

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **2094/2007**

In the matter between-

CHARLES OPPELT

Plaintiff

and

THE HEAD: HEALTH, DEPARTMENT OF HEALTH,

PROVINCIAL ADMINISTRATION: WESTERN CAPE

First Defendant

SOUTH AFRICAN RUGBY UNION

Second Defendant

BOLAND RUGBY UNION

Third Defendant

MAMRE RUGBY FOOTBALL CLUB

Fourth Defendant

FIRST DEFENDANT'S NOTICE IN TERMS OF RULE 16A

KINDLY TAKE NOTICE that the First Defendant in the above action raises the following Constitutional issues in its Plea (as amended):

Filed by: The State Attorney
Per: Ms C van Tonder
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1. The Plaintiff sues the First Defendant for damages arising from the conduct of Defendants' employees, which resulted in a spinal injury.
2. The First Defendant pleaded to the Plaintiff's Particulars of Claim to the relevant portion, as follows:

17.1 PAST MEDICAL EXPENSES (as pleaded in para 21.1 in Plaintiff's Amended Particulars of Claim):

17.1.1 The Defendant has no knowledge of the contents hereof, does not admit same and puts the Plaintiff to the proof thereof.

17.2 FUTURE MEDICAL AND RELATED EXPENSES (R21 717 054.00 as pleaded in Plaintiff's Amended Particulars of Claim):

17.2.1 REHABILITATION COSTS (R3 836 750.00 (per actuarial report of Wim Loots):

17.2.2 The Defendant refers to the actuarial report filed on behalf of Plaintiff on 29 August 2018 in respect whereof future medical expenses is claimed in terms of a medico-legal report of Dr E Balbergen, a rehabilitation practitioner, in respect whereof the Defendant pleads as follows:

17.2.3 The Defendant denies the content hereof, does not admit same and puts the Plaintiff to the proof thereof.

17.2.4 In the event of the Plaintiff proving that the future medical and related expenses as referred to in Dr Balbergen's report are reasonably required, and to which compensation the Plaintiff may be entitled, the Defendant pleads as follows:

17.2.4.1 In the event of the Plaintiff proving that the future hospital, medical and related care ("the future medical care") claimed are reasonably necessary and that he is entitled to compensation in respect thereof, then the Defendant pleads as follows:

17.2.4.1.1 The Defendant will accommodate the Plaintiff, and supply goods and/or render the services claimed at a public healthcare

institution, to wit, Groot
Schoor Hospital;

17.2.4.1.2 The reasonable transportation of the Plaintiff to public healthcare facilities will be provided by the Defendant at no charge;

17.2.4.1.3 The provision of future medical care at a public healthcare institution will be of a standard consistent with the norms and standards determined in terms of the National Health Act, No. 61 of 2003 (“the National Health Act”), or alternatively, of a reasonable standard;

17.2.4.1.4 The Plaintiff is obliged to mitigate his losses and/or

damages in respect of the future hospital, medical and related expenses (“future medical expenses”) which may be proven or agreed by utilising the hospital, medical and related services available at a public healthcare institution;

17.2.4.1.5 The Plaintiff’s claim in respect of future medical expenses is unreasonable and excessive as these medical services can be provided to him free of charge in the public healthcare sector, more particularly the hospital and medical institutions, and care facilities of the Defendant at a standard consistent with the norms and standards determined

in terms of the National Health Act, alternatively at a reasonable standard;

17.2.4.1.6 The Defendant expressly reserves the right to lead evidence that such hospital, medical and/or related services of the same or higher standard than the private sector, will be available to the Plaintiff in the future.

17.3 Alternatively to sub-paragraphs hereinabove, and only in the event of this court finding that the future medical care, or any component thereof, is not available in the public healthcare sector at the standard pleaded in paragraph hereinabove, then the Defendant tenders to:

17.3.1 Procure the hospital, and/or medical service and/or medical supply required in the private healthcare sector; or

17.3.2 Reimburse the Plaintiff, for expenses reasonably incurred in the private healthcare sector in respect of the future medical care, upon such conditions, if any, as may be determined by this court.

17.4 In the alternative to the paragraphs hereinabove:

17.4.1 The Defendant will provide an undertaking to pay the reasonable and necessary costs of the future accommodation of the Plaintiff in a hospital, or a nursing home, or appropriate facility and in relation to treatment, or the rendering of a service or supplying of goods to him, arising out of the injuries allegedly sustained by him and in respect of which the merits have been conceded.

