IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable

CASE No.:2399/2017

In the matter between:

N[...] G[...] M[...] obo R[...] V[...] M[...] **PLAINTIFF**

And

MEMBER OF THE EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF HEALTH: FREE STATE PROVINCE **DEFENDANT**

Coram: **Van Rhyn J**

Heard: **3 December 2024**

Delivered: **14 January 2025**

Summary: Delictual damages - medical negligence - damages ensuing as a result of hypoxic brain injury - cerebral palsy - contingency deduction percentage applied to claim for loss of earnings - normal between 15% and 20% - no reason to deviate from the normal contingency deduction.

ORDER

1. The Defendant is ordered to pay the Plaintiff, in her representative capacity, the amount of R635 740.00 (SIX HUNDRED AND THIRTY-FIVE THOUSAND SEVEN HUNDRED AND FORTY RAND) in full and final settlement of the Plaintiff’s claim for loss of earnings.

2. Insofar as the Defendant fails to make the payment as ordered in paragraph 1 *supra*, within a period of 30 days from date of the order, the Defendant is ordered to pay interest to the Plaintiff on the amount payable, at the prescribed interest rate per annum, *a tempore morae*, calculated from the 31st day after judgment to the date of final payment, both days included.

3. The Plaintiff's attorney of record is authorised to cause to be created, within 6 (SIX) months of the date of this order, a trust to be established in accordance with the Trust Property Control Act No 57 of 1988, and, if it is not created within 6 (six) months to approach this Court or a Judge in chambers (as directed by the Judge President or Deputy Judge President) for a further direction or extension of time, which trust: -

3.1 shall be created in accordance with the draft trust deed, and shall contain the provisions set out therein, a copy of which is annexed hereto as **"A"**;

3.2 shall have as its trustee MARIA MAGDALENA ROBBERTSE with the powers and duties as set out in the aforesaid trust deed.

4. The trustee shall: -

4.1 Be entitled in the execution of their duties and fiduciary responsibilities towards the of the trust, to have the attorney and client costs and disbursements of Plaintiff's attorneys taxed, unless agreed; and

4.2 Be obliged to render security to the satisfaction of the Master of the High Court.

4.3 Be entitled and obliged to take all necessary steps to recover any money, paid by the Defendant flowing from this action, paid over to any other trust registered for the benefit of the minor, and to demand full accounting from any such trust.

5. The Plaintiff's attorneys of record:

5.1 Are authorised, pending the creation and registration of the trust, to invest the award less such fees and/or costs to which they are entitled, in an interest-bearing account in terms of section 86(4) of the Legal Practice Act, Act 28 of 2014, and to make payment of any reasonable expense or disbursement for the benefit of the minor child as a trustee would have been able to do should such expenditure or disbursement be regarded as reasonably necessary;

5.2 Shall account fully to the trustee appointed, of all costs, fees, expenditure and/or disbursements paid from the award once the trust had been registered and the balance of the award paid over.

6. The Defendant shall pay the plaintiff's taxed or agreed costs of suit, to date, insofar as it relates to loss of earnings, on the High Court scale, such costs to include the following:

6.1 Insofar as not paid in terms of any previous order or settlement, the reasonable costs attendant upon the obtaining of medico-legal reports and/or addendum reports and/or joint minutes, if any, of the following expert witnesses in terms whereof expert notices were filed:

6.1.1 Dr J Brooks (Life Expectancy);

6.1.2 M Nethavhani & Laauwen (Educational Psychologists)

6.1.3 L Marais (Industrial Psychologist);

6.1.4 Catherine Rice (Occupational Therapist)

6.1.5 Munroe Actuaries.

6.2 The costs attendant upon the appointment of senior counsel Myburgh SC, including his reasonable fees for preparation, drafting of the opening submissions and heads of argument, as well as his reasonable day fee for 3 December 2024, to be taxed on **scale C.**

6.3 The costs of attorneys, to date of this order, which shall, subject to the discretion of the taxing master, include necessary travelling costs and expenses incurred on behalf of the Plaintiff, preparation for trial and expenses, preparation for trial and attendance at court on 3 December 2024.

