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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 22670/2018

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

In the matter between:

P[...] G[...] M[...] obo M[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

NIGRINI AJ

Summary - Claim for loss of earnings on behalf of a minor child. Factual and legal causation. Lump sum award. Protection of damages awards. Creation of protective trust or *curator bonis*.

Background - The minor child, M[...] M[...] (Identity number 0[...]) (M[...]) sustained bodily injuries as a result of in in a motor vehicle accident which occurred on 12 July 2014 (*collision*).

The Defendant conceded the issue of negligence 100% in M[...]’s favour and the parties settled the claim for general damages and the Defendant furnished an undertaking in terms of Section 17(4) a of the Road Accident Fund Act, 56 of 1996 (RAF Act), as amended, for 100% of M[...]’s future medical costs, as envisaged (undertaking).

Issues

1. The only issue for determination is the *quantum* of the minor child’s claim for loss of earnings.
2. The Defendant specifically dispute that the Plaintiff presented sufficient evidence to establish that M[...] ‘*will suffer any future loss of earnings as a result of the accident in question.*’ The Defendant further contends ‘*that the real dispute whether ‘any injuries sustained by the minor will have any impact on the minor’s future employment and employability. The legal question is whether there is nexus between the injury and a patrimonial loss in the form of loss of earnings. The Defendant will demonstrate that there is no nexus between the injuries sustained in the accident in question and the minor suffering a future loss of earnings.*
3. The contended in conclusion that the Plaintiff failed to prove a loss of earnings ‘*as the experts of the plaintiff relied too heavily on speculation to support the claim of the minor child, the factual evidence provided to court by the Plaintiff is that the minor’s lack of interest and failure to study is the factual reason and cause for the minor’s poor academic performance.*’
4. The Defendant contended in the alternative and in the event that M[...] is entitled to compensation for loss of earnings that that ‘*the Robert Koch system/ principle of a 0.5% per annum contingency up to retirement should apply as well an additional contingency to factor unemployment which was excluded from the Industrial Psychologist report.*’ and postulated pre-morbid and post-morbid

contingencies, which, according to it, should be applied. In relation to the pre-morbid contingencies the Defendant contends that a contingency *'in the region of 30%.'* should be applied, and in regard to post-morbid contingencies, the Defendant contends *'that a higher than normal contingency should be applied and therefore we submit that 40% will be fair and reasonable under the circumstance.'*

5. The Defendant furthermore contends that: *'The Plaintiff has not proven an actual patrimonial loss in respect of loss of earnings, at best a slight negligible possible loss of earning capacity may be considered by way of applying a 10% differential to arrive at an award. With the method of the differential any contingency can be applied to achieve the same outcome of 10% of the projected income. i.e 10/20%, 25/35%, 30%/40% etc. in the circumstances the 30%/40% is applied.'* The Defendant furnished the following calculation based on its aforementioned premise:
 Value of M[...]’s income if the accident did not occur (but for) = R8 554 596 less contingency of 30% equating to R2 566 378 = R5 988 217.20
 Value of M[...]’s income having regard to accident = R8 554 596 less contingency of 40% equating R3 421 838.40 = 5 132 757.60 = Total nett loss of earnings in an amount of R855 459.60.

6. The Plaintiff claims a net future loss of earnings in an amount of R 5 709 324 , calculated, as follows:

Value of M[...]’s income if the accident did not occur (but for) = R 8 554 596
Less 25% contingency deduction = R 2 138 649
= R 6 415 947
Value of M[...]’s income having regard to accident = R 1 009 462
Less 30% continency deduction = R 302 839
= R 706 623 = Net Future Loss = R 5 709 324

Judgement

7. The Plaintiff, in her capacity as the mother and legal guardian of M[...], instituted an action for loss of earnings against the Defendant. The other heads of damages became settled prior to the hearing. The issue of negligence became settled 100% in M[...]'s favour. In addition, on 7 June 2019, the Defendant undertook

to pay R600 000 to the Plaintiff in respect of the claim for general damages, and the Defendant undertook to furnish an undertaking

8. The parties signed a pre-trial minute on 21 July 2022 (*pre-trial minute*). The Plaintiff was represented by Mr. Masera Vuxaka and the Defendant by Mr Thavadasan Naidoo in his capacity as a State Attorney. It constitutes that both parties' legal representatives were duly authorised to sign the *pre-trial minute*. The parties agreed as follows in the pre-trial minute:

'The following issues are agreed between the parties:

4.1 The issues of merits, general damages and an undertaking were settled at R600 000-00.

4.2 The Plaintiff suffered a mild to moderate traumatic brain injury as per the Neurosurgeons' reports.

4.3 The Plaintiff suffered deficits in attention, memory and reduced motor speed as a result of the accident and requires consultations with a Clinical Psychologist as per the Clinical Psychologists' reports.

4.4 Pre-accident the Plaintiff would have most likely passed grade 12 with admission to a tertiary institution as the Educational Psychologists' reports.'

9. The pre-trial minute contains the following admissions sought by the Plaintiff and the Defendant's answers. I quote from the following extracts from the pre-trial minute.

11.2.4 Ad Medical Report

The RAF1 claim form medical report by Dr B Madisakwane is what it purports to be and should be admitted into evidence without any further proof

Answer: Noted

11.2.5 Ad Hospital Records

That the copies of the hospital records from Natalspruit Hospital are what they purport to be and should be admitted into evidence without any further proof thereof?

Answer: Noted to the extent they appear to be and are confirmed to be correct.

Admissions in respect of the Plaintiff's Medical Reports

11.2.6 Does the Defendant admit Dr. Mpotone (Neurosurgeon - insertion)

report dated 2 May 2019 in circumstances where it does not have a corresponding experts.

Answer: Noted to the extent they appear to be and are confirmed to be correct.

11.2.7 Does the Defendant admit Oscar Modipa's Clinical Psychologist report dated 29 March 2019?

Answer: Yes

11.2.7.2 Does the Defendant admit Dr. Kumalo Educational Psychologist report dated 2 May 2019?

Answer: Yes

11.2.9 Does the Defendant admit Nosiphiwe Matlabane (Occupational Therapist - insertion) report dated 10 May 2019 in circumstances where it does not have a corresponding expert?

Answer: Agreed

11.2.9.2 Does the Defendant admit Dr Mohapi Malaka Industrial Psychologist report dated 16 May 2019 in circumstances where it does not have a corresponding expert?

Answer: Yes'

10. The Plaintiff furthermore requested the Defendant to admit the contents of the actuarial calculation perfumed by the actuary, Jacobson, dated 21 May 2019 and the Defendant reserved its rights.

11. It is evident from the questions and answers provided in the pre-trial minute that the Defendant admitted the correctness of the opinions and findings contained in the medico legal reports prepared by Oscar Modipa (Clinical Psychologist) dated 29 March 2019, Dr Kumalo (Educational Psychologist) dated 2 May 2019, Nosiphiwe Matlabane (Occupational Therapist) dated 10 May 2019 and Dr Mohapi Malaka (Industrial Psychologist) dated 16 May 2019. The Defendant expressly admitted the diagnosis made by the Neurosurgeon in his 2019 report. The Defendant's admission that M[...] sustained a mild to moderate brain injury provides the answer to the Defendant's qualified answer in para 11.2.6 of the pre-trial minute.

12. The accident occurred at or near Nhlapo Section Katlehong, Johannesburg on

20 July 2014 between 18H00-19H00. She was alone at the time of the accident. M[...] was a pedestrian when the vehicle there and then driven by the insured drive collided with her and she sustained bodily injuries as a result of the impact.

13. At the time of the accident M[...] was in Grade R. She was 6 years and 1 month of age. She was receiving treatment for tuberculosis at the time of the accident. For this reason she was not attending school. She does not have a history of chronic illness or the use of chronic medication. She started with Grade 1 in 2015. She repeated grade 1 and she was condoned to Grade 2. She displays aggressive behaviour at school. Such conduct and behavioural difficulties have persisted ever since she started school. She is said to become easily distracted and displays poor comprehension. M[...] is presently 16 years of age and in Grade 9. She attends at Alafang Secondary School. Her school reports indicates inconsistent performances across academic terms.

14. Her birth was not marked by any complications and she reached normal developmental milestones until the collision. She was happy child pre-accident.

15. She was not involved in any previous accident, did not have any pre-conditions and achieved maximum medical improvement. It constitutes common cause that her life expectancy is unaffected.

16. The Plaintiff applied for leave to present the evidence of the experts who examined M[...] on affidavit in terms of Rule 38(2) of the Uniform Rules of Court (*experts*). The Defendant raised an objection from the bar against the application premised thereon that it disagreed with the extent of the injuries sustained by M[...] and the *sequelae* thereof. The Defendant disputes causation between the injuries sustained by M[...] and her claim for loss of earnings and argued that it deserved the right to cross examine the experts.

17. The Defendant's agreed that the evidence of Mr Oscar Modipa (Clinical Psychologist), Dr. Kumalo (Educational Psychologist) and Immerman Actuaries be presented on affidavit in terms of Rule 38(2).

