IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: **21234/11**

In the matter between:

THANDI KENJANI First Plaintiff

THANDILE RAMANGOANE Second Plaintiff

SYDNEY SIPHIWO NCATE Third Plaintiff

And

THE MINISTER OF POLICE Defendant

Date of hearing: 22 November 2022

Date of Judgment: 30 March 2023 delivered electronically to the counsel

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JUDGMENT

HENNEY, J

Introduction:

[1] On 15 March 2009 the deceased, father to the first and second plaintiffs and the son of the third plaintiff, was killed by members of the defendant during the course and scope of their employment. Subsequently, the three plaintiffs instituted separate claims for damages in this court. The issues of liability and quantum were separated for adjudication by agreement between the plaintiffs and defendant.

[2] The first and second plaintiffs' claim were for loss of support and maintenance, and the third plaintiff's claim were in respect of damages suffered for funeral expenses incurred by him. The proceedings to determine the issue of liability in respect of the first and second plaintiffs' claim were dealt with by Samela J, who handed down a judgment on 14 May 2019 in which he made the following order: '*The Defendant is found liable to the plaintiff's loss of support occasioned by the shooting and killing of the deceased, Mazizandile Terence Ncate, by members of the South African police services that relate to on 15 March 2009*.'

[3] In the proceedings before this court, only the quantum in respect of the damages suffered by the first and second plaintiffs need to be determined. The first and second plaintiff seeks to be compensated for damages in respect of past and future loss of support in the amount of R958 350.00 each, together with the costs incurred during the determination of the defendant's liability and all associated costs of that proceedings, as well as the costs associated with these proceedings on taxed or agreed High Court costs of the plaintiffs' counsel and the associated costs related thereto**.**

[4] Although the defendant does not dispute that the plaintiffs are entitled to an amount of damages, it does dispute liability for the amount of damages that the plaintiffs have set out in their respective claims. Mr. Botha appears for the plaintiffs and Mr. O'Brien appears for defendant.

Undisputed and common cause facts:

[5] It is common cause that the deceased was employed at Correctional Services Department since 8 September 2000. At the time of his death he was earning on salary level 5, Notch 5, R79 287.00 per annum. It is not in dispute that both the plaintiffs and the defendant appointed Industrial psychologists. The plaintiffs appointed Lindy Emsley and the defendant appointed Bernard Swart.

[6] Furthermore, the Industrial psychologists appointed by both parties prepared a joint minute, which was accepted as undisputed evidence by the plaintiffs and the defendant. Wherein the experts agreed that the deceased would have continued earning as such and progressed a notch each year until he reached the top notch of where he would have continued to work until he would have been promoted to the next Salary Grade, and so forth until he would have retired at the age of 60. It is not in dispute that based on the joint minute, joint instructions were prepared by the legal representatives for the plaintiffs and the defendant, and provided to Munro to calculate the plaintiffs' loss of support. The joint instructions consisted of the following:

'a) Kindly use the assumptions as per the joint minute of the industrial psychologist, specifically the consideration as outlined in paragraphs 2.1.7.1 to 2.1.7.5.

b) Calculate the Plaintiffs losses, to the age of 23, for both the Plaintiffs.

c) Apply a 5% contingency deduction for past losses. No contingency deductions for future losses.

d) Use the standard apportionment of family earnings of two shares to the deceased and one share to each child whilst dependant.'

[7] It is furthermore common cause that based on these joint instructions, Munro Actuaries prepared an Actuarial Report dated 17 May 2022, which formed the basis and the subject matter of the evidence presented by Boshoff. It needs to be mentioned no such joint instructions were given to the actuaries employed by the defendant. Only the plaintiffs presented evidence in respect of the determination of the quantum. The following witnesses were called, the actuary, Willem Boshoff, the first and second plaintiff, as well as the mother of the first plaintiff, Moekie Kenjani and the mother of the second plaintiff, Nomvuyo Ramangoane.

