merwe's aircraft. The on-going battle between the parties is recorded in a number of cases in this Court and the Supreme Court of Appeal [23].

[173] In the first of those cases (the Huey Extreme Club matter), a dispute had arisen between the parties as to their airworthiness of the helicopter in question. In opposing an application which sought to set aside the groundingof the aircraft, the CAA filed an answering affidavit by its Manager: Leagal Services which concluded with the following statement:

> *"I humbly submit that to uplift the grounding of the helicopter without establishing the airworthiness status will compromise aviation safety and could endanger the lives of both the operators (sic) personnel and passengers."* [24]

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[23] The Huey Extreme Club v South African Civil Aviation Authority, case no. 10549/2003; V and A Waterfront Properties (Pty) Ltd and 1 Other v Helicopter and Marine Services (Pty) Ltd and 2 Others [2004] 2 All SA 664(C); and on appeal at 2006(1) SA 252(SCA); Helibase (Pty) Ltd v Commissioner for Civil Aviation and Others [2009] ZAWCHC 136 (13 February 2009).

[24] See para 78 of the affidavit of Khalatse Colbert Marobela*jurat* 17 December 2003.

[174] Quite clearly the function of the CAA then was intended to prevent an illegal activity which could expose innocent members of the public to harm: an activity which they no doubthad reason to believe was lawful given the very public manner in which it was being operated. To my mind the situation was no different in relation to the question of commercial tandem paragliding and I am of the view that the argument advanced by the CAA which I have set out above is really semantic in nature and no more.

[175] Secondly, the purported reliance in argument by counsel on para 43 of Carmichele[25] does not assist the CAA either. The ultimate responsibility for the enforcement of the Aviation Act and the CAR's lay, at all material times, with the CAA. This responsibility was prescribed statutorily. In Carmichele, Harms JA discussed the role of the State generally in matters such as these.

> *"[43] Did the State owe a duty to the plaintiff? The answer lies in the recognition of the general norm of accountability: the State is liable for the failure to perform the duties imposed upon it by the Constitution unless it can be shown that there is compelling reason to deviate from that norm."*

[176] Applying that approach to the facts at hand, the situation arises where the CAA, a statutory body and therefore an organ of State, is vested with the statutory responsibility to take reasonable steps to ensure the safety of all potential commercial

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[25]Carmichele v Minister of Safety and Security and Another 2004 (3) SA 305 (SCA) at 324B

air passengers. By virtue of the definitions already referred to earlier this would include the Plaintiff.

[177] The evidence placed before the Court shows unequivocally that as far back as about 1998, the CAA knew that commercial tandem paragliding was rife and, as the email from Buxton referred to earlier shows, it was aware of the potential danger that it posed to passengers.But, despite warnings issued from time to time by certain of its officials regarding these activities, no positive steps were taken by the CAA to put an end thereto. And, it must immediately be said, those steps were relatively simple and readily available to the CAA. It could have withdrawn the offending pilots' licences, refused to issue or renew licences, and it could have taken steps to inform members of the public by way of a general publicity campaign, of the very illegality of the activity. Furthermore, it was empowered to effect the withdrawal of the authority conferred on SAHPA to regulate and control paragliding.

[178] In my view, the legal convictions of the community in which we live demand that the failure by the CAA to take such reasonable steps to prevent the occurrence of an illegal activity such as commercial tandem paragliding, of which it was manifestly aware, and which illegal activitycould, and ultimately did, result in serious injury to an unsuspecting member of the public, should be considered to be unlawful.

[179] The fact that the CAA had delegated the regulation and control of paragliding ultimately to SAHPA is to my mind neither here nor there. The CAA has

admitted in the pleadings that it bears the statutory responsibility to control and regulate civil aviation in South Africa, and in particular, civil aviation safety. The denial in its plea that its failure to ensure that commercial tandem paragliding flights did not take place "*did not fall within [its] statutory functions and duties*" is therefore not sustainable.

[180] The statutory duties described in the 1998 Act are primarily the responsibility of the CAA. Its decision to contractually delegate certain of those functions to the Aero Club and then to sanction further delegation on to SAHPA does not relieve the CAA of its statutory obligations. None of the parties contended that the delegation of control ultimately to SAHPA fell foul of the provisions of sec. 238 of the Constitution, 1996, nor was the point dealt with in argument.

[181] The legal basis for delegation of control was to be found in the provisions of Part 149 of the CAR's. Both Mr. Rosenberg SC and Mr. Bekker SC were in agreement on this point. Part 149.01.2 permits the Commissioner of the CAA to designate a body or institution to establish safety standards relating to aviation recreation, and to carry out a range of related functions. Part 149.02.1 provides that no organization shall undertake aviation recreation except under the authority of, and in accordance with, the provisions of, an aviation recreation organization approval issued under sub-part (2) of Part 149.

