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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Reportable

Case no: 13735/2014

In the matter between:

SENZO CHILIZA

FIRST PLAINTIFF

BASANTHIE NAIDOO

SECOND PLAINTIFF

and

SR SUBRAMONEY

FIRST DEFENDANT

**MINISTER OF EDUCATION
A MEMBER OF THE EXECUTIVE
COUNCIL FOR EDUCATION FOR
THE PROVINCE OF
KWAZULU-NATAL**

SECOND DEFENDANT

Coram:

M E Nkosi J

Date of Hearing: 05, 06 and 07 September 2022

Date of Judgment: 16 September 2022

ORDER

1. The second defendant is directed to:-
 - (a) pay the second plaintiff the sum of R168 025.34 within 30 days hereof;
 - (b) pay the first plaintiff the sum of R3 906 746.50 within 30 days hereof;
 - (c) pay interest on the amounts referred to in prayers (a) and (b) above, which must start running only after 30 days of date hereof to date of payment;
 - (d) pay the plaintiffs' costs, such costs to include:-
 - i. any and all reserved costs;
 - ii. the travelling and subsistence costs of both plaintiffs travelling from Gauteng to Durban to attend the trial set down for the 5th, 6th and 7th September 2022;
 - iii. the travelling and subsistence costs of plaintiffs' counsel travelling to Gauteng to consult with the plaintiffs on the 1st September 2022 in order to prepare for the trial set down for the 5th, 6th and 7th September 2022;
 - iv. the costs incurred in the employment of the expert witnesses listed hereunder, which shall include the costs of consultation with and assessment of the first plaintiff and, the preparation of their expert

reports, the consultation of the expert witnesses with plaintiffs' attorney and counsel (where held) and the attendance of the said witnesses being:-

- aa. Dr Robert Fraser, orthopaedic surgeon;
- bb. Jeremy Kriek, orthoptist;
- cc. Jade Robinson, occupational therapist;
- dd. Shaida Bobat, industrial psychologist;
- ee. Dr Caron Bustin, educational psychologist;
- ff. Stephen Terblanche, biokineticist;
- gg. Dr R S Ballaram, radiologist; and
- hh. IAC - actuaries.

2. It is recorded that only the following expert witnesses testified in court on the issue of quantum, namely:-

- (a) Jeremy Kriek, orthoptist;
- (b) Jade Robinson, occupational therapist; and
- (c) Shaida Bobat, industrial psychologist.

JUDGMENT

M E Nkosi J

Introduction

[1] The first plaintiff is Senzo Chiliza, a major male born on 1 June 1998. The second plaintiff is Basanthie Naidoo, a major female who, together with her husband, were appointed the foster parents of the first plaintiff prior to his attainment of majority by an order of the Chatsworth Magistrates Court and have, since then, acted as the *de facto* parents of the first plaintiff.

[2] The plaintiffs sued the defendants for damages arising from an injury that was sustained by the first plaintiff on 1 March 2013 when a guillotine he and other learners were attempting to move in the plumbing workshop at his erstwhile school, namely, D[...] Pre-Vocational Secondary School ("the school") in C[...], was accidentally dropped on his right foot. The learners were allegedly instructed to move the guillotine concerned by the first defendant, in his capacity as an educator at the school and, as such, an employee of the second defendant.

[3] The injuries sustained by the first plaintiff from the accident were described by Dr Robert Fraser ("Dr Fraser") in his medico-legal report dated 6 March 2017 as fractures of the proximal phalanges of the first, second and third toes of the first metatarsal. This resulted in the amputation of the affected toes of the first plaintiffs right foot due to the development of gangrene.

[4] The damages claimed by the plaintiffs against the defendants, jointly and severally, the one paying the other to be absolved, were the sums of R168 025.34 for past medical expenses incurred by the second plaintiff in relation to the first plaintiffs injuries, R623 712 for future medical expenses of the first plaintiff, R3 303 570 for his loss of earnings and R500 000 for his general damages. The defendants denied any liability for the damages claimed by the plaintiffs.

[5] The trial for the determination of liability was held in 2016, when judgment was granted in favour of the plaintiffs in terms of which the second defendant was found to be liable for any and all such damages as the plaintiffs may be able to prove. Pursuant to that judgment, the plaintiffs engaged the services of various experts to prove their damages against the second defendant. The reports of the experts concerned were served upon the State Attorney, who was acting for the defendants in respect of this matter. No experts were engaged by the defendants to give evidence on their behalf in relation to the plaintiffs' claims.