The evidence:

[8] Willem Boshoff, an actuary in the service of Munro Forensic Actuaries, testified that Munro Forensic Actuaries prepare calculations for approximately 2000

loss of support cases per year. He has worked as an actuary for approximately 10 years and in his entire career, has only come across approximately 3 or 4 cases where the apportionment deviates from the norm of 2:2:1:1 and in all of these cases he thought it was not justified. According to his expert opinion the 2:2:1:1 apportionment proves to be fairly accurate as it is derived from scientific research based on large population groups, he however conceded that it could be seen as a blunt instrument. According to him, it is difficult to work with exact figures because the needs of children change as they become older. He has applied this formula to the deceased salary and he also included inflationary increases and for each year: According to this norm 2 shares would be awarded to the parents and 1 share for each child. He also calculated the loss of support to the plaintiffs over the period he was requested to. He came to a figure of a R958 350.00 for each, calculated from the date of the death of the deceased until they reached the age of 23 years; which he stated is a conservative assumption as young people usually struggle to find employment after they concluded their studies.

[9] During cross examination by Mr O'Brien, he was questioned under which circumstances a 3:1:1 apportionment would be used and he explained that it would be used when the family income is excessively large, which would result in the children not being able to utilise all the money a larger apportionment would entail i.e. 2:1:1. He further stated that the formula he used is not arbitrary, but was scientifically determined and it is based on the deceased's duty of support. He also considered that the deceased also worked overtime, which increased his salary by 30%, to meet his family's needs. The calculations were based on the deceased's salary which included his annual salary increases. It was agreed that the calculations

should be based on the salary he would have earned until he reached his retirement age of 60 years.

[10] Moekie Kenjani is the biological mother of the first plaintiff and the deceased was the biological father. She testified that the deceased supported her and the first plaintiff since her birth until his death. He was a good father, and he would have financially supported her to study further and make a life for herself. She testified that up to the death of the deceased, they were involved in a relationship. He gave her R1500. 00 per month and if he was by the means he would sometimes give her up to R2000. 00 per month. In addition to this payment he made, there was also a garnishee order compelling his employer to pay R450.00 per month into her account towards maintenance.

[11] In a rather bizarre and extraordinary testimony when questioned as to why she would have gone to the maintenance court and asked for R450.00 if the deceased in any event gave her R1500.00 per month, she explained that she was “jealous” and wanted to “spite” him, as she was aware of another woman which the deceased was involved with. It was put to her during cross-examination that this was unrealistic. Nothing however, turns on this rather bizarre evidence, because it would have no influence on the question whether the deceased had a duty to support the first plaintiff. In any event, the defendant in its submissions concedes that on the evidence, it is reasonable to accept that the deceased would have been liable to pay maintenance in the amount of R2000.00 per month for each of the plaintiffs.

[12] Although the mother of the first plaintiff testified that she was earning R2400.00 per month at the time of the death of the deceased, I agree with the submission of Mr Botha that this is irrelevant for purposes of determining the plaintiff's damages for loss of support, as confirmed by Willem Boshoff during his evidence.

[13] Nomvuyo Ramangoane is the biological mother of the second plaintiff, Thandile Ramanoane, of which the deceased was the biological father. She also testified that the deceased maintained and supported her and the second plaintiff. The deceased was a good father to the second plaintiff and they had a good relationship with each other. Since the second plaintiff's birth and until the death of the deceased, she never worked. During this time the deceased supported them and provided them with what they needed. The deceased gave her R450.00 cash per month and he also bought them enough groceries to last for herself, the second plaintiff and her mother for a month. She estimated that the amount that the deceased would spend on groceries, would be about R1300.00 per month.

[14] The deceased would also on occasion have taken the second plaintiff to the Spur. The evidence of this witness in respect of the fact that the deceased supported them was not contested. It was also uncontested that the deceased would have continued to support the second plaintiff with his studies.

The circumstances of the first and second Plaintiff:

The first plaintiff:

[15] She was in her 4th year of studies at Nelson Mandela University after having completed her Diploma in Accountancy, and was studying towards her advance diploma, during the time of her testimony. During the first 3 years of her studies it was funded with a NSFAS bursary. She is currently studying from home and her studies is funded by another bursary from a different institution. At the time of her giving evidence (November 2022) she did not have a bursary for 2023 and she endeavours to study towards her CTA 1 and the year after that, her CTA 2. She will be 23 years of age when she completes her formal studies. From her evidence, it is apparent that she had a very good relationship with the deceased and he regularly took her on outings.

