IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 26017/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
(4)

28 October 2022

....

Date **ML TWALA**

In the matter between:

STEVENS: SUSSAN CORNELIA SUSARAH **FIRST PLAINTIFF**

BOTES: SHEREEN **SECOND PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 31st of October 2022.

TWALA J

[1] The First and Second plaintiffs sued the defendant out of this Court for damages arising out of the motor vehicle accident that occurred on the 13th of September 2015 in Lambton, Germiston as a result whereof the deceased, Petrus Johannes Botes, was killed. The first plaintiff was at the time engaged to the deceased for a period of fifteen years and were blessed with a girl child who was fourteen years old at the time of the accident and is the second plaintiff in this case. Both plaintiffs are claiming loss of support.

[2] On the 28th of February 2019 the parties concluded a settlement agreement which agreement was ultimately made an order of the Court and reads as follows:

> *"By agreement between the parties, it is ordered that:*
>
> 1. *The defendant is liable for 100% (one hundred percent) of the Second Plaintiff's proven damages;*

2. *The defendant shall pay to the Second Plaintiff's attorneys, Leon JJ van Rensburg Attorneys, in respect of the second plaintiff, as an interim payment the sum of R632 988.00 (Six Hundred and thirty-two thousand nine hundred and eighty-eight Rand) payable within 14 days after the date of this order together with interest thereon from 14 days after this order till date of payment at the rate of 10% per annum;*
3. ……

[3] Furthermore, it is noteworthy that on the 19th of May 2021 the Court struck out the defence of the defendant since it failed to comply with a Court order and the matter served before this Court with the plaintiffs seeking judgment by default against the defendant. However, to the surprise of the plaintiffs, counsel for the defendant appeared in Court not to defend the case but to assist the Court in arriving at a just decision, so it was contended.

[4] It was then agreed between the parties that the actuarial report and the affidavits of the plaintiffs including that of the actuary be admitted in evidence and that the plaintiffs would lead evidence only on limited issues. These issues being: (a) the marital status of the first plaintiff and the deceased at the time they were engaged and at the time of the death of the deceased, (b) the marital status of the first plaintiff at this moment, (c) whether the deceased had other dependants at the time of his death, and (d) the progress of the second plaintiff with its education.

[5] Noting that the Court order of the 28th of February 2019 only refers to the second plaintiff, the Court directed the parties to address the issue of the merits in relation to the first plaintiff. The parties were ad idem that the issue relating to negligence and causation has been settled and what remains to be

determined is the issue of the legal duty on the part of the deceased to maintain the first plaintiff. This issue was addressed satisfactorily in the first plaintiff's affidavit which has been admitted in evidence. The irresistible conclusion is therefore that the defendant is 100% liable for the damages of the first plaintiff.

[6] The first plaintiff testified that at the time they got engaged to each other, she and the deceased were unmarried. However, the deceased had a son, John Botes ("John") from his previous marriage. She was aware that the deceased maintained his son John until he started working and at the time when the deceased met his untimely death John was living with his mother and was employed and completely independent of the deceased. At present John has immigrated to the United Kingdom. She is presently not married and does not have any relationship nor does she intend to get married in the future. She further confirmed that she is living with the second plaintiff who enrolled with CTU Training Solution (CTU) in 2020/21 and is now doing her second year as she is busy with profiles for her graphic design course. Once she finishes her profiles she will be attending a two year course at the University for her graphic design.

[7] The second plaintiff testified that she knows her brother John Botes and had a good relationship with him before he immigrated to the United Kingdom. John informed her that he was working for CTS Towing Services. She completed her matric in 2018 and did not work in 2019 until she enrolled with CTU in 2020/21. She is presently awaiting her results with regard to the profiles she has been doing in her second year and once the results are to hand she will apply to the University for the course in graphic design. She did not know exactly what the requirements are to be admitted at the University except that she has to pass what she was doing at CTU. Furthermore, she

could not explain why she does not have the results by now being late in the year. She testified that she did not attend school in 2019 due to lack of funds and was assisted by the interim payment from the RAF – hence she registered with CTU in 2020/21.

[8] Counsel for the plaintiffs submitted that, although he did not note an objecting at the commencement of this hearing, it was improper and against the rules of Court to allow the defendant to participate in these proceedings for its defence has been struck out. His agreement with counsel for the defendant was only to lead evidence of the plaintiffs on the points listed above but not to give the defendant an opportunity to cross examine the witnesses. It was further submitted that, the Court should not place much weight on the negative evidence, if any, that may have been elicited under cross examination. This is tantamount to, so the argument went, being ambushed by the defendant whom it was not expected to attend Court let alone to participate in the proceedings when its defence has been struck out.

[9] In *Khunou & Others v Fihrer & Son 1982 (3) SA (WLD)* the Court stated the following:

> *"The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and*

that the true issues aforementioned are clarified and tried in a just manner."

[10] In *Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A)* which was quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla & Another (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY 2014)* the court stated the following:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[11] I disagree with the contentions of counsel for the plaintiffs. It has been held in a number of decisions that the rules are for the court and not the court for the rules. Moreover, in casu, the striking out of the defence of the defendant does not in itself bar the defendant from participating in these proceedings. The defendant is entitled to participate in these proceedings but his participation is restricted in the sense that it cannot raise the defence that had been struck out by an order of Court. It is therefore not correct to say the defendant was not entitled to cross examine the plaintiffs after giving evidence. Furthermore, the cross examination was on the evidence tendered by the plaintiffs and the defendant did not attempt to introduce its own case during the cross examination.

