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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

Case no: 34073 /2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 21/04/2026

SIGNATURE:

In the matter between:

N[...] A[...] G[...]

Plaintiff

Obo B[...] K[...]

and

ROAD ACCIDENT FUND

Defendant

Link no: 4952983

JUDGEMENT

CORAM:	ZITHA, AJ
HEARD ON:	09 DECEMBER 2025
DELIVERED ON:	21st APRIL 2026
<u>INTRODUCTION</u>	

This is a delictual claim as a result of a motor vehicle collision, which occurred on the 13th December 2018. The Plaintiff approaches the court by a way of default judgment. This is a result of the Defendant's failure to file a notice of intention to defend and serve a plea.

PARTIES

- [1]** The Plaintiff is a female adult person with identity number 7[...] currently residing at 1[...] N[...] Street, Grahamstown, Eastern Cape Province, who sues herein in her representative capacity as the mother and natural guardian of **B[...] K[...]** born on the 01st of March 2008, as a result of his involvement in a motor vehicle accident.
- [2]** The Defendant is the Road Accident Fund, a juristic person established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996 ("*the Act*") with full legal personality and of address 3[...] I[...] Street, Menlo Park, Pretoria, Gauteng.
- [3]** On 13 December 2018 at approximately 10:00 and in Mfitshane location, Mqanduli, Eastern Cape Province, the Plaintiff was a passenger on a bakkie when the said vehicle was involved in an accident. This is an action for damages which the Plaintiff suffered as a result of injuries he suffered in the accident. The Plaintiff instituted the action in her representative capacity. The issue of liability has already been resolved between the parties.
- [4]** In terms of the particulars of claim the Plaintiff suffered the following injuries:

4.1 Mild Traumatic brain injury;

- 4.2 Multiple bruises on the head; and
- 4.3 Laceration on the occipital;

AN APPLICATION IN TERMS OF RULE 38(2) OF THE UNIFORM RULES

[5] The Plaintiff made an application in terms of Rule 38(2), in order to lead evidence by a way of an affidavit. Such application was properly served and accompanied by the expert affidavits. The application was granted. For future medical expenses the Plaintiff is awarded an undertaking in terms of section 17 of the Road Accident Fund Act.

In this regard the Plaintiff's evidence is unchallenged and uncontested as the

Defendant's plea was struck off by the Court.

The Plaintiff applied that his quantum evidence be admitted by way of affidavit.

This included:

- 5.1. The Plaintiff's quantum evidence;
- 5.2. Any collateral witness evidence; and
- 5.3. In terms of the Judge President's Practice Directive 1 of 2021 (paragraph 29), evidence may be tendered by affidavit, and the Trial Judge may exercise his/her discretion to accept such evidence.
- 5.4. In the matter of ***Abraham v City of Cape Town***¹, the Court held:

"It was common cause before me that where an application for default judgment serves before a Court, it has a clear and unfettered discretion in terms of the relevant Rule of Court to decide whether or not to hear oral

¹ 1995 (2) SA 319

evidence on any of the issues which may require to be decided in order to determine whether or not to grant the relief claimed.”

5.5. In ***Mnisi v The Road Accident Fund and Seven Similar Matters***², the court held and quoted the following at paragraph 52:

“The subrule provides a mechanism whereby the court may on application and if sufficient reason is shown, allow that evidence be given on affidavit. Firstly, there must be an application to adduce evidence by affidavit. Secondly, there must be sufficient reason for doing so and thirdly, the court may lay down the terms and conditions for the evidence to be adduced. In Madibeng Local Municipality v Public Investment Corporation Ltd 2018 (6) SA 55 (SCA) at 25, the Supreme Court of Appeal expressed itself over subrule 38(2):

‘The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings, the nature of the evidence, whether the application for evidence to be adduced by way of affidavit is by agreement, and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.

And at paragraph 53:

² [2022] ZAMPMBHC 23

“Plaintiffs in RAF matters often request the court to accept evidence upon affidavit. Especially now where in most RAF matters there is no appearance by the RAF or where the RAF has not participated in the pre-trial proceedings or where the RAF has not defended the action and/or failed to deliver and file a plea. Of course, where the RAF does not appear at the trial, there will be no request for cross-examination as provided for in the subrule. Therefore, subject to what I set out in paragraphs 61³ and 62⁴ below, I see no reason why Rule 38(2) may not actually be used to contribute to the speedy and cost-effective delivery of justice in RAF matters.

5.6. The Plaintiff served all information and documentation on the Defendant.

5.7. This is a quintessential example of a matter that can be disposed of by way of affidavit to save time and costs.

5.8. The Plaintiff requested that the expert affidavits and the affidavits in respect of the quantum evidence of the Plaintiff be admitted as evidence.

5.9. Insofar as any of the experts in their reports rely upon hearsay evidence the Honourable Court was respectfully requested to admit the said hearsay evidence as an exception to the hearsay rule.

ISSUES TO BE DETERMINED

[6] I am consequently called upon to determine the future loss of income and or earning capacity of the Plaintiff. In this regard the Plaintiff is claiming an amount of R10 719 900 (Ten million Seven hundred and nineteen thousand

³ Paragraph 61 of the judgment: “In my view, the approach in RAF matters in circumstances set out above where there is no participation by the RAF at all or only limited participation or there is no appearance when the trial is called for hearing, the approach to be adopted should be on basis of what is set out by Froneman J *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC)”

⁴ Paragraph 61 of the judgment: “In my view, the approach of Froneman J applies to RAF actions where the circumstances set out in this judgment apply. The court should be extremely astute and consider all the information before it which includes the pleadings, documents that were discovered, all reports by the experts and all affidavits (if filed) before the trial commences to determine the way to approach the trial. The pleadings, the facts that appear from what is in the court file and the expert reports, (especially whether the findings therein) tally with the rest of the information ...”

and nine hundred rand). I am further called upon to determine the future medical expenses.

THE EVIDENCE:

- [7] The Plaintiff relied on the medico-legal reports to adduce evidence that dealt with the sequelae of the injuries that he sustained.

