



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Not reportable
CASE NO. 381/2020

In the matter between:

N[...] M[...] obo

B[...] M[...]

Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH,

EASTERN CAPE PROVINCE

Defendant

JUDGMENT

LAING J

[1] This is a claim for damages arising from the negligence of the medical staff at the Idutywa Clinic and Butterworth Hospital. The plaintiff's child, B, was born on 14 April 2016 with cerebral palsy and suffers from permanent brain damage.

Background

[2] The defendant has already been found liable on the merits. The parties subsequently settled the claim for general damages and architectural costs and the matter proceeded to trial for the determination of B's mobility costs and loss of earning capacity.

[3] B is nine years old. It was common cause that her life expectancy is 26.5 years. The joint minute prepared by the parties' respective occupational therapists recorded that B presents with a profound disability, characterised by spastic quadriplegia, deficient hand functions and eating efficiency, as well as difficulties with communication. She is developmentally and cognitively disabled, compounded by visual deficits, and totally reliant on caregivers for survival. Regarding B's mobility needs, the therapists agreed that she would require a wheelchair and an MPV for transportation. They were unable to agree, however, on the accompanying costs. This aspect was left to a mobility expert for further investigation.

[4] The loss of earning capacity was the remaining issue. The parties' respective industrial psychologists prepared a joint minute in terms of which they agreed that B was uneducable and unemployable, and that she would require a full-time caregiver. They agreed that, but for her condition, she would probably have achieved a grade 12 level of education. They disagreed, however, on her probable earnings.

Issues to be decided

[5] The court must determine: (a) B's mobility costs; and (b) her loss of earning capacity. The former will depend on whether more than one vehicle will be necessary for her remaining life expectancy, while the latter will depend on which of the industrial psychologists' opinions must be preferred. The court must also decide what deductions to make for contingencies. An overview of the relevant principles follow.

Legal framework

[6] The court must rely primarily on the opinions expressed by various experts through their reports, joint minutes, and testimonies. In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*,¹ the Supreme Court of Appeal set out the correct approach to expert evidence, stating that:

‘ . . . the question of reasonableness and negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court’s reaching its own conclusion on the issues raised.’²

The court continued:

‘ . . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.’³

[7] In *Louwrens v Oldwage*,⁴ the Supreme Court of Appeal confirmed the correctness of the approach. Dealing with the trial court’s handling of competing sets of evidence, the appeal court disapproved of the former’s uncritical acceptance of an expert’s opinion, pointing out that:

‘ . . . What was required of the trial judge was to determine to what extent the opinions advanced by the experts were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities.’⁵

[8] The Supreme Court of Appeal considered the subject again in *AM and Another v MEC for Health, Western Cape*,⁶ where it held as follows:

¹ 2001 (3) SA 1188 (SCA).

² Para 34.

³ Para 36.

⁴ 2006 (2) SA 161 (SCA).

⁵ At paragraph 27.

⁶ 2021 (3) SA 337 (SCA).

‘Something needs to be said about the role of expert witnesses . . . The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.’⁷

The court went on to say that:

‘The opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation.’⁸

[9] This constitutes a basic framework within which the opinions of the experts in the present matter must be evaluated. A summary of the trial evidence follows.

Mobility costs

[10] In terms of a joint minute, the occupational therapists recorded their areas of agreement as follows:

‘3.3.1. Agreed that she is unable to walk and will remain wheelchair dependent. She should be transported in an MPV as the most suitable transport option.’⁹

⁷ Para 17.

⁸ Para 21.

⁹ ‘MPV’ is understood as an acronym for multi-purpose vehicle.

- 3.3.2. Agreed to defer to the mobility expert for costing of vehicles and adaptive devices specific to travel.
- 3.3.3. Agreed that the costs of such a vehicle . . . [eg] a VW Caddy or Ford Transit Connect, are similar, at R 455 000 – R 509 000, and [that] each vehicle offers similar features.
- 3.3.4. Agreed that necessary ramp adaptations are needed, and costing is recognised as being in a wide range according to supplier and whether purchased new or second-hand. JB noted [that] costing [from] R 75 500 (second-hand) to R 102 000 (new) [should] be allowed for . . . wheelchair transportation. CR costed R 18 500 for heavy-duty ramps.¹⁰