[12] Furthermore, there is no merit in the argument that the plaintiffs have been ambushed by the sudden appearance of the defendant whose defence has been struck out since they were only prepared to advance their case on the papers. Legal practitioners are always expected to be fully prepared and must familiarise themselves with the case they are to present in Court. Litigants and their legal practitioners should not assume that if they do not have opponents then it means they will obtain the relief they seek. Litigants should always prepare to prove their case on a balance of probability and satisfy the Court on the evidence they present. I hold the view therefore that the contention of the plaintiffs that the defendant was 'red carded' (language used by counsel for the plaintiffs) and should not have been allowed to cross examine is a misconception of the Rules of Court.

[13] It is now settled that the approach to be adopted in the interpretation of a document requires that from the outset one considers the context and the language together, with neither predominating over the other. Context and purpose must be taken into account as a matter of course whether or not the words used in the document are ambiguous.

[14] In *Novartis v Maphil [2015] ZASCA 111* which was recently quoted with approval by Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another (CCT 70/20) [2021] ZACC 13, 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) (11June 2021)* the Supreme Court of Appeal stated the following:

> "*[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has*

consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.

[28] The passage cited from the judgment of Wallis JA in Endumeni summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Norvatis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paragraphs 10 to 12 and in North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paragraphs 24 and 25. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in Coopers & Lybrand & others v Bryant [1995] ZASCA 64; 1995 (3)

SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look at surrounding circumstances, Wallis JA said (para 12 of Bothma-Botha):

'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise" [a reference to a statement of Lord Clarke SCJ in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].

[30] Lord Clarke in Rainy Sky in turn referred to a passage in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of

the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[31] This was also the approach of this court in Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in Hillas & Co Ltd v Arcos Ltd 147 LTR 503 at 514:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'

[15] The contentions of the defendant that the intention of the parties when the claim for the second respondent was settled and the settlement made an order of Court on the 28th of February 2019 was that the claim was settled in full and final is baseless and has no merit. The Court order is plain and unambiguous on paragraph 2 thereof where it orders that the defendant shall

pay to the attorneys of the second plaintiff as an interim payment a sum of R632 988. I am unable to disagree with counsel for the plaintiffs' submission that, if the payment of the sum of R632 988 was meant to be in full and final settlement of the second plaintiff's claim it would have said so. It is my considered view therefore that the wording of the Court order is clear and unambiguous and it follows that the settlement was interim.

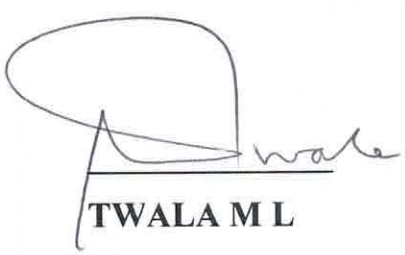
[16] It is incorrect to say that the second plaintiff did not know the requirements of the University for her to register for the course in graphic design. The second plaintiff testified that she finalised her first year at CTU and that she did profiles for her second year and is awaiting the results. She knew that she has to pass her course at CTU in order for her to be admitted at University for her graphic design course. Her results for the first year were 67% which is a good average. I have no doubt in my mind that the possibility exist that she will pass her profiles and progress to register for her two - year graphic design course with the University. It is my view therefore that the second plaintiff is entitled to be compensated for her loss of support up to her reaching the age of 24 years.

[17] On the issue of contingencies applied by the actuary for the plaintiffs, counsel for the defendant submitted that the actuary did not take into account the prospect that the first plaintiff may marry in the future – hence it applied the general future contingencies of 15%. Furthermore, that the deceased would have catered or assisted its son John if a need arose later. I disagree. The first plaintiff is 57 years old and has testified that since the death of the deceased she does not have a relationship and does not intend to get married nor to have a partner. Much as the deceased would have assisted John in hard times, it is my considered view that the general future contingencies of 15% are meant to cover what cannot be said with any certainty will happen or not in the near or

distant future – that includes the prospect of finding another partner or remarriage.

[18] In the circumstances, I make the following order:

1. The defendant is to pay the first plaintiff a sum of R820 204.00 (Eight Hundred and Twenty Thousand and Two Hundred and Four Rand);
2. The defendant is to pay the second plaintiff the sum of R552 050.00 (Five Hundred and Fifty -Two Thousand and Fifty Rand);
3. The defendant shall pay interest on the sums mentioned in 1 and 2 above from 14 days after the date of this order at the prescribed morae rate of interest applicable from time to time, if payment of the amounts mentioned in 1 and 2 above is not made within 180 days of this order;
4. The defendant is to pay the plaintiffs' costs of the action including costs of obtaining the actuarial report, which costs are to be agreed or taxed;
5. The defendant shall pay the agreed or taxed costs of the plaintiffs within 14 days from the date of this order, if payment thereof is not made within 180 days from the date of taxation or agreement;
6. All the amounts payable by defendant to the plaintiffs shall be paid into the Trust Account of the plaintiffs' attorneys: Anton Myburgh Attorneys; Nedbank, Three Rivers Branch, Vereeniging, Account No: 1198766239 for the credit and benefit of the plaintiffs.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing:	**18th and 19th October 2022**
Date of Judgment:	**31st October 2022**
For the Plaintiffs:	**Mr AS Myburgh**
Instructed by:	**Anton Myburgh Attorneys** **Tel: 082 312 9323** **antonmyb@gmail.com**
For the Respondent:	**Advocate M Khan**
Instructed by:	**State Attorney** **Tel: 071 167 0671**