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

**JUDGMENT**

**Reportable**

Case No.: 1321/2016

In the matter between:

**B[...] P[...] J[...] - N[...] obo I[...] N[...]**

**Plaintiff**

And

**THE ROAD ACCIDENT FUND**

**Defendant**

**Coram:** Francis J

**Heard:** 19 May 2026

**Delivered:** 3 June 2026

## **ORDER**

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1. The defendant shall pay the plaintiff's attorneys the sum of R5 220 425.00 (five million two hundred and twenty thousand four hundred and twenty-five rand) ("the capital"), made up of R4 120 425.00 for the future loss of earning capacity and R1 100 000.00 for general damages, by electronic transfer into the trust account identified in paragraph 9 below.
2. The defendant shall furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Act to compensate the plaintiff and/or I[...] N[...] for 100% of the costs of the future accommodation of I[...] in a hospital or nursing home, treatment of or rendering of a service or supplying of goods to him arising from the collision of 9 June 2013, after those costs have been incurred and on proof thereof.
3. The defendant shall pay the plaintiff's taxed or agreed costs on the High Court scale as between party and party, which costs shall include but not be limited to —
  - 3.1 the qualifying, reservation, preparation and attendance fees (where applicable) of the plaintiff's experts Dr Z Domingo (neurosurgeon), Ms Debbie Lopes (educational psychologist), Dr D Ogilvy (speech and language therapist), Ms E Auret-Besselaar (industrial psychologist) and Munro Forensic Actuaries, together with the costs of their reports and any addenda;
  - 3.2 the reasonable reservation and attendance fee of Ms E Auret-Besselaar for 19 May 2026, subject to the discretion of the Taxing Master;

- 3.3 the fees of the plaintiff's counsel on Scale B, including consultations, judicial case-management attendances, preparation, the practice note and written submissions, and the day fee for 19 May 2026;
  - 3.4 the costs of the plaintiff's attorney attending the Rule 37(8) pre-trial conferences and the costs of the Rule 38(2) application;
  - 3.5 all costs attendant upon obtaining payment of the capital and of the costs.
4. The defendant shall pay the capital within 180 calendar days of the date of this order, failing which interest shall run on the capital at the applicable legal rate from 14 calendar days after the date of this order to the date of final payment.
  5. The plaintiff shall not issue a warrant of execution in respect of the capital before the expiry of the 180-day period.
  6. The taxed or agreed costs shall be paid within 180 calendar days of taxation or agreement, by electronic transfer into the trust account identified in paragraph 9 below, failing which interest shall run at the applicable legal rate from 14 calendar days after the Taxing Master's *allocatur* or the agreement of costs to the date of final payment. The plaintiff shall not issue a warrant of execution in respect of the costs before the expiry of that period.
  7. Pending the determination of the application referred to in paragraph 8, the capital shall be retained in the trust account of the plaintiff's attorneys and shall not be paid over to the plaintiff personally, save for any disbursements necessarily incurred, or required, for and on behalf of I[...] N[...].
  8. The plaintiff's attorneys are directed to bring an application in terms of Rule 57 of the Uniform Rules of Court, within 90 calendar days of the date of this order, for the appointment of a *curator ad litem* to investigate and report on whether I[...] N[...] requires the appointment of a *curator bonis* or a trust to administer the capital. If compliance with this direction is not achieved within the stated period, the Registrar is directed to bring the matter before me for further directions.

9. Payment of the capital and of the costs shall be made into the following trust account:

Bank: FNB Business  
Account holder: De Vries Shields Chiat Inc.  
Branch: Portside  
Account number: 6[...]  
Branch code: 210651

