

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

CASE NO: Y2012/202045

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE: 27 June 2025

In the matter between:

UYS JORDAAN obo S[...] M[...] E[...]

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Summary: Damages - claim-motor-vehicle accident. Section 17 Road Accident Act (RAF Act) and section 17(4) (a) RAF Act-Certificate. 100% liability settled. General damages and loss of earnings contested. Defendant liable for both general damages and loss of earnings. Contingency fees calculated at 25% for both *pre* and *post*-accident levels of education. General damages *postponed sine die* and loss of earning-to be paid within 180 days. Plaintiff to open a Trust Fund for the minor child.

NTLAMA-MAKHANYA AJ

[1] This is an application for damages brought by the Plaintiff on behalf of M[...] E[...] S[...] (minor child) against the Respondent in terms of section 17 of the Road Accident Fund Act 56 of 1996 (RAF Act). The action emanated from the injuries that the minor child sustained in a motor vehicle accident on 28 August 2011.

[2] The Plaintiff called Expert Witnesses to testify in person on the impact of the accident on the minor child, having submitted their reports for the benefit of this Court. The Plaintiff also made an application in terms of Rule 38(2) of the Uniform Rules of the Court for the admission of the reports of the said experts as files of records before this Court which was granted.

[3] The issue of merits in this case was settled at 100% in favour of the Plaintiff and received his section 17(4) undertaking certificate for 100% of his future hospital and medical expenses in February 2015.

[4] On 09 November 2021, Mr Uys Jordaan, whom I shall refer to as the Plaintiff or minor child for purposes of convenience, was appointed as *curator ad litem* to the minor child by Mavuma J. The outstanding issues in this regard which were left for determination by this Court were (i) general damages and (ii) the past and future expenses for loss of earnings of the minor child.

Background

Plaintiff's evidence

[5] The Plaintiff quantified the justification of his claim and relied on the expert reports who presented files of records and appeared in person to prove the injuries sustained by the minor child in the motor-vehicle collision. Further to concretise the proof with the effect such injuries have on short and long-term impairments on his mental health and body function. At the time of the accident, the minor child was three (3) years old and doing Grade 3 and now is at 14 years.

[6] As evident from the papers, the minor child was sent to Krugersdorp Netcare Hospital and then transferred to Charlotte Maxeke Academic Hospital. The minor sustained an injured left leg; superficial multiple lacerations on the face; severe bruising to the left arm; soft tissue injuries to the upper and lower legs; bilateral femur fractures and depressive disorder due to injuries sustained in the collision.

[7] The Plaintiff relied on the first expert an Orthopaedic Surgeon, Dr De Graad examined the minor child on two occasions, and his report: first 12 June 2012 and on his second consultation four years later on 08 February and provided report on 17 February 2016. He noted that the growth plate had closed permanently and apart from the shortening of the right leg, there was a distortion of the femoral condyles that resulted in incongruity of the knee joint. He suggested that a provision must be made for a knee replacement and revision knee replacement and indicated a need for knee arthrodesis later in life. He substantiated his findings by further proposals of the minor's follow ups with (i) the Orthopaedic Surgeon for the monitoring of the bone length discrepancy (ii) need surgery to be done as a result of the limb length and inequalities which may probably be done by lengthening the right femur than the closure the closure of the growth plate of the left femur and his further noting of the sustained fracture of the left distal femur which is referred by the Hospital Records as a Salter Harris type injury IV and "complex". On his further observation, there was a femoral growth plate and epiphysis that had an abnormal appearance that caused permanent damage to the growth plate and distal femur which shortened the right femur.

[8] The second expert relied upon was Dr June Rossi, a Neuro and Educational Psychologist who considered the medical report completed by Dr Erasmus that showed the sustenance of bilateral femur fractures which required surgery. The child awareness on his admissions at Krugersdorp Hospital at about 18h00 until 19h50 could also not be determined as the mother could not remember the accident which rendered her unconscious. Although a CT brain scan revealed no abnormalities, on admission at CMJAH periorbital ecchymosis was queried. Dr Erasmus then deferred the grading of

his head injury Dr Rossi who considered the relevant literature on the impact of injuries on children and noted that younger children remain at risk as M[...] was 3 years 4 months old at the time of the accident. The assessment done 4 years 9 months later meant that a child in a traumatic brain injury, a conclusive assessment could be done once the child is older.