Documentary evidence:

- [8] As part of the Plaintiff's case, the following expert reports, as confirmed by affidavits, were handed in as exhibits:

- 8.1 Ms Ntembeko Lungelo Nqapela, Industrial Psychologist,
- 8.2 Dr S.M KHANYILE, Orthopaedic Surgeon
- 8.3 Dr Akhona Mazwi, Neurosurgeon,
- 8.4 M. S Mthimkhulu, Educational Psychologist,
- 8.5 Ms Muyahavho Beauty Koko, Clinical Psychologist,
- 8.6 Ms Zethu Nkosi, Occupational Therapist, and
- 8.7 Mr Edwin Chauke , Tsebo Actuaries,

The Educational Psychologist medico-legal report:

Pre-accident:

- [9] In respect of the pre-accident scenario, the expert noted and concluded as follows:

- 9.1. If the performance of his parents and sibling at school is taken into account and the fact that he has not failed any grade before the accident and looking at various factors that might determine the learner's education potential, including family members (both maternal and paternal educational background), environment, socio-economic factors of the family, it is likely before the accident

he could probably pass grade twelve (12) and obtain admission to a Bachelor's degree study. He could probably pursue the degree study course of his choice and obtain an NQF level 7 qualification. The trend now lately is that children often achieve more than their parents, academically and vocationally. The educational landscape has since changed to support the learners so that most are able to complete high school education.

- 9.2** No pre-existing conditions were reported.
- 9.3** His gross developmental milestones followed a normal trajectory.
- 9.4** His medical history does not include any significant medical illness prior to the accident. The expert opined that B[...]’s medical history had included no previous head trauma, loss of consciousness, epilepsy, or neurocognitive deficits prior to the accident under discussion. Based on the above information gathered the expert is of the view that the Plaintiff presented with largely intact neurodevelopmental functioning.
- 9.5** He is staying with his parents and siblings. Their family relationships and interactions were reported to be satisfactory. He had been a Grade 4 learner at the time of the accident. He reportedly did not present with any cognitive difficulties as there were no cognitive challenges reported prior to the accident. An analysis of Grade 4 (2017, terms 1-4) school report, it shows that he passed terms 1, 3 and 4 and failed term 2.
- 9.6** He had the ability to pass matric with a Bachelor Endorsement and the expert opine that he could have been able to obtain post-school qualification at NQF Level 7.

(My emphasis)

- 9.7** The Educational expert further noted that at the time of the accident, B[...] was undertaking Grade 4 studies. Prior to the accident, he had completed Grades 1-3 without any reported

scholastic challenges and had progressed to succeeding grades with ease.

An analysis of Grade 4 (2017, terms 1-4) school report

- 9.8** It shows he passed terms 1, 3 & 4 and failed term 2.
- 9.9** In term 1, his performance ranged between Moderate achievement (40-49%) and Outstanding Achievement (80-100%).
- 9.10** In term 2, a slight decline was noted as it ranged between Elementary Achievement (30-39%) and Outstanding Achievement (80-100%).
- 9.11** In term 3, the same academic performance was noted.
- 9.12** In term 4, his performance ranged between Moderate Achievement (40-49%) and Outstanding Achievement (80-100%).
- 9.13** Even though he had failed term 2, his performance improved, suggesting recovery.
- 9.14** The Educational expert postulated that based on the above information obtained, the writer is therefore of the opinion that had the accident not occurred, B[...] would have likely completed Grade 12 (NQF 4) and further obtained a Degree (NQF 7) qualification. He would have obtained this qualification with a possible 1-year delay.

Post-accident:

- [10]** With regard to the Plaintiff's post-accident functioning, the expert stated as follows:

- 10.1.** The expert noted and agreed that he presents with forgetfulness, short memory span and the inability to comprehend instructions as expected. Furthermore, he presents with physical and emotional complaints.
- 10.2.** It would seem that his neuropsychological, physical and emotional problems have impacted negatively on his scholastic and academic progress and on his quality of life. He experiences feeling of anxiety, inadequacy and uncertainty. Muyahavho Beauty Koko, Clinical psychologist states that he has moderate Post Traumatic Disorder symptoms, mood dysregulation associated with presence of depression, anxiety and irritability.
- 10.3.** The accident has rendered him academically vulnerable. The prognosis of him passing grade 12 seems bleak. He will thus not achieve his pre-accident potential. His highest level of education will be Grade 12 (NQF level 6) post-accident.

Post-accident school results

- 10.4.** An analysis by educational expert of his Grade 5 (2018, terms 1-4) school report shows his overall academic performance ranging between Adequate Achievement (50-59%) and Outstanding Achievement (80-100%).
- 10.5.** The same academic performance was also noted in his Grade 6 (2019, terms 1-4) and Grade 7 (2020, terms 1, 3 & 4) school reports.
- 10.6.** Academic performance over the Grade 11 (2024) and Grade 12 (2025) school years reflects a consistent pattern of achievement within the *Diploma pass* category. This performance indicates that while he demonstrates commitment and progress across academic terms, his overall attainment remains variable across subjects and terms.

- 10.7.** In Grade 11, his performance ranged from *elementary achievement (level 2)* to *outstanding achievement (level 7)*, with relative strengths observed in *IsiXhosa Home Language*, *English First Additional Language*, and *Life Orientation*, where he consistently performed at *meritorious (level 6)* or *outstanding (level 7)* levels.
- 10.8.** Conversely, he showed persistent challenges in *History*, *Life Sciences*, and *Physical Sciences*, where achievement levels fluctuated between *elementary (level 2)* and *adequate (level 4)*, suggesting difficulties in conceptually demanding and abstract subjects requiring higher-order reasoning and sustained concentration.
- 10.9.** A similar performance trend is observed in his Grade 12 results, where he once again attained an overall *Diploma pass*.
- 10.10.** In this academic year, his language-based and personal development subjects continued to be areas of strength, particularly *IsiXhosa HL*, *English FAL*, and *Life Orientation*, with scores ranging from *substantial (level 5)* to *outstanding (level 7)* achievement.
- 10.11.** However, his performance in *Mathematics*, *Physical Sciences*, *History*, and *Life Sciences* remained inconsistent, often ranging between *not achieved (level 1)* and *adequate achievement (level 4)*.
- 10.12.** Considering all the information received, B[...] is likely to obtain an equivalent of NQF 6 studies (Diploma) upon completion of Grade 12 (NQF 4), provided he continues to receive adequate academic support, such as extra classes.”
- 10.13.** This inconsistency reflects cognitive vulnerability in his abstract abilities.