[11] They deferred the question of the costs of a motor vehicle and adaptive devices to a mobility expert. In that regard, the plaintiff appointed Ms Rosslyn Rich, who recommended own transport as a primary solution. A ‘runabout’ such as a Renault Triber had a spacious interior with foldable back seats that would allow the stowage of wheelchair equipment. This would suffice, said Ms Rich, until B reached a mass of 22 – 25 kilogrammes, after which the recommended method was to load and transport her while she was seated in a wheelchair. A spacious MPV with a flat cargo floor, such as a Volkswagen Caddy, was suitable; it could be adapted to accommodate an automated wheelchair hoist and a restraint system. Ms Rich compared the respective costs of two entry-level runabouts, viz a Renault Triber and a Suzuki Ertiga, including purchase price (less trade-in value after six years), insurance, running expenses, and an appropriate car seat. She also listed the corresponding costs for a Volkswagen Caddy, but replaced the car seat with provision for a hoist and a restraint system.

[12] At trial, Ms Rich explained that a Suzuki Ertiga was more suitable than the Renault Triber for the harsher conditions where B resided. She based her calculations on a six-year motor vehicle lifespan, which would preserve its trade-in value. It would also accommodate B’s growth until she attained a mass of 22 – 25 kilogrammes, after which a larger vehicle would be required. Counsel challenged the need for two vehicles, saying that there was no need for a runabout; a single MPV

¹⁰ Sic. ‘JB’ is a reference to the plaintiff’s occupational therapist, Ms Jane Bainbridge; ‘CR’ is a reference to the defendant’s occupational therapist, Ms Chery Rooy.

would be adequate. Ms Rich pointed out that both the Renault Triber and the Suzuki Ertiga were classed as small MPVs. For the sake of cost efficiency, she had made allowance for a smaller vehicle, to be replaced in due course by the larger Volkswagen Caddy. The use of a single, large MPV, from the outset, would increase costs because the Volkswagen Caddy was simply a more expensive vehicle to purchase and operate for B's remaining life expectancy.

[13] Ms Rich's recommendation of two vehicles also anticipated B's gain in mass. A medical practitioner, Dr Robert Campbell, testified in that regard. He had previously assessed B on 12 September 2022, at which stage her mass was ten kilogrammes. This was 'very low' for her age. Prior to trial, the plaintiff delivered a letter to the defendant, setting out Dr Campbell's views regarding the probable age at which B would attain a mass of 23 kilogrammes. The defendant objected to its admission on procedural grounds and pointed out that there was no factual basis for Dr Campbell's views because he had not conducted any recent physical assessment; furthermore, dietetics fell outside his area of expertise. The court allowed the letter. At trial, Dr Campbell expressed the view, based on his professional knowledge and experience, that B would probably attain a mass of 23 kilogrammes at the age of 13.75 years. He acknowledged that he had not conducted a recent assessment but had relied on the findings of other experts. From the available information, Dr Campbell saw how B's mass had fluctuated over time because she had not been provided with the treatment that she required. He stated that, on a balance of probabilities, if she received proper care then her mass would increase. He conceded, however, that without the necessary interventions this would not occur.

Loss of earning capacity

[14] The industrial psychologists agreed that, but for the negligence of the defendant's medical staff, B would have obtained a grade 12. They disagreed, however, on how her career would have developed.

[15] The plaintiff's expert, Ms Busisiwe Pepu, said that B would have obtained a diploma by 2036 and then entered the semi-skilled labour market. She would have received a learnership stipend for 2037, facilitated by one of the Sector Education and Training Authorities (SETAs) that fell under the auspices of the South African Qualifications Authority (SAQA). She would have then secured a position in 2038 at Paterson level B3 (25th percentile),¹¹ which was in accordance with accepted benchmarks; it was conservative, however, because it considered the impact of the COVID pandemic on economic growth, as well as the current unemployment rate. B's total package, at that stage, would have been worth R 271 000. Subsequently, B would have benefitted from further training and development, as envisaged under the Skills Development Act 97 of 1998 (SDA). This would have allowed her to progress to level C4 (50th percentile) by 2046. Her total package would have been worth R 786 000. This would have marked her career ceiling, after which she would have received inflation-linked increases until her retirement at 65 years.

