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

Case Number: 000013/2023

(1) REPORTABLE: N0
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

06/10/2025

In the matter between:

S[...] P[...] M[...] Plaintiff

And

ROAD ACCIDENT FUND Defendant

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on Case-Lines. The date and time for hand-down is deemed to be 10h00 on ---- October 2025.*

JUDGMENT

VELE AJ

Introduction

[1] The plaintiff, in her Nominated Officio capacity, as the guardian of M[...] M[...] (the minor child or M[...]) issued summons against the Road Accident Fund

(defendant or the Fund), a juristic person established in terms of Section 2 of the Road Accident Fund Act 56 of 1996 (The Act). She is claiming the sum of R 13 500 000.00, as the defendant failed to respond to a claim lodged in terms of the Act and its Regulations for compensation of the minor child's damages for personal injuries sustained from of the accident that took place on 18 of March 2022. The minor child was a passenger in the motor vehicle (bearing registration number C[…]) driven by his father Mr Stanley Mohale which collided with another vehicle (with registration L[…]) along N12 near Fochville in the Gauteng Province. The minor child was one year and six months old at the time and a normal bouncy child.

[2] The defendant entered its intention to defend the action. After the close of the pleadings, the plaintiff filed several expert reports in support of the minor child's claim. The defendant did not file a single expert report. The matter was certified trial ready with both merits and quantum contested.

[3] Thereafter, the matter was enrolled and allocated to Crawford J, when for the first time the defendant indicated its intention to introduce a new defence of *actus novus intervenes***,** occasioning the matter to be reallocated. The defendant did not amend its plea but proceeded with the plea as it is.

[4] On 10 February 2025, plaintiff brought an application in terms of Rule 38 (2) for the admission of the expert witnesses' reports. The defendant opposed the said application indicating that it will be prejudiced because it will not be able to test the evidence. The application was dismissed with reasons provided, and costs in the cause of the main action. The court ruled that some of plaintiff's expert witnesses are to give oral evidence.

[5] Following the court's ruling in terms of Rule 38(2) of the Uniform Rules, as the way of curtailing evidence and containment of costs. The Reports of these experts, Ms M Mokgata – Speech Therapist; Mr MS Mthimkhulu – Educational Psychologist; Ms R Khwela – Occupational Therapist were admitted as evidence of their contents were not disputed. The merits and quantum were not separated as the plaintiff's counsel indicated that the evidence was intertwined and may result in duplication thereof.

Oral evidence

Stanley Mohale

[6] Stanley Mohale testified that on 18 March 2022 he was the driver of a Volkswagen Polo, bearing registration number C[…], travelling along the N12 from Tzaneen in Limpopo to Wolmaransstad in the North West Province. He was with a friend one Pontso, his partner S[...] M[...] and his son M[...] M[...] who was 18 months old at the time. His friend was in the front passenger seat, whilst his partner and the minor child were at the back.

[7] Whilst travelling along the N12 around Fochville; he attempted to overtake another vehicle, lanes merged, resulting in a head on collision with an oncoming vehicle. As a result of the collision, the witness, his partner and the minor child sustained serious injuries. They were all taken to Potchefstroom Hospital in an ambulance. A few days later, he learnt that the minor child was transferred to Chris Hani Baragwanath Hospital due to a condition that had developed, whilst he and the mother remained at Potchefstroom Hospital.

[8] He was cross examined and further testified that the child was born on 10 October 2020, at Wolmaransstad Hospital. He only saw the minor child after six months due to COVID 19 Regulations restrictions, which prohibited inter–provincial visits. He confirmed that he was a member of a medical aid scheme, with the minor child as a beneficiary since March 2022. The minor child was no longer receiving treatment on regular basis, since the stoma-bag was removed in early 2024 at Welmedpark in Klerksdorp. He last visited the minor child during September school holidays in 2024. He was not sure if the child received all the stages vaccines, since the child was with the mother in Wolmaransstad, who possessed the child's Health Chart card. The accident occurred after the mother and child visited him in Limpopo. He was not contacted by the Road Accident Fund employees to confirm if he had medical aid. The child resides in North West province and visits the aunt in Gauteng occasionally, mainly for treatment purposes.

S[...] P[…] M[...]

[9] S[...] P[…] M[...] testified that on 18 March 2022, she was a backseat passenger in a motor vehicle driven by her partner, Stanley Mohale. She was seated next to her minor child M[...] M[...]. The vehicle collided with another head-on and they all sustained serious injuries. She sustained injuries on both her legs and hands. She was unconscious when transported to Potchefstroom Hospital, together with her partner and minor child in ambulances.

[10] She was hospitalised for a month and took a further month recovering at home, prior to her first visit to the child at Chris Hani-Baragwanath Hospital. She did not see the child during her stay in hospital, as she was informed that he was transferred to Chris Hani-Baragwanath Hospital for further treatment. She stayed with her elder sister who resides at Freedom-Park Location, as it was close to Chris Hani-Baragwanath Hospital to be able to visit the child daily. The minor child spent five months in hospital, three months at Chris Hani, then transferred to Klerksdorp Hospital to be nearer to home.

[11] The minor child was born naturally, at Nick Bordenstein Hospital in Wolmaransstad, North West Province on 10 October 2020. He was like any normal child. She is the child's primary caregiver. Up until the accident, the child was developing normally with no signs of abnormality. When at his paternal home in Limpopo, he played with other children and was developing some vocabulary, like "papa" and "mama". Post-accident, he regressed as he could no longer utter those few words and could no longer walk or stand unaided. He is different compared to other children as he can no longer express his needs and is always in a nappy. If she is to walk with him, she has to give him support all the time, as he is not steady. His relations with other children is very bad, as he is always hitting them. If he is reprimanded, he responds by crying. He also cries when hungry or needs attention. The child receives physiotherapy and occupational therapy.

[12] She was cross examined and confirmed that she completed Grade 12 and can read and understand English. She confirmed that her injuries were orthopaedic in nature. She spent one week in hospital after the child was born, due to her

high blood pressure, not because of the child's condition. The child has a Health – chart card, he used when visiting Sekgametsi Clinic. The child was attending monthly clinic check-ups on a regular basis and continued with them, whilst in Limpopo at Modjadji Clinic. She confirmed that the child was taken on monthly basis for the first year.

[13] She lodged the claim on behalf of her child. She confirmed that she was in possession of a of a South African identity document. When her attorney, one Mr Winners, whom she pointed out in court, approached her at home to obtain instructions, he asked her to make a copy and forward it to him, as she did not have one ready at the time. She later sent him an uncertified copy, not the ID book.

[14] She was unaware that the child suffered from meningitis prior to the accident. She was not aware of the Potchefstroom Hospital doctor's records regarding the condition of the child. She did not know what injuries were sustained by the child. She further stated that she was informed that the child sustained internal injuries during the accident, but never explained in detail.

Dr Fikile Cynthia Mabena (expert evidence)

[15] Dr Mabena confirmed that she was an expert in the field of Paediatric medicine, with MBChB degree obtained from University of Pretoria, MMed – Paed degree obtained from Wits University and FC Paed (SA). She was admitted to the Specialist – Register as a Paediatrician in 2014 and has been a medical practitioner since 2002. Her full qualifications, professional registration, membership to the professional body are set out in Exhibit "A". The court is satisfied that she is an expert in this field of specialization.

[16] She initially examined the minor child on 25 October 2022, when he was two years old at the time, following the road accident that took place on 19 March 2022. The minor child's mother gave the history of the injuries. She was provided with the medical Records of the patient from Potchefstroom and Chris Hani-Baragwanath Hospitals, together with the Form RAF 1 that was dully completed.

