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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **AR23/2024**

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH - KWAZULU-NATAL**

APPELLANT

and

Z[...] N[...]

RESPONDENT

Coram: Mossop, Mlaba and Jikela JJ

Heard: 7 February 2025

Delivered: 7 March 2025

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Z P Nkosi J sitting as court of first instance):

1. Condonation for the appellant's failure to timeously:
 - (a) deliver a notice of appeal;
 - (b) seek an appeal date; and
 - (c) deliver the appeal record,is granted, with no order as to costs.
2. Save to the extent set out in paragraph 3 of this order, the appeal against the judgment of the trial court granted on 3 November 2022 is dismissed with no order as to costs.

3. Paragraph 1 of the order of the court a quo is set aside and shall be replaced with an appropriate order once the actuarial calculations identified in table 5 of this judgment and ordered in paragraph 4 of this order have been completed.

4. Munro Forensic Actuaries, a firm of actuaries, is requested, within 30 days of the date of this judgment, to perform the actuarial calculations in respect of the items identified in table 5 of this judgment on the basis that the life expectancy of M[...] N[...] N[...], a girl born on 6 August 2009, is 49,85 years.

5. The calculations referred to in paragraph 4 above shall forthwith be presented to this court to permit the formulation and finalisation of the paragraph designed to replace paragraph 1 of the order granted by court a quo.

6. In the event of there being anything unclear in what the actuaries are required to calculate, the parties are given leave to jointly request clarification of the uncertain issues from this court.

7. The respondent shall pay the appellant's costs in respect of:

- (a) The application to the trial court for leave to appeal; and
- (b) The application to the Supreme Court of Appeal for leave to appeal, such to include the costs of two counsel where so employed.

JUDGMENT

MOSSOP J (MLABA and JIKELA JJ concurring):

Introduction

[1] The respondent is the biological mother of a young girl named M[...] N[...] N[...].¹ The respondent sued the appellant for damages arising out of N[...] being born with cerebral palsy. The respondent alleged that the appellant's servants had been negligent in treating her during the final phase of her labour and during the birthing process and that this had resulted in N[...]’s condition. The appellant did not

¹ During the trial, the respondent's daughter was referred to interchangeably either by her forename, 'M[...]', or by her middle name, 'N[...]', as the transcript of proceedings reveals. In his judgment, the trial judge referred to her as 'N[...]' and to promote some form of consistency, I shall also refer to her by her middle name.

deny this and admitted its liability for N[...]’s condition. It, however, defended the respondent’s action on the issue of quantum.

[2] On 3 November 2022, Z P Nkosi J (the trial judge) determined that issue and granted an order (the order) directing the appellant to pay to the respondent a total amount of R28 846 182.75 (the judgment amount).

[3] The appellant sought leave to appeal the order from the trial court. That application was dismissed with costs. An application for leave to appeal was then delivered to the Supreme Court of Appeal. That application enjoyed a more favourable outcome and leave to appeal was granted in respect of the entirety of the order granted by the trial judge and the appeal is now before this court.

Condonation

[4] Before considering the merits of the appeal, there is a need to deal with the appellant’s application for condonation. The appellant failed to timeously file a notice of appeal, failed to obtain an appeal date within the prescribed period and then filed the appeal record late.

[5] The appellant has delivered a lengthy and substantive application in which it explains in some detail why these failings occurred. The deponent of the founding affidavit in support of the condonation application is the attorney in the office of the State Attorney who is responsible for the conduct of the matter on behalf of the appellant. The explanation provided in that affidavit is a lamentable narration of several misfortunes that befell the attorney, mixed with a remarkable lack of knowledge on her behalf of appeal procedure, which is rendered even more remarkable by her self-confessed seniority in the legal profession.

[6] The condonation application is, however, not opposed by the respondent. Having considered it, and the shortcomings that the state attorney has freely and, perhaps courageously, conceded regarding her own conduct, I am persuaded that no serious prejudice has been occasioned by the appellant’s attorney’s lapses, and that as the matter is of considerable interest to the appellant, condonation should,

therefore, be granted. As the application was never opposed by the respondent, it is proper that there should be no order as to costs.

The facts

[7] The appeal cannot be evaluated in a vacuum and the relevant material facts must be briefly considered.²

[8] N[...] was born at the Prince Mshiyeni Hospital in Umlazi, Durban on 6 August 2009. The hospital is a State-owned hospital, and the appellant is responsible for its functioning. Due to the admitted negligence of the appellant's servants, N[...] was born profoundly disabled, is permanently brain damaged, has a multitude of physical issues and, as a consequence, cannot be educated as would any other child and will never work. Because of this, her life expectancy has been compromised and shortened. It is predicted that she will only live 49,85 years. At the time of the commencement of the trial before the trial judge, N[...] was nine years old.

[9] How profoundly N[...] is disabled is assessed by referring to her score on the gross motor function classification system, which is a tool that is used to measure the severity of mobility impairments in children with cerebral palsy. The scale runs from one to five, with level five indicating the most impairment. N[...] has been classified as being on level 4. It is likely that she will always remain at that level.

The order

[10] The order granted by the trial judge is lengthy, covering in excess of three pages, and it would serve no purpose to repeat it in all its detail other than to unnecessarily lengthen this judgment. In summarised form, paragraph 1 of the order ordered the appellant to pay to the respondent the following amounts in respect of the following heads of damages:

	Head of Damages	Amount Awarded (R)
(a)	General damages	2 200 000

² *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) para 53.

	Head of Damages	Amount Awarded (R)
(b)	Future loss of earnings	3 304 200
(c)	Future medical and related expenses	21 210 570
(d)	The costs of a trust at 7,5% of the award	2 003 607
(e)	Past medical expenses	127 805
	Total	28 846 182

(Table 1)

The grounds of appeal

[11] The appellant alleges that in calculating the judgment amount and in formulating the order, the trial judge misdirected himself in a number of respects. Such misdirection manifested itself, generally speaking, in the trial judge erroneously and variously granting relief where no case had been made out for that relief, in not considering all available evidence relating to certain heads of damages, in inexplicably granting an award without disclosing the reason for allowing the amount claimed and where reasoning is disclosed, that such reasoning is illogical, does not justify the decision made and cannot be permitted to stand.

[12] The appellant's notice of appeal did not claim that the respondent should not have been awarded damages. On the contrary, the appellant accepted that as far as each of the heads of damages referred to in table 1 is concerned, the respondent was entitled to be compensated. However, the appellant was of the view that in respect of each of the heads of damages, the award had been overly generous and, as a consequence, the respondent had been excessively and unreasonably compensated.

[13] The appellant thus claimed that the amounts awarded by the trial judge should be reduced as follows:

	Head of Damages	Amount Awarded (R)	Amount proposed to be awarded on appeal (R)	Deduction (R)

	Head of Damages	Amount Awarded (R)	Amount proposed to be awarded on appeal (R)	Deduction (R)
(a)	General damages	2 200 000	1 800 000	400 000
(b)	Future loss of earnings	3 304 200	2 891 175	413 025
(c)	Future medical and related expenses	21 210 570	9 056 020	12 154 550
	Total	26 714 770	13 747 195	12 967 575

(Table 2)

[14] The respondent does not accept the deductions claimed by the appellant, save for one instance.³ There is, however, agreement between the parties on two issues. The first is that whatever amount is ultimately awarded by this court, the costs of a trust that has been set up to administer the award on behalf of N[...] are to be calculated and allowed at the rate of 7,5 percent of the amount finally awarded by this court. The second is that it is accepted that the respondent incurred past medical expenses in the amount of R127 805, which consequently must be allowed.

The appellant's approach to the appeal

[15] Each of the three heads of damages mentioned above in table 2 is comprised of various subcategories. The appellant initially indicated that it would seek the reduction of amounts ordered by the trial judge in a number of these sub-categories in each of the respective heads of damages.

[16] We were, however, advised before argument of the appeal commenced that in preparing for the appeal, counsel for the appellant, Mr A K Kissoon Singh SC and Ms M Moodley, had revisited the grounds of appeal and decided to adopt a more pragmatic and nuanced approach to them. The consequence of this introspective exercise was that the appellant's counsel decided to either jettison some of the heads of damages or to offer no argument in respect of some of them. This reduced

³ This is in respect of the costs of annual speech therapy reassessments.

the number of grounds of appeal that were relied upon by the appellant and shortened the appeal. For this we are grateful to Mr Kissoon Singh and Ms Moodley.

[17] Of the three principal heads of damages referred to in table 2 above, we consequently only heard argument on that marked (c), being the head of damages described as ‘future medical and related expenses’. The heads of damages marked (a) and (b) in table 2 were not argued before us. Without argument, it is not possible for this court to form any view on the correctness or otherwise of findings made by the trial judge when considering these two heads of damages and accordingly no adjustment can be made to them. It follows that this appeal relates only to the amounts awarded to the respondent in respect of future medical expenses.

Interim payments

[18] Both before and after the order was granted by the trial judge, the appellant made interim payments to the respondent. In June 2017, before the trial commenced and before the order was granted by the trial court, the appellant made a payment of R5 million. In February 2024, after the order was granted, a second interim payment in the amount of R1 561 237.90 was also made to the respondent. These payments must be borne in mind and their sum, amounting to R6 561 237.90, must be deducted from the final award determined by this court as being due to the respondent.

