IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO.: 1400/2016

In the matter between:

C[...] B[...] O[...]	First Plaintiff
C[...] O[...]	Second Plaintiff
C[...] O[...]	Third Plaintiff

and

MINISTER OF POLICE	First Defendant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Defendant

JUDGMENT

TOKOTA J

Introduction:

[1] On 16 December 2014 the husband of the first plaintiff (the deceased) was fishing at Swartkops River, Gqeberha, when he met his untimely death. He

was shot and killed by criminals, one of whom was Mr Siphumelele Phethelo (Phethelo), who was out on bail at the time in respect of another murder case of the late Mr Henry. Phethelo and another were subsequently convicted of murder and robbery of the deceased. There were other charges for which they were sentenced to periods of imprisonment. They were sentenced to life imprisonment for the murder charge.

[2] The first plaintiff and her children (second and third plaintiffs) are now claiming damages from the defendants arising from the alleged conduct of the employees of the defendants who were acting within the course and scope of their employment with the defendants. The defendants deny liability as alleged or at all and are resisting the claim.

[2] At the commencement of the trial, an application for the separation of the merits of the claim from the quantum in terms of Rule 33(4) of the Uniform Rules of Court was granted. This Court is now called upon to determine liability only, and the determination of quantum has been postponed sine die.

***Factual matrix*:**

[3] The first plaintiff was the only witness called to support the plaintiffs' case. She testified that she was married to the deceased, C[...] J[...] O[...], and that marriage was terminated by the death of her husband, who was murdered by Phethelo and another. Out of their marriage, they had two children, the

second and the third plaintiffs. On 16 December 2014, the deceased went fishing at the Swartkops River, Gqeberha, where he was robbed and murdered. The killers were subsequently convicted of robbery with aggravating circumstances for which they were each sentenced to 15 years' imprisonment; murder for which they were each sentenced to life imprisonment; unlawful possession of ammunition for which they were each sentenced to 1 years' imprisonmen and unlawful possession of a firearm for which they were each sentenced to three years' imprisonment.

[4] At the time of the death of their father, the second and third plaintiffs were still under age but have now since attained their ages of majority. The first plaintiff is unemployed. She was happily married to the deceased, who was supporting the family. The deceased was a plumber by occupation. He loved fishing during his lifetime.

[5] The first plaintiff was present in Court when the killers were tried, and she also gave evidence. They were disrespectful and often laughed and did not show any remorse for what they did. When Phethelo and his friend shot and killed the deceased, Phethelo was out on bail in respect of the murder case of Mr Henry.

[6] Under cross-examination the following was put to the plaintiff: that on 3 June 2013 Phethelo was arrested for the murder of Mr Henry. On 19 June 2013 Phethelo was then released on bail. Whilst on bail, he was again arrested for an

offence of assault with intent to do grievous bodily harm on one Ms Phethelo. On 5 November 2013 Phethelo failed to appear in court for the murder case, and a warrant for his arrest was authorised, and his bail was provisionally cancelled and forfeited to the State until 20 November 2013. On 20 November Phethelo did not appear in court, and his bail was finally forfeited to the State.

[7] On 27 November 2013 Phethelo was convicted of assault with intent to do grievous bodily harm and a suspended sentence was imposed. On 14 January 2014 Phethelo was rearrested by one Warrant Officer Vieira pursuant to the warrant of arrest which was authorised on 5 November 2013. On 15 January 2014 Phethelo applied for bail, which was fixed at R300.00. Phethelo paid bail on 22 April 2014. It was further put to the first plaintiff that the defendants would deny that they acted unlawfully. The plaintiffs' case was then closed.

[8] The first witness of the defendants was Mr Eugen Paul van Greunen. He is a senior investigator employed by Combined Private Investigations, Eastern Cape. He is a former police man. During 2013 he was still employed by the South African Police Services (the SAPS) and stationed at Kwazakhele, Gqeberha. He was working together with Warrant Officer Vieira in the murder and robbery squad at Kwazakhele. He was aware of a murder case in which W/O Vieira was the investigating officer. There was a warrant of arrest issued against Phethelo. He was in the tracing squad for most wanted persons. They

traced the suspect, put him in St Albans prison, and W/O Vieira continued with the case. Nothing significant came out of his cross-examination.