[17] She based her opinion on the hospital Records that were provided and her own examination of the child. The defendant objected to her evidence on the basis that there was no rule 35(9) notices filed by the plaintiff's attorney for the hospital records, the court provisionally allowed the evidence, on the basis that the plaintiff indicated that witnesses from the hospitals will be called at a later stage. Rule 35(9) reads as follows:

> "Any party proposing to prove documents or tape recordings at a trial may give notice to the other party requiring him to any other party requiring him within ten days after receipt of such notice to admit that those documents or tape recordings were properly executed and are what they purport to be. If the party receiving the said notice does not within the said period so admit, then as against such party the party giving the notice shall be entitled to produce the documents or tape recordings specified at the trial without proof other than proof (if it is disputed) that the documents or tape recordings referred to in the notice and that the notice was duly given. If the party receiving the states that the document or tape recording are not admitted as aforesaid, they shall be proved by the party giving notice before he is entitled to use them at the trial, but the party not admitting them may be ordered to pay the costs of their proof"

[18] The court found that the Report of Dr Mabena, was filed in line with the provisions of the Rules. The defendant did not object thereto within the prescribed period of 10 days as stipulated in rule 35(9), which has long expired. It will be in the interest of justice to provisionally allow her to testify, including the information that she indicated in her Report that it was extracts from the hospital records. Mere admission of her evidence based on the hospital records does not amount to an admission of the contents of the hospital records, until the truthfulness there is proven. In this matter the plaintiff indicated that hospital staff will be called to prove the correctness of the contents these records. Erasmus Superior Court Practice,[1] in commentary on rule 35(9), the writer is of the view that if a document was not objected to, the party intending to rely on it,

[1] Uniform Rules of Court, Volume 2, Second Edition, P D1 – 477, Van Loggerenberg, Juta

still has the onus to prove the truthfulness of its content. Pending the plaintiff calling the hospital staff, Dr Mabena's evidence will be provisionally admitted.[2]

[19] Dr Mabena proceeded with her evidence and referred to paragraph 2 of her expert report. In this regard, she stated that the child sustained Grade 3 sigmoid colon tear mesenteric avulsion and exposed spine injuries, as reflected in the Chris Hani-Baragwanath Hospital Records.

[20] In paragraph 3 of her expert report, she referred to CT – brain and neck scans that revealed no acute injuries to the brain and the neck, child was admitted for neuro-observations and bed rest. Child's temperature started to rise the following day and followed by the seizures. On day three, rectal bleeding was noticed, causing him to be managed as a case of febrile convulsions, and was transferred to Chris Hani-Baragwanath Hospital for further treatment.

[21] The minor child was taken to theatre for the exploratory laparotomy leading to following injuries found: grade 3 sigmoid colon perforation, mesenteric avulsion and spine exposed. The injuries were then surgically repaired, and stoma bag inserted. Child developed meningitis after the operation and an MRI scan of the spine was conducted and revealed a pyogenic lumbar (L2/L3) spine spondylodiscitis with a retroperitoneal abscess spread to the psoas muscle complicated by arachnoiditis, meningitis and left temporal subdural empyema. Leading to the meningitis it was evident that the child had features of encephalopathy and neurological fallout. He was Hospitalised for five months receiving both physiotherapy and occupational Therapy and provided with the a TLSO brace for lumbar spine support.

[22] Dr Mabena opined that the minor child showed signs of general regression in that he could no longer sit unsupported and the few words he uttered were no longer coherent. Mother stated that the minor child was a generally healthy child prior to the accident. The child's progress was regressed as he could no longer socialise with other children, as he is disabled and requires full time care and support from the mother. The minor child has cerebral palsy and based on

[2] See *Absa Bank Bpk v ONS Beleggins BK* 2000 (4) SA 27 (SCA) at 32F – I; *Visser v 1 Life Direct Insurance Ltd* 2015 (3) SA 69 (SCA) at 80H.

the level of cognitive impairment he has suffered, he will require special schooling when he gets to school going age.

[23] Her clinical examination revealed the following: head and neck reflected no signs of infection. Child could see and hear, able to follow with his eyes. No abnormalities seen or detected on chest. The abdomen had a full – length laparotomy scar visible-healing stoma in situ, with no sign of infection around the abdomen. Normal bowl sounds, with no tenderness on palpation. Musculoskeletal system child had no obvious injuries on his upper and lower limbs. He had normal muscle bulk on both lower and upper limbs, though they had decreased power. He was receiving both physiotherapy and occupational Therapy regularly and mother continued with physiotherapy at home. She concluded that cerebral palsy secondary to hydrocephalus resulting from meningitis which was a complication of pyogenic spondylodiscitis. The child's condition makes it impossible to be a candidate for employment in the open labour market. The Occupational Therapist and Industrial Psychologist are the once who can provide final opinion on his future employability. Opinion on loss of earnings is deferred Industrial Psychologist.

[24] Dr Mabena was unable to give an opinion regarding the minor child's life expectancy at the time given his tender age and fact that specialist care was still ongoing. Stating that a fair and rational opinion can only be given when the child is over 5 years of age.

[25] She was cross-examined and confirmed that her duties entail checking children born in private facilities, as those born in public hospital are checked by the Midwives. Children are checked at various stages of development until they are 18 months old and finally when they reach the age of six years. She conceded that if the mother was suffering from high blood pressure that was not properly controlled, it could put the child at risk, but there is no proof that it was the case in this matter. Information from the mother was that the child was born through the natural birth and appeared normal.

[26] She was not informed that the mother had high blood pressure prior to giving birth. She based her diagnosis of post MVA cerebral palsy and fact that the

child will not be able to recover and lead a normal life as set out in paragraph 13 of her Report, and on Chris Hani-Baragwanath hospital Records. She confirmed that the diagnosis that he had meningitis was also from the hospital records, and her examination.

[27] She further confirmed that she asked about pre-existing conditions, in the medical history portion of her Report. She confirmed that she did not mention meningitis and hydrophiles, based on the information that the mother informed her, the child was seating next to her and was able to walk. She confirmed that she further re-assessed the child in September 2024 and there was no improvement. She was not aware that the child was receiving medical attention from a private facility. She further stated that it was not brought to her attention that the child walked with guidance or assistance from the mother. She was referred to page 2 of the form RAF 1. She was further referred to paragraph 11.9 of her expert report and stated that a child with cerebral palsy and meningitis's life expectancy may be shortened by the fact he may develop complications as a result of infections. She conceded that she was unable to confirm the veracity of the information contained in Form RAF1 or hospital records as she was not the author thereof.

[28] She was re-examined and denied that the cerebral palsy could have been pre-existed, stating the child was going through the normal stages of development, but regressed post-accident.

[29] The defendant indicate that it was not going to contest the evidence of the following witnesses' Reports: Educational Psychologist, Occupational Therapist, the Speech Therapist and the Actuary. Furthermore, the defendant was not challenging the hospital records from Potchefstroom Hospital.

Dr Michael Brian Huth (expert evidence)

[30] Dr Huth confirmed that he was an expert in the field of Neurology medicine, admitted to the Specialist Register as a Neurologist, and been in practice for the past 11 years. His full qualifications, professional registration, membership to various professional body were set out in Exhibit "B". The court is satisfied that he is an expert in this field of specialization.

[31] He testified that his duties entail assessing and treating all diseases of the neurological system, nervous system, brain, spinal cord, nerves and muscles. On 27 March 2023, he examined M[...] M[...] born on 10 October 2020, who was 2 years and 5 months old at the time, following the road accident that took place on 18 March 2022. The patient's mother gave the history of the accident as per paragraph 3.1.2 of his Report. At the time of the accident, the child was unrestrained as he was on his mother's lap not wearing a seatbelt.

[32] Dr Huth opined that the minor child was taken to Potchefstroom Hospital by the paramedics and had sustained following injuries as per hospital records and reflected on paragraph 3 of his expert report. In paragraph 3.1.6 following injuries are recorded (1) Colonic injury; (2) Spinal injury complicated by Meningitis; (3)(2) complicated by Hydrocephalus. Child was hospitalised for 4 months and 10 days.

[33] Following surgical procedures were performed on the child as reflected on paragraph 3.1.9 of his Report: (1) On 24 March 2022 the child underwent a Gastroscopy, Colonoscopy, Exploratory Laparotomy and transfusion. (2) On 01 April 2022 he underwent a relook Laparotomy. (3) On 20 June 2022 he underwent Endoscopic Third Ventriculostomy after ventricular peritoneal shunt placed failed due to bleeding obscuring the vision. (4) The patient had a Ventricular Peritoneal Shunt inserted on 28 June 2022.

[34] He did not receive the hospital records from Potchefstroom Hospital, only those from Chris Hani-Baragwanath. The child was hospitalised for five months, during which he received physiotherapy and occupational therapy. The patient was discharged on 28 July 2022 with a ventricular Peritoneal Shunt and colostomy in place. The Medical-Records reflect the following injuries, per paragraph 3.4 of his Report. Sigmoid colon perforation, mesenteric avulsion and exposed spine, Meningitis, Hydrocephalus, Spinal injury, and Head injury.

[35] The complaints noted after the accident. The child had no history of epilepsy or seizures prior to the accident. First seizure was recorded on 19 March 2022, a day after the accident. These became frequent during his stay in hospital.

There is no warning signs or triggers that were recorded. The is no treatment given.