6.4 The reasonable costs incurred by and on behalf of the Plaintiff in as well as the costs consequent to attending the medico-legal examinations of the educational psychologists, industrial psychologists and/or life expectancy experts.

6.5 The costs consequent to the plaintiff's trial bundles being prepared.

6.6 The costs of round table meetings between Myburgh SC and Dodson SC.

6.7 The costs of and consequent of the holding of all expert meetings between the Life expectancy experts and industrial psychologists.

7. The defendant shall pay interest on the above taxed or agreed costs of suit at the prescribed statutory rate calculated from 31 (THIRTY-ONE) days after agreement in respect thereof, or from the date of affixing of the taxing master's allocatur, to date of payment.

8. Any costs incurred by the Plaintiff's previous attorney of record, insofar as it

relates to loss of earnings, are reserved.

9. Plaintiff’s counsel declared that there is no contingency fee agreement.

10. Any payment due in terms of this order shall be paid into the following trust account:

WERNER BOSHOFF INC.
Standard Bank Lynnwood Ridge
Account Number: 0[…]
Branch Code: 012-445
REF: MAT1632

JUDGMENT

[1] The plaintiff, N[…] G[…] M[…], in her capacity as mother and guardian of the minor, R[…] V[…] M[…], instituted action on 16 May 2017 against the defendant, the Member of the Executive Council for the Department of Health of the Free State Province, for damages following the birth of the minor. The plaintiff claimed that the defendant, through its agents and/or personnel at the Botshabelo Hospital, under the jurisdiction of the defendant, negligently caused the minor to suffer from cerebral palsy.

[2] The defendant has conceded liability on the merits. The claim for general damages has been settled and payment in the amount of R1.9 million has been made on 23 March 2021. An agreement has been reached and payment of a lump sum in the amount of R724 199.24 has been made in respect of cost of acquisition of a house to accommodate the minor’s disability. As such, the quantification of the remaining damages, being loss of earning capacity and future medical expenditure suffered by the plaintiff coupled with the public health remedy and undertaking to pay

remedy, raised by the defendant, constitutes the only remaining issues between the parties. At the commencement of the hearing of this matter, the parties proposed that the plaintiff's claims for loss of earning capacity be separated from the remaining issues in terms of the provisions of Rule 33(4) of the Uniform Rules of Court and that the remaining issues be postponed to the pre-trial roll.

[3] Therefore, the following rulings were made:

1. In terms of the provisions of Rule 33(4) of the Uniform Rules of Court the plaintiff's claim for loss of earning capacity is separated from the remaining issues.

2. The remaining issues are postponed to the judicial pre-trial roll of Monday, 20 January 2025.

[4] The parties accept that there is a dispute regarding the life expectancy of the minor. To circumvent the need to call such experts and having regard to the small difference in the respective opinions, the plaintiff accepts the correctness of the life expectancy as opined by the defendant's expert. The parties furthermore handed up a joint submission seeking a further ruling admitting the expert reports and joint minutes into evidence. Consequently, the following ruling was made that:

1. the joint minute of the industrial psychologists;

2. the reports of the industrial psychologists;

3. the joint minute of the life expectancy experts;

4. the reports of the educational psychologists;

are admitted into evidence in terms of s 3(1)*(a)* of the Law of Evidence Amendment Act 45 of 1988 and that these documents be relied upon for purposes of determination of the contingency deduction to be applied to the quantum in respect of the loss of earning capacity for the minor on the basis set out in the joint submission. The agreements reached in the joint minute of the industrial psychologists to prevail over their reports and those of the educational psychologists where there is any conflict.

