REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2015/20604

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

16/8/2019

DATE

MOKOSE SNI

In the matter between:

PHALAFALA: MOSIMA GIVEN	1st Plaintiff
MOTEBU: NOMSIZI BRENDA	2nd Plaintiff
PHALAFALA: WESLEY KHOMOTSO	3rd Plaintiff

and

MEC FOR HEALTH, GAUTENG PROVINCE	Defendant

JUDGMENT

MOKOSE J

Introduction

[1] The plaintiffs sue for loss of support arising from the death of Patrick Phuti Leshiba who, it is alleged, was married by customary marriage to the first plaintiff who sues on her own behalf and in a representative capacity as the mother and natural guardian of her minor child McRoy Masele Phalafala. The second plaintiff sues for loss of support of her daughter born out of the relationship with the deceased. Wesley Khomotso Phalafala, the third plaintiff, sues in his own right having attained majority.

[2] At the commencement of the matter, the plaintiff brought to the court's attention that the issue of paternity is no longer in dispute that the three children were the deceased's offspring.

Factual Context

[3] It is common cause that during the early hours of 13 June 2012 the deceased was involved in an altercation at Morula Sun Casino. The deceased was unlawfully assaulted by unknown people and sustained serious injuries. Members of the SAPS intervened in the altercation. They then arrested and kept the deceased at the Terminus Police Station overnight.

[4] The next day the deceased was taken to Odi Hospital in Mabopane, which falls under the auspices and control of the Gauteng Department of Health, for treatment after it was ascertained that his injuries were serious. He was attended to by Dr Mogotlane on his admission at 12H20 on 14 June 2012 who noted that the deceased presented with "severe redness in the bilateral abdominal area", had multiple abrasions on the

face, had wheals on his back, noticed a faecal discharge on his trousers and had an extremely high white blood cell count soon after admission.

[5] The deceased was treated and admitted to the ward for further management by Dr Thosago who perpetuated the diagnosis of Dr Mogotlane of alcoholic gastritis alternatively pancreatitis.

[6] The deceased died of his injuries at Odi Hospital at 16H50 the following day, the 14th June 2012. The cause of death was noted by the pathologist as blunt force abdominal trauma.

[7] The plaintiffs allege that the defendant breached its legal or contractual duty of care that arose from the relationship which was established by the parties upon admission of the deceased at the hospital in that:

(i) it had failed to provide him with emergency medical care and to stabilise his condition;

(ii) it failed to ensure that he is treated with the necessary skill and care of a hospital treating a patient that had been seriously injured;

(iii) it failed to complete all the necessary procedures and medical interventions to ensure that he receives the best available medical care for his existing condition.

[8] The defendant denies having acted in breach of its duty of care they owed to the deceased. Furthermore, the defendant denies the existence of a customary marriage between the deceased and the first plaintiff.

Issue

[9] The issues to be determined by this court are the following:

(i) the determination of the right of the first plaintiff to sue – the marriage between the deceased and the first plaintiff having not been registered in terms of the Recognition of Customary Marriages Act 120 of 1998;

(ii) the negligence of the defendant and consequently its liability to pay damages to the plaintiff; and

(iii) the quantum of such damages.

[10] I will not delve into all the evidence presented by the parties but will highlight the common cause facts, corroborated evidence and discrepancies.

The Customary Law Marriage

[11] The first witness called on behalf of the first plaintiff was Sewela Verly Leshiba who is the deceased's younger brother who was in Kinshasa in the Democratic Republic of Congo at the time of the deceased's demise. He testified that the first plaintiff was his deceased brother's wife who was married in or about June 2003 after lobola had been paid and all other gifts exchanged. He testified further that there was no ceremony which was undertaken in contemplation of the marriage although the lobola was agreed and paid to the first plaintiff's family.

[12] In cross-examination, Mr Sewela Leshiba conceded that he was not present at the lobola negotiations as he was at college but confirmed that the exchange of gifts had occurred according to the Sepedi culture. He conceded further that the deceased and the first plaintiff resided together in Limpopo but that the deceased had also worked and resided in Brits where he had a house. He confirmed that the deceased had been engaged in an extra-marital relationship with the second plaintiff but that most members of the family had no knowledge of the relationship.

