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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

**REPORTABLE
CASE NO: 3444/2015**

In the matter between:

N[...] W[...]

First Plaintiff

C[...] M[...] A[...]

Second Plaintiff

G[...] G[...] A[...]

Third Plaintiff

R[...] C[...] A[...]

Fourth Plaintiff

A[...] A[...] A[...]

Fifth Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NONCEMBU J

[1] This is a delictual claim in which the plaintiffs are claiming damages from the defendant arising out of the unlawful and intentional shooting of C[...] A[...]¹ (C[...]) and the holding hostage of the second plaintiff by G[...] A[...] (G[...]) on the night of 30 September to 1 October 2013. G[...] was the ex-spouse of C[...] with whom she shared a tumultuous relationship characterised by domestic violence and protection orders. He committed suicide after shooting and killing C[...] with a service firearm. This, after he had been declared unfit to possess a firearm by his employer, the South African Police Service.

[2] The first and the second plaintiffs, now divorced, were married to each other at the time of the incidence. It is alleged that the incidence of their divorce was sequelae to the death of C[...] and the holding hostage of the second plaintiff at the hands of G[...]. The third to the fifth plaintiffs are the children of the deceased couple.²

[3] The merits of the matter were conceded on terms set out in a court order which was taken by consent. The terms of the order are, *inter alia* –

‘That the defendant is directed to compensate the First to Fifth Plaintiffs such damages arising out of the unlawful and intentional shooting of C[...] A[...] by G[...] A[...], as well as the unlawful and intentional holding of the Second Plaintiff hostage by G[...] A[...] on the night of the 30th September to 1 October 2013 as may be proved by the Plaintiffs, alternatively may be agreed upon between the parties.’

[4] Pursuant to the said order, the current proceedings are in respect of quantum only.

[5] At the onset, it must be pointed out that whilst the claim for the plaintiffs as set out in their amended particulars of claim, is premised on damages sustained as a result of the death of both C[...] and G[...], it seems that reliance on the damages

¹ The second plaintiff's daughter and stepdaughter of the first plaintiff.

² And the grandchildren of the second plaintiff.

sustained as a result of the death of the latter has since been abandoned.³ This is apparent from the above court order. Furthermore, some of the plaintiffs' expert witnesses conceded as much, albeit painstakingly, when it was put to them during cross-examination, that whatever damages were found to have been suffered must be apportioned accordingly and limited only to those sustained as a result of the death of C[...].⁴

[6] At the commencement of the trial proceedings counsel for the defendant placed on record an unconditional tender of settlement by the defendant which was on the following terms: no tender in respect of the first plaintiff; R 220 000 in respect of the second plaintiff; R 72 000 in respect of the third plaintiff; R 52 000 in respect of the fourth plaintiff; and R 135 000 in respect of the fifth plaintiff. The tender included the payment of the second, third, fourth and fifth plaintiffs' taxed party and party costs.

The First and Second Plaintiffs' Evidence

[7] Before getting into the evidence tendered in respect of the quantum of damages that the plaintiffs are entitled to in the matter, I pause to mention one aspect which came out strongly during the opening and closing arguments by counsel for both the first and second plaintiffs and for the defendant. This pertained to the failure to testify by both the first and second plaintiffs in support of their claims.

[8] According to Mr Jooste, counsel for the first and second plaintiffs, given that the merits were conceded in the matter, the absence of testimony from the two plaintiffs has no bearing on their claims as the evidence of their experts is sufficient in establishing the damages they suffered; and such evidence cannot be said to amount to hearsay as it was based on their observations in assessing the plaintiffs. Mr Beyleveld, counsel for the defendant, argued to the contrary, submitting that in the absence of evidence from the plaintiffs themselves, the evidence of their experts

³ See also the Joint Practice Note signed by the parties at page 41 of the Rule 37 Index.

⁴This is in line with the decision in *Minister of Safety and Security v Hlomza* [2014] ZASCA 51 (2 April 2014), where the Supreme Court of Appeal held that suicide by a police officer does not constitute an enforceable cause of action by any of his dependents.

carries no value as it has no factual basis. Both parties referred this court to various decided cases on the issue. I deal with this issue more fully later in the judgment.

[9] In respect of the first and second plaintiffs, the evidence of two witnesses; D J Stigant, a clinical psychologist and Anel Booysen, an occupational therapist, was tendered in support of their claim. The summary of their evidence follows.

[10] Stigant holds a master's degree in clinical psychology from Rhodes University. He has been a clinical psychologist for 37 years and practices for his own account. He is registered with the HPC (Health Professionals Council) and has given evidence in court many times before.

[11] He compiled the medico-legal psychological report in respect of the first and second plaintiffs, the latter having been referred to him by attorney Gregory de Cock Associates, after having consulted with the two for purposes of evaluation and compiling such report.

[12] He carried out one test with the first plaintiff called the Minnesota Multiphasic Personality Inventory (MMPI). The test entails over 500 computerized statements which a patient completes him/herself. From his interpretation of the MMPI, it came out that the first plaintiff was a person who tends to be stressed and sensitive to anxiety reactions which he represses all the time. He described this as a condition similar to PTSD, though not the same, but a stress condition that evolved from PTSD. According to him this was due to the fact that the second plaintiff had, since the incident, changed from the person he had been married to for 30 years. He found it difficult to confidently relate to her as he did before. It was as if he could not please her as before and that undermined his confidence as a husband in an emotionally bonded relationship with his wife. According to Stigant the first plaintiff could not give him another precipitating event that could have caused him to be in the mental state indicated by the MMPI. He opines that this is what led the first plaintiff to divorce the second plaintiff.

[13] In respect of the second plaintiff, he also read parts of the report by Doctor Estelle De Wit, a clinical psychologist, and ascertained therefrom that Dr De Wit

made a diagnosis of Post-Traumatic Stress Disorder (PTSD). Ten years had passed since the incident when Stigant saw the plaintiffs. He told the court that if PTSD is still present after one month, it becomes chronic, meaning that it is a permanent and lifelong disorder. In describing the condition, he told the court that typically PTSD is not reactive at the time of the incident but emerges at any time from a few months after the event and thus develops post the trauma.