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## JUDGMENT

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**FRANCIS, J:**

### **Introduction**

- [1] The plaintiff sues in her representative capacity as the mother and natural guardian of her minor son, I[...] N[...], who was born on 24 June 2010. On 9 June 2013, a fortnight short of his third birthday, I[...], a pedestrian, was struck by a motor vehicle. He was then two years and eleven months old.
- [2] The defendant has conceded liability and accepts that I[...] sustained serious injuries that qualify for an award of general damages under the Road Accident Fund Act 56 of 1996 (“the Act”). What remains in dispute is the quantum under two heads. The first, pleaded as a future loss of earnings, is more properly a claim for the loss of earning capacity. The second is general damages. The defendant has agreed to furnish an undertaking under s 17(4)(a) of the Act for I[...]’s future hospital, medical and related expenses, and that head requires no adjudication.
- [3] By agreement, the plaintiff’s application under Rule 38(2) to adduce the evidence of her experts on affidavit was granted. The expert reports and the joint minutes accordingly stand as the evidence before me. No oral evidence was led. I heard

argument from counsel for the plaintiff and from the defendant's attorney, and I have had regard to the plaintiff's heads of argument and the submissions made from the bar. Although the dispute is one of quantum, it raises a question of some general importance that I consider it useful to address: how general damages are to be assessed where a traumatic brain injury is clinically mild but is sustained by an infant whose developing brain renders the injury disabling over the course of his life. I deal with that question under the head of general damages below.

### **The injuries and the medical evidence**

- [4] The collision left I[...] with a mild traumatic brain injury accompanied by a transient loss of consciousness, a small posterior fossa extra-axial haematoma demonstrated on CT and confirmed on MRI, post-traumatic seizures, scalp abrasions and lacerations, a left peri-orbital haematoma with marked swelling of the left eye, and an abrasion of the left hand. The dispute does not turn on the mechanism of injury but on its lasting consequences for a brain that was still developing when it was injured.
- [5] The neurosurgeons, Dr Z Domingo for the plaintiff and Dr M S Mohale for the defendant, recorded their agreement in a joint minute dated 6 December 2024. They agree that I[...] sustained a mild traumatic brain injury; that he is left with residual cognitive deficits and significant behavioural problems, the onset of which the collateral history dates to this accident; and that, although a mild brain injury frequently resolves well, a minority of such injuries, of the order of 15 per cent, leave permanent cognitive impairment. They agree that he had late post-traumatic seizures within the year following the accident, that his seizure risk remains above the population average, and that, more than a decade on, his deficits are permanent. Both experts consider that the injury qualifies as serious under the Narrative Test at paragraph 5.3, namely a severe long-term mental or behavioural disturbance or disorder. The whole person impairment was assessed at 20 per cent.

- [6] Dr Dale Ogilvy, a speech and language therapist, assessed I[...] in 2019. On formal testing she found significant cognitive-communicative deficits: slowed semantic processing, slowed interpretation of auditory verbal information, reduced verbal working memory, disturbed auditory attention, inefficient listening comprehension and impaired recall of verbal information. She regards these as permanent and as directly attributable to the brain injury, and as deficits that will hamper I[...] in both his schooling and any form of employment. The history she obtained was of a child who, before the accident, had reached his milestones early and was bright, talkative and interactive.
- [7] The neuropsychologist, Ms Gumbi, assessed I[...] in August 2024. She found his global intelligence quotient to fall within the mild range of intellectual disability, with compromised language development, impaired abstract reasoning, significantly impaired auditory short-term memory, impaired visual perception and problem-solving, and a psychosocial profile marked by emotional and social withdrawal, aggression and feelings of inadequacy.
- [8] The educational psychologists, Ms Debbie Lopes for the plaintiff and Dr Xolani Fakude for the defendant, agreed in a joint minute dated 19 February 2025 that, but for the accident, I[...] would have completed Grade 12 and progressed to tertiary study, attaining at least an NQF level 6 qualification and possibly an NQF level 7 degree, in keeping with the educational achievements of his immediate and extended family. They agree that, as matters now stand, he has significant learning delays. He will not pass Grade 12 and at best may reach Grade 9 and acquire a basic skill in sympathetic employment, and he will in any event remain a vulnerable competitor in the open labour market by reason of his cognitive-communicative deficits, behavioural difficulties, low frustration tolerance, headaches and elevated seizure risk.

### **Future loss of earning capacity**

- [9] The industrial psychologists, Ms Esther Auret-Besselaar for the plaintiff and Ms Moipone Kheswa for the defendant, agreed the pre- and post-morbid scenarios

in a joint minute dated 23 April 2026. Munro Forensic Actuaries prepared a report dated 24 April 2026 on those agreed scenarios.