Career aspiration

10.14. The Plaintiff reported that he wants to enrol for Computer Science studies after completing Grade 12. Considering his inconsistent performance in Mathematics, Physical Sciences and Life Sciences, he might need to choose a career that does not require these subjects that he may qualify for.

The medico-legal report of the Clinical Psychologist:

Pre-accident:

- [11]** The expert concludes that the Plaintiff had no history of cognitive-, physical- or emotional challenges that would have impacted on the neuropsychological test results.
- [12]** Socially, he had a good relationship with his family, he was sociable individual with good relations with his peers.
- [13]** Physically, he had no physical difficulties or limitation noted. He would be considered to have been a healthy individual with no significant illnesses or injuries prior to the accident.
- [14]** Cognitively, he had no difficulties in his scholastic studies. His premorbid aptitude was reportedly average.
- [15]** Psychologically, he had never had any psychological or psychiatric ills nor any interventions reported prior to the accident. He had not reported on any prior traumatic incidents.
- [16]** Academically/Occupationally, he was a scholar at the time of the accident.

Post-Accident:

- [17]** With regard to the post-accident scenario, the expert concluded as follows:

- 17.1.** Socially, there is a decline in his engagements with friends /peers due to increased irritability.
- 17.2.** Physically, he is no longer able to participate in sporting activities due to his pain in the ankle. He currently suffers from headaches. He experiences dizziness about once a week. He reports on lowered energy levels (fatigue) which occur most of the time. Pain and physical difficulties affect him on a daily basis. As such he reports on difficulties with standing for long and walking long distances due to pain.
- 17.3.** Cognitively, he has memory difficulties, with impact both within his living and educational settings. He has poor concentration and distractibility.
- 17.4.** Psychological, he has decreased appetite. He experiences fatigability. He has increased irritability with verbal outbursts. He has presence of moderate anxiety. He is anxious when travelling in a motor vehicle after the accident. He also presents with PTSD symptoms.
- 17.5.** Academically/Occupationally, he is currently in grade 12. He indicated his post-accident scholastic performance as decreased due to memory and concentration difficulties.
- 17.6.** The Clinical Expert noted Mr. K[...] is experiencing moderate levels of anxiety. Mr. K[...]’s anxiety symptoms are significant enough to cause discomfort and may interfere with his daily functioning and sense of safety, particularly in situations that trigger his fear responses. The results of the Post Traumatic Stress Disorder (PTSD) scale indicated moderate symptoms of post-traumatic stress disorder.
- 17.7.** He currently presents with physical, psychological, and cognitive limitations that have emerged since the accident. This indicates a noticeable decline in his overall functioning compared to his pre-accident level. Based on the assessment findings, collateral information, reviewed documentation, and expert reports, the

assessor concludes that a significant shift in Mr. K[...]’s functioning post-accident suggests a negative impact on his physical and psychosocial well-being.

17.8. Results from the emotional assessment indicate mild mood disturbance, moderate anxiety, and post-traumatic stress symptoms. These symptoms reflect ongoing psychological distress and suggest that Mr. K[...] continues to experience the emotional sequelae of the traumatic event, which may be overwhelming and difficult for him to manage.

17.9. Neuropsychological assessment findings revealed a mixed cognitive profile in Mr. K[...], characterized by intact, fluctuating, and impaired cognitive functions. His visual memory, perceptual-motor skills, and constructional abilities were intact, indicating preserved visuospatial and perceptual reasoning. However, variability was observed in attention, concentration, and executive functioning, while specific deficits emerged in verbal memory, processing speed, and abstract and social reasoning.

17.10. The observed cognitive inefficiencies are likely to hinder his optimal performance in daily and academic tasks. Empirical studies support that even mild head injuries sustained during childhood or adolescence can lead to subtle but enduring deficits, especially in memory processing, attention, and processing speed (Bryant et al., 2004; Marasini et al., 2022).

17.11. Mr. K[...]’s emotional challenges, including symptoms of depression and posttraumatic stress, likely exacerbate his cognitive inefficiency. Clinically, mood disturbances such as these can impair concentration, motivation, and academic persistence, compounding the effects of his cognitive difficulties.

17.12. His neurocognitive profile demonstrates subtle inefficiencies in domains critical for academic success, including attention, concentration, verbal memory, processing speed, and verbal learning. While these deficits are not global or severe, they signify

a notable decline from his pre-accident baseline. Additionally, symptoms of depression, anxiety, and post-traumatic stress likely compound his cognitive challenges, further hindering academic performance and motivation. Without targeted educational interventions and academic support, these difficulties may persist and intensify with the increasing cognitive demands of senior schooling

The medico-legal report of the Neurosurgeon:

Post-accident:

[18] The expert concluded as follows:

- 18.1.** The Plaintiff sustained a head injury in the accident. The expert suggested a mild head injury as evident by a Glasgow Coma Scale 15/15 and no CT brain scan was performed. The head injury was treated conservatively.
- 18.2.** Since the accident, he has been complaining of headaches.
- 18.3.** The Plaintiff complains of memory problems, short temper, nightmares about the accident, anxiety.
- 18.4.** The injuries sustained from the accident in question including multiple head and forehead bruises, lacerated occipital. He reportedly sustained a head injury with an occipital laceration/ scalp wound and bruising to the right leg (thigh). He was vomiting and drowsy. The treatment that he received includes X-rays, CT scans, routine blood, wound debridement, analgesia, and antibiotics.
- 18.5.** He continued to receive outpatient care at Livingstone Hospital, which involved suture removal and monitoring of his healing progress.

- 18.6.** The Neuro expert noted that claimant experienced head trauma, also had occipital head scalp laceration and headaches, with loss of awareness. The claimant had brief loss of consciousness and amnesia in keeping with a mild head injury.

Symptoms according to the Neurosurgeon

- 18.7** Has recurrent nose bleeding epistaxis
- 18.8** Has occipital head scar
- 18.9** Has reduced educability
- 18.10** Combined whole person impairment is 18%
- 18.11** He complains of poor focus at school
- 18.12** Has declined school performance
- 18.13** Has post injury recurrent headaches
- 18.14** Has difficulty with focusing
- 18.15** Easily forgets, has poor recall
- 18.16** Has memory disturbances

The medico-legal report of the Occupational Therapist:

- 19.1** During the occupational therapy assessment, the Plaintiff struggled to perform various activities that require repetitive bilateral lower limbs movements as well as dynamic postures due to right ankle pain.

