THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 1010/2013

In the matter between:

THE SOUTH AFRICAN HANG AND PARAGLIDING ASSOCIATION **FIRST APPELLANT**

THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY` **SECOND APPELLANT**

and

DIANE ELIZABETH BEWICK (NEE MILLER) **RESPONDENT**

Neutral citation:	*The South African Hang and Paragliding Association v Bewick* (1010/2013) [2015] ZASCA 34 (25 March 2015).
Coram:	Brand, Mhlantla, Leach, Saldulker *et* Mbha JJA
Heard:	9 March 2015
Delivered:	25 March 2015

Summary: Delict – respondent injured in paragliding accident while transported as passenger for reward – issue whether tandem paragliding for reward illegal – further issue, whether in that event failure by appellants to prevent the illegal activity constituted wrongfulness in delict – further issue whether appellants' omission was causally connected to harm suffered by respondent.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel (in respect of both the appellants).
2 The order of the court a quo is set aside and replaced by the following:
'The plaintiff's claim against the fourth and fifth defendants is dismissed with costs, including the costs of two counsel in respect of both these defendants.'

JUDGMENT

Brand JA (Mhlantla, Leach, Saldulker *et* Mbha JJA concurring):

[1] The first appellant is the South African Hang and Paragliding Association (SAHPA) while the second appellant is the South African Civil Aviation Authority (SACAA). I propose to refer to them jointly as the appellants, save where distinction becomes necessary. The respondent is Mrs Diane Berwick, a radiographer from Tyneside in the United Kingdom. During 2004 she spent the Easter holiday in Cape Town with her husband, who was then her fiancé. One evening over dinner she expressed an interest in taking a tandem paragliding flight. She did so because she had had the experience in Turkey and because she thought she would enjoy seeing the Cape Town Waterfront from the air. One of her friends then made the necessary arrangements with entities that offered tandem paragliding flights for reward.

[2] So it happened that on Monday 12 April 2004 the respondent and her group were picked up from their hotel in Cape Town. Contrary to her expectation that the

flight would take her over the Cape Town Waterfront, the group was driven out to Hermanus in a minibus. The respondent was paired with a very experienced paragliding pilot, Mr Robert de Villiers-Roux. Unlike a hang-glider, a paraglider has no fixed frame, and is more akin to a parachute. With a tandem paraglider the passenger is positioned in front and slightly lower than the pilot. The respondent and De Villiers-Roux took off from the launch site on a hillside outside Hermanus. Just after take-off, the paraglider experienced a so-called wing collapse which affected its manoeuvrability and caused it to lose height. In consequence, De Villiers-Roux swung the paraglider back towards the hillside in an attempt to keep it aloft. From the position where she was sitting, the respondent thought that she could cushion the blow of the impending collision by putting her feet out. She obviously did not realise the speed at which they were already travelling. When her feet hit the hillside, she broke both her legs and also her spine. In consequence, she spent many months in hospital, first in Cape Town and then in England. Eventually her injuries left her paralysed in a wheelchair.

[3] Resulting from these tragic events, the respondent instituted action in the Western Cape Division of the High Court in which she claimed damages, in the pounds sterling equivalent of about R25 million, from six defendants. The first defendant was the pilot, Mr De Villiers-Roux. The second and third defendants were his employers with whom she had contracted to take the tandem flight for reward. The fourth and fifth defendants were SAHPA and SACAA while the sixth defendant was the Department of Transport. Shortly before the commencement of the trial, however, the respondent settled her case against first, second and third defendants and withdrew her claim against the sixth. In consequence the trial proceeded before Gamble J solely against the two appellants. At the commencement of the hearing and at the behest of all parties, Gamble J ordered a separation of issues under Uniform rule 33(4) of the High Court Rules. In terms of the separation order, issues concerning the merits, ie those relating to the appellants' liability in principle, were to be adjudicated first while issues concerning the extent of the respondent's loss and the quantum of her damages were to stand over for later determination. At the end

of the preliminary proceedings, Gamble J held in favour of the respondent. In the result he found the two appellants liable, jointly and severally, for such damages as the respondent may prove at the second stage. The appeal against that order is with the leave of the court a quo.

[4] By the nature of things, the exact nature and the constituent elements of the respondent's claim against the appellants will in time become apparent in full detail. For introductory purposes it can, however, be stated thus:

(a) Paragliding within South Africa fell under the direction and control of the two appellants.

