IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

CASE NO: 120/2020

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE 08/04/2025

SIGNATURE

In the matter between:

ADVOCATE JEANNE-MARIE LIEBEL N.O.

N[...] S[...] L[...] **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 08 April 2025 at 10:00.

JUDGMENT

Mashile J

Introduction

[1] On 19 November 2011 at approximately 17h55, the Plaintiff (“Ms L[...]”), was crossing Langeloop Road to Kamhlushwa Township in Malelane, Mpumalanga Province when she collided with motor vehicle bearing registration letters and number D[...] driven by one J Mabuza. In consequence of the collision, Ms L[...] who was nine years old, sustained serious bodily injuries. The collision exposed the Defendant (“the Fund”) to an action for damages by the mother and natural guardian of Ms L[...]. Upon attainment of majority, Ms L[...] took over the claim from her mother.

[2] Subsequently, various experts projected that due to the nature and sequelae of Ms L[...]’s injuries, a *curatrix ad litem* be appointed. Following the recommendation, an application for the appointment of Advocate Jeanne-Marie Liebel as a *curatrix ad litem* was launched with this Court. This Court granted an order for her appointment in that capacity on 24 March 2023. Ms L[...] has since been substituted accordingly.

[3] When this matter served before this Court, the parties had on an earlier date resolved that the Fund would be 100% liable for damages that Ms L[...] may prove against it. Additionally, the Fund has agreed to furnish her with a certificate in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended. The Court was also advised that Ms L[...] has abandoned her claim for past hospital and medical expenses because she was treated at a Government Hospital. In the result, only general damages and loss of earning capacity stand for determination.

[4] Despite delivering a plea, the Fund is fundamentally not defending the action. I say so because it did not appoint its own experts. In this regard, the Court was advised that the Fund would use the reports of Ms L[...]. Furthermore, the Fund in fact agrees with the findings of the various experts save for the contingencies to be applied. Stripped of all the verbiage, Ms L[...]’s claim simmers down to general damages and loss of earnings. To prove her claim, Ms L[...] appointed various experts. These were the following:

4.1 Dr L A Oelofse, an Orthopaedic Surgeon;

4.2 Dr JPN Pienaar, a Plastic and Reconstruction Surgeon;
4.3 Dr Tommy Bingle, a Neurosurgeon;
4.4 Dr DLC Stolp, an Ear, Nose and Throat Specialist;
4.5 Ms Dorrithe Benade, an Educational Psychologist;
4.6 Mr Stephen Ferreira-Teixeira, a Clinical Psychologist;
4.7 Ms Khanyisa Ntshengulana, an Occupational Therapist;
4.8 Ms Roelin van Niekerk.

Evidence

[5] Dr Oelofse records that Ms L[...] sustained injuries to her head, chest and right leg. Following the collision, her Glasgow Coma Scale ("GCS") registered 7/15. An ambulance conveyed Ms L[...] to Shongwe Hospital where she was stabilised and later transported to Rob Ferreira Hospital. On admission at Rob Ferreira Hospital, her GCS had improved to 13/15. Ms L[...] was admitted to the intensive care unit ("ICU") for neuro-observation for approximately one month. Thereafter, she was moved to a general ward for further observation for another month or so.

[6] Dr Oelofse further stated that Ms L[...] was intubated, neurologically observed, received pain medication and anti-inflammatory medication and skin traction was applied to her injured right leg while detained in hospital. She received physiotherapy and was supplied with crutches, which she used to amble around. Once again, on 13 March 2011, she was re-admitted to Witbank Hospital with breathing problems for a further 5 weeks. There was reference made to a tracheostomy. Ms L[...] suffered tracheal narrowing following intubation.

[7] When Dr Oelofse was assessing Ms L[...], she complained that since the collision she encounters breathing difficulties. Additionally, she cannot participate in any strength-demanding activities, walk long distances, run or climb stairs due to breathing difficulties. When Dr Oelofse examined her, he established that she presented with a

tender unsightly tracheostomy scar. There was also tracheal narrowing secondary to prolonged intubation with resultant breathing difficulties.