19.2 He had limitations in performing various body postures such as crouching and repetitive squatting. He was concluded to have limitations in lifting or carrying heavy objects. During the lifting protocol, his lifting or carrying capacity was within sedentary to light physical demands.

These physical assessment findings conclude compromised physical and functional capacity to perform strenuous daily activities.

19.3 Neurocognitive and mood challenges were noted. The writer opined that the presence of compromised neurocognitive, emotional and psychological well-being may have a further negative impact on his future work ability, interpersonal relations and day to day functioning.

19.4 His limitations will limit his productivity at work if he manages to achieve future career aspirations. His injuries will make him a lesser competitor in the open labour market compared to his peers.

19.5 Due to accident-related challenges, the Plaintiff 's career or job options are likely to be curtailed as he will have difficulty in coping with highly physical and cognitively demanding jobs.

19.6 His competitiveness in the open labour market is noted to be compromised. He will always be a disadvantaged employee from promotions and career growth. This validates that the plaintiff will not be a fair competitor in the open labour market amongst his uninjured peers. His injuries will make him a lesser competitor in the open labour market amongst his uninjured peers.

19.7. Considering the above, the Plaintiff does not retain enough physical vocational capacity to compete in the open labour market. He will have difficulty meeting the physical demands of his occupation role due to accident acquired impairment.

The medico-legal report of the Industrial Psychologist:

Pre-accident performance: (Had the accident not occurred)

[20] The Plaintiff gross developmental milestones followed a normal trajectory. He reportedly not presented with any cognitive difficulties as there were no cognitive challenges reported. The Plaintiff had the pre-accident ability to pass Matric with a Bachelor Endorsement and opined he could have been able to obtain post-school qualification at NQF Level 7. He aspired to complete his studies and pursue a career as a teacher

(My emphasis)

[21] The industrial Expert noted and further postulated that based on the educational opinion “But If Not for the Accident” B[...] would have most likely passed Grade 12 in 2025 with an endorsement for a Bachelor’s degree (NQF 7). Thereafter his completion of Matric he could have registered a 4-year bachelor’s degree qualification. He would have obtained this qualification with a possible 1-year delay.

[22] Thereafter, contingent upon corporate labour market absorption rates and the availability of opportunities in his line of qualification, a provision 6-months’ delay for job-searching may have been applicable; subsequent to which he would have commenced with an internship or in-service training in June 2029.

[23] Complete internship at least from July 2029 to the end of June or December 2030 with NQF5 and maximum credits was set at R125 899 stipend per annum (2025 Quantum Yearbook, Robert J. Koch).

Then would have been eligible to enter the open labour market in semi-skilled positions, earning a guaranteed total package on Paterson B5 (R380 000 - R431 000 - R516 000, lower to median quartile of the scale, total package as from January 2031 (23 years of age).

In page **08 – 145**

Progress in his career based on – compulsory inflationary increases, annual performance evaluations, promotions, dedication to work, positive work ethic, need for growth, benefit from on the job training and skills continuous professional development programs often offered by

employers, the acquisition of adequate work experience and managerial skills and the availability of opportunities.

B[...] could have been motivated to improve his education and training in order to advance in the organisational ladder and to differentiate his output from the competition.

Competition for higher positions gets tough as one ascends the organisational ladder, therefore those with bachelor's degrees continue studying through correspondence to enhance their competitiveness and earnings potential and to avoid career stagnation.

He *“would have qualified for job prospects within higher levels leading to more specialized or professional and senior roles I. e. IT and engineering, management, finance etc.”* There is nothing reported in the pre-accident scenario to doubt that he was going to have a fair chance to compete and grow as required in his career of choice in an open labour market.

In light of this, it is envisaged that after about a period of 10-years from (January 2031 to 2041 - 33 years) when he would have had time to explore the different career paths in his line of work, B[...] could have also opted to pursue an NQF 8 rated qualification (Honours / Advanced Diploma). He would have chosen open distance learning to balance his work, family and academic roles. He is likely to have commenced with NQF8 rated qualification in January 2041 (aged 33) with potential to complete the qualification within a period of 2-3 years (2043 - 35 years of age).

Then he could have plateaued on a higher level in corporate.

He would have been positioned to compete for skilled and middle managerial positions. He is likely to have enjoyed smooth increases with potential to reach peak in Middle Managerial positions on Paterson D2, earning a guaranteed total package per annum, between the median to upper quartile of the scale at 45 years of age). The expert notes such higher positions are not easily available and that he would have had to fight to earn or reach such positions in the open labour market. There is

however no reason to doubt that without limitations he had a fair chance of competing for growth or advancement in his career.

Post-accident functioning: (Situation due to the accident)

[24] The expert noted and concluded as follows:

Post-accident

[25] POST ACCIDENT POSTULATION

25.1 There is persistent post-injury cognitive and somatic complaints, including difficulties with concentration, memory disturbances, and recurrent headaches.

25.2. These symptoms emerged following a head injury that resulted in an occipital scalp laceration and transient loss of awareness variability was observed in attention, concentration, and executive functioning, while specific deficits emerged in verbal memory, processing speed, and abstract and social reasoning.

25.3 These academic difficulties indicate that his neurocognitive deficits have a direct and ongoing impact on his educability. B[...]’s neurocognitive difficulties are likely to result in disturbances that will negatively affect his ability to learn and perform academically like his pre-accident potential. Educationally, this constellation of cognitive difficulties will likely limit his ability to acquire, retain, and apply new knowledge effectively. Additionally, recurrent nose bleeding (epistaxis) may also result in academic setbacks as he may have to halt whatever he may be doing at school so he can attend to his nosebleed.

25.4. Applicant submits that these difficulties have already manifested educationally and will continue in higher education resulting in the postulated delays in obtaining a diploma. Post- accident

- 25.5.** Based on the assessment results, his Verbal Comprehension and Processing Speed fell within the Average range, while his Perceptual Reasoning and Working Memory fell within the Low Average range. There were significant discrepancies between verbal comprehension and perceptual reasoning, between verbal comprehension and working memory, between processing speed and perceptual reasoning, and between processing speed and working memory abilities.
- 25.6.** His Full IQ Scale is, however, estimated to be within the Low Average range. The assessment results reveal cognitive decline. Performance on the *Bender Copy* and *Bender Recall* tasks revealed some weaknesses, with results falling within the *Low* and *Low Average* ranges, respectively.
- 25.7.** These findings point to mild deficits in visual–motor integration, perceptual organization, and visual memory skills essential for tasks involving written output, copying from the board, and recalling visual information.