17.5 In the further alternative to the paragraphs hereinabove, and should the Court not order the relief tendered in either of the two immediately preceding sub-paragraphs as regards the Plaintiff's damages, that any damages awarded in respect of his future medical expenses be regulated in the manner set forth below:

17.5.1 The attorney for the Plaintiff is directed to do the following:

17.5.1.1 To retain all the monies paid into the trust account of the Plaintiff's attorneys of record in respect of the Plaintiff's future medical expenses until the establishment of the Trust referred to hereinbelow;

17.5.1.2 To cause a trust ("the Trust) to be established, in accordance with the Trust Property Control Act, No. 57 of 1988 ("the Trust Property Control Act"), on the terms set out in a Trust Deed to be prepared, and/or upon such terms as may be directed by this court;

17.5.1.3 To pay all monies held in trust by the Plaintiff's attorneys of record in respect of the Plaintiff's medical expenses (less the taxed or agreed costs of suit payable to the Plaintiff's attorneys of record, including the costs of counsel and the qualifying fees of the Plaintiff's expert witnesses in respect of

whom notices in terms of Rule 36(9)(a) and (b) were served) to the Trust;

17.5.1.4 The monies paid over to the Trust in terms of the immediately preceding paragraph shall be held for the sole benefit of the Plaintiff.

17.5.2 The Defendant is to pay the costs of administering the Trust, as determined and quantified by the court, in the manner contemplated in the Trust Deed to be prepared, the said amount to be calculated and paid over once the monies which have to be paid to the trust have so been paid.

17.5.3 In the event of the Trust not being created within one month of the court's order, the parties and their attorneys are directed to approach this court within two months after the expiry of the first period of one month, to obtain further directions with regards to the manner in which the amount paid by the Defendant in respect of the Plaintiff's future medical expenses should be administered on his behalf.

17.6 The Defendant accordingly seeks an order directing that:

17.6.1 If, upon the death of the Plaintiff, any damages remain from the amount awarded in respect of the Plaintiff's future expenses or such further amount paid by the Defendant in terms of paragraphs hereinabove, excluding any adaptations to the accommodation of the Plaintiff, the remaining amount will:

17.6.1.1 Not form part of the Plaintiff's estate and will thus not devolve upon his heirs; but

17.6.1.2 Be returned to the Department of Health of the Western Cape Province or its successor in law or in title in order that such funds may be utilised by that Department in the fulfilment of its constitutional and legislative obligations in relation to the provision of health services to other persons in the Western Cape Province, and

17.6.2 That upon the termination of the Trust, any balance of the Trustee's Remuneration Fund, as contemplated in the Trust Deed to be prepared, shall be distributed or transferred to the Defendant, provided that any costs for fees associated with such distribution or

transfer or any taxes levied thereon, shall first be deducted by the Trustee.

17.7 The Defendant pleads that this court has the power to make an order contemplated in the paragraphs hereinabove, in delictual claims arising from alleged medical negligence where:

17.7.1 The actual damages are dependent in large measure upon the life expectancy of the injured person;

17.7.2 There is a substantial degree of uncertainty as to the actual life expectancy of the person injured; and

17.7.3 There is therefore a material risk that if the damages paid for such a person's future medical expenses will be insufficient to cover such costs, or any portion of the damages paid will not be required or utilised for their intended purpose; and

17.7.4 The claim is made against the Defendant, or alternatively an organ of state, which has the constitutional and legislative duty to provide access to healthcare services to persons who have the reciprocal right to receive such services.

17.8 The Defendant pleads further that:

17.8.1 It is just and equitable, and in the interests of other persons who need access to public healthcare services, that the award in this matter shall also include a provision of the kind contemplated in the paragraphs hereinabove, to avoid the risk that any damages awarded in respect of the Plaintiff's future medical expenses will not be required or utilised for that purpose.

17.9 Further alternatively to the paragraphs hereinabove, and to the extent necessary and for the reasons pleaded in the said paragraphs, the principles of the common law fall to be developed as contemplated in section 39(2), or alternatively section 173, of the Constitution of the Republic of South Africa, 1996, Act No. 108 of 1996 ("the Constitution") so as to allow for damages to be awarded in the manner provided in any of the preceding paragraphs, and that the Court develops the "once and for all" rule, having regard to the preceding and subsequent paragraphs pleaded herein, for purposes of developing the common law.

17.10 It is further pleaded in relation to the aforementioned development of the common law that:

- 17.10.1 In terms of section 27(1) of the Constitution, everyone has a right of access to, amongst others, health care services;
- 17.10.2 In terms of section 27(2) of the Constitution, the State must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of each of these rights enumerated in section 27(1) thereof;
- 17.10.3 The Constitution also provides in section 27(3) thereof, that no one may be refused emergency medical treatment;
- 17.10.4 There are a number of similar matters pending in this court;
- 17.10.5 The common law rules require development in accordance with section 39(2), or alternatively section 173 of the Constitution, in order for the Defendant to meet the constitutional obligations imposed upon her by section 27 of the Constitution;
- 17.10.6 In terms of section 39(2) of the Constitution, the court is enjoined when interpreting any legislation,

and when developing the common law and/or customary law to promote the spirit, purport and objects of the Bill of Rights;

17.10.7 The “once and for all rule” as currently framed and applied is inimical to the rights contained in section 27 of the Constitution;

17.10.8 In the circumstances, the “once and for all rule” requires development in terms of section 39(2), or alternatively section 173, of the Constitution, to provide for periodic payment of damages for future medical services, as well as the “top-up/claw-back” provisions referred to above, in order to promote the spirit, purport and objects of the Bill of Rights.