[14] When he interviewed the second plaintiff she broke down and was very distressed when she had to recount the event. Stigant predicts that she would break down in the witness stand should she have been called to testify. He concluded that the second plaintiff's personality functioning has deteriorated as a result of post-traumatic stress disorder (PTSD).

[15] He based his conclusion on a statement made by the second plaintiff when she said that 'the traumatic event had dramatically changed her as a person'. According to him, this was in line with what they see overtime when there is a severe PTSD. During the interview he asked questions on how the plaintiff experienced herself on a day-to-day basis. Whether she had any nightmares, dreams, things like that which would normally indicate the existence of PTSD. Whether she gets depressed or anxious, or how she has been from the time of the event until the assessment 10 years later.

[16] The questions are aimed at establishing whether her responses would fit in with the criteria that make up or qualify for a diagnosis of PTSD. He referred to a publication called DSM (V) which he defined as a psychiatric handbook published by the Psychiatric Association in America, containing standardized criteria used across the world to determine the existence of psychiatric disorders.

[17] Stigant recommends psychotherapy sessions for both plaintiffs for the management of their disorders going forward. This is aimed at helping them with learning a different perspective on the events that caused the mental disturbances. He states that once things become chronic over time, especially in the case of the first plaintiff, it is very difficult to effect meaningful changes such that therapy becomes mainly supportive rather than remedial. According to him supportiveness

usually alleviates to a degree the symptomatology, but it does not cure the person so to speak.

[18] The evidence of Anel Booyse, an Occupational Therapist, was also tendered in respect of the second plaintiff. Ms Booyse studied at the University of Stellenbosch where she graduated in 1995. Her working experience started at a school for disabled children where she focused, primarily on learning disabilities and social emotional groups working with children displaying emotional distress. In 2017, she started working in medico-legal and has been working as a locum at Eugene Marais Hospital Rehabilitation Facility (Part of the Life Group) in Pretoria, which specializes in medico-legal. They do not offer any treatment and only conduct assessments for the courts.

[19] As an occupational therapist she evaluates the physical, cognitive and psychological abilities and the impact an incident would have on plaintiffs' activities of daily living, their leisure abilities and their interaction with people around them in the community. After making that assessment, she would then make recommendations in regard to assisted devices, assistance, adaptation and the like. As a background to her report, she used the diagnosis contained in the reports of Dr De Wit and Mr Stigant.

[20] Ms Booyse assessed the second plaintiff utilizing the Activity Participations Outcomes Measure (APOM), a model standardized by the University of Pretoria. On her observations the second plaintiff did not make eye contact with her during the interview. She looked defeated, anxious, and depressed. She became tearful when asked to talk about the incident and the impact it had on her life. She found it difficult to express herself. Ms Booyse however did not exclude the possibility of illiteracy contributing to the second plaintiff's difficulty in expressing herself.

[21] She told the court that the second plaintiff noted that she was healthy and happy with no psychological difficulties prior to the incident, except that she had been diagnosed with high blood pressure when she was younger.

[22] She testified that the APOM results indicate that the second plaintiff will require assistance in her daily living to the extent that she is on the borderline of a patient found in a psychiatric institution in terms of her functioning level. She opines that if the second plaintiff does not receive the care that she needs, it is likely that she will regress to requiring long-term institutionalised care in a psychiatric facility, following which it would be very difficult for her to re-enter the community.

[23] Ms Booyse concludes that the PTSD has had and continues to have severe impact on the second plaintiff's functioning, and she is of the opinion that the second plaintiff will require assistance to care and manage her day to day living. In regard to the loss of amenities, Ms Booyse concluded that the second plaintiff will require assistance in her daily living and will require a carer to assist her with daily planning and setting up a routine that will assist her in managing her day better.

[24] She made recommendations to assist the second plaintiff with the identified challenges which include occupational therapy sessions, quarterly occupational therapy (OT) home visits and an assessment by a psychiatrist for treatment of PTSD and related symptoms. She also recommended in-patient psychiatric treatment from which she believes the second plaintiff would benefit. Additionally, she opines that the second plaintiff would benefit from domestic assistance once a week, gardening assistance once bi-weekly and constant supervision and care to assist with the daily management of her life. It is also recommended that she gets an orthopaedic mattress and a contour memory foam pillow.

Evidence of the third to the fifth plaintiffs

[25] Six witnesses, including the three plaintiffs themselves, tendered evidence in support of the plaintiffs' claims. What follows below is a summary of their evidence.

[26] Elaine Romaren (Elaine) is currently employed as a financial manager at Jeffreys Bay Superspar, which is part of the same group as Humansdorp Spar where C[...] used to work prior to her demise. Part of Elaine's role is to conduct HR processing each month as there is no separate HR department.

[27] In her capacity as financial manager, she compiled a document setting out the employment details and earnings of C[...]. She testified that C[...] commenced her employment as a Cashier at Humansdorp Spar on 1 April 2010. She worked 48 hours per week (ordinary working hours at the time). This information was captured from the payroll system.

[28] Elaine told the court that prior to the incident in 2013, C[...] was paid R15.96 per hour as per the sectoral determination at the time. She worked 192 hours per month, adding up to a total amount of R36 772 per annum. According to Elaine, had C[...] not died as a result of the incident in 2013, and had she continued to work for Spar, her salary would have increased annually according to the sectoral determination each year up to the hourly rate of R25. 70 in 2024. She would have likely continued working until the age of 65, which is the normal retirement age for employees working at Spar.

[29] Elaine indicated that for the period of March to September 2013 C[...]’s net income was approximately R3000 per month. She later submitted a copy of the sectoral determinations for the wholesale and retail departments setting out the historical increases for, inter alia, cashiers from 2014 to 2023. (calculation pertaining to sectoral determination increases for subsequent years as they would have applied to C[...]’s net income).