(b) Tandem paragliding for reward was illegal and the two appellants were aware that this illegal activity was going on.

(c) The two appellants were under a legal duty to take reasonable steps to terminate and prevent this illegal activity, but had negligently failed to do so.

(d) Had the appellants done so, the flight during which the respondent sustained her injuries, would not have occurred.

[5] The respondent's case is therefore based on an omission or failure to do something as opposed to positive culpable conduct. That brings about a different approach to the delictual element of wrongfulness. As has by now become well established, negligent conduct manifesting itself in the form of a positive act which causes physical injury raises a presumption of wrongfulness. By contrast, in relation to liability for omission and pure economic loss, wrongfulness is not presumed and depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination according to criteria of public and legal policy consistent with constitutional norms (see eg *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) paras 22-25).

[6] On occasion the same principles had been formulated somewhat differently, namely that wrongfulness depends on whether or not it would be reasonable, having

regard to considerations of public and legal policy, to impose delictual liability on the defendant for the loss resulting from the specific omission. No objection can be raised against this formulation, as long as it is borne in mind that reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, which is an element of negligence, but concerns the reasonableness of imposing liability on the defendant for the harm resulting from his or her omission (see eg *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae* 2011 (3) SA 274 (CC) para 122). Since wrongfulness is not presumed in the case of an omission, a plaintiff who claims on this basis must plead and prove facts relied upon to support that essential allegation (see eg *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency* 2009 (2) SA 150 (SCA) para 14).

[7] The legal duty on the part of the appellants for which the respondent contended in her pleadings, rested on two propositions: (a) that at the time, tandem paragliding for reward was illegal; and (b) that the appellants were under a statutory obligation to prevent or terminate that illegal activity. Establishment of these facts will, of course, give rise to the secondary enquiry as to whether, as a matter of public and legal policy, they justify the imposition of a legal duty with the consequence of delictual liability. But the antecedent question remains whether the respondent had succeeded in proving the factual grounds on which her case relies. Before embarking on these questions of fact, it is perhaps useful, however, to point out what is not in issue. First, the negligence of the pilot, Mr de Villiers-Roux, is not in issue. This is so, not only because the respondent had settled with him and his employers, but because the respondent's whole approach was that it matters not, for the determination of the appellants' legal duty, whether the pilot was negligent. Secondly, the respondent does not contend that tandem paragliding in itself was illegal and should thus have been prevented by the two appellants. Her proposition of illegality turned exclusively on the element of reward.

Illegality of tandem paragliding for reward

[8] In support of her thesis of illegality, the respondent set great store in the evidence of Mr Robert Manzoni, who was at some earlier stage the vice-chair of SAHPA. According to his evidence, paragliding for reward became prevalent in this country during about 1998. From the start, he was against it. The reason for his opposition stemmed from his conviction that reward increased the danger of the sport. Once passengers are prepared to pay up to R800 for a flight, so Manzoni believed, there is pressure on the pilot to fly. The decision whether to fly or not, so he maintained, becomes driven by money instead of aviation safety. Manzoni also believed that paragliding for reward was illegal. He communicated his views to his fellow members of SAHPA as well as to SACAA. Broadly speaking, the response to his communications was (a) general disagreement with his thesis that reward renders tandem paragliding more dangerous; but (b) consensus that paragliding for reward was probably illegal. The qualification probably resulted from the fact that the legislative enactments governing civil aviation were all promulgated before paragliding became popular as a sport. In consequence the legality or otherwise of paragliding remained somewhat obscure.

[9] The difference of opinion with regard to the impact of reward on safety gave rise to a different approach to legality. While Manzoni's proposal was that the illegal activity should be put to an end, others, including SACAA, who did not share Manzoni's belief that reward increased the risk inherent in tandem paragliding, were making an effort to remove all legal impediments to this activity. It appears that Manzoni became increasingly isolated in his stand, which drove him to become somewhat intransigent. I infer this from the length, content and number of the emails that he sent to SAHPA, SACAA and other interested parties in his attempt to persuade them to adopt the course of conduct which he proposed. It is clear, however, that his efforts met with no success. In fact, it had the opposite effect. The responses to his emails reveal growing irritation with his crusade until eventually Manzoni became ostracised by the paragliding community. What is demonstrated by all this, as I see it, is that the overwhelming view in paragliding circles, which

encompassed both SAHPA and SACAA, was that reward did not render tandem paragliding more dangerous, ie that it did not increase the risks inherent in tandem paragliding, and that it should therefore be legalised. These developments, I believe, are also revealed by the legislative history, to which I now turn.