[16] Ms Pepu disagreed with the defendant's industrial psychologist, Ms Shaida Bobat, who had based her calculations on B's obtaining a qualification somewhere between a diploma and a certificate. This resulted in earnings appropriate for the latter, which was too conservative. If B would have obtained a diploma, then she would have progressed to level C and not remained at level B. Furthermore, Ms Pepu disagreed with Ms Bobat's reliance on information from Statistics South Africa ('Stats SA'). This was based on a public survey that was not verified by employees' actual earnings, substantiated by payslips. It was an unreliable measure. The Paterson grading system, which Ms Pepu had used, was more reliable because it was based on information collected from employers in the open labour market, where there was a correlation between remuneration and job level. Furthermore, Ms Pepu was critical of Ms Bobat's failure to have considered the possibility of B's having secured a SETA learnership, saying that, in her experience, graduates were often successful in this regard.

[17] For her part, Ms Bobat testified that family history was an important variable in relation to educational potential and employability. It was, however, impossible to

¹¹ R Koch *Quantum Yearbook* (2023), page reference not provided.

say, definitively, whether B would have obtained either a diploma or a certificate; Ms Bobat's report accommodated this uncertainty. She accepted that she had ultimately indicated that the likely scenario was a diploma, but pointed out that the experts differed in relation to B's progression thereafter. From her experience, few students completed their tertiary training within the allotted time. This placed their National Student Financial Aid Scheme (NSFAS) funding at risk and required them to work to compensate for any resultant loss. It meant, moreover, that it could take up to six or seven years for a student to complete his or her studies. Poverty was an additional variable that needed to be considered.

[18] Ms Bobat agreed that B could have entered the labour market in 2038 at level B3. Nevertheless, she emphasised that it was necessary to be realistic, considering the type of qualification that could be obtained and the overall difficulty in finding employment. The current unemployment rate was 60% for youth, classified as anyone under 25 years; a one-year gap after studying was optimistic. Ms Bobat accepted that both SETA learnerships and private sector internships were available to graduates but reiterated that it was an extremely competitive environment in a stagnant labour market. The circumstances were unlikely to change in the foreseeable future. The SETAs to which Ms Pepu had referred were struggling with financial problems and unable to gain effective access to organizational networks.

[19] The expert explained that any salary dataset had its own weaknesses, each job grading system was different. The Stats SA information was not limited to the corporate sector, upon which much of the Paterson grading system was based; it also considered employment within the Small, Medium, and Micro Enterprise (SMME) sector. No assumption could be made that B would have been able to secure employment in the former. Ms Bobat had used a basic instead of a total benefits package for her calculations because the former included mandatory benefits such as maternity leave, as well as Unemployment Insurance Fund (UIF) and COIDA¹² contributions; any additional benefits, such as medical aid and bonuses, were discretionary. Ms Bobat testified that B could have reached a career ceiling at level C2. Considering the nature of South Africa's labour market, however, Ms Bobat was of the view that a more realistic path would have entailed B's securing

¹² Compensation for Occupational Injuries and Diseases Act 130 of 1993.

employment by 2041. Her earnings would have been in the lower quartile, level B1, increasing to the median thereof after one or two years, after which she would have reached a career ceiling by 2061, earning R 467 000 per annum in terms of the Stats SA dataset.

[20] Ms Bobat explained further that she had based the lower projection of learnership earnings on her own research. She accepted, however, that there was nothing wrong with Ms Pepu's having relied on the corresponding Paterson level. She disagreed that B would have attained level C4, saying that this would have required a high IQ and emotional intelligence; her psycho-social background did not support such a scenario. Ms Bobat conceded that it was, nevertheless, theoretically possible. She also conceded that the unemployment rate for graduates with tertiary qualifications was not as high as 60%; it was much lower. Ms Bobat emphasised that considerably more uncertainty was being introduced into the labour market by ongoing technological innovations. Research indicated that a range of new skills would be required. South Africa's high unemployment rate and recessionary economic climate would probably persist but she accepted that the overall outlook remained uncertain. Regarding her use of a combination of the Paterson grading system and the Stats SA levels for the determination of B's career progression, Ms Bobat contended that it was a reasonable approach after having considered the variables as well as the available research. It was very improbable that B would have reached level C4.

Discussion

[21] As a starting point, it is helpful to reiterate the principles pertaining to joint minutes. In *Bee v Road Accident Fund*,¹³ the Supreme Court of Appeal dealt with the effect of an agreement recorded in a joint minute. In that regard, Rogers AJA held as follows:

¹³ 2018 (4) SA 366 (SCA).