[13] The second witness who was called by the plaintiffs was Peter Pheeha Leshiba, the deceased's elder brother who testified that he and his mother had represented the Leshiba family in the lobola negotiations for the first plaintiff. He confirmed that certain items of clothing which were requested by the first plaintiff's family were handed over when the final amount of lobola was paid. A goat was also handed over to the first plaintiff's family as had been requested by them as one of the gifts.

[14] At first, Mr Peter Leshiba confirmed that the document confirming payment of lobola was drawn by the first plaintiff's father and signed by all the parties present, being him and his mother on behalf of his family and the first plaintiff's parents. After the court had adjourned for tea, he continued in his evidence and averred that the document was drawn by his mother. His explanation for the absence of other members of the family was that it had been agreed that only the two of them would represent the family as other family members were unavailable at that time. Mr Peter Leshiba testified further that the lobola was negotiated on 15 April 2003, on which date the document was drawn and on 25 June 2003, on which date it was recorded that payment of the amount agreed had been effected.

[15] Mr Peter Leshiba conceded in cross-examination that according to Sepedi custom lobola negotiations were not undertaken by a brother but by both maternal and paternal aunts and uncles. He however explained that it had been agreed within the family that because of the unavailability of these aunts and uncles, he and his mother would represent the family in the lobola negotiations.

[16] Mr Peter Leshiba further conceded that he had knowledge of the child born out of wedlock with the second plaintiff however, he denied that the deceased and the second plaintiff had cohabited at all as he had lived with his brother.

[17] The third witness, Ms Mosima Given Phalafala testified that she had been in a relationship with the deceased since 1996 until the time when the deceased sent emissaries to negotiate her lobola. She testified further that when the lobola had been paid and gifts exchanged, she regarded herself as the deceased's wife. No further ceremonies to mark the marriage had been held by the two families.

[18] In cross-examination the first plaintiff conceded that she has intimate knowledge of Sepedi custom. She explained that her family, other than her parents were not present at the lobola negotiations and payment thereof for the reason that they were not available as they resided in Venda, a distance from her home. She testified further that the deceased was not present when the lobola was paid as he was not expected to be present according to Sepedi custom. She conceded that both damages for the previous pregnancy which resulted in the birth of her first born child and lobola were paid at the same time and that the amount paid by the deceased's family was intended to be payment for both.

[19] In response to questions put to Ms Phalafala by counsel for the defendant that she could not have regarded herself as being married to the deceased at the time of the second child's birth as he (McRoy) was registered with her maiden surname and not that of his father, Ms Phalafala said that it had been agreed by her and the deceased that the children's surnames would be changed after they had concluded a civil marriage. This was also dependent upon the completion of a house they were building in Bochum, Limpopo. There was no necessity to change the surnames sooner.

[20] Ms Phalafala conceded that she was not in possession of a certificate of registration of the customary law marriage concluded with the deceased. She furthermore confirmed that she had not been to the Department of Home Affairs nor approached the High Court to register the said marriage but had deposed to an affidavit shortly after the deceased's death that she was married to the deceased by customary law which the Master of the High Court had accepted when he appointed her as the executrix of the deceased's estate.

[21] In response to a question by the court, Ms Phalafala confirmed that at the time of the lobola negotiations she was expecting a child. She confirmed further that she had two children with the deceased being Kgomotso Phalafala (the third plaintiff) who was born on 5 March 1999 and McRoy Masete Phalafala born on 21 July 2005.

Arguments

[22] Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 ("the Recognition Act") provides as follows:

"3(1) For a customary marriage entered into after the commencement of this Act to be valid –

(a) The prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law;

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

[23] Section 4 provides that failure to register a customary marriage does not affect the validity of that marriage.

[24] The first plaintiff's view was that she and the deceased had complied with the requirements of the Recognition Act and regarded their relationship as a valid marriage in terms of the Act. However, the defendant was of the view that the first plaintiff was never married to the deceased by customary law and that the document which had been furnished to prove the marriage was a fabrication to enable the first plaintiff to access the death benefits which accrued to the family of the deceased.

[25] Customary law is defined in the Recognition Act as '*customs and usages traditionally observed among indigenous African peoples of South Africa and which form part of the cultures of those peoples*'. A customary marriage is defined as '*a marriage concluded in accordance with customary law*'.