[10] In her particulars of claim, the respondent pertinently alleged that paragliding for commercial gain was illegal due to (a) clauses 1.16 and 2.8 of SAHPA's Operations and Procedures Manual; (2000) (b) Part 2.25 of the Air Navigation Regulations, 1976; and (c) Parts 24, 94 and 96 of the Civil Aviation Regulations 1997, read with Aeronautical Information Circular (AIC) 18.23.

[11] Clauses 1.16 and 2.8 of SAHPA's Operations and Procedures manual provide:

'1.16 Tandem flights

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 a paraglider.

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

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.'

[12] The Civil Aviation Regulations (CARS) 1997, to which reference is made in the quotation from the respondent's pleadings, were issued under s 22 of the Aviation Act, 74 of 1962 (since repealed by the Civil Aviation Act 13 of 2009). The Aviation Act applied to all aircraft. Albeit of doubtful correctness, the prevailing opinion, not only amongst the parties, but also of those responsible for the drafting of regulations, was that a paraglider qualified as an aircraft. Moreover, it was generally accepted that a paraglider is a 'non-type certified aircraft', or NTCA, as defined in the

CARS. Why I find the prevailing opinion of doubtful correctness, is that an 'aircraft' is defined in the Aviation Act as 'any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface'. My misgivings arise from the fact that I do not believe that a paraglider – which is akin to a parachute – can be described as a 'machine', a word that generally connotes an apparatus that uses mechanical power – *Concise Oxford Dictionary* 12 ed (2011). In addition, according to Mr Manzoni's evidence, paragliding only took root as a sport in this country during the late 1980s. It can therefore be accepted with confidence that the definition of an 'aircraft', which was introduced by way of an amendment to the Aviation Act in 1969, never had paragliders in mind. But because it was common cause between the parties in this case, that a paraglider is an aircraft, the issue was never properly investigated.

[13] The Aeronautical Information Circulars or AICs to which reference is also made in the respondent's pleadings, were issued by the Commissioner of Civil Aviation in terms of the 1997 CARS. AICs were published to convey practices and procedures, technical standards and so forth. But they were also used to publish exemptions which the Commissioner of Civil Aviation was empowered to make in terms of CARS. So, for example, the Commissioner was authorised to exempt any aircraft from certain provisions of 'document LS/1'. Until about November 2002 the operation of NTCAs, including paragliders, was regulated by this document. Of significance, for present purposes, was paragraph 1.3 of LS1 which provided that NTCAs 'shall not be operated for remuneration, unless otherwise authorised by the Commissioner'.

[14] On 15 November 2002 the Commissioner issued AIC 18.23 to which specific reference is made in the respondent's particulars of claim. The document was entitled: (568) 'Publication . . . of the full particulars of an exemption granted by the Commissioner for Civil Aviation from the requirements of regulation 11.04.6 of the Civil Aviation Regulations 1997.' Under the heading "Details of exemption' the document then explained that:

'The exemption will . . . withdraw Document LS/1 and impose the requirements contained in proposed Parts 24, 94 and 96 . . . as conditions for the operation of aircraft that do not qualify for the issue of a certificate of airworthiness (Non-type Certificated Aircraft)[or NTCAs].

Under the heading 'Background Information' the document proceeded:

'Document LS/1 was reinstated by the CAA . . . as an interim measure to address the lack of any regulatory requirements for non-type certificated aircraft. It was initially envisaged that the Document LS/1 would be re-instated for a period of six months. This envisaged six months re-instatement period has stretched to over 18 months and it will probably take another six months before Parts 24, 94 and 96 are promulgated.

Document LS/1, however, does not make adequate provision for the commercial operation of non-type certificated aircraft and is completely silent on the issue of operating certificates. . . . .'