[5] Following the rulings made at the hearing of the matter the only remaining issue to be adjudicated upon is the appropriate contingency deduction to be applied to the minor's premorbid earnings. The plaintiff was admitted to hospital for the birth of her baby on 8 September 2009. The plaintiff gave birth on 9 September 2009. As a result of the negligence of the defendant's employees the minor suffered a total and permanent impairment of the brain. In the joint minute of the life expectancy experts, Professor P Cooper and Dr J Brooks dated 15 November 2024, the minor's condition is described as: 'severe quadriplegic cerebral palsy. She is immobile, has no functional hand use, is nonverbal, has severe intellectual disability, and a severe visual impairment. Her gross motor impairment is the most severe category as she cannot consistently lift her head in the prone position'. The minor, since birth, has manifested with specific symptoms related to birth asphyxia i e cerebral palsy.

[6] The Industrial Psychologists, Lance Marais and Mark Peverett (joint minute dated 25 to 28 November 2024) agreed that the minor has been 'rendered uneducable, untrainable and unemployable, due to the incident that occurred leaving the minor [with] cerebral palsy requiring a full-time care giver.' It is agreed by the Industrial Psychologists that it is generally known that children equal or obtain higher qualifications than their parents, which would probably have been the case with the minor. The calculation of the minor's loss of earning capacity is based upon the agreement reached between the Industrial Psychologists having agreed that the following factors should be taken into account as the basis for computation:

(a) the minor's life expectancy is until the age of 31.1 years;

(b) as a result of her injuries, she is unemployable;

(c) the minor would have attained a National Senior Certificate (NSC) (NQF level 4) in 2027(at age18);

(d) the minor would have obtained a tertiary qualification (NQF level 5) in 2009 if she had met the entry requirements of the tertiary institution as well as securing NFSAS funding.

(e) tertiary education was a possibility rather than a probability and employment would be based on obtaining a Grade 12 level of education;

(f) the minor would have secured employment in the formal labour market after a period of two to five years;

(g) earnings per annum should be based on a grade 12 level of education, using the Quantum Yearbook 2024, in the median quartile, which gives R84 000, R169 000 and R247 000 for the ages younger than 25, between the ages 25 and 44 and the ages 45 and older respectively;

(h) post matric, it would take two to five years to secure employment in the formal labour market;

(i) the unemployment rates are exceptionally high in south Africa. In the Eastern Cape where the minor and her family reside, the total unemployment rate for the Black African group is 42% with far higher scales of unemployment indicated for the ages 15 to 34, sourced from Stats SA Quarterly Labour Force Survey 3rd Quarter 2024:

Age 15-19: 82%

Age 20-24: 62%

Age 25-29: 52%

Age 30-34: 51%

[7] The plaintiff contends that a 15% contingency deduction is fair having regard to all the circumstances of the matter and based upon case law where the courts have applied contingency percentages of 15% in matters where the injured persons became entirely unemployable or had suffered mental retardation and permanent impairment.[1] The usual adversities of life i.e., economic downturn, retrenchment, accidents and illness, are possibilities that could interrupt or impede the working life of any person. These factors have been incorporated in the proposed 15% contingency deduction. The defendant, on the other hand, argues for a 50% contingency deduction to be applied. The minor and her family are residing in the Eastern Cape Province where the unemployment rate indicates that there is a low demand for jobseekers. This would be compounded by only obtaining a matric qualification. It is argued that at the time when the minor would have entered the employment market after her matric year, the applicable unemployment rate will be at 82%, suggesting an 18% chance of actually finding employment. At each stage of employment that is foreseeable during the minor's lifetime, her prospects of employment are less than 50%. Therefore, purely taking into account unemployment, and none of the other vicissitudes of life, at each of the stages, being at age 20 years, 25 years and 30 years, it is improbable that she will become employed.

[8] The determination of loss of earning capacity is speculative as held in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A): 'Any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough

[1] *Nkomo v President Insurance Co Ltd* 1992 (4) C&B A4-82 (W); *Uijs v General Accident Versekerings Maatskappy Beperk* 1991 (4) C&B A4-88 (C); *Hurter v Road Accident Fund and Another* 2010 (6) QOD A4-12 (ECP); *Cordeira v Road Accident Fund* 2010 QOD A4-45 (GNP).

