



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 3987/2017

In the matter between:

ADV CLAIRE CAWOOD obo LWANDO MTSHAMBA

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

Judgment Reserved: 15 April 2025

Judgment Delivered: 7 August 2025

JUDGMENT

HOLDERNESS J

A. INTRODUCTION

[1] On 11 April 2016, between Phillipi and Lentegour Stations, Mr. Lwando Mtshamba (Mr. Mtshamba), an adult male former construction worker who was born on 2 July 1997, was attacked by unknown assailants on a train operated by the defendant (the incident).

[2] Mr. Mtshamba was thrown from the train by his assailants. He sustained serious bodily injuries, including head injuries with fractures, severe traumatic brain injuries resulting in significant residual cognitive and cognitive communicative problems, psychological problems, and a neurocognitive disorder. He further sustained a C1 cervical spine fracture, a right medial malleolus ankle fracture, and lacerations to his scalp, forehead and right elbow.

[3] The plaintiff, Adv. Claire Cawood, a practising advocate and member of the Cape Bar, acts herein in her representative capacity as the duly appointed curator *ad litem* to Mr. Mtshamba. The merits of the claim have been settled on the basis that the defendant is to pay 80% (eighty percent) of Mr. Mtshamba's proven or agreed damages arising from the incident.

[4] The plaintiff in her amended particulars of claim seeks judgment against the defendant, the Passenger Rail Agency of South Africa, as follows:

4.1	Past Medical Expenses:	R60,000
4.2	Future Medical Expenses:	To be determined by the court.
4.3	Past and future loss of earning capacity:	R10,000,000
4.4	General damages:	R4,000,000

[5] The issues which this court is called upon to adjudicate are the following:

5.1 The past medical expenses.

- 5.2 The future medical expenses provided for by the occupational therapists, as listed in the plaintiff's actuarial report quantifying such future medical expenses.
- 5.3 Mr. Mtshamba's uninjured career path and earnings, and the quantum of his loss of earning capacity, including what contingencies should apply.
- 5.4 The quantum of general damages.
- 5.5 Costs and the scale of costs which should apply.

B. THE EXPERT EVIDENCE

[6] I turn now to summarise the salient aspects of the expert evidence led on behalf of the parties, and to highlight the points of agreement and disagreement.

[7] The only evidence adduced at the trial was that of the parties' respective experts, as the plaintiff elected not to call Mr. Mtshamba's mother or any other family members or friends to give collateral evidence regarding his pre- and post-morbid functioning and abilities.

[8] Five days prior to the commencement of the trial, the plaintiff, who was represented by Adv. Laubscher, applied in terms of Rule 38(2) for the following expert reports and joint expert minutes to be introduced into evidence by way of affidavit, on the basis that the respective experts are in full agreement, and neither party has repudiated any agreement contained in the respective joint expert minutes:

- 8.1 Dr. Z Domingo and Dr. CF Kieck (neurosurgeons) dated 2 September 2024.
- 8.2 Dr. T Sutherland and Dr. P Cilliers (psychiatrists) dated 9 October 2024.
- 8.3 Ms. R de Wit and Prof. G Lipinska (neuropsychologists) dated 31 October 2024.
- 8.4 Dr. J Sagor and Prof. GJ Vlok (orthopaedic surgeons) dated 29 April 2024.

[9] The plaintiff further sought an order admitting the expert report of Dr. Keith Cronwright (Dr. Cronwright), its appointed expert plastic surgeon into evidence, as the defendant did not obtain a like expert report, and his report and opinion accordingly stands uncontradicted.

[10] The defendant initially opposed the plaintiff's Rule 38(2) application to admit the evidence by affidavit of the joint expert minutes of Drs. Sagor and Vlok, and the expert report of Dr. Cronwright. After the first day of the trial, the defendant withdrew its opposition thereto. An order was accordingly granted in terms thereof.

i. Occupational Therapist – Ms. M le Roux

[11] Ms. Martinette le Roux (Ms. Le Roux), an occupational therapist with more than 28 years' experience, was the first expert witness called by the plaintiff. Her focus is medico-legal work, and she has compiled more than 2,270 medico-legal reports.

[12] In the joint expert minute of Ms. Le Roux and Ms. Joan Andrews (Ms. Andrews), the occupational therapist appointed by the defendant (the OT experts), they agreed that Mr. Mtshamba's residual physical abilities allow him to perform light to medium physical tasks. They found that Mr. Mtshamba exhibits both behavioural difficulties and cognitive impairments,¹ needs a structured environment to manage his daily activities and requires a case manager.

[13] The OT experts further agreed that Mr. Mtshamba is unlikely to meet the general criteria for working in the open labour market permanently due to the *sequelae* of his traumatic brain injury (TBI). They concurred that continuing with his occasional informal light work, including building doll houses and cleaning yards, would be beneficial to his quality of life.

¹ Both Ms. Le Roux and Ms. Andrews agreed to defer to the neuropsychologists in this regard.

[14] Lastly, the OT experts agreed that education needs to be provided to Mr. Mtshamba's family. They both support psychiatric and / or psychological intervention and treatment as recommended by the neurosurgeons, and the appointment of a curator.

[15] The crucial point of disagreement between the OT experts was whether Mr. Mtshamba can live independently or requires a caregiver for supervision and guidance for the remainder of his life. The costs of a carer made up a substantial portion of Mr. Mtshamba's claim for future medical expenses.

[16] In the joint minute (and not in her initial and second reports) Ms. Le Roux expressly aligns herself with the care recommendations made by the neurosurgeons, psychiatrists and neuropsychologists in their joint minutes, namely that Mr. Mtshamba requires a part-time or full-time caregiver for the remainder of his life.

[17] Ms. Le Roux opined that the caregiver could also manage domestic tasks, meal preparation and assist in adhering to a daily routine. I pause to note that it appears that these are tasks in which Mr. Mtshamba could be assisted by an experienced domestic worker. Ms. Le Roux observed further that if Mr. Mtshamba were to develop epilepsy, his required level of care would inevitably increase.

[18] In the opinion of Ms. Andrews, Mr. Mtshamba's home environment is suitable and only requires adaptations which are unlikely to cause significant disruption to him and his family. She notes that his parents currently both work full day, and Mr. Mtshamba lives alone in a shed in the yard of their property. In her view, he does not require supervision, nor a part- or full-time caregiver.

[19] The Adaptive Behaviour Assessment conducted by Ms. Andrews indicated that Mr. Mtshamba needed structure, not care. In Ms. Andrews' opinion, being accompanied by a carer as he socialises, or does *ad hoc* work, is likely to severely restrict Mr. Mtshamba's current productive activities and social interaction, especially given his

stated desire to be considered non-impaired by his friends. She recommended occupational therapy, the assistance of Cape Mental Health services, parental education, and some domestic assistance to assist in providing the necessary structure and routine, to assist Mr. Mtshamba to lead as normal a life as possible.

[20] Lastly, Ms. Andrews expressed the view that the determination of independence in everyday activities and subsequent recommendations for care needs is not usually the role of a neurosurgeon, nor a neuropsychologist or psychiatrist.

[21] With regard to case management, both Ms. Le Roux and Ms. Andrews recommended 3 to 5 hours per month initially, and thereafter, one hour every three to six months, at R950 per hour, plus travel costs of R240 at AA rates, for life.