[6] After the close of pleadings the matter was certified ready for trial and set down for hearing on 5, 6 and 7 September 2022. There was no appearance on behalf of the defendants at the trial. Prior to the commencement of the trial the court enquired from Mr *Reddy*, who appeared for the plaintiffs, as to whether the defendants and/or their legal representatives were aware of the dates allocated for the hearing of the matter. In response, Mr *Reddy* assured the court that the relevant official at the State Attorney's office was fully aware of the trial dates. He added that his instructing attorney had a telephone conversation with the official concerned about the trial only a few days before the commencement thereof, and he promised to revert to her but never did. In the circumstances, the hearing of the matter proceeded without any appearance on behalf of the defendants.

Evidence

[7] The first witness who testified for the plaintiffs was the first plaintiff himself, Senzo Chiliza. His evidence, briefly stated, was that he was 24 years-old, and had always regarded the second plaintiff and her husband as his parents, having stayed with them since he was only one year old. They were subsequently appointed his foster parents when he was ten years old, after the death of his biological mother who was employed as their domestic worker.

[8] Prior to his enrolment at the school, which was a pre-vocational school,

he was a pupil at the Glenview Primary School in Silverglen, C[...], which was a normal school. The highest level of education he attained at the school was grade nine, which was an equivalent of grade seven at a normal school. On 1 March 2013, he and the other learners were instructed by the first defendant to move a guillotine in the plumbing workshop at the school. As they did so, the guillotine was accidentally dropped on his right foot causing him serious injury, which resulted in his three toes being amputated after they developed gangrene.

[9] Following the amputation of his toes, he was unable to continue with his education at the school due to the difficulty in climbing the stairs to attend his lessons. Over the years, he has been in constant pain not only from his injured right foot, but also from the other affected parts of his body, such as his lower and upper leg, as well as his right hip. The other problems he experienced included, inter alia, a massive weight gain due to his inability to engage in physical exercise, lack of self-esteem, as well as depression to the extent that he even contemplated committing suicide at some stage.

[10] The second plaintiff and her family have, over the years, done everything in their power to help him regain control of his life. Their efforts include, inter alia, equipping him with different skills and exposing him to different career opportunities for which he might be suited taking into account the limitations in his physical and mental capabilities. He felt that he had not yet reached his full potential regarding his achievements and believed that he was capable of achieving much more in his education and training if he applied a bit more effort.

[11] The second plaintiff, Basanthie Naidoo, also testified on her own behalf. Her evidence was that she was 68-years-old and a retiree. Prior to her retirement in 2019 she had been employed as a national warehouse manager for 17 years. Apart from the first plaintiff she and her husband have three other children, two girls and one boy. All three of them have lucrative careers and are gainfully employed. She confirmed that the first plaintiff's mother worked for her

family for a period of five years as a domestic worker. In 2008, prior to her passing away, the first plaintiffs biological mother asked her to take care of the first plaintiff, to which she agreed.

[12] After the death of the first plaintiffs mother she and her husband made a formal application to be appointed the first plaintiffs foster parents, and their application was duly granted. They have acted as the first plaintiffs *de facto* parents since then. Following their retirement from active employment, they relocated to Johannesburg with the first plaintiff, where they share a house with one of their daughters. She also testified at length about the difficulties experienced by the first plaintiff over the years as the result of the amputation of his toes, as well as the efforts made by her and the other members of her family to help him regain his self-esteem and to expose him to other career opportunities for which he might be suited.

[13] She said had the first plaintiff not been injured, he probably would have finished school and, in time, started his own artisan business as a plumber or welder with the financial assistance from her and the other members of her family. She confirmed that she incurred the medical expenses which formed the subject of her claim against the defendants, the details of which are contained in the bundle of documents that was accepted as evidence marked Exhibit 'A'. The total amount of her claim against the defendants was R168 025.34.

[14] As for the evidence of the expert witnesses, I think a brief summary of the evidence of each witness will suffice for the purposes of this judgment. Starting with the evidence of Dr Fraser, the orthopaedic surgeon, it was indicated by Mr *Reddy* that Dr Fraser was not available to give oral evidence at the trial on behalf of the plaintiffs. Instead, he sought leave of the court to request Ms Jade Botha ('Ms Botha', nee Robinson), an occupational therapist who also testified on behalf of the plaintiffs, to commence her evidence by clarifying for the benefit of the court the salient aspects of the medico-legal report compiled by Dr Fraser dated 6 March 2017.