[26] The Recognition Act stipulates that the marriage must be negotiated and entered into or celebrated in accordance with customary law. The legislature did not consider it necessary to define 'celebration in accordance with customary law'. This is understandable as customary law is as diverse as the number of different ethnic groups as we have in this country. It is also accepted that African law and custom are

not static but dynamic.[1] They develop and change along with the society in which they are practised.

[27] It follows that it would be well-nigh impossible and undesirable to attempt an exhaustive and inclusive definition of a customary law marriage followed by a particular ethnic group. How then does a court determine what the current customary law is that is applicable to a particular case? The first two requirements of a customary law marriage being that both parties must be over the age of 18 and that they must consent to the marriage are clear in their interpretation. However, the requirement that the marriage must be negotiated and entered into or celebrated in accordance with customary law is vague as it does not specify the actual requirements of a customary law marriage. As such, a factual determination has to be made to ascertain whether the requirements have in fact been complied with.

[28] This issue was identified in the matter of **Bhe v Magistrate, Khayelitsha** (supra) where Ngcobo J (as he then was) in a dissenting judgment identified three ways in which customary law can be established. This is by:

(i) taking judicial notice where it can be readily ascertained with sufficient certainty;

(ii) where it cannot be readily ascertained, expert evidence may be adduced to establish it; and

(iii) having recourse to text books and case law.

[1] Bhe v Magistrate, Khayelitsa 2005 (1) SA 580 (C)

[29] Ngcobo J remarked in the Bhe matter that in ascertaining customary law, caution should be exercised when relying on case law and text books. The same cautious approach was spelled out as follows in the case of **Alexcor Limited and Another v The Richtersveld Community & Others**[2] where the following was said:

"Although a number of textbooks exist and there is a reasonable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people."

[30] Reverting to the facts of the matter on hand, the defendant avers that there is no valid customary union without, inter alia, the 'handing over' ceremony. The defendant places much emphasis on the 'handing over' ceremony and referred the court to the case of **Motsoatsoa v Roro & Another**[3] in which it was held that lobola or the handing over to the bride's family will form evidentiary material to prove the existence of a marriage. Counsel for the defendant submits further that none of the processes undertaken by the parties in the lobola negotiations reflect Sepedi custom and as such, the first plaintiff's claim for loss of support should be dismissed with costs. It is noted that no expert witness on customary law was called by the defendant despite counsel for the defendant having indicated during the trial that the defendant would argue with

[2] 2004 (5) SA 460 (CC) at para [51]
[3] [2011] 2 SA 324 (GSJ)

reference to the Bapedi customary law that the deceased and the first plaintiff had not been married according to customary law.

[31] Three witnesses for the plaintiff testified on the validity of the marriage between the first plaintiff and the deceased. The deceased's younger brother, testified that he was not present at the marriage but was aware that lobola had been paid and gifts exchanged. He was also aware that the deceased had a relationship with the second plaintiff whilst he cohabited with the first plaintiff.

[32] The evidence led by the second witness, Peter Leshiba, the deceased's elder brother was not helpful as it was fraught with contradictions. He testified that he and his mother negotiated the lobola and handed over the gifts to the first plaintiff's parents. His explanation of the absence of relatives for the lobola negotiations was implausible. He confirmed that thereafter nothing further was done in celebration of the marriage by either family but that the first plaintiff was regarded as the deceased's wife. Peter Leshiba also testified that the lobola document was written on the same day with the use of one pen but then changed his evidence that it was not written on the same day. His evidence pertaining to the author of the document was also not satisfactory as he retracted his evidence that it was written by the plaintiff's father and then suggested that it had been written by his mother.

[33] The first plaintiff testified that damages were paid in respect of both her pregnancy of the first child as well as lobola on 25 June 2003. She confirmed that gifts were also exchanged on the same day. The first plaintiff also testified that after the payment of lobola no ceremony was performed and the emissaries left. She then regarded herself as the deceased's wife as lobola had been paid. In response to a question by the

defendant's counsel, she failed to proffer a reasonable explanation on why the child born after the consummation of the marriage did not bear the deceased's surname although she was married at that stage. She however, admitted during cross-examination, that she had deposed to an affidavit after the deceased's burial to enable her to access his death benefits. I am of the view that the deposition to an affidavit has no bearing on the validity of the marriage.