[36] The Post Traumatic Cerebral Palsy and MR Report, the patient's mother stated that patient cannot seat on his own. His speech has not further developed. His motor milestones have substantially regressed as he could no longer walk. He suffered from Post Traumatic Cerebral palsy.

[37] Records no visual or hearing loss post the accident. Patient has speech difficulties. He had swallowing difficulties, causing choking at times, but no drooling. The bladder functioning was normal but had abnormal bowel function. His autonomic functions were normal. His limbs were weak as a result of neurological motor deficits. (See the sensory neurological symptoms in any of the limbs.) His balance was abnormal, as he could not seat unaided or crawl, though walking prior to the accident. He had no joint pain or swelling. He has surgical scars on his abdomen.

[38] The vital signs were the temperature, pulse rate and rhythm, blood pressure, oxygen saturation and respiratory rate were normal. He uttered no words, only babbles. He could see objects and lights. His pupils are equal and reactive to light, with normal eye movements. He hears sounds bilaterally easily. The bulbar area, particularly the tongue and palate demonstrate normal motor and sensory function with no drooling. His head control is weak. He has poor axial and truncal control and unable to sit. His spine has no tender area.

[39] His final neurological diagnosis is, there is clear nexus from the injury to the complication of meningitis and hydrocephalus. Complicated meningitis from pyogenic lumbar spondlylodisitis, leading to Hydrocephalus and cerebral palsy with spastic diplegic variant with MR and epilepsy. Pre-accident the patient was a normal toddler with no history of neurological illness. However post-accident status is the child had a VP shunt, symptoms and signs of cerebral palsy with spastic diplegic variant, Mental Retardation and epilepsy.

[40] Permanent Neurological Disability - He developed symptoms of Complicated Meningitis due to pyogenic lumbar spondylodiscitis, leading to MR and cerebral palsy with spastic diplegic variant and epilepsy that have caused the patient impairment and disability. The further qualification and quantification of the above-mentioned impairment, disability, reduction in future productivity at school, employment potential, accommodations needed and impact in learning and vocation is deferred to an Educational Psychologist, Occupational Therapist and Industrial Psychologist.

[41] Future Disability – The patient has reached maximal medical improvement. The symptoms are chronic, established and unremitting. It is foreseen that the symptoms and disability will not improve with special care.

[42] Academic Implications and Effect – The patient's academic potential and trajectory has been affected by the accident. The opinion is deferred to the Educational Psychologist.

[43] Effect on the capacity for higher order decision making – Any funds awarded to the patient should be protected. The patient and mother will require curator ad litem and curator bonis.

[44] Effect on longevity – The lifespan of the patient has been shortened by approximately 5 (five) years due to epilepsy. Cerebral Palsy with mental retardation carries a further variable reduction in lifespan.

[45] Conservative Treatment – The total cost per annum for comprehensive pharmacological and non- pharmacological treatment of Complicated meningitis, leading to MR and cerebral palsy with spastic diplegic variant and epilepsy, including treatment for sequela and complications that are in a private sector will be in the region of R140 000, 00 per annum with CPI increasing conservatively. This amount is a global figure inclusive of both pharmacological and non-pharmacological treatment, doctors' visits, and medication expenses.

[46] The patient may need further non-pharmacological optional treatments, which include stress management, therapeutic-exercise programs, exercise, acupuncture hydration, relaxation training, biofeedback and massage. The

Surgical expert may advise on Shunt revision, monitoring and a possible spinal stimulator for future consideration.

[47] Dr Huth further recommended that following specialist and allied professionals be consulted. Occupational Therapist, Speech Therapist, Physiotherapist, Educational Psychologist and a Neurosurgeon. His observation was that the patient suffered blunt force injuries to the brain, which removed any realistic likelihood of normal recovery.

He concluded that patient's life expectancy, was reduced by approximately 10 years compared to a normal individual. The patient was uneducable and unemployable. The patient is unable to look after his own affairs. A curator-bonis will have to be appointed, and his mother is not suitable to take this position. He reached a conclusion, that no signs of improvement of the patient's condition is expected in future, as the condition is permanent.

Siyabonga Siphosethu Ngobese

[48] Mr Ngobese is an Administration – officer in the employment of the Department of Health, Gauteng and stationed at Chris Hani – Baragwanath Hospital, attached to the Motor Vehicle and other accidents cases Department. Their main task was to assist in referring claim forms to the doctors for completion of medical reports in road accident related matters and other insurance claims. On Form RAF 1 was submitted in the current matter. No request was received from the Road Accident Fund for the copy of the medical records from his Department.

[49] He confirmed that the plaintiff's attorney approached his office for assistance with the comparison of the Hospital Records with the information in a completed Form RAF 1. The request was forwarded to a Medical Doctor, who did the comparison and confirmed that they indeed matched. He confirmed that according to the hospital records, the child M[...] M[...] was admitted on the 24th of March 2022 to Ward 32 and discharged on the 25th of June 2022.

[50] Thereafter he visited the hospital as an outpatient for follow up treatment on the following dates: On the 08th of August 2022, he visited the Stoma Clinic. On the 22nd of August 2022, he visited the Physiotherapy Unit. On the 08th of September 2022, he visited the Stoma Clinic for a follow up. On the 14th of September 2022, he again visited the Stoma Clinic. On 06th of October 2022, he visited Stoma Clinic. On 11th of October 2022, he visited the Pharmacy for collection of prescribed medication. On 24th of October 2022, he visited the Neurology Clinic. On the 02nd of November 2022, he visited the Stoma Clinic. On the 17th of November 2022, he visited Stoma Clinic. On the 23rd of November 2022, he visited Stoma Clinic. On the 28th of November 2022, he visited the Occupational Clinic doctors. Lastly on the 01st of December 2022, the patient attended to the Neuro – Surgical Clinic.

[51] When he was perusing the copies provided by the patient's attorney, he was in possession of the original Chris Hani – Baragwanath Hospital Records and referred them to the doctor to verify the correctness thereof.

[52] He was cross–examined. He confirmed that he did not see the Hospital Records uploaded on the case-line, as he was only provided with the copy from attorneys. He confirmed that he was using the laptop that was provided by the attorney, due to lack of resources at the hospital. He confirmed that the doctor did look at both records.

[53] It was put to him that page 42 of the Hospital Record in his possession was not the same as the one on case- line, he could not reply to this, simply saying he did not peruse, he merely took the two records and give to the doctor to verify. He confirmed that the hospital records in his possession was up to June 2022, he could not say why the records in possession of the plaintiff's attorneys, were up to July 2022, deferring same to the Medical-Officer who checked the files.

[54] He was re–examined and confirmed that Page 42 on the Caselines and hospital records in his possession were not the same but deferred it to the Medical-Officer who checked the file. He further confirmed that Page 41 on the Case – line reflect a date in May 2022, whilst hospital records reflect a date in July 2022 date. He further confirmed that Page 35 on the Case – line reflect a

date in July 2022, whilst hospital records reflect a date in May 2022. He was further unable to explain as to why is Page 18.130 on case-line is dated 18 June 2022, if Page 18.129, is a record for the entry done on the 17 June 2022 in hospital records.

Dr Babitsanang Annah Selepe

[55] Dr Selepe confirmed that she was an expert in the field of Industrial Psychology**,** having recently received her doctoral studies qualifications from Rhodes University. Though there is no curriculum vitae attached to her report, following her evidence in court and no objection thereto, the court is satisfied that she is an expert in this field of specialization.

[56] She assessed and evaluated M[...] on 09 November 2022 and compiled a Report on 27 March 2024. Background information was that, at the time of the accident on 19 March 2022, M[...] was just 1 year and 6 months, and not yet at school; therefore, there is no school history. She referred to Mr Mthimkhulu, an Educational Psychologist's Report marked as Exhibit "D".

[57] The purpose of her Report was to assess the impact of the injuries sustained as the result of the accident in as far as M[...]'s employability, effectiveness in the workplace, family and other social roles, as well as his earning capacity. She based her Report on the interviews with the mother, aunt and Reports of various specialists who examined the child. Her observations were that at the time of the assessment, the child was unable to sit and was carried by the aunt. He could not talk or walk. He struggles to balance his neck at the time he was fitted with a stomach pouch and always tried pulling it out hurting himself. The aunt indicated that the child was a special needs child, who needed extra care in bathing, dressing and feeding, which took a toll on his mother. This changed the mother's life, making it difficult for her to coupe on her own, as her partner works far away, and the child is often crying with as he was in pain.