[9] The second witness for the defendants, Captain Trevor Atonion Senekal, testified that he is a police Captain stationed at Mount Road Local Criminal Record Centre, Gqeberha. He handed to the court a printout from the SAPS criminal record system. It is a computer screen grab indicating fingerprints, identity number and names of the accused, among other things. The printout also indicated that in that particular case, Phethelo was found guilty of assault and sentenced on 27 November 2013. He testified that the results of the case where Phethelo was convicted of assault were received after the case was finalised. The system was updated on 17 January 2014. The results of the Phethelo case were forwarded to his department electronically and manually. The results of the trial were verified on 24 January 2014. The results of the trial can only be on the record of the accused's previous convictions (the SAP69 record) after verification. Therefore, the previous conviction did not appear on the SAP 69 record on 15 January 2014.

[11] Under cross-examination he testified that after the case is finalised the SAPS policy states that the investigating officer must submit the results to the criminal record centre within seven days. The witness conceded that the results of the trial should have been submitted in December 2013. He further testified that the investigating officer has seven days within which to submit the results

of the trial and the criminal record centre has 20 days within which to capture the information to put on the SAP 69 record. It was put to the witness that because of the failure to submit the information on time as prescribed by the policy, on 14 January 2014 the SAP 69 record did not reflect that Phethelo had a previous conviction of assault with intent to do grievous bodily harm. This resulted in Phethelo being released on bail.

[12] The next witness was Ms Hester Alette Meiring. She was the control prosecutor in the Magistrate's Court, Gqeberha She testified that Phethelo's matter was on the roll of 14 January 2014 after he had been arrested on a Bench warrant of arrest. She handed the Bench warrant to the court. The matter was rolled over to the following day for a formal bail application. She was not involved in the bail proceedings on 15 January 2014. On 3 March 2014 she transferred the matter to the regional court for trial, which was to take place on 17 March 2014.

[13] The next witness was Mr Tobani Jokani. He testified that he is the prosecutor who handled the bail application of Phethelo on 15 January 2014. He referred to the affidavit of Phethelo in support of his bail application. Mr Jokani, understandably, relied on the record of the proceedings in the Magistrates' Court outlining what took place on 15 January 2014. He referred this Court to the record to find out what transpired on that day.

[14] According to the record, Phethelo appeared in court on a warrant on 14 January 2014 before Magistrate Juicy. The record reads as follows:

> "Accused appears on a warrant J165. Acc admits being the person mentioned in the warrant J165.
>
> Rem 15/1/14 C26 /acc. i/c (indistinct…) Date"

In his affidavit, Phethelo simply stated that he was going to plead not guilty to the charges against him and that he had no previous convictions. The investigating officer also did not object to him being granted bail. Mr Jokani testified that the information about previous convictions would have come from the investigating officer and Phethelo. According to the SAP69 record, which was in the docket, Phethelo had no previous convictions.

[15] Whilst preparing this judgment, I realised that I did not invite the parties to address me on certain aspects of the case. For this reason, on 15 November 2025 I issued a request to Counsel for both parties in the following:

> "The parties in this matter are requested to submit supplementary heads of argument dealing pertinently, and supported by authorities where available, with the following issues, within ten days from the date of receipt hereof:
>
> '1. As the plaintiffs' claim is based on delict, whether fault in the form of negligence is one of the necessary requirements to sustain the claim, if so, where is this alleged in the particulars of claim?

2. If negligence is a requirement and is not alleged in the particulars of claim, whether the court can still exercise its discretion in overlooking such in view thereof that pleadings are made for the Court, not the Court for pleadings. Bearing in mind that this discretion can only be exercised in exceptional cases, if such exceptional circumstances exist *in casu*, reference thereto, especially in the plaintiffs' testimony, should be specifically made.

3. If any of the elements of the delict is missing from the pleadings and eventually this court finds that the plaintiffs have failed to establish the cause of action and in view thereof that no exception was taken, what about costs?'

[16] Although both Counsel filed further heads of argument, Counsel who previously appeared for the plaintiffs did not address my concerns. I am indebted to counsel for the defendant for her helpful heads of argument. When both Counsel were invited to argue orally, I asked Counsel for the plaintiff why this was not done, and he informed me that he was not in chambers and undertook to submit proper heads of argument in January 2026. Those heads of argument were never filed.