[30] Dr Peter Whitehead is an Industrial Psychologist who specialises in medico-legal work. His qualifications and expertise in the field were not disputed. He compiled a report and gave evidence pertaining thereto in respect of the projected career path and earnings of C[...] A[...] but for the incident.

[31] In compiling his report he had regard to various source documents as well as undertaking interviews with collateral witnesses such as the first, second and fourth plaintiffs as well as Ms Elaine Romaren.

[32] He told the court that C[...] would have continued her work as a cashier but for the shooting and that given her work history and limited exposure to alternative jobs, she would not likely have made any significant career changes.

[24] He further testified that C[...] earned the minimum wage for cashiers in the wholesale and retail sector and her future earnings, but for the incident, would probably have been similar, adjusted by annual increases in accordance with the wholesale and retail sector sectorial determination scales for a cashier. He also testified that C[...] earned a merit bonus of between R 1 200 – R 1 500 annually and that but for the incident, she would have continued working as a cashier until ordinary retirement age of 65 years.

[25] When cross examined with regards to the burning down of the Humansdorp Spar in 2018 leading to its closing down, he conceded that one could not say what could have happened to C[...] or whether she would have been earning an income at all over that period. He agreed with the proposition of a speculation that C[...] would have received a similar position and be immediately employable thereafter given her years of experience as a cashier.

[26] The following witness was Dr Derek van der Merwe, a medical practitioner specialising in the field of psychiatry registered as a specialist psychiatrist in 1979. He has been working in the medico-legal field for the past 21 years. His qualifications and expertise in the field were not gainsaid.

[27] Dr van der Merwe did assessments and compiled reports in respect of the third plaintiff (dated 29 November 2021), the fourth plaintiff (dated 16 February 2023) and the fifth plaintiff (dated 6 November 2021).

[28] The purpose of his assessment and reports was to reflect on the psychological impact that the highly traumatic event (the shooting of their mother by their father and their father committing suicide) had on the plaintiffs' mental state and well-being. He used the format of the DSM (V) in assessing the PTSD in respect of the three plaintiffs.

[29] He conducted a psychiatric forensic interview, first by interviewing the second plaintiff who was directly involved in the initial incident, to get an account of the actual events as the children were not present at the time and only heard about it

from other parties. He also used collateral sources which include the psychiatric report of Dr De Wit.

[30] In respect of the third plaintiff he made a diagnosis of partial PTSD as he did not meet all the criteria for full PTSD (due to the absence of criteria B requirements, eg. bad dreams, flashbacks, extreme distress, mental and physical when something reminds you of the traumatic event). He also diagnosed him with major depression in partial remission and complex persistent bereavement disorder.

[31] He noted that although the third plaintiff presently does not meet the criteria for major depression, he stood a high risk of having future depressive episodes. He alluded to the possibility that the third plaintiff might have mental disorders such as depression and PTSD antedating the death of his parents due to the domestic violence between his parents.

[32] With regards to the fourth plaintiff, the interview was conducted via zoom and WhatsApp calls as the fourth plaintiff was busy with military training at the time. The diagnosis in his regard was PTSD in remission, dissociative symptoms and adult victim of childhood trauma. The reason why the PTSD was said to be in remission was because all the symptoms which he had before were no longer present at the time of assessment, therefore they were in the past.

[33] He did indicate though, that there were 50% chances that the PTSD could come back. According to Mr van der Merwe, if the plaintiff relapses his treatment costs are not going to be high, but if he has serious relapses the costs could be very high, hence there were two possible trajectories for his future expenses.

[34] The diagnosis of adult victim childhood trauma related to the incidence of the death of his parents, and it was said that it could have damaging effects which can persist into adulthood and affect the behaviour and functioning across the lifespan of the person.

[35] The diagnosis of dissociative symptoms is based on the fact that the fourth plaintiff could not recall various details such as the funeral, the cause of this being

the incident and the deaths of his parents. Van der Merwe testified that medication has little effect for dissociative symptoms and that the fourth plaintiff is unlikely to use therapy at this stage, although it was more probable than not that he would need and benefit from long therapy at some stage in the future. He also found it likely that in 10-20 years severe depression would surface necessitating protracted psychotherapy and protracted use of medication if depression becomes bad enough. He did caution though, that serious depression is poorly treatment responsive.

[36] It was further noted that the aforementioned may be especially relevant considering that the fourth plaintiff may be exposed to military trauma as a result of his career choice, and it was said to be advisable that he does not ever enter into an active combat situation as he is unlikely to cope.

[37] At the time of diagnosis, there were no sufficient symptoms to make a diagnosis of prolonged grief disorder.

[38] Psychiatric treatment and medication was said not to be needed for the fourth plaintiff at present; however, it was recommended that he undergoes psychotherapy treatment.

[39] With regards to the report on the fifth plaintiff, van der Merwe testified as follows:

39.1 He is the youngest of the children and was around 12 years old at the time of the trauma inducing incident. He was still in school and visiting his aunt in Patensie when he received the news of the tragic demise of his parents. He closed himself in his room, resorting to alcohol and dagga for a week after receiving the news, however, he stopped about a week after the funeral.

39.2 The fifth plaintiff was diagnosed with PTSD in partial remission, major and severe depression and persistent complex bereavement disorder in partial remission, all of which are accepted as psychiatric disorders. A GAF score (a brief disability rating) of 60 out of 80 (80 being very healthy), was assigned to the plaintiff, meaning that he is one level above the ability to work.

39.3 He is likely to have relapses of depression into old age, and the co-existence of depression and PTSD worsen the prognosis for both. He is at high risk of suicide.

39.4 While treatment is recommended, the outcome is not guaranteed to provide a good result since people presenting with the co-existence of these diagnosis implies a poor prognosis. Treatment, however, would make life tolerable.

[40] Propositions and recommendations for treatment in respect of all three plaintiffs and the costs involved were made.