[34] The custom of 'handing over' in customary law has not been given the space to adapt and keep pace with changing socio-economic conditions and constitutional values.[4] Whilst argument by the first plaintiff has been heard that she is the deceased's wife for reasons that she has complied with Section 3(1) of the Recognition Act and argument submitted by the defendant that an essentialia for the customary marriage had not been effected, I am of the view that there was no marriage in terms of the Recognition Act concluded by the parties. The reason stems from the evidence presented by the witnesses who have failed to convince the court that the negotiations which were held by the parties were in fact lobola negotiations. Several inconsistencies were uncovered in the evidence as stated above and as such, it appears that the parties were in discussion about the pregnancy of the first plaintiff and damages to be paid rather than lobola negotiations. Furthermore, in response to a question by the court about the number of children the first plaintiff had with the deceased and the ages of those children, the first plaintiff confirmed to the court that she had two children as stated above and that was pregnant during the lobola negotiations. If she was indeed pregnant at the time of the negotiations, then the child born after such date would at least have been born later that year or during the next year (2004) and not in 2005 when McRoy was born. Accordingly, I am of the view that the first plaintiff has failed

[4] Sengadi v Tsambo (40344/2018) [2018] ZAGPJHC 613

to prove that a customary marriage had been concluded by her and the deceased and her claim in her personal capacity for loss of support stands to be dismissed.

Negligence

[35] The case before the court is a claim for loss of support. It is trite that the conduct of the defendant must have caused the loss suffered by the plaintiff and the resulting harm must not be too remote.[5] The plaintiffs needs to show that the defendant and/or the staff of Odi Hospital had acted negligently and that such negligence had caused or materially contributed to the death of the deceased. If a reasonable person would have foreseen the harm and would have taken reasonable steps to prevent it, and the person in question did not do so, negligence is established.[6]

[36] The party who bears the onus of proof can only discharge it if he has adduced enough credible evidence to support the case of the party on whom the onus rests. In the matter of **National Employer's General Insurance v Jagers**[7] the court considered the matter and said-

"In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true."

[5] Coertze v RAF 2016 ZAGPPHC 558 at para [37]
[6] Kruger v Coetzee 1966 (2) SA 428 (A)
[7] 1984 (4) SA 437 (E) at 440 D - G

[37] Evidence of a witness which is not contradicted does not necessarily have to be accepted by a court. Whether or not the evidence is accepted will depend upon its quality. Evidence which is vague, contradictory, highly improbable or just plain irrational will not pass muster.[8]

[38] The test to be applied in order to weigh the defendant's conduct is enunciated in the matter of **Kruger v Coetzee**[9] in which the following was stated:

"Negligence can only be attributed by examining the facts of each case. Moreover, one does not draw inferences of negligence on a piecemeal approach. One must consider the totality of the facts and then decide whether the driver has exercised the standard of conduct which the law requires. The standard of care so required is that which a reasonable man would exercise in the circumstances. In all the cases the question is whether the driver should reasonably in all circumstances have foreseen the possibility of a collision."

[39] It is common cause that upon the deceased's admission at the hospital a relationship was created between the hospital and the deceased in terms of which the defendant was to provide emergency care to the deceased and treat him with the necessary skill and care. The deceased died of injuries described by the pathologist, Dr Lukhozi, as blunt force abdominal trauma which had resulted in the deceased losing 1350 ml of blood. In cross-examination, Dr Lukhozi conceded that the mechanism of death may have been hypovolemic shock after blood and clots were found in both thoracic cavities, the peritoneal cavity as well as the mesentery vessel. Contusions were also present in the thoracic cavities.

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[8] Essential Judicial Reasoning by BR Southwood page 3
[9] 1996 (2) SA 428 (A) at 430 E - G

[40] It is noted that although the hospital had diagnosed and treated the deceased for alcoholic pancreatitis and gastritis, the pathologist made no mention in the autopsy report of an inflamed or infected pancreas or stomach as would have been expected.

[41] Dr Mogotlane, the doctor who admitted the deceased, noted evidence of an assault and the smell of alcohol on the deceased's admission to hospital. He noted a high heart rate which he testified, could have been caused even by the distress the deceased was experiencing. He also observed that the deceased was weepy. Dr Mogotlane wrote on the hospital progress note that the deceased possibly had pancreatitis and gastritis. In cross-examination he explained that he had written question marks next to the diagnosis as it was still too early to tell. He conceded further that not everyone develops pancreatitis and gastritis when they drink too much alcohol. He confirmed that all the deceased's vital signs were normal but for the increased heart rate.