[17] Subsequently, the plaintiffs delivered notice of amendment of their particulars of claim in February 2026. The amendment was effected without opposition from the defendants, who subsequently adjusted their plea accordingly. I then called for a meeting with the parties where I pointed out to the defendants that if they felt uncomfortable with me presiding over the trial, they were free to say so and I was prepared to release the matter to another

Judge. Instructions were taken, and I was informed that I should continue with the case. The matter was then set down for oral argument on 18 June 2026. New Counsel, *Mr Ronaasen SC,* appeared for the plaintiffs. I am indebted to both Counsel for their helpful submissions.

Facts which are common cause:

[15] Taking the pleadings together with the evidence of the defendants, the following facts are common cause. On 3 June 2013 Phethelo appeared in Court in respect of the murder of Mr Henry, the first murder case. The case was postponed to 19 June 2013, and on that date, he was released on bail, and the case was postponed to 5 November 2013. On 5 November 2013, Phethelo failed to appear in Court, and a warrant for his arrest was authorised, and bail was provisionally estreated. The case was postponed for 14 days to 20 November 2013. On 20 November 2013, Phethelo failed to appear in Court, and his bail was finally cancelled and forfeited to the State.

[17] While Phethelo was on bail in respect of the first murder case, he committed an offence of assault with intent to do grievous bodily harm on his mother. On 3 October 2013 he was arrested for the said assault. He was remanded in custody to 27 November 2013, by which date he pleaded guilty to assault and was accordingly found guilty and sentenced to a wholly suspended sentence.

[18] The plaintiff's husband was robbed and murdered by Phethelo and Nyaniso Mathiwa on 16 December 2014 while fishing at the Swartkops River. At the time of the murder of the deceased, Phethelo was out on bail in respect of the first murder charge. At the time when Phethelo applied for bail on 14 January 2014 after his arrest for failure to appear in court, there was no record of SAP69 in the docket. The investigating officer and the prosecutor did not object to bail being granted. Phethelo paid bail in the amount of R300 on 22 April 2014.

[19] It is appropriate at this stage to remark that despite the fact that there was a warrant for his arrest for failure to appear in Court on 5 November 2013, on 27 November 2013 Phethelo was released after he was found guilty and a suspended sentence was imposed. He was re-arrested on 14 January 2014 and appeared in Court on the same day. His case was remanded to the following day (15 January 2014). On 15 January 2014 Phethelo applied for bail once more in respect of the first murder. The investigating officer made a statement, which was handed to court by the prosecutor, stating that he had no objection to him being granted bail of R1000. Phethelo lied in his application for bail and said he had no previous convictions when he knew fully well that he had been convicted of assault.

The issues for determination:

[20] The question which falls to be considered is whether a remedy in damages should be extended in a case in which a person is released on bail as a consequence of the negligent conduct on the part of those who owed a duty of care to the general public in order to ensure its safety.

The legal principles:

Discussion:

[21] I deem it expedient to deal first with technical issues just to get them out of the way before dealing with the merits of the case. During the trial, Counsel for the defendants objected to cross-examination of the defendants' witnesses by Counsel for the plaintiffs in relation to one document which was discovered by the defendants a day before trial. She objected on the basis that the line of cross-examination was not pleaded by the plaintiffs. I overruled the objection because in my view Counsel for the plaintiffs was entitled to cross-examine the witness in relation to matters pertaining to the document. The fact that his cross-examination might have revealed that someone did not do his/her was exactly the plaintiffs' basis of the claim.

[22] In my view, there was no reason to limit cross-examination to the pleadings in view thereof that there are various objectives for cross-examination. Additionally, since the document on which cross-examination was

based was only discovered a day before the hearing, the plaintiffs were not aware of its existence.

[23] In my considered view it did not lie in the mouth of defendants' Counsel to object on cross-examination based thereon. Furthermore, the plaintiffs were prejudiced by the late discovery of the document. Counsel for the defendants submitted that on the allegations pleaded there was no allegation of failure by the investigating officer or the prosecutor to bring to the notice of the court Phethelo's conviction on 27 November 2013. The latter aspect constitutes evidence and falls outside the realm of pleadings.