17.11 The payment of damages in respect of the Plaintiff’s future medical expenses based on the common law rules, coupled with the fact that the amounts claimed are in accordance with the rates levied in the private healthcare sector, has impacted and will impact on the Defendant, the department and the Defendant’s budget in a manner that:

17.11.1 Detracts from and will continue to detract from the fulfilment by the Defendant of her constitutional

obligations, resulting in the breach of the fundamental rights pleaded in the above paragraphs;

- 17.11.2 Detracts from and will continue to detract from the fulfilment by the Defendant of her constitutional obligations in terms of section 7(2) of the Constitution, read with 8(1) thereof to respect, protect, promote and fulfil the right of access of all patients in the Western Cape Province to basic healthcare services, resulting in the breach of the fundamental rights pleaded herein;
- 17.11.3 Will prejudice the best interests of other patients resident in the Western Cape, other than the Plaintiff and persons similarly situated, in conflict with section 28(2) of the Constitution;
- 17.11.4 Fails to promote the spirit, purport and objects of the Bill of Rights, as contemplated in section 39(2) of the Constitution;
- 17.11.5 Is in breach of the right of persons dependent on the public healthcare system to equality before the law and to equal protection and benefit of the law, as enjoined in section 9(1) of the Constitution.

17.12 The development of the common law so as to accommodate the relief sought in the Defendant's amended plea will promote the spirit, purport and objects of the Bill of Rights, and/or is in the interests of justice, inter alia, for the following reasons:

17.12.1 South Africa is a developmental State that has limited resources and multiple demands on its budget such that it cannot immediately realise the fundamental socio-economic rights in sections 26(1), 27(1) and 29(1)(b) of the Constitution;

17.12.2 The obligations in terms of sections 26(2), 27(2) and 29(1)(b), read with section 7(2) and 8(1) of the Constitution, progressively to realise the rights referred to above, require that the budgetary allocations of funds at national, provincial and local level for the realisation of such rights are optimally, reasonably and prudently employed in their fulfilment;

17.12.3 The expenditure of scarce public funding on damages for future medical treatment computed on private healthcare rates and on the basis of the aforementioned common law rules results in a suboptimal, unreasonable, imprudent and

unconstitutional diversion or application of such funding;

17.12.4 By reason of its accessibility, scale and the absence of any profit motive, the public healthcare sector is able to provide the future medical treatment required by the Plaintiff and those similarly situated at a substantially lower cost than the private sector is able to do;

17.12.5 The common law rule requiring damages to be paid in money and not in kind, unreasonably and unconstitutionally prevents the State from providing future medical care to the Plaintiff (and those similarly situated) in the public healthcare sector as a substitute for paying monetary damages in satisfaction of the relief sought in a delictual claim;

17.12.6 The “once and for all” rule and its corollary that damages must be paid out in a lump sum, unreasonably and unconstitutionally obliges the State to allocate scarce public funds for expenditure on future medical care –

- 17.12.6.1 When there is no guarantee that the funds will be allocated or used therefor;
- 17.12.6.2 Immediately and in a year when most of the future medical care will not be needed or provided;
- 17.12.6.3 In a manner that is inconsistent with reasonable and prudent public financial management and budgeting, which matches the allocation of funds with expenditure in the year that it is incurred;
- 17.12.6.4 When it is not known whether the particular components of the future medical care will in fact be required by the Plaintiff in the future, or only that there is a risk or possibility that they may be required;
- 17.12.6.5 When it is not known whether or not the Plaintiff will be alive at the time that the future medical care is compensated for,

as the Plaintiff's longevity is uncertain and speculative;

17.12.6.6 In circumstances where up to 25% of any award of damages based on the common law rules referred to above and the cost of the future medical care is based on private sector rates, is typically paid to the Plaintiff's legal representatives in terms of the Contingency Fee Act, No. 66 of 1997 and is therefore not used for the purpose for which it was claimed; and

17.12.6.7 There is a risk that the future hospital, medical and related treatment will have to be provided at a public healthcare facility in any event with the result that the Plaintiff would have been compensated twice by the State in respect of such treatment.

17.13 COSTS OF AN OCCUPATIONAL THERAPIST (E J H BESTER: R15 325 739.00 per actuarial report of Wim Loots):

17.13.1 In relation to the above amount claimed, the Defendant refers to the joint minute between the parties' experts and prays that same be read and incorporated herein, as if specifically pleaded and that any compensation the Plaintiff may be entitled to, having regard to the relevant evidence tendered, be accepted.