[9] Dr Rossi further noted that although the grading of a possible head injury is an important factor in the etiology of his current neuropsychological, educational, behavioural and emotional problems, other accident- and non-accident related factors such as the (i) tragic death of his father, (ii) a traumatic separation from his mother who had been admitted to a separate ward, (iii) painful orthopaedic injuries for which he endured pain and a long period of recovery, (iv) the possible negative orthopaedic prognosis, (v) Mrs S[...]’s medical and psychological state of health and her inability in disciplining Mome who has become demanding and difficult, all contribute to his current problems and most of all the loss of Mome’s father has been traumatic and will continue to impact him severely and has lost a stabilizing influence on his life which is immeasurable. Post-morbidly, his physical injuries were deferred to the orthopaedic surgeon and occupational therapist because he has (i) neuropsychological, educational, behavioural and emotional problems and (ii) shows executive functioning problems which impact educationally, (iii) has written language and spelling difficulties; (iv) his anxiety and uncertainty affect his behaviour which impact on him educationally. His pre-morbid intellectual potential can be estimated by examining his pre-accident scholastic progress, familial educational achievement, and results on a current intellectual assessment. Further, although M[...] was enrolled at the school, it was too soon after the accident, thus, he passed all his grades, his post-morbid challenges can have a negative impact on his future. In the circumstances, his general recommendations were:

- (a) First, future medical treatment and expenses (i) whether M[...] sustained a head injury was deferred to a neurosurgeon, (ii) deferral the opinion of Dr M de Graad, the orthopaedic surgeon regarding treatment for his leg length discrepancy, (iii) recommendation for the testing of his eyes are tested, (iv)

deferral was given to social worker, Ms K du Buisson's recommendations, (v) a case manager should be appointed post-haste to monitor the home environment, (vi) despite the belief that routine and behavioural parameters would improve his attention and lessen his anxiety, she recommended a paediatric psychiatrist's opinion, (vii) deferral was given to the opinion of an occupational therapist regarding his physical functioning, (viii) recommended for a speech and language therapist/audiologist to examine his central auditory processing, (ix) recommendation was also made for 40 sessions of play therapy/counselling to help M[...] now and with future issues that may arise, and 20 sessions of support and guidance for his mother which cost R950.00 per hour.

(b) Secondly, his educational expenses, (i) need remedial assistance with written expression and spelling, (ii) recommendation for the monitoring and provision for extra lessons and study skills and training to determine his educational progression.

(c) Thirdly, loss of amenities of life were lost during his recovery and would need additional operations in the future.

(d) Fourthly, temporary/permanent disablement the expert noted the permanent disfigurement because of his scarring.

(e) Fifthly, loss of earnings and earning capacity that the (i) the accident has had an effect on his future which could affect his earning capacity, Physically, he has been limited vocationally because of his femur injuries. This was deferred to the orthopaedic surgeon and occupational therapist, (ii) although it was soon to predict how M[...] will progress, poor attention, labile and impulsive behaviour do not bode well for the future, and affect a person academically, vocationally, emotionally and socially, (iii) M[...] has the ability to pass a mainstream matric and obtain a diploma, but this is dependent on his cognitive, neuropsychological and psychological development. If he can receive psychological and educational support, his pre- and post-morbid intellectual potential was and is average (90-109) and he would have passed/is expected to pass Gr 12 and obtain a diploma, (iv) deferral was given to the industrial psychologist.

- (f) Sixthly, general damages for pain and suffering were noted by Dr De Graad that Mome suffered significant pain, and
- (g) Seventhly life expectancy was deferred to a medical expert for determination. Eighthly, a *Curator Bonis* A curator needs to be appointed for the protection of the funds.

[10] The third expert was Dr M Naidoo, a Psychiatrist, who said that the accident was a “watershed moment” in his life which was characterised by (i) loss of the father, (ii) his mother’s sustenance of the of traumatic brain injury; (iii) debilitating injuries that affected his self-esteem and (iv) his physical appearance and functioning. According to him, these characteristics presented a psycho-pathology which bears a link to the injuries he sustained in the collision as well as the subsequent changes in his life.

[11] The fourth expert was Ms Megan Clerk: Educational Psychologist, who, after her assessment recommended (i) the opinions of other experts to be heeded for M[...]’s future; (ii) deferral of the potential loss of earnings to an Industrial Psychologist; (iii) Play Therapy to address his emotional difficulties; (iv) Subject Guidance and Career Guidance for Grades 9-11/12 regarding his future and career prospects; (v) parental guidance to be provided to Mrs S[...] in understanding and being able to discipline M[...].

[12] The fifth expert, Ms Talia Talmud, having considered the opinions of other experts, recommended that the calculation of M[...]’s future loss of earnings should take into account he was left with physical, emotional/psychosocial, functional and cognitive limitations. She then deferred the treatment and cost of future treatment to other medical experts.