[15] Therefore, with the leave of the court, Mr *Reddy* proceeded to lead the evidence of Ms Botha regarding the views expressed by Dr Fraser in his medico-legal report on the first plaintiffs injury, albeit from an occupational therapist's point of view. In essence, Dr Fraser described the first plaintiffs injuries as follows:

- '1. Closed fracture right first metatarsal;
2. Closed fracture proximal phalanx right hallux;
3. Closed fracture proximal phalanx right second toe;
4. Closed fracture proximal phalanx right third toe;
5. Closed fracture middle phalanx right third toe.'

He stated that the first plaintiff was taken back to theatre on 18 March 2013 for the amputation of his injured toes after they developed gangrene.

[16] In early 2014 he developed symptoms of neuroma in his right foot, which was cut back proximally by Dr Alan Pillay on 24 February 2014. He was hospitalised for three days to undergo that operation. He did not return to school after the operation as he had difficulty walking up and down the stairs to the classrooms at the upper levels of the school. He also developed reflex sympathetic dystrophy in his right foot and experienced extreme pain and sensitivity which radiated up the leg to his groin.

[17] After her evidence in clarification of the views expressed in Dr Fraser's medico-legal report, Ms Botha proceeded to testify on the contents of her own medico-legal report dated 1 June 2017, which she compiled after her assessment of the first plaintiff on 11 and 19 May 2017. Amongst the documents she had in her possession at the time of the first plaintiff's assessment were the hospital records from Chatsmed Hospital, the radiology report of Dr R S Ballaram and the medico-legal report of Dr Fraser.

[18] In her assessment of the first plaintiff's range of movement she found that the impairment of his movement from the amputation of his toes converted to a lack of muscle strength in his right foot. He had an impaired active range of movement in the dorsi-flexion of his right ankle, and a significantly impaired range of movement of the three medial toes of his right foot. He also presented with mild impaired muscle strength in the muscle groups of his right hip and right ankle, and had an impaired unilateral standing balance.

[19] Furthermore, despite him possessing an intact upper limb functioning, his unilateral and bilateral upper limb functioning during coordinated activities were impaired, which would adversely affect his employment opportunities in the open labour market. He would require some form of occupation in the sedentary category with light duty components, provided that he found a sympathetic employer who was prepared to grant him such opportunity. Given his vocational screening and significantly impaired performance levels within administrative and technical based skills, he would battle to secure occupation even within a sedentary category environment.

[20] In her view, he would benefit from a referral to a physiotherapist and a bio-kinetic specialist for further rehabilitation. However, she qualified her view by adding that at a realistic level he would find it extremely difficult to compete with the multitude of other job seekers who are likely to be better equipped than him, with no physical or mental impairments. She was concerned that he would probably be doomed to a lifetime of rejected job applications in the sedentary administrative environment.

[21] The next witness who testified for the plaintiffs was Mr Jeremy Kriek ('Mr Kriek'), an orthoptist, who confirmed that he assessed the first plaintiff on 7 July 2017. His evidence was that the first plaintiff walked with the aid of an elbow crutch to avoid the pain he experienced when he walked without it. He was unable to squat, kneel, run or jump. He recommended the following aids to assist the first plaintiff to walk comfortably without feeling pain: pressure

relieving custom in-soles with a toe filler; a carbon foot plate; extra depth shoes; extra depth trainer; extra depth formal shoes; and extra depth sandals.

[22] The next witness for the plaintiffs was Ms Shaida Bobat ('Ms Bobat'), who is an industrial psychologist. Prior to giving evidence on her own expert report, she was requested by Mr *Reddy*, with the leave of the court, to comment on the salient aspects of the expert report compiled by Dr Caron Bustin ('Dr Bustin'), who is an educational psychologist. Mr *Reddy* explained that this was because Dr Bustin could not come to court to testify as she was in England. Ms Bobat indicated that although she is not an expert in educational psychology, her qualifications as an industrial psychologist made her suited to comment on the views expressed by Dr Bustin in her expert report.

[23] Ms Bobat then proceeded to comment on the views expressed by Dr Bustin in her medico-legal report in response to the specific questions posed to her by Mr Reddy in relation thereto. She noted that the first plaintiff was first assessed by Dr Bustin on 13 November 2017. She then prepared her initial report on 18 November 2017 containing her findings on her assessment of the first plaintiff. She subsequently prepared a supplementary report dated 20 September 2021, in which she essentially confirmed the conclusions she reached in her first report of 18 November 2017.