estimate, of the present value of the loss.'[2] The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has considerable discretion to award what it considers suitable and just. Over time, our courts have accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which contingencies have to be accounted for. Put differently, the longer period over which unforeseen contingencies can have an influence over the accuracy of the amount adjudged to be the probable income of the plaintiff, the higher the contingencies that have to be applied. [3]

[9] A contingency deduction is made so that any possible and relevant future event which might otherwise have caused or influenced the extent of the damages sustained by the plaintiff is considered. Contingencies have been described as 'the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors'.[4] In *Southern Insurance Association Ltd v Bailey NO* the court, with reference to an Australian case, took into account that the 'fortunes of life' are not always adverse and it is therefore a mistake to suppose the necessity to scale down an award for loss of income. What it involves depends on a consideration what the future may have held for the particular individual concerned. All vicissitudes are not harmful; they may be favourable.[5]

[10] The following factors are relevant in order to determine what would be a fair and reasonable contingency deduction in the circumstances of this case:

(a) The minor's mother is 28 years old, single and obtained a Grade 10 qualification at school in 2004. She is unemployed and has never been employed except for having generated some earnings by doing recycling work for a two-to-three-month period earning R1200 per month. The minor's mother

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[2] See *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at para 8.
[3] *Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W)392H – 393G.*
[4] *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at para 3.
[5] *Southern Insurance Association Ltd v Bailey NO at 117.*

had to terminate her attempt to generate an income as the minor was struggling without her permanent caregiving. Since then, the plaintiff has been the full- time caregiver of the minor.

(b) The minor's grandfather, B[…] M[…] (according to report by Lance Marais) or L[…] M[…] (according to report by Marc Peverett) is 53 years old and has obtained a Grade 4 qualification (according to report by Lance Marias) or a Grade 6 qualification (according to report by Marc Peverett). He earns an income by doing gardening/cleaning 'piece jobs'.

(c) The minor's maternal aunt (27 years) obtained Grade 11, failed Grade 12 and is unemployed. From the report by Marc Peverett, compiled when the maternal aunt was 29 years old, she was working as a cleaner and earned an income of R780 per month.

(d) The minor's father worked as a safety guard at the time when the minor was conceived. His occupational experience falls within the semi-skilled occupational group. No further information regarding the father is available and he does not play any role in the care or maintenance of the minor.

(e) The minor is a 15 year-old girl with severe quadriplegic cerebral palsy. She is immobile, has no functional hand use, is non-verbal, has severe intellectual disability and a severe visual impairment. She is completely in need of care of others for her needs including feeding, which she does take orally rather than by gastrostomy. Her immobility and inability to self-feed are strongly adverse factors for her life expectancy. A positive factor is to feed orally. She does not have epilepsy. Initially, during 2020, Dr Jordan Brooks estimated the minor's life expectancy to be 22.7 years to age 33.2 based upon the information that she was able to lift her head consistently in prone position. However, since further information came to hand that the minor does not lift her head in the prone position, the updated life expectancy estimate is revised by Dr Jordan Brooks to 16.7 years to age 31.9. Professor Peter Cooper's revised and updated estimate based upon the updated information is 15.9 years to age 31.1 years.

[11] The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%.[6] In *Singh and another v Ebrahim* (8027/2004) [2008] ZAKZHC 112 (30 July 2008) the diminished life expectancy was assessed of a minor child who suffered brain damage as a result of medical negligence and, in awarding damages for loss of earnings, a contingency deduction of 15% was applied. In *Kriel NO obo S v Member of the Executive Council for Health Gauteng Provincial Government* (9407/2017) [2020] ZAGPJHC 273 (4 November 2020) Meyer J considered the appropriate contingency deduction that should be applied to the child's loss of earnings and held that a 20% contingency deduction to be appropriate. In *AD and IB v MEC for Health and Social Development, Western Cape Provincial Government* 2016 (7A4) QOD 32 (WCC) Rogers J held, with reference to *Singh* that a contingency deduction of 17.5 years to be appropriate. Rogers J found that something more than merely the child's life expectancy of 43.5 additional years is required to depart from the normal range of between 15% and 20%.