[58] The Psychometric evaluation was not conducted on the child, as he was an infant at the time of the accident with no earning capacity. She relied on the family members' achievements and concluded that had it not been for the accident, M[...] would have gone through High school and matriculated, which

would have been his passage to tertiary education and obtaining at least a diploma, which is NQF level 6. Due to him sustaining the injuries at a very early stage in life, she used the broader guidelines for determining Mr M[...]'s pre – accident occupational and income attainment. His mother has passed Grade 12 and is unemployed. His father has a teaching degree and is employed as a High school teacher.

[59] She referred to Mr Mthimkhulu, Educational Psychologist's Report, that the child in an uninjured state could have passed matric and gained entry to university, due to academic excellence could have obtained a study bursary or qualified for NFSAS. He could have obtained a degree qualification and secured internship by age of 22 years, this coupled with the practical work experience he could have accumulated, would helped him to secure permanent/ long/fixed- term contract employment at the age of 23 years at Koch Upper Band semi-skilled salary of R204 000 p.a. (2023 July rand value). He would have earned in with Paterson B4/C1 Lower total guaranteed package. He could have progressed until he reached the age of 45 years at Paterson D1 Median Band in corporate sector followed by inflationary increases under retirement depending on the policy of the organisation or employer.

[60] Though she reflected that above was scenario 1, it was the only scenario. She further indicated that in the absence of serious health impairments and with willingness to study further, he could have been able to exercise his career choice, moving from one job to the next, depending on availability of job opportunities. He could have been able to function as expected, until he reached the retirement age and beyond depending on strength to do so. M[...]'s post-accident earning capacity potential was not affected as he was still a minor, who has not yet started schooling and was still undergoing treatment sessions.

[61] She referred to other experts reports. In this regard, she referred to Ms R. Khwela, the Occupational Therapist, who indicated that M[...] has a low toned body and his left leg presents with spasticity. During the assessment, M[...]

presented with limitation and inability to balance on the one leg, walk on heel and toes, as well as squatting, stooping, crouching and climbing with regards to mobility and agility skills. Her observation was, he was unable to interact with other persons.

[62] She further referred to Dr Mabena Specialist Paediatrician's Report, which point to the serious injuries that M[...] sustained as a result of the accident in question. He now has a post- traumatic cerebral palsy with the VP shunt and stoma bag in situ.

[63] She further concluded that he was unable to attend mainstream school as he presents cerebral palsy and is permanently disabled. Ongoing occupational therapy was recommended in his life.

[64] She further referred to Dr Huth - Specialist Neurologist's Report that M[...] sustained head injury, spinal injury, hydrocephalus and meningitis. M[...] developed symptoms of Complicated Meningitis due to pyogenic lumber spondylodiscitis, leading to mental retardation and cerebral palsy with spastic diplegic variant and epilepsy, that have caused the patient impairment and disability, resulting in WPI of 55%. She further concluded that he was unable to attend mainstream school as he presents with cerebral palsy and is permanently disabled. Ongoing occupational therapy was recommended in his life.

[65] Dr F C Mabena Specialist Paediatrician confirmed that M[...] suffered serious injuries from accident in question. As a result, M[...] has a post -traumatic cerebral palsy with a VP shunt and stoma bag in situ. She did not expect him to make a remarkable recovery, as his condition was permanent. He was permanently disabled and would need full time support and care going forward.

[66] She further referred to Dr D.J.D Surridge, Colorectal Surgeon and certified Gastroenterologist's Report, that M[...] suffers avulsion of the sigmoid mesentery with resulting necrosis of the synod colon and perforation, which resulted in the sepsis in the central nervous system with complications. As a way of controlling the source of sepsis, the sigmoid colon is removed, and an end colostomy brought out. A colostomy is an opening in the bowel into the skin

to allow the faeces to drain via an alternative route. His colon was compromised by the damage to the blood supply and a primary anastomosis would have healed. Due to complications associated with the sepsis, which require repeat surgery. The Hartman's procedure may be reserved, and the colostomy closed by another operation in the future as long as M[...]'s neurology allows for him to be continent. His further conclusion was that M[...] will require a lifelong management of his colostomy.

[67] Dr Selepe concluded that M[...] is unlikely to follow the typical educational trajectory. The likelihood is that M[...] can be considered as a child who will have special educational needs once he embarks on his educational journey. She referred to Ms Malusi Mokgata, the Speech Therapist and Audiologist, who concurs that, M[...] will require an individualised education and rehabilitation plan (IEP) in the form of an intensive period of speech-language therapy whilst receiving a multi-disciplinary team approach. He will need to be placed in an appropriate early development centre/ care centre where he would receive stimulation, learning opportunities and therapeutic intervention within a specialised environment. She concluded that though the multi-disciplinary interventions will provide educational stimulation, which will be costly to the family, M[...] will remain uneducable**.**

[68] Dr Selepe further finds that the accident has negatively impacted M[...]'s future employment prospects. It has also impacted on his future scholastic achievement, which subsequently affect his future earning potential. Based on her observations, in line with Dr Mabena, the (Specialist Paediatrician's Report), M[...]'s final orthopaedic impairment score is 60% and he qualifies for general damages. M[...] will not be a candidate for employment in the open labour market due to his current condition.

[69] Dr Selepe concluded that based on his severe long-term poor medical prognosis, work history coupled with no educational background, M[...] may be regarded, for practical purposes functionally unemployable in an open market.

He will not be able to proceed in life as per scenario in 7.1,1 of her Report, which will result in total loss of the potential earnings as a result of the accident.

[70] It clear that healing is not foreseeable, impairing the prospects of venturing into the open labour market, as he will not be able to compete with his non-injured peers, he has no skills, knowledge and experience.

[71] She concluded that he was functionally and virtually unemployable in an open labour market, which means that a provision of total loss of earnings should be made, in line with the content of para 7.2.1.1 of her Report.

[72] Her recommendations are that medical costs as incurred as a result of the accident should be provided for, including future medical costs as recommended by the various experts. He should be reimbursed for all transportation costs incurred as a result of the accident. She also recommended the he be compensated for general damages for pain and suffering. She has deferred the quantification thereof to other experts and actuarial report for accuracy.

[73] She confirmed under cross – examination, that the child could have completed a diploma, which is NQF level 5 and not a degree which is NQF level 7. She further conceded that the Corporate scale is compiled by taking into consideration the top 100 companies in the country and that majority of South Africans were not employed by these companies but only a selected few. She has no data to support that someone with a degree will always earn more than someone holding a diploma. She further conceded that due to hard economic conditions, it was harder to get employment. She further conceded that it was hard to gain tertiary institution placement, due to high number of applications, with only the top candidates securing placements.

[74] She further conceded that it now took longer than two years for a person to enter the labour market with tertiary qualifications. She further indicated that she referred to Koch Upper Band and not Statistics South Africa Report (Stats SA), as Koch Upper Band is more researched. She was not aware that courts

were referring Stats SA, as opposed to Koch Upper band or Patizen Scale, as a way of determining damages. She further conceded that she failed to consider the Educational Psychologist's Report in her initial Report, when she concluded that the child could have obtained a degree (NQF level 6) instead of a diploma which is (NQF level 5).

Maurious Mthimkhulu

[75] Mr Mthimkhulu' s expert report was one of those admitted into the record and marked as Exhibit "F" in terms of Rule 38 (2) of the Uniform Rules, as the way of curtailing evidence and containment of costs. He is an expert in the field of Educational Psychology. He is a registered Educational Psychologist with HPCSA number: PS 0132861 and Practice number: 0642371. His curriculum vitae was not attached to the Report. Since there was no challenge to his qualifications, the court is satisfied that she is an expert in this field of specialization.

[76] He assessed the child, M[...] M[...] on 12 October 2023, when he was 3 years old and compiled the Report on 07 February 2024. Purpose of his Report was to assess the required cognitive, emotional and scholastic functioning of the child. It was aimed at gathering M[...]'s developmental milestones, health status as well as his behaviour pre and post – accident status.

[77] He consulted with the mother, who informed him that, M[...] was born through natural birth, after a full term of pregnancy. There were no pre and post-natal complications, though the mother suffered from hypertension at the time, she denied presence of stressors. M[...]'s pre-morbid developmental milestone were normal but has since regressed as a result of the accident. Mother stated he started walking at the age of 11 months and was starting to utter a few words. He has since regressed as he cannot walk unsupported and struggles to stand on his own. He is not fully potty trained due to his injuries. His speech development has stagnated.

[78] His mother denied any family history of chronic or psychiatric illness. Mother informed him that following the collision, the child fell underneath the front seat, as he was unrestrained and was crying as a result of injuries.