Under 'Motivation' it further proceeded:

'Document LS/1 has clearly outlived its usefulness. It is expected that it will take approximately six months to translate Parts 24, 94 and 96 into Zulu and obtain the Ministers approval for these Parts. As an interim measure, the CAA motivated the granting of this exemption to operators of Non Type Certificated Aircraft, subject to the condition that the requirements contained in proposed Parts 24, 94 and 96 are to be complied with by the operators of NTCA'

and:

'During the development of parts 24, 94 and 96, extensive consultation was undertaken and the proposed Parts were well received by stakeholders. Furthermore the Proposed Parts 24, 94 and 96 were published for comments on 11 January 2002 . . . There should therefore be no objection from stakeholders to these Parts being introduced in this manner and at this juncture. Indeed the commercial operators of NTCA should welcome the speedy introduction of the Proposed Parts, as this will eradicate most of the impediments they currently face. . . .'.

[15] As it turned out, parts 24, 94 and 96 of CARS eventually only came into operation six years later, during 2008. But at the trial all parties accepted that, as at 12 April 2004 when the respondent's accident occurred, paragliding operations were governed, pursuant to AIC 18.23, by the proposed parts 24, 94 and 96 of the 1997

CARS. Likewise it was common cause at the trial that Part 24 was not of any direct concern in this case. The provisions of Part 94 relied upon by the respondent appeared in subparagraph 94(4), which provided that 'non-type certificated aircraft operated in terms of this Part are prohibited to carry passengers or cargo for reward'. But a debate arose with regard to what Part 96 provided at the time. The reason for the debate appears from what follows. As finally promulgated in 2008 regulation 96.01.1 – included in Part 96 – contained, inter alia, subparagraphs (2) and (6) which read as follows:

'(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) . . .

(6) For the purposes of sub-regulation (2), tandem operations with hang-gliders, paragliders or parachutes, even if carried out for remuneration or reward, shall not considered to be the providing of an air service as defined in the Air Services Licensing Act, 1990 [Act 115 of1990] . . . nor to be a commercial air transport operation, as defined in Part 1 of these Regulations.'

[16] The respondent's case is clearly supported by subparagraph (2), because it is common cause that no paraglider operator in this country – including the operator in this case – had at the time been issued with a licence in terms of the Air Services Licensing Act, 1990. At the same time it is clear that, for hang-gliders, paragliders and parachutes, the effect of subparagraph (2) is cancelled out by (6). In fact, on the face of it, the latter subparagraph clearly proclaimed tandem paragliding for reward to be a legal activity. The debate arose, however, because the respondent relied on a version of regulation 96.01.1, published on 11 January 2002, which contained no subparagraph (6). The appellants, on the other hand, were unable to produce a published version of 96.01.1 which supported their case, ie which included subparagraph (6). What they relied on was a minute of a SAHPA committee meeting on 25 November 2002 which reads:

'**Commercial Tandem Issue**: The law currently removes the requirement to register in terms of the air licences act 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 shall not be considered to be the providing of an air service nor to be a commercial operation.'

[17] In the event, the court a quo held that SAHPA had failed to show that subparagraph (6) was incorporated in the Commissioner's exemption under AIC 18.23. After that judgment was handed down and pending this appeal, the appellants continued their search for the document that could have given rise to the SAHPA minutes of 25 November 2002. That search remained unsuccessful. Yet, the search produced a completely different document, AIC 18.30, which was published by the Commissioner on 3 November 2003, that is, a year subsequent to the minuted SAHPA meeting but prior to the respondent's accident on 12 April 2004. This document is entitled 'Amendments to proposed parts 24, 94 and 96'. In paragraph 1 it provided 'AIC 18.23 dated 02-11-15 refers'. Even more significantly, annexed to the document was a version of Part 96 which included sub-paragraph (6).

[18] The appellants brought an application to introduce AIC 18.30, together with its important annexure, in evidence on appeal. Despite earnest opposition to this application by the respondent, I believe we should receive the further evidence. First of all, I think the failure to produce AIC 18.30 at the trial was as much the fault of the respondent as that of the appellants. Perhaps even more so, since the onus to establish the facts surrounding the illegality or otherwise of tandem paragliding for reward, was on the respondent, not on the appellant as the court a quo seems to have thought. Secondly, I would be left with a feeling of unease if we were compelled to decide the question of legality on a statutory basis we now know to be outdated. In the light of this new evidence the clear inference, as I see it, is that prior to the accident, the Commissioner of Civil Aviation intended to legalise tandem paragliding for reward by introducing subparagraph (6).