[12] On 2 December 2024 Manala Actuaries calculated the loss of earnings in respect of the minor. The report containing the calculation and salary information was handed up by agreement between the parties during the hearing of the matter. The calculation date is 1 January 2025 and is based upon the Industrial Psychologists reports and upon instructions received from the legal representatives of the parties. It is assumed that the minor would have finished matric when she would have turned 18 years i.e. December 2027. She would have a period of 3.5 years of unemployment after matric until 31 December 2030. The following career path is taken into consideration:

(a) 1 January 2028 to 31 December 2030 (3.5 years – unemployed)

[6] (*AA Mutual Association Ltd v Maqula* 1978 (1) SA 805 (A) 812; *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980(3) SA 105(A) 114-115A- D.

(b) 1 July 2031: Median quartile for grade 12 (early career stage) i.e. R84 000 per annum, July 2024 money terms;

(c) Age 40 years (October 2049): Median quartile for grade 12 (mid-career stage) i.e.R169 000 per annum, July 2024 money terms;

(d) Age 55 years (1 October 2064) Median quartile for grade 12 (late career stage) i.e. R247 000 per annum, July 2024 money terms.

[13] No allowance has been made for social grants. An expected age of death at age 31.1 years has been utilised for the calculation. A reduced life expectancy of 15.85 years at the calculation date is used. The calculation for future loss of income amounts to R794 675. In *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) the Supreme Court of Appeal held that the younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path. A 15 % deduction for loss of earnings over a work lifespan of 11 years was held to be appropriate. In *PM v MEC for Health, Gauteng Provincial Government (A5093/2014)* [2017] ZAGPJHC 346 (7 March 2017) the court, on appeal, referred to 'the trial court's large contingency deduction of 50%' in respect of loss of earnings of a child diagnosed with cerebral palsy, as being out of general accord with the contingency deductions previously applied in comparable cases.

[14] I agree with the contention on behalf of the plaintiff that the high rate of unemployment in South Africa and the minor's earning capacity being diminished or interrupted by '. . . periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions'[7] are the normal vicissitudes of life taken into account by applying a contingency deduction of between 15% and

[7] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 116H-117A.

20%, being the normal contingency deduction. I furthermore have regard to the possibility that the economic growth may exceed the expectations suggested by the defendant and therefore agree that there are no special circumstances present to indicate that a higher contingency deduction ought to be implemented. In the circumstances I consider that a 20% contingency deduction should be applied to the actuarially calculated loss of earnings. The calculation of the minor's loss of earnings, with a 20% contingency deduction is as follows:

Pre-morbid future earnings	R794 675
Less 20% contingency	R158 935
Less post-morbid earnings	R0
Total	R635 740

[15] The establishment of a trust for the benefit of the minor is necessary for the protection of the funds already paid by the defendant as well as any future payment regarding the claim for damages against the defendant. Mr Myburgh SC, counsel on behalf of the plaintiff, informed the court that a trust has been established without the knowledge of the attorney acting on behalf of the plaintiff and it is unknown who is currently administering the said trust. The wording of the proposed trust deed submitted by the plaintiff at the hearing of the matter is not disputed and the parties agree that an order for the establishment of a trust be made as per the draft order which was received subsequent to the hearing of this matter.

[16] In the result the following order is made:

1. The Defendant is ordered to pay the Plaintiff, in her representative capacity, the amount of R635 740.00 (SIX HUNDRED AND THIRTY-FIVE THOUSAND SEVEN HUNDRED AND FORTY RAND) in full and final settlement of the Plaintiff's claim for loss of earnings.

2. Insofar as the Defendant fails to make the payment as ordered in paragraph 1 *supra*, within a period of 30 days from date of the order, the Defendant is ordered to pay interest to the Plaintiff on the amount payable, at the prescribed interest rate per annum, *a tempore morae*, calculated from the 31st day after judgment to the date of final payment, both days included.