Career path and loss of future earnings:

- [26]** As already evident, there is no past loss of earnings applicable, only future loss of earnings. Pre-accident the plaintiff aspired to complete his studies and pursue a career as a teacher. Post-accident his aspirations remain the same.

Past loss of earnings:

- [27]** Considering that the Plaintiff was a student at the time of the accident, it is surmised that he did not suffer past loss of income.
- [28]** In light of the totality of the evidence, I find that, on probabilities, with a Degree (NQF Level 7) level of education, He would have entered the open labour market at a Paterson Level B5, and progressed, reaching his career ceiling earning at the upper quartiles of Paterson Level D2, at age around 45 years, and after ten (10) years he would have pursued

an NQF 8 (Honours) qualification, thereafter received inflationary increases thereafter.

Future loss of earnings:

[29] It is probable that the severe sequelae of the injuries sustained has affected the Plaintiff's optimal scholastic and vocational functioning and thus, he will experience challenges competing on par with his healthier, uninjured peers in the open labour market. Owing to the nature of the injuries sustained, he has been rendered an unequal competitor and thus will no longer be able to perform in his pre-accident capacity. It is opined that the difference between his pre-accident and post-accident vocational potential be used to determine future loss of income.

[30] The Industrial Psychologist opines that he will work in the open labour market until the normal retirement age of 65 years, depending on a variety of factors, such as health status, personal circumstances, personal preferences and conditions of employment, etc.

[31] From the totality of the evidence, I agree with the opinion of the Plaintiff's experts and the Plaintiff is to be considered as practically unemployable in the open labour market. However, having said that, I do intend to properly discount the vicissitudes of life, specifically in respect of the Plaintiff personally, by means of a reasonable and fair contingency.

[32] With regard to the post-accident future earnings, after consideration of all the relevant evidence, I am of the view that the Plaintiff will be a jobseeker with NQF level 6 (Diploma) in the skills development sector who could enter the open labour market as an skilled labourer earning at the lower quartiles of Paterson Level A3 (Total package) and with a potential to progress to skilled positions graded on C3/C4 (Total package) a career ceiling earning at the median quartiles at Paterson Level C3/C4 at around the age of 40 – 45 years, receiving inflationary increases thereafter.

- [33] Physically challenged and emotionally individuals have difficulties sustaining jobs. Thus it is considered that having delayed securing and completing an internship and first job post-internship and given the prospect of entering the open labour market at a lower level than where he could have entered with a degree, without a sustaining job to keep, it will be very difficult for B[...] to progress beyond the semi-skilled category (Paterson B3, median to upper quartile)

THE LAW

Contingencies:

- [34] It is trite that it is for the court to determine the percentage of contingencies to be applied in a matter such as this.

- [35] Contingencies discount the vicissitudes of life, and it is a method used to arrive at fair and reasonable compensation. The determination of contingencies was dealt with in **Southern Insurance Association Ltd v Bailey N.O.** 1984 (1) SA 98 (A) at 113G and 116G – 117A:

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

...

Where the method of actuarial computation is adopted, it does not mean that the trial Judge is ‘tied down by inexorable actuarial calculations. He has ‘a large discretion to award what he considers right’ (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for ‘contingencies’ or the ‘vicissitudes of life’. These include such matters as the possibility that the plaintiff may in the result have less than a ‘normal’ expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.

...

It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of *Bresatz v Przibilla* (1962) 36 ALJR 212 (HCA) at 213:

'It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.'

[36] In the judgment of **Gillbanks v Sigournay** 1959 (2) SA 11 (N) the following was stated at 17 E – F in respect of contingencies in an estimation of a Plaintiff's claim for loss of earnings:

"In any estimate of a person's loss of earning capacity allowance must be made for all contingencies including the accidents of life and certain deductions must be made from the estimated gross income to allow for unemployment benefits, insurance and so on. These contingencies would include -

- (i) a possibility that plaintiff's working life may have been less than sixty-five years;
- (ii) a possibility of his death before he reaches the age of sixty-five years;
- (iii) the likelihood of his suffering an illness of long duration;
- (iv) unemployment;
- (v) inflation and deflation;
- (vi) alterations in the cost-of-living allowances;
- (vii) an accident whilst participating in sport such as hockey or cricket, or at any other time which would affect his earning capacity; and
- (viii) any other contingency that might affect his earning capacity."

[37] In the judgment of **Dlamini v Road Accident Fund** (59188/13) [2015] ZAGPPHC 646 (3 September 2015) at paras [29] – [31] the court dealt with and applied some guidelines referred to by Koch in The Quantum Year Book:

[29] In his book *The Quantum Yearbook*, Koch states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is in the prerogative of the court. General contingencies cover a wide range of considerations which may vary from case to case and may include taxation, early death, loss of employment, promotion prospect, divorce etc.

(My emphasis)

[30] Koch refers to the following as some of the guidelines as regards contingencies:

‘Normal contingencies’ as deductions of 5% for past loss and 15% for future loss.

‘Sliding scale’: 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on *Goodall v President Insurance* 1978 (1) SA 389.

‘Differential contingencies’ are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[31] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.”

[38] Contingencies

Nicholas J in *Southern Insurance Association Limited v Bailey NO*, held that: ‘Any enquiry into damages for loss of earning capacity is in its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of present value of the loss. It has open to it two possibilities approaches.

One is for the Judge to make a round estimate of an amount which seem to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

Or

Two is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a nonpossumus attitude and make no award...’.

A court has wide discretion “*when it assesses the quantum of damages due to loss of earning capacity*” and will award what it considers right. Even though the actuarial calculations are useful in guiding the court, the court “*is certainly not tied down by exorable actuarial calculations*”. The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending on the facts of the case.

A 50% contingency deduction for a minor postulated at Paterson D level pre-accident is highly unusual and would only be justified in exceptional circumstances. Paterson D implies a skilled supervisory or junior management role, which typically warrants lower deductions (e.g., 15%–25%). However, courts may still apply a 50% deduction if there are compounding risk factors that severely undermine the reliability of that projection.

