

PARTICULARS OF CLAIM

1. The first plaintiff is **ILANA CEDAR JOUBERT**, an adult female counsellor, born on 22 August 1975 and residing at **6 Ladybird Street, Nelspruit, Mpumalanga**.
2. The second plaintiff is **ILANA CEDAR JOUBERT** in her capacity as mother and guardian of her minor child **NINA CEDAR JOUBERT**, born on 23 April 2011.
3. The third plaintiff is **ILANA CEDAR JOUBERT** in her capacity as mother and guardian of her minor child **NICOLAS HENDRI KLEINHANS**, born on 12 July 2001.
4. The defendant is **BUSCOR (PTY) LIMITED**, a private company with limited liability incorporated in terms of the Companies Act, Act 61 of 1973, read with Item 2 of Schedule 5 of the Companies Act, Act 71 of 2008, with registered address at **5 Van Rensburg Street, Nelspruit, Mpumalanga**.
5. The first plaintiff married **FRANCOIS WILHELM JOUBERT** ("the deceased") on 27 September 2008 and was still married to him at the time of his death.
6. The deceased was born on 18 January 1983 and died on 7 May 2011.

7. Nina was born of the marriage between the first plaintiff and the deceased.
8. As a result, the deceased owed both the first plaintiff and Nina a duty of support.
9. Nicolas was born of the first plaintiff's previous marriage, but lived in a family unit where he accepted the decedent as a father figure.
10. At all times relevant to this claim:
 - 10.1. The defendant operated a bus depot and workshop where it repaired and maintained its fleet of busses at 5 Van Rensburg Street, Nelspruit, Mpumalanga.
 - 10.2. The defendant was an employer as defined in section 1 of the Occupational Health and Safety Act, Act 85 of 1993 ("the OHSA").
 - 10.3. The bus depot and / or the workshop was a workplace as defined in section 1 of the OHSA.
 - 10.4. The deceased was employed as an apprentice electrician by Lira Electrical CC ("Lira Electrical"), which conducted a business repairing and maintaining electrical and mechanical equipment.

- 10.5. The defendant contracted with Lira Electrical to carry out electrical and mechanical repairs and maintenance on certain equipment at the workplace.
11. On 5 May 2012, at approximately 16:00, the defendant, acting through its employees, who acted in the course and scope of their employment with the defendant, requested and permitted or allowed the deceased to enter a sump for purposes of effecting repairs and / or conducting maintenance on the submersible pump situated in the sump.
12. The sump comprises a concrete-lined hole in the ground of approximately 1.5 metres in diameter and 3 metres deep which is accessed through a manhole located in the concrete roof of the sump.
13. The sump collects oil and other toxic substances from the vehicle wash bays in the workplace.
14. The sump:
- 14.1. Was a confined space as defined in regulation 1 of the General Safety Regulations to the OHSA, published under Government Notice R1031 in Government Gazette 10252 of 30 May 1986 ("the regulations"); and



14.2 Was a confined space containing or likely to contain :

14.2.1 hazardous as, vapour, dust or fumes; and

14.2.2 an oxygen content of less than 20 percent by volume and/or an oxygen-deficient atmosphere.

15. Section 9 of the OHSA imposes a duty upon every employer to conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.

16. Regulation 5 of the regulations imposes specific duties upon an employer where a person enters a confined space at the workplace of the employer, including the duties referred to in paragraph 17 below.

17. The defendant, in breach of its statutory duties, failed to:

17.1 Ensure that the deceased entered the sump only after the air therein had been tested and evaluated by a person who is competent to pronounce on the safety thereof, and who has certified in writing that the confined space is safe and will remain safe whilst the deceased or any person is in the confined space, taking into account the nature and duration of the work to be performed therein; or

17.2 take steps to ensure that

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17.2.1. the sump was entered by the deceased only after the sump had been purged and ventilated to provide a safe atmosphere therein and had taken measures necessary to maintain a safe atmosphere therein, and

17.2.2. it had isolated all pipes, ducts and other communicating openings by means of effective blanking other than the shutting or locking of a valve or a cock or, if not practicable, only when all valves and cocks which are a potential source of danger have been locked and securely fastened by means of chains and padlocks;

or

17.3. take steps to ensure that

17.3.1. the sump was entered by the deceased using breathing apparatus of a type approved by the Chief Inspector, and

17.3.2. it had isolated all pipes, ducts and other communicating openings by means of effective blanking other than the shutting or locking of a

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valve or a cock, or if not practicable, only when all valves and cocks which are a potential source of danger have been locked and securely fastened by means of chains and padlocks, and

17.3.3 the deceased utilised a safety harness or other similar equipment to which a rope was securely attached and which reached beyond the access to the confined space, with the free end attended to by a person trained in resuscitation, and

17.3.4 at least one other person trained in resuscitation is and remains in attendance immediately outside the entrance of the confined space in order to assist or remove any person or persons from the confined space, if necessary, and

17.3.5 effective apparatus for breathing and resuscitation of a type approved by the Chief Inspector was available immediately outside the confined space.