[8] Insofar as her fractured right leg was concerned, she complained that actions like standing for long periods, walking long distances, handling heavy objects and squatting caused her pain. She further told Dr Oelofse that her right leg felt weak. Dr Oelofse confirmed that Ms L[...] had pain in both knees when she squatted. On examination of the right leg, Dr Oelofse found that Ms L[...] had wasting of the injured leg: 4 cm over the right quadricep muscles and 2 cm over the right calf. Clinically, the right leg was 3.5 cm shorter than the left. She had moderate tenderness over her groin, anterior and lateral aspects of the right hip, anterior joint line of the right knee and over the medial and lateral aspects of the tibiofemoral joint.

[9] Dr Oelofse also stated that the range of motion of the right hip is moderately impaired with mild pain on flexion and abduction. The range of motion of her right knee is mildly impaired with slight pain. He then diagnosed her with a femur fracture, which has fully united with shortening. The left limb is 4.8 cm longer than the right. She had an impaired and painful range of hip movements and residual soft tissue pain. Regarding future medical treatment, Dr Oelofse states that she will require both conservative and surgical. He recommended leg lengthening procedure. That said, he warned that due to the risks involved in undergoing the procedure, it needs to be fully explained to Ms L[...].

[10] Insofar as employment is concerned, Dr Oelofse remarks that Ms L[...] was a Grade 3 scholar when the collision occurred. He rules her out of strength-demanding employment but predicts that she will still be suited for light physical work. However, considering her severe chest injury, she may be limited to work of a sedentary nature. Finally, Dr Oelofse states that the after-effects of the brain injury should be considered as it may haunt her with persistent concentration and memory impairments leading to poor performance in a sedentary work environment.

[11] Dr JPM Pienaar consulted and examined Ms L[...]'s scars occasioned by the injuries that she sustained during the collision. He noted the following scars:

11.1 A 1.5 cm irregular hyperpigmented scar that is visible and unsightly at the top of her left eyebrow;

11.2 A visible and unsightly abrasion scar of 2.5 cm x 2.5 cm over her right cheek;

11.3 A 3 cm scar on her anterior neck with an opening to her trachea which causes a fistula;

11.4 Four 1 cm scars where the central lines were inserted that are visible and unsightly around her right clavicle;

11.5 A 3 cm x 3 cm abrasion scar over her right elbow and an 8 cm x 4 cm scar over her left shoulder that is also hyperpigmented, visible and unsightly;

11.6 A 2 cm x 2 cm and a 4 cm x 2 cm visible scar over her right thigh;

11.7 A 10 cm x 2 cm irregular, visible and unsightly scar on her left forearm and wrist.

[12] Dr Pienaar stated that some of the scars will be amenable to surgery. That said, Ms L[...] will still be left with an extensive amount of scarring for her entire life. Dr Pienaar added that the collision has left the patient with serious permanent scarring and disfigurement, which gravely affects her appearance and dignity. It causes her severe social anxiety and embarrassment.

[13] Dr Bingle noted that Ms L[...] sustained injuries to her head with scratches on both cheeks, chest and right upper leg. Neurocognitively, Ms L[...] complained that she experienced problems with her short-term memory and concentration. She further stated that she encounters a short temper with episodes of verbal aggression and feels depressed and frustrated. She is anxious when travelling in a motor vehicle. Ms L[...] also has chronic headaches most of which is concentrated in the frontal area. The headaches seem to be responsible for her disturbed sleep pattern.

[14] During inclement weather, Ms L[...] would have chronic pain in the middle of her chest. She also experiences weakness of her right leg and intermittent pain. Ms L[...]

reported problems with her visual acuity and she has a reduced sense of hearing in both ears.