[42] Dr Mogotlane testified further that he had ordered blood to be taken and analysed. Several issues were noted in the clinical pathology and haematology reports which were of concern. In particular, the white cell count was not within normal range and was in fact raised. Dr Mogotlane conceded that a further analysis of the deceased's bloods should have occurred but was not done due to the attendant cost thereof. He further conceded that the black staff(sic) in his vomitus which was noted by the nurses in the daily fluid balance chart at 14H15 on the day of the deceased's admission could indicate bleeding. No further investigations were made in this regard.

[43] It also emerged in examination in chief that Dr Mogotlane ordered that an x-ray be taken of the deceased's chest and abdomen. Evidence was led that the x-rays had

been misplaced and were not available to the court. However, Dr Mogotlane testified that he had seen the x-rays which were in order and showed no signs of any abnormalities. He also conceded that he had had sight of the pathologist's report whose results he found difficult to accept. He could not explain how he had missed signs of contusions which had been noted by the pathologist and the policeman who had identified the deceased's body. He also conceded further that the deceased should have been monitored on a four-hourly basis.

[44] The deceased was admitted to the ward for monitoring whereafter he was in the care of Dr Thosago who admitted that he had knowledge that the deceased was a victim of an assault although he had not mentioned this in his statement made after the deceased's demise nor had he treated him according to protocols for an assault. He had treated him for pancreatitis and gastritis. He admitted that the plan for the deceased on his admission was to monitor him for hypovolemic shock. He conceded that the deceased required regular monitoring in view of his history of an assault. Dr Thosago admitted that he had noticed contusions on the deceased's epi-gastric and thoracic areas but had not mentioned them in his report, nor had he done further investigations in this regard.

[45] A number of nurses who had been on duty on the day leading up to the deceased's demise gave evidence on behalf of the defendant which was not useful. In cross-examination of Ms Peu in particular, it became apparent that she had no recollection of the deceased nor his treatment. She had also been in court during Dr Mogotlane's testimony. She also admitted that she had not consulted with the defendant's legal adviser prior to testifying in the matter.

[46] Dr Bastiaan Hendrik Pienaar, a general surgeon, was called as an expert witness by the plaintiff to testify whether any act of omission or commission had resulted in the deceased's demise. He was also called to identify a plausible cause of death.

[47] Dr Pienaar testified that the diagnosis by Dr Mogotlane was fair if it was part of a differential diagnosis and not a definitive diagnosis. He was of the view that the deceased should have been monitored on a four-hourly basis. He brought it to the court's attention that pancreatitis can be accurately diagnosed only after 18 to 24 hours after ingestion of copious amounts of alcohol in a short period of time. Dr Pienaar noted further that there had been no indication of treatment or protocols being followed despite the deceased having been a victim of assault. Administering charts were not meticulously recorded and red flags were not taken into account and acted upon where they should have been.

[48] It is trite that an expert witness is employed to assist the court in deciding issues in which the court does not have the ordinary and requisite expertise. Furthermore, the opinion of an expert witness must be well grounded and reasoned. The determination of the probable value and weight of an expert witness's evidence is not always about credibility; and that judicial officers should be careful not to allow the opinion of an expert witness to take the place of their own finding of fact.

[49] In the matter of **Lord Arbinger v Ashton (1873) LR Eq 358** at 374, the court held as follows:

"Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural and it is effectual that we

constantly see persons, instead of considering themselves witness, rather consider themselves as the paid agents of the person who employ them."

[50] Davis J in the matter of **Schneider NO and Others v AA and Another**[10] said:

"In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

[51] Francis J in the unreported matter of **S Zulu obo The MEC for Health and Social Development (Gauteng)**[11] said that the remarks have continued to resonate in different courts around the world and have not escaped South African Courts.