[19] I turn now to consider the legal principles involved.

Discretion

[20] A court that is requested to determine the quantum of damages claimed by a plaintiff attempts the difficult task of determining a fair award that is intended to compensate that plaintiff for the delict that has been suffered. This, by its very nature, requires a large measure of speculation as to what the future may hold for the plaintiff, for that future, given the randomness of life, is not knowable by man with any true precision. Peter Drucker,⁴ the premier management thinker of the twentieth century, once observed that the only thing we know about the future is that it will be

⁴ Peter Ferdinand Drucker (born 19 November 1909 and died 11 November 2005) was an Austrian-American management consultant, educator, and author.

different. Despite this, it is the task of the court to try and predict what that different, essentially unknowable, future may hold for the successful plaintiff. In doing so, it, of necessity, exercises a discretion.

[21] Khampepe J in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another*,⁵ noted that two types of discretion exist. These are a discretion in the strict or narrow or true sense (true discretion) and a discretion in the broad or wide or loose sense (broad discretion).

[22] What is the difference between the two? The Supreme Court of Appeal provided that answer in *Media Workers Association of South Africa and others v Press Corporation of South Africa Ltd ('Perskor')*,⁶ and explained that a true discretionary power exists where a number of options are available to the court exercising that discretion. A court exercising a true discretion has an election of which option it will apply, and any option chosen can never be said to be wrong because each option is entirely permissible. Where a lower court exercises a true discretion and chooses an available option, an appellate court would not be entitled to set that choice aside merely because the appellate court itself would have favoured another of the available options. The restriction on the power of an appellate court when faced with the exercise of a true discretion is based upon the notion that the:

‘... principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.’⁷

[23] However, when exercising a discretion in the broad sense, a court does not necessarily have a choice between equally permissible options. In *Knox D’Arcy Ltd and others v Jamieson and others*,⁸ in referring with approval to *Perskor*, it was accepted that the exercise of a discretion in the broad sense means that:

⁵ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 83.

⁶ *Media Workers Association of South Africa and others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) (*Perskor*) at 800D-E.

⁷ *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC) para 113.

⁸ *Knox D’Arcy Ltd and others v Jamieson and others* 1996 (4) SA 348 (A) at 361H-I.

‘... the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.’

[24] Because of this, an appellate court, when faced with an instance of the exercise of a broad discretion, will be able to exercise its own discretion if it considers the lower court’s decision to be incorrect. Despite this power, the appellate court must, nonetheless, still act with caution in altering the lower court’s decision.

[25] The first question to be asked and answered in this appeal is which type of discretion is at play here? Again, the Supreme Court of Appeal provides the answer. In *Minister of Safety and Security v Augustine and others*, the court concluded that:⁹ ‘[t]he amount of this award is therefore not susceptible of precise calculation. It is arrived at in the exercise of a broad discretion.’ (Footnote omitted.)

Counsel for both parties agreed with this proposition and this appeal will therefore be considered on the basis that the trial court was endowed with a broad discretion.

The test

[26] The test for interference on appeal where a broad discretion has been exercised is therefore whether the appellate court finds that after a consideration of the proceedings and the judgment delivered:

‘... the trial Court had misdirected itself with regard to material facts or in its approach to the assessment, or, having considered all the facts and circumstances of the case, the trial Court’s assessment of damages is markedly different to that of the appellate Court . . .’¹⁰

[27] Where, as is here, the amount of damages is a matter of estimation and discretion, an appellate court will not easily interfere with the award of the trial court. It will only be entitled, indeed it is obliged, to interfere with an award of damages if it finds there to have been a misdirection or if it finds that there is no rational basis for the order to have been made¹¹ or if it finds that the award of the trial court was

⁹ *Minister of Safety and Security v Augustine and others* [2017] ZASCA 59; 2017 (2) SACR 332 (SCA) para 25.

¹⁰ *Ibid* para 26, quoting from *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC) para 57.

¹¹ *Road Accident Fund v Guedes* [2006] ZASCA 19; 2006 (5) SA 583 (SCA) para 8.

palpably excessive and clearly disproportionate in the circumstances of the case,¹² grossly extravagant or unreasonable¹³ or so high as to be manifestly unreasonable.¹⁴

[28] Where an excessive disproportionality is found to exist, interference by an appellate court will be justified on the basis that the unquestionable discretion possessed by the lower court was not reasonably, or judicially, exercised by it. A discretion is judicially exercised when it is not exercised capriciously but for substantial reasons. In *Merber v Merber*,¹⁵ the court referred, with approval, to the English matter of *Ritter v Godfrey*,¹⁶ where the following was said on this issue: 'The discretion must be judicially exercised and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial.'

[29] The application of the test thus requires an appellate court to embark on a two-legged inquiry. Firstly, it must consider whether the trial court has misdirected itself in any material respect. If there is no misdirection, the ground of appeal must obviously fail. If a misdirection is identified, then the second leg of the inquiry kicks in and the appellate court should then consider what it might have awarded to the plaintiff had it been the court of first instance. If there is a material discrepancy between the two amounts, the appellate court may intervene in the original decision.

General observations

[30] In assessing damages and their quantum, the dicta of Watermeyer JA, delivered some 80 years ago in *Sandler v Wholesale Coal Supplies Ltd*,¹⁷ continues to hold true, namely that:

'... it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money...there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the

¹² *Salzmann v Holmes* 1914 AD 471 at 480.

¹³ *Black and others v Joseph* 1931 AD 132 at 145.

¹⁴ *Ibid* at 150.

¹⁵ *Merber v Merber* 1948 (1) SA 446 (A) at 452-453.

¹⁶ *Ritter v Godfrey* [1920] 2 KB 47.

¹⁷ *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 at 199.

one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations....'

[31] What the court was saying in that extract was that there is no real natural relationship between the money claimed and the loss sustained.¹⁸ Any relationship that exists is thus man-made or, perhaps, more accurately, court made. Holmes J in *Pitt v Economic Insurance Co Ltd*¹⁹ accordingly cautioned that:

'... the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense.'

[32] A conservative approach must therefore be adopted, based primarily upon policy considerations. Those policy considerations take account of the fact that when a court assesses damages, particularly for loss of future earning capacity and medical expenses, it has been said to be 'pondering the imponderable'.²⁰ A temptation to be overly generous to a plaintiff when an uncertain future is assessed, at a time when the injuries caused by the defendant are a known fact, must be guarded against.²¹ The general equities in the case must also be considered and assessed to ensure that a just result is achieved that is fair to both parties.

[33] I turn now to consider the grounds of appeal.

Misdirections

[34] The appellant's heads of argument identify eleven instances in respect of which it is alleged that the trial judge misdirected himself. I consider each of those alleged misdirections in the sequence in which they are dealt with in the appellant's heads of argument:

¹⁸ *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as amicus curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC) paras 39 and 41.

¹⁹ *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) at 287E.

²⁰ *Anthony and another v Cape Town Municipality* 1967 (4) SA 445 (A) at 451B-C; *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 114B; *Vodacom (Pty) Ltd v Makate and Another* [2024] ZASCA 14; 2024 (3) SA 347 (SCA); [2024] 2 All SA 1 (SCA) para 151.

²¹ *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 274F-275D.

The first alleged misdirection

[35] This ground of appeal relates to the proposed provision to N[...] of a form of treatment known as 'Vitalstim' (Vitalstim). Children suffering from cerebral palsy apparently often have difficulty in swallowing.²² This creates problems when eating and can also lead to a child aspirating its own saliva, which, in turn, can lead to infections in the lungs. In Vitalstim treatment, an electrode is passed through the skin into the cranial nerve. An electric current is then introduced to the electrode. When that occurs, the cranial nerve is artificially sparked into action and the muscle associated with that nerve contracts, which may, over time, apparently assist in ingraining the process of swallowing in the person receiving the treatment.

[36] The respondent claimed that N[...] required such treatment to improve her swallowing capabilities and consequently claimed its costs from the appellant. The trial court accepted that it should be awarded and allowed the very substantial amount of R4 882 600 for this form of treatment.

[37] On appeal, the appellant contended that nothing should have been awarded to the respondent for this treatment and that the trial judge had misdirected himself in accepting the claim and in making the award that he did. It advances multiple reasons for this submission. Principally, it suggests that Vitalstim is an experimental form of treatment that has not yet been embraced by mainstream medical practice and ought, consequently, not to be lightly undertaken and should not be undertaken in this instance. It also submits that the evidence adduced on this aspect did not establish that the alternative conventional, and cheaper, treatment that N[...] was receiving would not have similar benefits for her at a substantially reduced cost.

[38] The evidence on the Vitalstim treatment was introduced by a witness called by the respondent, namely Ms Shobana Singh (Ms Singh). Ms Singh is a speech therapist who is trained in Vitalstim treatment, and she recommended its use for N[...].

²² The medical term for this is dysphagia.

[39] It was put to Ms Singh by the appellant's erstwhile counsel during cross-examination that Ms Singh had last examined N[...] a year before the trial commenced. That was admitted. N[...] was, at the time of the trial, not being treated by Ms Singh but was being treated by another speech therapist, Ms Rochelle Thanjan (Ms Thanjan). Because of the gap between the last date upon which she examined N[...] and the date upon which she gave her evidence, Ms Singh agreed that she would defer to the views of Ms Thanjan, whose knowledge of N[...]’s condition was more current.