[15] Dr Bingle's estimation is that Ms L[...]'s posttraumatic headaches have become chronic and are expected to persist in variable degree in the long term. Dr Bingle concludes that Ms L[...] has suffered a severe traumatic brain injury during the collision. He states further that following a massive traumatic brain injury of the kind suffered by Ms L[...], it is expected that neurocognitive and psychological sequelae would be a matter of course.

[16] It appears that the main reason for referring Ms L[...] to an ENT specialist was her complaint that her sense of hearing had significantly reduced. As it turned out, there was nothing clinically wrong with her ears or hearing. That said, Dr Stolp recorded the following injuries:

16.1 Severe concussive head injury with loss of consciousness and posttraumatic amnesia;

16.2 Swelling, lacerations and contusion of her face and head;

16.3 Lacerations of the left shoulder and right elbow;

16.4 Fracture of the right femur; and

16.5 Hard blow and contusion to her chest.

[17] Ms L[...] complained that she had difficulty breathing, shortness of breath and wheezing, which became aggravated even with measured exercise. Her voice was weak and she could not increase the volume. This caused difficulty with communication. Ms L[...] has memory difficulties and a depressed mood. She complained of headaches and severe neck pain. She experienced dizziness.

[18] From the above, Dr Stolp concludes that Ms L[...] presents with respiratory and expiratory stridor and poor voice quality. The clinical examination of the ears was normal. Dr Stolp stated that on direct fibre-optic laryngoscopy, it was noticed that both vocal cords were fixed and immobile in the paramedian position. This is due to bilateral

vocal cord paralysis secondary to recurrent laryngeal nerve damage. This leads to upper airway obstruction and poor voice quality. Ms L[...] may require a tracheotomy with the insertion of a speech valve. She may require further surgery on her vocal cords to improve airway with a view to possible decannulation in future.

[19] Ms D Benade noted that her assessment revealed that Ms L[...]'s neurological tests indicated that her neurocognitive performance varies as variances of functioning in memory, processing speed, problem-solving and abstract reasoning. Ms Benade said that it is possible that Ms L[...] was functioning on a low average cognitive potential. Ms L[...] presented with an overall below average or borderline cognitive ability during her evaluation. Considering her level of functioning, it seems that her cognitive potential has declined.

[20] Ms L[...]'s pre-collision academic potential, according to Ms Benade, is that it is likely that Ms L[...] would have completed Grade 12 (NQF level 4 and possibly, even attained a Higher Certificate (NQF level 5) albeit with some failures along the way. For as long as Ms L[...] receives the necessary intervention and supports as recommended, Ms Benade predicts that she should be able to pass Grade 12 or NQF4. However, she thinks that her chances of obtaining a Higher Certificate (NQF level 5) are gloomy because of the injuries sustained during the collision.

[21] Following his consultation and examination of Ms L[...], Mr Teixeira-Ferreira recorded that her profile suggested gross deficits in neurocognitive constructs. She volunteered various cognitive challenges in the form of poor attention and concentration, forgetfulness and multitasking. This is not surprising, he said, because it is anticipated that a severe brain injury would normally lead to significant long-term neuropsychological sequelae.

[22] The results of his assessment exposed psychological distress in the form of severe features of depression, anxiety and PTSD symptoms. From a neuropsychological perspective, Mr Teixeira-Ferreira considers that the following

accident-related factors will have a negative influence on Ms L[...]'s academic/occupational functioning:

22.1 Her neuro-cognitive complaints/shortfalls may render her more prone to making errors in the execution of tasks; she may take longer to complete tasks and may also be negligent in her work due to her memory problems and poor concentration. This could have a negative impact on her job performance and thus decrease her effectiveness in an academic/occupational environment;

22.2 Ms L[...] has lost confidence in herself due to her accident-related injuries and scarring which has negatively affected her overall self-esteem post-accident. Negative self-esteem could impact destructively on her interpersonal and scholastic functioning, as well as on her future occupational functioning in addition to her enjoyment and quality of life;

22.3 Ms L[...]'s depression, anxiety and PTSD symptoms may result in her being less motivated and driven overall. This, in turn, may hamper her scholastic/employment opportunities and render her vulnerable in any employment situation;