[182] The evidence establishes, not that there has been a designation of a body or institution by the Commissioner purporting to act in terms of Part 149.01.2(1),

but rather an alternative method of designation to the Aero Club in terms of a contractual arrangement, the Memorandum of Understanding of 2001.

[183] But the CAA's duties and responsibilities are prescribed statutorily – in the present case by virtue of the 1998 Act – and there is nothing in that Act which suggests that these statutory duties and responsibilities can be delegated by the CAA to any other party, thereby relieving itself of its statutory tasks and functions. The limited power of delegation under Part 149 must be construed against this statutory backdrop. In my view the general norm of accountability referred to earlier in Carmichele prevails above all else. The CAA knew of the fact that commercial tandem paragliding was rife and it knew of the potentially disarstrous consequences of an accident. It is the primary agency of the State charged with responsibility for aviation safety andit cannot be absolved from such responsibility because it has chosen to delegate control of civil aviation safety in respect of paragliders to SAHPA. This argument applies all the more where the CAA had direct knowledge that SAHPA was acting in breach of the CAR's and did nothing to address the situation.

[184] In those circumstances the legal convictions of the community, knowing that a failure by the CAA to take reasonable steps could have far reaching consequences for an unsuspecting member of the public given the nature of the activityinvolved, would without doubt regard such failure as unlawful. I conclude therefore that the CAA's omission, like SAHPA's, was unlawful.

[185] It is perhaps appropriate at this juncture to deal with a further submission made by Mr. Rosenberg SC when arguing the *ultra vires* point dealt with above. The argument was that in the absence of an exemption properly granted under the Air Services Act tandem paragliding for reward without a commercial operating licence remained unlawful and that that was the position even today.

[186] While there is much to be said for this submission in the light of the findings made in this judgment, it is notnecessary nor appropriate to finally pronounce upon the point. The Court was not asked to deal with the issue, for example, by delivering a declaratory order. Furthermore, there may be other parties who have an interest in such an order who have not been heard, and it is also possible that SAHPA may have wished to make further submissions on the point.

[187] I will accordingly leave the matter there, save to say that the respective duties of care of SAHPA and the CAA have been dealt with above and those parties now know what they have to do, and how they need to conduct their affairs, in order to discharge those duties of care. I have little doubt that as responsible bodies they will ensure that no further harm is caused to unsuspecting commercial paragliding passengers.

CAUSATION

[188] As with the duty of care, much has been said and written in recent times about causation. As the Constitutional Court recently said in Lee [26]:

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[26] Lee v Minister for Corrrectional Services 2013 (2) SA 144(CC) at 161B.

> *"[38] The point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem, arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation."*

[189] After a detailed analysis of the relevant case law and the most recent academic writings, Nkabinde J endorsed the *sine qua non* theory to causation formulated by Corbett CJ in International Shipping[27]:

> *"…[I]n the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a*

[27] International Shipping Company (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700E-I.

> *causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way to be a cause sine qua non of the loss it does not necessarily result in legal liability. The second enquiry then arises viz. whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of public policy may play a part. This is sometimes called "legal causation"."*

[190] The Constitutional Court went on in Lee to emphasize that our law does not require an inflexible application of a substitution exercise in the application of the "but-four" test: a flexible and commonsense approach should be adopted. The Court does not require of a plaintiff to establish the necessary causal link with certainty, but rather to establish that the wrongful conduct was a probable cause of the loss. This calls for a sensible retrospective analysis of what would probably have occurred, due

regard being had to the facts of the case and what one would expect of people in the ordinary course of human affairs.

[191] So, one must ask onesself, would commercial tandem paragliding opportunities have been available to the general public during the Easter weekend of 2004 had SAHPA and the CAA done what was expected of them: to have taken relatively straight-forward and inexpensive steps to put a stop to what was known to be an illegal activity?

[192] In this regard, what would have been required of SAHPA was to issue a firm and unequivocal directive to its members by way of its regular electronic newsletter that the activity was proscribed, and that pilots who continued to participate therein would lose their ratings. Further steps would have been to withdraw permission to non-compliant pilots to use SAHPA's affiliated clubs' launch sites. And, one could also contemplate a publicity drive to bring the situation to the attention of an unsuspecting public.