‘ . . . The appellant’s counsel referred us to the judgment of Sutherland J in *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161. The learned judge said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts (para 9). Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement “unless it does so clearly and, at the very latest, at the outset of the trial” (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference (para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare (para 13).’¹⁴

[22] In the present matter, the court must accept the facts agreed upon by the occupational therapists and industrial psychologists, as well as their shared opinions. The court cannot reject opinion evidence unless there are exceptional circumstances for doing so, eg where there is a clear and material error in either the factual matrix or the reasoning based thereon.

[23] Regarding mobility costs, the therapists agreed that an MPV was the most suitable transport option. They could not, however, agree on the ‘costing of *vehicles* and adaptive devices specific to travel’ (emphasis added). This was left to a mobility expert. They went on to record their agreement that ‘the costs of such a *vehicle* . . . [eg] a VW Caddy or Ford Transit Connect, are similar, at R 455 000 – R 509 000, and [that] each vehicle offers similar features’ (emphasis added). The joint minute cannot be said to reflect agreement that only a single MPV was required; the possibility existed that a further vehicle would be necessary, but the overall costs were for determination by the expert in question.

[24] Ms Rich based her recommendation on two key factors. The first was the need to preserve the trade-in value of the Suzuki Ertiga that she had proposed. It was common cause that B was nine years old and that her life expectancy was 26.5 years. It was also undisputed that B resided in a rural area with rudimentary

¹⁴ Para [64].

transportation networks and harsh driving conditions. Ms Rich's recommendation stands to reason when considering the wear and tear on a vehicle using rough roads to transport B for the duration of her remaining life expectancy, which equated to approximately 17.5 years. It was improbable that a single MPV would suffice in such circumstances. The increasing costs of repairs and maintenance would be likely to exceed the costs of commencing with a smaller vehicle equipped with a car seat and subsequently trading it in for an appropriate MPV that could accommodate a hoist and a restraint system. An additional aspect is the diminishing safety of a single vehicle used for such an extensive period. Ms Rich's recommendation, in that regard, cannot be criticized. The defendant presented no evidence to challenge the facts and reasoning upon which it had been based.

[25] The second factor involved was the expected age at which B would attain a mass of 22 – 25 kilogrammes. Whereas the court admitted Dr Campbell's letter at trial, it became clear during testimony that no reliance could be placed on it. He had not conducted any recent physical assessment of B. Furthermore, he acknowledged fluctuations in her mass because of inadequate treatment and conceded that it was improbable that she would attain a mass of 23 kilogrammes at 13.75 years without proper care. Consequently, the speculative nature of the expert's opinion undermined its evidential value. It cannot be accepted as support for Ms Rich's recommendation.

[26] The parties agreed, in general, on the calculations prepared by the defendant's actuary in relation to mobility costs. On the strength of Ms Rich's opinion, based chiefly on the need to preserve the trade-in value of the Suzuki Ertiga within the context of B's locality and the duration of her remaining life expectancy, the court is persuaded that provision for the costs of two vehicles is justified.

[27] Turning to the loss of earning capacity, it is notoriously difficult to decide such an issue when the claimant is of such a young age. The tools available to the experts, such as Koch's *Quantum Yearbook* and the information derived from Stats SA surveys, are indeed most useful — but far from perfect. Both Ms Pepu and Ms Bobat admitted as much. To some extent, the imperfections can be ameliorated by making allowance for contingencies in the final award. As Ms Bobat sagely pointed

out, however, society finds itself on the cusp of major changes in the labour market, accompanied by a great deal of uncertainty about what training, qualifications, or skills will be essential for navigating, successfully, a brave new world.

[28] For immediate purposes, the court is required to apply the principles already mentioned. At the outset, it is necessary to acknowledge that Ms Bobat's views were informed by a clear and sensible appreciation of the influence of what has been termed the fourth industrial revolution,¹⁵ as well as the vulnerability of South Africa's labour market, handicapped as it is already by stagnant economic growth and high unemployment rates. The factual basis upon which she drew her inferences, however, was often unclear. This was apparent, for example, when testifying about the value of the learnership that B would (or could) have secured, as the following extract illustrates:

'MS BOBAT: . . . for an internship or a learnership . . . I would be much more inclined to say that the figure . . . the R 88 500 . . . [is] the midpoint between the two. The figure itself reflects the research that I have spoken about.