[13] The sixth expert was Katherine Gradidge's (Occupational Therapist) who noted that the minor child’s assessment revealed that:

- (a) his gait is antalgic to the right as he displayed an asymmetrical posture due to the leg length discrepancy;

- (b) his gross and fine coordination is poor;
- (c) his movement characteristics are slow and he is obese which leads to inappropriate behaviour and overfamiliarity.
- (d) his behavior was slightly inappropriate and overfamiliar;
- (e) he had poor perseverance on physically difficult test items with limitations of standing; walking and stairclimbing; and inability to crouch.
- (f) he has a decreased range of motion of the knees which presents a decreased muscle strength of the muscles of the hips, knees and right ankle, muscular endurance and his own reporting of the pain in the left ankle and knee.
- (g) he has poor fine manual control, or upper limb coordination, poor body coordination and strength and agility.

According to her, the minor child is best suited only for sedentary work and is precluded from manual tasks because he:

- presented poor perseverance on physically difficult test items and poor resistance to distraction;
- has slightly inappropriate and aggressive behavior; and
- displays poor general knowledge, visuospatial perception and bilateral integration.

[14] The seventh expert was the Social Worker, K du Buissen who was requested by Wolmarans Attorneys to formulate a holistic assessment with particular focus on the minor child's Psycho-Social needs following the accident on 28 August 2011. The Social Worker, in giving effect to her mandate, adopted a quantitative methodology and the summary of her report was presented as follows:

- (a) From a young boy with no health problems and developing within normal range of a three-year-old child, who enjoyed being active and participating in sporting activities, was no longer able to participate in sporting activities because of the orthopaedic injuries sustained in the accident.

- (b) He had many friends' pre-accident and knew how to manage himself socially and post-accident his friends no longer visit or invite him over.
- (c) He has become socially withdrawn and reclusive, as he has also endured constant teasing and bullying at school from his peers.

The Social Worker concluded that M[...]s life has become permanently and irreversibly altered due to the damage caused by his MVA. It has had far reaching consequences for him and his family.

[15] The eighth expert was the Orthotist: Chene Kerswill (Orthotist), who observed that the minor has not yet reached skeletal maturity and recommended that an external shoe build up. Further, there is a need for consideration for home modifications as the child battles to climb the stairs leading to the house and garden effectively, pain-free and safely. Also, his condition has serious repercussions which may be physiological, psychological, social, economic and ergonomic. As expressed by her, the restoration of some form of proper biomechanics, the correct shoe and lift should be manufactured and supplied which should be done in collaboration with a reputable multidisciplinary team for success.

[16] The ninth expert was GW Jacobson Consulting Actuaries and gave a report with the following actuarial calculations on an assumption of 65 years retirement age: -

Basis I Degree Level of Education

Future Loss:

Past loss income:	pre-accident	post-accident
	20%	25%

Loss of Income, Basis 1:

Pre-accident:	R10 005 165
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20% Contingency Deductions	<u>-R2 001 03.3</u>
	<u>R8 004 132</u>
Post-accident	<u>R3 518 780</u>
25% Contingency Deductions	<u>-R879 695</u>
	<u>R2 639 085</u>
Net Future Loss:	<u>R5 365 047</u>

Basis II: Honour's Degree Level of Education

Future Loss of Income:

Pre-Accident:	R13 209 040
20% Contingency Deductions:	<u>-R2 641 808</u>
	<u>R10 567 232</u>

Post-accident:	R3 518 780
25% Contingency Deductions:	<u>-R8 79 695</u>
	<u>R2 369 085</u>
Net Future Loss:	<u>R7 928 147</u>

Post future loss due to the Road Amendment Act 19 of 2005 wherein the loss of annual income at the time of the accident amounted to R189 017 was considered during the calculation which then reduced the post lost to the following:

Net Future Loss:	<u>R706 598</u>
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[17] The Plaintiff filed a notice for amendment and amended the Particulars of Claim. The Plaintiff in the amended Particulars of Claim claimed for the payment of the sum of R8 261 598.00 including interest thereof. The Court is now left with the question of determining the legal question on the liability of the Defendant regarding the general damages and future loss of past and post-accident earning capacity.

[18] On the other hand, the Defendant, as noted above that he did not have Expert Witnesses, his opposition to the claim was solely based on the credibility of the Plaintiff's Expert Witnesses Reports. On his submission, I will focus on his contention and not regurgitate his summary of the Expert's Opinion's Reports. He submitted:

[18.1] The Court to be cautious of Dr Naidoo's in accepting his testimony because it was riddled by inaccuracies. It was historic as he was supposed to have re-evaluated before making an informed opinion as he also did not use the screening tools such as DSM-5.

[18.2] The Educational Psychologist: Ms Clerk could not make a definitive opinion on the minor child's academic performance although there are glaring factors that the child never failed since Grade 4. Mr Clerk also did not have maternal and parental documentary proof that could have enabled her to postulate on how they academically performed.