Section 42 of the National Prosecuting Authority Act 32 of 1998 defence:

[24] The second issue relates to the defence of immunity. The second defendant pleaded that in terms of section 42 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act)[1] , he was not liable by virtue of the immunity contained therein. It was contended that the prosecutor who handled the case of Phethelo acted in good faith. Plaintiffs contended that this defence is only available to an individual prosecutor and not in cases of vicarious liability. Counsel for the defendants was constrained to concede this contention. However, the concession is legal in nature and therefore not binding on me. Furthermore, in my view the concession is not sound in law.

[1] The section provides: 'No person shall be liable in respect of anything done in good faith under this Act.'

[25] In *Mamela Taxi Rank (Pty) Ltd v Mamela Taxi Association and Others,*[2] Alkema J stated:

> 'The rule that a court is not bound by concessions of legal nature made by legal representatives is trite and needs no authority. This is so because the submission or concession may be wrong.'[3]

I wish to add that the concession of a legal point constitute an opinion of Counsel hence the court is not bound by it.

Section 42 makes available to the second defendant a defence specifically directed at the wrongfulness element of delictual liability. It is trite that, in the case of a defence of this nature, the onus rests on the defendant not only to plead but also to prove the defence. Although the defence was pleaded, it was not covered in evidence.[4] The prosecutor who handled the bail application did not testify as to why he did not investigate the existence of any fact which could influence the granting of bail, nor did he investigate why the investigating officer did not object to bail. There was even an opportunity to discover the previous records of Phethelo before he could be released on 22 April 2014.

In the circumstances, even if the defence was applicable to the second defendant, it would not be sustainable. During the criminal proceedings, the

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[2] *Mamela Taxi Rank (Pty) Ltd v Mamela Taxi Association and Others (*CA 155/2010) [2010] ZAECMHC 31 (28 October 2010) para. 56.

[3] See also, *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC).

[4] J R Midgley & J C van der Walt 'Delict' in Law of South Africa 2 ed Vol 8, Part I para 86,

prosecutor merely handed up the bench warrant and raised no objection to bail. Furthermore, the prosecutor did not testify as to which duty he was performing in terms of the NPA Act to be covered with the immunity in s.42.

[26] The prosecutor had a statutory duty to charge Phethelo in terms of s. 20 of the NPA Act. He failed to do so, and no explanation was forthcoming as to why this was not done. In *Simon's Town Municipality v Dews & another* [5] it was held that the person exercising the statutory power is under a duty to exercise due care and to take all reasonable precautions to avoid or minimise injury to others. The failure to exercise the statutory power with due care and without having taken reasonable precautions to avoid or minimise injury to others, renders the conduct of the repository of the statutory power unlawful.

[27] If regard is had to the section, it postulates two requirements for legal immunity: (a) the act in question must have been done in good faith, and (b) it must have been done in the exercise of a power or duty conferred by the NPA Act. In my view, the duty under the NPA Act relates to charging a person in terms of s.20. The defence contained in the section operates in cases where the prosecutor charges a person wrongly but bona fide believing that there is a case against that person. The present case is not such a case.

[5] 1993 (1) SA 191 (A).

Merits of the case:

Analysis of the legal principles:

[28] Since the claim is founded in delict, in order to succeed, the plaintiffs have to establish five elements of delict, namely, conduct (the act or omission), unlawfulness or wrongfulness, fault (in the form of *animus injuriandi* or negligence), causation and the harm. In order for the particulars of claim to sustain a cause of action, it is necessary to allege and prove all these elements. Since the onus to prove wrongfulness and negligence is on the plaintiffs, they must allege and prove those elements.

[29] The parties in litigation must plead facts in support of their causes of action or defence. A party will not be allowed to lead evidence at the trial unless the other party and the court have been drawn to the issues by way of pleadings.[6] However, this is not an inflexible rule. In *Robinson v Randfontein Estates GM Co Ltd,*[7] the Court said the following:

> 'The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place

[6] *Imprefed (Pty) Ltd. v National Transport Commission (13*/91) [1993] ZASCA 36; 1993 (3) SA 94 (SCA) at 107C-E; *Van Zyl and Others v Government of the Republic of South Africa and Others* (20320/02) [2005] ZAGPHC 70; [2005] 4 All SA 96 (T); 2005 (11) BCLR 1106 (T) para0.103; *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* (786/21) [2022] ZASCA 51; [2022] 2 All SA 607 (SCA); 2022 (4) SA 57 (SCA); para.9.