The second plaintiff:

[16] He took a gap year after school and testified that he earned R3400.00 per month for 6 months during that period. In 2021 he started studying Electrical Engineering at Northlink College, also on a NSFAS bursary and is currently studying towards the completion of his N4 level. In 2023 he plans on studying his N5 level which he hopes to finalise by July 2023, and progress onto his practical training N6. The N6 practical training is for a further 18 months. He will also be 23 years of age when he completes his studies. He testified that the deceased was a good father and that he remembers him fondly. The deceased would buy him clothes on occasion.

The Submissions of the parties:

[17] The dispute in this case turns on the question whether the quantum for damages for loss of support should be assessed in the manner as submitted by the plaintiffs, based on the actuarial report of Boshoff. Mr. Botha submitted that he was surprised that the defendant disputed the actuarial report, after the plaintiffs as well as defendant's attorneys agreed on 5 May 2022 to issue joint instructions to the actuaries as set out above.

[18] In the joint instructions issued to the actuaries, the parties agreed that they should use the assumptions as per the joint minutes of the industrial psychologists as set out in paragraphs 2.17.1 – 2.1.7.5 of that joint minute. In the joint minute of the industrial psychologists under paragraph 2.1.7 the following is stated: '*Based on all the considerations outlined above, the following pre-traumatic career postulation of the deceased is offered for the deceased in this matter:*

1) *securing employment with the Department of Correctional Services on 8 September 2000-as had been the case;*

2) *continuing employment at the Department of correctional services and earning on Notch R79287 per annum in 2009-as had been the case;*

3) *as a government employee, his annual increases would consist of CPI increases in the remuneration tables (OSD) each year AND a notch increase each year. His annual increases will hence be CPI plus notch be annum;*

4) *usual government benefit must be added and to be found in Koch Quantum Yearbook (2020, page 120);*

5) *retiring age at 60 years of age.'*

[19] They also agreed that the first and second plaintiffs' losses should be calculated to the age of 23. That a 5% contingency deduction for past losses should be taken into account and that no contingency deductions for future losses should be calculated. They furthermore agreed that the standard apportionment of family earnings should be: two shares to the deceased, and one share for each child whilst dependent. The industrial psychologists prepared the joint minute which was accepted as undisputed evidence by the plaintiffs and the defendant.

[20] On 18 May 2022, the actuarial report by Munro Forensic Actuaries was sent to the defendant's counsel. Thereafter nothing else was forthcoming from the defendant since the receipt of the actuarial report, except that they will be not be making a settlement offer.

[21] On 7 November 2022, one day before the trial, the defendant's counsel informed the plaintiff's counsel through a WhatsApp message that they will be accepting the joint IP report and the calculations of the actuaries except the ratio 2:1:1.

[22] Mr. O' Brien submits that that there is no dispute that the plaintiffs' loss must be ascertained until they reach the age of 23 because both of them are students and

are performing exceptionally well in their respective courses. He further submits that there is no dispute about the actuarial method of calculating the value of the plaintiffs' loss. However, the assumptions upon which actuarial calculations are based is in issue. And in this regard the plaintiffs rely on the evidence of Boshoff. Boshoff bases his calculations on an apportionment of 2:1:1, although he concedes that he has seen larger apportionments in cases of the exceptionally high earning families because expenses cannot go below a certain amount in low income families.

[23] Mr. O'Brien further submitted that Boshoff's assumptions are inconsistent with the evidence presented in this matter. His assumption is based on a family where two shares are apportioned to each adult, and one share for each child. According to him in this matter, the plaintiffs' mothers were not married to the deceased. In this regard, he submits that Boshoff's evidence that it will not make any difference is not based on fact. He also did not give the court the reasons why the position is different in this case given the fact that the mothers of the plaintiffs were not married to the deceased. He submitted that an expert must set out a factual basis for the acceptance of his opinion, otherwise it does not hold any value.

[24] Mr O'Brien submitted that the defendant's actuaries in their report dated 3 November 2020, apportioned the income as three parts to the deceased, and one portion to each claimant while in receipt of parental support, bearing in mind the economic circumstances of the single parent. This according to Mr. O'Brien shows that the 2:1:1, standard is not cast in stone. I, however agree with Mr Botha, this was not presented as evidence and cannot form part of the record for consideration.