[19] Yet, the respondent raised another argument as to why, despite the Commissioner's efforts, the activity remained illegal. This argument went along the

following lines. Even if the exemption in subparagraph (6) of regulation 96.01.1, on its own terms, legalised tandem paragliding for gain, it was not competent for the Commissioner to exempt these operators from the provisions of the Air Services Licencing Act, 1990 in the purported exercise of an authority conferred by regulations promulgated under different legislation, ie the Aviation Act. The stipulation by the Air Services Licensing Act, that commercial flying requires a carrier licence, so the respondent's argument concluded, therefore remained in place – hence the continued illegality of commercial tandem operations. The appellants' response to this line of argument was, in the main, that the respondent had not previously placed any reliance on non-compliance with the Air Licencing Act. She had not, so they pointed out, referred to this Act in her pleadings and had never contended at any stage during the trial that tandem flying for gain was illegal, due to non-compliance with this Act. In consequence the factual basis for this argument was never properly considered. Although I share the appellants' aversion to litigation by ambush, the respondent's argument leaves one with the niggling disquiet that it may be a good one; that despite the publication of Part 96.01.1(6) of CARS by the Commissioner, tandem paragliding for gain without a commercial operating licence had, after all, remained illegal under the Air Services Licencing Act.

[20] The other legislative provision on which the respondent relied in her pleadings was the Air Navigation Regulations, 1976. SACAA's answer to this allegation in its plea was simply that these regulations never applied to paragliders. As far as I can determine, the issue thus arising was never properly canvassed at the trial. In fact, it was clear at the hearing of the appeal that counsel for both appellants were under the firm impression that the respondent no longer relied on these regulations. However, it became apparent during the argument on behalf of the respondent that she indeed still relied on the proposition that these regulations found application and that they had been contravened. Her arguments in support of this contention started out from the premise that, at the time of the accident, Part 62 of the 1997 CARS, which provided for the issuing of pilot licences for recreational aircraft, had not yet been brought into operation. Pilot licences were therefore still regulated by the Air

Navigation Regulations of 1976. Broadly stated, private licences issued under these regulations did not allow flying an aircraft for reward – what was required for this purpose, was a commercial pilot's licence. Although these regulations predated paragliders, it did pertain, so the respondent's argument went, to an 'aircraft' as defined, which definition included paragliders. Since the pilot in this case had no commercial licence, so the respondent contended, he acted in contravention of these regulations when he undertook the tandem flight for gain. Again, this argument leaves one with the niggling sense of unease that, although its factual basis had not been properly explored, it may just be correct. In the end my overall impression of the legal position is therefore that the Commissioner of Civil Aviation intended to legalise paragliding for reward and perhaps thought that he had succeeded in doing so. Nonetheless there could have been other statutory provisions in this maze of enactments which still required co-ordination so as to harmonise the position. The result may be that, albeit unintended, tandem paragliding for reward remained illegal at the time of the accident. My further deliberation thus proceeds on the assumption that this was so.

The appellants' statutory obligations to terminate and prevent tandem paragliding for reward

[21] On the assumption that there were statutory provisions which rendered the impugned activity illegal, the next question arising is – why were the appellants responsible for the enforcement of these statutory provisions? With regard to SACAA, the respondent's case rested on the Civil Aviation Authority Act 40 of 1998, which provided SACAA with its statutory origin. With reference to the provisions of this Act, the respondent relied primarily on s 3 and s 4. In terms of s 3, the objects of the SACAA are, amongst other things, to control, regulate and provide civil aviation safety and security. Section 4 renders SACAA responsible for the administration of the laws referred to in the section, which include the Aviation Act and, by implication, the regulations promulgated under that Act. In the light of these provisions, I agree with the court a quo's finding that the ultimate responsibility for the enforcement of

civil aviation safety vested with SACAA. I also agree with the court's further conclusion that:

'Through its various functionaries, including an inspectorate and licencing office, it is responsible for the licencing 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.'