[52] At the commencement of the trial, counsel for the defendant mentioned to the court that the joint minutes by Drs Botha, Pienaar and Professor Koto was being disputed by Professor Koto for the reason that the document is incomplete and as such not authentic and that it differs materially from the contents of the medico-legal report compiled by him. It was noted by the court that the joint minute was a series of twenty-

[10] 2010 (5) SA 203 (WCC) at 211
[11] High Court of South Africa Gauteng Local Division dated 8 December 2016 at paras 96 and 97

one questions which were answered by each of the parties and signed at the bottom of each page. Furthermore, an email was handed into court which email I note, had been forwarded to Dr Pienaar by a Ms Matilda Howard from the Department of Surgery on the instruction of Professor Koto.

[53] It was not evident from the joint minute whether the last question signified the end of the document or not. Accordingly, a ruling was made by the court at the commencement of the trial that the minute would not be used but that evidence would be given by the authors to the minute as to the authenticity of the document, having taken into account the concerns raised. Dr Pienaar testified on the authenticity of the joint minute and confirmed that it had been received from Professor Koto. He also testified that he had signed the document.

[54] Prior to closing argument, counsel for the defendant made mention of the fact that Professor Koto would not be called to give evidence in support of the defendant's case despite having assured the court of his availability to do so on the last day allocated for the trial. The reason that was advanced by the defendant's counsel for Professor Koto's failure to give evidence was that it would not be necessary for him to testify having heard the evidence of Dr Mogotlane. This culminated in a situation where a ruling was made on the basis that Professor Koto would testify as to the authenticity of the joint minute. As it stands, we have no evidence on hand from Professor Koto as to the authenticity of the minute and as such, there is no reason for it to be rejected by the court. The court only heard submissions by counsel for the defendant which submissions can be regarded as submissions made from the bar.

[55] Accordingly, I will deal with the joint minutes which were accepted and signed by Drs Pienaar, Botha and Professor Koto. The court is obliged to consider the principles applicable to the withdrawal of an admission or agreement made at a pre-trial conference. A pre-trial conference is a procedural step provided for in Rule 37 aimed at, as envisaged in the Rule, promoting the effective disposal of the litigation (Rule 37(9)(a)(ii)). It is moreover intended to expedite the trial and to limit the issues before court (See **Hendricks v President Insurance Co Ltd**[12]). In **Price NO v Allied-JBS Building Society**[13] it was stated thus:

"The pre-trial conference conducted under the terms of Rule of Court 37 is designed to afford an opportunity to the parties amongst other matters, to endeavour to find ways of curtailing the duration of the trial by redefining the issues to be tried. One of the methods of doing so is by way of admissions of fact which could lead to the elimination of one or more of the issues raised in the pleadings."

[56] The salutary principle of long standing that a party should be held to an agreement reached, has been confirmed in numerous cases. The reasoning underlying the principle applies equally, if not more so, where an agreement is reached on specific issues dealt with at a pre-trial conference. A party will not, in the absence of special circumstances, be allowed to resile from an agreement deliberately reached at a pre-trial conference. To allow a party to do so, Harms JA held in **Filta-Matix (Pty) Ltd v Freudenberg and Others**[14] *"would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of litigation"*. What will constitute special circumstances is not capable of any hard and fast definition. Each case must be decided on its own facts. A concession of a major issue by a party in the election to limit the ambit of the case, is usually binding.

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[12] 1993 (3) SA 158 at 166 E - F
[13] 1980 (3) SA 874 (A) at 882 D
[14] 1998 (1) SA 606 (A) at 614 C

[57] Applying the above criteria to the matter now before me, the defendant must show that special circumstances exist for this court to exercise its discretion in its favour in order to succeed. Three requirements must be met:

(i) the defendant must furnish an explanation sufficiently full of the circumstances under which the concession was made and why it is sought to be withdrawn;

(ii) he should satisfy the court as to his *bona fides;* and

(iii) show that in all the circumstances justice and fairness would justify the withdrawal.

[58] The defendant has not come anywhere near to satisfying any of these requirements. It has failed to testify and explain the circumstances under which the concessions were made in the joint minutes and why they are sought to be withdrawn. The court has not had the benefit of Professor Koto's evidence as to whether he denies his signature on the document or whether he refutes the agreement. Counsel for the defendant merely states in an address to the court, from the bar, that Professor Koto disputes the joint minutes on the basis that the document is incomplete and is not authentic and it differs materially from the contents of the medico-legal report compiled by Professor Koto.