MR SCHOEMAN: The research that you have spoken about to say that it proves that learnerships will earn at that range, we do not have that. There is nothing in the documents before us.

MS BOBAT: Yes, absolutely, but my thinking is informed by that.'

[29] Furthermore, Ms Bobat seemed to have been inconsistent in her reliance on either the Paterson grading system or the information provided by Stats SA, using the relevant tables interchangeably to arrive at earnings that corresponded with what she believed was a more realistic reflection of B's career trajectory. Her scepticism is, to a degree, understandable. Nevertheless, she was unable to provide a convincing justification for her approach, which tended to compromise the factual basis upon which she drew her inferences.

¹⁵ The term is understood as 'a neologism describing rapid technological advancement in the 21st century . . . these developments represent a significant shift in industrial capitalism.' See https://en.wikipedia.org/wiki/Fourth_Industrial_Revolution accessed on 28 January 2026.

[30] There also appeared to have been gaps in Ms Bobat's explanation for how she had applied the tables. For example, she indicated that B would ultimately have earned R 467 000 per annum, representing her career ceiling, but have had difficulty in demonstrating why she had used the figure in question. Consider the following extract:

'MR SCHOEMAN: So then what I do not understand is if you are utilising Stats SA, why do you not utilise R 598 000? Why do you not utilise [this] . . . where you got your figure from . . . ?¹⁶

MS BOBAT: Because that is the reasonable figure in terms of all the other research I have done in arriving at that figure. . . Then it is about in-between R 353 000 and R 598 000. It is neither here nor there. I mean, I do not think we must kind of get caught up in why it is in this figure and why it is in that. It still reflects a reasonable and statistically sound way of projecting earnings when I take into account all the variables. That is all I am saying.

MR SCHOEMAN: But once again, to me it seems you just looked at the document, saw R 467 000 . . . and utilised that.

MS BOBAT: Certainly, M'Lord, I did not pluck it out of the air.

MR SCHOEMAN: No, I am not saying it was plucked out of the air. It comes directly from this document.

MS BOBAT: Well, it comes from the document and . . . I have just explained how to make sense of it.'

[31] It emerged, after further cross-examination, that Ms Bobat had adopted an approach based on her own research. This, she said, had revealed that the figure of R 467 000 was more accurate for B's likely career ceiling. When counsel pointed out that such research was not before court, Ms Bobat referred in general to her earlier testimony about, inter alia, the percentages of people earning various amounts, the

¹⁶ Both figures were in the Stats SA upper quartile for a grade 12 education, with a diploma. However, R 467 000 corresponded to mid-career, from 26 to 44 years, whereas R 598 000 corresponded to late career, from 45 years onwards. The latter was the more likely stage when a person would reach his or her career ceiling.

duration of training for various occupations, bargaining council rates, data surveys, and so forth. She then stated:

‘MS BOBAT: . . . So there is a broad reading of it and when you look at it all cumulatively, when I look at it all cumulatively, this [ie R 467 000] was reasonable and realistic . . .’

[32] Whereas the expert was undoubtedly equipped with the necessary experience and expertise to have assisted the court, the above comments were simply unhelpful. *AM* is authority for the principle that an expert’s role is, inter alia, to furnish the court with abstract or general knowledge about his or her discipline to enable it to understand the issues in question. Furthermore, the expert must provide evidence in relation to his or own inferences and opinions on such issues, as well as the grounds upon which they are made or drawn. In the present matter, the grounds were obscure at best, absent at worst. It is impossible to decide, without further details about the nature and scope of the underlying research, as well as the findings made, whether Ms Bobat’s views were founded on logical reasoning. This, combined with several key concessions regarding the theoretical possibility of B’s career progression, as well as the beneficial impact of existing legislation, policies, and labour programmes, had the effect of undermining her evidence.

[33] In contrast, Ms Pepu’s views had a sound factual basis and exhibited clear and logical reasoning. She acknowledged the possible benefits of SETA learnerships but also applied conservative Paterson gradings in accordance with accepted benchmarks, recognizing the effects of slow economic growth and the current unemployment rate. Ms Pepu correctly allowed for further training and development in terms of the SDA. If anything, then her projections could merely be criticized for not having properly considered the uncertainties presented by the advent of the fourth industrial revolution, to use Ms Bobat’s term, and its influence on the labour market. Nevertheless, any shortcoming in this regard can be mitigated by making provision for contingencies. This aspect will be discussed further below.