[22] The statutory position of SAHPA is somewhat more obscure. In terms of a memorandum of agreement between SACAA and an entity called the Aeroclub of South Africa – an association incorporated not for gain – SACAA delegated some of its powers and functions with regard to sporting aviation activities, to the latter, as it was authorised to do in terms of regulation 149 of the 1997 CARS. One of its powers so designated was 'the issuing of paragliding pilot certificates'. Yet, by some or other means unknown, SAHPA – and not the Aeroclub – assumed the power to issue and suspend paragliding pilots' licences. In the same way as the court a quo, I shall assume, in favour of the respondent and without any evidence to that effect, that this power must have been delegated to SAHPA by the Aeroclub pursuant to its authority to do so in terms of clause 10 of the memorandum of agreement between it and SACAA. Starting out from this premise, the respondent contended that SAHPA was statutorily obliged to suspend the licences or to refuse the annual renewal of the licences of paragliding pilots who acted in contravention of statutory provisions and of SAHPA's own Operations and Procedural Manual, by partaking in tandem paragliding for gain. For the sake of argument I shall assume in favour of the respondent that all this holds true.

Wrongfulness

[23] Even on the assumption that the appellants had failed to perform a duty imposed upon them by statute, the question remains whether their omissions were wrongful in the delictual sense. To the uninitiated it may sound contradictory to say that omissions to comply with statutory obligations are not wrongful. But that impression loses sight of the special meaning attributed to the element of wrongfulness in the context of delictual liability. As I have said by way of

introduction, wrongfulness in this context means that, in accordance with judicial determination, considerations of public and legal policy dictate that it is reasonable to impose delictual liability on the defendant for the harm caused by the omission involved. The proper approach to the question, whether an omission to comply with a statutory obligation gives rise to delictual liability, appears from the following statement by Cameron JA in *Olitzki Property Holdings v State Tender Board & Another* 2001 (3) SA 1247 (SCA) para 12:

'Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretations, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, . . . But where a common law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is 'just and reasonable' that a civil claim for damages should be accorded. The conduct is wrongful, not because of the breach of the statutory duty *per se*, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.'

[24] In this case the respondent did not contend that the statutory provisions upon which she relied, in themselves, conferred an action for damages on her. Instead her claim rested on a common law legal duty. So, as explained in *Olitzki*, the question of wrongfulness depends on whether, in all the circumstances, it would be reasonable to impose legal liability on the appellants. The court a quo held that it would. What weighed heavily with the court in arriving at that conclusion, was the principle deriving from the concept of State accountability which is formulated thus by Nugent JA in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 21:

'Where 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 recognised in any particular case.'

But as Nugent JA immediately added:

'The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages . . .'

[25] Accountability is therefore just one of the considerations which should, among others, be taken into account. My concern immediately arising from the conclusion arrived at by the court a quo can be illustrated by the following example: Passenger A goes on a tandem paragliding flight for reward, while passenger B also goes on a tandem flight, but for free. Both are involved in an accident in exactly the same circumstances, which did not entail any negligence on the part of the pilot. Both accidents constituted what could be described in the parlance of insurance law as an act of God. Nonetheless, passenger A has a delictual claim against the appellants while passenger B has none. Can that really represent the sense of justice of the community?

[26] I think what lies at the heart of my difficulty, is that, in the preponderance of cases, payment of a reward would have nothing to do with the occurrence of the harm causing accident. I know Manzoni thought differently, but his was clearly a lone voice crying in the wilderness. The vast majority of those involved in paragliding circles, including SACAA, obviously thought otherwise. They clearly believed that there is no correlation between the payment of reward, on the one hand, and the inherent dangers of tandem paragliding, on the other. Otherwise stated, they clearly believed that reward does not increase the risk of an accident. I say that because, around the time of the accident, the clear majority of those involved in paragliding, including SACAA, were doing their level best to legalise the impugned activity by changing the regulations. In addition, the respondent's case was not that those advocating these changes were irresponsible or that the changes would render tandem paragliding more dangerous. On the contrary, her case was simply that

unless and until the regulations were amended, the activity was unlawful. The only conclusion dictated by logic, is an acceptance by most, including the respondent, that the illegality had nothing to do with the safety of the passenger.

[27] Stated somewhat differently: if the appellants' underlying statutory obligations stemmed from their obligation to ensure and promote the safety of civil aviation, why would it be reasonable to impose liability upon them for an omission which had no direct impact on aviation safety. Closely linked to this consideration is that, from the appellants' perspective, virtually everybody involved in the sport of paragliding was of the view that tandem paragliding for gain should be legalised. They probably also realised that after the publication of subparagraph (6) of Part 96 by the Commissioner of Civil Aviation, legalisation of this activity was merely a matter of dotting the i's and crossing the t's, so to speak. In addition, they were aware, because it appears from their exchange of emails with Mr Manzoni, that tandem paragliding for reward had by then become a popular tourist attraction and that some paragliding pilots had started to make a living out of this activity. The rhetorical question arising from all this is – why would the appellants, in these circumstances, take steps to stop an activity which was about to be legalised and did not constitute a safety hazard? This, of course, gives rise to the further rhetorical question – why would it, in the circumstances, be considered reasonable to impose legal liability upon them for not doing so?