18. The following experts gave *viva voce* on behalf of the Plaintiff:

18.1. Dr T S Mpotoane - Neurosurgeon;

18.2. Zenzele Khubeka - Educational Psychologist;

18.3. Ms Prudence Ngoako - Industrial Psychologist.

19. The Defendant stated in its heads of argument that it, *"In assessing loss of earnings, the defendant gave consideration to hospital records of Natalspruit Hospital and expert reports namely: "Dr Mpotoane - Neurosurgeon (25 May 2024), Oscar Modipa - Clinical Psychologist (21 July 2024), Zenzele Kubheka - Educational Psychologist (17 July 2024), Nosiphiwo Matlabane – Occupational Therapist (16 August 2024), Prudence Mogoma - Industrial Psychologist (27 August 2024) and Gerard Jacobson – Actuary (3 September 2024)"*

20. During 2019 a number of the aforementioned experts assessed M[...]. She was almost 11 years of age at the time. Mahehello was re-assessed during 2024 by the experts who testified. Her condition has not improved since 2019.

21. It is indicated in the RAF 1 form completed by Dr Madisakwame that M[...] was treated with Panado, Amoxyl and Chloromex ointment and that she is not on any ongoing treatment.

22. The following is recorded in the Natalspruit hospital records: *No history of LOC, GCS 15/15 on admission, Abrasion left cheek, Radiological exam of skull and mandible found no abnormalities and the following diagnosis and treatment and management were recorded: Soft tissue injuries. Pain management, x-rays, neurological observations and antibiotics.*

23. It follows from the settlement of the claim for general damages that the Defendant accepted that M[...] sustained a serious injury in accordance with the 6th edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The Defendant, accordingly, accepted that M[...] either has a combined whole person impairment rating above the threshold or that she qualifies for compensation on the basis of the narrative test which requires that an injured person such as M[...] suffers serious long term impairment or loss of body function. M[...]

does not suffer from any significant scarring. At that juncture the Defendant already obtained medico legal reports. The settlement was evidently not based on aforementioned hospital records.

24. The Plaintiff alleges that M[...] sustained a mild to moderate head injury and a laceration and abrasion on her left cheek.

25. M[...] was confused after the impact. The following complains are noted - frequent headaches; nosebleeds; forgetfulness; psycho-social problems (aggression and behavioural problems); cognitive difficulties and chronic backache.

26. On the day of the accident M[...] left home without permission and upon her return she 'threw' herself on the bed in her room. Shortly thereafter members of the community arrived at her home accompanied by the driver of the vehicle who collided with M[...]. A neighbour carried her to the vehicle and the driver transported M[...] and the Plaintiff to the Ntalspruit Hospital (*Hospital*). M[...] was not feeling well and appeared dizzy. A doctor treated the laceration on her cheek and a cut above her one eye. She did not suffer a loss of consciousness as a result of the impact. She was diagnosed with soft tissue injuries and discharged on analgesics. They were told to return the following day to collect medication. Her condition deteriorated after her discharge from Hospital. That evening M[...] was confused and she talked gibberish. The Plaintiff relayed to the Neurosurgeon that M[...] was confused and behaving like a mad person when she woke up the following day. The Plaintiff took M[...] to the hospital the following day for further assessment. X-rays found no abnormalities. M[...] vomited during the course of that evening. The medication was administered as prescribed.

27. The minor child's has undergone a personality changes since the accident and she is displaying aggressive behaviour towards other children. Her teachers is complaining about her behaviour. She is displaying suicidal tendencies and threatened to commit suicide. She is very forgetful, irritable and often moody and threatens to kill her family. She experiences nose bleeds and blood clots would come out. She experiences headaches 3 (three) times per week. Her behaviour is not age appropriate and she struggles to sustain lasting relationships with friends.

28. She tends to forget to perform tasks and she struggles at school. Her marks are poor and she does not listen to her teachers. She shows no interest in her studies.

29. The experts assessed M[...] and expressed their opinions in their respective reports. Their expertise is not contested.

30. Dr Mpotoane, the Neurosurgeon, assessed M[...] 25 February 2019 and re-assessed her on 6 May 2024. He reported the following:

30.1. She speaks Sesotho fluently in and has no speech impediments. No special neuropsychological batteries of tests were performed by the Neurosurgeon. She was well orientated to person, place and time, her attention, concentration, and judgement are good. Registration and recall was fair and her mood and behaviour was described as withdrawn and shy.

30.2. M[...] sustained a head injury and a soft tissue injury of the face. She suffered a mild to moderate traumatic brain injury with post traumatic chronic headache and post traumatic neuropsychological dysfunction. The injuries were adequately treated.

30.3. She usually takes Disprin for headaches with good response.

30.4. She presents with right knee pains following the accident, behaves aggressively towards other children, displays abnormal behaviour and became socially withdrawn since the accident. Her educators are complaining about her abnormal behaviour and they intend to take her for psychological assessment. She furthermore presents with suicidal ideation and she threatens to commit suicide often. She suffers from depression. She hears voices that instruct her to kill herself. She threatens to kill/poison her family at home, especially when angry. She displays unprovoked aggressive behaviour to her family.

30.5. The Plaintiff responded to his question whether the injuries are serious that “...*the accident has changed her, and now she has anger issues and she is aggressive towards her peers.*” The Plaintiff was asked whether any of M[...]’s pre-accident (such as sporting, household, social or recreational) have been hampered by her injuries, and she replied: “*Yes, she is now very*

aggressive towards her peers, she finds it difficult to play with other children due to the knees discomfort."

31. Mr Modipa (*Clinical Psychologist*) first assessed M[...] during 2019 when she was 10-years and 8 months of age. His first report is dated 29 March 2019. His second report is dated 21 July 2024. Mr Modipa recorded the following:

31.1. Pre-morbidly there was no reported developmental, medical or psychiatric history of note.

31.2. He performed his assessment through the administration of a comprehensive battery of selected instruments/psychological tests that assess various domains of emotional/psychological functioning and conducted a clinical interview with M[...] and the Plaintiff. He summarised the test results and the results of his clinical interview.

31.3. He gathered relevant background information relating to her premorbid functioning, circumstances related to the accident, and her post-accident functioning. Her concentration fluctuated as she seemed to struggle with complex tasks during the assessment. She cried at one stage and expressed the wish that her father was still alive.

31.4. Mapheello's neuro-cognitive functioning and general intellectual efficiency were evaluated from her performances on various tasks.

31.5. M[...] presents with notable emotional and behavioural adjustment difficulties, including outburst, oppositional-defiant behavior, and suicidal ideation. She suffers from residual traffic-related anxiety and regular post trauma headaches daily and associated dizziness which is managed with analgesics.

31.6. She complained of visual difficulties - blurry vision and eyes tends to become teary. She experiences regular nose bleeds and experiences pain affecting the right leg, with regular swelling. She also reported a sharp pain under her left breast and abdominal pain.

31.7. She experiences memory and concentration deficits that adversely affected her scholastic performances. As the result she repeated grade 1 and received a condoned pass in grade 2.

31.8. Mapheello presents with some cognitive deficits. She is reported to display difficulties with memory, poor comprehension, and decreased

concentration as she tends to ruminate. She displayed deficits in sustained concentration. She could not sit still and complete tasks during the assessment.

31.9. M[...]’s emotional and behavioral difficulties were summarised, as follows:

‘3.3.1. M[...] is reported to display irritable mood most of the time. She is also said to be aggressive toward other children and would throw things around when she is angry. She tends to cry easily and would then threaten suicide often. She often threatens to throw herself onto the train tracks.

3.3.2. Her mother expressed strong concerns regarding M[...]’s behavioral disorder, especially the extent of her aggressive outbursts. She related an incident during which M[...] is said to have intended hurting another child by chasing after her and aggressively throwing a brick at her. Fortunately she missed. In another incident she is reported to have beaten up another child until she bled on the face. Ms M[...]indicated that her daughter behaves like a possessed person when angry and this was never the case before the accident.

3.3.3. Ms M[...]reported that her daughter has engaged in regular untoward behavior involving shoplifting, and stealing from the house.

3.3.4. She is also reported to be oppositional-defiant toward authority. She is hyperactive and struggles to sit still for the duration of task performance.

3.3.5. She also displays traffic-related anxiety especially when crossing the street.

3.3.6 Disturbed sleep. She tends to talk in her sleep.’

31.10. M[...] presents with a neurocognitive profile characterized by generally below average performances in several cognitive domains. She displayed deficits in capacities and skills in sustained and alternating attention, immediate visual memory, working memory visuospatial reasoning. Her immediate and delayed auditory memory, and verbal learning were below average limits and she displays inconsistent sensory motor processing speed. She has average visuo-perceptual skills and below average verbal learning skills.

31.11. Despite no loss of consciousness upon impact, the GCS score of 15/15 suggests that she is likely to have sustained a primary traumatic brain injury of

mild severity consequent upon direct trauma to the head and neck. Persistent cognitive, emotional, behavioural and scholastic adjustment difficulties suggests that she may have suffered secondary brain injury that rendered her vulnerable to experience long-term difficulties. Her opinion is supported by Dr. Mpotoane (Neurosurgeon).