[41] Van der Merwe conceded that in accordance with Dr De Witt's report, the environment of the third to fifth plaintiffs whilst staying with the first and second plaintiffs was at best turbulent and sounds negative and damaging to a child. It was also conceded that there was no indication that the fourth plaintiff had struggled at all in his tertiary studies before being accepted to the SANDF.

[42] Another material concession made was that whether positive or negative prognosis are given, nobody is able to state that it will happen and thus, such comments essentially remain assumptions, and nobody can say with certainty whether these issues will return in any of the plaintiffs.

[43] The third plaintiff (G[...])'s evidence can be summarised as follows: He is currently 28 years old. He lived with his mother after his parents' divorce. He thinks that his father mostly provided for their necessities but couldn't say the extent thereof as their mother also provided for them. He had a good relationship with his mother, and she helped him with his schoolwork, looked after his daily needs and helped him with whatever problems he had. She also gave him money for luxuries when he asked.

[44] He also had a good relationship with his father and was of the opinion that his parents had a good relationship as they never argued in front of him. After the death of his parents, he started using cannabis for two to three months as a coping

mechanism. He stopped using on his own without any need for treatment and never used it again.

[45] As a result of the trauma of losing his parents he left school without matriculating. He started working in 2015 at Waterwiel Broedery and continues to work there to this day. He stated during cross examination, that the first plaintiff made his life a misery and that he even went so far as putting him and his brothers out onto the street when he was drunk.

[46] In brief, the evidence of the fourth plaintiff (R[...]) was the following. He is currently 25 years old, residing at Humansdorp. He is employed at One Signal Regiment in Pretoria as a radio technician and operator for the South African National Defence Force (SANDF) holding the rank of a Corporal. He has been in the employ of the SANDF since January 2020.

[47] He was approximately 14 years old at the time of his mother's death. He was very close to his mother, spending a lot of time with her in their home. The relationship between his parents was difficult and unstable, his father drank a lot. He performed well at school and never repeated any grades.

[48] According to him his mother bought most of the groceries at their home as his father was not there for very long. His mother paid for household expenses from her salary as it was noticeable that after the divorce, she would become visibly worried over buying things like electricity. R[...] could recall one incident where his mother had to borrow money from his aunt to buy school shoes. He did not know if his father contributed or what he contributed towards their maintenance.

[49] He lived with the first plaintiff from grade 9 to the middle of his matric year when he left as a result of the first plaintiff's sister who was verbally abusive towards him.

[50] He studied a bridging course in business management at Varsity College post – matric but he did not complete the course as he was unable to pass accounting. Thereafter, he studied at Boland College in Stellenbosch for three weeks when he

received a call from the SANDF to say that he had been successful in the recruitment process.

[51] He was 21 years old when he joined the military and prior to this he did part time work at Woolworths in Jeffrey's Bay and U Save in Humansdorp, doing mostly holiday work and earning approximately R 3000 for the two holiday periods at Woolworths. He earned approximately R 3000 per month for three months in 2019 at U Save.

[52] According to him it was better to live with the Prinsloos (his mother's relatives) as opposed to the first plaintiff as it was a more stable environment. His parents did not have a good relationship. He particularly recalled one night when his father returned home very drunk and swearing that they had to flee the house. They fled to the first plaintiff's house, who opened the gate and told them that they could not stay there, which led to them going to their uncle's house (Mr Prinsloo).

[53] He told the court that the first plaintiff was not very sympathetic towards him and his brothers and that they did not have a good relationship with him. He further stated, during cross examination, that the first plaintiff was domineering and when it came to finances, he calculated every cent that he supposedly spent on their maintenance, with the intention of claiming it back. According to R[...], it became apparent to him and his brothers that they were not welcome at the first plaintiff's house and that he was really using them for financial gain.

[54] He admitted that although he had medical aid from his employment with the SANDF, it has never occurred to him to seek medical assistance relating to his trauma or to obtain prescription medication. He did indicate that he would do so if a doctor says he needs medication.

[55] The evidence of the fifth plaintiff (A[...]) was the following. He was approximately 12 years old when his mother died. After the divorce of his parents, his mother made the purchases for their immediate needs from her salary, although he had no idea how much of her salary she was using because he was still young at the time.

[56] He had a good relationship with his mother, and she always made time for him and to assist him with whatever problems he had, and she was actively involved in his school activities. He matriculated in 2021. He was first employed in March 2022 at Coca-Cola merchandiser in Patensie when he was 21 years old. He still works for Coca-Cola but is now based in Humansdorp Super Spar. His parents' death affects his work relationships with other people as well as other ongoing problems. To date he has not received any medical treatment for his problems.

[57] After the death of his parents he was looked after by his grandmother's brother (Mr Prinsloo). He does not know what his mother's salary was or that of his father as he was young at the time.

[58] He recalls receiving treatment from psychologists in 2019 which his family members on his father's side paid for. He was not happy while living in the care of the first and second plaintiffs. There were disagreements with these plaintiffs over money, and he did not receive all of his money from his father's pension. After moving in with the Prinsloos, he had no further contact with the two. He briefly used dagga and alcohol after his parents' death however, at this point in his life he is generally happy in his work and has no disciplinary record.

The Issue

[59] The only issue for determination before this court is the quantum of damages which the defendant is liable for in respect of the plaintiffs.

[60] In respect of the first and second plaintiffs, the matter turns on whether their failure to testify in court and relying solely on the experts' testimony can be said to be fatal to their claims. The contention by Mr Byleveld for the defendant in this regard is that the evidence of the experts, in the absence of a factual basis, is hearsay, and therefore carries no probative value.

[61] In response, Mr Jooste contended that considering their mental status due to the psychological impact of the damage they suffered (as contained in the expert

reports), these plaintiffs could not be called to re-live the traumatic events they underwent by testifying in court. To drive this point home, he made the example of certain victims of crime who in certain criminal matters are exempted from testifying in court to prevent further victimization. This, he argues, is more so given that the merits have been conceded by the defendant in this matter.