Contingencies

[34] The determination of damages for loss of earning capacity entails making accommodation for the uncertainties of life. These include various internal factors that are unique to a claimant's personal circumstances, as well as the influence of external factors on his or her contribution of skills and abilities to the market. Making provision for contingencies by implementing the necessary deductions from an award serves as a useful legal tool.

[35] Dendy remarks that:

'In awarding damages for future loss courts usually make provision for contingencies. Contingencies include any possible relevant future event which might otherwise have caused the damage or a part thereof, or which may otherwise influence the extent of the plaintiff's damage. In a wide sense, contingencies are described as "hazards that normally beset the lives and circumstances of ordinary people".¹⁷ This may, for example, imply that provision is made for the fact that the prospective loss which is possible at the time of assessment of damage might in any event possibly have occurred independently of the delict or the breach of contract in question.'¹⁸

[36] The courts have referred to contingencies as 'the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors'.¹⁹ It has been recognised, however, that the fortunes of life are not always adverse; they may be favourable.²⁰ A court must exercise its discretion the determination of a contingency deduction by deciding what is fair and reasonable.²¹ The exercise is not an exact science.

[37] In the present matter, the parties agreed on the calculations prepared by the defendant's actuary regarding mobility costs. There was no dispute that these were, overall, conservative. It is not apparent that a deduction for contingencies should be made. In contrast, the parties agreed that it would be appropriate to make a contingency deduction of 15% in relation to B's loss of earning capacity. This was

¹⁷ *AA Mutual Insurance Association Ltd v Van Jaarsveld* (1) 1974 2 QOD 360 (A), at 367.

¹⁸ See M Dendy's title on 'Damages' in 14(1) *Lawsa* 3 ed para 27.

¹⁹ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA), para 3.

²⁰ *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A), at 117B.

²¹ *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ), paras 95 to 96; and *Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd* [2016] 4 All SA 153 (GJ), para 147.

supported by the case law to which counsel referred.²² Mindful, however, of the court's assessment of the opinion evidence presented by Ms Pepu and Ms Bobat, it would seem necessary not to overlook the combination of B's youthfulness (nine years) and the degree of uncertainty in the labour market, as already discussed. This would accord with the principles set out by the Supreme Court of Appeal in *Road Accident Fund v Kerridge*,²³ where it was reiterated that 'the younger a claimant, the more time he or she has to fall prey to [the] vicissitudes and imponderables of life'.²⁴ Consequently, it would be fair and reasonable for the court to exercise its discretion by making a slightly higher deduction than counsel suggested.

Relief and order

[38] The court is satisfied that B's mobility costs must include provision for two vehicles, as recommended by Ms Rich. The calculations prepared by the defendant's actuary serve as an adequate basis for the determination to be made, without adjustment for the lower age at which Dr Campbell believed that B would attain a mass of 23 kilogrammes. Furthermore, the court is satisfied that Ms Pepu's views, rather than Ms Bobat's, must be accepted for the determination of loss of earning capacity. The calculations prepared by the defendant's actuary can similarly be used in this regard, as agreed upon by the parties. A deduction of 20% must be made, however, for contingencies.

[39] It is necessary to address, briefly, the defendant's contention that the common law ought to be developed to allow a departure from the principle of awarding damages in money, as well as the 'once and for all' rule. Counsel argued that any award should be made by way of periodic, instead of 'lump-sum', payments. There are, of course, statutory obligations that bind the defendant.²⁵ The Constitutional

²² See, inter alia, *Benjamin NO v Road Accident Fund* 2005 (5B4) QOD 205 (C); *Smit NO v Road Accident Fund* 2006 (5B4) QOD 251 (T); and *Mokhethi and Another v MEC for Health, Gauteng* 2014 (1) SA 93 (GSJ).

²³ 2019 (2) SA 233 (SCA).

²⁴ Para 44.