[40] Ms Thanjan, who was also called by the respondent, sequentially testified before Ms Singh, and stated in her evidence that there was:

‘... a lot of controversy around Vitalstim ...’.

She testified that she did not use Vitalstim in her practice and stated that:

‘Research does not give evidence that [it] is better in any way, compared to the traditional therapy that I use.’

[41] Ms Thanjan’s views on this form of therapy were summed up in the following exchange:

‘... Would you recommend Vital therapy for N[...] (sic)? --- I would not, based on my report and my findings.’

[42] The respondent thus presented two contradictory approaches to the desirability of using Vitalstim to improve N[...]’s condition in the form of the evidence of Ms Singh and the evidence of Ms Thanjan. It does not appear that this was appreciated by the trial judge, for no attempt was made in his judgment to deal with the diametrically opposing evidence of these two witnesses.

[43] As to which of the two approaches should hold sway, the evidence of a witness called by the appellant, Ms Krishini Chetty (Ms Chetty) should, in my view, have been determinative of the issue. Ms Chetty is also a speech therapist, and she testified, without objection, to the views of the Health Professions Council of South Africa (the HPCSA) on neuromuscular electrical stimulation, which includes treatments such as Vitalstim. The attitude of the HPCSA is captured in a document

described by it as being its 'position statement' (the position statement). The purpose behind issuing the position statement was stated by the HPCSA to be in discharge of its:

'... responsibility of guiding the profession and protecting the public.'

[44] The position statement records that:

'To date, there remains a paucity of clinical and research evidence about the efficacy, side effects, and other risks, to support the use of electrical stimulation as a treatment strategy for patients, including the paediatric population.'

[45] And further, it states that:

'While there may be preliminary evidence that application of neuromuscular electrical stimulation in swallowing rehabilitation may present as an adjunct approach for swallowing impairment under some limited conditions, this information remains not yet confirmed. Based on available published literature and the ethical guidelines that govern clinical practice, it is thus the position of the HPCSA SLH Board²³ that the application of this treatment modality in swallowing rehabilitation cannot be supported by empirical evidence, has the under evaluated potential to cause harm and long term side effects for the paediatric population, and does not meet the expectations for evidence-based practice.'

[46] In the respondent's heads of argument, it is submitted that neither Ms Thanjan nor Ms Chetty is trained in the use of Vitalstim. The inference inherent in that submission is that neither could, nor would, consequently recommend it because they knew nothing of it. I do not think that argument is sound. Both witnesses clearly knew of the treatment and what it entailed, and Ms Thanjan consciously chose not to use it in her practice. Ms Chetty knew of the HPCSA's position on Vitalstim and Ms Thanjan specifically stated that she would not recommend it for N[...].

[47] While the respondent's counsel argued that the appellant led no evidence to contradict the evidence of Ms Singh on the desirability of permitting Vitalstim to be provided to N[...], in my view it did not need to do so. The respondent's own witness,

²³ Speech, Language and Hearing Board.

Ms Thanjan, contradicted Ms Singh and did not recommend that form of treatment, and the evidence of Ms Chetty provided the context for that decision.

[48] In his judgment, the trial judge briefly dealt with the issue of Vitalstim before making the award that he did. He observed that Ms Singh had recommended that form of treatment for N[...] and concluded that:

‘Ms Singh’s submissions are persuasive. It appears to me that N[...] would probably benefit from this additional therapy, alongside traditional methods used for similar candidates.’

[49] The fact that Ms Thanjan and Ms Chetty testified at the trial was acknowledged in the judgment but not in the context of Vitalstim. The judgment mentioned them only in the context of speech and language therapy. Specifically, no mention was made of the fact that Ms Thanjan rejected Vitalstim as being appropriate for N[...] nor was any reference made in the judgment to the HPCSA’s position statement in respect of which Ms Chetty testified.

[50] I, however, immediately caution myself against automatically assuming that, because something is not mentioned in a judgment, it has not been taken into consideration. I acknowledge that no judgment can be perfect and not everything that was mentioned during a trial can possibly be shoehorned into a coherent judgment. But where the HPCSA has taken a strong line on treatments such as Vitalstim and where one of the respondent’s own witness had testified that she would not recommend it as an appropriate treatment for N[...], and neither of these important issues are mentioned in the judgment, then I am inexorably driven to the conclusion that these issues were not properly considered and evaluated by the trial judge. Had the HPCSA’s position statement alone been considered, it would undoubtedly have caused red lights to illuminate in the mind of the trial judge. It seems this did not happen, for the evidence of Ms Singh was found to be persuasive by the trial judge.

[51] I regret that I cannot share that conclusion. No persuasive case was made out for this form of treatment. It cannot be acceptable to permit treatment of a child to

occur where that treatment is not supported by empirical research, or where the treatment has the unevaluated potential to cause harm and long-term side effects to her, as the HPCSA's position statement discloses. As previously mentioned, in assessing damages, a court must act conservatively. Granting funds to a plaintiff to pursue a treatment not approved by the HPCSA appears to me to be antithetical to the required conservatism that the law requires.

[52] N[...] is receiving conventional therapy in respect of which she is apparently showing improvement. In my view, the appellant has established a misdirection on the part of the trial court and the first ground of appeal must be upheld. I would not have awarded anything for this treatment had I been the trial judge and I would accordingly propose that the amount of R4 882 600 be disallowed from the judgment amount.

The second alleged misdirection

[53] This ground of appeal was directed at the conclusion to which the trial court came on N[...]’s life expectancy. That evidence was given by Dr Robert Campbell (Dr Campbell), an expert witness called by the respondent. It is one of the grounds that the appellant decided not to persist with, although it was not entirely abandoned as it continues to have a significant impact on the appellant’s argument that the contingencies to be applied should be increased, given Dr Campbell’s findings on N[...]’s life expectancy and it will be considered more thoroughly in that context.

The third alleged misdirection

[54] This ground is described in the appellant’s heads of argument as relating to various medical recommendations made by the same Dr Campbell. It is multi-faceted and is comprised of a number of subcategories, namely Dr Campbell’s recommendations relating to medications that he recommended for epilepsy, the likelihood of N[...] acquiring chest infections in the future and the cost of serum testing. Each is considered.

[55] On the issue of epilepsy, Dr Campbell testified that certain medications should be allowed for N[...]’s use in the future. The medications identified by him, namely Valproate and Keppra, are conventionally prescribed for the treatment of epilepsy.

[56] In the early stages of her life, N[...] was epileptic and was prescribed medication for this condition. When questioned under cross-examination on N[...]’s current condition, Dr Campbell gave the following evidence:

‘In 2015, M’Lord, when I saw this child she had partially controlled epilepsy on treatment that I just judged to be woefully inadequate. In my opinion with correction of the treatment one could obtain proper control or the epilepsy would resolve completely, an assumption at that stage which has proven to be correct, M’Lord.’

[57] Building on this, Dr Campbell testified further that:

‘M’Lord, there is an assumption that with compensation and with access to proper care this child’s epilepsy would be controlled and indeed has been controlled or resolved and her epilepsy medication has been withdrawn completely, she no longer requires it she no longer had active epilepsy.’

That this was, in fact, what had happened was confirmed by the respondent when she testified and responded to the following question:

‘N[...] is no longer on epileptic medication, correct? --- Yes at the present moment.’

[58] This update on N[...]’s current condition was of some significance. The cost of epilepsy medication was being claimed by the respondent for a condition that had resolved itself and was no longer present. When confronted with this, Dr Campbell suggested that an ‘allowance’ be made for the future reappearance of the condition. It seems to me to be inherently unreasonable to allow for the continuing daily cost of medication for a condition that does not presently exist.

[59] There is no mention in the judgment of the amount that the trial judge agreed to in respect of this medication, a globular amount in respect of future medical treatment simply being awarded. But what the judgment does record is the apparent satisfaction of the trial judge with certain calculations performed by a firm of actuaries, namely Munro Forensic Actuaries (the actuaries). Several actuarial

calculations were performed. Our attention was drawn to the most recent of these calculations, which was attached to the respondent's heads of argument. In that calculation, there is a breakdown of each of the individual items claimed by the respondent and their cost. The actuaries then used these individual amounts to calculate the globular amount ultimately awarded by the trial court. Included in the actuarial breakdown is an allowance in respect of both Valproate and Keppra. The narration next to each medicine is that it is to be prescribed at a cost of R984 per month in respect of Valproate, and at a cost of R747 per month in respect of Keppra, for the duration of N[...]s life. This is hardly in accordance with the 'allowance' suggested by Dr Campbell but is rather an acceptance of the lifelong and ongoing monthly prescription of the use of these two medicines. That, ultimately, was not the thrust of Dr Campbell's evidence.

[60] When the monthly cost of each medicine is calculated for the remainder of N[...]s estimated life, it comes to R450 070 in respect of Valproate and R341 670 in respect of Keppra, totalling R791 740. The amount cannot be justified on the evidence led.

[61] There was no evidence led before the trial judge on the likelihood of epilepsy reappearing. In awarding the amount that he did, it consequently appears to me that the trial judge misdirected himself. As the issue of epilepsy has, according to the evidence of Dr Campbell, resolved itself, nothing ought to have been awarded for its future treatment.