[18.3] The Industrial Psychologist had unjustifiably put a dim light on the evolving economy of the country where people living with disabilities have the potential to get into the job market that is specifically reserved for them.

[18.4] The Defendant submitted that calculating the contingencies should be deviated from the normal 25% as a guideline from Guedes and Bailey and a 10% spread with higher contingencies of 50% and 60% will bring a reasonable and fair amount of R3 595 070.50. Further, Bailey was decided 41 years ago, and the economy of the country was different then.

Therefore, the above submissions necessitate their evaluation to determine the rationality of the Plaintiff's claim against the Defendant.

Discussion

[19] In this case, both parties' Heads of Arguments and all the experts' reports were of value in considering this matter. Although the Defendant did not have Expert Witnesses, his Heads of Arguments were concise and identified key issues of contention in the Plaintiff's Expert Reports and oral presentations. Further, this Court acknowledges the "frowned-upon approach" regarding the use of Experts in litigation against the Road Accident Fund. Satchwell J in *Bvuma v RAF*¹ held:

"This [...] is yet another example of the 'sausage machine outsourcing' approach to Road Accident Fund litigation. Where there was a claim for 'loss of earnings/loss of earning capacity', there was no attempt by any legal representatives to conduct any enquiry into or obtain any information about the plaintiff's factual situation of employment. Instead, the attorneys for both parties simply referred the plaintiff to a multitude of medical 'experts' resulting in an absence of factual information relevant to the claim for loss of earnings." (emphasis added).

[20] However, in this matter, I move from an exercise of caution in balancing the proof of the claim *vis-à-vis* the principles that underly the holding of RAF liable for motor-vehicle collisions. That caution was traceable to the historic development of the state's responsibility for motor vehicle collisions following the gap in the regulation of this area of the law. Such history was summarised by Moseneke DCJ as he was in *Law Society of South Africa v Minister of Transport*² who held:

"The statutory road accident compensation scheme was introduced only in 1942, well after the advent of motor vehicles on public roads. And even so, it came into effect only on 1 May 1946. As elsewhere in the world, statutory intervention to regulate compensation for loss spawned by road accidents became necessary because of an increasing number of motor vehicles and the resultant deaths and bodily injuries on public roads. The right of recourse under the common law

¹ 2012 SA (GSJ) at para 1.

² 2011 (2) BCLR 150 (CC) at para 17.

proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk. It seems plain that the scheme arose out of the social responsibility of the state. In effect, it was, and indeed [remains], part of the social security net for all road users and their dependants.”

[21] From the reading of Moseneke DCJ’s analysis of the history and the contributory effect it has today entails the continued affirmation of the liability of the Fund to pay for any damage that arose from a motor-vehicle collision. In this case, like in any other motor-vehicle collision wherein a claim has been lodged with the Road Accident Fund, the objects of the Fund are of paramount importance because they are a determinant of the liability of the Fund as envisaged in section 3 of the RAF Act that “[...] the Fund shall be [liable] for the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.” It is in this regard that RAF is obligated by section 17(1)(a) to compensate the victims of road accidents of all valid claims that have been submitted for consideration for payment.

[22] Accordingly, the liability of the Defendant is not a pure matter of being involved in a motor-vehicle collision but entails various factors that underly the proof of the claim against the Fund. For purposes of this case, the issue of liability was settled at 100% and general damages and loss of past and future earnings were contested. It is imperative that I consider these latter matters.

General Damages

[23] In this case, the Defendant opposed the awarding of general damages although the matter was even referred to HPCSA that confirmed the seriousness of the physical injuries as a “Salter Harris type 4 fracture. It is evident that the injuries would have serious implications for the future of the minor child. Let me repeat, the Defendant

admitted 100% liability; provided a section 17(4) certificate and offered an amount of R900 000. 00 as reasonable and fair compensation to the minor child. According to him, the offer was justified due to the impact of the injuries on the minor child relating to the need for future surgery of the limb inequalities and the provision for knee replacement and revision and arthrodesis. This admission does not need any further enquiry as the Defendant had already made for himself “a bed that he must lie on.” However, for the purpose of advancing his admission of damages, it is also imperative to state why the admission was justifiable in the circumstances.