22.4 The experience of chronic pain and increased psychological distress, as evidenced by her anxiety and PTSD symptoms, may take more of a toll on her emotional resources, thus rendering her less stress-tolerant and resilient than she was pre-accident. This may reduce her ability to meet the psychological demands of school/work;

22.5 She reported increased frustration, irritability, and short-temperedness post-accident. This may render her more prone to interpersonal conflict and/or social isolation and, as a result, will impact negatively on her interpersonal relationships;

22.6 Her travel-related anxiety may render her somewhat less attentive upon initial arrival at work. This could affect her levels of efficiency and productivity at the start of each day.

[23] Mr Teixeira-Ferreira concluded that Ms L[...] has suffered a deterioration in her psychological functioning overall. She presents with a decreased self-esteem, increased irritability, she is socially withdrawn, sad and frustrated with her situation. Given the

severity of the brain injury, the nature of the symptoms described by Ms L[...] would have an organic aetiology and are in-keeping with severe head injury sequelae.

[24] Ms K Ntshengulana noted and confirmed Ms L[...]'s collision injuries as per the findings of the other experts. The complaints of Ms L[...] to her were fundamentally akin to those captured in the various medico-legal reports that I have already traversed supra. Ms Ntshengulana recorded that Ms L[...]'s physical perspective will be limited in her choice of occupation because she will not be able to cope with any occupation of her choice. Having regard to the outcome of her assessment. Ms L[...] will not be suited for any strength-demanding work or where she will be required to stand for almost an entire day, walk, climb stairs for prolonged periods, reach/assume elevated postures or assume low level tasks involving the right lower limb for prolonged periods.

[25] Ms L[...] will always be at a disadvantage and is not an equal competitor in the open labour market. Her work options have significantly diminished. It is anticipated that she will struggle to secure employment for which she is qualified, and which may be appropriate to her physical condition. Ms Ntshengulana states that even if Ms L[...] were to rigorously follow the recommended treatment interventions– surgical intervention, pain management and rehabilitation, her physical function and comfort is only expected to improve marginally.

[26] It is likely that she would never be able to meet the demands of full light work and any work of medium to heavy physical demands. This could mark a restriction on her ability to ever attain work in fields requiring these demands. Ms L[...]'s cognitive difficulties as well as poor conation will probably prevent her from coping with high semi-skilled and skilled occupations. In this regard, Ms Ntshengulana stated that she agrees with Ms Benade, Educational Psychologist, that the patient's chances of achieving a higher qualification have reduced.

[27] Ms L[...] presents with various neuro-behavioural and neuropsychological challenges. These factors will negatively affect her general functioning and therefore her

work pace, productivity and efficiency. She will be prone to disagreement, which will negatively affect her working relationships. Ms Ntshengulana stated further that considering her overall presentation, Ms L[...] is best suited for unskilled manual work. Thus, she will struggle to reach her pre-accident work potential especially considering that she would have been able to complete NQF 5 qualification pre-collision.

[28] Ms Ntshengulana concluded that the resultant symptoms presentation has rendered Ms L[...] distinctly vulnerable within the open labour market. It is highly likely that she will continue to experience prolonged periods of unemployment and may remain unemployed for the remainder of her life if her assessment outcomes are anything to determine this. Ms L[...] may ultimately become more suited to acquire work within protective employment. However, in the South African context it is very difficult to find institutions that offer supportive employment. Supported employment may not necessarily be equally gainful as working in the mainstream open labour market. This further underscores the fact that Ms L[...]'s chances of gainful employment will be severely curtailed.

[29] According to Mesdames van Niekerk and Rautembach, it is anticipated that the patient would have had the capacity to qualify with an NQF level 5 qualification at the end of 2022. Thereafter, she would possibly have applied for internships or learnerships to gain experience. The Industrial Psychologists suggest that she would have earned comparable to the Koch Semi-skilled Lower level (2023 terms) as per market research, by approximately July 2023. After approximately 24 months, Ms L[...] might have obtained employment within capacities such as call-centre operator, switchboard operator, sales assistant, receptionist, typist, data capture clerk, administrative assistant, etc.