[7] 1925 AD 173 at 198.

> all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleadings of the opponent has not been as explicit as it might have been.'

Therefore, where the evidence covers the allegations which should have been pleaded and the opponent is not prejudiced thereby, the Court retains a discretion to allow the evidence notwithstanding failure to plead the issues.

Conduct of the defendants:

[30] Damages under the Aquilian action follow only if the harm suffered was the consequence of the negligent and wrongful act or omission of the defendant. Negligence is a separate element from wrongfulness. Whether or not an act or omission in negligent breach of a statutory duty or procedure should be characterised as wrongful (or 'actionable') for delictual purposes is a question of legal policy.[8]

[31] An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent

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[8] Cf. e.g. *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at paras [10]-[12]; *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) at paras [12]-[16]; *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA) (2001 (8) BCLR 779) at para. [12]; and *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A - B.

harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.

[32] Our courts have in a number of recent decisions recognised that the entrenchment of the right to be free from violence in s12(1)(c), read with s 205(3) of the Constitution, would, in appropriate circumstances, be strongly indicative of a legal duty resting on the police to act positively to prevent violent crimes. Where public officials endowed with the duty to act positively to prevent harm in terms of any statutory provision fail to so act, liability in delict arises.

[33] Courts do not confine liability for an omission to certain stereotypes but adopt an open-ended and flexible approach to the question whether a particular omission to act should be held unlawful or not. In deciding that question, the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability.[9] Wrongfulness is established where there is a breach of a legal duty not to cause harm to another by one's negligent conduct.[10]

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[9] *Van Duivenboden* para 19. Note 9

[10] See *Minister van Polisie v Ewels.* 1975 (3) SA 590 (A) at 597B–C; *Bayer South Africa (Pty) Ltd v Frost* [1991] ZASCA 85; 1991 (4) SA 559 (A) at 570J; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* [1991] ZASCA 190; 1992 (1) SA 783 (A) at 797F; *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) at para 27; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para. 12; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12; *Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA)para 12; *Hirschowitz Flionis v Bartlett and Another* [2006] ZASCA 23; 2006 (3) SA 575 (SCA) at paras 27-8; and *MV MSC Spain; Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) at para 14.

[34] If the defendants acted negligently, then liability can only arise where the circumstances give rise to a legal duty to avoid negligently causing harm. The principles applicable to liability for negligent omission were correctly formulated by Nugent JA in the following terms:[11]

> '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 recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will 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*, 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, "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.'

Wrongfulness:

[35] There is a plethora of decided cases dealing with, inter alia, the element of wrongfulness. To begin with, I start off with the often quoted judgment of *Minister van Polisie v Ewels.*[12] The Court stated at 597A-B that conduct is wrongful if public policy considerations demand that, in the particular circumstances, the plaintiff has to be compensated for the loss suffered by the

[11] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441E-442B.
[12] 1975 (3) SA 590 (A).

defendant's negligent act or omission, *i.e.* the legal convictions of society regard the conduct as wrongful.[13]

[36] In *Hawekwa Youth Camp and Another v Byrne,*[14] the SCA confirmed the legal position as follows:

> '…. negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages.'

[37] In *Gouda Boerdery Bk v Transnet,*[15] Scott, JA explained that in order to find whether a legal duty existed to act positively, factors such as reasonableness, policy and, where appropriate, constitutional norms should be considered.

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[13] Ibid, at 597A-B.

[14] 2010 (6) SA 83 (SCA) para.22.

[15] 2005 (5) SA 490 (SCA) para.12; see also *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) paras.20-21; *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC).

[38] The Constitutional Court in *Loureiro and Others v Imvula Quality Protection (Pty) Ltd*[16] warned that the concepts of wrongfulness and negligence should not be conflated. The court stated as follows:

> 'The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability." Therefore, the court held that a defendant's subjective state of mind is not the focus of the wrongfulness enquiry. Negligence, on the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault.' [Footnotes omitted]

[39]] In *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae),*[17] the court said:

> 'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns

[16] Footnote 20, supra,para.53.
[17] 2011 (3) SA 274 (CC) para.122.

the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'

In determining wrongfulness, the other elements of delictual liability are usually assumed.