[25] Mr O'Brien further submitted in this regard that this approach was rejected in the case of *Reay & Another v Netcare (Pty) Ltd. t/a Umhlanga Hospital & Others*[1] where *Koen J* said the following: '*This is a crucial point of departure to the calculations. The determination of any loss of support suffered by the plaintiffs by virtue of the death of Mrs Reay should be determined firstly on the basis of objective evidence, which should be available, of the actual financial support they enjoyed and were accustomed to receive, and which they were deprived of by her untimely death. It is an issue on which specific evidence should be available and which should have been adduced. The plaintiffs did not adduce such evidence. Instead, they have in the main simply contented themselves with apportioning the joint income of Graeme and Mrs Reay available from time to time in the proportions of 2 parts for Graeme, 2 parts to Mrs Reay and 1 part each to Jarred and Tyrone, often used and adopted in support and maintenance claims. That is not desirable and should at best have been a fall-back position, and then only provided the limitations of adopting such an approach are clearly understood. Whilst such an apportionment might in some instances not be inappropriate, for example where the total available income would be depleted by the needs of those dependant on that joint income, it permits of no savings and would result in an inaccurate calculation of loss of support where the actual costs of support of Graeme, Jarred and Tyrone amounted to less than 4/6ths of the total combined incomes of Graeme and his wife. The defendant, perforce, because no alternative evidential basis presents itself, has had to conduct its own calculations also on that basis. The plaintiffs are fortunate that such an approach was adopted by the defendant because no reason was advanced why objective evidence of the actual support Mrs Reay provided and the actual support*

[1] [2016] 4 SA All SA 195 KZP at para 11

Graeme and his two sons were accustomed to receive, were not placed before this Court.'

[26] Boshoff conceded that there are other methods to calculate like 1/6, 1/7 and 1/8 that are used but stated that these methods were found not be acceptable. Mr. O'Brien further submitted that the figure of R958 350.00 does take into account living and travelling expenses.

[27] According to Mr. O'Brien the amount of maintenance the plaintiffs would have received from the deceased depends on the relationship between the parties, the actual amount of maintenance and support he had paid before his death, the requirements of the deceased and the general circumstance of the case.

[28] He submits that given the many imponderables in this matter, which includes the fact that the parties were living apart, the maintenance order, the evidence of the mothers and the mathematical calculation proposed by Boshoff, the so-called standard assumption should not be applied. According to him, if the standard assumption is applied, it cannot be contrary to the plaintiffs' evidence.

[29] In respect of the maintenance Mr. O'Brien submits that in considering the general equities of this case and the imponderables, the court should find the figure as maintenance the deceased paid before his death as R2000.00 per child. According to him, this accords with the legal principles set out in the cases that established his income immediately before his death and further submits that this

figure of R2000.00 should be annually adjusted from time to time at the prevailing interest rate.)

[30] Regarding deductions, he submitted that is common cause that the first plaintiff received NSFAS financial assistance in relation to her studies. He submitted that based on the principles as laid down in *Zysset & others v Santam Ltd*[2] and *Road Accident Fund v N F Timis*[3], it was stated that where payments are made at the expense of taxpayers, it would amount to double compensation. He submitted that the NSFAS payments falls into this category and needs to be deducted.

[31] In respect of the first plaintiff, her expenses were paid from this scheme and she received an amount of R1500.00 per month for the period 2019 and 2022. She furthermore received a bursary from the University in 2022, which covered her tuition fees. She was further dependent on her mother for support.

[32] In respect of the second plaintiff, he took a gap year in 2020 for which he should receive no support, and for a period of six months in 2020, he received an income which was more than the actual support.

[33] Regarding contingencies, Mr. O'Brien submits that the deceased had a motor vehicle, he lived with his mother and he had to travel to work at Pollsmoor prison. It therefore must be inferred that he had living expenses because he lived with his mother. What also needs to be considered as a contingency was the possibility of the deceased getting married.

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[2] 1996 (1) SA 273 (C) at 278B-D
[3] (29/09) [2010] ZSCA 30 (26 March 2010)

[34] He therefore submits that the 5% contingencies are too low if regard should be had to all the factors he had referred to. According to him, a contingency factor of 40%, although a thumbs-suck will give effect to the imponderables referred to earlier.

