THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 036/08

AARON JONATHAN BROOKS **Appellant**

and

THE MINISTER OF SAFETY AND SECURITY
Respondent

Neutral citation: **Brooks v Minister of Safety and Security (036/08) [2008] ZASCA 141 (27 November 2008)**

CORAM: **MPATI P, FARLAM and PONNAN JJA, KGOMO and MHLANTLA AJJA**

HEARD: **11 November 2008**

DELIVERED: **27November 2008**

Summary: Delict – liability of State - for loss of support in consequence of the incarceration of the breadwinner

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ORDER

On appeal from: High Court (Cape Town) (HJ Erasmus J sitting as court of first instance).

The appeal is dismissed with costs, including those consequent upon the employment of two counsel.

JUDGMENT

PONNAN JA (Mpati P, Farlam JA, Kgomo and Mhlantla AJJA concurring):

[1] This appeal has its genesis in events that formed the subject matter of *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA). Tevents, which are offered as no more than a backdrop and which require no elaboration at this stage, were succinctly set out by Nugent JA (para 1) as follows:

'Neil Brooks, who lived in Bothasig on the Cape Peninsula with his wife, Dawn, and their two children, Nicole and Aaron, was fond of firearms. He owned a 9mm pistol and .38 revolver, both of which he was licensed to possess in terms of s 3(1) of the Arms and Ammunition Act 75 of 1969. Brooks was also fond of alcohol, which he habitually consumed to excess. When under its influence he was inclined to become aggressive and to abuse his family. On 21 October 1995 these various aspects of his life combined into tragedy. During the late afternoon, after Brooks had been drinking at the family home, a domestic squabble erupted. Brooks loaded both his firearms, placed a holster and more ammunition around his waist, and confronted Dawn, who was then in the garage with the children. Brooks pointed the cocked pistol at her, but she repeatedly pushed it away, and then he shot her. Although she was injured Dawn managed to escape from the garage with Aaron and they sought refuge across the road on the property of the respondent [Van Duivenboden]. Brooks then turned on eleven-year-old Nicole, who remained trapped in the garage, and he shot and killed her before following after Dawn. Meanwhile, Aaron, who was in possession of Dawn's revolver, had called on the respondent for assistance and had handed to him the revolver. The respondent and his father went into the street to investigate, where they encountered Brooks who began firing at them and at other neighbours who had come to investigate, with both firearms. A bullet struck the respondent in the ankle as he attempted to flee and he collapsed on the ground. Brooks found Dawn hiding in the respondent's garage and he shot her repeatedly until she was dead. He then returned to where the respondent had collapsed and shot him in the shoulder before the respondent managed to ward him off by firing with Dawn's revolver. Ultimately the police arrived and Brooks was arrested. He is now serving a long term of imprisonment for the crimes he committed that day.'

[2] The appellant is Aaron, the son of Neil Brooks. His grievance would appear to lie against his father, but like Mr Van Duivenboden, he chosen instead to sue the State, represented by the respondent (the Minister of Safety and Security) for the recovery of damages. The basis of this claim, once again like that of Van Duivenboden, that the police were negligent in failing to take the steps available to them in law to deprive Brooks of his firearms. Had that been done, so it is postulated, the tragedy would not have occurred.

[3] The particulars of claim allege:

'As a consequence of the shooting incident as aforesaid, the said Brooks was charged and convicted of various offences, including murder, as a result of which he was given a sentence of 20 years of imprisonment, which he still serves.
As a result thereof he has been rendered permanently unable to support Plaintiff as he would otherwise have done.'

[4] Of the total amount claimed by the plaintiff, R168 000 lies in respect of 'loss of support from his father' and R2 400 000 in respect of 'loss of a proper education opportunity as a result of loss of support'. That portion of the plaintiff's particulars of claim was met with an exception. Of the five grounds initially raised, the following three – without the remaining two having been specifically abandoned – were advanced in the court below: first, that no delict had been committed against the appellant's breadwinner; second, respondent's servants did not act wrongfully; and, third, was no causal nexus between the omission complained of and the loss suffered. The second ground was upheld by H J Erasmus J in the High Court (Cape Town), who issued the following order:

'1 The exception to the plaintiff's claim for loss of support and for loss of an education opportunity arising from the incarceration of his father, Neil Brooks, is upheld with costs, including the costs occasioned by the employment of two counsel.

2 The plaintiff is given leave, if so advised, to file amended particulars of claim within one month.'

The judgment is reported as *Brooks v Minister of Safety and Security*2008 (2) SA 397 (C). The present appeal is with the leave of the court below.

[5] The exception raises the issue of wrongfulness, which is a *sine qua non*of Aquilian liability. Negligent conduct giving rise to damage is not per se actionable. It is only actionable if the law recognises it as wrongful. As Brand JA stated in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*2006 (3) SA 138 (SCA) para 10:

'Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss…. In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. ...'