31.12. M[...] suffers elevated levels of anxiety and negative self-concept. She also presents with residual post-traumatic stress symptoms, including traffic-related anxiety. Psychotherapeutic intervention is recommended for her emotional problems. The prognosis is, however, guarded. The prognosis is supported by the lengthy period of time that has lapsed since the accident.

31.13. In her early schooling, she is reported to have experienced difficulties with attention, comprehension and memory and needed constant assistance. She was also reported to have been disruptive in class. She still display inconsistent performances, reflecting her persistent scholastic struggles. The opinion of the educational psychologist regarding her residual scholastic potential further suggest that she is likely to continue to experience difficulties in her overall scholastic achievements.

31.14. She recommended at least 20 sessions psychotherapy with a psychologist to deal with her residual post-traumatic stress symptoms, emotional and behavioural difficulties. She also recommended an evaluation of the conduct disorder by a paediatric psychiatrist. The evaluation was not performed.

32. Mr Modipa and Mr Mahlangu (Clinical Psychologist employed by the Defendant) prepared a joint minute dated 4 June 2019 in which Mr Mahlangu agreed with most of the opinions and findings by Mr Modipa.

33. Mr Kubheka, an Educational Psychologist, determined the minor child's pre-accident functioning, and final educational outcome. Mr Kubheka recorded the following:

33.1. In determining M[...]s pre-accident potential Mr Kubheka considered her developmental history, family educational attainment, environmental factors, and the current educational system. Given her age at the time of the accident no pre-accident scholastic history was available to assist in

determining her pre-accident learning potential with any level of certainty. However, pre-natal, perinatal and postnatal no identifiable risk or causal factors presented itself that could be the cause for any leaning challenges.

33.2. An average pre-morbid intellectual functioning is assumed and that M[...] would probably have passed Grade 12 with a Higher Certificate admission. With the benefit of an increase in funding for the tertiary education for socio-economically disadvantaged learners it is likely that she would have registered at a TVET College and completed a Higher Certificate (Vocational) resulting in NQF level 5 and enter the labour market in a more practical field (such as Hairdressing or Hospitality etc.). She deferred to an Industrial Psychologist for comprehensive insights into her career prospects and potential earnings prior to the accident.

33.3. In relation to her post-accident functioning and final educational outcome no improvement is anticipated in the Plaintiff's current cognitive and neurocognitive profile.

33.4. Mapheello's current cognitive test results points towards significant challenges. Her cognitive challenges are that she would find tasks that demand sustained attention and concentration difficult. The review of her latest school report indicates that she presents of serious learning difficulties. There are indications of systemic challenges as the whole grade is failing most of the learning areas that the Plaintiff is also struggling with. It is considered that her learning challenges are multifaceted. Considering the brain injury *sequelae* she will struggle with more complex information processing. M[...] suffered a traumatic brain injury that appeared to be complicated by the vulnerable age at which the injury occurred. Present information indicates that her performance would probably deteriorate further as she progresses in the Further Education and Training (FET) phase when the academic demands increase and become even more pronounced.

33.5. It is therefore evident she would probably never reach her full pre-accident learning potential. With the current Education Policy, she would probably be pushed through the system and exit with a condoned Grade 11 as her highest level of education. M[...] is regarded as a vulnerable employee due to her IQ (below average), and cognitive limitations that will hamper further education and performance in the workplace.

33.6. The *sequelae* of the injuries sustained in the accident rendered her a vulnerable individual. Her poor neurocognitive profile is likely to make her susceptible to negligent mistakes at work, which may decrease her effectiveness in terms of any positions that she might hold in future.

33.7. It is unlikely that she would sustain employment for long periods. She deferred to an occupational therapist in relation to the impact of her injuries on her future work performance and the industrial psychologist in relation to her post-accident career prospects and earnings.

34. Ngoako, an Industrial Psychologist, provided an opinion in relation to her pre- and post morbid income earning potential. The Industrial Psychologist integrated the findings and opinions of the experts. She considered the accident related impairments and her pre- and post morbid function. She specifically considered that the minor child sustained “mild to moderate traumatic brain injury” and the psychological *sequelae* thereof on her career and progress. She recorded the following:

34.1. M[...] started attending creche when she was 2 or 3 years. As a result of the injuries she will probably not realise her pre-morbid potential in the open labour market. She will consequently suffer a loss of income/earnings potential. Her progression will be affected.

34.2. The Industrial Psychologist agrees with the Educational Psychologist’s findings and that M[...] ‘*would have probably entered the labour market with an NQF level 5 qualification in a more practical field (such as Hairdressing or Hospitality etc.)*’

34.3. Because M[...] is a minor and her career choices remain uncertain she applied a generic approach pertaining to her career and earnings (i.e. general salary scales per grade and not specifically for a particular position).

34.4. M[...] failed and repeated grade 1 post accident and she has physical and neurocognitive limitations post-accident that will impact negatively on her functioning currently and as she grows older, including academic and occupational performance. With a grade 11 level of education, M[...] is limited to unskilled work in the informal sector of the economy. She relies upon the Occupational Therapist who opined that “*So, making an allowance for the guarded prognosis as stipulated by the specialist reports together with the*

functional limitations demonstrated on the functional capacity evaluation, the claimant will always require optimal continuous rehabilitative treatment in order to be relatively comfortable and productive with even the lightest manual occupations. Thus, the writer notes that the claimant's remaining impairments placed her at a disadvantage for reaching her optimal level of functioning in or outside of school, and gaining sufficient opportunities in the open labour market in the future."

34.5. But for the accident M[...] would have been able to effectively compete for employment in the formal labour market sector. She explained that the Paterson job evaluation system grades occupations according to the levels of decision-making and complexity in terms of difficulty, importance and responsibility - the more senior the band, the more crucial the individual's decisions are for successful performance and applied Paterson job grading and market related salaries for various roles as per PE Corporate Services Salary Surveys.

34.6. As a direct result of the accident related injuries M[...] presents with prematurely curtailed occupational options in the open labour market compared to her peers. Being restricted not only from physically demanding jobs, but also cognitively-demanding jobs means she will be excluded from manual and cognitively demanding jobs in the open labour market. Prospective employers are likely to be prejudiced against her due to her reported limitations.

34.7. *Mapheello's* psychological deficits are posing a threat to her academic progress and her employability once she reaches adulthood. She is likely to struggle with maintaining good interpersonal relations in the workplace due to the reported psychological limitations. As a result, she may be at an increased risk of struggling to main lasting employment relationship (s) and by implication, likely to be subjected to periods of unemployment as a result of subsequent disciplinary and dismissal. M[...] is an unequal competitor. She will find it difficult to enter the open labour market and prolonged periods of unemployment is inevitable. The supply of unskilled workers exceed the demand.

34.8. During her periods of employment *M[...]* will likely to earn wages consonant with that of unskilled labourers in the non-corporate sector.

34.9. M[...] will suffer a loss of earnings as a result of the injuries sustained in the collision.

34.10. Based on the opinion of the Educational Psychologist Mr Khubeka, Ms Ngoako is of the opinion that, but for the accident, M[...] would have completed Grade 12 as well as an NQF level 5 Certificate (assumed by the end of 2027). With this level of education, she would have entered the labour market earning on par with the Paterson B2/B3 level. Median packages have been used by the actuary. B2 = R217 000 per annum and B3 = R241 000 per annum. Thereafter, she would have progressed to a career ceiling by the age of 45, earning in line with the Paterson level C1/C2. C1 = R387 000 per annum and C2 = R 421 000 per annum. These figures correspond with the 2024 Quantum Yearbook by Dr R.J. Koch recordal of Paterson salary levels at 1.7.2024. Annual inflationary increases would have been applicable thereafter until retirement at the age of 65. According to the 2024 Quantum Yearbook by Dr R.J. Koch, the following earning assumptions are applicable to unskilled labourers: R 27 600 - R 49 800 - R 110 000 per annum.

34.11. *Having regard to the accident, Ms Ngoako indicated that M[...] will probably leave school with only a Grade 11 level of education. Ms Ngoako concluded as follows: "The writer is also of the opinion that during periods of employment, having considered her projected post-accident educational level, M[...] is likely to earn income in line with that of unskilled labourers in the non-corporate sector". "The writer is of the opinion that Mapheello may enter the open labour market at the lower quartile of the abovementioned scales and given her reported limitations she is not seen as having the capacity to progress beyond the median level of the scales. In addition to earning income at the lower levels, she is seen as being likely to be subjected to extended periods of unemployment in her lifetime given her guarded psychological prognosis which, in all likelihood is going to impact negatively on her ability to maintain and sustain lasting relationships which will directly impact her ability to sustain employment".* The actuary based his calculations on the Industrial Psychologist's report and used a 2.5 net discounting rate. The actuary assumed that 'M[...] will enter the labour market in 2028, earning in line with the lower quartile for unskilled labourers, Thereafter, she will progress to a career ceiling by the age of 45, earning on par with the median for unskilled

labourers. Annual inflationary increases will be applicable thereafter until retirement at the age of 65. In addition to the above, and for illustrative purposes, I have applied a higher post-morbid contingency deduction to account for future periods of unemployment. The amount of the contingency deductions is essentially subjective and should be a decision of the Court.’ The actuary applied taxation at the rates of Income Tax in force from time to time and assumed that the current rates of tax will be adjusted annually to compensate for the effect of inflation. Tax rebates have been taken into account. In relation to mortality the actuary applied the 4‘1984/86 South African Life Tables (Life Table 2 as per the Quantum Yearbook).’ According to the actuary ‘A capital sum has been calculated such that, after investment M[...] will be in the same financial position as she would have been but for the accident.’ ‘Future losses have been capitalised on 1.10.2024 at a rate of interest of 9% per annum. In arriving at the rate of interest of 9% I have taken into consideration the average future yield after tax that may be obtained on a portfolio of well-secured investments selected to produce the income lost by M[...]. The rate of inflation in conjunction with the interest rate implies a net discount rate of 2.50% per annum.’