Circumstances That Could Justify a 50% Deduction include speculative or Weak Basis for Paterson D Projection that the projection is based on aspirational assumptions rather than concrete evidence (e.g., no academic record; no family history of similar achievement); The child is very young and the Paterson D level is not supported by actuarial or educational assessments; socioeconomic disadvantage; the child comes from a severely disadvantaged background with limited access to quality education, healthcare, or stable home life. A Courts may view the Paterson D projection as overly optimistic in such contexts.

Other considerations are Pre-existing Developmental or Health Concerns. If the child had developmental delays, learning disabilities, or chronic health conditions before the accident, these could have limited their ability to reach Paterson D. Lack of Academic profile. If school reports or psychological assessments pre-accident show below-average performance, poor attendance, or behavioural issues, the court may find the projected trajectory unrealistic. Courts have applied a 50% contingency deduction for minors postulated at Paterson D level in the above exceptional cases where the projected career path was deemed highly speculative and unsupported.

[39] In Mdibi v Road Accident Fund [2023] ZAGPPHC 1158

Facts: The plaintiff, acting on behalf of a minor, claimed damages for future loss of earnings after a motor vehicle accident. The child was postulated to reach Paterson D level.

Key Issue: The court questioned the realism of the Paterson D projection, given the child's young age, lack of academic record, and socio-economic background.

Outcome: The court applied a 50% contingency deduction, citing the speculative nature of the career projection and the absence of concrete evidence to support the child's ability to reach that level.

[40] **In Kagiso Mosetlhe v Road Accident Fund (Case No: 2993/2015, ZAGPPHC 254)**

Facts: The plaintiff, a minor at the time of the accident, was projected to reach a Paterson D level. However, the court scrutinized the educational and familial context, noting limited academic performance and uncertain future prospects.

Outcome: A 50% contingency deduction was applied to the pre-accident earnings, based on the high level of uncertainty surrounding the child's ability to achieve the projected career level.

The general observation from case study is that Courts are cautious about accepting high-level career projections for minors without strong supporting evidence. A 50% deduction is typically justified when The Paterson D projection is aspirational rather than evidence-based. If the child's background, education, or health casts doubt on future earning potential.

[41] **In Sayed N.O v Road Accident Fund (34250/2020) [2024] ZAGPPHC 881 (5 September 2024) where judgement was handed down by:**

Retief J directing that the Court agrees that the pre-morbid calculation is on the generous side having regard to all the facts, the Question was is it reasonable to accept that the minor living on the farm with his family, in a remote area of the Western Cape would have followed in the footsteps of his father and brother after attaining a grade 12 and, if not, whether he would have been committed enough to achieve a degree over a long period whilst already being active in the open labour market. Having regard to the minor's socio demographics this is an important enquiry

considering the facts before the Court. This uncertainty can be dealt with by making an adjustment.

The minor's mother was unemployed but previously was employed as a domestic worker. She attained a grade 7.

His father achieved a grade 10, worked on the farm at the time of the accident and later became a long-distance truck driver.

The minor's older brother followed in his father's footsteps, although he obtained a grade 12 he remained and worked on the farm.

The minor's uncle has a grade 8 and is a truck driver.

Of some significance is that the IP too, postulated the minor's pre-morbid path without obtaining any pre-morbid information, collateral. There was insufficient or no pre-morbid information.

The Defendant's Counsel had argued that the Court should consider a higher pre-morbid contingency by applying a 35% deduction.

To ensure an appropriate award the Court directed that Plaintiff's actuary to provide it with separate calculations for all three stages (discussed *infra*) as postulated pre-morbidly. The first stage the most probable and as such the normal contingency deduction of 20% remains undisturbed. The Court deemed a 50% contingency deduction in respect of the calculation in respect of stage 2 and 3 is to be applied. A 15% post-morbid deduction was applied accepting that the minor will receive the treatment he requires and be able to function in a semi-skilled working environment in the Western Cape. *(We wish to humbly place on record our sincere error in previous court submissions of 35% pre-morbid in*

relation to the above authority noting that this was merely a suggestion in submissions by Defendant's counsel)

For the benefit of the Court the factual background in the above authority is that the minor was 5 (five) years old when he fell off the back of a trailer hauled by a tractor, suffering from third degree burns on his back and sustained a mild concussive head injury. When the matter finally went before Court the minor was 13 years and attending school and progressing very well. *He has never repeated a grade.*

His psychological dysfunction is associated with chronic post-traumatic stress disorder symptoms [PTSD] and attention deficit and hyperactivity disorder [ADHD]. On reassessment in 2022 by Ingrid Jonker, the neuropsychologist, she recorded the presence of significant concentration problems and that the minor's overall cognitive profile remained more depressed than one would have expected. minor's cognitive abilities which range from his narrative memory, his visual mental tracking, his verbal abstract reasoning, and mental inflexibility are impaired and are expected to in time, become more impactful resulting in inconsistent scholastic outcomes.

Minor's career pre-morbid postulation is that he possessed average intelligence, as a result of which, it is postulated by the IP in the latest report of 2024, that:

STAGE 1

The minor will pass all his schooling years on his first attempt, completing his grade 12 at the end of 2029; Thereafter, it would take him 1 (one) to 2 (two) years to secure formal employment. Initially securing work in the informal sector was 50% at the time, earning a national minimum wage;

STAGE 2

After 3 (three) years he would have then obtained and secured formal employment with the job complexity and remuneration commensurate for

a basic salary as provided by Paterson A2 median level. Whilst working in the formal sector he could have passed his NQF 7 (degree) level qualification within a period of 4 (four) to 5 (five) years after securing the formal employment;

STAGE 3

Upon completion of his qualification (NQF 7) his earnings would have increased to job complexity remuneration commensurate of an annual package of Paterson B3 median level;

At age 45 (forty-five) he would have reached his career ceiling on Paterson D2 medial level, thereafter, receiving an inflationary increase until retirement age of 65 (sixty-five). In that case the pre-morbid postulation above was considered by the IP as a conservative approach, *inter alia* having regard to the minor's perceived average intelligence, that children appear to do better than their parents and having regard to the unemployment possibilities in the future. Consideration too, was given to the minor's family socio-economic demographic information, namely

- [42] Mr Ngobeni submitted during argument that 35% and 40% contingency deduction for loss of earnings should be applied. In the heads of argument, a different percentage of 20% and 35% contingency deduction for loss of earnings was suggested that it should be applied as being fair and just. As a result, we sat with two different contingency proposals.
- [43] There appears to be an actuarial report., The Plaintiff's actuarial report is dated 28 October 2025, drafted by Mr Edwin Chauke of Tsebo Actuaries, and which was handed in by the Plaintiff as an exhibit. This is the report which the Plaintiff seek to rely upon for loss of earnings.
- [44] Mr Ngoveni is relying on the actuarial calculations, where contingency deductions of 20% and 35% is made and the total loss of future earnings amounts to R 9 203 856.