[24] In this matter, the Defendant’s admission of 100% liability was the undisputed evidence that the minor child was involved in a motor-vehicle accident that was caused by the negligence and recklessness of his insured driver. The requirements of liability on the part of the insured driver were satisfied as prescribed by section 17(1) of the RAF Act. It is my opinion that the Defendant cannot fail to fulfil the objects of the Fund as envisaged in section 3 of the same Act when there is conspicuous evidence of the impact of the accident on the minor child. The Defendant has already proved that he committed wrongful conduct that was not in line with due diligence that was required of him as a reasonable driver in the circumstances. Mncube AJ in *D.B.S. obo Minor v Road Accident Fund*³ expressed the contention well and went further and gave meaning to the concept of “wrongfulness as an element of delictual liability that involve[d] a breach of a legal duty [which demonstrates] the test for factual causation [that is comprised of an] act or omission that proves the harm caused without which there can be no question of liability if it is not [shown] that the wrongdoer caused the damage [that gave rise to the two stage enquiry] regarding the factual enquiry on the defendant’s wrongful conduct which caused the harm suffered by the Plaintiff and the close link to the harm suffered.”

[25] In *casu*, the minor child, who was 3 years old at the time of the accident and at 14 years when his claim was considered by this Court, he is still a child as defined in the Constitution and the Children’s Act 38 of 2005 as “anyone below the age of 18 years”.

³ 2024] ZAGPHC 519 at paras 8-9.

This means that the child was under parental care and responsibility of his father whom he lost at the time of the accident. The underage status constitutes a measure to determine the Defendant's liability. The minor child's injuries were exacerbated by the loss of the father who could have taken care of him until he attains the age of majority. The age of majority is of direct link to section 28(2) of the Constitution and section 7 of the Children's Act that protect the "best interest" that should not be compromised. Of further importance is the fact that even if the child had to attain the age of majority if he was in a position of being unable to sustain himself, the father had still to carry that responsibility until he was able to sustain himself. As similarly expressed in *Makgoka J in Mofamadi v Road Accident Fund*⁴ and articulation of this position well that "majority is not the determining factor [because] the parent's duty does not cease at a particular age but obliged to continue supporting the child up to self-sufficiency." Therefore, the consequent result of the accident was of direct linkage of the cause with harm suffered by the child with a negative impact on the principle of the "best interest of the child". This meant that there was an unwavering cause of the harm suffered by the minor child.

[26] It is also my further opinion that the dysfunctional family was also not to be used as a measure of evading liability because of his parent's circumstances. The instability in his home environment should not be placed on his shoulders. The fact that a *Curator* was appointed to look after the affairs and interest of the minor child does not absolve the Defendant of his liability. The responsibility of the *Curator* is not the subject matter in this Court, and I will not even delve into his role. Thus, it was not legally sustainable that a child's parental circumstances could be construed and serve as a bar to the claim for delictual damages arising from a motor-vehicle accident. Therefore, it is my affirmative view that the Plaintiff suffered actual loss and is entitled to general damages as evidenced by the conspectus of factors presented before this Court. It is my view that the Defendant's liability for general damages should not be interpreted independently of the loss of past and future earnings.

Loss of Earnings

⁴ (34221/06) [2012] ZAGPHC152 (3 August 2012) at para 30.

[27] The determination of the loss of earnings is subject to the judicial discretion of the court. However, this Court, having been provided with evidence that was quantified by the Expert's opinions, it is of fundamental importance that it addresses the question of the loss of earnings as a contested matter. It was placed before this Court that the child suffered past and future loss of earnings. The injuries that he sustained during the collision were not only physical but extended to his mental health and toughness which, as opined by the experts, might have psychological effects and negative bearing on his future life. Accordingly, from the experts' reports, the permanency of physical injuries affect the level of the minor child's psychological, neurosurgical, cognitive and occupational functioning. In this regard, the experts recommended the ongoing treatment, failing which without such, the post-accident harm will have serious and negative impact on him in the future.

[28] The Defendant opposed and argued vehemently against the evidence of Dr Naidoo who, after the first assessment, only assessed the minor child after four years. I will confine the opposition to Dr Naidoo's historic assessment because the physical injuries were confirmed by HPCSA as a credible national body in the regulation of health profession at large. Therefore, Dr Naidoo's historic assessment is of direct link to the recent reports produced by other experts. In this regard, the Defendant argued that Dr Naidoo's evidence was not credible due to the lapse of time after the first assessment of the minor child. This argument is misplaced because the evidence presented in this Court was not taken in a piecemeal fashion but holistically as a framework against which to determine the effect of the accident on the minor child. The fact that the child remained scarred, having psychological trauma and other factors that were presented before this Court served as a key content of the Defendant's liability. Further, the Defendant brought to the attention of this Court a scholarly article by Van der Bilj and Pienaar entitled: "*The DSM-5 and the role of personality disorders under criminal law*"⁵ who argue for the recent criteria on an organizational structure of mental disorders in a criminal context. I find difficulty of the relevance of the argument in that article because

⁵ 2014 (35) *Obiter* 316-335 at 316 and para 21.6 of the Heads of Arguments.

it's focus was solely to "*establish the role of mental disorders in a criminal context*," (emphasis added). This is a civil matter, and the Defendant did not justify the indirect application of criminal law principles in a civil action matter. Let me repeat, as argued by the Defendant, the lack of the veracity of Dr Naidoo's evidence and testimony as being riddled with inaccuracies and contradictions was argued based on criminal law principles. It is my view that criminal law principles were ambushed in a civil law matter without being justified of their relevance and interdependence in addressing the determination of mental disorders.

