THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 27428/10

AD **FIRST PLAINTIFF**

IB **SECOND PLAINTIFF**

And

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, WESTERN CAPE PROVINCIAL GOVERNMENT **DEFENDANT**

Coram: ROGERS J

Delivered: 1 DECEMBER 2016

FIRST SUPPLEMENTARY JUDGMENT

ROGERS J:

Introduction

[1] This judgment supplements the main judgment I delivered on 7 September 2016. In regard to para 6 of my order, neither side filed notices requesting me to clarify or amplify my findings.

The trust deed

[2] There has been due compliance with paras 9-11 of my previous order. The Deputy Master has filed a comprehensive report on behalf of the Master for which he is thanked. He has no objection in principle to IDT's damages being paid to a trust rather than a curator bonis. He supports the recognition of IDT's' parents as the founders of the trust. The proposed trustee, Nedgroup Trust Ltd ('NGT'), is known to him and he has no objection to that company's appointment or to its exemption from the obligation to furnish security. NGT's proposed remuneration accords with the current practice of corporate trustees.

[3] The Deputy Master supports the proposals I made in paras 628, 641, 644 and 649 of the judgment. These have been reflected in the revised trust deed submitted by the parties.

[4] The Deputy Master has queried the appropriateness and permissibility of there being more than one nominee of the corporate trustee. The revised trust deed accords with the Deputy Master's view. Other minor points of detail raised by the Deputy Master have also been addressed in the revised deed.

The actuarial calculations

[5] As to para 7 of my order, the parties duly submitted a joint minute by their actuaries. The actuaries presented three different calculations of future earnings and future medical expenses, based on three possible interpretations of my judgment. The uncertainty concerned the manner in which IDT's mortality risk was to be taken into account in the calculations, having regard to my finding on IDT's life expectancy.

[6] If one has a full life table applicable to the person in respect of whom calculations are being done, one can use the table to determine the likelihood of the person's being alive at the end of each year of life. This probability is much higher in earlier years than in later years. Life expectancy in the actuarial sense means the year in which the person has a 50% chance of still being alive, ie the year by which the sum of the chances of death in each of the preceding years reaches 50%. For an actuary, to say that IDT's age-seven life expectancy was reduced from 60,3 years to 48 years (as I found) means that the age by which he has only a 50/50 chance of being alive will be reached after 48 years rather than 60,3 years (ie by the age of 55 rather than 67,3). Although at age 8 (for example) IDT would have a very high chance of still being alive, it would not for an actuary be 100%. Similarly, although his chance of still being alive after age 55 would be less than 50% and would diminish with each further year, the chance in any such year would not be zero.

[7] If mortality risk is accounted for in this way, it will be apparent that the so-called 'lost years', for which our law does not allow a victim to be compensated by way of lost earnings, are not lost completely. In the present case, I referred to IDT's expected death age as 55. But for his injury he would have worked until age 65. Although one might think that the lost years are the years from age 55 to 65, the actuarial method I have summarised would still allow IDT some recovery of lost earnings for those years. The lost years, so the actuaries say, are accommodated by a reduction in the probability of his still being alive in that period. For example, whereas pre-morbidly he might have had (say) a 55% chance of being alive at the age of 64, he would now have only a (say) 44% chance of being alive and therefore will only recover the net present value of 44% of his earnings for that year rather than 55% thereof.

[8] The first method of calculation assumes that IDT's mortality risk must be calculated in the manner I have described. The actuaries refer to this as the 'generally accepted actuarial method of calculation'. I should mention in this regard that although Dr Strauss created a full life table for IDT's post-morbid life expectancy, I did not adopt that life table even though I upheld much of Dr Strauss' methodology. Similarly, I did not adopt any particular life table as representing the

pre-morbid life table applicable to IDT. The actuaries' first set of calculations must thus have required some assumptions on their part as to IDT's chances of death in each year of life, both before and after age 55.

[9] The second method adopted the same methodology up to age 55 but allowed nothing in respect of medical expenses and earnings after age 55. This was put forward by the defendant's actuary, Mr Lowther, in the light of certain statements in my judgment. I shall refer to this as the cut-off method.

[10] The third method was put forward by the plaintiffs' actuary, Mr Whittaker, again based on certain statements in my judgment. This method assumes that IDT recovers 100% of the anticipated medical expenses and lost earnings to age 55 and nothing thereafter. Mr Whittaker refers to this as the 'expectancy method'. Viewed from a legal perspective, this approach treats the expected death age as a finding, on a balance of probability, as to when IDT will die, this representing an accepted fact for purposes of the case. Like other facts determined on a balance of probability, it is treated as a certainty. On this approach the lost years are truly lost – there is no recovery for lost earnings beyond the expected death age. But conversely the actuarial calculation assumes no risk of mortality prior to the expected death age.