Issues for consideration:

[35] a) Whether the defendant, based on the joint instructions given to the actuaries- Munro, is bound thereto and cannot disavow that instruction under the circumstances and if so;

b) Whether joint instructions given to the expert have the same evidentiary status of a joint minute to which a party can be held bound to; and

c) Whether such agreement to the issuing of joint instructions constitutes an admission, for the purposes of the calculation of the damages upon which the actuaries based its report and if so;

d) Whether bursaries paid by National Student Financial Aid Scheme deductible and can be regarded as double compensation.

I will now deal with the issues in turn.

Discussion:

[36] I agree with the submission of Mr. Botha, that there's no evidence that was placed before this court to come to the conclusion that a 40% contingency factor

should be considered. The plaintiffs on the other hand, firstly, presented an expert report based on the joint instructions given to the actuaries and secondly, based on the actual evidence of Boshoff, presented evidence to the court about the amount to be determined as the quantum for the loss of support suffered by them.

[37] The difficulty I have for the defendant's position adopted in this case was that they agreed with the plaintiff that the actuaries should apply a 5% contingency deduction for past losses and secondly, to use the standard apportionment of family earnings being two shares to the deceased, and one share to each child, whilst dependent. They also agreed that the calculations of the plaintiffs' losses be calculated to the age of 23.

[38] The report of Munro actuaries was presented to the defendant's counsel on 18 May 2022, after the joint instructions agreed to between the two parties were sent to actuaries on 5 May 2022. It was only on 7 May 2022, a day before the trial that the defendant's counsel stated that they have difficulty with the calculations of Boshoff, and in particular, the standard of apportionment of 2:1:1 and the 5% contingency deduction.

[39] It is not open to the defendant at this late stage to disavow their agreement which amounted to admitting the evidence given by Boshoff that was tendered by the plaintiffs, especially in the absence of any evidence presented by it to disprove the case presented by the plaintiffs. In *McWilliams v First Consolidated Holdings Pty Ltd*[4] it was said under certain circumstances: "*[A] party's silence and inaction, unless*

[4] 1982(2) SA 1(A) 10 E-G

satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion".

[40] The law with regards to joint minutes of experts which amounts to an agreement and are regarded as common cause facts in our law of evidence, is well established. It is in my view of equal application in certain cases where parties agree to jointly give instructions to an expert. In my view, the status and evidential value of such a joint instruction based on an agreement, at the very least in this case, are similar to those where parties agree to a joint minute in respect of expert witnesses. And can be regarded as an admission of a prejudicial fact, *Schmidt and Rademeyer: Law of Evidence*[5] thus states: '*An admission must be a communication confirming a prejudicial fact. The communication may be by words or conduct. Conduct that does not amount to a communication but from which a prejudicial fact may be inferred, is not an admission but circumstantial evidence. Such conduct is admissible simply because it is relevant and does not have to be tested against the admissibility requirements for admissions.'*

[41] Rogers AJA (at that point in time) in *BEE v Road Accident Fund*[6] the learned judge with reference to *Thomas v BD Sarens (Pty) Ltd*[7] said the following:

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[5] May 2022 Edition S 1 20 at 19-7
[6] 2018 (4) SA 366 (SCA) at 384 paragraph 64
[7] [2012] ZAGPJHC

'[64] This raises the question as to the effect of an agreement recorded by experts in a joint minute. The appellant's counsel referred us to the judgment of Sutherland J in Thomas v BD Sarens (Pty) Ltd [2012] ZAGPJHC 161. The learned judge said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts (para 9). 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 latest, at the outset of the trial" (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference (para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare (para 13). Sutherland J's exposition has been approved in several subsequent cases, including in a decision of the full court of the Gauteng Division, Pretoria, in Malema v Road Accident Fund [2017] ZAGPJHC 275 para 92.'

[42] In this particular case, there was an agreement on the following aspects:

1) the assumptions as per the joint minute of the industrial psychologists, referred to earlier on;

2) that the plaintiffs losses be calculated to the age of 23;

3) at a 5% contingency deduction for past losses should be used, and that no contingency deductions could be used for future losses;

4) that the standard apportionment of family earnings which are two shares to the deceased and one share to each child of dependent should be used.