35. The Defendant’s room to manoeuvre was limited by its failure to call any experts and the admissions contained in the pre-trial minute. The cross examination was for the most part contrary to the common cause facts. The Defendant, for example, attacked the neurosurgeon’s diagnosis until I pointed out to her that it constitutes common cause in the pre-trial minuted signed by by parties. The Defendant’s counsel was unaware of the aforementioned concession. The same applied to her contention that M[...]’s psychological sequelae cannot solely be attributed to the accident and her contentions which are at odds with the admitted Educational Psychologists report. I specifically asked her whether it is contended by the Defendant that its legal representative who signed the pre-trial minute was not authorised to make the concession. She confirmed that his authority is not disputed.

36. Defendant’s counsel was also clearly unaware that psychometric tests are performed by inter alia Clinical Psychologists and not by Neurosurgeons. The Neurosurgeon confirmed this fact. The cross examination did not make a dent in the

evidence presented by the experts. All it did was to provide an opportunity to them to provide an even better and more detailed explanation and motivation for their opinions and findings contained in their reports.

37. The nature and extent of the injuries sustained by the minor child was already conceded when the *quantum* of the claim for general damages became settled prior to the hearing. The questions put to the Neurosurgeon by the Defendant's counsel intimated that the extent of the brain injury is disputed. She in fact, before my intervention, put to the Neurosurgeon that the minor child sustained a mild head injury. The Defendant in fact admitted all the medico legal reports prepared by the experts employed by the Plaintiff in the aforementioned pre-trial minute.

38. The causal link between the accident and the injuries sustained by the Plaintiff and the *sequelae* thereof is not disputed. The Defendant disputes causation. The Defendant did not specifically argue the alleged failure with reference to factual and legal causation between the *sequelae* of the injuries and the alleged loss of earnings. Nor did the Defendant's heads of argument contain any distinction or case law in regard to causation. Parties should, when they are serious present a proper motivated argument.

39. In regard to factual causation our courts have applied the 'but for' test (*causa sine qua non*). The accident and the injuries and its *sequelae* are closely linked and no facts have been presented that can conceivably rule out factual causation between the injuries and the loss of earnings. In relation to legal causation it was held by Nienaber JA in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*¹ at [51], that "*But it may be worth noting that this Court's approach to legal causation within other disparate fields such as crime, delict, insurance and latterly, perhaps, estoppel, has undergone considerable evolution in recent years by the development of a new model for causation sometimes termed the flexible or supple test. (Compare S v Mokgethi en Andere 1990 (1) SA 32 (A) 39I-41A; International Shipping Company (Pty) Ltd v Bentley 1990 (1) SA 680 (A) 700H-701F;*

¹ (416/99) [2001] ZASCA 82; [2001] 4 All SA 161 (A); 2001 (4) SA 551 (SCA) (1 June 2001) at [51]

Smit v Abrahams **1994 (4) SA 1** (A) 15B-18H; *Stellenbosch Farmers' Winery Ltd v Apostolos Vlachos t/a Liquor Den* case number 117/99, not yet reported.) In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* **[1994] ZASCA 146; 1994 (4) SA 747** (A) at 765A-B the new test was described, again by Corbett CJ, as: "... a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part."

40. The injuries and *sequelae* thereof have been proved on a balance of probabilities. It is accident related. The Defendant's contention that M[...] suffered a mild brain injury, as was put to the Neurosurgeon, is misguided and premised on speculation. Despite the baseless speculative nature thereof I allowed the Neurosurgeon to respond. He effectively addressed the issue and buried the Defendant's contention for good by explaining, as more fully set out above, that the established significant *sequelae* (supported by the tests performed by the Clinical Psychologist) would probably in any event have presented even if mild brain injury was diagnosed, and he ruled out other possible causes for the *sequelae*. The Neurosurgeon testified accepted research shows that approximately 15% of injured persons suffering from a mild brain injury would in any event suffer from the serious permanent psychological *sequelae*.

41. The high water mark of the Defendant's contentions relating to causation is that the experts employed by the Plaintiff '*...relied too heavily on speculation to support the claim of the minor child..*' and that '*..the factual evidence provided to court by the Plaintiff is that the minor's lack of interest and failure to study is the factual reason and cause for the minor's poor academic performance.*' I disagree with the Defendant's aforementioned contentions. The Defendant failed to assess the undisputed evidence as a whole. The factual evidence establishes the injuries and the immediate onset of the *sequelae* (impairments and diminished capacity). The permanence of the injuries was not disputed and the aforementioned serious psychological *sequelae* are indisputable absent countenancing expert evidence. The factual evidence established proximity between the accident and the injuries, as well as the *sequelae* thereof, and the experts based their expert opinions thereon.

42. Based on the facts and expert evidence presented I accept the diagnosis of a mild to moderate brain injury. The proposed treatment cannot alter the seriousness of the brain injury.

43. Absent any evidence, the Defendant failed to provide any assistance to deciding factual and legal causation ‘... *between the injuries sustained in the accident in question and the minor suffering a future loss of earnings.*’

44. I apply a flexible practical common sense approach to legal causation. I am of the view that the Plaintiff established both factual and legal causation between the accident and the loss of earnings. M[...] has a clear capacity loss. She presents with a significantly reduced capacity to earn and progress in her career. She will not be able to reach her pre-morbid potential. Her ability to enter the labour markets will be delayed and shall not be a walk in the park. Her ability to sustain employment is affected.

45. I apply the reasoning in the Advocate Viljoen case. M[...] did not testify either. She could have given greater clarity regarding her future aspirations and plans. I have, however, been provided with the expert reports on which I rely. M[...] was in grade R at the time of the accident and 16 years of age at the time of the trial. She failed the year after the accident. Her school results are mixed. Mixed results are not according to the experts out of the ordinary for a brain injured person. She is struggling at school and she suffers from significant behavioural and emotional sequelae, as well as memory difficulties.

46. The Educational Psychologist and the Industrial Psychologist considered her school results. It is improbable that she will be able to progress beyond grade 11. She has been condoned before and it is likely that she has been condoned again. Pupils may not be condoned in grade 12. Grade 11 will, accordingly, be her highest qualification. She will, accordingly, no longer be able to enrol for and obtain an NQF5 qualification. She displays cognitive as well as memory and attention deficits. Her significant emotional and behavioural symptoms have and will be impacting negatively on her ability to learn and achieve. These deficits are in keeping with a mild to moderate brain injury with significant emotional and behavioural sequelae.

47. She has become a vulnerable individual who would have to compete with able bodied persons in an informal sector of the labour market where the supply exceeds the demand. Her cognitive decline and significant psychological sequelae will have an ongoing permanent impact on all aspects of her daily living, including her ability to study or secure and sustain employment.

48. The parties apply different contingencies and a different approach to the quantification of the loss of earnings. The Plaintiff contended for the application of an actuarial based approach and the Defendant for a lump-sum approach. The Plaintiff arrives at R5 988 217.20 and the Defendant R855 459.60. The Plaintiff applied a 30% post morbid contingency deduction to M[...]’s estimated future income. The Defendant used the same income pre- and post morbid and applied a 10% differential.

49. In determining the quantum of M[...]’s loss of earnings I will place some reliance on the figures used and calculations performed by the actuary employed by the Plaintiff and apply contingencies deductions. The actuarial calculation is based on reasonable (plausible) scenarios postulated by the Educational Psychologist and Industrial Psychologist. Because M[...] did not enter the labour market I intend to award a fair and reasonable lump-sum award for her future loss of earnings. I am not tied by the actuarial calculations and the contingencies suggested by the parties. I have a large discretion to award what I consider, on the basis of the facts of this case, as fair and adequate compensation under the circumstances.

50. Van der Merwe v RAF² with reference to in Mutual Insurance Association v Maqula³ held that *‘It is settled law that a trial court has a wide discretion to award what it in the particular circumstances considers to be fair and adequate compensation to the injured party for his bodily injuries and their sequelae.’*

51. The parties presented estimates of the total monetary value of what an

² [2020] JOL 49701 (FB) at [20]

³ 1978 (1) SA 805 (A) at 806

uninjured M[...] would have been capable of bringing into her patrimony and the total present day monetary value of what an injured M[...] would be able to bring into her patrimony during the course of her productive working life. The difference/shortfall between these values represents an estimate of her patrimonial loss. I refer to *Prinsloo v RAF* in this regard.⁴ Fair and reasonable contingency conceptions must be applied to the shortfall and I will take the facts as a whole into account. I refer to *RAF v Guedes*⁵ and *RAF v Kerridge*⁶ and *NK v MEC for Health Gauteng*.⁷ Contingency deductions are applied irrespective of whether an actuarial method is applied or a lump-sum is awarded.