[22] Concerning transport costs, Ms. Le Roux recommended that Mr. Mtshamba should not travel unaccompanied, and that for his recommended treatments he required 47 trips for the first year reduced to 36 annually thereafter. A 40km round trip will cost R18,800 in the first year (R1,566 p/m) and R14,400 annually thereafter (R1,200 per month) based on Uber rate of R10/km for Mr. Mtshamba and his carer.)

[23] Ms. Andrews is of the view that specialist treatment is likely to be found in Mitchells Plain, which is 7 to 10 km from Mr. Mtshamba's home in Phillipi, and is likely to cost the minimum Uber fare of R40 per trip.² In my view this is unduly conservative and the estimate provided by Ms. Le Roux is preferable.

[24] Lastly, Ms. Le Roux recommended a home maintenance allowance of R2,500 per annum for the remainder of Mr. Mtshamba's life.

ii. Expert Psychiatrist – Dr. T Sutherland

² The first year will cost R2,400 per annum, and thereafter R1,600 per annum.

[25] Dr. Taryn Sutherland (Dr. Sutherland), a psychiatrist in private practice, has been practising as such since 2012, and has engaged in medico-legal work since March 2024.

[26] In her evidence, Dr. Sutherland confirmed the contents of the joint minute with the expert psychiatrist appointed by the defendant, Dr. PL Cilliers (Dr. Cilliers). There were no points of disagreement between Dr. Sutherland and Dr. Cilliers (the psychiatric experts).

[27] The psychiatric experts agreed that Mr. Mtshamba sustained a severe trauma, resulting in ongoing clinically significant cognitive and behavioural difficulties. They further agreed that Mr. Mtshamba has a neurocognitive disorder secondary to the traumatic brain injury sustained, and that he has a personality change and psychotic disorder secondary to the traumatic brain injury.

[28] Drs. Sutherland and Cilliers further agreed that Mr. Mtshamba's significant cognitive deficits have rendered him permanently unemployable in the open labour market, that he is vulnerable to exploitation and that any awarded funds should be protected.

[29] The psychiatric experts further agreed as to the psychiatric care and medication required by Mr. Mtshamba in the future, as outlined in paragraphs 5.2 and 5.3 of the joint minute dated 9 October 2024.³

[30] Lastly, Drs. Sutherland and Cilliers agreed that, given Mr. Mtshamba's 'complex clinical picture with cognitive behavioural and psychiatric components', care by a NQF4 home-based carer is indicated from the current date and lifelong as follows:

³ The outpatient psychiatric care provided for was as follows: 36–45-minute consultations six times per year for the first year; Thereafter 36-45-minute consultations three times per year for life; Ethical cost according to Health Man 2024 tariffs is R2343.70 per appointment. A provision for medication of R2,000 per month, lifelong, was agreed, in addition to annual blood monitoring at R790 per annum.

- 30.1 Whilst he still lives with his family, carers are recommended for 12 hours a day.⁴
- 30.2 When he no longer lives with family, full-time living care is recommended.⁵
- 30.3 Should this level of care be insufficient, Mr. Mtshamba will in the future require residential care.⁶

iii. Expert Neurosurgeon – Dr. Z Domingo

[31] Dr. Zayne Domingo (Dr. Domingo) qualified as a neurosurgeon in 1991. In evidence, he confirmed the contents of his expert minute and the joint minute with Dr. CF Kieck (Dr. Kieck) dated 2 September 2024. There were no areas of disagreement in the joint minute of Drs. Domingo and Kieck (the expert neurosurgeons).

[32] The salient points of agreement in the joint minute of the expert neurosurgeons are the following:

- 32.1 Mr. Mtshamba sustained a significant blow to the head in the incident, as evidenced by the skull, skull base and cranio-cervical junction fractures. As a result, he sustained a severe traumatic brain injury (TBI).
- 32.2 Mr. Mtshamba reported significant residual cognitive and cognitive-communicative deficits as confirmed in the neuropsychological assessment. The neurosurgeons deferred to the neuropsychologists regarding the extent and severity of the deficits, which the neurosurgeons agreed are in keeping with the nature and severity of the brain injuries sustained.
- 32.3 As more than eight years have elapsed since the incident, any cognitive deficits are permanent.

⁴ Costed via Care Champ at R20,999 per month.

⁵ Costed via Care Champ at R26,999 per month.

⁶ Costed via St Anthony's Home at R25,972 per month.

32.4 Mr. Mtshamba has a 10% risk of developing late post-traumatic seizures.

32.5 As a result of his deficits, Mr. Mtshamba has been unable to retain employment. He remains unemployed. The expert neurosurgeons deferred to the neuropsychologists and occupational therapists regarding his future employability in the open labour market.

32.6 As a result of his significant cognitive deficits, Mr. Mtshamba is incapable of independent living.

32.7 His future medical expenses were agreed as outlined in paragraphs 12.1 to 12.5 of the joint minute.⁷

[33] Drs. Domingo and Kieck were both of the opinion that, as Mr. Mtshamba is incapable of independent living, and, in their opinion, is dependent on others to look after him and manage him for the rest of his life, provision will need to be made for a carer, as follows:

33.1 Whilst he is living with his family, provision needs to be made for a carer for 12 hours a day;

33.2 When he is no longer living with his family, or if he develops seizures, provision will need to be made for a full-time live-in carer with a NQF4 qualification.

iv. Expert Neuropsychologist – Ms. R De Wit

⁷ 12.1. Analgesia: R1,500 per year for life; 12.2 Post-traumatic seizures treatment: R450,000; GP consultations – 4 per year at R600 per consultation (lifelong); 12.4 Specialist consultations (1 per year) – R2,500 per consultation. Psychological intervention expenses to be determined by the relevant experts.

[34] Ms. Renee de Wit (Ms. de Wit), a neuropsychologist, has been in private practice and has worked in the medico-legal field since 2003. She has written more than 2,800 medico-legal reports.

[35] Ms. de Wit and the neuropsychologist appointed on behalf of the defendant, Ms. Gosia Lipinska (Ms. Lipinska) (the neuropsychologists), in terms of a joint minute dated 31 October 2024, agree that Mr. Mtshamba has persisting and permanent neuropsychological difficulties including memory and concentration difficulties, difficulty multitasking, slow thinking and reasoning, short temperedness, low frustration tolerance, very little consideration for others' point of view, emotional lability, lack of appreciation of potentially dangerous situations and lack of social tact. They also found that he is easily influenced and concurred that he needs guidance and supervision with most tasks of daily living.

[36] The neuropsychologists agree that others perceive Mr. Mtshamba as 'different' after the accident, that this has contributed to his social isolation, and that his TBI has affected his ability to engage effectively in social interactions.

[37] They noted that Mr. Mtshamba has a grade 9 level of education. He dropped out of school the year before the accident. The reason given was that he moved from the Eastern Cape to Cape Town when he was 14 years old and struggled with English second language. He could not attend school regularly due to gangsterism in the area. In Grade 9, he was expelled for smoking.

[38] The accident happened shortly before Mr. Mtshamba's 19th birthday. Before the accident, he worked briefly as a packer/ general worker. According to Ms. de Wit, pre-injury, he aspired to obtain his matric certificate and become a police detective.