Put somewhat differently: 'The negligent causation of pure economic loss is *prima facie* wrongful in the delictual sense and does not give rise to liability for damages unless policy considerations require that the plaintiff should be recompensed by the defendant for the loss suffered' (per Harms JA in *Steenkamp NO v Provincial Tender Board, Eastern Cape* (3) SA 151 (SCA) para 1).

[6] At the outset it is necessary to investigate the nature and scope of the action brought by the appellant. It is undoubtedly a claim by a dependant for loss of support. According to existing South African law, such a claim is available to a dependant against a person who has unlawfully killed a breadwinner, who was legally liable to support him/her (*Legal Insurance Company Ltd v Botes*1963 (1) SA 608 (A) at 614B). The nature of a dependant's claim, in contradistinction to a damages action for bodily injuries, was dealt with by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838H-839C in these terms:

'In the case of an Aquilian action for damages for bodily injury . . ., the basic ingredients of the plaintiff's cause of action are *(a)* a wrongful act by the defendant causing bodily injury, *(b)* accompanied by fault, in the sense of *culpa* or *dolus*, on the part of the defendant, and (c) *damnum*, ie loss to plaintiff's patrimony, caused by the bodily injury. The material facts which must be proved in order to enable the plaintiff to sue (or *facta probanda*) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action arises. In the usual case of bodily injury arising from a motor accident this concurrence would take place at the time of the accident. On the other hand, in the case of an action for damages for loss of support, the basic ingredients of the plaintiff's cause of action would be *(a)* a wrongful act by the defendant causing the death of the deceased, *(b)* concomitant *culpa* or (*dolus*) on the part of the defendant, *(c)* a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and *(d) damnum*, in the sense of a real deprivation of anticipated support. The *facta probanda* would relate to these matters and no cause of action would arise until they had all occurred.'

[7] The action is *sui generis*and, as it was put by Innes CJ in *Jameson's Minors v*

*Central South African Railways*1908 TS 575 at 583-4:

'Our law, while recognising no right of action on behalf of the deceased's estate, gives to those dependent on him a direct claim, enforceable in their own names, against the wrong-doer. This is a right not derived from the deceased man or his estate, but independently conferred upon members of his family.'

An essential and unusual feature of the remedy, according to Corbett JA (*Evins* 837H-838B)

‘ ... is that, while the defendant incurs liability because he has acted wrongfully and negligently (or with *dolus*) towards the deceased and thereby caused the death of the deceased, the claimant (the dependant) derives his right of action not through the deceased or from his estate but from the facts that he has been injured by the death of the deceased and that the defendant is in law responsible therefor. Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue and in such action the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner. These principles are trite and require no citation of authority.’

[8] The scope of the action is therefore clear - it is due to third parties who do not derive their rights through the deceased or his/her estate but rather from the fact that they have been injured by the death of their breadwinner and that the defendant is in law responsible for such death (*Union Government (Minister of Railways) v Lee* AD 202). Here we have been invited to extend the common law action for damages for loss of support to a person in the position of the appellant. That, it has been submitted, would be an incremental step to ensure that our common law evolves in accordance with the norms and values as reflected in our Constitution and the judicial pronouncements of this court, particularly in *Van Duivenboden.*

[9] The first ingredient of a plaintiff's cause of action for loss of support is a wrongful act by the defendant causing the death of the breadwinner. To satisfy that requirement a plaintiff is required to prove: (a) a wrongful act by the defendant; (b) the death of the deceased; and (c) a causal nexus between (a) and (b). has been argued that the considerations relied upon in *Van Duivenboden*in finding in favour of the existence of a legal duty on the part of the police, apply with equal force to this case and there is no good reason why that duty should not be extended to the appellant. This hypothesis, as I shall endeavour to demonstrate, is plainly untenable.

[10] Notwithstanding a measure of overlapping, there is a basic difference between a claim for loss of support and that available to a plaintiff who has suffered

bodily injury or sustained damage to his/her property as a result of the wrongful and negligent (or intentional) conduct of the defendant. In the latter case the action lies for a wrongful act committed in respect of the plaintiff's person or property and with *culpa*(or *dolus*) *vis-à-vis*the plaintiff. The distinction, as Corbett JA pointed out in *Evins* (at 839C – G), is significant. The *facta probanda*in a bodily injury claim differ substantially from the *facta probanda*in a claim for loss of support. Proof of bodily injury to the plaintiff is basic to one; proof of the death of the breadwinner is basic to the other. Moreover, even where both claims flow from the same incident, each cause of action may arise at a different time. The cause of action in respect of bodily injury will normally arise at the time of the event giving rise to the claim, whilst the cause of action for loss of support will arise only upon the death of the deceased which may occur some considerable time later.