[193] As for the CAA, it employs an inspectorate with fairly wide powers, as one sees in the decision of the Court *a quo* in the V and A Waterfront Properties case *supra*. Indeed, the names of certain of the personnel mentioned in that case (Messrs Broberg and Cloete) also cropped up in this matter. It was never suggested by the CAA in this case that enforcement of the legislation would have presented any realistic or insurmountable problems. And rightly so – it can hardly be alleged that the CAA lacked the legal teeth, or the necessary manpower to bring commercial tandem

paragliding to a halt. Further, our courts must assume that law enforcement through the usual methods such as the grounding of aircraft, criminal prosecution of offenders and even interdicting such conduct, if necessary, would have had the desired effect.

[194] I am therefore satisfied that the Plaintiff has established, on a balance of probabilities, that the failure by SAHPA and the CAA to enforce the statutory regimé and to stop the unlawful activity in question has been shown to be causally connected (in the sense that Corbett CJ in International Shippingspoke of "*factual causation*") to her injuries. In any event, the issue was ultimately not seriously challenged in argument by Messrs Bekker SC and Mokoena SC – for good reason. Common sense tells one that had these two bodies taken the necessary steps to stop the activity, the opportunity for the Plaintiff's "*walk on the wild side*" would simply not have arisen.

[195] Turning to the second leg of the causation enquiry(the so-called "*legal causation"*), the Court's task touches on, *inter alia*, considerations of public policy. In International Shipping[28] Corbett CJ referred to the following passage from Fleming[29] as a useful summary in that regard:

> *"The second problem involves the question whether, or to what extent,the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed*

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[28]701B

[29]The Law of Torts, 7th ed at 173

> *upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted valued 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."*

[196] In my view, an organ of State such as the CAA will be held strictly to account for the failure to adequately discharge its statutory functions. The proper control of all forms of aviation activities is absolutely essential in a world where aviation has become an integral part of daily life: from commercial and cargo carriage to private conveyance and leisure – time activities. And, it is important to bear in mind that the purpose of such control is to ensure not only the safety of those being conveyed on an aircraft, but also those ordinary people on the ground, many of whom still gaze up in wonderment as a huge passenger aircraft thunders overhead on its way to some distant destination.

DISCURSUS – VOLENTI NON FIT INIURIA

[197] In the context of considering legal causation, it is necessary to touch on a defence to the claim raised by both SAHPA and the CAA. This was the application

of the Roman law maxim *volenti non fit iniuria*[30] which is generally, and loosely, referred to as "*the voluntary assumption of risk*".

[198] As Burchell[31] points out, there are really two defences raised when the maxim is resorted to by a defendant. The first is consent, in the sense that a plaintiff consented to intentional infliction of harm upon herself. The second is the knowledge and appreciation of the risk inherent in the activity involved and the agreement to run that risk.

[199] It seems to me that the Plaintiff's decision to "*take a walk on the wild side*", was taken with the full appreciation that she was embarking on a potentially dangerous activity: to her it was potentially "*wild*". And, there can be no doubt that running off a slope on the side of a mountain as a means of launching onesself into manned flight is inherently dangerous. To that end the participants wear protective gear such as crash helmets and flying suits to limit injury, and attempt to minimize the risk by choosing optimal weather conditions, or by declining to fly when the weather is adverse or unpredictable.

[200] In this case, in seeking to establish this ground of justification, SAHPA and the CAA bore the onus of establishing the *volenti* defences pleaded.[32] Neither of these parties adduced any evidence on the point in the attempt to discharge the onus

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[30]*An injury is not done to one who consents*"

[31]Principles of Delict p68 *et seq*

[32]Santam Insurance Company Ltd v Vorster 1973 (4) SA 764 (A) at 780G

of proof but relied rather on cross-examination of the Plaintiff (which in any event was limited), and the general circumstances surrounding the case.

[201] In Vorster, which remains the leading case in our law on the defence of *volenti*, Ogilvie Thompson CJ observed that while the dividing line between a *volenti* defence and contributory negligence may sometimes be blurred, the relevant criteria to establish the former as a defence are radically different from the latter. The touchstone for such proof was "*knowledge, appreciation and consent*" on the part of the party alleged to have consented. In defining the approach to be adopted the Chief Justice said the following [33]:

> *"The Court must, in my view, thus perforce resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter the Court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary, have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto. The foregoing appears to me to afford a practical method of dealing with what is admittedly a somewhat*

[33] 781D

difficult problem, to be in general conformity withour decisions insofar as they touch this point…".