[29] I am not persuaded by the application of the principles that are applicable in another context of law could be seen as of value in challenging the evidence that is applicable in a different setting of the law. This Court acknowledges that civil and criminal law principles might be interdependent, thus, they should be justified on how they influence each other in the application of the matter at hand. Further, the use of comparative law in that article as a secondary source of law, is not obligatory in this case to find its bearing in determining the quality of the evidence presented by Dr Naidoo. This Court is not to dispute the application and consideration of international law and foreign law in South Africa as envisaged in section 39(1)(b) and (c) of the Constitution. Thus, South Africa is not in any way bound to follow it as its application is subject to the discretion of the Court. The fact that section 39(1)(c) expressly says a Court "may" does not entail any obligation to apply foreign law even if the matter was civil in nature.

[30] It is my opinion that the integrity of Dr Naidoo's testimony was of value in that it was considered within the overall framework of other reports that endorsed the impact of the accident on the future of the minor child. Of importance, was the fact that HPCSA, a credible national institution that regulates the different health professions, provided a helpful insight into the quality of the assessment of the injuries of the minor child. Therefore, that disputed history by the Defendant was endorsed in the recent reports by other experts, which this Court did not consider separately from his testimony. That history provided a context then which served as a guide in interpreting the recent

context. It also offered a legal basis for legal arguments and circumstances as faced by the minor child. I am therefore not persuaded that Dr Naidoo's gap between the first and last assessment period was not of significance. It constituted the framework that served as a determinant of the root cause then and how the expert's reports found relevance in the minor's current situation.

[31] I also found it difficult to understand the Defendant's opposition of the opinion of the Industrial Psychologist about the Plaintiff's potential in finding work. His argument about the possibility of the Plaintiff finding work due to work that is purposively reserved for people living with disabilities is not sustainable and his defence falls flat on this ground alone. It is within public knowledge of lack of employment opportunities in South Africa for all people without distinction. The fact that there is a special focus on people living with disabilities is indicative of the vulnerability that continues to manifest itself about their lack of opportunities. This Court do acknowledge that the special consideration is a transformative measure as required by section 9 of the Constitution of Republic of South Africa, 1996 (Constitution) for the development of legal and other measures which are not meant to address the historic imbalances but the situations today. Those measures, even if they are developed, are not a guarantee that vulnerable people, as is the case of the Plaintiff will be immediately addressed. In the context of this case, I do find relevance to the argument being made by the Defendant as being progressive so that the Plaintiff and others who are similarly situated should not consider themselves as victims of their circumstances but as ordinary citizens that are entitled to equal rights and responsibilities. However, the child's psychosocial, being bullied at school with friends no longer inviting or visiting him and being mocked as having a high-heeled shoe meant that there is a potential for an inactive life that may impact on him progressing into the labour market.

[32] The key now in this case is the actual determination of the appropriate compensation for loss of past and future earnings that will coincide with the 100% admission of liability and a section 17(4) certificate. The Actuaries Report in the determination of the loss of past and future earnings is foundational to the overall

compensation that may, at the discretion of this Court, be awarded to the Plaintiff. I am also not to put any emphasis on the advantage of the exercise of judicial discretion to determine what could be a reasonable amount for injuries suffered. In *Southern Insurance v Bailey*⁶, the Court held:

“Any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of 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 to 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.”

[33] Pursuant to Jacobson Actuary calculations on *pre* and *post*-accident and since the Plaintiff was still a minor child, the value of the loss of earnings were calculated on the Basis 1 and II Levels of Education as follows:

First scenario (Basis 1)	pre-accident: 10 005 165
Second Scenario Basis II	pre-accident: 13 209 040
Post-accident:	R3 518 780
Net Future Loss at 25%:	<u>R5 365 047</u>
Net Future Loss at 25%:	<u>R7 928 147</u>

⁶ 1984 (1) SA 98 (A) at 113H-114.