52. I am alive to the *dictum* in *Kerridge* at [25] with reference to *Rudman v Road Accident Fund*⁸ that: “[25] *Indeed, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income.*”

53. In the context of different methods of calculation it was held in *Goldie v City Council of Johannesburg*⁹ that: “[B]ut if the fundamental principle of an award of damages under the *Lex Aquilia* is compensation for patrimonial loss, then it seems to me that one must try to ascertain the value of what was lost on some logical basis and not on impulse or by guesswork.”

54. M[...] should be compensated for her diminished earning capacity. In **Sanlam Versekerings Maatskappy v Byleveldt**¹⁰ Rumpff JA, states the principle as follows at at p. 150B-D: “*In ‘n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoënsposisie*

⁴ 2009 (5) SA 406 (SSE at [5])

⁵ 2006 (5) SA 583 (SCA) at [9]

⁶ 2019 (2) SA 233 (SCA) at 42]-[44]

⁷ 2018 (4) SA 454 (SCA) at [15]-[16]

⁸ 2003 2) SA 234 (SCA) at [11]

⁹ 1948 (2) SA 913 (W) at 920

¹⁰ 1973 (2) SA 146 (A)

van die benadeelde vóór die onregmatige daad en daarna. Kyk bv., *Union Government v. Warneke* **1911 A.D. 657** op bl. 665, en die bekende omskrywing deur Mommsen *Beiträge zum Obligationenrecht*, band 2, bl. 3. Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie.”

55. In similar vein, in ***Dippenaar v Shield Insurance Co Ltd*¹¹**, the Court articulated the principle in the following terms at 917B-D: *“In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears: “In later Roman law property came to mean the universitas of the plaintiff’s rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act of damage and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland. See also Union and National Insurance Co Ltd v Coetzee 1970 (1) SA 295 (A) where damages were claimed and allowed by reason of impairment of loss of earning capacity.”*

56. Hartzembeg J dealt with the legal principles applicable to a quantification of damages for loss of earning capacity in *Road Accident Fund v Maasdorp*,¹² where he held that: *'The question of loss of earnings and loss of earning capacity is a vexed*

¹¹ 1979 (2) SA 904 (A)

¹² (1552/1999) [2003] ZANHC 49 (21 November 2003).

one and is often considered by our courts. Usually, the material available to the court is scant, and very often, the contentions are speculative. Nevertheless, if the court is satisfied that there was a loss of earnings and/or earning capacity, the court must formulate an award of damages. What damages the court will award will depend entirely on the material available to the court.'

57. Van der Schyff J (Mabuse J et R Matthys AJ concurring) held in Advocate Viljoen N.O v Road Accident Fund¹³ that:

"[13] When a claimant's loss of earning capacity is assessed, courts essentially use one of two methods. (Southern Insurance Association v Bailey NO 1984 (1) SA 98.) The first is establishing a reasonable and fair amount based on the proven facts and the prevailing circumstances. This entails the determination of a lump-sum that the court regards to be fair and just in the given circumstances. The second approach is to establish an amount by a mathematical calculation based on the proven facts of the case. Millard (D Millard, 'Loss of earning capacity: The difference between the sum-formula approach and the 'somehow-or-other' approach', Law, Democracy & Development 2007, vol 11:1.) opines that courts are likely to follow the first approach in circumstances where it is impossible to make a mathematical calculation, for example, where the claimant is a minor who has not yet embarked on a career path.

[14] This court must take into consideration the fact that the plaintiff did not testify in person. There was no direct evidence from her. Her evidence would have been valuable in assessing what the future might hold for her. This, however, does not mean that the court cannot consider the evidence of the expert witnesses. It does, however, impact on the quantification method that will be utilised. It is impossible to accurately determine the patient's post-morbid progression without evidence of how the claimant sees and experiences her future unfolding. In the claimant's absence, insufficient light was shed on the reason for her failing her first year and why she did not consider another study field. Due to the patient's failure to testify, a

¹³ (A76/19) [2021] ZAGPPHC 461 (19 July 2021)

considerable measure of uncertainty prevails. This disregards the application of a purely mathematical model, even if higher than normal contingencies are applied. It is trite that in these circumstances, the court may decide to fix a lump sum as compensation, although it considers the actuarial calculations as one of the factors in determining the award.

[15] Even in determining a lump-sum, the court is guided by the evidence before it.'

58. The approach towards a determination of a loss of earning capacity was articulated as follows in *Southern Insurance Association Ltd v Bailey* No:¹⁴

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of a loss.

It has open to it two possible approaches. One is for the Judge to make a round estimate on an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try and make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non possumus attitude and make no award."

59. It was further held by Nicholas JA in *Southern Insurance Association v Bailey* NO¹⁵ that *"where the method of actuarial calculations is adopted, it does not mean that the trial Judge is tied down by inexorable actuarial calculations. He has a large discretion to award what he considers right"*. The amount of any contingency deduction may vary, depending upon the circumstances of each case. Nicholls JA

¹⁴ 1984 (1) SA 98 (A),

¹⁵ 1984 (1) SA 98 (A) at 116-117

further held that “[42] Contingencies are arbitrary and also highly subjective. It can be described as no better than the oft-quoted passage in *Goodall v President Insurance Co Ltd*,¹⁶: “In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of forfeiting the future, so confidently practiced by ancient prophets and soothsayers, and by augurs, of a certain type of almanack, is not numbered among the qualifications for judicial office.”

60. Zulman JA, in *Road Accident Fund v Guedes*¹⁷, with reference to various authorities including *Southern Assurance* decision, held that “*The calculation of the quantum of the future amount, such as loss of earning capacity, is not as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, southern insurance Association Ltd v Bailey NO) courts have adopted the approach that, in order to assist in such calculation, amount to be awarded as compensation and the figure arrived at depends on the Judge’s view of what is fair*”.

61. Stratford J, in *Hersman v Shapiro and Co*,¹⁸ held that:

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.”

62. Holmes JA, in *Anthony and Another v Cape Town Municipality*¹⁹ held that:

“I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not

¹⁶ 1978 (1) SA 389 (W) at 392H-393A. Also reported at [1978] 1 ALL SA 101 (W - Ed)

¹⁷ (611/04) [2006] SCA 18 RSA

¹⁸ 1926 TPD 367 at 379

¹⁹ 1967 (4) SA 445 (A) at 451 B-C

inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see Pitt v Economic Insurance Co. Ltd., 1957 (3) SA 284 (N) at p. 287, and Turkstra Ltd v Richards, 1926 TPD at 282 in fin - 283.”

63. Chetty J, in *D’Hooghe v Road Accident Fund*,²⁰ held that:

“In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an “informed guess”, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge’s “gut feeling” (to use the words of appellant’s counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920.)”

64. It was held in *Sigournay v Gillbanks*²¹ that: *“Where there has been a change in the situation between the date of the delict and the date of the judgement, this change may affect the amount of damages.”* No changes in the situation applies.

65. Visser & Potgieter²² states the following: *“... the assessment of all damages (general and special) takes place at the time of the damage – causing event, whereas for purposes of quantification of the damages to be awarded, all facts and other evidence available at the time of quantification are taken into account.”*

66. I am of the view that the Plaintiff, in her assessment of contingencies, failed to place sufficient weight on the risk posed by M[...]’s suicidal tendencies. I intend to take same into account when I apply contingencies as part of a lump-sum award. I also disagree with the Defendant’s postulation of contingencies. A 10% differential is completely out of touch with the facts of this case. An application thereof will be unduly unfair to the Plaintiff. I must be fair to both parties. It is, accordingly, possible

²⁰ 2010 (6J2) QOD 1 (ECP) at J2-8

²¹ 1960 (2) SA 552 (A) at 557

²² Visser & Potgieter *supra*, at [6.7.4 – 6.7.5]

that M[...]’s life expectancy may be less than the life expectancy used by the actuary. She will experience periods of unemployment by reason of incapacity due to illness or incapacity due to illness or accident, or to labour unrest or general economic conditions. Her behavioural issues will prevent her from securing and maintaining employment. Especially her uncontrollable aggression seriously complicates her employability. I accept that grade 11 will be her highest qualification and that she had the pre-morbid potential to pass matric and *‘would have probably entered the labour market with an NQF level 5 qualification in a more practical field (such as Hairdressing or Hospitality etc.)’* She will no longer be able to achieve an NQF level qualification.

67. The facts and opinions and findings of the experts provides a logical basis for assessing the value of her loss of earnings. It places the case outside the realm of ‘impulse’ or ‘guesswork’. The significant neurocognitive and behavioural sequelae of her permanent mild to moderate brain injury and impact thereof on her functioning and employment have been explained by the experts. A marked difference between M[...]’s pre- and post morbid income earning potential has been established. She is a vulnerable first entrant to the labour market and will suffer an actual loss of earnings.

68. The common cause injuries forms the basis for the claim for loss of earnings. A proper basis has been provided of the postulation of the minor child’s pre-morbid and post morbid income earning potential. It is in keeping with the expected outcome. I accept the experts’ opinions and findings and base my judgement thereon.