[62] The second aspect of Dr Campbell's evidence challenged by the appellant is his allowance for N[...]s treatment in the future for respiratory tract infections. In April 2015, Dr Campbell prepared a report which indicated that N[...] did not have a history of chest infections, a fact that he later confirmed to still be the case when he prepared a further report in May 2021. The respondent herself was asked the following questions when she testified and responded to them as follows:

'Has N[...] ever had a lung infection? --- No.

She is a healthy young girl --- Yes.'

[63] Nonetheless, and notwithstanding this evidence, the trial judge awarded the respondent an amount of R39 180 in respect of prospective chest infections. The appellant submits that this was not justified on the evidence presented by the respondent. I agree that this is a valid criticism of this award.

[64] A trial court is required to determine an action based upon the evidence led before it together with the facts that are common cause and are therefore admitted. The issue of chest infections was not common cause nor was its likely occurrence in the future admitted by the appellant. The need for the future treatment of this type of infection, therefore, had to be proved by the respondent. In my view, on the evidence adduced, it was not. The amount of R39 180 must therefore be deducted from the amount awarded by the trial judge.

[65] The final issue addressed by Dr Campbell in his evidence was the costs associated with serum testing.²⁴ This form of testing is apparently useful, and indeed necessary, where epilepsy is being treated, and epileptic medication has been prescribed. This, however, is redundant in this matter as N[...]’s epilepsy has resolved itself. The trial judge allowed an amount of R38 600 for serum testing. He misdirected himself in doing so. In my view, nothing ought to have been awarded and the amount of R38 600 must therefore be deducted from the judgment amount.

The fourth alleged misdirection

[66] The appellant refers to this ground of appeal as encompassing ‘alternative and augmentative communication’ (AAC).

[67] In argument, Mr Topping SC, who appears for the respondent, provided a helpful insight into what this treatment is designed to overcome. People who have suffered a significant injury to their brain often have enormous difficulty in communicating. We were asked to imagine a person in a room completely painted black with no electric light and with all the windowpanes also painted black. The person inside this room cannot have any comprehension of what occurs either inside or outside the confines of the room and cannot communicate at all with anyone on

²⁴ Serum is ‘blood plasma from which the clotting factors have been removed’: Collins Online Dictionary <https://www.collinsdictionary.com/dictionary/english/blood-serum>.

the outside. This is the experience of a person with a significant brain injury. AAC attempts, initially, to remove the black paint from a single windowpane to allow the person within the darkened room to look out and understand what occurs beyond that room and to commence communicating with those outside the darkened room. AAC, therefore, is an important treatment designed to assist persons such as N[...].

[68] Insofar as AAC therapy sessions are concerned, the principal witnesses were the speech therapists already mentioned, Ms Thanjan for the respondent and Ms Chetty for the appellant. The respondent also called the evidence of a remedial teacher, Ms Maureen Casey (Ms Casey).

[69] Ms Thanjan and Ms Chetty prepared a joint minute before they testified. The purpose of joint minutes is to serve as a tool to clarify the issues for a court and to narrow, and even eliminate, the gap between the competing opinions of expert witnesses called by the parties, thus reducing the number of disputed issues that the court is called upon to resolve.²⁵ The joint minute between these two expert witnesses is a comprehensive document that is 11 pages long. The two experts agreed that N[...] was a suitable candidate to receive AAC therapy and they agreed upon the devices that she ought to be equipped with, and their respective cost, in order to maximize the impact of the AAC therapy that she should receive.

[70] Ms Casey also testified that she would offer N[...] extensive AAC therapy. When it was pointed out to her that this had already been considered and proposed by the two experts in their joint minute, Ms Casey indicated that she was unaware of this but went on to confirm that Ms Thanjan and Ms Chetty were entitled to recommend such treatment, as such a recommendation would be entirely 'within their scope of practice'. Ms Casey also stated that she would not dispute what was contained in the joint minute regarding the AAC treatment proposed by Ms Thanjan and Ms Chetty. She was then asked the following questions and provided the following answers:

'Yes and you are not in a position to say that in addition to what they are offering for AAC that there needs to be additional therapy as recommended. I am not saying that

²⁵ *Ntombela v Road Accident Fund* [2018] ZAGPJHC 41; 2018 (4) SA 486 (GJ) para 41.

you recommend additional therapy but a separate accommodation for the therapy that you have recommended. --- Normally what would happen is if they are getting this say in speech therapy over and above I wouldn't say, normally if I had had this I would say okay then for the one hour but I didn't have this.

Yes and with absolute respect the speech therapists have decided between them how to accommodate AAC therapy and AAC devices and its within their realm to make the recommendation. --- Yes.'

[71] Ms Casey thus accepted the AAC therapy regime proposed by Ms Thanjan and Ms Chetty.²⁶ This concession appears to have eluded the trial judge, who awarded an amount for the AAC treatment proposed by Ms Thanjan and Ms Chetty and then duplicated the cost of this treatment by awarding the full amount proposed by Ms Casey for the same treatment. Thus, an amount of R427 890 was unnecessarily awarded.

[72] I agree with Mr Kissoon Singh's submission that this was a misdirection by the trial judge. The agreement of the two expert witnesses, expressed in their joint minute, completely covered the AAC treatment to be provided to N[...]. I would accordingly propose that the amount of R427 890 awarded in respect of the AAC treatment advocated for by Ms Casey cannot stand and must be deducted from the judgment amount.

[73] The duplication of costs does not simply end with the AAC treatment. Ms Casey also allowed for an amount of R41 820 for caregiver training and for an amount of R82 160 in respect of team meetings. This would not be necessary, given the fact that the AAC treatment was to occur as proposed by Ms Thanjan and Ms Chetty. Both these amounts accordingly fall away and must be deducted from the judgment amount.

The fifth alleged misdirection

[74] This ground of appeal relates to the future physiotherapy needs of N[...]. The two experts who testified on this issue were the physiotherapists, Ms Surekha

²⁶ To be entirely fair, Ms Casey did suggest an additional one hour of therapy per month in addition to the therapy proposed by the other two witnesses.

Somaroo (Ms Somaroo), who testified for the respondent, and Ms Thilor Naidoo (Ms Naidoo), who testified for the appellant. These experts prepared two joint minutes, one in September 2018 (the 2018 joint minute) and one in June 2021 (the 2021 joint minute).

[75] In the 2021 joint minute, Ms Somaroo changed her position on the frequency of physiotherapy sessions required by N[...] and now advocated for considerably more physiotherapy sessions than she had previously suggested were necessary in the 2018 joint minute. This change was not agreed to by Ms Naidoo. Indeed, no other witness suggested that this increase in the frequency of physiotherapy sessions was needed. The 2021 joint minute thus became a sticking point of some contention. To overcome this, when Ms Naidoo was cross-examined by the respondent's counsel, the following was put to her with regard to the 2018 joint minute:

'Yes, do you agree that there is substantial agreement in this joint minute? --- Yes, it was just minor differences in quantity.

No, don't you think that that's where the pragmatic choice needs to be made? --- Yes, so are we going to ignore 2021 and just work on 2018 for this trial?'

Later, the following exchange occurred:

'Would it be sensible and reasonable and just to both parties to take the rates that you agreed in 2018 where you agreed --- Yes.

And where you disagreed, for example on neurological treatment rates, to split the difference between you. --- Yes, but why would you use that one when you've got a 2021 because we are looking at the future and we're going back to something that was different.

Of course the prices would be escalated appropriately by an actuary to the year 2021. ---Correct.'

[76] It was therefore agreed that the trial court should utilise the 2018 joint minute, primarily because of the agreement that existed therein and that where there was a lack of agreement, the contrasting positions should be averaged out. As a consequence, the 2021 joint minute largely went unexplored. Ms Naidoo, however, did not agree that the differences between what was contained in the 2018 joint

minute and in the 2021 joint minute should also be split: the splitting related only to the contents of the 2018 joint minute.

[77] In formulating his order on the physiotherapy sessions to be provided to N[...], the trial judge accordingly accepted the recommendations jointly agreed to in the 2018 joint minute and averaged out the recommendations where there was no consensus between Ms Somaroo and Ms Naidoo. Had the exercise ended there, the appellant could have had no complaint, for that was what was agreed upon. Unfortunately, the trial judge then went on and averaged what was contained in the 2018 joint minute with what was contained in the 2021 joint minute, thereby duplicating his award and acting contrary to the understanding that only the 2018 joint minute was to be considered.

[78] As far as the lack of consensus is concerned, the appellant submits that credibility findings in relation to Ms Somaroo and Ms Naidoo should have been made by the trial judge, and that the recommendation of the most credible witness should have then been adopted, and we were urged to follow this approach. The trial court, however, did not make such a credibility finding and we have not had the benefit of observing either of the witnesses. In those circumstances, it appears to me that the fairest approach would be to do what everyone thought would be done, namely that where there was agreement in the 2018 joint minute, it be accepted and where there was disagreement, the average be taken between what was proposed by Ms Somaroo and what was proposed by Ms Naidoo. The result of that exercise would then have to be adjusted to reflect its value in 2021. I am not competent to do that calculation and in due course the actuaries will be requested to do it.