Discussion

[62] In my view, Mr Jooste's argument, however, falls foul on two levels. In the first leg, in the example used pertaining to criminal matters, expert testimony would ordinarily be tendered *following an assessment of the witness with regards to his or her ability to testify in court proceedings, and only thereafter would such a witness be exempted*. (emphasis intended) For an expert to simply give an opinion that the witness cannot testify in court because they suffered trauma without any professional assessment having been conducted in this regard (ability to testify in court proceedings), goes beyond the scope and the function of an expert in court proceedings.

[63] In the second instance, and most pertinently, the facts leading to the plaintiffs suffering the psychological trauma which forms the basis of their claims in this matter have indeed been conceded. The plaintiffs therefore are not required nor expected to testify in regards thereto. What they are required to testify about is the extent of the impact that the sequelae of such actions had on them, so that the court can be able to determine and quantify the damage they suffered. In this regard they bear the onus.

[64] Citing as authority for his argument in this regard, Mr Byleveld referred this court to a decision by the full court of this division in *MEC for Health, Eastern Cape v MM obo ELM*⁵ where the following was stated:

'[12] . . . Expert evidence is by its nature an opinion premised on the drawing of an inference from established facts. In the present context it amounts in

⁵ [2022] JOL 54016 (ECB) at paras 12 – 13.

essence to a statement that established medical opinion, as the expert interprets it, dictates a particular result under an assumed set of facts. Accordingly, by reason of its very nature, expert opinion must have a factual basis. The facts, which are usually found in the primary evidence, provide the necessary link with the opinion, which in turn cannot be reached without the application of expertise. If the expert witness is unable to give direct evidence with regards to the existence of a fact, the opinion is based on a fact assumed to be true for the purpose of giving the opinion, and it must be proved at the trial to give the opinion any probative value. 'In the law of evidence "opinion" means any inference from observed facts, and the law on the subject derives from a general rule that witnesses must speak only to that which was directly observed by them' and "an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness".

[13] It follows that, unless the facts on which an expert witness expresses an opinion on are not in dispute, they are nothing more than factual assumptions which is inadmissible hearsay unless proved by admissible evidence. Subject to the qualification that in any given matter, all or some of the facts may be common cause, in that its existence was pertinently agreed upon by the litigants, or it was not placed in issue on the pleadings, it is the duty of the court as the final arbiter of fact, to decide if the factual basis for an opinion had been established. "Expert assistance does not extend to supplanting the court as the decision-maker. The fact-finding judge cannot delegate the decision-making role to the expert".'

[65] In *Williams v Member of the Executive Council, Department of Health, Eastern Cape and Another*,⁶ Bands AJ (as she then was) stated the following:

'It is trite that it is the court's task to determine issues of fact and not the task of an expert witness, whose function cannot usurp that of the judicial officer. The key function of an expert witness is to guide the court in its decision-

⁶ [2023] 1 All SA 562 (ECP) at paras 18 – 19

making process on questions, which fall within the ambit of the expert's specialised field of knowledge.'

[66] The Supreme Court of Appeal in *HAL obo MML v MEC for Health, Free State*, held that where –

‘. . . the facts are central to the opinions of the experts, the court should require that those facts be led in evidence before the experts express their opinion.’

[67] In the matter under consideration the evidence and opinions of the experts are based on the assumption that but for the traumatic event of the kidnapping of the second plaintiff, and the killing of C[...] by her ex-husband, the first and second plaintiffs were fine with no psychological issues. Of course, this factor is not common cause between the parties, nor was it ever admitted. No evidence was tendered by the two plaintiffs pertaining to their physical or mental wellbeing prior to the traumatic event.

[68] Based on the information received from the first and second plaintiffs, the experts formulate opinions that any psychological and other related issues that the two plaintiffs have (even culminating in their divorce), were a direct result of the traumatic events. Propositions are even made by one of the experts with regards to physical adjustments and equipment needed to adjust the living conditions of the second plaintiff, despite there being no factual evidence from the second plaintiff herself, as to what her living conditions were prior to and since the incident (and thus provide a link with the opinion/proposition made).

[69] The defendant was not afforded an opportunity to cross examine the plaintiffs to test their evidence on these facts. This is also despite the fact that one of the expert reports formulates an opinion that the first plaintiff was or may have been a bully and abusive towards the second plaintiff. Which opinion seems to align with the evidence of the third to the fifth plaintiffs. Whether or not this was indeed the case, and if so, whether it could have impacted on the first and second plaintiff's mental status and wellbeing post the incident could not be tested under cross examination.

[70] To further bolster the defendant's argument on this point, is the fact that not only was the first plaintiff not the biological father of C[...], he was also not directly involved when the trauma inducing incident took place. This factor, taken in conjunction with the evidence of C[...]'s children, that he was never sympathetic towards C[...] even when she was alive (to the extent of even chasing her and her children away when she sought refuge in his house from her abusive husband at the time), and even more unsympathetic to C[...]'s children after she had passed (except for the financial gain it provided for him). This aligns with the alleged abusive and bully nature of the first plaintiff, which could possibly be ascribed to the ultimate divorce between him and the second plaintiff.

[71] In the absence of primary evidence from the two plaintiffs however, this court is none the wiser. No facts were presented before the court to provide a link with the opinions of the experts in this regard. In the final analysis, any evidence pertaining to the cause of the divorce between the first and the second plaintiffs, is hearsay as it pertains to expert opinions for which no factual basis was presented before court.

[72] In *P v P*⁷, where evidence under cross-examination established facts which were totally contrary to what was disclosed to the experts, the court stated the following;

‘. . . While her evidence in chief portrayed Mrs P as an uncaring, neglectful and bullying mother prone to outbursts of rage and physical abuse directed against both Dr P and her children, her evidence under cross-examination revealed quite a different picture. Ms Zama conceded, albeit somewhat grudgingly, that her function in the parties' household was that of a domestic worker who left at half past four each afternoon, and that Mrs P was the person who primarily cared for the children on a day-to-day basis. Ms Zama went so far as to concede that Mrs P, with whom she clearly had a difficult and somewhat turbulent relationship, was in fact “ ‘n goeie ma”.’