17.14 COSTS OF A CLINICAL PSYCHOLOGIST (G LEWIS: R67 360.00 - per actuarial report of Wim Loots):

17.14.1 The Defendant has no knowledge of the contents hereof, does not admit same and puts the Plaintiff to the proof thereof.

17.15 COSTS OF A PHYSIOTHERAPIST (E WAKEFIELD: R162 298.00 - per actuarial report of Wim Loots):

17.15.1 The Defendant has no knowledge of the contents hereof, does not admit same and puts the Plaintiff to the proof thereof.

17.16 COSTS OF A QUANTITY SURVEYOR (M R WARREN: R3 165 791.00 - per actuarial report of Wim Loots):

- 17.16.1 The Defendant refers to the report of Mr Phillip Allan Thompson and with reference to the report of Mr Khatz of Khats & Sparks Land Surveyors, and pleads that it be read and incorporated herein.
- 17.16.2 The Defendant furthermore pleads that, given the Plaintiff's vocational history, he would not have been in a position to purchase his own home and would in all probability remain resident at his parental home.
- 17.16.3 In the event of the Court finding that the Plaintiff would, on the probabilities, been in a position to purchase his own home, then and in such event, the Defendant pleads that such notional home could be purchased from the loss of income award, duly discounted.
- 17.16.4 In the event of the Court finding that the Plaintiff is entitled to a notional home, then and in such event, the Defendant pleads that the Department of Human Settlements, having had regard to Plaintiff's potential income, would provide Plaintiff with a notional home in lieu of a cash award with alterations and requirements.

17.17 BIODYNAMICIST EXPENSES (R EVANS: R2 452 954.00 - per actuarial report of Wim Loots):

17.17.1 The Defendant denies that the Plaintiff would be entitled to such compensation, more particularly in the event of the Court awarding damages in relation to the physio- and occupational therapy treatment.

17.17.2 In the event of the Court finding that the Plaintiff would be entitled to biodynamic rehabilitation, then Defendant pleads that such rehabilitation would be available at the Rehabilitation Centre, Lenteguur, Mitchell's Plain.

17.18 PAST AND FUTURE LOSS OR EARNINGS / EARNING CAPACITY:

17.18.1 The Defendant refers to the joint minute between the parties' industrial psychologists and prays that same be read and incorporated herein, as if specifically pleaded and that any compensation that the Plaintiff may be entitled to, having regard to the relevant evidence tendered, be accepted.

17.19 GENERAL DAMAGES:

3.2.1 The Defendant admits that Plaintiff is entitled to reasonable compensation in respect of general damages, as proven.

TAKE NOTICE FURTHER that any party with an interest in the above Constitutional issues may, with the written consent of all the parties to the proceedings, give notice of not less than twenty (20) days after the filing of this notice in which the Constitutional issue is raised, be admitted therein as *amicus curiae*, or any other interested party, upon such terms and conditions as may be agreed upon, in writing, between the parties.

TAKE NOTICE FURTHER that the written consent referred to above shall, within 5 days of it having been obtained, be lodged with the Registrar and the *amicus curiae*, or any other interested party shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

TAKE NOTICE FURTHER that the terms and conditions referred to above may be amended by the Court.

TAKE NOTICE FURTHER that if the interested party is unable to obtain the written consent as contemplated herein, he or she may, within five (5) days of the expiry of the twenty (20) day period prescribed above, apply to the Court to be admitted as *amicus curiae*, or any other interested party, and shall in its application:

- (a) Briefly describe the interest of the *amicus curiae*, or any other interested party, in the proceedings;
- (b) Clearly and succinctly set out the submissions to be advanced, their relevance to the proceedings and the party's reasons for believing that they will assist the Court, and be different from those of the parties; and
- (c) Serve the application on all parties to the proceedings.

TAKE NOTICE FURTHER that any party to the proceedings or wishes to oppose an application to be admitted as an *amicus curiae*, or any other interested party, shall file an Answering Affidavit within five (5) days of service of such application on such parties. The answering affidavit shall clearly set out the basis of the opposition.

TAKE NOTICE FURTHER that the Court may dispense with any of the requirements of Rule 16A, if it is in the interest of justice to do so.

DATED at **CAPE TOWN** on this **30th** day of **JULY 2020**.

THE STATE ATTORNEY

per: 

CHARLENE VAN TONDER

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First Defendant's Attorneys

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CAPE TOWN

(Ref: **Ms C van Tonder/2063/03/P8**)

TO: THE REGISTRAR

Western Cape High Court

CAPE TOWN

AND TO: SCHEIBERT & ASSOCIATES

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