[79] Ms Somaroo and Ms Naidoo also locked horns over the issue of a static bicycle required by N[...]. Ms Somaroo proposed the acquisition of a static bicycle that would cost R100 000. When calculated by the actuaries, the amount to be allocated for this bicycle was, in fact, R105 000. The benefit of acquiring this bicycle would be that only a single bicycle would have to be purchased during N[...]'s lifetime. Ms Naidoo took a different, and more pragmatic, approach to the issue. She proposed that multiple, cheaper bicycles would be needed over N[...]'s lifetime. The

bicycle that she proposed be acquired would cost R10 000 but would need to be replaced seven times over N[...]’s lifetime. However, when the amount needed for these cheaper bicycles was calculated by the actuaries, it came to R45 240. This was therefore an attractive and cost-effective proposition.

[80] The trial court, in coming to its decision on this issue, however, appeared to average the costs of the two types of bicycles. This appears to be case because the actuarial calculation to which this court was referred indicates that 50 percent of the R100 000 bicycle was allowed by the trial judge. As previously stated, this had a capital value R105 000, and thus an amount of R52 640 was allowed. The trial judge also allowed 50 percent of the total cost of the R10 000 bicycles, in the amount of R22 620, the total cost being R45 240. The amount of R22 620 was then added to the R52 640 to give an award of R75 260.

[81] Why this approach was adopted is difficult to comprehend. Mr Kissoon Singh submitted that what was done was illogical because the court ultimately ended up falling between two stools:²⁷ the R75 260 awarded was insufficient to purchase the R105 000 bicycle and was in excess of what was required to purchase all the iterations of the cheaper bicycle required over N[...]’s life. The amount claimed in respect of the cheaper bicycle should therefore simply have been awarded.

[82] I would accordingly propose that an amount of R30 020, being the difference between the amounts of R75 260 and R45 240 be deducted from the judgment amount.

The sixth alleged misdirection

[83] This ground of appeal relates to the provision of nursing services to N[...] and pivots around the evidence of Ms Susan Anderson (Ms Anderson), a nursing expert. Regrettably, it requires an examination, in granular detail, of some of the minutiae of what is required by N[...] on a day-to-day basis as far as her personal hygiene requirements are concerned.

²⁷ Derived from the Latin proverb, ‘abitur enitens sellis herere duabus’ (he falls trying to sit on two seats).

[84] The first issue over which there is a dispute concerns the number of nappies that N[...] uses per day and is anticipated to use in the future. Having heard Ms Anderson's evidence, the trial court determined that N[...] used between six and seven nappies per day and awarded a commensurate value. That accorded with the evidence of Ms Anderson on this issue.

[85] The appellant contends, however, that Ms Anderson's evidence on this point was contradicted by the evidence of other witnesses. Ms Naidoo, the physiotherapist, interviewed the respondent personally and prepared a report which was received by the trial court as an exhibit. Ms Naidoo testified that she obtained a history of the matter from the respondent and recorded in her report what she told her. As to the use of nappies, the respondent told her that:

'[s]he utilizes 3 to 4 size 4 diapers per day.'

There was thus a dispute between the use of three to four nappies per day, as reported to Ms Naidoo, and the six to seven nappies per day contended for by Ms Anderson.

[86] Despite her continued use of nappies, the evidence was that N[...] was in the process of being trained to use the toilet. Ms Somaroo, the physiotherapist, indicated that there was a chance that N[...] could be totally toilet trained. If that occurred, there was an expectation that she would then use fewer nappies. This was rendered more likely by virtue of several facts, according to the appellant. The first was that it was not in dispute between the parties that N[...] was to receive 24-hours-a-day care from a caregiver throughout the remainder of her life and the ever-present involvement of the caregiver would hopefully ensure that N[...] would use the toilet instead of soiling herself in a nappy. The second fact was that it was established that N[...] knows when she needs to use the toilet, and she is able to communicate this need to her caregiver. This evidence was given by the respondent, her mother. The third fact was that the respondent stated that she intended to acquire a device known as a 'Tilt in Space Commode' with a portion of the award. This would permit N[...] to conveniently relieve herself and it was further anticipated that she would, as a consequence, use fewer nappies. An amount was consequently awarded for this device by the trial court.

[87] While that was hoped for, it was not anticipated, at least not by the respondent, that N[...] would stop using nappies altogether. That much emerges from the following interaction between counsel for the appellant and the respondent when she was cross-examined:

MS MOODLEY We are hoping that N[...] will use less nappies once the seat arrives - -- Yes, that would decrease but she won't stop.

NKOSI J Sorry, she won't stop what? --- To use the nappy.

MS MOODLEY Why do you say that? --- As the school is far away from the house, if she feels like peeing I won't stop her to pee up until we arrive at home.'

[88] This is entirely understandable, in my view, for the school N[...] attends is 47 kilometres away from her home and that distance must be traversed twice a day. It accordingly appears that notwithstanding receiving toilet training, there is still a need for nappies, and it seems to me that provision will have to be made for nappies for the rest of N[...]’s life. The question is how many are required per day?

[89] It is so that having apparently told Ms Naidoo that three or four nappies were used each day, the respondent testified to a different number when she was called to give evidence. Under oath, she was asked how many nappies N[...] used per day and the following exchange occurred between herself and counsel for the appellant: 'Now can you give us some idea of how many nappies she uses in a day? --- From 6 to 7 depending on the state of her health.'

Sorry I don't understand about the state of her health --- For instance if she's got a running stomach she will use more.

Do you send some nappies with her to school? --- Yes.

So you are including those as well in the six to seven that are used every day. --- Yes.'

[90] It was suggested in argument that the respondent had tailored her evidence in order for it to dovetail with the evidence of Ms Anderson on this issue, for sequentially, Ms Anderson testified before the respondent and the respondent apparently was present to hear her evidence. Again, I do not see things that way.

Accepting for a moment that there were no language difficulties, the different answers given by the respondent were given at contrasting times in N[...]’s life. Ordinary human beings, fortunate to not be in the physical condition that N[...] is in, are required to use a toilet multiple times a day. Why should it be any different for her? With her less than ideal physical condition, it seems highly likely to me that accidents are likely to happen and must be catered for. And the fact that N[...]’s mother sends nappies with her to school seems to me to be entirely sensible and a necessary precaution. Nappies are not, in my view, a luxury spend but are a necessity for someone with less than perfect control over their bladder and bowels. They help in maintaining a desired level of hygiene and, most importantly, they are essential for preserving N[...]’s dignity.

[91] The highest that the appellant could place matters was a hope, or an expectation, that fewer nappies would be used once toilet training was completed. There is by no means certainty that the training will be entirely successful, and I am not sure that such an expectation can prevail over the personal experience, and the evidence, of the respondent. I am, in the circumstances, not persuaded that the trial judge misdirected himself in finding as he did, and this ground of appeal must accordingly fail.

[92] Linked to the issue of nappies, unfortunately, is the issue of constipation. The trial judge allowed an amount of R50 000 over the course of N[...]’s life for medication designed to ease constipation. The appellant’s dissatisfaction with this award is that there was no evidence led at the trial that N[...] suffered from constipation. The requirement for such medication was motivated for by Ms Anderson when she testified.

[93] It is not possible for the award of a court to cover every possible ailment that may eventually occur in the future to someone in the position of N[...]. Not every possibility is foreseeable or predictable. Those that are known and which are likely to occur in the future must obviously be considered and catered for, where possible. The fact of the matter is that N[...] does not suffer from constipation. Becoming constipated is one of the risks of being alive as is, for example, catching a cold or

getting influenza. It happens to some and not to others. There was, furthermore, no evidence that N[...]’s condition pre-disposed her to the risk of becoming constipated. To allow an amount of R50 000 for this undiagnosed condition is incorrect in my view and invites the interference of this court on this issue. I would accordingly propose that the appeal on this issue be upheld and that the amount of R50 000 be deducted from the judgment amount.

[94] Pressure sores, a pressure care mattress and the maintenance of that mattress were the final issues in respect of which Ms Anderson testified. That pressure sores can be of great concern permits of no doubt. Ms Jane Bainbridge (Ms Bainbridge), an occupational therapist called by the respondent, stated that:

‘... The therapy is essential long-term, for maintaining joint integrity, preventing contractures, helping with mobility, keeping muscle strength intact, making sure that they are not prone to pressure sores, which is a big problem. All of that, if we can maintain that to the best we can, it helps with fatigue. It helps with pain.’

[95] Ms Anderson initially was of the view that N[...] would face the risk of pressure sores developing throughout her life. She then varied that to the last ten years of N[...]’s life. This was because N[...]’s condition will inexorably deteriorate, and she will consequently spend a greater portion of her time in bed when that occurs. Medication for these pressure sores was therefore recommended.

[96] Ms Naidoo, the already mentioned physiotherapist called by the appellant, also addressed the issue of pressure sores. She explained that they are caused when the blood supply to an area of the body is depleted by the application of pressure, causing the skin to break down and a sore to develop. In her opinion, this was unlikely to occur with N[...] in her early life because she has both athetoid movements²⁸ and dynamic movements, which are virtually always present. The presence of dynamic movements results in N[...] being physically unable to remain still, thus diminishing the prospect of prolonged and sustained pressure to any one

²⁸ An athetoid condition is characterised by slow, involuntary, writhing movements, especially of the limbs and fingers, caused by damage to the central nervous system: Collins Online Dictionary: <https://www.collinsdictionary.com/dictionary/english/athetoid>.

part of her body. Asked about the likelihood of a pressure sore developing, Ms Naidoo answered thus:

'In my opinion she's got enough sensation and awareness to get out of a position that irritates her.'