Thus, due to the Road Amendment Act 19 of 2005 wherein the loss of annual income was at the time of the accident amounted to R189 017, the limitation was considered during the calculation which then reduced the post-loss to the following:

Net Future Loss: R706 598

[34] The contingency deductions were respectfully calculated at 20% and 25% by the Actuary. However, at the discretion of this Court, the contingency deductions consider both scenarios (basis 1 and 11) at 25%. This means the Plaintiff's past and future loss of income:

Net Future Loss: pre and post at 25%: R5 365 047

+R7 061 598

R12 426 645 / 2

Total Future Loss: R6 213 323.00

This is a reasonable amount these amounts are justifiable, which I am of the opinion are appropriate for compensating the Plaintiff. The Defendant submitted a 10% spread with higher contingencies at 50% and 60% to be considered by this Court. The submission is misdirected because the Plaintiff was still a minor and 3 years old at the time of the accident and to date at 17 years and has not even reached the age of majority. Further, the existing possibility of struggling to enter the labour market which may impact on self-sustainability let alone the physical and emotional consequences of the accident on his future life justifies the amount of compensation as viewed by this Court.

[35] Further, I will not interfere with the independence of the parties having agreed on 100% liability of the Defendant. This meant that the root cause of the claim in this matter was no longer in dispute and need not be interfered with. The arguments about the

technicalities on how to give effect to that agreed liability were of further value in this regard. The agreement settled enabled this Court to solely focus on how apply the balancing act in respect of the loss of earnings.

[36] In the circumstances, I am satisfied that the Plaintiff has fulfilled the primary responsibility of proving his claim against the Defendant. This case was not a matter of the Defendant having admitted 100% liability for wrongdoing. The Plaintiff had to prove the sustenance of the injuries that were caused by the negligent conduct of the driver without which the Defendant could have been absolved of liability.

ORDER

[37] Accordingly, the following order is made:

[37.1] The Defendant is ordered to pay 100% of the agreed or proven damages.

[37.2] The Defendant shall pay to the Plaintiff a Capital amount of R6 213 323 within 180 days (one hundred and eighty days) of this court order to the Plaintiff's attorneys: A Wolmarans Incorporated which shall be transferred to their trust account. The account details of the attorneys are as follows:

Name of the Bank	ABSA Bank, Northcliffe
Name of the Account Holder	A W[...] I[...]
Account Number	4[...]
Branch Code	6[...]
Reference Number	Ms G[...] / M[...] 1[...]

[37.3] Further, as agreed between the parties, the Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 Certificate for the costs of the future accommodation in hospital or nursing home or treatment of or rendering of a service to the Plaintiff

or supply of goods arising out of the injuries sustained by the Plaintiff in the collision that occurred on 28 August 2011.

[37.4] General damages and past medical expenses are *post poned* sine die.

[37.5] The Defendant is ordered to pay the Plaintiff the costs of this application in respect of the determination of quantum on Scale B which costs shall include the costs of expert witnesses:

[37.6] In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount due, calculated from the 15th calendar day after the date of this Order to date of payment.

[37.7] The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale in respect of both liability and quantum, up to and including 12th March 2025, and notwithstanding, and over and above the costs as allowed by the Taxing Master subject thereto that:

[37.7.1] In the event that the costs are not agreed:

[37.1.1] The Plaintiff shall serve a Notice of Taxation on the Defendant's attorney of record;

[37.1.2] The Plaintiff shall allow the Defendant 30 (THIRTY) days from date of allocatur to make payment of the taxed costs; and

[37.1.3] Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the prevailing rate on the taxed or agreed costs from date of allocatur to date of final payment.

[38] Such costs shall include, as allowed by the Taxing Master:

[38.1] The costs incurred in obtaining payment of the amounts mentioned in paragraphs 2 and 4.1 above;

[38.2] The costs of and consequent to the appointment of the curator ad litem, Mr U Jordaan;

[38.3] The costs of and consequent to the appointment of counsel on scale B, Adv N. Adam, including, but not limited to the following: trial preparation, counsel's trial day fee in respect of the trial dates of 11th March 2025 and 12th March 2025, and attending to the drafting of the heads of argument, the practice note and the draft order;

[38.4] The costs of all medico-legal, radiological, MR, sonar, pathologist, actuarial and addendum reports and/or forms obtained, as well as such reports and/or forms furnished to the Defendant and/or its attorneys, as well as all reports and/or forms in their possession and all reports and/or forms contained in the Plaintiff's bundles, including, but not limited to the following:

[38.4.1] Dr M. De Graad (Orthopaedic Surgeon);

[38.4.2] J Schutte (Radiologist);

[38.4.3] Dr de Villiers & Partners (Radiologists);

[38.4.4] Dr M Naidoo (Psychiatrist);

[38.4.5] 4.2.4.5 Ms C. Kerswill (Orthotist/Prosthetist);

[38.4.6] Dr J. Rossi (Educational Psychologist);

- [38.4.7] Ms M. Clerk (Educational Psychologist);
- [38.4.8] Ms K. du Buisson (Social Work Practitioner);
- [38.4.9] Ms K. Gradidge (Occupational Therapist);
- [38.4.10] Ms S. Stevens (Industrial Psychologist); and
- [38.4.11] Mr R. Immermann (Consulting Actuaries).