[11] The cut-off method (the second method) is the least favourable from IDT's perspective. It so turns out that the third method is more favourable than the first.

[12] The import of my judgment was discussed with counsel at a case management meeting on 3 November 2016. I indicated that I had conceptualised my life expectancy finding and its implications in accordance with the expectancy method (the third method). This inter alia explained the passages to which the actuaries had referred in putting forward the second and third sets of calculations. It also explained why I included mortality prior to the expected death age as one of the hazards to be taken into account in determining the contingency deduction of 17,5%. If I had anticipated the use of the first method, I would have made a lower contingency deduction. I also pointed out that I had arrived at a pre-morbid and post-morbid age-seven life expectancy for IDT without determining a full life table for

him. I indicated a firm prima facie view that the second method was not consistent with my judgment.

[13] The use of the first method with a lower contingency deduction might in the event have yielded a net result not very different from the use of the third method with a higher contingency deduction. Be that as it may, Mr Irish for the plaintiffs indicated that the plaintiffs were content, as a matter of agreement with the defendant, to accept the first method (despite what might on that basis be a higher contingency deduction than I would otherwise have set) but resisted the second method and said the plaintiffs might wish to lead actuarial evidence if the defendant pressed for its use.

[14] During the case management meeting Ms Bawa submitted that prior to the commencement of the trial the actuaries had agreed in a joint minute dated 4 December 2015 that the actuarial method for calculating present capital values would be the one described in para 3.1 of Mr Whittaker's report dated 17 November 2015. She submitted that this was the first of the three methods described in the recent joint report. That appears to be so though the actuaries' agreed approach appears to assume that the court's decision would identify a full underlying life table to be applied in performing the calculations. Ms Bawa also submitted that there were certain indications in my judgment which pointed to the adoption of the second (cut-off) method. In the case management meeting she reserved the defendant's position. She subsequently reverted with an instruction that for pragmatic reasons and to bring matters to finality the defendant agreed to the use of the first method.

[15] Accordingly, and on the basis of the parties have so agreed, I shall make an order in accordance with the first set of calculations presented by the actuaries. This does not involve an acceptance by the court that the first method is the one which gives effect to my judgment properly interpreted nor does it involve any decision as to the import or binding effect of the joint minute of the actuaries dated 4 December 2015.

Conclusion and order

[16] The main issues which are still standing over for later determination are costs and the determination of the amount to be awarded for the administration of the trust. In accordance with agreed directions, the hearing on costs will take place on 14 February 2017. The parties are to file an agreed bundle of correspondence and documents by 2 December 2016. The plaintiffs must file their heads by 3 February 2017 and the defendant must file its heads by 10 February 2017.

[17] The following supplementary orders are made pursuant to the orders contained in my judgment of 7 September 2016 ('the previous orders'):

(a) The amount awarded pursuant to para 2 of the previous orders is R12 323 224, which has been calculated in the manner set out in appendix 1 to the joint report of the actuaries dated 7 October 2016, a copy of which appendix is attached hereto marked "J1".

(b) The amount awarded pursuant to para 4 of the previous orders, after taking into account the 17,5% contingency deduction, is R3 057 858, which has been calculated in in accordance with the first of the three methods (the 'generally accepted actuarial method') described in the joint report of the actuaries dated 7 October 2016.

(c) Pursuant to para 8 of the previous orders, it is finally determined that IDT's damages are to be paid to a trust to be founded by the plaintiffs on the terms set out in the draft trust deed attached to the letter written by the plaintiffs' attorneys to the court on 17 October 2016, a copy of such trust deed being attached hereto and marked "J2".

(d) Pursuant to para 12 of the previous orders, the defendant must, forthwith upon the establishment of the said trust, pay a provisional sum of R1 million to the trust towards the cost of administering the award pending the actuarial calculation of such cost. The said sum of R1 million shall not, pending any contrary determination in terms of para 14 of the previous orders, be reduced by legal costs or contingency fees.

ROGERS J

APPEARANCES

For Plaintiffs	Mr D Irish SC & Ms W Munro Instructed by Joseph's Incorporated Unit 1, Bompas Square 9 Bompas Road Dunkeld
For Defendant	Ms N Bawa SC & Ms M O'Sullivan Instructed by The State Attorney 4th Floor, 22 Long Street Cape Town
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