[97] It was put to Ms Anderson under cross-examination that the probability that N[...] would develop pressure sores was remote as in the nine years of her life that had been lived at the time of the trial, she had not developed a single pressure sore. Ms Anderson conceded this to be correct and then changed her evidence when she answered as follows:

'I think towards the end of her life, she is certainly at risk, but not now.'

[98] Ms Anderson then further varied her estimation that N[...] would develop pressure sores in the last ten years of her life and suggested that they were likely to manifest in the last five years of her life. This latter concession emerged in the following exchange between herself and the appellant's counsel:

'Is that a necessity, given the fact that N[...] has not shown signs of bedsores, abrasions, callouses? --- I think the last 10 years of her life... [intervention]

The last 10... [intervention] --- It last 10 years. But if you want to say the last five years, you hear what I am saying?

Yes, yes --- I think when she gets frail. I think now is fine.'

[99] The appellant's difficulty with the judgment of the trial court on this issue is that the respondent was granted the cost of treatment for pressure sores throughout N[...]’s life and not just in respect of the last five years of her life. It appears that the trial judge did not recognise the concession made by Ms Anderson nor the value of the evidence of Ms Naidoo on this issue, with whom Ms Anderson, ultimately, agreed. In my view, this award was a misdirection and was not justified on the evidence before the trial judge.

[100] The amount awarded to the respondent was R132 990, covering the entire span of N[...]’s life. The amount to be awarded needs to be amended to reflect the cost for the last five years of N[...]’s life. This court is not able to do that calculation, and the actuaries will thus be requested to calculate that value.

[101] Associated with the combatting of pressure sores is a pressure care mattress. Such a mattress helps reduce the risk of pressure sores developing. In line with her initial evidence, Ms Anderson originally proposed that such a mattress was required for the duration of N[...]’s life and would need to be changed every ten years, but, as with the pressure sore medication, this was changed by her to a submission that N[...] would require a pressure care mattress for the last five years of her life. This was a further significant concession by Ms Anderson that also went unnoticed by the trial judge, who awarded the costs of a pressure care mattress for the duration of N[...]’s life.

[102] The appellant, however, has conceded that N[...] requires a single pressure care mattress that will last ten years. N[...] would thus be provided with such a mattress for a period in excess of that ultimately contemplated by Ms Anderson. In my view, that is what should have been awarded. The amount that should be awarded is also not capable of being calculated by this court and should be calculated by the actuaries.

[103] The adjustment to the number of pressure care mattresses required by N[...] must result in an adjustment in the value of the maintenance costs for the mattresses awarded by the trial court. Only one pressure care mattress needs to be maintained for a period of ten years and the cost of maintaining multiple such mattresses cannot accordingly be justified. The cost of maintaining a single pressure care mattress in the last ten years of N[...]’s life must therefore be calculated by the actuaries.

The seventh alleged misdirection

[104] This ground of appeal dealt with speech therapy and was comprised of several subcategories. Virtually the entirety of this alleged misdirection was not pursued before us by the appellant, save for a single subcategory involving the number of annual speech therapy reassessments allowed by the trial court. The expert witnesses, Ms Thanjan and Ms Chetty, both agreed that N[...] only required speech therapy reassessment in the event that she required speech therapy beyond the age

of 18. They agreed that a single annual assessment would be appropriate in that case.

[105] For some unexplained reason, the trial judge awarded two such reassessments per annum at a total value of R20 210 over the duration of N[...]’s life. The award did not accord with the evidence and the reason a second reassessment was ordered was not explained in the judgment handed down. Recognising this misdirection, Mr Topping, very sensibly in my view, indicated in the respondent’s heads of argument that the respondent would be content with the cost of a single reassessment per annum and abandoned the value of the remaining reassessment per annum on behalf of the respondent.

[106] The award of the trial judge amounts to a misdirection and therefore cannot stand. The value of R20 210 has been actuarially calculated and simply needs to be halved. I would accordingly propose that an amount of R10 105 must accordingly be deducted from the judgment amount.

The eighth alleged misdirection

[107] The area explored by this ground of appeal relates to the supply of orthotics and prosthetics to N[...]. The principal witness called by the respondent was Mr Ugyen Chetty (Mr Chetty), an expert in this field.

[108] Mr Chetty referenced certain devices that should be supplied to N[...] and testified that they would need to be replaced every four years. Another expert witness, the occupational therapist, Ms Bainbridge, who also testified for the respondent, estimated that such devices should only have to be replaced every five years, while Ms Anderson believed they would need to be replaced every six years. There were accordingly divergent views on the issue.

[109] In the appellant’s heads of argument, it was suggested that Mr Chetty recanted on his evidence on the number of years before a device needed to be replaced. He did not explicitly do that in my view, but certainly appeared to hint at,

and possibly accept, that a longer period of usage of such devices could be achieved, as appears from the following extract from his evidence:

'MS MOODLEY ... Given the new information that I provided you, you would in respect of the child's ability to move, the fact that she enjoys... [indistinct] on the floor, it is a clear indication that she wants to be more normal by sitting in a chair. Do you still hold the same views, in respect of replacement time and periods? --- Yes. So, it could possibly prolong... [intervention].

Yes ...[intervention] --- The lifespan on certain appliances ... [intervention]

...

Yes ...[intervention] --- So, definitely in terms of the seating. Yes. You would get maybe a prolonged usage of the seating. But, obviously, if she is sitting less, then she is more mobile... [intervention].'

[110] Mr Chetty's final position on this issue, namely that the devices be replaced every five years and not every four years, accorded, at least, with the evidence of Ms Bainbridge, who also testified on this issue. This shift in Mr Chetty's evidence was unfortunately not recognised by the trial judge, who granted an order based upon Mr Chetty's initial view and not on his final view. That amounts to a misdirection. The value of the amount to be awarded must therefore be reduced by an amount to be calculated by the actuaries.

[111] Mr Chetty also testified about a system referred to as the 'Unwin Tie Down System' (the Unwin system). This is a method of securing a wheelchair (with the user seated in it) in a motor vehicle that prevents the wheelchair from rolling around when the motor vehicle is in motion. The trial judge awarded R221 260 for the Unwin system and accepted the evidence of Mr Chetty that each time a new motor vehicle is purchased for the transport of N[...], a new Unwin system would need to be purchased. It was speculated that it would be necessary to purchase eight different motor vehicles for N[...] over the course of her life. And, thus, eight different Unwin systems would have to be acquired, the cost of which was allowed by the trial court.

[112] Mr Kissoon Singh submitted that the trial court had erred in awarding anything for the Unwin system. He argued that the appellant had tendered the cost of an

automated hoist that would be used to lift N[...] into the motor vehicle in which she would be transported while remaining seated in her wheelchair. The respondent had accepted the tender. Only one of these hoists would be needed during N[...]’s lifetime and it could be transferred from one motor vehicle to another as and when a new motor vehicle was acquired. Why this rendered the acquisition of the Unwin system superfluous was that the automated hoist has an equivalent system that prevents a wheelchair from moving once the motor vehicle is in motion. Mr Kissoon Singh submitted that the trial court, in awarding the costs of several Unwin systems, thus erred because the Unwin system was not needed, and the costs were thus duplicated.

[113] The logic of Mr Kissoon Singh’s submission is attractive and unavoidable. The trial court misdirected itself on this issue and failed to consider the properties of the automated hoist. In my view, nothing should have been awarded for the Unwin System, and accordingly, an amount of R221 260 must be deducted from the judgment amount.

[114] A similar argument was advanced by Mr Kissoon Singh in relation to a device known as a ‘Leckey Bath Chair’ (the chair). The chair is used when bathing, usually when showering, and simultaneously provides postural support, safety, and security to the user. The life span of such a device was estimated by Mr Chetty to be four years and a single chair would cost R18 696.66. Thus, an award was made by the trial court in the amount of R137 020 to cover the span of N[...]’s life. Mr Kissoon Singh again submitted that the trial court ought not to have awarded anything for the chair because it had also awarded the cost of a ‘Tilt in Space Commode’, previously mentioned in this judgment, which performs exactly the same function as the chair. Mr Topping did not seriously dispute this submission.

[115] It again appears to me that the trial judge misdirected himself and, having awarded the costs of the Tilt in Space Commode, he ought not to have awarded anything for the chair. Mr Kissoon Singh’s submission must therefore be upheld and the amount of R137 020 must be deducted from the judgment amount.

[116] The final issue arising out of Mr Chetty's evidence related to his evidence that devices referred to as 'Genu Valgum Splints' be acquired for N[...]. Mr Kissoon Singh submitted that this device is used on the leg between the ankle and the knee after surgery has been performed. There was not an atom of evidence led that suggested that N[...] faced the prospect of surgery on her legs at any stage. It simply was not an issue in this matter. Why an amount was allowed for this device is accordingly entirely mystifying. An amount of R9 080 was allowed. While this, relatively speaking, is a small amount, its award was unjustified, and it cannot stand.

The ninth alleged misdirection

[117] This ground of appeal relates to occupational therapy and involved the conflicting evidence of two occupational therapists, namely the already mentioned Ms Bainbridge, and Ms Shelley Anne Broughton (Ms Broughton). Ms Broughton testified for the appellant and Ms Bainbridge testified for the respondent.