[43] The plaintiffs were clearly placed under the impression, until a day before the start of the trial, that these facts are common cause and would not be disputed by the defendant. There was no timeous repudiation by the defendant of the above-mentioned facts agreed upon between it and the plaintiffs were clearly taken by surprise when the defendant, a day before the commencement of the trial only, stated they do not agree with points 3 and 4 of the agreed facts, as mentioned above. This is exactly what Rogers AJA in *BEE* with reference to the *Thomas* judgment of Sutherland J which he referred to, said should be avoided where he said at:

> '[65] … *A fundamental feature of case management, 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.... 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 litigants' respective experts. There would be no incentive for parties and experts to agree matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue…'*

And what is of importance to this current matter is what Rogers AJA says further at [66]: *'Facts and opinions on which the litigants' experts agree are not quite the same as admissions by or agreements between the litigants themselves (whether directly or, more commonly, through their legal representatives) because a witness is not an agent of the litigant who engages him or her*." (own underlining)

In this particular case, the parties agreed to give joint instructions to one expert, Boshoff of Munro Actuaries, to report back on an agreed set of facts and criteria to determine the quantum. It was an agreement between the parties or their legal representatives not between witnesses or experts. And the purpose of this joint instructions was to one particular expert instructions in order to limit the issues on which evidence was needed in respect of the quantum.

[44] I agree with Mr. Botha that when I engaged with Mr. O'Brien during argument as to whether these facts agreed to, work for the purpose of settlement he said it was not, but it was merely to do a calculation to see what the figures would amount to. It was never his argument that the reason why this evidence would not be permissible was due to the fact that it was an agreement or concession made in the course of settlement negotiations. There was also never any issue about the admissibility of the agreed instructions and throughout the trial there was no objection to any reference made by the plaintiffs to these joint instructions. This was even presented through the evidence of Boshoff.

[45] And in any event, this was also not the reason other than the reasons cited during argument, that was given for the repudiation of the agreement reached

between two parties. In this regard, what Rogers AJA said in *BEE* is once again important, which is that, if a litigant for any reason, does not wish to be bound by the limitation, fair warning must be given. And… '*In the absence of repudiation (i.e. fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the parties are not in issue.'*

[46] This is exactly what the plaintiffs believed up until a day before the start of the trial and they were entitled to run the trial on the basis that the actuarial report was not in issue, because there was no timeous repudiation. The defendant is therefore bound by the agreement concluded between it and the plaintiffs as to the criteria and method for the determination of the damages for loss of support. This included a 5% contingency for past losses and no contingency deduction for future losses. And that the *standard* apportionment of family earnings of two shares to the deceased and one share to each child whilst dependant, be applied in the determination. This resulted in the determination of the amount by Boshoff of R958 350.00 for each plaintiff. This was in essence admitted by the defendant. This should be the end of the matter. I however need to address some of the other issues Mr O'Brien raised in argument

[47] The defendant's reliance on the *Reay* case in my view is misplaced, purely based on the fact that there was other reliable evidence, which justified the court not to rely on the two parts to each adult and one part to each child in order to determine the quantum.

[48] The court said in *Reay* that this was usually the method used to determine quantum in loss of support cases and were it not for the evidence in that case, the 2:2:1:1 method "*should have been the fall-back position*", which is in line with what Boshoff said regarding the use of this method in the ordinary course. And in this particular case, the method used was *two parts to the deceased and one part to each of the plaintiffs* and the reason therefore is justified, which is that it was not an ordinary family that consisted of a father, mother and two children which the parties agreed upon. This was common cause between the parties when they agreed to the actuarial method to be used.

[49] No evidence was presented to contradict the reasons why Boshoff used the 2:1:1 method of calculation in this particular case. He stated firstly that it was based on the standard practices used by actuaries in South Africa. He further stated that this is the default position and method used, unless there are exceptional circumstances to justify a difference in the manner of apportionment.

[50] He further testified that based on his experience and expertise he has seldom seen a large apportionment. He makes mention that this happened on three or four occasions, which according to his opinion was not justified. In fact, he stated that in cases where there was a larger apportionment it would be in the case where the earnings of the family would be exceptionally high. And in cases of lower income families, the method he used would be the preferred method, because if you should go lower, the amount that would be apportioned would not be able to meet the expenses of the person in need of support.