[59] Recently in **Bee v The Road Accident Fund**[15] the court discussed the effect of an agreement between experts and said the following:

"Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement unless it does so clearly and at the very

[15] 2018 (4) SA 366 (SCA) at p384 A-C

least, at the outset of the trial.....Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. "

[60] The court in the Bee matter (supra) made mention of the judgment of Sutherland J in the full court decision of **Malema v The Road Accident Fund**[16] in which it was discussed that a fundamental feature of case management both here and abroad is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried. The court continued and said that where the matter in question falls within the realm of experts rather than lay witnesses, it is entirely appropriate to insist that experts in like disciplines meet and sign joint minutes. Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigant's respective experts.

[61] In view of the opinions expressed by our courts and in view of the failure of Professor Koto to testify and explain the circumstances under which the concessions were made and the reasons why he seeks to withdraw from same, I am of the view that the joint minutes are authentic and proper on the face of them. Professor Koto agreed with Dr Pienaar, in particular that the defendant had been negligent in the treatment of the defendant.

[62] There were a couple of expert witnesses I was not particularly impressed with. The evidence of the nursing staff did not advance the case of the defendant. The court cannot rely upon this evidence as the facts clearly speak for themselves.

[16] [2017] ZAGPHC 275 at para 92

[63] Dr Mogotlane did not give evidence as an expert witness but as a factual witness with a direct and material interest in the matter in that it was his first diagnosis that forms the basis of the plaintiff's claim against the defendant. As such, no weight can be attached to his evidence. He was also forced to make several concessions in cross-examination as stated above.

[64] The court took counsel from the evidence of both Dr Pienaar and Dr Lushozi. They were found to be credible expert witnesses whose evidence was corroborated by the other especially in the conclusion that the deceased's demise was as a result of hypovolemic shock. Dr Pienaar conceded where it was necessary and in particular conceded that he had misread an entry which had been made about the deceased's condition. The court accepted that it was a genuine mistake and not intended to mislead it.

[65] It is evident that the defendant has failed in the execution of its legal duty of care to the defendant in that the defendant and/or the hospital staff had acted negligently and that such negligence had caused or materially contributed to the death of the deceased. Accordingly, the defendant is liable to compensate the plaintiffs for the damage caused by the breach of the legal duty of care. The death of the deceased may have been avoided had better care been taken of the deceased by the defendant and its employees.

Quantification of the Plaintiff's Claim

[66] It remains for me to consider the quantum in respect of loss of earnings. The court must accordingly do the best it can on the information before it to consider an award which it considers to be just and fair in the circumstances. The general approach to

assessing loss of earnings was stated in the matter of **Southern Insurance Association Ltd v Bailey NO**[17] where the court acknowledged that any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. The court can only make an estimate which is often a very rough one of the present value of the loss.

[67] Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed are contingencies and are usually provided for by deducting a stated percentage of the amount or specific claims.

De Jongh v Gunther[18]

[68] A trial judge, in assessing compensation has a large discretion to award what he considers just and equitable. He may be guided by but not tied down by inexorable calculations by the parties' actuaries.

Legal Insurance Company Ltd v Botes[19]

[69] According to the pre-trial minutes of 10 November 2017 the defendant disputes the amount claimed by the first plaintiff as she receives a pension from the GEPF. It is clear that the defendant has failed to consider the provisions of the Assessment of Damages Act 1969 which provides that death benefits from a pension fund may not be taken into account in determining the loss of the plaintiffs.

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[17] 1984 (1) SA 98 (A) at p113G
[18] 1975 (4) SA 78 (W) at p80F
[19] 1963 (1) SA 608 (A) at p614F - G

[70] The actuarial report furnished by the plaintiff has made calculations until age 21 for the deceased's children on the basis that the third plaintiff is attending university. His younger brother, McRoy Phalafala is also expected to obtain a tertiary education. The actuary has applied general contingencies of 5% of the past loss and 10% in respect of the children's future loss. Having considered the plaintiff's actuarial report and in view of there being no contradictory evidence furnished by the defendant, I am of the view that the amounts proposed by the plaintiff's actuary are fair and just in the circumstances.

Costs

[71] Counsel for the plaintiff made submissions that the matter had come on trial for the third time. On the first occasion the judge who had been allocated to the matter was not available on the first day and on the following morning, it was suggested by the plaintiff's counsel that the matter be postponed as the days allocated were too few to finalise the trial. The trial was postponed and costs reserved.