[118] Ms Bainbridge and Ms Broughton first disagreed on the number of caregivers required for N[...] and then progressed that disagreement to the rates at which they should be paid. Dealing firstly with the number of caregivers required, Ms Bainbridge proposed that two distinct phases be recognised in N[...]’s life: from the date of the trial until she reached 18 years of age (the first phase) and from that age onwards (the second phase). This appears to have been accepted by Ms Broughton. During the first phase, Ms Bainbridge proposed that two caregivers would be necessary, each working eight hours per day and with a third caregiver being available over weekends. Ms Broughton, in turn, proposed two fulltime caregivers working on rotation, four days on and four days off during the first phase.

[119] During the second phase, Ms Bainbridge proposed three fulltime caregivers working on a rotational basis, working four days on and four days off with access to a fourth daytime caregiver. Ms Broughton proposed the same arrangement as for the first phase, namely two fulltime caregivers also working on a rotational basis of four days on and four days off.

[120] In his judgment, the trial judge stated with regard to the first phase that:

'Ms Bainbridge proposed for a caregiver over weekend (sic) while Ms Broughton proposed only two full-time caregivers to work 12 hour shifts and not an eight hour shift as suggested by Ms Bainbridge. A third relief caregiver will be needed as I believe it would be too onerous for only two full-time caregivers to work excessive 12 hour shifts and hope that her family would shoulder the burden for the remainder of the time.'

[121] In my view, the trial judge cannot be faulted in his reasoning. It is simply unrealistic to expect two caregivers to work twelve hours per day without relief, as proposed by Ms Broughton.

[122] As regards the second phase as defined by Ms Bainbridge, the trial judge found that a similar arrangement was necessary:

'Three full time caregivers would, in my view, be required, the third being a relief not only for weekends but also where the need arises when any of the two caregivers may be ill, on leave or indisposed.'

[123] Again, I cannot disagree with the trial judge. To the extent that he favoured the recommendations of Ms Bainbridge over those of Ms Broughton, he was correct in my opinion in doing so. Indeed, Ms Broughton initially agreed that three caregivers were necessary but then changed her view on this for some unknown reason. In my view there was no misdirection on this issue.

[124] There was disagreement between Ms Bainbridge and Ms Broughton on the issue of the rates at which the caregivers ought to be remunerated. It was contended by Ms Broughton that there should be a differentiation between the amount to be paid to a day caregiver and the amount to be paid to a night caregiver. The argument in this regard was that a night caregiver apparently earns less, despite working the same hours as a day caregiver. This is apparently justified by the fact that the patient ordinarily would be asleep for a large part of the time when the night caregiver would be on duty and the night caregiver would therefore not be required to be as active as a day caregiver. However, it cannot be gainsaid that both a day caregiver and a night caregiver must be possessed of the same skills.

[125] In making his award, the trial judge did not order that different rates be paid to the day and night caregivers, assessing the reasonable amount to be paid as being R7 000 per month calculated over 13,25 months. In doing so, the trial judge accepted the evidence of Ms Bainbridge that this would be a fair and equitable rate and rejected the evidence of Ms Broughton. The finding as to the rate to be paid was at the lower end of what Ms Bainbridge had recommended.

[126] I can find no evidence of a misdirection in the trial judge's finding. There was competing evidence before him, and he chose a fair, conservative and equitable solution to the problem. In doing so, he did not misdirect himself, in my view.

[127] A further point of dispute between Ms Bainbridge and Ms Broughton involved the issue of occupational therapy to be provided to N[...]. Ms Bainbridge and Ms Broughton initially signed a joint minute in terms of which it was agreed that N[...] would receive 55 hours of occupational therapy for a period of eight years. However, during the trial, Ms Bainbridge acknowledged that what was proposed by Ms Broughton, insofar as the frequency of occupational therapy was concerned, was correct. This was recorded in the following interaction:

'But, what Ms Broughton has now done is recommended the 50 to 60 hours, but over a period of the next five years. --- Yes. Which is right... [intervention]
Is it right... [intervention] --- Because three years have expired.
Yes. You are quite happy with that. --- Yes.'

[128] Ms Bainbridge thus agreed to the following therapy programme:

- (a) During the first five years, N[...] would receive 50 to 60 hours of occupational therapy;
- (b) During the next three years following upon the five year period, N[...] would receive another 20 hours of occupational therapy; and
- (c) After the conclusion of the second period referred to above, N[...] required 10 to 15 hours of occupational therapy per year for the rest of her life.

[129] The effect of this agreement was that the provision of occupational therapy to N[...] would thus gradually taper down as she aged.

[130] The trial judge, however, appeared to overlook this evidence. Instead, he based his decision on this issue on the joint minute concluded between Ms Bainbridge and Ms Broughton, despite this having been superseded by Ms Bainbridge accepting the correctness of what Ms Broughton had proposed. Instead of deciding the issue on the evidence that he heard, the trial judge awarded 55 hours of occupational therapy over a period of eight years, to be followed by 20 hours of therapy for a period of two and a half years and then 13 hours of therapy per annum for the rest of N[...]’s life.

[131] The appellant submits that the evidence on the frequency of occupational therapy was, therefore, ultimately not in dispute but that the trial court, for undisclosed reasons, did not accept that evidence and instead relied on an outdated joint minute.

[132] I can discern no reason why the evidence of the expert witnesses and their newfound agreement, as reflected in the extract from Ms Bainbridge’s evidence just mentioned, should have been rejected. What they recommended seems to have been both well thought out and reasonable. In my view, the trial judge misdirected himself in making the award that he did. The reduced cost of the physiotherapy accordingly needs to be calculated by the actuaries.

The tenth alleged misdirection

[133] Not much needs to be said about this ground of appeal, despite it being defended at some length in the respondent’s heads of argument. It involves the purchase of certain immovable property to accommodate N[...] and her family. An architect, Mr Roger Kerr (Mr Kerr), was instructed by the appellant to prepare a report on what accommodation N[...] reasonably required. He recommended in his report the acquisition of a three-bedroomed house at a purchase consideration of R310 000, and he further proposed alterations to the acquired property, which brought the total capital outlay to the amount of R564 976.50.

[134] At the trial, the appellant did not call Mr Kerr to testify but he was, instead, called by the respondent, who thereby clearly accepted his report and his recommendations.

[135] It will be recalled that the appellant made its first interim payment to the respondent in June 2017 in the amount of R5 million. Utilising that payment, the trust formed to administer N[...]’s award purchased an immovable property and renovated it to accommodate N[...]’s needs, all of which cost R850 000. Included in these renovations was the purchase and installation of a chandelier. This was considerably in excess of what Mr Kerr believed to be reasonable.

[136] It was submitted on appeal by the appellant that the acquisition of this home was an extravagance that was not justified on the evidence of Mr Kerr. Nonetheless, ignoring Mr Kerr’s initial report, the trial judge ultimately awarded the respondent an amount of R896 680 to acquire the home. Why this amount was awarded in the light of the evidence led by the respondent went unexplained in the judgment. In my view, the trial judge misdirected himself in making that award.

[137] Mr Topping, again very correctly in my view, indicated that he could not support the acquisition of the home at the cost at which it was acquired in the face of Mr Kerr’s recommendations and left the matter in the hands of this court.

[138] It does appear that an unnecessarily lavish home was acquired for N[...]. It is obviously necessary to ask why a chandelier had to be acquired. The answer is, however, not immediately obvious. It appears to me that the proposal made by Mr Kerr was reasonable and catered fully for the necessary adaptations to the home to make it suitable for N[...]. In my view, the difference between what was awarded and what ought to have been spent according to Mr Kerr’s proposal must be deducted from the judgment amount. Thus, the judgment amount falls to be reduced by an amount of R331 703.50.

The eleventh alleged misdirection

[139] As has been mentioned several times during the course of this judgment, the trial court attempted to divine the future, a form of human conduct that is not particularly accurate or reliable. Human experience may predict what is likely to occur in the future, but it is only when that future is lived that the accuracy of that prediction can be assessed. Life can only be understood backwards, but it must be lived forwards.²⁹

[140] Because of the unknowable future, it is possible that what is predicted may not occur, or may imperfectly occur, if it occurs at all. To overcome this, it is usual for a court to make an award subject to the reduction of an agreed, or determined, contingency percentage. The potential occurrence of unemployment, illness, accidents, and general economic conditions are factors that must be considered when considering the contingency to be applied, as must the fact that while it is intended to expose N[...] to an impressive array of interventions and therapies, there is the possibility, given human nature, that not all those interventions and therapies will actually commence or be seen through to their conclusion.³⁰ A further relevant consideration is her age.³¹ This is not a definitive list of all the considerations that must be taken into account and any factor that is relevant may be considered.

[141] Where there is no agreement between the parties on the contingency to be applied, the court determines it in accordance with its discretionary powers. That discretion can be exercised either by way of a mathematical evaluation of the probabilities or on the gut feel of the court assessing the contingency. But whichever method is applied, the discretion exercised should be founded, where possible, on facts.

[142] It was mentioned previously that the appellant abandoned its appeal against the life expectancy proposed for N[...] by Dr Campbell. It was not in dispute that Dr Campbell is an expert on this issue. The appellant initially submitted that the predicted life expectancy figure suggested by Dr Campbell be reduced by ten

²⁹ An observation by Soren Kierkegaard (born on 5 May 1813 and died on 11 November 1855), who was a Danish theologian, philosopher, poet, social critic, and religious author.