18. Upon entering the sump the deceased was exposed to and overcome by hazardous gas or vapour or fumes; alternatively, an oxygen deficient atmosphere

19. As a consequence of the deceased's exposure to hazardous gas or vapour or fumes; alternatively, his exposure to an oxygen deficient atmosphere, the deceased suffered severe injuries to his central nervous system and to his cardio-respiratory system.
20. The deceased had to be and was resuscitated on the scene, hospitalised at the Rob Ferreira Hospital in Nelspruit, and connected to a respirator.
21. As a consequence of the irreversibility of the injury, which did not allow the deceased to sustain life without artificial intervention, the treating physicians disconnected the respirator at approximately 08:40 on 7 May 2011, upon which the deceased died.
22. The OHSA and the regulations were promulgated for the benefit and protection of persons entering confined spaces at workplaces and those dependent upon them for maintenance and support.
23. The type of harm suffered by the deceased was of the type contemplated in the regulations and which the regulations were promulgated to protect against.
24. In the premises the defendant owed a statutory duty of care to the deceased and his dependants to comply with its duties in terms of OHSA and the regulations, which duty it breached.

Alternatively

25. The defendant owed the deceased and his dependants a common law duty of care to take reasonable measures to ensure the safety of persons employed in the workplace, which included a duty to ensure that the provisions of the OHSA and the regulations were complied with and to take reasonable measures to ensure the safety of persons entering upon the premises of the defendant, and in particular persons who accessed, used, maintained and repaired the defendant's waste run-off removal system, of which the sump forms part, because the system is an inherently dangerous installation and further creates a source of danger.
26. The defendant is strictly liable for the plaintiff's damages as a result of its breach of its statutory duties, alternatively, the defendant breached its statutory duties and/or common law duty that it owed to the deceased and his dependents, by negligently failing to take the measures set out in paragraph 17, which it could and should reasonably have done.
27. In consequence of the defendants breach of its statutory alternatively common law duty of care owed to the deceased and to his dependents and his ensuing death, the first and second plaintiffs suffered past and future loss of support as follows :
- 27.1 In respect of past loss of support, calculated from 7 May 2011 to 15 March 2013 :-
- 27.1.1 the first plaintiff suffered a loss in the amount of R29 526.00;
- 27.1.2 Nina suffered a loss in the amount of R14 763.00;
- 27.2 In respect of future loss of support,

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27.2.1. the first plaintiff has suffered a loss in the amount of R1 651 080,00 calculated from 6 March 2013 to the date upon which the deceased would have turned 65;

27.2.2. Nina has suffered a loss in the sum of R569 074,00 calculated from 15 March 2013 to the date upon which Nina will turn 21, up to which date she would have been dependant on the deceased.

28. The calculation of the aforesaid figures are evident from annexure A hereto, being a certificate prepared by Mr Robert J Koch, an actuary, dated 13 September 2012.
29. The first plaintiff and Nicolas had maintained a vigil next to the deceased's hospital bed for much of the time that he was hospitalised and were present when the respirator was disconnected and he died.
30. As a consequence of the emotional and physical proximity to the deceased during his hospitalisation and the moment of his death, the first plaintiff and Nicolas suffered emotional shock resulting in psychological injury.

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31. In particular,

31.1. the first plaintiff suffered and still suffers from a recurrent depressive disorder; and

31.2. Nicolas suffered and continues to suffer from a disturbance of activity and attention.

32. As a consequence, the first plaintiff and Nicolas have incurred and will incur the following medical costs:

32.1. In respect of past medical costs,

32.1.1. the plaintiff incurred costs in the amount of R8 760,90; and

32.1.2. the first plaintiff incurred past medical costs in respect of Nicolas in the amount of R6 110,90.

32.2. Future medical costs would be incurred as follows:

32.2.1. The plaintiff will require:

32.2.1.1. four sessions per year with a psychiatrist for five years at R1 028,20 per session, totalling R20 564,00; and

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32.2.1.2. twelve sessions per year with a psychologist for five years at R200,00 per session, totalling R12 000,00;

32.2.1.3. totalling R32 564,00.

32.2.2. Nicolas will require:

32.2.2.1. two sessions per year with a psychiatrist for five years at R951,50 per session, totalling R9 515,00; and

32.2.2.2. twelve sessions per year with a psychologist for five years at R200,00 per session, totally R12 000,00;

32.2.2.3. totalling R21 515,00.

33. As a further consequence of their psychiatric and psychological injuries:-

33.1. the plaintiff has suffered general damages for pain and suffering for which an amount of R500 000,00 would be reasonable compensation; and

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33.2. Nicolas has suffered general damages for pain and suffering for which an amount of R400 000,00 would be reasonable compensation.

WHEREFORE the plaintiffs claim for judgment against the defendant as follows:

1. Payment to the first plaintiff of the amount of R2 221 930,90.
2. Payment to the second plaintiff of the amount of R427 625,90.
3. Payment to the third plaintiff in the amount of R583 837,00.
4. Interest on the above amounts at 15.5% per annum *a tempore morae*.
5. Costs of suit.

DATED AT PRETORIA ON THIS ____ DAY OF _____ 2013.

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