²⁵ See, for example, section 3 (3) (a) of the State Liability Act 20 of 1957, requiring satisfaction of a court order for the payment of money within 30 days, alternatively the date agreed upon. Under section 38 (1) (f)

Court observed, in *MEC for Health and Social Development, Gauteng v DZ obo WZ*,²⁶ that any development of the common law required factual material upon which an assessment to that effect could be made. The court, per Froneman J, held that:

‘ . . . Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced for assessment. If it is sufficiently cogent, it might well carry the day.’²⁷

[40] The court in the present matter dealt extensively with the subject in *AQ obo IQ v Member of the Executive Council for Health, Eastern Cape*.²⁸ Applying the principles set out therein, it is not persuaded that the defendant has, in any manner, properly adduced the requisite factual evidence to support the development of the common law. Nothing further needs to be said in that regard.

[41] Finally, in relation to costs, there is no reason why the general rule should not be implemented. The plaintiff is entitled to her costs, including those reserved on 13 February 2025, upon which date the parties attempted unsuccessfully to reach settlement. Considering the complexity of the matter and the importance of the relief sought, the plaintiff’s employment of two counsel was justified; scale C is applicable for senior counsel, scale B for junior counsel.

[42] Consequently, an order is made in terms of annexure ‘A’.

JGA LAING
JUDGE OF THE HIGH COURT

of the Public Finance Management Act 1 of 1999, an accounting officer must pay all money owing within the prescribed or agreed period.

²⁶ 2018 (1) SA 335 (CC).

²⁷ Para 58.

²⁸ (856/2019) [2025] ZAECBHC 30 (18 November 2025).

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Dates heard: 13 February 2025, 19 – 21 May 2025, and 17 July 2025.

Date delivered: 3 February 2026.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MTHATHA

Thursday, 9 September 2025

Before the Honourable Mr Justice LAING

CASE NO. 381/2020

In the matter between :

N[...] M[...] obo

B[...] M[...]

PLAINTIFF

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, PROVINCE OF THE EASTERN CAPE

DEFENDANT

DRAFT ORDER

Having heard Advocate A D Schoeman SC with Advocate H B Ayerst for the Plaintiff, and Advocate L Brauns for the Defendant, and having read the papers filed of record, and having heard the evidence presented and argument thereon, it is ordered that:

1. The Defendant is liable to pay the Plaintiff the amount of R 4,171,356 (Four million one hundred and seventy-one thousand three hundred and fifty-six rand) in respect of the minor child's claims under the following heads of damages:

1.1 Architectural costs	R1,112,485.00
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1.2 Mobility costs	R1,539, 221.00
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1.3 Loss of income	R1,519,650.00
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(having regard to contingencies).

2. In addition to the above, the Defendant is to pay interest on the aforementioned amounts, at the prevailing legal rate, from 30 days from date of Judgment to date of final payment thereof;

3. The Defendant shall pay the Plaintiff's costs of the trial in respect of the abovementioned issues, in accordance with Scale C (Scale B for Junior Counsel), together with all reserved costs, if any, including interest thereon at the prevailing legal rate from a date 30 days after allocatur and/or agreement to date of payment, which costs shall furthermore include :

- 3.1 The costs of two Counsel, where utilised;

- 3.2 The costs of the hearing on 13 February 2025, 19 to 21 May 2026, 17 July 2025 and 9 September 2025, including Counsel's day fees;

- 3.3 The costs of preparing for consultations and trial;

- 3.4 The costs of perusal of the transcript of proceeding for the purpose of drafting the heads of argument together with the costs of drafting the heads of argument;

- 3.5 The costs of preparing for argument;

- 1.4 The travelling and accommodation expenses, if any, of the Plaintiff's legal representatives attending consultations with witnesses and Court;

1.5 The reservation fees, if any, together with the qualifying fees, if any, of the Plaintiff's below expert witnesses together with their travelling and accommodation costs, if any :

1.5.1 Ms Rosslyn Rich, mobility expert;

1.5.2 Dr R D D Campbell, rehabilitation and life expectancy expert;

1.5.3 Ms G B Pepu, industrial psychologist;

1.5.4 Williams Associates Architects; and

1.5.5 Mr W Loots, actuary.

2. The aforementioned amounts are to be paid into the Trust Account of Mjulelwa Inc. Attorneys with the following details :

Account Name : Mjulelwa Inc. Attorneys

Bank : Standard Bank, Mthatha

Account Number : 2[...]

Branch Code : 052621

Reference : M[...] versus MEC for Health

3. The issues relating to caregiving, case management and the costs of a stimulation centre, together with all the issues forming part of the public health care defence, are postponed for later determination by the above Honourable Court.

By Order

REGISTRAR