[28] Another question that presents itself in considering the picture as a whole is – what were the appellants expected to do? As to both the appellants, the respondent's first answer to this question is that they should have informed paragliders that the activity was illegal, which presupposes, of course, that paragliders did not know that. As to SAHPA, the respondent's further contention was that it should have refused to renew or suspend the pilot licences of offending pilots. With reference to SACAA the respondent proposed that it should have withdrawn SAHPA's authority to issue pilots' licences and then suspend or refuse to renew the licences of offending pilots. In addition, so I understood the argument, SACAA

should have taken legal steps to stop this illegal activity, eg by approaching the court for an interdict against the offending pilots or by reporting them to the police. What the exercise of these policing functions presupposes, of course, is that the offending pilots have been identified. Paragliders, so it appears from the evidence, can take off from an untold number of places. Unlike aircraft, properly so called, they are not confined to an airfield. Identification of offending pilots would therefore require widespread control and investigation by inspectors appointed by the appellants. As to SAHPA, no evidence was presented with regard to its available resources, but the inherent probabilities seem to indicate that it would not be able to afford these extensive measures of control.

[29] By contrast, SACAA would probably be able to impose the necessary control by various measures at its disposal, including its inspectorate. But as the court a quo rightly pointed out, SACAA is responsible for a myriad of safety measures which are inherent to the broader civil aviation sector. I also agree with the court's sentiment that civil aviation safety, for which the SACAA holds overall responsibility, has become an integral part of daily life for most South Africans. Not only to passengers, but also to those living close to airports. 'No doubt', so the court said, 'the public would want to be assured that such aircraft flights were safe, both in respect of aircraft airworthiness and pilot qualifications'. This is undoubtedly so, but in these circumstances it could hardly be expected of SACAA, in its determination of priorities, to allocate substantial resources to prevent tandem paragliding for gain which was considered not to increase the risk of harm in any way and at a time when this activity was about to be legalised. That, as I see it, presents another reason why it would not be reasonable to impose legal liability on the appellants for omitting to terminate or prevent this activity.

[30] Apart from these considerations, application of general principles that have become crystallised in the jurisprudence of this court (see eg *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 21) also seem to point away from the imposition of legal liability on the appellants. First

amongst these is the general point of departure that appears from the following statement by Grosskopf AJA in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 504D-H:

'However, the approach of English law seems to me to be different from ours . . . English law adopts a liberal approach to the extension of a duty of care . . . South African law approaches the matter in a more cautious way, as I have indicated, and does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension.'

[31] Another principle, aligned to this conservative approach, was formulated thus by Harms JA in *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 12:

'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author *Asser* points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is 'dat skade rus waar dit val'. Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that the act is negligent does not make it wrongful . . .'

[32] A further policy consideration which always looms large in deciding whether or not to extend delictual liability to a situation not previously recognised, is the apprehension of boundless liability (see eg *Fourway Haulage* para 24). In the course of its judgment the court a quo gave various examples of situations in which SAHPA would in its view be held liable. Included amongst these was liability to:

'. . . [T]hose 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 those spaces.'

In addition, the court proceeded to extend the liability of the appellants to other situations which it described as tandem 'flips' by a pilot not properly qualified; tandem flights that took off from dangerous places; and so forth. If all this is true, it would to me be the cause of great concern about indeterminate liability.

[33] Then there is also the consideration which has become known in the context of wrongfulness as the plaintiff's vulnerability to risk. As developed in our law, vulnerability to risk signifies that the plaintiff would have no alternative remedy or could not avoid the risk of harm by other means (see eg *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) para 28). As we know in this case, the respondent did indeed have another remedy: she could and did sue the pilot and his employer. It is true of course, that this remedy would only be available if the pilot was negligent. But if he was not, there seems to be good reason to revert to the default position in law of delict, namely, that everyone has to bear the loss that he or she suffers. Although one obviously has great sympathy for the respondent in her plight that, in itself, cannot justify the extension of delictual liability where it would not be reasonable to do so. It follows that, in my view, the court a quo had erred in deciding the issue of wrongfulness in favour of the respondent.