[30] In this capacity she could have been able to earn according to the Koch Semi-skilled Median level. As she gained experience in such capacity, she could have progressed by means of promotions to a position such as personal assistant, senior administrative clerk, payroll administrator or HR clerk, etc. In such a position she would

earn comparable to a Paterson B1 basic median salary at the age of 45. Thereafter inflationary increases would be applicable until the normal retirement age of 65.

[31] Post the collision, Ms L[...] experiences chronic pain and dysfunction and her physical scope of employment has been reduced, even after successful treatment, she will remain best suited for work of a sedentary nature to limited light work. The Industrial Psychologists refer to the medico-legal report of Ms Ntshengulana whose opinion is that Ms L[...] is likely to experience extended periods of unemployment because her involvement in the collision has rendered her unemployable in the open labour market within fields requiring above a light physical demand level and those needing high level cognitive skills. Like Ms Ntshengulana, the Industrial Psychologists conclude that Ms L[...] is unemployable in the open labour market.

Issues

[32] Now that the issue of liability has been settled, this Court is faced with the determination of a causal link between the injuries suffered during the collision and the ensuing loss claimed by Ms L[...]. Once that has been decided, the question of loss of earning capacity of Ms L[...] will come into focus. Lastly, given the nature of Ms L[...], what award should this Court make under general damages.

Legal Framework

[33] It is trite that primarily there are two ways in which the court can approach the subject of loss of earning capacity. These are firstly, the court may ascertain a practical and realistic amount of loss based on the verified facts and the existing circumstances of the case or secondly, the court may, with reference to mathematical computation, determine an amount made on the demonstrated facts of the case using such calculation as a foundation for its award. See in this regard the case of *Southern Insurance Association v Bailey N.O*.[1]

[1] *Southern Insurance Association v Bailey N.O*. 1984 (1) SA 98 (A).

[34] At times the court is faced with instances where there exists no sufficient information. In those cases, the "gut feel" approach is normally ideal, the proviso being that the Plaintiff puts at the court's disposal adequate evidence to enable the court to appraise such financial loss.

[35] This Court is already exposed to the actuarial report of Mr Potgieter containing mathematical computation. In the circumstances, it will be sensible to utilise it to determine an amount made on the demonstrated facts of the case. With the figures suggested by Mr Potgieter, this Court will apply the usual contingencies such as:

35.1 The possibility of mistakes having been made in the determination of the life expectancy of Ms L[...];

35.2 Accidents which may affect her earning capacity and life expectancy;

35.3 Circumstances which would increase or decrease her cost of living;

35.4 The likelihood of illness, inflation and adjustment for costs of living allowance;

35.5 The fact that Ms L[...] lives in a violent and lawless neighbourhood, which may tend to increase the risk of her being killed or assaulted;

35.6 The likelihood of Ms L[...] being fired or retrenched;

35.7 Ms L[...]'s age; and

35.8 Ms L[...]'s work history.

[36] The list above of possible contingencies is meant to serve as guidance only and should not be regarded as comprehensive. However, it is also true that one should not always assume that the worst will happen to a person in Ms L[...]'s position. In this regard see *Southern Insurance Association Ltd v Bailey N.O*[2] where Nicholas JA expressed it in the following terms:

> "Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he

[2] *Southern Insurance Association v Bailey N.O*. 1984 (1) SA 98 (A) at 99E-G.

considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot, of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case. In making such a discount for contingencies' or the 'vicissitudes of life', it is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable."