[39] The neuropsychologists agreed that, based on his pre-accident educational process and adequate grasp of some complex concepts on testing, were it not for the incident, Mr. Mtshamba had the cognitive potential to pass grade 12 if he applied

himself, and could have learned a skill that would have improved his employment prospects. Post-accident, he attempted to work but was unable to sustain employment due to his severe neuro-psychological difficulties.

[40] Ms. de Wit and Ms. Lipinska further agreed that it is necessary to appoint a curator *bonis* to protect any award, and that Mr. Mtshamba is incapable of independent living because of the incident-related severe neuropsychological deficits he experiences. They agreed with the care suggested by the neurosurgeons and psychiatrists and referred to their respective draft minutes for specification of the costs of such care.

[41] They agreed that the appointment of a caseworker will be beneficial to monitor and coordinate the care Mr. Mtshamba receives, and that provision should be made for supportive psychotherapy to motivate him to comply with the proposed psychiatric treatment and to abstain from using substances.⁸ They agreed that provision should be made for psychiatric treatment, as recommended by the psychiatrists.

v. Expert Industrial Psychologist – Ms. Auret-Besselaar

[42] The evidence of the industrial psychologists on behalf of the plaintiff and defendant, Ms. Esther Auret-Besselaar (Ms. Auret-Besselaar) and Dr. Charlene Omrawo (Dr. Omrawo) respectively (the expert IPS), was aligned in several respects, as outlined in their joint minute and quantified in the actuarial calculations which were handed in as Exhibits 'D' and 'E'.

[43] They agreed with the other experts that Mr. Mtshamba's various neuropsychological, neurocognitive and physical defects are permanent, rendering him unemployable in the open labour market. It is apparent on a conspectus of the expert

⁸ They provided for two sessions per month for the first year; Thereafter one session per month for the following five years, at approximately R1,200 per hour session.

evidence that Mr. Mtshamba was indeed rendered permanently unemployable as a result of the incident, which occurred at the young age of 18.

[44] In their joint minute, Ms. Auret-Besselaar and Dr. Omrawo agreed *inter alia* as follows:

44.1 Mr. Mtshamba, who is now 27 years old, has been unable to sustain meaningful employment, including light and demanding work, due to the injuries sustained in the incident.

44.2 He made various attempts to work in the formal sector after the incident. However, his employment was short-lived, with employer complaints of unproductivity and the inability to perform basic job requirements.

(a) Mr. Mtshamba's uninjured career path

[45] Pre-accident, Mr. Mtshamba worked as a general worker at a supermarket and at a construction company. Both jobs were casual and of a temporary nature. The incident occurred three days into his job at the construction company. He had earned R1,000 for the three days worked. According to Dr. Omrawo, he worked at a supermarket for three weekends at R160 per day in December 2015; however, according to Ms. Auret-Besselaar, he only worked there for one weekend for R500.

[46] Mr. Mtshamba's mother, Ms. Mtshamba, reported that, pre-accident, Mr. Mtshamba aspired to return to school to complete Grade 12.

[47] Mr. Willem Boshoff of Munro Forensic Actuaries (Munro) quantified the various scenarios provided by Ms. Auret-Besselaar (EAB) and Dr Omrawo (CO) as Scenarios 1, 2, 3 and 4 (4 being the average of scenarios 1 – 3)⁹ and 1,2 (3 in Exhibit 'D') and 3 (average of 1 and 2) in Exhibit 'E'.

⁹ In Exhibit 'D'.

Scenarios 1 and 3 – Without Grade 12

[48] In their joint minute, EAB and CO, in respect of scenarios 1 and 3, which were both based on Mr. Mtshamba not completing his schooling and passing Grade 12, agreed on Mr. Mtshamba's uninjured career path as follows:

- 48.1 Mr. Mtshamba would have been able to secure a job as a general worker and would have continued working in this capacity, earning at the very least the National Minimum Wage Rate (NMWR).
- 48.2 He would have gained job experience and progressed to semi-skilled level work, reaching his career ceiling at age 45, and would likely have retired by age 65.

[49] The uninjured earning projections of Ms. Auret-Besselaar and Dr. Omrawo, respectively, are as follows:¹⁰

49.1 EAB Earnings Projection – Scenario 1

49.1.1 January to March 2020: Considering Mr. Mtshamba's prior job experience and willingness to work, he was likely to have been unemployed for three months.

49.1.2 April 2020: Mr. Mtshamba would likely have secured employment as a general worker, earning NMWR of R5,378 per month, working a 45-hour week (2024 terms).

49.1.3 Working in an industry, for example, a manufacturing factory, he would have, in all probability, worked overtime, calculated on

¹⁰ As confirmed in evidence by Ms. Auret-Besselaar.

average, for two Saturdays per month over the year, and earned 1.5 times the basic wage rate for five hours per day.¹¹

49.1.4 Mr. Mtshamba would have advanced through in-service skills and job experience to progress via linear increases to reach his career ceiling at age 45, earning at the upper quartile as a non-corporate semi-skilled worker, i.e. R228,000 per annum,¹² which equates to approximately R19,000 per month.

49.2 CO Earnings Projection – Scenario 2

49.2.1 In Dr. Omrawo's opinion in 2016 (at age 18), Mr. Mtshamba was likely to have earned 50% of between R248 to R295 per day, increasing to R248 to R295 per day (full-time) by 2018.

49.2.2 She was of the view that by 2028 (at age 30), Mr. Mtshamba was likely to have earned R384 per day for semi-skilled work, with inflationary increases until his retirement in 2062 at age 65. This equates to R100,608 (based on 262 work/week days per year), or R8,384 per month.

vi. **Expert Actuary - Mr. Willem Hendrik Boshoff**

[50] Mr. Willem Hendrik Boshoff (Mr. Boshoff), an actuary with Munro who qualified as such in 2007, and has specialised in RAF Loss of Earnings, Loss of Support and other medico-legal calculations for the past eight years. Mr. Boshoff is a SAMLA¹³ registered Medico-Legal practitioner and has completed more than 5,000 medico-legal

¹¹ When working over 45 hours per week. For calculation purposes, the average of two Saturdays per month over 12 months was stated as a reasonable assumption.

¹² Koch, non-corporate sector, 1 July 2025 terms.

¹³ The South African Medico-Legal Association.

reports, was called on behalf of the plaintiff. The defendant did not appoint an actuarial expert.

[51] The actuary's role is to assess an appropriate present capital value of the loss of earnings and future additional costs for a claimant. The past loss of earnings is the difference between the values of the unaffected and affected earnings in the past. The future loss of earnings (strictly speaking, loss of earning capacity) is similarly the difference between future uninjured and injured earnings. The experts generally agree that the patient is unemployable in the injured state, meaning he will earn no or negligible income following the accident.

[52] Mr. Boshoff confirmed the actuarial reports prepared by him on 23 January 2025 (Exhibit 'D') and 28 January 2025 (Exhibit 'E'), respectively (the actuarial reports). The joint minute of the industrial psychologists was the source document upon which the calculations in these actuarial reports were based. In all scenarios, Mr. Boshoff adopted the standard methodology of allowing for earnings inflation until the retirement age of 65 years.

[53] In the actuarial reports, Mr. Boshoff sets out the respective injured and uninjured career paths and earnings according to the opinions expressed by Ms. Aurret-Besselaar and Dr. Omrawo in their joint minute.