[11] That distinction is not purely theoretical in this case. It explains why Van Duivenboden and the appellant must fail. Van Duivenboden's was one for compensation for bodily injuries sustained by him during the events giving rise to the claim – the shooting incident. The appellant's claim on the other hand is located elsewhere. It is one for loss of support, which is alleged to have occurred in consequence of the incarceration of the breadwinner. But that could hardly give rise to a claim. Plainly, the deprivation of the breadwinner's liberty, which renders him incapable of supporting the appellant, is a consequence of the law simply having taken its course. The breadwinner's incarceration followed upon his arrest, prosecution, conviction and sentence for the crimes that he had committed. The lengthy period of imprisonment and the consequent deprivation of his liberty was expressly sanctioned by law. Notwithstanding the undoubted hardship that this must have caused the appellant, it can hardly give rise to an action for loss of support.

[12] It has been submitted that 'the fact that the appellant's father's capacity to support the appellant was extinguished, not by his death or injury, but by his incarceration, makes no difference in principle'. In *De Vaal v Messing*1938 TPD 34, the court was asked to extend the dependant's action from the case of fatal to non-fatal injuries, in circumstances where the breadwinner was injured in a collision and disabled to the extent of 75 per cent in his wage-earning capacity. It declined to do

so. It reasoned that it is clear that the breadwinner would in those circumstances be entitled as against the wrongdoer to compensation for the full extent of the diminution in his earning capacity and that any claim by his dependants would thus be met by the simple answer that they had suffered no damage.

[13] In the present factual matrix, the claim is even more tenuous than that encountered in *De Vaal*. , the breadwinner by his own intentional act has rendered himself incapable of supporting his dependant. That notwithstanding, even if one were to assume for present purposes in the appellant's favour, that the conduct complained of by the servants of the respondent is indeed wrongful, for as long as the breadwinner is alive such conduct would only be wrongful *vis-à-vis*the breadwinner and not the dependant. It follows that so long as a right of action exists in a breadwinner there cannot also be a right of action in his/her dependants for loss of maintenance (*Tucker's Dependants v Sub Nigel G.M. Co.*1929 (13) PH J7 (WLD)). For, when the injured breadwinner himself/herself has a right to obtain compensation for the injury suffered, the necessary proof that the dependants – who look to their breadwinner for support and whose claim has not been extinguished – have suffered loss owing to that injury cannot also be forthcoming. Quite obviously, if both the dependant and the breadwinner were to be entitled to recover compensation, the person causing the injury would be liable to pay compensation twice over in respect of the same damage.

[14] One of the reasons advanced in *De Vaal* refusing to extend the common law dependant's action to the plaintiff in that case was that such an extension would produce the anomaly that a person in *De Vaal'*position could, by his own contributory negligence, create in favour of his dependants a cause of action that would otherwise not exist in the absence of such negligence. As Greenberg J pointed out (at 39):

'… we would have the extraordinary result that in the case of a non-fatal injury, the other party's liability to the dependants is created by the bread-winner's contributory negligence; this conjures up the picture of a trial case in which the bread-winner in his evidence will stoutly maintain that he too was to blame for the collision while the defendant will be equally concerned to convince the Court that he alone is the culprit and that the injured was above reproach.'

That anomaly would be exacerbated, where – as here – there is intentional

wrongdoing by the breadwinner, who by his own act has rendered himself incapable of supporting his dependants.

[15] Of *De Vaal v Messing*, Schreiner JA stated:

‘ ... [t]hough it is not a decision of this Court [it] furnishes support for the view that, even in the field of dependants’ action, the law takes a conservative view on the subject of the expansion of the Aquilian remedy beyond what the authorities have recognised in the past.’ (*Union Government v Ocean Accident and Guarantee Corporation Ltd* (1) SA 577 (A) at 586H-587A).

[16] It is true that in matters of human behaviour we are often told not to judge by results, but in law, when considering whether a contention is well-founded, the absurdity of the results to which it will give rise is not an immaterial consideration. That a person in the position of Brooks could by his own intentional wrongful act create in favour of his dependants a cause of action that would not otherwise exist is nothing short of preposterous; indeed in my view that would be a dangerous proposition. After all it is a trite principle of our law, that a person should not be allowed to benefit from his/her own wrongful act.

[17] Considerations of legal policy, coherence and consistency manifestly informed the decision in *De Vaal.* , whilst our system of law *is*a living system, capable of adaptation to changing circumstances, I am not satisfied that jettisoning a basic ingredient of the dependant’s action is warranted on the grounds that to do so would be to keep in step with the prevailing attitudes of society. The remedy in its present ambit is *sui generis*and anomalous and extending it to a person in the position of the appellant would accentuate the anomaly as in this case – unlike in *De Vaal* not even bodily injury to the breadwinner can be shown. This court cannot give its imprimatur to what is being sought here, as to do so would not be to extend legal principle but to go counter to it. It follows that the appeal must fail.

[18] In the result the appeal is dismissed with costs, including those consequent upon the employment of two counsel.

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V M PONNAN

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	R S van Riet SC J H Roux SC Instructed by: Heyns and Partners Inc Goodwood Honey Attorneys Bloemfontein
For Respondent:	A Schippers SC R Jaga Instructed by: The State Attorney Cape Town The State Attorney Bloemfontein