[37] Insofar as general damages are concerned, it has been remarked in many different cases and writings that making an award normally appeals to the presiding judge's sense of reasonability and fairness. These concepts are no doubt often nebulous in the extreme especially under circumstances like the present where the court does not have an all-inclusive pre-collision background of Ms L[...] to compare to her post-collision. To drive the point home, it could be instructive to refer to the Law of Third Party Compensation by H.B. Klooper where the following is stated:

"Fairness and reasonableness mean that the claimant must be sufficiently compensated for the injuries suffered, but conversely also mean that the inordinately high award should not necessarily burden the defendant. Stated differently, fairness and reasonableness also mean that the award for non-pecuniary damage is made with compassion for the plaintiff but, with reference to the particular circumstances of every case, with a tendency to err in favour of the defendant."

[38] The above should be contrasted with what was stated in the case of *Wright v Multilateral Motor Vehicle Accident Fund 1997* cited in Corbett and Honey *The Quantum*

of Damages in Bodily and Fatal Injury Cases vol 4 at E3-31 (N),[3] quoted with approval by Navsa JA in *Road Accident Fund v Marunga*[4] where Broome DJP said:

> "I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries."

Evaluation

Loss of Earning Capacity

[39] There is no question that Ms L[...] was physically not compromised prior to the collision. She had not undergone any surgical operations stemming from any kind of accident and had not been treated for any medical condition. The injuries that she sustained in that collision have left her noticeably disabled. The injury to her femur has shortened her right leg by 3.5 cm. This will probably cause pain to her lower back ultimately, states Dr Oelofse. Additionally, she now experiences difficulties with walking for long distances and climbing lots of stairs.

[40] Dr Pienaar states that while some of her scars will be open for resolution by plastic and reconstruction surgery, many of them, which are equally unsightly, will remain unamenable to surgery. The scars have stolen her confidence. The wheezing coming from her chest and the poor voice quality does not make her feel any better.

[41] Her head injury has been described as massive due to the length of the amnesia accompanying the collision. Ms L[...] does not have any recollection of the collision and

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[3] *Wright v Multilateral Motor Vehicle Accident Fund* 1997 cited in Corbett and Honey *The Quantum of Damages in Bodily and Fatal Injury Cases* vol 4 at E3-31 (N).
[4] *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) para 27.

how she ended up lying in hospital. Her GCS registered 7/15 at the scene of the collision and 13/15 after admission in hospital.

[42] Academically, it is not easy to assess Ms L[...] pre-collision because this Court does not have any school reports albeit that there is family background information that can be utilised for determining her likely scenario. The Educational Psychologist relied on such information to suggest that before the collision Ms L[...] would ultimately have passed Grade 12. Thereafter, she would have proceeded to obtain an equivalent of NQF Level 5 even though such accomplishment would have come with challenges.

[43] What this Court knows of Ms L[...]'s pre-collision education is that she started school at the age of five. She failed Grade 1, passed Grade 2 and did not complete Grade 3 because of the collision but was nonetheless promoted to Grade 4. Ms L[...]'s post-collision academic records unearth poor performance. That said, it is not easy to decipher whether this would have been the case had the collision not occurred especially given her repeat of Grade 1. However, this Court will assume that her post-collision performance is attributable to the severe head injury with all its attendant sequelae as described by the Psychologists and the other relevant experts.

[44] I find the reference to the extract from the Newsletter by Robert J Koch and his book "The Quantum Year book" by Counsel for Ms L[...] instructive. The learned author states that there are no fixed rules as regards general contingencies and one of his helpful guidelines is that of the sliding scale contingency theory: "Sliding scale: ½% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age." As I have stated *supra*, the assessment of loss in Ms L[...]'s case is that there is virtually no information pre-collision against which to measure her post-collision performance.

[45] Ms Ntshengulana thinks that Ms L[...] can be accommodated in a protected employment environment but that and given the South African gloomy economic outlook, she can safely be regarded as unemployable. She expressed that view based on Ms L[...]'s physical disability coupled with her cognitive deficits as established by the

Psychologists. I tend to agree with the assessments of the various experts because Ms L[...]'s orthopaedic injuries are severe. I am referring here to her leg that is now 3.5 cm shorter than the other, her wheezing chest and unsightly scars that are not amenable to surgery. Added to these are her cognitive difficulties.