[54] In Exhibit 'E', the quantification of the three scenarios postulated by Ms. Aurret-Besselaar and Dr. Omrawo, and an average of the three scenarios, were as follows:

54.1	Scenario 1 (EAB):	R3,595,070
54.2	Scenario 2 (CO):	R2,678,595
54.3	Scenario 3 (Average):	R3,136,930

[55] The IP experts were unable to agree on whether, but for the incident, Mr. Mtshamba would have achieved a Grade 12. Ms. Aurret-Besselaar's view was that he

had the cognitive ability to pass Grade 12 if he applied himself, and that he could have attended a TVET¹⁴ college, which offers learners who have completed Grade 9 an opportunity to complete Grade 12.

[56] The neuropsychologists, Ms. De Wit, Ms. Lipinska, and Dr Sutherland supported the view that clinically, Mr. Mtshamba gave the impression that he did not have a low baseline of intelligence before the incident.

[57] In Dr. Omrawo's opinion, it would have been unlikely, considering the path taken by Mr. Mtshamba before the incident, that he would have returned to school and completed Grade 12. She noted Ms. Mtshamba's report of his aspiration to return to school, however she did not indicate a clear path for action in this, and considering the pre-morbid factors, namely that the plaintiff failed grade 9 and 10 and was expelled from school due to poor attendance and misconduct, in her view it was speculative whether Mr. Mtshamba would have returned to school. As such, career progressions in her report were based on completion of a grade 9 qualification.

[58] In Exhibit 'D', Mr. Boshoff calculated Mr. Mtshamba's unaffected earnings, described as the 'Capital Value of Loss of Earnings (after contingencies) as follows¹⁵:

	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Past	R345 690	R384 830	R486 955	R406 110
Future	R3 249 380	R4 405 465	R2 191 640	R3 303 270
Total	R3 595 070	R4 790 295	R2 678 595	R3 709 380

Scenario 1 – EAB Uninjured / Unaffected Earnings (No Grade 12 - Semi-skilled)

¹⁴ Technical and Vocational Education and Training.

¹⁵ The claim was based on the following: That the claimant was unable to work immediately after the accident; Only managed to secure intermittent and lower paying jobs since the incident; Has remained unemployed since March 2023 to date (scenarios 1 & 2); Has remained unemployed since May 2024 to date (scenario 3); Is expected to remain unemployable in the future.

[59] Scenario 1 is based on Mr. Mtshamba's unaffected earnings as postulated by EAB. It provides for semi-skilled (upper) at R228,000 per year (2025 terms) from August 2042 (age 45).¹⁶

[60] The affected or post-morbid earnings in Scenarios 1 and 2 (Exhibit 'D') are based on the following:

- 60.1 Date of incident: No earnings
- 60.2 March 2022: R1 050 per week (2022 terms)
- 60.3 April 2022: No earnings
- 60.4 February 2023: R1,118 per month from 11 February¹⁷
- 60.5 March 2023: No further earnings from 21 March

[61] Contingencies of 5% and 15% were applied to the uninjured past and future earnings (Capital Value Loss of Earnings), respectively, as follows:

	Unaffected Earnings	Affected Earnings	Loss of Earnings
Past	R370,200	R6,000	
<i>Less contingencies</i>	5%		
	R351,690	R6,000	R345,690
Future	R3,822,800	R -	
<i>Less contingencies</i>	15%	-	
	R3,249,380	R -	R3,249,380
TOTAL LOSS OF EARNINGS			R3,595,070

¹⁶ The semi-skilled figures are as per the "Quantum Yearbook 2025" by Robert J Koch (median, unless stated otherwise).

¹⁷ R719 / 18 days in period (11 February – 28 February 2023), x 28 days.

Scenario 2 – EAB Uninjured / Unaffected Earnings (Passed Grade 12 - Paterson B3)

[62] Scenario 2 is also based on Mr. Mtshamba's unaffected earnings as postulated by EAB. Scenario 2, however, provides for Paterson B3 (median/upper) at R334,000 per year (2025 terms) from August 2042 (age 45).¹⁸

[63] As for in Scenario 1, in Scenario 2 (Exhibit D), contingencies of 5% and 15% were applied to the uninjured past and future earnings (Capital Value Loss of Earnings), respectively, as follows:

	Unaffected Earnings	Affected Earnings	Loss of Earnings
Past	R411,400	R6,000	
<i>Less contingencies</i>	5%		
	R390,830	R6,000	R384,830
Future	R5,182,900	R -	
<i>Less contingencies</i>	15%	-	
	R4,405,465	R -	R4,405,465
TOTAL LOSS OF EARNINGS			R4,790,295

Scenario 3 – CO Uninjured / Unaffected Earnings (No Grade 12)

[64] Dr. Omrawo only postulated a single scenario, which was based on Mr. Mtshamba not passing Grade 12.

[65] The unaffected earnings in Scenario 3 of Exhibit 'D', as postulated by CO (had the incident not occurred)¹⁹ are based on the following:

¹⁸ The Paterson figures are as the corporate survey earnings (median total package, unless stated otherwise) as per the "Quantum Yearbook 2025" by Robert J Koch.

¹⁹ 2024 terms, before tax, unless stated otherwise.

65.1 Date of incident:	50% of R248 – R295 per day, 5 days per week
65.2 January 2018:	R248 – R295 per day, 5 days per week, straight line to
65.3 August 2027 (age 30):	R384 per day, 5 days per week, straight line to
65.4 August 2027 (age 45):	R384 per day, 5 days per week, plus 20% benefits.

[66] The affected earnings according to CO are as follows²⁰:

66.1 Date of incident:	No earnings
66.2 January 2019:	R250 per day, 5 days per week (2019 terms)
66.3 February 2019:	No earnings
66.4 June 2022:	R1,050 per week (2022 terms)
66.5 July 2022:	No earnings
66.6 February 2023:	R1,118 per month from 11 February ²¹
66.7 March 2023:	No earnings from 21 March
66.8 May 2024:	R250 per day for 1 day in total (2024 terms)
66.9 June 2024:	No further earnings

[67] As was the case for Scenarios 1 and 2, in Scenario 3 (Exhibit D), contingencies of 5% and 15% were applied to the uninjured past and future earnings (Capital Value Loss of Earnings), respectively, as follows:

	Unaffected Earnings	Affected Earnings	Loss of Earnings
Past	R524,900	R11,700	
<i>Less contingencies</i>	5%		
	R498,655	R11,700	R486,955

²⁰ 2023 terms, before tax, unless stated otherwise.

²¹ R719 / 18 days in period (11 February – 28 February 2023), x 28 days.

Future	R2,578,400	R -	
<i>Less contingencies</i>	15%	-	
	R2,191,640	R -	R2,191,640
TOTAL LOSS OF EARNINGS			R2,678,595

Scenario 4 – Average of Scenario 1 - 3

Scenarios 1 to 3, and scenario 4 (an average of scenarios 1 to 3), were as follows:

68.1	Scenario 1 (EAB – without Grade 12):	R3,595,070
68.2	Scenario 2 (EAB – with Grade 12):	R4,790,295
68.3	Scenario 3 (CO – without Grade 12):	R2,678,595
68.4	Scenario 4 (Average of 1 to 3):	R3,709,380

C. RELEVANT LEGAL PRINCIPLES AND EVALUATION

I. Loss of earning capacity and contingencies

[69] It is trite that an award of damages for the loss of a claimant's earning capacity is intended to place him in the financial position he would have been in had it not been for the delict.