[79] He assessed the child and referred to Dr M. Huth, a Specialist Neurologist, Dr F Mabena, Specialist Paediatrician, Dr D Surridge, a Colorectal Surgeon and Ms M Mokgata, a Speech Therapist and Audiologist's Reports, whilst focusing on educational level and training, that M[...] could have achieved had it not been for the accident.

[80] According to the Reports he perused, the child sustained following injuries: Head injury, spinal injury, hydrocephalus and Meningitis. He underwent colostomy (Stoma surgery) during March 2022 and a further surgery to drain water from the brain in June 2022.

[81] His pre – morbid condition was that he was a normal child, who was interacting with other children. Post – morbid, he was severely handicapped and could not sit on his own. Can only walk when supported. His speech was still non – existent. He is still on nappies, as potty training is impossible. He has poor pencil grip. He is not aware of dangerous situations. He struggles to follow instructions, making it impossible to conduct a proper assessment.

[82] He concluded that his pre–morbid condition, considering the general factors that could have influenced his position, he could have present with intact neurodevelopmental functioning. In this regard she took into consideration the academic achievement of other family members, the father, who has a teaching degree and employed as a teacher, as well as his mother whose highest qualification is matric and is unemployed. This could have inspired him to do well for himself academically in a mainstream school and completed Grade 12 and possibly progressed academically to an NQF5 level.

[83] His conclusion in as far as his post – morbid position concerned, "Considering M[...]'s current presentation, it is important to note that the development of meningitis can have major cognitive and emotional consequences in areas such as processing speed, attention and memory, while hydrocephalus can cause headaches, impaired vision, cognitive difficulties, loss of control and incontinence. The Specialist Neurologist writes that M[...]'s symptoms are chronic, established, and unremitting. According to the Specialist it is foreseen

that the symptoms will not improve with specialist care and the disability is unlikely to improve."

[84] The Specialist Neurologist is of the opinion that M[...] has a shortened life span by approximately 5 (five years due to epilepsy. Cerebral palsy with mental retardation carries a further variable reduction in life span. It should be noted that the Specialist Neurologist gave a WPI of 55%, which the writer concurs with and further notes that this indicates the likelihood that M[...] may face with activities of daily living along with his functioning (cognitive, behavioural or emotional). … … It should be noted that M[...]'s mother reported that M[...] has regressed severely with regards to his developmental milestones. The writer notes that children who experience severe injuries during their critical or early developmental periods are likely to be susceptible to neurocognitive and neuropsychological fallout associated with the sustained injury. Additionally, the Speech Therapist & Audiologist notes that the accident occurred when M[...] was 18 months which is within the first three years of development and is considered a crucial period for language development." (See Report para 12.3.1 at p.13 – 14).

[85] His assessment findings are as follows: "It was impossible to conduct formal assessment. However informal, qualitative, and clinical observation identified poor gross motor skills, poor speech, poor fine motor skills, and an inability to understand instructions. M[...] is a severely challenged individual in many aspects of his functioning, including his cognitive and behavioural functioning. According the Specialist Neurologist, M[...] presents with mental retardation/ intellectual disability which the writer opines will continue to make it difficult for M[...] to function an age-appropriate level. From an educational perspective, the writer notes that M[...] is unlikely to follow the typical educational trajectory. …. The Speech Therapist and Audiologist concurs with the later and further notes that M[...] requires an individualised education and rehabilitation plan (IEP) in the form of intensive period of speech-language therapy whilst receiving multi-disciplinary team approach. Placement in an early development centre/ care centre where he would receive stimulation, learning opportunities and therapeutic intervention within a specialised environment is crucial. …,

however, M[...] will remain uneducable**.** The writer notes that such special needs institutions will be financial draining on the family. It should be noted that the family will need to be equipped with the skills and resources to take care of M[...].”

[86] He recommended that M[...] be placed in special needs school/ a stimulation centre will implement an individualised education and rehabilitation plan. He further recommended that both the child and the mother be referred for psychotherapy to assist them cope with post-accident reality.

[87] He further recommended that he be assessed by the Occupational Therapist for the physical capabilities. Her final recommendation was that the Industrial Psychologist should quantify the loss of earning suffered by the child.

Relebogile Khwela

[88] Ms Khwela is an Occupational Therapist. Her expert report was one of those admitted into the record and marked as Exhibit “G” in terms of Rule 38 (2) of the Uniform Rules, as the way of curtailing evidence and containment of costs. Her Report, she dealt with M[...]’s residual abilities and the impact of the injuries he sustained in his participation in daily living activities, including leisure, recreation and work. The impact the accident had in his ability to assist with house-chores. His need to use special and adapted equipment, as well as adapted means of transport.

[89] She conducted the following tests as part of her assessment. Physical assessment, Borg Numeric pain scale assessment and Ransford Pain Drawing. Since M[...] was18 months old at the time of the accident, he has not yet attended school and has no employment history. Leisure history was that prior to the accident he enjoyed playing outside, but since the accident he has regressed as he could no longer walk on his own and only plays with his hands.

[90] He is fully dependent on his mother for bathing, cooking, doing laundry, cleaning and general grooming. Prior to the accident the child was reaching all the milestones in time and showing good health signs. M[...] is unable to walk,

sit, or stand unassisted, play, roll on his own and needs to be turned over. He is unable to control his neck's movement as it is floppy. His left leg is spastic, though he is able to flex and extend it slowly and stiffly.

[91] Her evaluation is that M[...] is unable to follow instructions to participate in an assessment. He walked with a normal gait. He presented with symmetrical standing and sitting posture. His movement pattern was unusual. He presented low body tone and left leg presents with spasticity. His range of motion of the Upper and Lower Limbs is functional. Both his upper and lower limbs presented a grade 4 Muscle strength. His hands functioning presented a weak mass grasp and is not fully developed. M[...] presented with limitation and inability to balance on the one leg, walk on heel and toes, as well as squatting, stooping, crouching and climbing with regards to mobility and agility skills. Her observation was, he was unable to interact with other persons.

[92] M[...] will be unable to attend the main stream school, as he presents with cerebral palsy and is permanently disabled, which disrupted his enjoyment of life amenities, resulting in him being fully dependent on his mother. Given his severe long-term neurocognitive, following the accident, it appears he would find it difficult to search, secure and maintain gainful employment in an unskilled or semi-skilled environment in the open labour market.

[93] She further recommended that occupational therapy would be beneficial to him and recommended 20 hours as necessary for this purpose. He will benefit from a case manager to follow-up on his progress and consider his needs from as he reaches different stages of life. She recommends that a 45 minutes Occupational Therapy cession weekly for period of 12 months, will be necessary to address the cognitive-perceptual deficits identified during the evaluation. This will be reviewed after the 12 months period depending on his progress. A general undertaking by the Fund will be sufficient. She estimated the therapy to cost R720, 00 per hour inclusive of VAT, with an extra R400, 00 per visit as travelling costs.

[94] She further recommended physiotherapy to improve and maintain his physical abilities and pain management. She deferred the nature of treatment and the

costs thereof to the Physiotherapist. She further recommended that he will benefit from special and adapted equipment. She recommended the Standing-frame at a once off cost of R21 000.00 and a Buggy wheelchair every two years, at a cost of R26 000, 00 to be covered by the undertaking by the Fund. She indicated that a future assessment by the Occupational Therapist may result in further assistance devices being recommended.

[95] She further recommended extra help, as M[...] will need 24 hours caregiver throughout his life. A Case Manager who will be an Occupational Therapist will act as a liaison officer between the family and the treating doctors as well as other professionals. She further recommended that all the funds should be protected as the mother is not suitable for this purpose. Her recommendations did not change in the addendum Report that she prepared on 26 February 2024, as the position remained the same after a year.

Mr Johan Sauer

[96] Mr Sauer is an Actuary, whose expert report was handed in by agreement between the parties. He compiled the Actuarial Report, based on his experience in field of actuarial sciences. He quantifies the damages for bodily injuries or death of a person and miscellaneous calculations for use in civil litigations. His full qualifications, professional registrations, membership to various professional bodies are not before court, as his curriculum vitae was not attached to the report. Only information appearing on the Report is that he is Fellow of the Institute of Actuaries, United Kingdom and Fellow of the Actuarial Society of South Africa. The court is satisfied that he is an expert in this field, as his Report was not contested.