[39] In *Carmichelle v Minister of Safety and Security and Another,*[18] the Constitutional Court recognised that a delictual action may lie against a police officer and prosecutors who failed in their duty to protect the plaintiffs from suffering harm, to be reconciled with the precautionary *dicta* in *Steenkamp NO*. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[19] the SCA, in a case concerning pure economic loss following upon an award by a tender board that was set aside, explained that where a breach of statutory duty gives rise to a claim for damages, a common law duty cannot arise.

Negligence:

[39] The next element to be discussed is whether the plaintiffs have established that the defendants were negligent in the performance of their duties. The leading case on the formulation of the test for negligence is *Kruger v Coetzee,*[20] where it was held that.

'For the purpose of liability, *culpa* arises if –

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[18]*Carmichelle v Minister of Safety and Security and Another 2* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 26.

[19] *Steenkamp N O v Provincial Tender Board, Eastern Cape* [2005] ZASCA 120; [2006] 1 All SA 478(SCA); 2006 (3) SA 151 (SCA) para 22.

[20] 1966 (2) SA 428 (A) at 430E.

(a) A *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'

[40] Negligence is not necessarily regarded as prima facie wrongful. In *Minister of Safety and Security v Van Duivenboden,*[21] it was held that negligence is unlawful, and thus actionable, only if it occurs 'in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm'. Where the negligence manifests itself in a positive act that causes physical harm, it is presumed to be unlawful.

[41] The legal convictions of the community require that where the defendant had knowledge of the potential danger of the person to be released on bail, the failure to take reasonable steps to prevent him being released resulting in possible harm to any member of the public would be wrongful. If the defendant then omits to take reasonable steps to prevent the risk from materialising (*ommissio*) the duty is breached.[22]

[21] 2002 (6) SA 431 (SCA) at para 12.
[22] See JP Midgley & JC Van der Walt "Delict" 2 Lawsa 2nd Edition par 65; quoted *Van Vuuren v eThekwini Municipality* (1308/2016) [2017] ZASCA 124; 2018 (1) SA 189 (SCA) at para.20.

[42] The plaintiff bears the onus of proving such negligence on a balance of probabilities. In some situations, where the plaintiff is not in a position to produce evidence on a particular aspect, the evidential burden is placed on the defendant to demonstrate what steps it had taken to comply with the standards to be expected. In such a case, less evidence showing a prima facie case might suffice if the facts are uniquely within the knowledge of the defendant. The overall onus, however, remains with the plaintiff. A person who occupied a position where he reasonably ought to have knowledge or reasonably ought to have made investigations to an extent that would have provided him with actual knowledge or resulted in him reasonably taking measures which, if taken, would reasonably be expected to have provided him with actual knowledge, such person has an evidential burden to show that he has taken such steps as were necessary to acquaint himself with such knowledge.

[43] Therefore, where the plaintiff is not in a position to produce evidence on a particular aspect which is normally, but not necessarily peculiarly in the knowledge of the defendant, this too does not affect the onus of proof and is usually invoked when the occurrence itself is the only known fact from which a conclusion of negligence can be drawn, and the incident does not ordinarily occur in the absence of negligent conduct.[23] A Prima facie case of negligence

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[23] *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA);

will suffice to cast an evidential rebuttal burden on the defendant to destroy the probability of negligence by giving a reasonable explanation;

[44] In *Gericke v Sack*,[24] it was said:

> 'It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party.[25] Consequently, our Courts take cognisance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent, and they have, in consequence, held that less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.[26] Taking into account all the circumstances highlighted above, I hold that the defendants were negligent.

Causation:

[45] The next question to be examined is whether the negligent conduct of the defendants was the cause of the injury of the plaintiffs. The onus rested on the plaintiffs to show that, but for the failure of the defendants to investigate and place before the magistrate the necessary information relating to the propensity of Phethelo to commit violent crimes, the murder of the deceased would not have occurred, resulting in the plaintiffs suffering damages.

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[24] 1978 (1) SA 821 (A) at 827D-G
[25] *R v Cohen*, 1933 T.P.D. 128.
[26] *Union Government (Minister of Railways) v Sykes*, 1913 A.D. 156 at p. 173,

[46] It is now well established that for causation to be established the plaintiffs are not required to establish the causal link with certainty. They are nevertheless required only to establish that the wrongful conduct was probably the cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.