[70] It is, in general, preferable, although not strictly necessary, to quantify the award by way of an actuarial calculation.²² The object of such a calculation is to arrive at a lump sum that would allow Mr. Mtshamba to enjoy the financial benefits equal to the *quantum* of the earnings lost by him.

[71] In *Dippenaar v Shield Insurance Co Ltd*²³, the SCA articulated the legal position relating to a claim for diminished capacity, as follows:

²² See *Southern Insurance Association Ltd v Bailey NO (Bailey)* 1984 (1) SA 98 (A) at 113H - 114F.

²³ 1979 (2) SA 904 (A) at 917 B-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.'

[72] In *Prinsloo v Road Accident Fund*²⁴ a person's earning capacity was described by Chetty J as follows:

'A person's all-round capacity to earn money consists, *inter alia*, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, *in casu*, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In *casu*, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss...'

[73] A physical disability which impacts on a person's capacity to earn an income does not, on its own, reduce the patrimony of an injured person. The plaintiff must prove that the reduction in the income earning capacity will result in actual loss of income.

[74] In attempting to forecast the future to determine future loss of earning capacity, the Court is essentially 'pondering the imponderable'²⁵ in that it is enjoined to reach the

²⁴ 2009 (5) SA 406 (SE) at 410 para 5.

²⁵ *Anthony and another v Cape Town Municipality* 1967 (4) SA 445 (A) at 451 B-C.

best decision it can on the evidence placed before it, however it is not 'tied down by inexorable actuarial calculations'²⁶.

[75] In *Southern Insurance Association Ltd v Bailey NO*²⁷ (*Bailey*), the Appellate Division observed that a Court, in determining such future damages, has two possible approaches to it:

'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.'

[76] That the latter approach is preferable is self-evident. As pointed out by the Court in *Bailey*, while the result of an actuarial computation may amount to an 'informed guess', it is an attempt to ascertain the value of what was lost on a logical basis, rather than the trial Judge's 'gut feeling' as to what is fair and reasonable is nothing more than a blind guess.²⁸

[77] In *MEC for Health, Gauteng Provincial Government v AAS obo CMMS*²⁹ the SCA affirmed the position regarding expert evidence as follows:

'The cogency of an expert opinion depends on its consistency with proven facts and on the reasoning by which the conclusion is reached. In general, it is important to bear in mind that it is ultimately the task of the court to determine the

²⁶ *Id.*

²⁷ 1984 (1) SA 98 (A) at 113 G-H.

²⁸ *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 920.

²⁹ *MEC for Health, Gauteng Provincial Government v AAS obo CMMS* (401/2023) [2025] ZASCA 91 (20 June 2025) at para 12.

probative value of the expert evidence placed before it and make its own findings with regard to the issues raised.’

[78] As recently observed by the SCA in *MEC for Health, Gauteng Provincial Government v AAS obo CMMS*³⁰, in the law of evidence, “‘opinion” means any reference from observed facts, and the law on the subject is derived from the general rule that witnesses must speak only to that which was directly observed by them. An expert’s opinion represents his reasoned conclusion based on certain facts or data, which are common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is uncontroverted, an expert’s bold statement of his opinion is not of real substance.’³¹

[79] In *NK obo ZK v Member of the Executive Council for Health of the Gauteng Provincial Government*³² (*NK obo ZK*), the Supreme Court of Appeal endorsed the following position which Rogers J held in *AD & another v MEC for Health* and which was followed by the full court in *PM obo TM v MEC for Health*:³³

‘Money cannot compensate IDT [the minor on behalf of whom the claim had been made] for everything he has lost. It does, however, have the power to enable those caring for him to try things which may alleviate his pain and suffering and to provide him with some pleasures in substitution for those which are now closed to him. These might include certain of the treatments which I have not felt able to allow as quantifiable future medical costs . . .’

iii. Contingencies

[80] As Nicholas JA said in *Bailey supra*³⁴ deduction for contingencies is meant to account for the ‘vicissitudes of life’³⁵. These include:

³⁰ Ibid at para 11, and the authorities there cited.

³¹ Ibid and *Ruto Flour Mills (Pty) Ltd v Adelson* (1) 1958 (4) SA 235 (T) at 235E-G.

³² (216/2017) [2018] ZASCA 13 ; 2018 (4) SA 454 (SCA) (15 March 2018).

³³ [2017] ZAGPJHC 346 (7 March 2017) para 56, and the authorities there cited.

³⁴ *Bailey* At 119D-H, as cited with approval in *NK obo ZK* at para 15.

‘[T]he possibility that the plaintiff may in the result have less than a “normal” expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.’

[81] In *NK obo ZK Willis* JA found that:

‘..simply taking the median between what the respective parties ask for on the deduction or contingencies without any further explanation, is indeed devoid of any rational connection between the means by which the decision was made and the result (or end) of the decision-making process....something more reasoned is required, not only if a court is to depart from the normal range of between 15 and 20 per cent, but also simply to take the median of what the respective parties asked for. It is like the rolling of a dice. A court is not a casino. Of particular relevance is that there are no special circumstances present to indicate that, but for his perinatal asphyxia, the vicissitudes of ZK’s life are likely to be more adverse than the norm. Conjecture may be required in making a contingency deduction, but it should not be done whimsically.’³⁶

[82] The court referred to *Singh v Ebrahim*,³⁷ in which a 15 per cent contingency deduction was approved, and *PM obo TM v MEC for Health* in which 20 per cent was deducted.³⁸

[83] The Court has ‘a large discretion to award what it considers right.’³⁹ One of the elements in exercising that discretion is the making of a discount for contingencies or the ‘vicissitudes of life.’ These include such matters as the possibility that the plaintiff may in the result have less than a ‘normal’ expectation of life; and that he may

³⁵ *Bailey* at 116H-117A.

³⁶ *NK obo ZK* at para 16.

³⁷ *Singh & another v Ebrahim* (413/09) [2010] ZASCA 145 (26 November 2010); 2010 JDR 1431 (SCA).

³⁸ *PM obo TM v MEC* at para 51.

³⁹ *Per* Holmes JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F; *Bailey* at p116.

experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case.⁴⁰

[84] In *Road Accident Fund v Kerridge*⁴¹ ('*Kerridge*') the Court noted that 5% and 15% for past and future earnings (or earning capacity), respectively, have become accepted as 'normal contingencies'.⁴² This generality notwithstanding, the assessment remains 'largely arbitrary' and must depend upon the trial Judge's impression of the case. As pointed out by *Bailey*, the vicissitudes of life may be either adverse or favourable.⁴³

[85] In *Guedes v RAF*⁴⁴ the SCA referred to the 'sliding scale approach to contingencies' at ½ % per year as follows:

'The author Koch describes his work as 'a publication of financial and statistical information relevant to the assessment of damages for personal injury or death'. The page in question is headed 'General Contingencies'. It states that when 'assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court; . . . There are no fixed rules as regards general contingencies. The following guidelines can be helpful.' Then follows what is termed a 'sliding scale' and the following is stated:

'Sliding Scale: ½ per cent for year to retirement age, i.e. 25 per cent for a child, 20 per cent for a youth and 10% in middle age.⁴⁵

⁴⁰ See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 – 5 as cited in *Bailey* at 116.