[51] In determining the quantum, he used all the circumstances of the deceased prior to the time of his death, which included the salary, salary increases which government employees of his rank and position would receive on a yearly basis, the yearly notch increases plus inflationary increases that the deceased would have acquired whilst he was still alive. While he concedes that the ratio he used can be regarded as a fairly blunt instrument, it nonetheless overtime, has proven to be fairly accurate. For the simple reason being that the exact expenses cannot always be determined in the case of children as their needs change as they grow older. He further explained in detail his reasons for his conclusion which remain unassailable. His evidence as to the reliability of this method and its applicability in this case is overwhelmingly convincing

[52] The second issue I need to deal with whether a bursary provided by NSFAS are deductible. I do not agree that the bursaries provided by NSFAS are deductible. In this regard, the approach of the Constitutional Court in *Coughlan v Road Accident Fund*[8] can be a useful guide in a matter like this. The scheme was enacted by Parliament, as the National Student Financial Aid Scheme Fund Act 59 of 1999 and in terms of section 2 the purpose of the Act is to establish a financial aid scheme for students at public higher education institutions. A further aim is to provide financial aid to eligible students admitted for admission to a higher education program.

[53] In terms of the preamble the purpose of the Act is to redress past discrimination and to ensure representivity and equal access to the human

[8] [2015] JOL 33137 (CC)

development of the nation. The NSFAS derives its funding from the following sources in terms of section 14 of the Act:

a) money appropriated by Parliament;

b) the donations and contributions;

c) interest;

d) money repaid and repayable by borrowers;

e) any other income received by NSFAS.

[54] The NSFAS Act is a piece of legislation enacted to give effect to our rights as enshrined by the Constitution, particularly the right to education. It also seeks to give effect to our constitutional values of dignity, equality and freedom. In in this regard, it can also be regarded to give effect to the right to social security as stated in section 27 of the Constitution, especially to those young people who were previously disadvantaged.

[55] The Constitution in terms of section 29(1) states*: 'Everyone has a right-*

a) to a basic education, including adult basic education; and(b) to <u>further education</u> which the state, through reasonable measures must make progressively available and accessible'. Section 29 (2) says the following with regard to this obligation … '*In order to ensure the effective access to, and implementation of, this right, the state*

must consider all reasonable educational alternatives, including single medium institutions, taking into account-

a) equity;

b) practicability; and

c) the need to redress the results of past racially discriminatory laws and practices.'

[56] In my view, the purpose of the scheme proposed in terms of the NSFAS Act was for the state to give effect to these rights in order to fulfil its obligations in terms of the Constitution, which as a result of racially discriminatory laws and practices of the past, the rights in the section were purposefully withheld from the majority of South Africans.

[57] The bursary payments made available to the plaintiffs is to give effect to their right to education, which the state, through reasonable measures had made progressively available and accessible to the plaintiffs in terms of the NSFAS Act as an instrument. It cannot be regarded as a form of compensation made to them by the State. It is a right the state had to fulfil in terms of the Constitution.

[58] In *Coughlan* at *[51]* the Constitutional Court said the following albeit in the context of child support grants and foster care grants but the underlying principle in my view, remains the same and is also applicable in this particular case: '*In sum: the payment of compensation for loss of support to foster children does not amount to double compensation: the nature and purpose of the grant is different from*

compensation, these grants arise from the constitutional obligations of the State to provide for the children in need of care, they are not paid to the children and predicated in the death of a parent.'

[59] This principle laid down in *Coughlan*, is of equal application in this particular case where the state, by making a financial contribution to the plaintiffs in exercising its obligation in terms of the Constitution to progressively give effect to the realization of the right, such payment from the State does not amount to double compensation. In circumstances where the State has to compensate from its coffers, that very same person for damages as a result loss of support, especially where the nature and purpose of the payment in this particular case, in the form a bursary, is different from compensation.

Conclusion:

[60] I therefore conclude for all of the reasons stated above, that the plaintiffs had proven the claim for damages on a balance of probabilities, which damages were calculated and the amounts contained in the Actuarial Report of Munro Actuaries dated 17 May 2022.