⁷ (215/06) [2007] ZASCA 47; [2007] 3 All SA 9 (SCA); 2007 (5) SA 94 (SCA) (30 March 2007) at para 22.

[73] In the present matter the court was clearly deprived of the facts central to the opinions of the experts, most pertinently in so far as the cause of the breakdown of the marriage between the parties, and the living conditions as well as the mental condition of the second plaintiff prior to the incident. To the extent that the opinions of the experts are based on such facts in establishing the mental and psychological conditions and the extent of the damages suffered by the two plaintiffs, such evidence carries no probative value before this court as it amounts to hearsay.

[74] Earlier on in the proceedings it was stated that reliance was to be placed on section 3 of the Law of Evidence Act in regard to the acceptance of the evidence of the experts in this regard, however, the requirements in terms the said provisions were never established during the court proceedings. This then leaves the only evidence in respect of the first and second plaintiffs being the tender that was made by the defendant at the commencement of the proceedings.

[75] I now turn to the assessment of damages in respect of the third, fourth and fifth plaintiffs.

[76] In their amended particulars of claim, the third, fourth and fifth plaintiffs claim damages under three heads: loss of maintenance and support, future medical expenses and general and /or constitutional damages.

[77] The claim for third plaintiff is the total amount of R732 180.00, broken down as follows: R30 230.000 for loss of maintenance and support, R 301 950.00 for future medical expenses and R 400 000.00 for general and /or constitutional damages. In the case of the fourth plaintiff the total claim of R 1 027 596.00 is broken down as follows: R71 510.00 for loss of maintenance and support; R 556 086.00 for future medical expenses; and R400 000.00 for general damages. For the fifth plaintiff the breakdown of the total claim of R1 157 163.00 is as follows: R 134 131.00 is for loss of maintenance and support; R 624 032.00 is for future medical expenses; and R 400 000.00 is for general and /or constitutional damages.

Loss of maintenance and support

[78] It is not in dispute that the deceased parents of the three plaintiffs (C[...] and G[...] A[...]), in their lifetime had a legal duty to provide maintenance and support to their children. The two were divorced on 24 May 2011, whereafter G[...] relocated to Patensie and the plaintiffs continued to reside with C[...] in Humansdorp. It is also not in dispute that there was a maintenance order against G[...] in favour of C[...] in the amount of R2 000 per month in respect of the children, which formed part of the divorce decree. As to whether payment in terms of the said order was maintained at all or regularly, is another question altogether.

[79] What is in issue in this regard is whether the first to the third plaintiffs have established on a balance of probabilities that C[...] did in fact provide for their maintenance and support. No issue was taken with Romarin's testimony with regards to C[...]’s earnings at Humansdorp Spar where she was employed.

[80] As of 1 October 2013, the date on which the plaintiffs’ parents passed away, the position of the plaintiffs was as follows:

80.1 The thirds plaintiff (G[...]), was 17 years old and attending grade 10 at Humansdorp Secondary School. His evidence was that he never failed any grade prior the incident. However, contrary to this, expert evidence revealed that he had failed grade 10 before, prior to the incident. According to him, he intended to finish matric, but due to the traumatic passing of his parents he could not cope, he lost focus at school and failed grade 10 in 2013 and ultimately left school in 2014. In 2015 he commenced employment at Waterwiel farm where he still works to date.

80.2 The fourth plaintiff (R[...]) was 14 years old and passed his matric in 2016. He never failed a grade in school and continued with full time studies after matric until he joined the SANDF at the age of 21 in January 2020. Post-matric his studies were paid for by Nicolus Prinsloo (his grandmother’s brother).

80.3 The youngest of the three, A[...] (fifth plaintiff), was 12 years old at the time. According to him he never failed a grade prior to the incident, and afterwards he lost interest in his schooling, which led to him failing grade 11. He later passed his

matric in 2021. In March 2022 he was employed by Coca Cola Merchandising where he works as a fridge packer up to date.

[81] All three plaintiffs testified that prior to their employment they were not able to support themselves and that their mother was responsible for their living expenses and necessities. They believed that she provided for them from her salary, although they could not say how much she spent on them due the fact that they were still young at the time. They did not dispute that their father also contributed to their expenses, but they could not say what the extent of such contribution was.

[82] Mr Paterson for the plaintiffs referred this court to various cases which set out the approach of courts when assessing claims for loss of support. Most pertinent of these, is the case of *Jonathan obo Jonathan v Road Accident Fund*⁸ (*Jonathan*), where it was held that the claim by a dependent for loss of support has been regarded as the right of property. The deprivation of which by a wrongful act of a defendant would find a claim for patrimonial damages. As patrimonial loss is a sine qua non for any action under the *lex Aquilia*, the action can only succeed when there has been a legal guilty on the deceased to maintain the plaintiff and where he in fact did so.⁹

[83] In *Hersman v Shapiro and Co.* 1926 TPD 367¹⁰ Stratford J at 379 said the following:

‘Monetary damages having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is little more than estimate; but even so, if it is certain that pecuniary damages have been suffered, the court is bound to award damages.’

[84] This approach was confirmed by the Appellate Division (as it was then known) in *Anthony and Another v Cape Town Municipality*¹¹ where Holmes JA held:

⁸ (731/08) [2011] ZAECPHC 7 (17 March 2011) (unreported).

⁹ At para 4.

¹⁰ Referred to in *Jonathan supra*.

‘ . . . When it comes to scanning the uncertain future, the court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss.’

[85] In *Jonathan (supra)*, after having considered various authorities, Eksteen J stated the following:

‘[12] It is now accepted that the court is not bound by any one method of calculation, (compare *Southern Insurance Association v Bailey NO*, supra at 114C – E) however, the general approach of our courts is usually to utilize the annuity basis of calculation and therefore to adjust the figure obtained in accordance with the general equities.