69. I determined the loss of earnings as realistically as possible based on the evidence presented and assumptions based thereon. I am unable to apply a strict actuarial calculation approach as career and income details are not available.

70. The minor child’s prospects to fulfil her potential in the formal and/or informal sectors of the open labour market has been severely curtailed. Her potential is trapped by the injuries and its *sequelae*. Her loss of earnings is determined by the clear difference between her uncontested pre-morbid and post morbid income earning potential. Her pre-morbid employment outlook has manifestly changed.

71. It was held in the *Bailie* case²³ referred to supra that: *“The generalisation that there must be a ‘scaling down’ for contingencies seems mistaken. All ‘contingencies’ are not adverse and all ‘vicissitudes’ are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets, and ignore the rewards of fortune.”*

72. In support of the Defendant’s contentions regarding contingencies it presented the following argument: *‘To substantiate the case law discussed in paragraph 8 above, the considerations applied to the contingencies are based on the following reasons:*

- 1. The fact that the Defendant and case lines were not furnished with pre-accident scholastic reports of the minor child in order to consider scholastic performance.*
- 2. With learning support the minor child is capable of completing her schooling based on the reports that are made available to the defendant and the court*
- 3. The fact that all experts do suggest and give recommendation to treatment and psychotherapy in order to address and improve the minor child’s abilities*
- 4. The fact that had the accident not occurred, any other unforeseen event could have happened that could have hindered the minor’s scholastic abilities and achievement*
- 5. That according to the educational psychologist, Mr Kubheka, the minor was emotionally compromised due to additional reasons unrelated to the accident in question*
- 6. That the cost of education could hinder or delay the scholastic prospects of the minor child given the current education system.*
- 7. The educational psychologist report is inconclusive as it excludes the prospects and career path based on remedial schooling.*
- 8. The career pre-accident career choices such as hairdressing and hostessing still remain a viable option as there is no NQF5 qualification pre-requisite for same.’*

²³ at 117C-D

73. The Defendant did not object to the belated discovery of M[...]’s reports. Certain of the experts had sight of her reports. It cannot be refuted that M[...] is struggling at school, that she has been condoned and that she will not be able to complete grade 12. The Educational Psychologist and Industrial Psychologist dealt with M[...]’s scholastic outcomes and struggles and established a sound basis for their indisputable opinions and findings. The undisputed evidence is that psychotherapy is not curative of the permanent brain injury. It cannot alter the nature and the extent of the injury. It could potentially control mood, but cannot compensate for cognitive and memory impairments, which ultimately affects M[...]’s ability to assimilate, memorise and retrieve information. The potential emotional effect of other factors have not been established. Such alleged factors such as the passing of her father cannot constitute a factor which could result in the serious psychological sequelae. Her father was in any event an absent father. The sequelae presented immediately after the accident. No other factors have been shown to have any effect of interest on her post-morbid deficits and reduced level of functioning. The Respondent’s contentions are not based on facts or any opinion by any expert and it is not supported by the facts. The 6th point is misguided. It is contradicted by the evidence. The evidence presented on behalf of the Plaintiff clearly established that no amount of remedial schooling or a career path premised thereon could alter the outcome or reduce the loss of earnings. The argument that pre-morbid career choices remained an option is equally misplaced. No expert supported the Defendant’s contention. It is improbable that, considering M[...]’s psychological profile, she would be able to qualify and secure employment as a hostess or hairdresser as suggested by the Defendant. The Defendant is grasping at straws. The manner in which this case was conducted shows that the Defendant has lost touch with its purpose. There is, accordingly, no basis for or merit in any of the Defendant’s contentions.

74. The assessment of contingencies is for the most part arbitrary. A 5% contingency in relation to a past loss is generally accepted. So is Dr. Robert Koch’s principle that a 0.5% contingency deduction be applied for every year of a person’s remaining working life.

75. I am in agreement with the Plaintiff's contention that a 25% pre-morbid contingency deduction be applied "but for" the accident. Strydom J held in *Groning v Road Accident Fund*²⁴ that: *"With regards to the minor in casu and his specific capabilities, I am of the view that, a 25% pre-morbid contingency deduction would cater for the risk that he might not have (even if the accident had not occurred) obtained the certificate/diploma level. This caters inter alia for the eventualities that his studies may have taken longer, financial restrictions or that he would have failed more grades, giving the pre-existing learning disabilities."* The Defendant argued that a pre-morbid contingency deduction 'in the region of 30%. should be applied.

76. The Defendant allowed for the same pre- and post morbid income and applied a 10% differential. The facts and opinions and findings of the experts do not support that M[...] will earn the same income having regard to the accident. It establishes a substantial decreased income earning capacity which translates into a substantial reduced ability to earn.

77. I accept as part of my rough estimate of the loss of earnings that a 25% contingency deduction to M[...]’s income if the accident did not occur (but for) be applied. Therefore, R 8 554 596 less 25% contingency deduction in an amount of R 2 138 649 = R 6 415 947. In the process of determining fair and reasonable compensation I also take into account the value of the amount at which M[...] would have entered the open labour market. M[...] has not been rendered entirely incapacitated. She should make use of counselling for her anger issues. It is impossible to determine the amount which she would be able to earn or her life expectancy with any measure of certainty. I must, accordingly, do the best I can with the available evidence.

78. Taking all the aforementioned factors into account I apply a 40% contingency to her pre- morbid estimated income in an amount of R2 566 378 (R 6 415 947 x 40%) and deduct the said sum from the estimated amount which she would have earned (R 6 415 947 less R2 566 378) = R3 849 567 (three million eight hundred

²⁴ [2019] JOL 42902 (GP).

and forty nine thousand five hundred and sixty seven rand).

79. I award a lump-sum award in the amount of R3 849 567 (three million eight hundred and forty nine thousand five hundred and sixty seven rand) to the Plaintiff in her representative capacity. The lump-sum constitutes the best rough estimate and fair compensation for her loss of earnings based on the facts of this case.

Protection of damages award

80. The Plaintiff's objection to the protection of the damages award was conveyed to me twice during the course of the hearing. The Plaintiff subsequently had a change of heart and proposed that a protective trust be established for the protection of the damages award. The Plaintiff uploaded a draft order on CaseLines containing proposed provisions for a protective trust.

81. The Full Court in *In Re Protection of Certain Personal Injury Awards* (Pretoria Society of Advocates and others amici curiae)²⁵ addressed the Master's of the High Court's concerns that ambiguous court orders confused the Master's powers under the Administration of Estates Act 66 of 1965 (Administration of Estates Act) with those under the Trust Property Control Act 57 of 1988, and the perceived attempt to circumvent the controls in the Administration of Estates Act by creating trusts rather than appointing curators *bonis*. It was further held that protective trusts as a protective mechanism is tenable in law and that the purpose of a protective trust is to protect the damages awards to ensure that the *'award should be available as an ongoing source of financial support for the remainder of the plaintiff's lifetime.'*

82. The Court should give due consideration to all relevant facts in deciding between the creation of a protective trust and the appointment of a *curator bonis*. It was further held in *In Re Protection of Certain Personal Injury Awards* that *'In matters against the RAF, it may be necessary for the plaintiff to adduce evidence regarding the remuneration of the curator bonis or trustee, particularly in relation to the*

²⁵ 2022 (6) SA 446 (GP)

*undertaking, which will entail evidence as to the expectations regarding complexity, time, and expertise required to administer such undertaking. Much will depend on the facts of each case and the court must be provided with sufficient evidence to endorse the remuneration structure that is appropriate in each case.'*²⁶

83. The proposed protective trust contains the following proposed provisions:

'6. Plaintiff's attorneys, being, Nokufa Neluheni Inc, shall:

6.1. Cause a trust to be established in accordance with the provisions of the Trust Property Control Act No. 57 of 1988 in favour of the Plaintiff;

6.2. In the event that the Trust is not established as aforesaid, immediately approach this Honourable Court by way of application for further direction;

6.3. Be entitled to deduct their disbursements for professional services from the aforesaid amount.

The trust instrument, contemplated in paragraph 6.1 above, shall inter alia, make provision for the following: -

7.1. Mapheello is to be the sole capital and income beneficiary of the Trust;

7.2. For M[...] to be provided with an allowance, a monthly income from the proceeds of the trust, which shall include but not be limited to her educational expenses;

7.3. The Trust property is to be excluded from any community of property or accrual arising from any valid marriage concluded by M[...];

7.4. The sole purpose of the Trust is to administer the funds of M[...] in a manner which best takes account of her interests;

7.5. The number of Trustees for the purpose of transacting the business of the Trust (save for the appointment of Trustees) shall be three (3), and such number shall not be exceeded or reduced;

7.6. The appointment of at least, one (1) independent professional Trustee who should be properly qualified to administer the Trust assets;

The composition of the Board of Trustees and the structure of the voting rights of the Trustees to be such that: -

7.7.1. The calling and holding of meetings are specified;

²⁶ In Re Protection of Certain Personal Injury Awards, supra, at para [86].