[39] The reasonable and taxable preparation, qualifying and reservation fees, in respect of the trial date of 11th March 2025 and 12th March 2025 in such amount as allowed by the Taxing Master, including but not limited to the following experts:

- [39.1] Dr M. Naidoo (Psychiatrist);
- [39.2] Ms K. Gradidge (Occupational Therapist);
- [39.3] Ms M. Clerk (Educational Psychologist); and
- [39.4] Ms S. Stevens (Industrial Psychologist).

[40] The reasonable costs incurred by the Plaintiff regarding the Minor's attendance at the medico-legal examinations of the Plaintiff's experts;

[41] The costs of and consequent to the Plaintiff's trial bundles and witness bundles, including the costs of 4 (four) copies thereof;

[42] The costs of and consequent to the holding of the pre-trial conferences.

[43] The reasonable travelling, travelling time, subsistence, accommodation and transportation costs, if any, and upon proof thereof, incurred by Minor in attending medico legal examinations with experts and in attending court on the day(s) of trial.

[44] The costs for the preparation, consultations, travelling and travelling time, to and attendance of the respective trial/s by the Plaintiff's representatives.

[45] The amounts referred to in paragraphs 36 and 37 will be paid to the Plaintiff's attorneys.

[46] The requisite steps shall be taken by the Plaintiff's attorney with a view to forming a Trust, inter alia, administering and/or managing the financial affairs of the Minor and that such Trust shall be formed within 6 (six) months of the date of this Order. Failing which the necessary application shall be lodged with the appropriate relief. The Trust's instrument shall provide for the following:

[46.1] The separation of the property of the trustee/s from the trust property;

[46.2] Ownership of the trust property vests in the trustee/s in their capacity as trustee/s;

[46.3] The independent trustee/s shall provide security to the satisfaction of the Master in terms of Section 6(2)(a) of the Trust Property Control Act 57 of 1988;

[46.4] Procedures to resolve any disputes shall be subject to review of any decision made in accordance therewith by the above Honourable Court;

[46.5] Amendments to the trust's instrument shall be subject to the leave of the above Honourable Court;

[46.6] The Minor shall be the sole income and capital beneficiary of the trust;

[46.7] The trust property is excluded from any community of property in the event of marriage;

[46.8] The trust shall terminate on the Minor's death, whereafter the trust assets shall devolve on his estate;

[46.9] The trust property and the administration thereof are subject to annual reporting by an accountant;

[46.10] At least two (2), but no more than three (3) trustees will be appointed, of which:

[46.10.1] shall be an independent and professional trustee being Fedgroup Trust Administrators (Pty) Ltd (Registration Number 1951/003389/07);

[46.10.2] One (1) shall be the Minor's aunt, Mrs Louise van der Linde, who shall be exempt from providing security to the satisfaction of the Master;

[46.10.2] A provision that if the number of trustees drops below the prescribed minimum, the remaining trustees are prohibited from acting other than to appoint a replacement trustee; and

[46.10.3] The trust deed may not be altered without the consent of the Court.

[47] Pending the creation of the Trust aforesaid, A Wolmarans Incorporated will invest the capital amount less the attorney and client fees and disbursements in terms of Section 86(4) of the Legal Practice Act 28 of 2014, with a financial institution, for the benefit of the Minor, the interest thereon, likewise, accruing for the benefit of the Minor, which investment shall be utilized as may be directed by the trustees of the Trust, when created.

[48] The party and party costs referred to in paragraph 37 above, as taxed or agreed, shall be paid by the Defendant directly into the trust account of A Wolmarans Incorporated for the benefit of the Plaintiff.

[49] After deduction of the legal costs consultant's fee for drawing the bill and attending to its settlement or taxation, the balance shall be paid into the Trust, unless same has not yet been created, in which event, such balance shall be invested in terms of Section 86(4) of the Legal Practice Act 28 of 2014, with the relevant financial institution, for the benefit of the Minor, the interest thereon, likewise accruing for the benefit of the Minor and shall be utilized as may be directed by the trustees of the Trust, when created.

[50] There is no contingency fee agreement.

**N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines, and its date of delivery is deemed 27 June 2025.*

Date of Hearing: 11-12 March 2025

Date Delivered: 27 June 2025

Appearances:

Counsel for Applicant: Advocate N Adam

Instructing Attorneys: A Wolmarans Inc

Defendant:

The State Attorney
Mr L Mtshemla