[13] What clearly emerges from the foregoing is that this is not the kind of case where the evidence is required to be of such a nature as to establish the quantum of damages with mathematical precision. In the final analysis the court will award such damages as the equity of the judge will determine having regard to the maintenance which the deceased would have been able to provide and which he used to provide.’

[86] At para [41] the court held:

‘In such cases the court is called upon to do the best it can with the evidence which may often be inconclusive, provided that the plaintiff has led the best evidence that it could reasonably be expected to lead.’¹²

[87] It is an acceptable method of calculation in maintenance matters where no precise records are available, to attribute one part of the household expenses to

¹¹ 1967(4) SA 445 (A) at 451 B – C.

¹² Footnotes omitted.

each child and two parts to each parent. This is what was also stated by Eksteen J in Jonathan (*supra*) at para [39] where he said:

‘In the absence of meticulous records of precisely how the family expenditure was divided our courts have accepted a convenient formalism which attributes one part to each child and two parts to each parent.’¹³

[88] The method referred to above is the same method that was utilized by the actuaries in the matter under consideration, to assess the plaintiffs’ damages in respect of loss of support and maintenance. The actuary’s report and calculations were not challenged, and no opposing evidence was tendered by the defendant in this regard.

[89] Whilst I accept that the plaintiffs’ father may have contributed to their maintenance needs, I have no reason not to accept that their mother, C[...], primarily supported them from her salary. They were all staying with her prior to the incident and all have testified that she was responsible for their maintenance needs. Clearly, given their ages at the time they cannot be expected to have the details of what was contributed by each parent. The evidence tendered in this regard therefore is the best evidence that could reasonably have been expected to establish the plaintiffs’ damages under this head.

[90] I am therefore satisfied that they have proved their claims on a balance of probabilities in this regard, and therefore grant judgment in their favour in the amounts set out in the actuarial calculation which takes into account a 5% past contingency deduction, contained in scenario 2 of Annexure A, as follows:

90.1 In respect of the third plaintiff, an amount of R 9 805.00;

90.2 In respect of the fourth plaintiff, an amount of R57 567.00; and

90.3 In respect of the fifth plaintiff, an amount of R95 289.00.

General Damages

¹³ Compare for example *Groenewald v Snyders* 1966 (3) SA 237 (A) at 247 F -H.

[91] Arriving at an appropriate award for general damages is never an easy task. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the court's view of what is fair in all circumstances of the case. Whilst one can accept that there is a readily perceptible tendency towards increased awards in respect of general damages in recent times, one must not lose sight of the fact that conservatism is one of the multiple factors to be taken into account in awarding such damages. The principle remains that the award should be fair to both sides – it must give compensation to the plaintiff, but 'not pour out largesse from the horn of plenty at the defendant's expense'. (as pointed out in *Pitt v Economic Insurance Company Limited* 1975 (3) SA 284 (D) at 287 E – F).¹⁴

[92] It is trite that general damages lie within the discretion of the court.¹⁵ The following remarks by the Supreme Court of Appeal¹⁶ remain apposite in determining an appropriate award for damages:

'It has been said before that while "money can never be more than a crude solatium for the deprivation of [liberty] . . . and there is no empirical measure for the loss" nonetheless "our courts are not extravagant in compensating the loss".'

[93] The expert evidence pertaining to the psychological injuries suffered by the third to the fifth plaintiffs due to the death of their parents, and the sequelae thereof, was not controverted by the defended. Dr van der Merwe suggested that an apportionment of 20% be applied in respect of the emotional and psychological sequelae to the third and fourth plaintiffs (5% towards the abusive relationship with the first and second respondents and 15% towards the events preceding the incident (the environment within which the plaintiffs grew up); and 80 % in respect of the incident itself).

¹⁴ *Flanagan v Minister of Safety and Security* (497/2017) [2018] ZASCA 96 (1 June 2018) at para 33.

¹⁵ See *Minister of Home Affairs v Rahim and Others* 2016 (3) SA 218 (CC).

¹⁶ *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA).

[94] It is unclear to me why the fifth plaintiff is differentiated in the above regard simply because he was younger than his brothers at the time. Furthermore, whilst I have no reason not to accept the doctor's opinion that the mind cannot apportion injury with regards to whether it is due to the death of the mother or the father, I have to take into account, as one of the considerations, that the plaintiffs lost not only their mother, but also their father whom they were close with in one swoop fell under tragic circumstances.

[95] It follows therefore that the cause of their psychiatric lesion was not only the passing of their mother but also tragically losing their father at the same time. Given the fact that no claim lies with regards to the passing of their father, in my view that calls for an apportionment of the damages they suffered.

[96] Both counsel referred me to previous comparable awards with regards to an appropriate award on the circumstances of this matter. As has been said on numerous occasions before, evidence of previous comparable awards is often fraught with difficulties as no two cases have identical facts or circumstances. Comparable awards merely serve as a guide, with no more value than that. Furthermore, attempting to determine an adequate solatium is a daunting task as no monetary compensation can ever make up for the loss suffered.

[97] In taking into account the previous awards I have been referred to in the present matter, the factors stated above, I am of the view that an award of R165 000 in respect of each of the plaintiffs is an appropriate award in respect of the emotional and psychological injuries suffered as a result of the death of their mother.

Future Medical Expenses

[98] Aligning himself with the recommendations of Dr De Wit, Dr van der Merwe recommended treatment in respect of the third plaintiff which includes psychiatric consultations, grief therapy sessions and medication to the total tune of R 262 775.00 with a proposition of a 20% contingency deduction to be applied.