[97] In March 2024, Mr Sauer prepared a Report for M[...] M[...], in line with the Report prepared by the Industrial Psychologist, Dr B Selepe on 27 March 2024. On paragraph 7 of Dr Selepe's expert report, she indicates what M[...] would have achieved and the amount he would have earned had it not been for the accident. (Pre-morbid scenario). She indicated that no income is projected until M[...] reaches the age of 20.5, which will be in the April 2041, as he was a

toddler at the time of the collision and could have studied towards obtaining a degree, which is NQF level 7 qualification. Upon completing his studies, he could have been able secure a practical internship and earn an income, equivalent to the upper quartile income of semi-skilled workers of R204 000, 00 per annum in 2023 monetary terms.

[98] The actuary projected this income with inflationary increases under he turns the age of 22.5 (22) + 23) / 2), therefore until 2043/04/10, when he would have completed his internship and secured employment in the corporate sector. Thereafter he would have been able to earn a total package, equal to lower quartile B4/C1 Paterson level, of R385 500,00 ((R513 000 + R458 000,00) / 2) (Quantum Yearbook 2024 figure) per annum in current monetary terms. 10% of this income is assumed to consist of non-taxable fringe benefits. This income is projected with linear increases until age 45, which will be in 2065/10/10, when he reached his career ceiling. Thereafter he would have been able to earn a total package of R1 114 000 (Quantum Yearbook 2024 figure) per annum in current monetary terms. 10% of this income is assumed to consist of non-taxable fringe benefits. He further projected this income with inflationary increases until retirement at age of 65.

[99] Mr Sauer, further dealt with his post morbid earning capacity, based on Dr Selepe the Industrial Psychologist's Report and project no income for M[...], he was only 18 months at the time of the accident and was rendered functionally unemployable in the open labour market as a result of the accident.

[100] He further pointed out that the calculations were done in line with the industrial psychologist' recommendations and do not in any way certify its correctness, as it is not part of his expertise. He worked on the Past escalation rate of 6. 01% per annum (Average CPI over past period). The future escalation rate is 4. 6% per annum. In as far as the tax is concerned, past earnings are taxed at the tax rate applicable in the relevant financial year, whilst future earnings are taxed at the latest available tax rates. He made the mortality deduction according to the life table 2 published in The Quantum Yearbook of Robert Koch. He also

allowed for contingency deductions in line with RAF Amendment (Act 19 of 2005) and followed the precedent set in Swartman v RAF (WCC)[3].

[101] He further made provision for the contingencies in the following fashion. 5% total deduction for past losses (pre-morbid) and 0% total deduction for past losses (post-morbid). 20% total deduction for future losses (pre-morbid) (approximately 0.5% per future working year.) and 0% total deduction for future losses (post-morbid).

[102] Mr Sauer concluded that following will be the calculations. Future earnings pre-morbid is an amount of R9 782 026, less 20% contingency deductions in the sum of R1 956 405, with the total of R7 825 621. Post-morbid the figure is 0, leaving the sum of R7 825 621 as the total loss of earnings suffered by M[...], as there is no RAF cap applicable.

[103] Mr Sauer concluded that following will be the calculations. Future earnings pre-morbid is an amount of R9 782 026, less 20% contingency deductions in the sum of R1 956 405, with the total of R7 825 621. Post-morbid the figure is 0, leaving the sum of R7 825 621 as the total loss of earnings suffered by M[...], as there is no RAF cap applicable

[104] This concluded his expert report, which formed part of the record and marked as exhibit “H”. The plaintiff closed her case. The defendant also proceeded to close its case without calling any witnesses.

[105] On the merits, the plaintiff adduced the evidence that on 18 March 2022, at around 20H45 the vehicle they were travelling in, driven by the child’s father was involved in a collision. As result there of the child sustained personal injuries. He was taken to Potchefstroom Hospital where received treatment, including the CT- brain and neck scan, that reflected no acute injuries. He only developed high temperature followed by the seizures the following day. He suffered Grade 3 sigmoid colon tear with mesenteric avulsion and exposed

[3] Unreported 17258/11, 2013/12/03

spine. He was transferred to Chris Hani – Baragwanath Hospital for further treatment on day three, upon noticing that there was rectal bleeding. Upon examination it was discovered that he suffered a Grade 3 sigmoid colon perforation, mesenteric avulsion and spine was expose. He was surgically repaired, and a stoma bag was inserted.

[106] The mother was not challenged when she stated that prior to the accident the child was developing normally, with no signs of abnormality. Post-accident, he regressed as he could no longer utter those few words and could no longer walk unaided, as if she is to take him for a walk, she has to give him support at all times, as he is not steady. This is in direct contrast with what the expert witness is saying as expert stated child was unable to walk. She further gave evidence that contrasted Dr Mabena, as she indicated that the child can sit on his own and had bad relations with other children, as he hits them with whatever is available. If reprimanded he reacts by crying, and same when hungry he cries for attention. Though alleged that the child received all vaccination injections, for the child his age, his Health Chart card was not discovered and mysterious was uploaded on the case-line before closing address.

[107] Mr Ngobese was very evasive on what exactly did he place before the doctor to verify and outcomes thereof. On several times, the court had to instruct him to look at the camera and not on the side when answering questions, as he with the plaintiff's attorney in the room. Strange enough, is that he could not provide the name of the doctor who perused the file and the copies provided by the plaintiff's attorney and confirmed that they matched, his answer was evasive as well. What he answered with ease in chief, became very difficult for him to deal with during cross – examination.

[108] After this treatment he was developed meningitis, an MRI scan of the spine was conducted and revealed a pyogenic lumbar (L2/L3) spine spondylodiscitis with a retroperitoneal abscess spread to the psoas muscle complicated by arachnoiditis, meningitis and left temporal subdural empyema. This was confirmed by Dr Mabena in Para 3 of her Report. Dr Huth, Specialist Neurologist's Report, connects the head injury, spinal injury, hydrocephalus

and meningitis suffered by M[...] to the accident that occurred on 18 March 2022. He further confirmed that the injuries M[...] sustained led to mental retardation and cerebral palsy with spastic diplegic variant and epilepsy, that have caused the patient impairment and disability. In this regard, Dr Huth created the causal link between the accident and the injuries. Though the defendant disputed the merits, it has as in most of its cases, no witnesses were in support of its case. The defendant's attempt to introduce a special plea of the *actus novus intervenes* was not carried through, as matter was proceeded with without an amendment.

[109] The defendant objected to the plaintiff's claim on the basis that it did not comply with the provisions of Section 17 of the Act, as no properly certified identity document of the plaintiff was, provided to the Fund. The plaintiff in this regard testified that when the attorney approached her at her home, she did not have her ID book with her, she arranged to forward a copy to the attorney. It is not clear as to how the copy ended in possession of the attorney. What is clear is that when she forwarded it, it was not commissioned. During the closing address, the plaintiff's counsel clarified that, the attorney that certified the copy was not attorney Winners Mathebula, who is the attorney of record, but another Mathebula who is not linked to this matter. This aspect was not challenged by the defendant's attorney, though problematic on its own, as the original was never in Johannesburg at that point, but with the plaintiff in Wolmaransstad in the North West Province. The original was never produced. The Defendant during cross – examination of the plaintiff, attempted to produce another copy of identity document that it alleged belonged to the plaintiff. Plaintiff objected and the court ruled in her favour, as the said document was not discovered and amounted to trial by ambush.

The Law

[110] In *Road Accident Fund v Busuku*[4] the Supreme Court of Appeal per Eksteen AJA held the following:

[4] [2020] ZASCA 158 at par 6.

> "Before I turn to the special plea, it is necessary to reflect on the principles relating to the interpretation of the Act. The general principle applicable to the interpretation of documents are settled and have been repeatedly restated in this Court. In considering the context in which the provisions appear and the purpose to which they are directed, it must be recognised that the Act constitutes a social legislation, and its primary concern is to give the greatest possible protection to persons who suffered loss through negligence or through unlawful acts on the part of the driver or owner of a motor vehicle. For this reason, the provisions of the Act must be interpreted as extensively as possible in favour of the third parties to afford them the widest protection. On other hand, courts should be alive to the fact that the Fund relies entirely on the fiscus for its funding, and they should be astute to protect it against illegitimate or fraudulent claim." (My own underlining).

[111] The above dictum resonates with what we see on a regular basis in courts, where unscrupulous syndicates hatch plans of how best to defraud the Fund/defendant. Can we say that it is the position in the current case? It is clear that the Fund is raising a point other than that the claim is either illegitimate or fraudulent. It is not disputing that a collision occurred on 18 March 2022, resulting in the minor child sustaining injuries, that curtailed his young life and left him uneducable and unemployable.