Causation

[34] My finding against the respondent with regard to the essential element of wrongfulness in reality tolls the death knell of her case. But I also find myself in disagreement with the court a quo's finding in her favour on the issue of causation. In the circumstances, I propose to formulate my reasons for this view with as little elaboration as practicable. The well-established test for factual causation is the 'but-for' test which is formulated by Corbett JA as follows in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-G:

'[T]he so-called "but-for" test, . . . is designed to determine whether a postulated cause can be identified as a *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 the plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not the cause of the plaintiff's loss; *aliter,* if it would not so have ensued.'

[35] In applying this test, the court a quo's reasoning went as follows:

'Common sense tells one that had these two bodies [ie the two appellants] taken the necessary steps to stop the activity, the opportunity for the Plaintiff's "walk on the wild side" [ie the tandem paragliding flight for reward] would simply not have arisen.'

My dilemma with this approach can be illustrated by the following example:

A, who is the owner of a motor vehicle, allows B, who to the knowledge of A, is unable to drive a vehicle, the use of his vehicle. A's conduct is clearly both wrongful and negligent. But B then has a collision with C which had nothing to do with B's incompetence as a driver. It was all C's fault. Applying the but-for test in the way of the court a quo, the conclusion will be that A's failure to prevent the incompetent driver from driving was the cause of the accident: but-for the fact that A had allowed B to drive the vehicle, the accident would not have occurred because the vehicle would not have been on the road. The result is self-evidently untenable.

[36] As I see it, the flaw in the court a quo's reasoning, illustrated by this example, lies in the wrong answer to the antecedent question which precedes the application of the but-for test, namely, what hypothetical lawful conduct should mentally replace the wrongful conduct of A? In my view, the answer is to allow a competent driver to drive his vehicle. It is not to prevent anybody from driving the vehicle at all. Applying the but-for test in this way, the enquiry will be: if A had allowed a competent driver, would the accident still have occurred? Since, in the given example, the answer is clearly 'yes', A's wrongful conduct was not the cause of the accident. In my view the same holds true for the facts of this case. The supposition, for present purposes, is that the appellants acted wrongfully by allowing tandem paragliding for reward. Allowing tandem paragliding without charge would be lawful. In applying the but-for test, one should therefore mentally replace the wrongful conduct with: allowing tandem paragliding for free. The question is therefore: had the respondent been conveyed for free, would the accident still have occurred? Since the answer is clearly 'yes', the conclusion is that factual causation had not been established. Of course, one can postulate a situation where payment of a reward could be the cause

of the accident, for instance, because the pilot would otherwise not have undertaken the flight. But those are not the facts of this case.

[37] For the sake of completeness I may add that, had I arrived at a different conclusion on the but-for test, I believe the respondent would in any event have been unsuccessful, for failure to establish the element of legal causation. The issue of legal causation, or remoteness, is determined by considerations of policy. It is a measure of control. It serves as a 'long stop' where right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability (see eg *mCubed International (Pty) Ltd & another v Singer NNO & others* 2009 (4) SA 471 (SCA) para 27). I say this because, even if the court a quo's application of the but-for test were to be accepted, the position would still remain that, what the appellants wrongfully omitted to prevent did not increase the risk of the accident which resulted in the respondent's injuries in any way. In this sense, the situation is therefore reminiscent of the following illustration by Lord Hoffman in *South Australia Asset Management Corp v York Montague Ltd* [1996] 3 All ER 365 (HL) at 371(*j*):

'A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering, but has nothing to do with his knee.'

At 382*e-g* Lord Hoffman then concluded:

'Your Lordships might, I would suggest, think that there was something wrong with a principle which, in the example which I have given, produced the result that the doctor was liable . . . There seems no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition.'

[38] For these reasons:

1 The appeal is upheld with costs, including the costs of two counsel (in respect of both the appellants).

2 The order of the court a quo is set aside and replaced by the following:

‘The plaintiff’s claim against the fourth and fifth defendants is dismissed with costs, including the costs of two counsel in respect of both these defendants.’

F D J Brand
Judge of Appeal

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