[46] The upshot of all the above is that she will enter the open labour market with a disadvantage compared to those who do not have any physical or cognitive challenges. All these said, her pre-collision life cannot be determined with some level of acceptable precision because of her age when she became involved in the collision and the lack of school reports for the period. Thus, what she would have become remains very speculative. This scenario calls for a higher contingency.

[47] I have had regard to the calculation of the Actuary, Mr Potgieter, which is based on the postulations of the Industrial Psychologist. I noted that his calculation does not include any contingencies as he has rightly left it to the discretion of this Court. While there is talk of residual working capacity by some of the experts in this matter, they are also quick to disregard it because of Ms L[...]'s cognitive deficits. I will accept that she is unemployable. Having considered the evidence levied before court in the form of reports of the various experts, I believe the following will be fair:

Past Loss of Earnings

47.1 Pre-morbid: R32 726.00 less 5%= R31 089.70;

47.2 Post-morbid: R3 257 084.00 less 25%= R2 442 813

Total: R2 473 902.70.

[48] Turning then to general damages, it is trite that the utilization of previous comparable awards as a guide or foundation in the determination of non-pecuniary loss must be preceded by two principles and these are that only the general award and not a comparison of every detail is taken into account to determine an appropriate amount and that comparison to previous awards is not the technique of evaluating non-patrimonial damage but only serves as a trend. It cannot be used in such a way to

prohibit or restrain the discretion of the court. See, *Protea Assurance Co Ltd v Lamb*.[5] This is the attitude with which this Court approaches the case authority mentioned by Ms L[...]'s Counsel.

[49] Of the six cases that Counsel for Ms L[...] presented to this Court as being comparable to Ms L[...]'s case, I find *Kgomo v Road Accident Fund*[6] and *Alexander v Road Accident Fund*[7] to be more appropriate. That said, it is accepted that it is not possible to find a match in these cases. Thus, it is not surprising that for example, in the *Kgomo* case there is a compression of the brain caused by progressive extra-dural haemorrhage. In the *Alexander* case, it appears that the only distinguishing injury is the poor vision in the right eye of the injured, an injury that is absent *in casu*.

[50] Counsel for Ms L[...] proposes an amount of R1 500 000.00. The *Kgomo* and *Alexander* cases, which are both serious in their own right, awarded R1 470 000.00 and R1 554 000.00 respectively. The difference between the two is a negligible amount of R84 000.00. Inconsequence, I do not think it is necessary to differ with Counsel for Ms L[...] on the amount that he proposes, R1 500 000.00.

[51] I note that Counsel for Ms L[...] proposes costs at Scale C of party and party. Scale C and B are almost punitive. I am not satisfied that Counsel for Ms L[...] has supplied adequate reasons to enable this Court to order payment of costs above the ordinary party and party costs.

[52] Against that background, I make the following order:

1. The Fund is 100% liable for payment of the amount of R3 973 902.00 being general damages of R1 500 000.00 and R2 473 902.00 for loss of earnings.
2. The Fund is liable for payment of the interest at the aforesaid sum at the prescribed legal rate of interest a *tempore morae* calculated, if the amount is not settled within 14 days, from date of judgment to date of payment.

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[5] *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A).
[6] *Kgomo v Road Accident Fund* 2011 JDR 1052 (GSJ).
[7] *Alexander v Road Accident Fund* 2020 JDR 0537 (GNP).

3. The Fund shall furnish a section 17(4)(a) certificate for the future hospital and medical expenses of Ms L[...] to Advocate Liebel.

4. The Fund shall pay the costs of Advocate Liebel to date, including those of two Counsel, where applicable.

B A MASHILE
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

Counsel for the Plaintiff:	Adv A R van Staden
Instructed by:	Frans Schutte & Mathews Phosa Inc
C/O	SDJ Inc
Counsel for the Defendant:	Adv S Manakana
Instructed by:	State Attorney, Mbombela
Date of Judgment:	08 April 2025