⁴¹ 2019 (2) SA 233 (SCA) at para 30.

⁴² *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) at para 30; *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A).

⁴³ *Bailey* at p116.

⁴⁴ 2006 (5) SA 583 (SCA) at para 9.

⁴⁵ See *Goodall v President Insurance* 1978 (1) SA 389 (W).

In the *Goodall* case which is relied upon by Koch for a suggested deduction of 10 per cent the plaintiff was aged 45 whereas the plaintiff in this matter was only 26 at the relevant time. An application of the author's sliding scale to this matter would have led to a contingency deduction of 19.5 per cent. It is true that immediately after referring to the passage in Koch, Boruchowitz J said:

'Having regard to the relevant facts, the plaintiff's age and station in life, I am of the view that in the "but for" scenario a contingency deduction of 10% would be fair and reasonable.'

[86] Age is clearly a relevant consideration in determining contingencies as '...the younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path'.⁴⁶

[87] As pointed out in the minority judgment in *Kerridge*.⁴⁷

'The role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information. Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demur. The facts upon which the experts rely can only be determined by the judicial officer concerned. An expert cannot usurp the function of the judicial officer who is not permitted to abdicate this responsibility — the court should actively evaluate the evidence. Ideally, expert evidence should be independent and should be presented for the benefit of the court. It is not the function of an expert witness to advocate the client's cause and attempt to get the maximum payout, as most seem to believe.'⁴⁸

[88] According to the evidence of Mr. Boshoff, the normal contingencies in respect of loss of earnings claims are 5% for past earnings and 15% for future earnings. This

⁴⁶ *Bee v Road Accident Fund* (4) SA 366 (SCA) (29 March 2018) at para 116.

⁴⁷ *Kerridge* at para 50 (from the minority dissenting judgment of Dambuza JA, Mocumie JA concurring).

⁴⁸ *Whitehouse v Jordan* [1981] 1 All ER 267 (HL) at 276.

evidence was not challenged by the defendant in cross-examination. These were the contingencies applied in all the actuarial calculations contained in Exhibits D and E.

[89] It is clear from the authorities referred to above that the application of contingencies falls within the Court's discretion. It is not for the appointed experts, such as industrial psychologists or actuaries, to determine contingencies - they may, at best, make a recommendation. It is for the Court to consider the peculiar facts and decide whether to apply a higher deduction than the 'normal' contingency deduction.

[90] The defendant cited *Masimola v RAF*⁴⁹, where the court held that contingencies play an important part in determining what a plaintiff would have earned and therefore in the exercise of the discretion by the court in awarding what it believes to be just. Notably, the court in that matter observed that whilst the deduction of contingencies remains the prerogative of the court, in normal circumstances, contingencies are, in general, applied as deductions of 5% for past loss of earnings and 15% for future loss of earnings before the loss is calculated.⁵⁰

[91] In this instance, nine years have elapsed since the accident occurred. Mr. Mtshamba would have had a further 32 years to go before he would have probably retired had the accident not occurred. A contingency deduction of 5% and a deduction of 15% would be regarded as normal deductions that would be applied to his potential earnings in the uninjured state. As I have preferred to adopt a middle-of-the-road career progression and an average earnings projection applied to that career projection, I do not consider it necessary to apply a higher-than-normal deduction to the earnings calculated by Mr. Boshoff.

[92] Mr. Mtshamba is presently 28 years old and thus has 37 years to retirement. Applying the sliding scale of 0.5% per year, the contingency to be applied to his future

⁴⁹ (3094/2020) [2023] ZAFSHC 447 (16 November 2023) at para 7.

⁵⁰ Ibid.

loss of earnings is 18.5%. The normal 5% contingency is to be applied to his past loss of earnings.

ii. Evaluation – Loss of earning capacity

[93] The starting point in determining the extent to which Mr. Mtshamba should be compensated for his future loss of earnings is that in the expert opinion of both Ms. Auret-Besselaar and Dr. Omrawo, Mr. Mtshamba is unlikely to re-enter the open labour market, and it is anticipated that he will remain unemployed for the rest of his life.

[94] The central issue in dispute between the IP experts was whether to apply the industry standard scales, as favoured by Dr. Omrawo (in particular, those linked to the Building Industry Bargaining Council in the non-corporate sector), or Koch's corporate sector scale, as relied upon by Ms. Auret-Besselaar.

[95] Mr. Manganya, who appeared for the defendant together with Ms. Masupye, contended that on a conspectus of the evidence, Mr. Mtshamba would likely have entered the labour market as an unskilled labourer, as he had done before the incident. He expressed a desire to become a bricklayer, and having been expelled from school, on a balance of probabilities, he would never have obtained Grade 12, either through remedial stream or mainstream, and his highest academic qualification would have been Grade 9 (NQF Level 2).

[96] Mr. Laubscher, on behalf of the plaintiff, suggested that the fairest way to calculate the loss of earning capacity claim is using the median of the four scenarios in Exhibit D.⁵¹

[97] The defendant on the other hand contends that to do so would be to 'evade specificity through generic assumptions', as the median in the plaintiff's actuarial report fails to accurately represent the underlying rationale or probabilities in the plaintiff's

⁵¹ Scenario 4 (Average of 1 to 3): R3,709,380

case, as it fails to take into account that Mr. Mtshamba had been expelled from school, had entered the informal job market before the incident, was 19 years old and had only obtained a Grade 9 pass at the time of the incident. The defendant asserts that to proceed from the premise that he would have obtained a grade 12 would be to require the defendant to compensate him for an improbable or unrealised outcome.

[98] The defendant argued that it is not the incident which curtailed Mr. Mtshamba's career trajectory, but rather his pre-injury personal circumstances and choices. Put differently, the defendant asserts that the scenario upon which it seeks relief does not involve managing uncertainties through contingencies but rather is based on relevant facts placed before the court.;

[99] Based on the foregoing, the defendant asserts that the court should accept scenario 3 of the actuarial calculations in Exhibit D as the scenario which most accurately represents Mr. Mtshamba's probable career trajectory pre-injury.

[100] Having considered the submissions advanced by both parties, Mr. Mtshamba's age at the date of the incident, his pre-morbid academic path and intellect, I am of the view that on a balance of probabilities, Mr. Mtshamba is unlikely to have resumed his studies and completed Grade 12.

[101] Ms. Auret-Besselaar presented two career scenarios for the uninjured state, one predicated on Mr. Mtshamba attaining matric and the other without matric. It is necessary to now determine which of the two projections by EAB and CO for Mr. Mtshamba's career projection without matric is most realistic. EAB suggested a higher earnings progression attached to the career progression, and the difference between EAB's projections and CO's projections is about R916,000.

[102] To address the 'expert bias' which invariably results in the projected losses being higher (in the case of the plaintiff) or lower (in the case of the defendant), in my view, the most fair and realistic projection is a median between the two, i.e. scenarios 1 and

3. As the IP experts agreed that Mr. Mtshamba is unemployable, his uninjured earnings (more correctly, his uninjured earning capacity) would translate to his loss of earnings in the injured state.