[202] In the instant case the *volenti* defence is of course taken, not by the person who was responsible for the paragliding flight in which the Plaintiff was injured, but by a party distant to the event itself. The riposte by SAHPA and the CAA is really "*you have no claim against me arising from a breach of my statutory duty/duty of care because you accepted the risk of injury to yourself when you agreed to fly with De Villiers*".

[203] Applying the approach advocated in Vorster, the important criterion which must be put into the equation is knowledge on the part of the Plaintiff that the activity itself was unlawful – it is only when that is factored in that one can consider whether the Plaintiff participated in the activity with the full knowledge of the risks attendant upon the flight. The Plaintiff's evidence before the Court that she would not have flown with De Villiers had she known that the activity was illegal does not really help one: it is a subjective state of mind and indeed, one would not have expected an answer to the contrary.

[204] One must rather establishwhether the Plaintiff is likely to have consented to the risk from an objective assessment of the facts of the case. Notwithstanding her frank admission to enjoying a bit of a thrill ("*a walk on the wild side"*), I have little doubt, having seen the Plaintiff testify, that she would not have participated had she been told that tandem flying for reward was prohibited. As her

professional qualification suggests, the Plaintiff is an intelligent person. She was a woman in her mid 30's who had not come to South Africa with the express intention of partaking in paragliding or other forms of adventure sport -she was expecting to be flown over the Atlantic Seaboard for a short flight to view the Waterfront from the air.One was left with the impression that the Plaintiff is not what is sometimes referred to colloquially as "*an adrenaline junkie*" – a phrase which I understand to refer to a person who has a predisposition to engaging in adventure sports and similar activities. In fact she struck me as someone who is of a somewhat retiring disposition.

[205] I would think that had the Plaintiff been told of the true situation she would most probably have declined the offer. She appears to be the sort of person who would abide by the law rather than contravene it. In saying this I must bear in mind also that the Plaintiff was in a foreign land and would most likely not have had knowledge of the consequences of participating in an illegal activity. That factor, too, was likely to have influenced her decision not to participate.

[206] However, in my view it is not necessary to conclusively decide this point at the level of evidentiary burden since I am of the view that it is inimical to our law that the *volenti* defence may be raised where the activity "*consented to*" is proscribed by statute. The following hypothetical example springs to mind. The relevant authority is aware that a helicopter used for recreational flips is not airworthy due to a technical defect. This notwithstanding, the helicopter is not grounded and is permitted to fly. When the helicopter crashes as a result of the aforesaid defect, a claim is

brought by an injured passenger against the responsible authority based on the breach of its duty of care to the passenger and its failure to prohibit the aircraft from flying.

[207] To permit the authority to raise the *volenti* defence in such circumstances would be to recognize and to legitimize the otherwise unlawful conduct of a statutory body. Such an approach seems to me to be *contra bonos mores* in a constitutional dispensation demanding a high degree of transparency and accountability on the part of its public administration in general, and organs of State in particular. In this regard I am mindful of the provisions of, *inter alia*, secs 40, 41 and 195 of the Constitution and the fact that public policy is now "*deeply rooted in our Constitution and the values that underlie it".*[34]

[208] The approach in English law for more than a century has been that it is not open to a party who acted in breach of a statutory duty, to escape liability by relying on the *volenti* principle. [35] The decision of the House of Lords in the ICI case has been cited with approval in four cases in our country [36], all of them in relation to the question of vicarious liability in the employment environment. It is true that the four English cases to which I have referred also arose in the employment situation (or

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[34]Barkhuizen v Napier 2007 (5) SA 323 (CC) at 333C-D.

[35]Baddeley v Earl Granville (1887) 19QBD 423; Wheeler and Another v New Merton Board Mills Ltd 1933 All ER (Reprint) 2008 (CA); Bowmaker Ltd v Tabor [1941] 2 All ER 72(CA); Imperial Chemical Industries Ltd v Shatwell [1964] 2 All ER 999 (HL) – "*The ICI case*".

[36]Santam Insurance Company Ltd v Vorster, *supra*, at 778 A; De Welzim v Regering van Kwazulu en 'n Ander 1990 (2) SA 915 (N) at 923 G; Midway Two Engineering and Construction Services v Transnet BK 1998 (3) SA 17 (SCA) at 22 B; Bezuidenhout NO v Eskom 2003 (3) SA 83 (SCA) at 92 H.

contract of "*master and servant*" as it was then known) and dealt with a similar theme *viz*. the employer requiring the employee to undertake a task that was forbidden by statute or regulation, the employee being injured in the process and the employer disavowoing liability on the basis of the *volenti*maxim. The courts in England consistently refused the employer the right to rely on the *volenti* defence in those circumstances.