³⁰ *Kriel v Administrator-General for South West Africa* 1986 (3A2) QOD 539 (SWA) at 551; *Du Pisanie NO (obo J G Rabe) v De Jongh* 2002 (5B4) QOD 109 (C) at 137-138.

³¹ *Madela v MEC for Health, KwaZulu-Natal* [2021] ZAKZDHC 18 para 72.

percent. The appellant no longer seeks that adjustment, this being one of the grounds that had been abandoned. But in abandoning its appeal on that issue, it was made perfectly clear by Mr Kissoon Singh, as mentioned previously, that the issue of N[...]’s life expectancy would continue to influence the issue of the contingencies to be applied and thus remained very much alive in that respect.

[143] In his evidence, Dr Campbell predicted that N[...] had a life expectancy of some 49.85 years. He also indicated that N[...] had a 48 percent chance of reaching the age of 30; a 38 percent chance of reaching the age of 40 and a 28 percent chance of reaching the age of 50. Viewed differently, Dr Campbell predicted that there was a 72 percent chance that N[...] would not achieve the age of 50. Because of the low chance of N[...] reaching the age of 50, Mr Kissoon Singh submitted that a greater than normal contingency be applied to any award made to the respondent.

[144] In his judgment, the trial judge summed up the argument that he heard on this point as follows:

‘Plaintiff’s counsel, therefore, suggested that a contingency deduction of five percent ought to be applied. The defendant’s counsel on the other hand contends that a fair rate would be 20 percent applied across the board, especially because Dr Campbell opined that N[...] had only 28 percent probability of living to age 50. I believe the contingency deduction of 10 percent would be appropriate considering that N[...]’s life expectancy to reach 50 is quite low.’

[145] It appears to me that the appellant was prepared to argue at the trial that a 20 percent contingency be applied whereas before us it now seeks a 25 percent contingency. I am of the view that a 10 percent contingency does not marry well with Dr Campbell’s sombre opinion of N[...]’s chances of reaching the age of 50. If regard is had to the traditional approach of calculating the contingency to be applied by awarding half a percent per annum, a contingency of ten percent fails to fully appreciate the prospects of N[...] reaching an advanced age. The trial judge accepted that the odds of N[...] reaching the age of 50 were ‘quite low’ but then did not compensate for that realisation by applying an appropriate contingency figure. The contingency figure awarded was extremely low, regard being had to the age of N[...].

I would, in the circumstances, propose that a contingency of 20 percent to be applied across the board for all future and related medical expenses.

Summation

[146] The appellant has succeeded in certain respects in its appeal and failed in others. It is necessary now to pull together the threads of the conclusions that have been reached. The amounts that have been disallowed outright are set out in the table below:

Item	Amount disallowed (R)
Vitalstim	4 882 600
Epileptic medication	791 740
Chest infections	39 180
Serum testing	38 600
AAC treatment – Ms Casey	427 890
Caregiver training – Ms Casey	41 820
Teams meetings – Ms Casey	82 160
Constipation medication	50 000
Unwin system	221 260
Leckey bath chair	137 020
Genu Valgum Splints	9 080
Total	6 721 350

(Table 3)

[147] In certain instances, this court has found that while an award was justified, the amount awarded was not and has consequently maintained the award but ordered a reduction in the amount allocated. In those instances, the court has felt itself competent to make the required deductions, which are set out in the table below:

Item	Amount allowed by the trial court (R)	Amount allowed on appeal (R)	Deduction to be made (R)
Static bicycle	75 260	45 240	30 020
The costs of speech therapy reassessments	20 210	10 105	10 105
The cost of the immovable property acquired	896 680	564 976.50	331 703.50
Total			371 828.50

(Table 4)

[148] In addition to these amounts disallowed and reduced, other amounts awarded by the trial judge have been upheld but also varied. Given the fact that certain of the amounts varied relate to events that will occur later in N[...]’s life, it is appropriate that these variations be considered by the actuaries, as this court is not competent to do those calculations.

[149] The importance of the calculations to be referred to the actuaries is that they are needed to finalise the total amount to be awarded in respect of future medical expenses. Once a total in this regard is calculated, the court will be able to determine the amount to be allowed for the costs of the trust, which is to be calculated at 7.5 percent of the amount awarded. The areas in which the assistance of the actuaries is required are set out in the table below:

Item	Explanation	Instructions to the actuaries
Physiotherapy	The trial court averaged the amounts stated in the 2018 joint minute and then again averaged that result with the amounts mentioned in the 2021 joint minute.	Only the amounts stated in the 2018 joint minute are to be utilised. Where there is disagreement in the 2018 minute, the averages of the contrasting points of view are to be taken to

Item	Explanation	Instructions to the actuaries
		calculate the total amount to be allowed. Whatever amount is arrived at, it must be adjusted to reflect the value of that amount in 2021.
Pressure sore medication	An amount of R132 990 was awarded by the trial court to cover the whole of N[...]’s life.	N[...] will only require pressure sore medication over the last five years of her life.
Pressure care mattress	The trial court found that N[...] will require a pressure care mattress throughout her life, replaceable every ten years.	N[...] will require only one pressure care mattress, to be acquired during the last ten years of her life.
Pressure care mattress maintenance	The trial court, having found that N[...] will require a pressure care mattress every ten years over the course of her entire life, awarded the costs of the maintenance of those multiple pressure care mattresses.	The cost of maintenance of one pressure care mattress to be acquired at the commencement of the final ten years of N[...]’s life is allowed.
Replacement period of prosthetics and orthotics	The trial court accepted that such devices required replacing every four years.	The devices require replacing every five years. In performing this calculation, the costs associated with the Unwin Tiedown system, the Leckey bath chair and the Genu Valgum Splints have been disallowed and are not to be taken into consideration.
Occupational therapy to be provided to N[...]	The trial court awarded the cost of occupational therapy for 55 hours during the first eight years following the trial, followed by 20 hours of therapy per	The cost of the occupational therapy of 55 hours is to be calculated over a period of five years and not eight years. The cost of 20 hours of

Item	Explanation	Instructions to the actuaries
	annum over a two and a half year period and finally 13 hours of therapy per annum over the remainder of N[...]’s life.	therapy per annum is to be calculated over a period of three years and not two and a half years. The cost of 13 hours of occupational therapy per annum over the remainder of N[...]’s life must then be calculated.

(Table 5)

[150] For the avoidance of doubt, the calculations to be performed by the actuaries should be calculated based on the life expectancy of N[...], being 49,85 years.

[151] Once the actuaries have performed the calculations referred to them by this court, the solutions thus calculated must be submitted to this court, which will then issue a final order in which the total amount due in respect of future medical expenses will be formulated. I can see no difficulty in this approach being adopted.³²

Costs

[152] The appellant obtained leave from the Supreme Court of Appeal to appeal against the entire order granted by the trial judge. Essentially, that encompassed an appeal against the three heads of damages identified in table 2. It, however, elected to only argue one of those heads of damages. In doing so, it may have been motivated by the purest of considerations, namely what was truly in the best interests of N[...], and I do not lose sight of that. Its success has, however, only been confined to a portion of a portion of the entire award granted by the trial court. In those circumstances, the interests of justice would be met by an order that each party bears its own costs on appeal.

[153] As regards the costs of the application to the trial judge for leave to appeal and the costs of the subsequent application for leave to appeal to the Supreme Court of Appeal, the appellant was ultimately successful in both of these endeavours, and the

³² A similar approach was adopted in *Singh and another v Ebrahim (1)* [2010] 3 All SA 187 (D) para 184.

costs should follow the result. By virtue of the fact that both applications for leave to appeal were finalised before 12 April 2024 and that the amendments to Uniform rules 67A and 69 only came into effect on that date, no order as to the scale of the costs can be granted. However, in both those applications, the costs of two counsel were justified and shall be allowed where two counsel were employed.

The order

[154] I would accordingly propose the following order:

1. Condonation for the appellant's failure to timeously:
 - (a) deliver a notice of appeal;
 - (b) seek an appeal date; and
 - (c) deliver the appeal record,
 is granted, with no order as to costs.
2. Save to the extent set out in paragraph 3 of this order, the appeal against the judgment of the trial court granted on 3 November 2022 is dismissed with no order as to costs.
3. Paragraph 1 of the order of the court a quo is set aside and shall be replaced with an appropriate order once the actuarial calculations identified in table 5 of this judgment and ordered in paragraph 4 of this order have been completed.
4. Munro Forensic Actuaries, a firm of actuaries, is requested, within 30 days of the date of this judgment, to perform the actuarial calculations in respect of the items identified in table 5 of this judgment on the basis that the life expectancy of M[...] N[...] N[...], a girl born on 6 August 2009, is 49,85 years.
5. The calculations referred to in paragraph 4 above shall forthwith be presented to this court to permit the formulation and finalisation of the paragraph designed to replace paragraph 1 of the order granted by court a quo.
6. In the event of there being anything unclear in what the actuaries are required to calculate, the parties are given leave to jointly request clarification of the uncertain issues from this court.
7. The respondent shall pay the appellant's costs in respect of:
 - (a) The application to the trial court for leave to appeal; and
 - (b) The application to the Supreme Court of Appeal for leave to appeal,
 such to include the costs of two counsel where so employed.

MOSSOP J

I agree:

MLABA J

I agree:

JIKELA J

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