3. The Plaintiff's attorney of record is authorised to cause to be created, within 6 (SIX) months of the date of this order, a trust to be established in accordance with the Trust Property Control Act No 57 of 1988, and, if it is not created within 6 (six) months to approach this Court or a Judge in chambers (as directed by the Judge President or Deputy Judge President) for a further direction or extension of time, which trust: -

3.1 shall be created in accordance with the draft trust deed, and shall contain the provisions set out therein, a copy of which is annexed hereto as **"A"**;

3.2 shall have as its trustee MARIA MAGDALENA ROBBERTSE with the powers and duties as set out in the aforesaid trust deed.

4. The trustee shall: -

4.1 Be entitled in the execution of their duties and fiduciary responsibilities towards the beneficiary of the trust, to have the attorney and clientcosts and disbursements of Plaintiff's attorneys taxed, unless agreed; and

4.2 Be obliged to render security to the satisfaction of the Master of the High Court.

4.3 Be entitled and obliged to take all necessary steps to recover any money, paid by the Defendant flowing from this action, paid over to any other trust registered for the benefit of the minor, and to demand full accounting from any such trust.

5. The Plaintiff's attorneys of record:

5.1 Are authorised, pending the creation and registration of the trust, tinvest the award less such fees and/or costs to which they are entitled, in an interest-bearing account in terms of section 86(4) of the Legal Practice Act, Act 28 of 2014, and to make payment of any reasonable expense or disbursement for the benefit of the minor child as a trustee would have been able to do should such expenditure or disbursement be regarded as reasonably necessary;

5.2 Shall account fully to the trustee appointed, of all costs, fees, expenditure and/or disbursements paid from the award once the trust had been registered and the balance of the award paid over.

6. The Defendant shall pay the plaintiff's taxed or agreed costs of suit, to date, insofar as it relates to loss of earnings, on the High Court scale, such costs to include the following:

6.1 Insofar as not paid in terms of any previous order or settlement, the reasonable costs attendant upon the obtaining of medico-legal reports and/or addendum reports and/or joint minutes, if any, of the following expert witnesses in terms whereof expert notices were filed:

6.1.1 Dr J Brooks (Life Expectancy);

6.1.2 M Nethavhani & Laauwen (Educational Psychologists)

6.1.3 L Marais (Industrial Psychologist);

6.1.4 Catherine Rice (Occupational Therapist)

6.1.5 Munroe Actuaries.

6.2 The costs attendant upon the appointm ent of senior counsel Myburgh SC, including his reasonable fees for preparation, drafting of the opening submissions and heads of argument, as well as his reasonable day fee for 3 December 2024, to be taxed on **scale C.**

6.3 The costs of attorneys, to date of this order, which shall, subject to the discretion of the taxing master, include necessary travelling costs and expenses incurred on behalf of the Plaintiff, preparation for trial and expenses, preparation for trial and attendance at court on 3 December 2024.

6.4 The reasonable costs incurred by and on behalf of the Plaintiff in as well as the costs consequent to attending the medico-legal examinations of the educational psychologists, industrial psychologists and/or life expectancy experts.

6.5 The costs consequent to the plaintiff's trial bundles being prepared.

6.6 The costs of round table meetings between Myburgh SC and Dodson SC.

6.7 The costs of and consequent of the holding of all expert meetings between the Life expectancy experts and industrial psychologists.

7. The defendant shall pay interest on the above taxed or agreed costs of suit at the prescribed statutory rate calculated from 31 (THIRTY-ONE) days after agreement in respect thereof, or from the date of affixing of the taxing master's allocatur, to date of payment.

8. Any costs incurred by the Plaintiff's previous attorney of record, insofar as it relates to loss of earnings, are reserved.

9. Plaintiff's counsel declared that there is no contingency fee agreement.

10. Any payment due in terms of this order shall be paid into the following trust account:

WERNER BOSHOFF INC.
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Account Number: 0[…]
Branch Code: 012-445
REF: MAT1632

VAN RHYN J

Appearances

For the Plaintiff:	S J Myburgh SC
Instructed by:	Honey Incorporated Bloemfontein
For the Defendant:	A Dodson SC L Mtukushe A Raw
Instructed by:	State Attorney Bloemfontein