Order:

[61] In the result therefore, I make the following order:

Merits

1. Defendant is liable to compensate First, Second and Third Plaintiff for 100% of their damages;

Capital

2. Defendant is liable to pay the First Plaintiff, in respect of past and future loss of support, the amount of R958 350.00;

3. Defendant is to pay Second Plaintiff, in respect of past and future loss of support, the amount of R958 350.00;

4. Defendant is to pay Third Plaintiff, in respect of funeral expenses the amount of R12 450.00;

5. It is accordingly recorded that the capital amount due and payable by the Defendant is R1 929 150.00.

Costs

6. Defendant shall pay Plaintiff's taxed or agreed High Court costs;

7. Plaintiff shall, in the event that the costs are not agreed, serve the notice of taxation on the Defendant's attorneys of record;

8. Defendant in respect of the expert witnesses listed herein below (the experts), shall pay the taxed or agreed qualifying expenses of the experts listed herein below, if any, the attendance, travelling, waiting time and reservation fees, if any, the reasonable costs attached to the procurement of the medical-legal

and other reports inclusive of those referred to, joint-minutes and consultation between Plaintiffs' attorney, counsel and expert witnesses.

9. The experts are:

9.1.1 Lindy Emsley, Industrial Psychologists;

9.1.2 Willem Boshoff, Actuary.

10. The Defendant shall be liable to pay the reasonable taxed or agreed costs of the Plaintiff's legal representatives including counsel in respect of consultations held with expert witnesses for trial preparations, costs for preparing and attending to pre-trial conferences and pre-trial conference minutes, pre-trial agendas, costs of the transcribed record, judicial case management meetings, inspections in loco at the scene of the incident, preparation of the trial bundles, memoranda prepared by counsel in respect of the settlement of this matter, heads of argument prepared by counsel, noting of the judgment, and trial fees for the following days: 4 September 2017, 5 September 2017, 26 November 2018, 27 November 2018, 28 November 2018, 29 November 2018, 11 December 2018, 12 December 2018, 11 February 2019, 12 February 2019, 08 November 2022, 09 November 2022 and 10 November 2022.

11. Defendant shall be liable to pay the following reasonable costs incurred subject to the discretion of the Taxing Master:

11.1 The costs incurred by Plaintiff, Plaintiff's attorney, Plaintiff's counsel and in respect of the second inspection in loco held at the scene of the scene of the incident, which inspection in loco was directed by the court in the merits trial;

11.2 The reservation fees of all expert-witnesses as listed in paragraph 10 above at their respective rates, to testify at the trial as set down for hearing on 08 November 2022, 09 November 2022 and 10 November 2022;

11.3 In respect of all lay witnesses, who testified in respect of both liability and quantum;

11.4 Costs related to the procurement of the transcribed records;

12. The taxed or agreed fees of Plaintiff's counsel, inclusive of consultations, preparation for trial and attendances at the trial of the matter, for the preparation of Heads of Argument and for his attendances at the inspection in loco.

Payment provisions

13. With regard to the capital amount, interest is to run at the prescribed rate *a tempore morae* from 14 days after date of judgment;

14. Payment of the capital amount as reflected shall be effected within 14 (fourteen) calendar days ("*the capital due date*") from date of this order by way of electronic transfer into the Plaintiff's trust banking account, details of which are listed below;

15. Payment of the taxed or agreed costs reflected above shall be effected within 14 (Fourteen) calendar days of agreement or taxation ("*the cost due date")* and shall be effected by way of electronic transfer into the Plaintiff's attorney's trust account, details of which are listed below.

16. Interest will run at the prescribed rate of interest, a tempore morae from 14 (fourteen) calendar days after the said costs have been agreed or allocated on taxation.

17. It is recorded that the Plaintiff entered into a contingency fee agreement and that same complies with the Act.

18. Plaintiff's attorney's trust banking account details are as follows:

NAME OF BANK:

BRANCH:

NAME OF ACCOUNT:

ACCOUNT NO.:

BRANCH CODE NO.:

R.C.A. Henney

Judge of the High Court

Plaintiffs' attorneys: Sohn and Wood attorneys, Cape Town

Defendant's attorneys: State attorney Cape Town