[24] In essence, she opined that the injury sustained by the first plaintiff had removed him from competing for labour intensive or technical based occupations, and that his only hope of employment was a sedentary point position with light duty components. He had extended periods of hospitalisation and, consequently, an extended delay in the ability to complete his schooling. There was variability in his cognitive functioning, which was probably exacerbated by fatigue on account of the pain, the lack of daily school attendance, as well as the potential mood disorder, all of which were brought about by the amputation of his toes.

[25] His cognitive fatigue and lack of school attendance had impacted negatively on his ability to work efficiently and accurately. When she tested him, she found variable and significantly lower than average working memory and significantly lower than average numerical processing ability. These resulted in a bleak prognosis for even the sympathetic employer. In respect of a spelling test he performed at the age of 13 years, while he was 19 years old at the time of the first assessment. In respect of reading comprehension he performed at the age of 13 years; and in respect of mathematics testing he performed at the age of nine years old. These made him an appropriate FET candidate.

[26] Ultimately, his ability to compete for work in the labour market was significantly reduced, which meant that he would probably be reliant upon a sympathetic work environment. Pre-morbidly, he would have had the capacity to complete formal education at the level of matriculation and, thereafter, proceeded to study in a semi-skilled capacity. Post-morbidly, he had markedly reduced options available which were disproportionate to his cognitive potential and resulted in multiple challenges for him. In conclusion, she opined that both his capacity for further study and his prospects of employment have been significantly reduced, for which he would require psychotherapy, as well as family and psycho-educational counselling.

[27] Regarding her own expert report, Ms Bobat testified that she first assessed the first plaintiff on 13 July 2017 and compiled her medico-legal report, which she subsequently supplemented in October 2021 after she carried out another assessment of him. Her view of his pre-morbid scenario was that he would have enrolled for a certificate course at the NQF Level 2, 3 and 4. He would have completed NQF 4 by 2021, and proceeded to work as an apprentice for a period of two years earning a salary at a grade level of R1 662.80 per week. Thereafter, he would have progressed to grade five level, earning a salary of R2 604.40 per week. In the post-accident scenario, she suggested that he would be unemployable in the open labour market suffering a total loss of future income. She based her prediction of his future unemployability on an acute shortage of sympathetic employers in an

environment of a large educated unemployed segment of the population.

General Damages

[28] Based on the evidence presented by the plaintiffs' witnesses, it was submitted by Mr *Reddy* that the cases in which the courts had to deal with injuries which are similar to those suffered by the first plaintiff were those of *Hatley v Union & South West Africa Insurance Co Ltd*¹ and *Union and South West Africa Insurance Co Ltd v Humphrey*.² In *Hatley*, the plaintiff was a girl aged 15 years at the time of the accident, who sustained the loss of her second toe and certain lacerations to her foot. She had to undergo three painful orthopaedic operations, with two future operations envisaged for her. She walked with the use of crutches, and suffered the loss of normal movement and amenities. She was awarded the total sum of R12 000, and the current around *circa* R400 000.

[29] In *Humphrey*, the plaintiff was a girl aged 15 years, who sustained a hairline fracture of the second and third metatarsals, as well as a tibia fracture and infection in the foot whilst she was in hospital. She underwent two operations, with another two envisaged for her in the future, which resulted in scarring of the foot and painful movement. She was awarded R8 500 and the current value *circa* R375 000.

[30] It was argued by Mr *Reddy* that considering the slightly more serious nature of the injury sustained by the first plaintiff in the present matter, and the debilitating sequelae it has had on his life, including social isolation, depression and the like, an award of between R450 000 to R500 000 for general damages would be appropriate. Without any legal arguments presented on behalf of the defendants to gainsay the legal arguments advanced by Mr *Reddy* on behalf of the first plaintiff, I have no reason to reject his submissions regarding an appropriate amount to be awarded to the first plaintiff for general damages. Therefore, I think the sum of R475 000 would be an appropriate amount to be

¹ *Hatley v Union & South West Africa Insurance Co Ltd* 1980 (3E9) QOD 137 (C).

awarded to the first plaintiff for general damages arising from the injury he sustained to his right foot.