[209] While the English approach to the defence of *volenti* when there was a statutory breach at play arose out of a contractual relationship between the litigating parties, it was recognized generally in South Africa by McKerron[37] in the leading text book on delict:

> *…(A)ccording to the generally accepted view, the maxim cannot be set up as a defence to an action based on the breach of a statutory duty. The duty, it is said, is imposed by the legislature and its existence cannot therefore be affected by the conduct of the injured party. But it is arguable – in our law, at least any rate, if not in English Law – that if the injured party not only knew of the danger but also knew of his statutory right to protection, and nevertheless dispensed with the performance of the duty, he cannot subsequently complain of its breach. See Morrison v Anglo Deep G.M. Ltd 1905 TS 775 at 781; Wheeler v New Mertin Board Mills Ltd, supra."*

[37]The Law of Delict 7th ed (1971) p73

[210] I am of the respectful view that this approach is still applicable several decades later, particularly in light of the constitutional imperatives in relation to public administration set out in sec 195 of the Constitution.[38] It is, in my mind, accordingly contrary to public policy to postulate a situation where a statutory duty of an organ of State to enforce the law can be defeated by a defence of *volenti*, particularly in circumstances where it has been shown that the injured party had no knowledge of the statutory prohibition.

[211] I therefore hold that there is no merit in the defence of *volenti non fit iniuria* put up by SAHPA and the CAA.

CONCLUDING REMARKS ON CAUSATION

[212] Following upon that digression, I revert to the question of legal causation. In Lee[39] the Constitutional Court observed that the purpose of establishing legal causation was to ensure that there was a reasonable connection between the breach of the duty and the harm caused. The link is most important because *"the consequences of an act or omission might stretch into infinity*" or "*impose an inordinate burden on the State*" leading to *"indeterminate liability*".

[213] I have found that the Plaintiff did not "*consent to the risk*". It was never suggested that the Plaintiff was partially responsible for her injury by way of

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[38] Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at 134 para 29.

[39] 171 para 68

contributory negligence, nor was it argued by either Messrs Bekker SC or Mokoena SC that to hold SAHPA and/or the CAA liable for the Plaintiff's damages was "*likely to have a 'chilling effect' on the performance of administrative or statutory"* functions [40].

[214] It is possible, I suppose, that some rogue pilots may have ignored the instructions of the authorities (had the latter done what they should have) and flown for reward because of the lure of easy money. There is no suggestion however, that De Villiers was a pilot of that sort. As a highly experienced international pilot one must assume that, had he been told that the activity was unlawful, he would not have flown commercially. And so, at the end of the day, one must adopt a common sense approach and ask the following question: had SAHPA and the CAA done what they should have in regard to the prevalence of tandem paragliding for reward, would the Plaintiff have flown with De Villiers on Monday 12 April 2004? The answer must be an unequivocal "*no*".I am accordingly satisfied that the question of causation has been established on a preponderance of probabilities.

CONCLUSION

[215] In the light of the aforegoing, I am satisfied that the Plaintiff has established that SAHPA and the CAA owed her a duty of care, that they breached that duty of care, that their breach was wrongful and that it was causally related to the injuries she suffered.

[216] **Accordingly I make the following order**:

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[40] Steenkamp NO's case *supra* at 140B

A. The Fourth and Fifth Defendants are found to be jointly and severally liable for such damages as the Plaintiff may prove to have been suffered by her as a result of the paragliding accident in which she was involved on 12 April 2004 at Hermanus, Western Cape.

B. The Fourth and Fifth Defendants are jointly and severally liable, the one paying, the other to be absolved, for Plaintiff's costs of suit herein, such costs to included the costs of two counsel where employed.

C. The Plaintiff is declared to have been a necessary witness.

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GAMBLE, J

FOR PLAINTIFF	**:**	**Adv. S.P. Rosenberg SC and Adv. P.A. Corbett**
INSTRUCTED BY	**:**	**Malcolm Lyons Brivik Inc**
FOR FOURTH DEFENDANT	**:**	**Adv. S.J.. Bekker SC and Adv. J. du Plessis**

INSTRUCTED BY	**:**	**Savage Jooste & Adams Inc c/o Norton Rose SA**
FOR FIFTH DEFENDANT	**:**	**Adv. P.L. Mokoena SC and Adv. M.B. Legoce**
INSTRUCTED BY	**:**	**Werksmans Attorneys**
DATES OF HEARINGS	**:**	**28 and 29 November 2013; 3, 4 and 5 December 2013; 29 January 2013; 18, 19 and 20 February 2013; 20 March 2013**
DATE OF JUDGMENT	**:**	**20 September 2013**