[112] The Fund is relying on technicalities, that could have been resolved during the pre – trial, if it played open cards, as it appears to be in possession of a different copy of the plaintiff' identity document. If this the case, why was this copy not discovered? What defendant is complaining about is form and not content, as the plaintiff is acting on behalf of a child who is part of the vulnerable group that the court in *Busuku*[5] is referring to, who need the greatest of protection, and have his claim rejected for minor grounds. The shortcomings of the attorneys in this regard cannot be visited on the child.

[113] Clearly a copy of the identity document of the mother was provided, as requested, though not properly commissioned, the Form RAF1 was completed as prescribed in Regulation 7 including the medical report portion that was

[5] *Id* at para 16.

completed by the doctor at Chris Hani – Baragwanath, the hospital where the child spent about five months receiving treatment as per section 24(1) (a) of the Act. If the Fund was not satisfied, it could have referred the child to be examined by a panel of its appointed doctors in line with the Act, but this avenue was not explored. Further still it could have requested the hospital records directly from the hospital, if it was suspecting foul play, but it did not do so.

[114] Nestadt JA in *Multilateral Motor Vehicle Accident Fund v Radebe*[6], earlier held the view that was followed by the SCA in *Busuku* and held the following:

> "It is true that the object of the Act is to give the widest possible protection to third parties. On the other hand, the benefit which the claim form is to give to the Fund must be borne in mind and given effect to. The information contained in the claim form allows for an assessment of its liability, including the early investigation of the case. In addition, also promotes the saving of the costs of litigation."

[115] The purpose of the claim form and its supporting documents is not for the Fund to find fault with each and every claim, but to gather information to enable it to investigate the case and settle it as quickly as possible in a cost–effective manner. Where fraud is suspected, it should be investigated without delay. In the current matter the Fund did not raise a special plea, nor discover documents in its possession.

[116] *Busuku* referred to *Pithey v Road Accident Fund*[7] and stated as follows:

> "It has been held in a long line of cases that the requirement relating to the submission of the claim form is peremptory and that the prescribed requirements concerning completeness of the form are directory, meaning that substantial compliance with such requirements suffices. As to the latter requirement this court in "SA Eagle Insurance CO Limited v Pretorius" reiterated that the test for substantial compliance is an objective one."[8]

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[6] 1996 (2) SA 154 (A) at 152 E–I.
[7] 2014 (4) SA 112 (SCA) at para 18.
[8] *Busuku* at para 14.

[117] The common thread, in all these decisions, is that substantial compliance test is objective in nature, and minimum compliance will suffice. Once there is enough information for the Fund to investigate, it should proceed to do so. Meaning that the scales are tipped in favour of the claimants, as this is a social protection legislation, more especially now that the general public has direct access to claim without the assistance of an attorney. Where there is sufficient information for the Fund to assess its risk, it should do so.

[118] In the current case the Fund was placed in possession of all documentation that is necessary to investigate, fulfilling the requirements. The discrepancy in the hospital records, was only canvassed during trial, not at the time of assessing the claim. As I have earlier indicated, this was an aspect that should have been canvassed during the pre-trial conference, so that the plaintiff's attorney can decide, who from the hospital to call. It is clear that Mr Ngobese, is an Administration – officer, who is merely a custodian and not an author of any of the entries therein. It is common practice that Administration – Officers are the people who in most instances are subpoenaed to produce information contained in hospital records. He confirmed that his role was nothing more than to place the records and the claim form before the doctor, who completed and return to him to dispatch. If indicated that the contents of the hospital records were in dispute, the plaintiff could have led the evidence of the doctor.

Liability

[119] It is common cause that the minor child was a passenger in the motor vehicle when the accident occurred, resulting in him sustaining some injuries. Though the defendant attempted to allege that the child had a pre-existing condition, no evidence was led in this regard and was contradicted by the plaintiff's expert witnesses, Dr Huth, Specialist Neurologist, and Dr Surridge, Colorectal Surgeon, as both confirmed that the injuries sustained by the child were consistent with the injuries caused by a motor collision accident and were not challenged meaning that their evidence should stand.

[120] The plaintiff only needs to prove 1% negligence, as the child was a passenger and no contributory negligence could be apportioned to him, as he is *doli in*

capax, rendering the defendant fully liable for his damages. DJP Mojapelo held the following in *Prins v Road Accident Fund*[9]:

> "It is common that a passenger needs only to prove the proverbial 1% negligence on the part of an insured driver in order to get 100% of damages that he is entitled to recover from the Fund."

[121] Mojapelo DJP's views were expressed by Mavundla J in *Groenewald C v Road Accident Fund*[10], wherein, the Judge was disturbed by the conduct of the Fund's representatives when dealing with passengers' claims. Fund's representative, being fully aware that in multitude of cases it was repeatedly held, that passengers need to prove only 1% negligence, continue to contest merits of the case, in most instances up to the court's door-step or in extreme cases like in current matter, proceed with the trial on merits being fully aware of the outcome. Judge Mavundla, attributed this to a deliberate attempt to build-up costs in some instances and found it to be disheartening, considering that these are public funds and suggested that curtailment measure be put in place. I echo this view and prompt the Legislature to consider closing this gap.

[122] The court is satisfied that in the circumstances the plaintiff should succeed 100% on the merits, as there is no contributory negligence.

Quantum

[123] I now move on to the quantum. The defendant did not call any witnesses in support of its case nor file an expert Reports, it relied only in cross-examination of the witnesses, which in some instances yielded positive results as some crucial concessions were made. Again, as with the merits, the Fund contested the handing in of the expert Reports, preferring the witnesses to testify even though it had nothing to counter with, causing the court to hear the Rule 38 application and make a ruling in its favour. The fund then withdrew its contestation, of the following witnesses Mr Mokgata, Speech Therapist, Mr Mthimkhulu, Educational Psychologist, Ms Khwela, Occupational Therapist,

[9] [2013] ZAGPPHC at para 4.
[10] [2017] ZAGPPHC 879 (5 October 2017).

and Mr Sauer, Actuary, when they were already reserved for hearing, resulting in wasted costs. This could have been curtailed during pre-trial conference, avoiding costs for preparation and reservations of these witnesses.

[124] Dr Selepe, the Industrial Psychologist, relied on the information that was contained in the other experts' Report and her own assessment to compile her Report. It is clear that Dr Mabena, confirmed that the life span of a child suffering from cerebral palsy and meningitis, may be shortened as a result thereof. She confirmed that the child not have had a pre-existing condition, as he was developing normally, only to regress post-accident. She was not challenged in this regard.

[125] Dr Selepe further referred to Dr Huth's Report, who is of the opinion that, patient's lifespan may be shortened by a period of approximately 10 (ten) years from that of an average person who do not suffer from Cerebral Palsy and epilepsy. This will be one of the factors to be considered when awarding damages. A shortened lifespan means that he will not need the care as set out in the expert Reports. This is an aspect that most of the other experts did not venture into. The above-mentioned amount will have to be adjusted taking into consideration the patient's anticipated lifespan.

[126] Dr Huth confirmed that, M[...] sustained head injury, spinal injury, hydrocephalus and meningitis. He developed symptoms of Complicated Meningitis due to pyogenic lumber spondylodiscitis, leading to mental retardation and cerebral palsy with spastic diplegic variant and epilepsy, that have caused the patient impairment and disability, resulting in WPI of 55%.

[127] Ms Khwela concluded that he was unable to attend mainstream school as he presents with cerebral palsy and is permanently disabled. Ongoing occupational therapy was recommended in his life. Dr Surridge, Colorectal Surgeon and certified Gastroenterologist's Report, that M[...] suffers avulsion of the sigmoid mesentery with resulting necrosis of the synod colon and perforation, which resulted in the sepsis in the central nervous system with complications. This resulted in the sigmoid colon being removed, as a way of

controlling the source of sepsis, and an end colostomy brought out and connected to a stoma-bag.

[128] Ms Mokgata, the Speech Therapist and Audiologist's conclusion is, M[...] will require an individualised education and rehabilitation plan (IEP) in the form of an intensive period of speech-language therapy whilst receiving a multi-disciplinary team approach. M[...] will need to be placed in an appropriate early development centre/ care-centre where he would receive stimulation, learning opportunities and therapeutic intervention within a specialised environment.

[129] Ms Selepe concluded that though the multi-disciplinary interventions will provide educational stimulation, which will be costly to the family, M[...] will remain uneducable. She later conceded under cross -examination that Koch's Upper Band theory was based on top 100 companies in the country, which employ a small percentage of the country's population and was not guaranteed. That it was not easy to attain the contract of employment that due to high demand for placement of tertiary institutions graduates.