[103] At the expense of duplication, but to dispel any confusion, the Actuarial earnings tables are duplicated here for scenarios 1 and 3. For the calculation, the Court shall ignore the R6,000 earned by the Patient in the injured state, as it is a relatively insignificant amount. This means that the Patient's loss of earnings translates to his projected uninjured earnings. As the Patient is relatively young and would have more years to tackle the vicissitudes of life, the application of the sliding scale reveals that a contingency deduction of 18.5% should apply to uninjured earnings as a normal contingency deduction to the calculation of earnings in the uninjured state in scenario 3. Scenario 1, which is premised on a more optimistic earnings trajectory, should attract a further deduction and in exercising my discretion, I shall apply an additional 2.5% deduction to cater for the likelihood that the Patient would have achieved the earnings attached to the career progression postulated by EAB. The normal 5% deduction applies to past uninjured earnings. Both past and future injured earnings are zero.

	Uninjured Earnings Scenario 1	Uninjured earnings Scenario 3	Average Loss of Earnings
Past	R370,200	R524,900	
<i>Less contingencies</i>	5%	5%	
	R351,690	R498,655	R384,830
Future	R3,822,800	R2,578,400	
<i>Less contingencies</i>	21%	18.5%	
	R3,020 001	R2,101,396	R3,611,396
TOTAL LOSS OF EARNINGS			R3,996,226

[104] The average of EAB's scenario 1 and CO's scenario 3, after applying the appropriate contingencies, is R2,985,526 (R3,371 001.20 + R2,600,051) / 2. Given that

there are no earnings in the injured state, the loss of earning potential thus amounts to R2 985 526.

D. FUTURE MEDICAL EXPENSES

[105] The future medical expenses claimed by the plaintiff are outlined in annexure 'A' to Exhibit 'F' (the schedule).

[106] Mr. Boshoff testified that:

106.1 The calculations set out in the schedule are based on the medical costs provided for in the various joint expert minutes and in the report of Dr Cronwright.

106.2 The calculations in the schedule take into account life expectancy, inflation and the probability of Mr. Mtshamba requiring the specified treatment.

106.3 The probability percentage⁵² is where contingencies in respect of claims for loss of earnings on the one hand and future medical expenses on the other hand, differ.

106.4 The uncertainties which contingencies or loss of earnings cater for, such as unemployment or changes in the workplace, are not relevant to future medical expenses.

106.5 In the circumstances, it is not uncommon for 0% contingencies to be applied to future medical costs.

[107] In its heads of argument, the plaintiff placed reliance on the decision of Rogers J⁵³ in *AD and Another v MEC for Health and Social Development, Western Cape*

⁵² Under the column headed 'Chance'.

*Provincial Government*⁵⁴, where the learned Judge, after considering relevant authorities, decided not to make a general contingency deduction from medical expenses. As observed in that matter, this approach is by no means novel.⁵⁵

[108] Counsel for the defendant contended that the normal range of contingency deductions for future medical expenses is between 15% and 20%, depending on the facts of each matter. Reliance was placed on *NK obo ZK v MEC for Health, Gauteng*⁵⁶ where the SCA stated that a reasoned outcome is nevertheless required, 'not only if a court is to depart from the normal range of between 15 and 20%. The court cautioned that while conjecture may be required, departure from the norm should not be done whimsically, but for good reason, such as the presence of special circumstances indicating that the patient's life is likely to be more adverse than the norm.

[109] In my view in this matter, taking into account the relevant facts and circumstances, and the relatively young age of Mr. Mtshamba, there is no reason to depart from the normal range of contingencies of between 15% and 20% to account for the 'vicissitudes of life'.

[110] In *casu*, the future medical expenses, save for items 21 to 36 of Annexure A and the costs of a carer and case manager, are uncontroversial. Items 1 to 20 are the subject of agreements recorded in the respective joint expert minutes (as confirmed in evidence by Mr. Boshoff). The court shall apply a contingency of 15% to these expenses which total R1,532,250. 80% of these expenses, less 15%, amounts to R1,041,930.

[111] Items 21 to 36 are the costs of occupational therapy and the costs (including travel) of a case manager.

⁵³ As he then was.

⁵⁴ (27428/10) [2016] ZAWCHC 180 (7 September 2016).

⁵⁵ At para 603, where the court referred with approval to *Van Deventer v Premier Gauteng* [2004 TPD] C & H Vol V E2.1; *De Jongh v Du Pisanie* NO 2005 (5) SA 457 (SCA) paras 48-49; *Lochner v MEC for Health and Social Development, Mpumalanga supra* paras 32, 37 etc.

⁵⁶ (216/17) [2018] ZASCA 13 (15 March 2018).

[112] In her evidence, Ms. Le Roux confirmed the content of her joint minute with Ms. Andrews, where she recommended occupational therapy if Mr. Mtshamba develops epilepsy to educate his family on the management of such a condition.

[113] I agree with counsel for the defendant that, as Mr Mtshamba was assessed as only having a 10% chance of developing epilepsy and because a decade has elapsed since the incident without him developing any symptoms, a 50% contingency should be applied to the expenses relating to OT and case management in items 21 to 36.

[114] The costs relating to a case manager, including for if he does not develop epilepsy, in my view, should also be subject to a 50% contingency deduction, considering that the patient travels independently and has family who can assist. The total of these line items (21 to 36) is R588,670. 80% of these expenses, less 50%, amounts to R235,468.

i. Claim for the costs of a carer

[115] The plaintiff contends that more weight should be attached to the consensus of the neurosurgeons, psychiatrists, neuropsychologists and Ms. Le Roux, who all agree that Mr. Mtshamba requires the services of a home-based carer.

[116] The lone voice of Ms. Andrews opined that an OT plays a 'key role' in assessing the need for a caregiver by evaluating a patient's functional abilities in daily living activities, identifying areas where they've struggled due to physical limitations or cognitive impairments, and determining if they require assistance from a caregiver to maintain independence and safety in their home environment, Including assessing the caregiver's capacity to provide necessary support and identifying potential areas where additional assistance might be needed.

[117] In her evidence, Ms. Andrews emphasised that Mr. Mtshamba is quite independent in the community and at home and can look after himself when his mother is at work. She noted that he can go and watch soccer every weekend with friends, plan his craft, and go around the community to look for materials or buy them if he can't find them. He goes to the clinic alone to collect his medication and can go to the shops alone.

[118] She confirmed that, based on the adaptive behavioural skill assessment, he does not require a companion to be with him all day in his physical presence.

[119] The majority of the experts who recommended a carer failed to carry out any formal assessments when making such a recommendation. In any event, it is not a 'numbers game', and I am not bound by the majority, particularly where their opinion is not underpinned by a solid factual foundation or cogent reasoning. In argument, the defendant emphasised that Ms. Andrews has 50 years' experience in occupational therapy and presented compelling evidence concerning the Lawton-Brody Instrumental Activities of Daily Living scale.

[120] Mr. Mtshamba has been living independently since the incident. He stays alone all day while his parents are at work, and travels alone. He can wash, dress and feed himself and can prepare simple meals. He will benefit from a domestic worker to assist him with cleaning and meal preparation, and provision will be made for such expense, however, I am not persuaded that a part-time or full-time carer is warranted in the circumstances of this case.

[121] I propose to apply a higher contingency of 35% to the costs of a domestic worker, as this expense will depend on the personal and living circumstances and changing needs of Mr. Mtshamba. Mr Boshoff kindly prepared a note, at the belated request of the court, which provided that the capital value of the cost of a full time domestic worker is R1,637,714. Applying a 35% contingency, provision will be made for R1,064,251 for such future expense.