[45] Be that as it may, since I have not made same findings similar to those postulated in the actuarial calculation's scenario presented by the actuary, same are not in order.

[46] With regard to the post-accident contingency, I take the following relevant information into consideration in exercising my discretion:

46.1. He has been rendered a vulnerable employee/jobseeker in the open labour market.

46.2. The Educational Psychologist concludes that he may struggle to complete NQF Level 6. he may need to be employed by a sympathetic employer.

46.3. The Clinical Psychologist concludes that the Plaintiff's neurocognitive deficits would affect his academic outcomes.

46.4. The Neurosurgeon agreed that severe long-term mental or severe long-term behavioural disturbances or disorders are evident. The expert also suggested that he has a 1 – 2% chance of developing epilepsy in future.

46.5. The Industrial Psychologist also concludes that with psychological limitations and potential health decline, his employability has been compromised in the open labour market. The Educational Psychologist opined that he may need to be employed by a sympathetic employer. The Industrial psychologist concludes thus he has been rendered an unequal competitor and a vulnerable jobseeker in the open labour market. He may experience difficulty securing and sustaining employment in his injured state.

46.6. Due to his neurological and cognitive deficiencies. He is not on par with jobseekers who do not have these deficiencies. There is also the possibility of periods of unemployment in-between.

[47] I am consequently of the view that a 35% contingency for future earnings pre-morbid and 45% contingency post-accident will be fair and reasonable in all the circumstances.

PRE-MORBID	POST MORBID
PAST NIL	PAST NIL
FUTURE 15 642 170 LESS 35% 10 167 410	FUTURE 5 069 214 LESS 45% 2 788 067 Total loss R 7 379 343 Less cap R14 891 Net total loss R 7 364 452

Costs:

[48] In ***Bauer v Bauer & Another***⁵ it was re-affirmed that the principle in awarding costs to a successful litigant is to strive to indemnify insofar as possible that litigant for the expenses he has incurred to initiate or defend litigation. These principles were also confirmed in ***Zeelie v General Accident Insurance Co Ltd***,⁶. This purpose of an award for costs has been acknowledged for a very long time, authoritatively ever since ***Texas Co (SA) Ltd v Cape Town Municipality***⁷.

⁵ (361104) [2008] ZAECHC 2008 (17 April 2008)

⁶ 1993 (2) SA 776 (EJ at 779 D-F)

⁷ 1926 AD 467 at 488. (See Cilliers, *Costs*, par 1.03 at 1-4/5)

[49] In ***Society of Advocates of KwaZulu - Natal v Levin***⁸ the Court also stated as follows in respect of Counsel fees:

"[19] A useful guide, which would find application in most cases where the reasonableness or otherwise of counsel's fee had to be determined on the taxation, was formulated in City of Cape Town v Arun Property Development (Pty) Ltd and Another:

'(a) Consideration should have been given to the importance of the matter, its financial value to the parties and the complexity of the issues raised and/or required to be canvassed".

[50] Pursuant to the recent amendment of Rule 69 and 70 (effective 12 April 2024) in terms of which Rule 67A was also introduced, it is incumbent upon a Court to make a ruling on the applicability of the new scales introduced for the employment of counsel. The scales listed in the amended Rule are Scales A, B and C. These scales govern the recoverability by the Plaintiff of counsels' costs on taxation.

[51] In ***Buhle Waste (Pty) Ltd v MEC for Health Gauteng & Others***⁹ Cajee AJ held as follows regarding the abovementioned Rule amendment.

"28. While I am cognizant of the fact that the new taxable costs regime no longer considers seniority of counsel, but rather complexity of the matter and value of the claim or importance of the relief sought to be the deciding factors, in my view a court should be wary not to grant or approve costs on a scale which counsel of a certain seniority would not ordinarily charge his or her own attorney and client. This would run counter to the intention of the new regime..."

[52] With regard to this present matter it is held by the court that the employ of

⁸ 4564/13) [2015] ZAKZPHC 35; 2015 (6) SA 50 (KZP); [2015] 4 All SA 213 (KZP) (6 July 2015)

⁹ (Gauteng Division Johannesburg, Case Number 2023-102560)

a senior counsel was warranted and that counsels' fees on Scale C are appropriate for *inter alia*, the following reasons:

52.1. Value of the claims:

The value of the claim should be evaluated in the eye of the Plaintiff who was injured. It is apparent that the Plaintiff needs to rely on his compensation to sustain himself especially in the later years of his life. From his point of view the amount concerned is considerable.

52.2. Importance of the relief sought

The relief sought is for damages aimed at the compensation of the unfortunate Plaintiff and his family who was involved in a motor vehicle accident. The Plaintiff suffered severe bodily and psychological injuries. The Plaintiff will suffer physical and psychological for the rest of his life; who has a permanent loss of his earning capacity; who has therefore lost the ability to properly earn a living. The matter has obvious importance to the Plaintiff in that his entire remaining working lifespan has been blighted.

As trenchantly observed by His Lordship Baqwa J in ***Adv AJ Du Toit N.O. obo Cee-Jay Lee Johnson v The Road Accident Fund***

¹⁰ the Plaintiff has only one shot at obtaining due compensation from the Defendant and the Plaintiff's whole life depends on obtaining a proper award.

52.3. Complexity of the matter

¹⁰ 20147/2021) Gauteng Division, Pretoria (23 April 2024)

This case involves the input by various experts of different disciplines. It involves an Orthopaedic surgeon to assess the functional *sequelae*; Psychologist in respect of neurological sequelae; an Occupational psychologist regarding the impact on his occupation; an Industrial psychologist regarding employment prospects; and the Actuary regarding the calculation of the loss of earnings/earning capacity.