7.7.2. *The taking of all resolutions is properly regulated and recorded in writing;*

7.7.3. *An adequate procedure is specified to resolve disputes between the Trustees;*

7.7.4. *The independent Trustee/s cannot be overruled or outvoted in relation to the management of the Trust assets by any Trustee who has a personal interest in the manner in which the trust is managed.*

7.7.5. *A deadlock between the Trustees is avoided;*

7.7.6. *The remaining Trustees are prevented and/or precluded from acting otherwise than to achieve the appointment of a replacement Trustee, in the event of their number being reduced below that prescribed;*

7.7.7. *To act in a tax-efficient and cost-effective way at all times, including but not limited to making investments and/or recovering their remuneration and/or costs;*

7.7.8. *No charge should be made by any Trustee in relation to the receipt of the initial payment to the Trust of the proceeds of the litigation.*

7.8. *The powers of the Trustees to be exercised with specific reference to the circumstances of M[...] and such to include but not be limited to: -*

7.8.1. *The right to purchase, sell and mortgage immovable property, invest and reinvest the Trust capital and/or income;*

7.8.2. *Applying the nett income of the Trust Fund and, if that is not adequate at any time for the purpose, the capital thereof, for the maintenance including, without derogating from the meaning of the term, the maintenance of the Plaintiff, her reasonable pleasures, entertainment, general upkeep, welfare benefits and rehabilitation and the acquisition or provision of residential facilities or a residence for the Plaintiff.*

7.8.3. *The income not used as aforesaid shall accumulate to the capital.*

7.9. *The duty of the Trustees to disclose any personal interest in any transaction involving Trust property to the Master of the High Court;*

7.10. *The amendment of the Trust instrument is subject to the leave of the High Court only;*

7.11. *The termination of the trust on the death of M[...] or with the leave of the High Court;*

7.12. *The right of the Trustees to pay the Plaintiff's attorney;*

7.13. *The Trustees shall be entitled to call for taxation of the Plaintiff's attorneys and client fee if deemed necessary;*

7.14. *Subject to the approval of the Master of the High Court, the nomination of the below-mentioned first trustees: -*

7.14.1. *Tshepo Mosimege - as an independent trustee whose consent is marked as "A."*

7.14.2. *P[...] G[...] M[...] (Mother of M[...]), an adult female, with identity number 8[...], and whose consent to act is annexed hereto marked "B".*

7.14.3. *Mohale Jona Rabothata, an Attorney of this Honourable Court, as an independent Trustee, and whose consent to act is annexed hereto marked "C".*

7.15. *The trustees should immediately take all the requisite steps to secure an appropriate bond/s of security to the satisfaction of the Master of the High Court for the due fulfilment of their obligations and to ensure that the bond/s of security be submitted to the Master of the High Court at the appropriate time as well as to all other interested parties;*

7.16. *That P[...] G[...] M[...] and Mohale Jona Rabothata be exempt from filing security as Trustee to the Master of the High Court;*

7.17. *Tshepo Mosimege, the independent trustee, is required to furnish security for the administration of the assets of the trust. His Trustee's fees for the administration of the trust are to be calculated at the rate of 1% per annum of the trust assets under administration, as indicated in the consent annexed marked as "A."*

7.18. *The provisions referred to above shall, in accordance with the provisions of the Trust Property Control Act No 58 of 1988, be subject to the approval of the Master.*

The Defendant has awarded M[...] an Undertaking in accordance with the provisions of Section 17(4) of the Road Accident Fund 56 of 1996 to compensate the Plaintiff in respect of the costs of future accommodation of M[...] in a hospital or nursing home, remedial schooling and remedial assistance or treatment for or rendering of a service or supplying of goods to M[...] after the costs have been incurred and on proof thereof, in respect of accident which occurred on 14th July 2014

The undertaking referred to above shall include payment of:-

9.1. *The costs of the creation and administration of the Trust and the appointment of the Trustee as referred to in paragraphs 6 and 7 above;*

9.2. *The costs of the Trustees in administering M[...]’s estate and the cost of administering the statutory undertaking furnished in terms of Section 17(4)(a) of the Road Accident Fund Act; and*

9.3. *The costs of obtaining an annual security bond/s to meet the requirements of the Master of the High Court in terms of Section 77 of the Administration of Estates Act, No. 66 of 1965, as amended.’*

84. It is not necessary for purposes of this judgement to deal in detail with the adequacy of the proposed provisions of the proposed protective trust.

85. I am astounded by the failure to protect the initial payment in an amount of R600 000. In response to my question the Plaintiff’s counsel stated that the general damages award were used to effect alterations to the home where M[...] lives. I have no idea in whose name the home is registered and/or whether there are any agreement in place to protect M[...]’s ‘investment’ in the alterations or the extent to which she derives and will derive a benefit therefrom in future. The aforementioned proposed provisions provide for the provision of accommodation and/or acquisition of a home for M[...]. What will happen to the improvements and/or alterations in such event?

86. I will not expose the damages award which I intend to make to the risk of being whistled away because I left it unprotected. I am intent on ensuring that M[...] received the full benefit of the damages award. The Plaintiff’s aforementioned objection strengthens my resolve to ensure the protection of the damages award.

87. A number of the proposed terms of the protective trust contained in the draft order are fluid. It lacks sufficient clarity and is open to more than one interpretation. I am not impressed thereby. The proposal that the Plaintiff and the attorney be exempt from furnishing security caught my attention. It will require a mountain of persuasion to convince me to allow an exemption.

88. The proposed protective trust includes the following term: ‘*The termination of*

the trust on the death of M[...] or with the leave of the High Court;’ The Plaintiff’s proposal that the protective trust be terminated upon M[...]’s death presupposes that the Plaintiff is agrees that the damages award not only requires protection, but that it be protected for life and that M[...] is unable to protect and manage her funds. The aforementioned objections were made earnestly on the express instructions of the Plaintiff. Based thereon I question the truthfulness of the Plaintiff’s motives and whether she is a suitable candidate to act as a trustee of a protective trust. The curator ad litem which will be appointed must deal with the manner in which the amount of R600 000 was spent, as well as my concerns.

89. I base the need for protection of the funds on the seriousness of the psychological sequelae. The damages award must be protected and managed for life. M[...]’s inappropriate behaviour commenced immediately after the accident and has persisted ever since. M[...]’s vulnerabilities extends to both her ability to secure and sustain work and her ability to protect and manage a substantial damages award.

90. I am concerned that M[...] may be unduly influenced and loose the necessary concept (if she has the concept) of prioritising between necessary and luxury purchases. I have serious doubt that she would be able to make sound investments and protect and manage a substantial damages award. Her impaired spatial planning ability contributes to the risk. It is improbable that she would be able to plan for the next sixty plus years to ensure that she does not end up penniless. She may very well fall pray to unscrupulous persons with ill intent and fair weather friends who will attempt to take advantage of her vulnerabilities.

91. The remaining question is whether a *curator bonis* should be appointed to M[...] or whether a protective trust Trust should be created.

92. I have first hand experience of at least 3 (three) instances, one recent, where protective trusts did not serve the intended purpose and failed the injured person.

93. Protective trusts should in my view only be considered as a vehicle to protect funds if all the boxes are ticked. Greed, lack of expertise and experience, and

succession of trustees all pose ongoing underestimated real risks. In my early days at the bar the establishment of trusts were the exception. Because it has seemingly become the norm the Court should be vigilant when it comes to the protection of damages awards of vulnerable exploitable persons.

94. The unrelenting demands of brain injured persons on trustees can take its toll and result in the resignation of trustees who simply had enough. I have seen this happen. The effect thereof can be devastating. I will be remiss in my duty if I do not act as an extension of an unbreakable golden chain of certainty to ensure that the *‘award should be available as an ongoing source of financial support for the remainder of the plaintiff’s lifetime.’*

95. The taxing nature of such appointments received mention in *Sandenbergh and Another v Master of the High Court and Another*²⁷ at [20] where Van der Schyff J referred to the evidence of an attorney and held that: *‘In reply, the Trustees state that managing the complexity of protective trusts is a monumental task. Mr. Sandenbergh explains that his office employs more than 15 people dedicated solely to administering the day-to-day needs of each individual Road Accident Fund claimant. The administrative burden imposed outweighs any commercial trust. The Trustees highlight that this reality is substantiated by the fact that Nedbank’s 2022 Fee Schedule under paragraph 4 of its terms and conditions to the trust fee schedule contains a qualification, providing that: ‘Fees are not applicable to Road Accident Fund trusts, medical negligence trusts and trusts holding interests in private entities. The fees for these trusts will be quoted and agreed on a case-by-case basis.’ [21] The Trustees submit that, in the ordinary sense, the administration of a traditional trust flows with relative ease. Trustees, furthermore, don’t have the additional administrative burden of interacting with a ‘recalcitrant paymaster’ such as the second respondent. This is juxtaposed with the administration of protective trusts.’*

96. I am of the view that the appointment of an experienced *curator bonis* should also be considered as an option. My view is supported by the nature and extent and

²⁷ (087032-2023) [2024] ZAGPPHC 436 (29 April 2024)

serious *sequelae* of the injuries, and the aforementioned need for protection.

97. Brain injured persons are amongst the most vulnerable individual. Their lack of insight and ability to plan and withstand pressures and influences and impulses are their achilles tendon and amongst the factors demanding protection of damages awards.