[99] In respect of the fourth plaintiff, he opined that although he may not require medical treatment presently, there is an 80% chance of any of his disorders relapsing. It was his further opinion that in approximately 10 – 20 years the fourth plaintiff would require some form of treatment for severe depression. He recommended that the fourth plaintiff receive psychotherapy and psychiatric sessions over a period of time, as well as medical treatment given the 80% risk of a relapse. The total cost of the recommended treatment in this regard is said to amount to R 505 973.00, whereupon a 40% contingency deduction should be applied (given that he will only require treatment in the event of a relapse).

[100] In the case of the fifth plaintiff, Dr van der Merwe's opinion is that he will require treatment in order to make life more tolerable and to improve his quality of life, given the likelihood that his symptoms will endure. He recommended that the fifth plaintiff receives psychiatric consultations, bereavement psychotherapy and psychotherapy sessions and a list of medications, all of which make a total amount of R 529 932.00. He proposed that an ordinary 20% contingency deduction be applied in respect of the total cost.

[101] It is trite that contingencies are a matter for the discretion of the court.¹⁷ In the present matter, it is my view that on the totality of the evidence presented, all three plaintiffs are gainfully employed and are thriving well at work with no incidences presently. I further take into account that they have not needed any significant treatment since the incident in 2013, and this notwithstanding that there were other traumatic situations they were exposed to prior and after the incident.¹⁸

[102] In my view an appropriate contingency deduction in respect of the third and fifth plaintiffs would be 40% and in respect of the fourth plaintiff, given the likelihood that a relapse may or may not occur, a 60% contingency deduction would be appropriate.

¹⁷ Cannon v Road Accident Fund [2023] EC case no 2473/2021 (Unreported judgment).

¹⁸ The domestic abuse between their parents; the evidence that the third plaintiff failed grade 10 prior to the incident and was at some stage previously institutionalized for drug use; the abusive living conditions with their grandparents over their father's pension monies and the tragic passing of their father.

[103] Therefore, applying the above contingencies to the amounts determined in Dr van Der Merwe's evidence, I am of the view that the following awards in respect of future medical expenses are appropriate:

103.1 In respect of the third plaintiff, an amount of R 157 665. 00 is awarded;

103.2 In respect of the fourth plaintiff an amount of R 202 389.00 is awarded;

and

103.3 In respect of the fifth plaintiff an amount of R 317 959.00 is awarded.

Costs

[104] What now remains for determination is the issue of costs. It is without a doubt that the plaintiffs have been substantially successful in their claims in that the amounts of damages awarded are way more than what was tendered by the defendant at the commencement of the trial. There is in my view no reason why costs should not follow the result. I am, however, not persuaded that a punitive cost order, as sought by the plaintiffs, is warranted on the circumstances of the matter, although I am satisfied that given the issues that arose in the matter, the sheer volume of the evidence and the expert testimony that was tendered, the employment of two counsel was justified.

Order

In conclusion, the following order is made:

1. The claim for the first plaintiff is dismissed with no order as to costs.

2. The defendant is directed to pay the second plaintiff an amount of R 220 000 as tendered, as compensation for all damages suffered as a result of the incident of 30 September to 1 October 2013.

3. The defendant shall pay compensation to:

3.1 the third plaintiff in the total amount of R 332 470.00, such amount calculated as follows:

3.1.1 R 9 805.00 for loss of maintenance and support;

3.1.2 R 165 000.00 for general damages;

3.1.3 R 157 665.00 for future hospital, medical and related expenses.

3.2 the fourth plaintiff in the total amount of R 424 956.00, such amount calculated as follows:

3.2.1 R 57 567.00 for loss of maintenance and support;

3.2.2 R 165 000.00 for general damages;

3.2.3 R 202 389.00 for future hospital, medical and related expenses.

3.3 the fifth plaintiff in the total amount of R 578 248.00, such amount calculated as follows:

3.3.1 R 95 289.00 for loss of maintenance and support;

3.3.2 R 195 000.00 for general damages;

3.3.3 R 317 959.00 for future hospital, medical and related expenses.

4. The defendant shall be liable for interest on the above amounts, calculated at the prevailing legal rate of interest per annum, from the date of judgment to the date of final payment.

5. The defendant shall pay the second plaintiff's taxed, alternatively agreed costs of this action up to and including the first day of trial, as contemplated under scale B, together with interest thereon calculated at the prescribed legal rate per annum, payable as from 14 days after the date of taxation or agreement until date of final payment.

6. The defendant shall pay the third to the fifth plaintiffs taxed, alternatively agreed costs of this action, as contemplated under scale B, together with interest thereon calculated at the prescribed legal rate of interest per annum, payable as from 14 days after date of taxation or agreement until date of final payment, such costs to include:

6.1 The reasonable costs of consultations between the plaintiffs' counsel, plaintiffs' attorney, plaintiffs and plaintiffs witnesses, the preparation for trial;

6.2 The costs of the reports and supplementary reports, as well as the qualifying fees and expenses and the reservation and testifying fees and expenses, if any, of the plaintiffs' expert witnesses, including:

- 6.2.1 Clinical psychologist, Dr Estelle de Wit;
- 6.2.2 Industrial psychologist, Dr Peter Whitehead;
- 6.2.3 Psychiatrist, Dr Derrick van der Merwe; and
- 6.2.4 Actuary, Arch Actuarial Consulting.

6.3 The reasonable travelling and accommodation fees and expenses of the plaintiffs in attending to consultations, as well as on attending on trial herein;

6.4 The costs of the employment of two Counsel; and

6.5 The reasonable costs of employing a correspondent attorney.

V P NONCEMBU
JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the first and second Plaintiffs	: <i>P Jooste</i>
Instructed by	: Gregory Clark & Associates Gqeberha
Counsel for the third to the fifth plaintiffs	: <i>N Paterson with N Karsan</i>
Instructed by	: Karsans Inc C/O Goldberg & De Villiers Inc Gqeberha
Counsel for the defendant	: <i>A Beyleveld SC</i>
Instructed by	: Office of the State Attorney Gqeberha
Dates of hearing	: 14 – 16, 19 – 20 February 2024 & 1 April 2025
Date judgment delivered	: 19 June 2025