[130] Ms Khwela, Occupational Therapist, confirmed that M[...] presented low body tone and left leg presents with spasticity. He will be unable to attend the main stream school, as he presents with cerebral palsy and is permanently disabled. Given his severe long-term neurocognitive, following the accident, it appears he would find it difficult to search, secure and maintain gainful employment in an unskilled or semi-skilled environment in the open labour market.

[131] Ms Selepe referred to Dr Huth – Specialist Neurologist's Report, which reflects that M[...] 's condition developed into Complicated Meningitis, which lead to mental retardation and cerebral palsy which caused the patient impairment and disability. M[...]'s severe long-term medical prognosis would not him to secure and maintain suitable employment. Although she suggests he may need a sympathetic employment, it is clear that his condition cannot allow any form of unskilled work, as he himself would need full-time care and is declared uneducable by Mr Mthimkhulu, Educational Psychologist.

[132] Dr Huth, Specialist Neurologist is of the opinion that M[...] has a shortened life span by approximately 5 (five) years due to epilepsy. Cerebral palsy with

mental retardation carries a further variable reduction in life span. See Report para 12.3.1 at p.13. This will impact on the total amount awarded for loss of income as he would in any way not have lived that long. Dr Selepe's conclusion is that he was functionally and virtually unemployable in an open labour market, which means that a provision of total loss of earnings should be made, in line with the content of para 7.2.1.1 of her Report.

[133] She concluded that as a result of the accident, he sustained injuries on his stomach, head and spinal cord, which resulted in him being unable to walk, talk, and sit without, support. This could have been the position in 2022 at the time of the assessment, as his mother at the hearing, gave evidence that he can now walk with her guidance and can sit on his own. His interaction with other children was described by the mother as bad, as he always hit them with whatever object is available.

[134] Dr Selepe tried to demonstrate M[...]'s retirement age Pre – accident. It is clear that although she tried to refer to his life-style contributing to him reaching retirement age of 65 years and working beyond it. This could not be supported in any way as the evidence before court is, he was only 18 months old at the time of the accident. She deferred the post-accident retirement age to the medical experts to deal with. It is clear that this aspect was not properly addressed, as it is clear that his life expectancy will be seriously shortened, which means that his earning capacity would have been affected as well. His life was said to be shortened by a period of about 10 years. M[...] as the results of the accident, he now can work up to age 55, according to Dr Huth, Specialist Neurologist, whose opinion is he has a shortened life span by approximately 5 (five) years due to epilepsy. Cerebral palsy with mental retardation carries a further variable reduction in life span. *See Report para 12.3.1 at p.13.* This will impact on the total amount awarded for loss of income as he would in any way not have lived that long.

[135] Mr Sauer, the Actuary's Report for M[...], relied mainly on Dr B Selepe the Industrial Psychologist's Report. In paragraph 7 of Dr Selepe's Report is the scenario of what M[...] would have progressed and earned pre-morbid. She indicated that no income is projected until M[...] reaches the age of 20.5, which

will be in the April 2041, as he was a toddler at the time of the collision and could have studied towards obtaining a degree, which is NQF level 7 qualification. She conceded under cross-examination that he could have reached NQF level 5 a diploma not a degree, as per Report. He could have entered the labour market with a diploma. Dr Selepe further conceded that upper quartile income of semi-skilled workers of R204 000, 00 per annum in 2023 monetary terms, was not accessible by majority of young people in this country, as it was based on what the top 100 companies offered.

[136] The actuary projected this income with inflationary increases until the child turns the age of 22.5 (22) + 23) / 2), therefore until 2043/04/10, when he would have completed his internship and secured employment in the corporate sector. His projection in this regard is subject adjustment, as Dr Selepe conceded that he would obtain a diploma not a degree and that upper quartile income was not for everyone. His projected a total package, equal to lower quartile B4/C1 Paterson level, of R385 500,00 ((R513 000 + R458 000,00) / 2) (Quantum Yearbook 2024 figure) per annum in current monetary terms, should also be adjusted accordingly. 10% of this income is assumed to consist of non-taxable fringe benefits.

[137] A further adjustment is necessary to his projected income linear increases until age 45, which will be in 2065/10/10, when he reached his career ceiling. Thereafter the total package of R1 114 000 (Quantum Yearbook 2024 figure) per annum in current monetary terms, may be lessened by the above factors. Further aspect for consideration will be that the projected this income inflationary increases, will be until retirement at age 55, as Dr Huth, indicated that life expectancy is shortened by approximately 10 years.

[138] Mr Sauer further pointed out that the calculations were done in line with the industrial psychologist' recommendations and do not in any way certify its correctness, as it is not part of his expertise.

[139] He worked on the Past escalation rate of 6. 01% per annum (Average CPI over past period). The future escalation rate is 4. 6% per annum. In as far as the tax is concerned, past earnings are taxed at the tax rate applicable in the relevant

financial year, whilst future earnings are taxed at the latest available tax rates. It is clear that he worked his contingencies provision, informed by Dr Selepe's report, which she conceded was based on incorrect information in as far as the NQF level was concerned and the life expectancy of the child. Clearly this would necessitate a further adjustment.

[140] Clearly a higher contingency is applicable in the circumstances. The 5% total deduction for past losses (pre-morbid) and 0% total deduction for past losses (post-morbid). A higher contingency than his 20% total deduction for future losses (pre-morbid) (approximately 0.5% per future working year.) and 0% total deduction for future losses (post-morbid), will be applicable. Mr Sauer concluded that following will be the calculations. Future earnings pre-morbid is an amount of R9 782 026, less 25% contingency deductions in the sum of R1 956 405, with the total of R7 825 621. Post-morbid the figure is 0, leaving the sum of R7 825 621 as the total loss of earnings suffered by M[...], as there is no RAF cap applicable.

[141] In determining the loss of earnings, the court has followed the approach of Stratford, J in *Hersman v Shapiro and Co*[11] where it was held that:

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

[142] The court finds that the evidence placed before it was of assistance, but laments the fact that Dr Selepe's Report and her evidence in court differed slightly as she placed in her Report that he could have obtained a degree, which is a NQF level 7, but in court under cross – examination confirmed that the Educational Psychologist's assessment of a diploma, which is the NQF Level 5 was the more appropriate in the circumstances. She further did not take into consideration that his life expectancy was shortened life span by approximately 5 (five) years due to epilepsy. And Cerebral palsy with mental

[11] 1926 TPD 367 at 369.

retardation carries a further variable reduction in life span. An average of 10 year could be the shortened life span. Based on this Mr Sauer worked out his calculations and came out with the final figure of R9 782 026, 00 less 20% contingency deductions in the sum of R1 956 405, with the total of R7 825 621, 00. Post-morbid the figure is 0, leaving the sum of R7 825 621, 00. It is clear that if he was provided with all this information, he could have arrived at an amount that is far less than the current figure.

[143] As set out in *Anthony and Another v Cape Town Municipality*[12], Holmes JA at held the following:

> "I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, no better system has been devised for assessing general damages for the future loss".

[144] The court has considered the information provided in various Reports and the oral evidence and reach a conclusion that a less amount be granted as compensation in the circumstances; with a higher contingency to compensate for the short coming. The amount as suggested by the plaintiff's attorney in the draft order in the sum of R6 592 708, 00 will be appropriate in the circumstances, as it is less than the amount of R6 847 418, 20, at a higher contingency of 30%.

[145] The court finds that an amount of R6 592 708, 00 is just and reasonable in the circumstances and make a compensation order for this amount.

[146] The court further makes an order for preservation of the funds, as the child is not in a position to manage his own affairs and the mother is not suitable for this position. His parents are not married and live apart, with the mother as the primary caregiver. His father is not directly involved in the child's day to day life and rarely sees the child. The father's negligence was the cause of the child's condition, putting him in charge of the funds will amount to him benefitting from

[12] 1967 (4) SA 445 (A) at 451B–C.

his wrong doing. It will be in the child's best interests if the fund be preserved in a Trust to be created in his favour and for his sole benefit.

[147] The defendant is also liable for all the costs associated with this claim. The draft order will be attached to this judgment as part hereof.

Order

[148] In the circumstances, I make the following order:

1. The draft order attached hereto marked with an "X", is made an order of court and final part of judgment in this matter.

SO VELE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

Counsel for Plaintiff:	Advocate M Kutama
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Counsel for Defendant:	Ms S Ameersigh
Instructed by:	State Attorney, Johannesburg
Dates of Hearing:	10 – 14/02/2025, 31/03/2025, 01/04/2025 and 07/07/2025
Date of Judgement:	06 October 2025