98. A *curator ad litem* should be appointed. The Court is the upper guardian of all minor children and the Court has an inherent power to perform an oversight role to ensure the protection of the funds.²⁸

99. I have not been favoured with all relevant information to enable me to make a reasoned decision in regard to the question whether or not the proposed protective trust should be used to protect and manage the damages award. I will make a decision after having considered the *curator ad litem*'s recommendation whether a protective trust or a *curator bonis* should be appointed to M[...] to achieve the lifelong protection of the damages award.

100. The *curator ad litem* must perform a detailed investigation and present his/her report to me for consideration. Both parties will be afforded an opportunity to consider the report and present legal argument in relation thereto, if required.

101. I require all relevant information to enable me to make a considered decision. I refer to the following passages in *In re: Protection of Certain Personal Injury Awards*:²⁹

“[58] We conclude therefore that for both principled and pragmatic reasons practitioners representing vulnerable plaintiffs in RAF and medical negligence matters (including curators ad litem where appropriate) should be permitted to apply to court for either the appointment of a curator bonis or for

²⁸ *In re: Protection of Certain Personal Injury Awards (Pretoria Society of Advocates and others amici curiae)* *supra* at paragraph 3

²⁹ *In re: Protection of Certain Personal Injury Awards (Pretoria Society of Advocates and others amici curiae)*, paragraphs 58-59

the establishment of a trust to protect the damages awarded. In each case it should be open to the court to determine whether the proposed protective mechanism will properly and effectively manage the award in the plaintiff's interests."

[59] *However, we are mindful of the pitfalls that have been highlighted arising from the ad hoc development of the trust route practice. In order to minimise these pitfalls, a court should be placed in a proper position to enable it to make a determination in each case as to whether the proposed protective mechanism is appropriate. This will require practitioners to provide the court with all information relevant to enable the court to make a proper determination as to whether it is proper to sanction the establishment of a trust rather than the appointment of a curator bonis. In addition, a court can, and should ensure that the powers and duties of the trustee are spelled out fully in the order and trust deed. Where appropriate, the court may impose additional obligations on a trustee to ensure that supervision by the Master is effective in terms of the Trust Act."*

102. The *curator ad litem* must have regard to the proposed guidelines for the development of the Practice Directive set out in ***In re: Protection of Certain Personal Injury Awards (Pretoria Society of Advocates and others amici curiae)***.³⁰

"[161](i) *In particular, the curator ad litem should be required to report to the Court on whether the appointment of a curator bonis, or the establishment of a trust is the most appropriate mechanism for the protection of the plaintiff's damages award.*

...

(bb) *Where the injured party is a child, unless circumstances exist justifying that it is not necessary to do so, a curator ad litem should be appointed to represent the child's interests and to make a recommendation to the court as to the form of protection that will best serve his or her interests."*

³⁰ 2022 (6) SA 446 (GP), para [161]

103. The *curator ad litem* must also deal with the costs for the establishment of a protective trust and the costs in relation to the administration of the trust assets, as well as the costs of a *curator bonis*. The parties failed to present any evidence in relation thereto. I refer to ***In re: Protection of Certain Personal Injury Awards at*** [72] - [90].³¹ It was held at [88] that:

“It will be incumbent on the parties to adduce evidence regarding the proposed remuneration and administration fees for which provision must be made. The evidence should cover the particular circumstances of the administration of the estate or trust, as the case may be. The structure of the fees and remuneration permitted must be delineated clearly in the court order and trust instrument.”

Costs

104. The costs must follow the result. The Defendant appointed a number of experts during 2019 and they produced medico-legal reports. The Defendant accepted the serious nature of the injuries sustained by M[...]. This is evident from the settlement reached in relation to the claim for general damages. Despite this the Defendant did not call any experts to testify at the hearing. It was made clear during the Defendant’s opening address that no experts will be called. For this reason the experts did not produce any joint minutes. It is illogical to appoint experts and not use their services. It is equally illogical to send counsel into battle without any ammunition.

105. The Defendant must have known that it did not have a sound basis to mount an attack on the opinions and findings of the experts employed by the Plaintiff. I am of the view, with the benefit of hindsight, that the Defendant’s objection to the application in terms of Rule 38 was vexatious.

106. The attack on the Neurosurgeon’s diagnosis in breach of the agreement reached in the aforementioned pre-trial minute is only an example of unacceptable

³¹ *Ibid*, paragraphs 72-90

conduct. The Defendant's aforementioned contentions are examples of the Defendant clutching at straws in the absence of any countenancing evidence.

107. The Defendant's counsel did not have any expert opinion to back her rogue cross examination of the Neurosurgeon and aforementioned contentions.

108. Notwithstanding the aforementioned criticism I have decided against grant granting costs on an attorney and client scale. The main reasons are that the Defendant came to the party during 2019 when it settled the merits and the claim for general damages and furnished an undertaking, and that a lump-sum award is a rough estimate.

109. I grant party and party costs to the Plaintiff, including counsel's fees on scale B, and I order the Defendant to pay the costs of the experts employed by the Plaintiff.

110. In these circumstances I make an order in the following terms:

Order:

1. The Defendant, in full and final settlement of the minor child's future loss earning, is ordered to pay the amount of R3 849 567 (three million eight hundred and forty nine thousand five hundred and sixty seven rand) to the Plaintiff in her representative capacity as the mother and legal guardian of the minor child, M[...] M[...].

2. Pending my decision regarding the mechanism for the protection of the damages award, as set out herein-below, the Defendant is ordered to pay the full amount of the damages award referred to in paragraph 1 herein-above into the Plaintiff's attorney's trust account by means of an electronic transfer for the sole benefit of the minor child, M[...] M[...], within a period of 180 days from the date of this order.

Trust Account as Follows:

NAME:	N[...] N[...] I[...]
-------	----------------------

BANK:	STANDARD BANK
BRANCH:	S[...] S[...]
TYPE OF ACCOUNT: TRUST ACCOUNT	
ACCOUNT NUMBER: 001324543	
BRANCH CODE:	1[...]
E-MAIL:	N[...]
REF NO:	M[...]

3. The Plaintiff's is ordered to procure that the Plaintiff's attorney of record invests and retains the full amount of the damages award referred to in paragraphs 1 and 2 herein-above, and the interest accrued thereon, in an interest-bearing trust account in terms of Section 86(2) of the Legal Practice Act No 28. of 2014, for the sole benefit of the minor child, M[...] M[...], pending the decision by Nigrini AJ in relation to the mechanism for the protection of the damages award.

4. The Plaintiff's attorney of record is directed to give effect to the order in paragraph 3 herein-above.

5. The Defendant is ordered to pay mora interest on the amount referred to in paragraph 1 above after the expiry of a period of 180 (one hundred and eighty days) from the date of this order to payment in full.

6. The Plaintiff is ordered to forthwith apply for the appointment of a *curator ad litem* to the minor child, M[...] M[...].

7. The Plaintiff's attorney of record is ordered to forthwith assist the Plaintiff to procure the appointment of a *curator ad litem* to the minor child, M[...] M[...].

8. The *curator ad litem* is directed to perform an investigation and prepare a report containing his or her recommendations for the protection of the damages award referred to in paragraph 1 herein-above.

9. The Defendant is ordered to pay of the costs incurred in relation to appointment of the *curator ad litem* and the preparation of his or her report.

10. Leave is granted to the parties to produce further evidence and/or present argument before Nigrini AJ in relation to the mechanism for the protection of the damages award and arrange a date for this purpose.

11. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on the High Court Scale, including counsel's fees on scale B, and including, but not limited to the fees relating to consultations, trial preparation, drafting of heads of argument, and the appearances on trial on 09, 10 and 11 October 2024.

12. The costs referred to in the preceding paragraph shall include, but not be limited to the following the costs in relation to the appointment of the following experts employed by the Plaintiff, including the costs of consultations, assessments, psychometric and other tests tests referred to in their respective medico-legal reports, the preparation of their medico-legal reports and addendums, as well as the costs incidental to the preparation of joint minutes, and reservation, preparation and qualifying fees, if any, as follows:

12.1. Mr Kubheka - Educational Therapist;

12.2. Dr Mpotoane - Specialist Neurosurgeon;

12.3. Mr Modipa - Clinical Psychologist;

12.4. Ms Matlabane - Occupational Therapist; 12.5 Ms Ngoako - Industrial Psychologist;

12.5. Gerard Jacobson - Consulting Actuaries.

13. The following will apply with regards to the determination of the aforementioned taxed of agreed costs:

13.1. The Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record;

13.2. The Plaintiff shall allow the Defendant until the 28th day of the month following taxation to make payment of the taxed costs from the date of settlement or taxation thereof;

13.3. Should the payment not be affected timeously, the Plaintiff will be entitled to recover interest at the rate of 11.50 % on the taxed or agreed costs from the 29th day following the month that taxation or settlement took place to the date of final payment.

14. The plaintiff's attorneys shall be entitled to pay the accounts rendered by the experts and counsel from the funds referred to in paragraphs 1, 2 and 3 herein-above.

15. No valid contingency fees agreement has been concluded.

By the Court

**DE WAAL KEET NIGRINI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Appearances:

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