Past Medical and Allied Expenses

[31] Regarding the past medical and allied expenses, it was submitted by Mr *Reddy* that this aspect of the second plaintiffs claim against the defendants is uncontentious, and that the second plaintiff has adduced the necessary documentation to prove such claim. He submitted that such claim should be awarded in its entirety, particularly, as it has obviously been understated due to interest not being included therein. I agree with Mr *Reddy* 's submission to that effect, and accordingly award the second plaintiff's claim against the defendants in the total sum of R168 025.34.

Future Medical and Allied Expenses

[32] Regarding the first plaintiff's future medical and allied expenses, it was submitted by Mr *Reddy* that the evidence by Mr Kriek and Ms Botha had demonstrated the necessity for specialised footwear and assistive devices which the first plaintiff would require for the rest of his life. According to the actuarial calculation thereof, this would amount to R623 712 as at 17 November 2021, which amount the first plaintiff would be content with. I have no reason to gainsay Mr *Reddy* 's submissions to that effect, and accordingly award the first plaintiff the total sum of R623 712 for future medical and allied expenses.

Loss of Earnings

[33] Lastly, when it comes to the first plaintiff's loss of earnings the submission made by Mr *Reddy* was that in the light of the evidence led by the plaintiffs' experts about the first plaintiff's total unemployability, his loss of earnings, as at 17 November 2021, was calculated at R3 303 570 as per the

² Union and South West Africa Insurance Co Ltd v Humphrey 1979 (3E5) QOD 58 (A).

actuarial report of IAC, who are the actuaries. However, Mr *Reddy* admitted that an allowance must be made for future contingencies, including the very remote possibility that the first plaintiff may find some sort of residual employment within a sympathetic environment. To this end, his suggestion was that a contingency of 12,5 to 15% be applied to the calculated loss of income, which would yield a nett amount of R2.7 million to R2.9 million in respect of the first plaintiffs claim for loss of earnings.

[34] Bearing in mind the positive sentiments expressed by the first plaintiff about the prospects of success in his future endeavours if he applies a little bit more effort towards his education or training for a suitable career, I think a contingency of 15% to his projected loss of earnings (ofR3 303 570) would be more of an encouragement of his future efforts in that direction. Therefore, I think the appropriate sum to be awarded to the first plaintiff for loss of earnings is the total sum of R2 808 034.50.

Order

[35] Therefore, based on the evidence presented by the plaintiffs and their expert witnesses at the trial of this matter, together with the legal arguments advanced by Mr *Reddy* in relation thereto, I am satisfied that the plaintiffs have succeeded in proving their damages against the defendants. I accordingly grant an order in the following terms:

1. The second defendant is directed to: -
 - (a) pay the second plaintiff the sum ofR168 025.34 within 30 days hereof;
 - (b) pay the first plaintiff the sum of R3 906 746.50 within 30 days hereof;
 - (c) pay interest on the amounts referred to in prayers (a) and (b) above, which must start running only after 30 days from the date

hereof to date of payment;

(d) pay the plaintiffs' costs, such costs to include:-

i. any and all reserved costs;

ii the travelling and subsistence costs of both plaintiffs travelling from Gauteng to Durban to attend the trial set down for the 5th, 6th and 7th September 2022;

iii the travelling and subsistence costs of plaintiffs' counsel travelling to Gauteng to consult with the plaintiffs on the 1st September 2022 in order to prepare for the trial set down for the 5th, 6th and 7th September 2022;

iv. the costs incurred in the employment of the expert witnesses listed hereunder, which shall include the costs of consultation with and assessment of the first plaintiff and, the preparation of their expert reports, the consultation of the expert witnesses with plaintiffs' attorney and counsel (where held) and the attendance of the said witnesses being:-

aa. Dr Robert Fraser, orthopaedic surgeon;

bb. Jeremy Kriek, orthoptist;

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ff. Stephan Terblanche, biokineticist;

gg. Dr R S Ballaram, radiologist; and

hh. IAC - actuaries.

2. It is recorded that only the following expert witnesses testified in court on the issue of quantum, namely:-

(a) Jeremy Kriek, orthoptist;

(b) Jade Robinson, occupational therapist; and

(c) Shaida Bobat, industrial psychologist.

M E Nkosi J

Appearances

For the Plaintiffs:

Mr G Reddy

Instructed by:

Zondi and Associates Inc

For the respondent:

No Appearances

Instructed by:

Date of Hearing:

05, 06 and 07 September 2022

Date of Judgment:

16 September 2022