[47] In *De Klerk v Minister of Police*[27] it was said:

> '[24] Causation comprises a factual and legal component. Factual causation relates to the question whether the act or omission caused or materially contributed to the harm. The "but-for" test (*conditio sine qua non*) is ordinarily applied to determine factual causation. If, but for a wrongdoer's conduct, the harm would probably not have been suffered by a claimant, then the conduct factually caused the harm.
>
> [25] Legal causation is concerned with the remoteness of damage. This entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue. Generally, a wrongdoer is not liable for harm that is too remote from the conduct concerned or harm that was not foreseeable.' [Footnotes omitted]

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[27] *De Klerk v Minister of Police* 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC); para. 24.

[48] The application of the but-for test is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday life experiences.

[49] In *Lee v Minister of Correctional Services*,[28] Nkabinde J said the following about causation in the case of a negligent omission:

> '[I]n the case of an omission the but-for test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts. However, as will be shown in detail later, the rule regarding the application of the test in positive acts and omission cases is not inflexible. There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility.'[29]

[50] While it may be more difficult to prove a causal link in the context of a negligent omission than of a commission, *Lee* explains that the 'but-for' test is not always the be-all and end-all of the causation enquiry when dealing with negligent omissions. The starting point, in terms of the 'but-for' test, is to introduce into the facts a hypothetical non-negligent conduct of the defendant and then ask the question whether the harm would have nonetheless ensued. If, but for the negligent omission, the harm would not have ensued, the requisite causal link shall have been established.

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[28] *Lee v Minister of Correctional Services* 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC).
[29] Ibid, para 41.

Application of the legal principles to the facts:

[51] In casu it is common cause that the defendants owed a legal duty to the plaintiffs to prevent the murder of their father and husband respectively. This could be done by ensuring that Phethelo was dealt with in terms of the law after he was rearrested for breach of the conditions of bail. The prosecutor had a statutory duty to charge him in terms of s 67A of the Criminal Procedure Act 51 of 1977 (read with s 20 of the NPA Act) which provides that failure to appear in court after bail has been granted constitutes a criminal offence.

[52] When Phethelo was brought to court on a warrant of arrest on 14 January 2014, it was not enough for the prosecutor to merely hand over the warrant and accept the investigator's opinion. He had a duty in terms of the NPA Act to charge him.[30] He omitted to do so. Furthermore, the investigating officer knew that he was dealing with a 'most wanted' criminal. He knew that Phethelo was a violent person, yet he failed to investigate whether or not he had any previous criminal records. Phethelo only paid bail on 22 April 2014. The records were updated on 24 January 2014, and therefore his criminal record was available before he was released. The prosecutor and the investigating officer were in a position to verify his records before he could be released. They failed to do so.

[30] The power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings vests in the prosecuting authority in terms of s.179(2) of the Constitution and s. 20(1) of the NPA.

[51] Regard being had to the fact that Phethelo was the 'most wanted criminal'; the fact that (a) he was a violent criminal; (b) he skipped bail; (c) he committed a violent crime during his bail period in violation of the bail conditions, both the investigating officer and the prosecutors had a legal duty to investigate whether or not he had criminal records. They both had an opportunity to do so even during the period between 15 January 2014 and 22 April 2014. These records were already available on 24 January 2014. I therefore hold that the defendants were negligent and their conduct was wrongful and this resulted in the plaintiffs suffering damages and that their conduct was closely linked to the death of the plaintiffs' breadwinner and therefore the legal causation was also satisfied.

Costs:

[52] What remains now is a question of costs. The general rule is that costs should follow the results unless there are exceptional circumstances justifying a deviation from the rule. I see none. It follows therefore that costs should follow the event.

Order:

[53] In the result, the following order will issue:

1. The defendants are liable, jointly and severally the one paying the other to be absolved, for such damages as the plaintiffs may prove

or as may be agreed upon between the parties, arising from the death of the late J[...] O[...].

2. The defendants are to pay the plaintiffs' costs in respect of the merits jointly and severally, the one paying the other to be absolved on the C scale in terms of Rule 67A including any reserved costs.

B R TOKOTA
JUDGE OF THE HIGH COURT

APPEARANCES:

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		Gqeberha
Heard on	:	18 June 2026
Judgment Delivered on	:	21 July 2026.