E. GENERAL DAMAGES

[122] General damages are awarded for non-financial losses or harm that cannot be readily quantified. It includes pain and suffering and loss of amenities of life.

[123] It is trite that general damages are within the discretion of the court, and that each case should be adjudicated by its own facts, and the previous decisions can only serve as a guideline.

[124] In *Road Accident Fund v Marunga*,⁵⁷ the SCA cited the following:

'In the *Wright* case (*Corbett and Honey* Vol 4 E3-36) Broome DJP stated:

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

[125] Counsel for both parties referred the court to the following decisions, which, whilst not on all fours with the facts in this matter, provide a valuable guideline.

[126] In *Van Rooyen N.O v Road Accident Fund*⁵⁸ Brand AJ Awarded general damages of R2,200,000, with a current value of R3,093,000 (QOD: 2025), to a junior farm manager, Mr. JPN van Reenen, 29 years of age at the time of the award, who sustained a severe head injury resulting in severe brain damage with permanent physical, cognitive and neuropsychological consequences. Post-accident, the patient was severely and permanently impaired. He was hospitalised for a prolonged period

⁵⁷ [2003] 2 All SA 148 (SCA) (28 March 2003) at para 27.

⁵⁸ (82697/2015) [2017] ZAGPPHC 1279 (8 December 2017).

and underwent a range of invasive medical procedures. He is severely physically disabled and suffers from persistent hemiparesis (weakness on one side of the body), has problems with incontinence and feeding and is essentially wheelchair bound. and only able to walk for short distances with his right side supported. His physical condition is such that he requires constant assistance from a carer to help him walk and in other respects.

[127] In *WV v RAF*⁵⁹ in the Bloemfontein High Court, Mbhele AJ awarded general damages of R2,100,000, with a current value of R2,842,000⁶⁰ to a 27-year-old apprentice, who in 2011 sustained traumatic brain injuries and was in a coma for one month. He is permanently disabled as a result, cannot walk unaided, has behavioural and emotional disorders and is permanently unable to work as a result. He requires constant supervision and nursing services.

[128] In *M v RAF*⁶¹ the court awarded general damages of R1,900,000, with a current value of R2,675,299⁶² to a 27-year-old stock clerk who sustained a TBI which resulted in significant physical limitations, cognitive defects, emotional difficulties and limitations in speech and language skills, rendering him unemployable.

[129] In *Smit v RAF*⁶³, the plaintiff, a 27-year-old gardener who sustained a fractured femur and a moderate to severe brain injury resulting in post-traumatic epilepsy, difficulties with concentration, impulsivity, distractibility, and reduced drive and endurance, displayed significant diffuse neuropsychological deficits and problems involving the frontal lobes, rendering him incapable of working as a gardener. The court awarded general damages of R650,000, with a present-day value of R1,135,000.

⁵⁹ (7A4) QOD 113 (FB).

⁶⁰ Koch: 2025, p 52.

⁶¹ (12601/2017) [2018] ZAGPJHC 438.

⁶² See Koch Quantum Yearbook: 2025, p 2.

⁶³ 2013 (6A4) QOD 188 (GNP).

[130] In *Raupert v RAF*⁶⁴, the plaintiff was a 20-year-old photography student employed as a casual shop assistant. She sustained a head injury consisting of extensive skull fracture with bilateral low contusions. As a result of her brain injury, she experienced memory loss, severe headaches, anxiety and depression. She was found to be unlikely to reach her premorbid potential in the workplace and was likely to experience difficulties in her interpersonal relationships. The court awarded general damages of R750,000 in 2011, with a present-day value of R1,382,000.

[131] After considering comparable awards, I am satisfied that an award of R2,000,000 would be a fair and just award in the circumstances.

F. PAST MEDICAL EXPENSES

[132] The plaintiff delivered a Rule 35(9) notice with attached vouchers in respect of past medical expenses on 10 April 2024. I am satisfied that the amount of R53,389.40 claimed in terms thereof is fair and reasonable, and shall award such amount.

G. COSTS OF THE CURATOR *AD LITEM*

[133] In her report dated 17 March 2025, the curator at Litem, Advocate Claire Cawood, has recommended that a curator *bonis* be appointed to the estate of the patient. I do not intend to deal with the appointment of a curator *bonis*, nor the curator's costs. This is to be determined by the court which will hear the application for the appointment of a curator *bonis* in due course.

H. COSTS

[134] The plaintiff has been substantially successful, and there is no reason why costs should not follow the result.

⁶⁴ 2011 (1) SA 452 (E).

[135] Rule 67A (3)(b) requires the court to set a maximum recoverable rate for which counsel's fees may be recovered on a party and party bill,⁶⁵ and requires the court to set a maximum recoverable rate for that work, having regard to the importance, value and complexity of the matter.

[136] Having considered the aforementioned factors and the complexity of this matter, in my view, Scale 'B' is appropriate.

ORDER

[137] The following order is issued:

1. The defendant is liable for 80% of the plaintiff's proved damages.
2. The defendant is ordered to pay the amount of R6,383,458 to the plaintiff, which is comprised as follows:

2.1 General damages:	R1,600,000
2.2 Past medical expenses:	R. 53,389
2.3 Loss of earnings:	R2,388,420
2.4 Future medical expenses:	R2,341,649
3. Defendant shall pay Plaintiff's taxed or agreed costs as between party and party, including the taxed or agreed costs of Counsel, and the costs of preparing heads of argument and supplementary submissions, on scale B.
4. The defendant shall be liable for interest on the capital, which shall run from 14 days following the date of this order, and for any costs incurred in obtaining the capital.

⁶⁵ Scale "A" provides a maximum tariff of R375 per quarter hour; scale "B" sets a maximum tariff of R750 per quarter hour; and scale "C" sets a maximum tariff of R1 125 per quarter hour. work having regard to the importance, value and complexity of the matter.

5. The Defendant shall pay the taxed or agreed fees of the following expert witnesses and the costs attached to the procurement of medico-legal reports and other reports, joint minutes, as well as any other related costs, including x-rays, MRI scans, and CT scans provided that those reports have been served on the Defendant and filed at Court:

- 5.1 Dr J Sagor,
- 5.2 Ms R De Wit,
- 5.3 Ms M Le Roux,
- 5.4 Dr Z Domingo,
- 5.5 Dr T Sutherland,
- 5.6 Dr K Cronwright,
- 5.7 Ms. E Auret-Besselaar,
- 5.8 Mr W Boshoff (Munro Forensic Actuaries).

6. The Defendant shall be liable for interest in respect of the costs reflected in paragraphs 3 and 5 at the legal rate of interest, which will run from 14 days following the date of taxation or agreement of those costs.

7. The defendant shall pay the taxed or agreed costs reflected in paragraphs 3, 4, and 7 of this order within 180 days following the date of taxation or, alternatively, the date the costs are agreed upon.

M Holderness
Judge of the High Court
Western Cape Division

For the Plaintiff:

Instructed by:

Adv A Laubscher

Ms N Stockdale

Adendorff Attorneys

For the Defendant:

Instructed by:

Adv K Masupye

Mr S Manganya

Nthambeleni Inc