[72] Counsel further submitted that on the second occasion in November 2017, the matter did not proceed despite the Acting Deputy Judge President having allocated the matter to be heard by an available judge for a period of 8 days. However, Counsel for the defendant insisted that 8 days would not suffice and that it be set down for 10 days. Again the matter was postponed and costs reserved.

[73] The matter was allocated to me to be heard for a period of 9 days, from 18 March to 29 March 2019. The matter proceeded from the 18th until the afternoon of 20th March when the matter was adjourned to continue on 25 March 2019, the 21st March being a

public holiday. The reason why I was forced not to continue proceedings on Friday 22 March despite my availability, was that Counsel for the defendant advised the court that she would not proceed as she thought that court would not sit in view of the holiday on 21 March. She was of the view that Friday 22 March would be considered by the court as a public holiday. As a result, the matter did not proceed.

[74] No evidence was heard on 26 March after counsel for the defendant indicated to the court that her witnesses were not available and that in particular, Dr Mogotlane would only avail himself on Wednesday 27 March and that Professor Koto on Friday 29 March due to other commitments. Accordingly, counsel for the plaintiffs seek a punitive costs order in view of the manner in which the litigation was conducted.

[75] Counsel for the defendant, on the other hand, was of the view that the delays in the matter were not occasioned by her clients and in particular, Professor Koto could not testify before the 29th March due to a national calling, his participation at a national conference. As such, punitive costs would be inappropriate in the circumstances.

[76] The normal rule pertaining to an award of costs is that costs should follow the result. The court may, in certain circumstances award punitive costs to show its displeasure for the way the litigation was conducted. In the matter on hand, counsel for the defendant failed to manage her case and failed to call her witnesses timeously causing undue delays. Furthermore, the court was told that Professor Koto would only testify on Friday 29th March due to his participation at a conference. However, on the 29th March the court was apprised of a decision not to call the witness to testify after the evidence of Dr Mogotlane had been heard and considered. It is to be noted that Dr Mogotlane gave his evidence on Wednesday 27 March and the decision not to testify

was made on 29 March. The court frowns upon conduct which is calculated to waste its time with impunity and needs to show its displeasure with the conduct of counsel for the defendant in her inability to manage her case. In the premises, the court orders that Ms Montsho-Moloisane should forfeit her fees for the 22 March, 25 March and 26 March for her non-appearance in court on those days and her inability to manage her case. Her junior, Adv Raphahlelo should also forfeit his fees for the 22 March as the matter did not proceed on that day. This is especially ordered due to the fact that Adv Montsh-Moloisane is not a junior advocate but a Senior Counsel and as such is expected to have knowledge on how not to waste a court's time and conduct herself accordingly.

Order

[77] Accordingly, the following order is granted:

(i) the claim of the first plaintiff is dismissed with costs including the costs of two counsel;

(ii) the defendant is ordered to pay to –

(a) the first plaintiff on behalf of McRoy Masete Phalafala the sum of R370 126,00;

(b) the second plaintiff on behalf of Moitheri Motebu the sum of R339 533,00;

(c) the third plaintiff the sum of R200 157,00.

(iii) Interest on the above amounts shall run at 10% per annum from 15 days of judgment to date of payment;

(iv) The defendant is ordered to pay costs of suit, on a scale as between attorney and client, including the cost of two counsel;

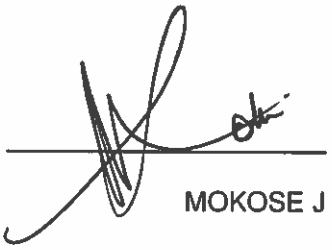
(v) For the information of the Taxing Master it is noted that the costs shall include the wasted costs of 22 and 26 March 2019;

(vi) The defendant is ordered to pay the costs reserved on 27 February 2016 and 15 November 2017 on the scale as between attorney and client, including the costs of two counsel;

(vii) The defendant is ordered to pay the qualifying fees of Dr Pienaar including the costs of 27 February 2016 and 15 November 2017;

(viii) Ms Montsho-Moloisane should forfeit her legal fees for 22, 25 and 26 March 2019;

(ix) Mr Raphahlelo should forfeit his legal fees for 22 March 2019.



MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

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For the Defendant:

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Date of Hearing:	18 March to 29 March 2019
Date of Judgement:	16 August 2019