The reporting of all the experts is not in plain layman's language, but in more complex and specific language and terms used in the respective expert disciplines. A proper understanding of the reporting requires special and specific knowledge by the legal practitioners.

- the matter involves preparation in regard to several different expert disciplines and expert witness reports; the drafting of heads of argument on the issue of the loss of earning capacity; and the research of the case law regarding awards of general damages.

52.4. It is therefore submitted that the value of the total claim is substantial, that the relief sought is of great importance to the Plaintiff; and that the matter involves issues of a high degree of complexity.

52.5. The specific circumstances and the various factors attendant in this matter, rendered it wise and reasonable for the Plaintiff to have briefed a more senior counsel.¹¹ There can be no justification for

¹¹ it was certainly a wise and reasonable precaution to employ the services of two counsel (compare *Newman v Prinsloo and Another* 1974 (4) SA 408 (W) at 411A; *Zweni v Minister of Law and Order* (1) 1991 (4) SA 166 (W) at 170A). The disputes involved potentially wide-ranging issue of both fact and law. It is not by any means a minor matter. The case was sufficiently difficult to justify the engagement of two counsel. (compare *DE NMMLOZE VENNOOTSCHAP ALINTEX v VON GERLACH* 1958 (1) SA 13 (T) at 16-7).

any contention that it was not necessary, or that it was wrong to employ a senior counsel; or that it is unfair to Defendant that it should be required to bear the costs incurred in the employment of a senior counsel. The Defendant could have settled this claim a long time ago had it complied with its statutory duties timeously.

*"In an unreported judgment of this Court, Road Accident Fund v Roman Klisiewicz, case No 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent's responsibilities, saying in para [42]: 'The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed'."*¹²

52.6. It was the Defendant that obliged the Plaintiff to approach this Honourable Court for relief.

52.7. It should be borne in mind that by awarding counsels' costs on scales A or B the Honourable Court will effectively be penalizing the Plaintiff. Counsel are entitled to mark and recover reasonable fees for their work done (**Algemene Balieraad van Suid-Afrika v Burger en 'n Ander**¹³LPC Code of Conduct 15.1 and 23.1). That is not affected by the particular scale under Rule 67 A. Rule 67 A merely restricts the ability of the Plaintiff to recover more than the specified amounts on scales A, B or C, respectively, from the unsuccessful Defendant. The balance of counsels' fees unfortunately have to be paid by the successful Plaintiff out of the capital awarded. This impinges on the trite principle set out in paragraph 3 above.

¹² (*Madzunye and Another v Road Accident Fund 2007 (1) SA 165 (SCA) par [17] at 171*).

¹³ 1993 (4) SA 510 (T);

52.8. In the premises, it is respectfully submitted that Plaintiff is entitled to an order that the fees consequent upon the employment of a senior counsel are allowed; and for a direction that such fees are granted on scale C.

52.9. Since the advent of the Covid pandemic and the consequential change that it had on the normal Court and trial procedures, the Court has placed more and more emphasis on comprehensive heads of argument to be filed by the representatives of litigants to assist the Court. Presiding judges rely more and more upon the written submissions of counsel to assist them rather than entertaining hours of oral argument.

52.10. In this sense the normal practise for presenting argument in the High Court has become more similar with the practice in the Constitutional Court. The court in ***Society of Advocates of KwaZulu - Natal v Lev*** matter *supra* held as follows:

“ii) In President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another^[41] Kriegler J drew a distinction between the practice in the Constitutional Court and the SCA in respect of the heads of argument and the associated appearance of counsel at the hearing. He pointed out that ‘in the SCA the emphasis is on the oral presentation of argument by counsel in open court with heads of argument serving largely as a preliminary guide to the Court, while in the Constitutional Court, the emphasis is on written submissions, which are not regarded as succinct heads of argument forming the basis of the argument to be presented, but the argument itself together with all the supporting material.’

And further that ‘In an appropriate case, therefore, it may be reasonable to make some special allowance for counsel’s fees for preparing written argument for this court. This is expressly contemplated by sub rule (2) of the CC Rule 21.’

iii) *There is no reason why a similar consideration should not apply to the assessment of counsel's fees in this matter.*

iv) *I have perused the relevant heads of argument and having considered the submissions of Ms Annandale on the general and specific purpose and content of heads of argument, I am of the view that the taxing mistress misdirected herself in assessing the fee at R600 per page, as such an assessment even on a per page basis, is disproportionate to the effort involved in drafting the heads and fails to take into account the issues dealt with therein.*

v) *I have already commented on the need for a uniform practice in accordance with the generally accepted computation of fees on a time spent basis, which will provide fair and reasonable remuneration for the service rendered."*

52.11 It has further become an acceptable practice that Counsel be allowed to ask for the drafting of his Heads of Argument premised upon the actual time (although must be reasonable) spent.

52.12 In the ***Society of Advocates of KwaZulu - Natal v Lev*** matter ***supra*** the Court stated as follows:

[17] *Counsel's fees in the bill of costs under review were charged on a time spent basis. I share the view expressed by Sholto-Douglas AJ in City of Cape Town v Arun Property Development (Pty) Ltd and Another:*

'The modern trend- if I may call it that- of charging a fee based on time actually expended is both acceptable and in the interest of transparency'."

52.13 In the premises it is held by the court that any order as to costs should include Counsel's time spent for drafting Heads of Argument as well.

[53] There is no reason why the costs are not to follow the outcome.

Order:

[54] The following order is consequently made:

1. The application in terms of Rule 38(2) is granted.
2. The defendant is held liable hundred percent (100%) of plaintiff's agreed and /or proven damages.
3. The Defendant shall furnish the Plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 13th December 2018.
4. The Plaintiff is awarded an amount of **R 7 364 452 (Seven Million Three Hundred Sixty Four Thousand Four Hundred Fifty Two Rands)** as compensation for future loss of earnings.
5. The issue of general damages is postponed sine die.
6. Counsel's fees awarded in terms of scale C.

J. ZITHA AJ

Judge of the High Court

Gauteng Division, Pretoria

Appearances:

On behalf of the plaintiff:

Adv. Elleck Ngoveni

Instructed by:

M G Mali Attorneys

On behalf of the defendant:

No appearance