- [10] On the uninjured path, I[...] would have matriculated, entered the labour market after a short period of job-seeking, and progressed from entry-level earnings through semi-skilled and skilled work, reaching the Paterson C1/C2 band by about age 45 and working to retirement at 65. On the injured path, he will not matriculate, will be confined to entry-level minimum-wage work if he is employable at all, will not progress, and is at high risk of cyclical employment and, in time, of being unemployable in a competitive market.
- [11] On those scenarios the actuary calculated a net future loss of R4 950 215, applying contingency deductions of 15 per cent pre-morbid and 60 per cent post-morbid, and R4 120 425, applying deductions of 25 per cent pre-morbid and 50 per cent post-morbid. In argument the plaintiff accepted the 25 and 50 per cent basis. The defendant contended for a deduction of 30 per cent on each leg.
- [12] The assessment of a future loss of this kind is not an exercise in arithmetic certainty. An actuarial calculation is a useful tool, but the court retains a wide discretion and is not bound by an inexorable computation (*Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)* at 113G–114E). Contingencies exist to accommodate the ordinary vicissitudes of life. While a sliding scale offers guidance, each case turns on its own facts. The child in *Bailey* was, like I [...], very young when injured. She was two years old, and a contingency in the region of a quarter was held appropriate for the speculative uninjured future of a child of that age.
- [13] Two considerations bear on the contingency assessment. The uninjured path rests substantially on an extrapolation from family achievement for a child injured before he had begun formal schooling. A future of that kind is inherently speculative and warrants a pre-morbid deduction higher than the figure conventionally applied to an established young earner. The injured path, by contrast, is one the experts regard as close to unemployable. This justifies a high

post-morbid deduction, though not one so high as to extinguish the very loss the experts are agreed he will suffer. Weighing those considerations against the joint minutes, I[...]’s age at injury and his supportive background, I am satisfied that deductions of 25 per cent pre-morbid and 50 per cent post-morbid are fair to both parties. The defendant’s symmetrical 30 per cent understates the gravity and permanence of the limitation on the injured path, while the actuary’s primary basis of 15 and 60 per cent is, on these facts, too generous to the plaintiff on the uninjured path and too severe on the injured path.

[14] On that basis the net future loss of earning capacity is R4 120 425, which I accept.

[15] The parties and the actuary are agreed that the statutory cap in s 17(4)(c) of the Act has no material effect on the result, because the projected earnings on which the loss is computed fall well within the cap, so that the limitation does not operate. As the upper guardian of the minor I should not accept such a concession without satisfying myself of its basis; having done so, I am content that it is correctly made.

### **General damages**

[16] General damages are claimed for pain and suffering, loss of the amenities of life, disability and disfigurement. The governing principles are well settled. The award must be fair to both sides. Comparable awards, adjusted for inflation, furnish broad guidance and serve consistency, but they do not displace the court’s discretion or bind it to the arithmetic of earlier cases, and the enduring effect of the injury on this claimant is what is ultimately decisive ( *De Jongh v Du Pisanie* NO 2005 (5) SA 457 (SCA) at 475–477). The court must give just compensation, but it must not, in the dictum approved in that case, be overly generous at the defendant’s expense.

[17] The label “mild” attached to this brain injury must not be allowed to obscure its effect. I[...] was injured at a critical stage of neurological development, when an

immature brain is more vulnerable to diffuse injury and when the acquisition of cognitive and social skills may be compromised in ways that become more apparent as the child grows. The sequelae here are not transient. He is left with permanent deficits in processing speed, memory, attention and comprehension, behavioural and emotional dysregulation, scholastic underachievement well below his pre-morbid potential, social difficulty and frustration, and a continuing elevated risk of seizures. Those consequences extend to his schooling, his employability, his independence, and his ordinary enjoyment of life.

[18] This case raises, perhaps more starkly than the decided authorities have hitherto done, a question that recurs in road accident litigation involving young children. Where a traumatic brain injury is clinically classified as “mild”, but the victim was an infant whose brain was still developing, how are general damages to be assessed? The feature that makes such an injury disabling, its diffuse interference with normal neurodevelopment, is precisely what the “mild” label hides. The point is not merely evidential. It goes to how the comparative exercise is conducted, and it is one on which practitioners continue to err, arranging comparable awards by the severity label attached to the primary injury rather than by its proven effect.

[19] In my view, the clinical grading of a brain injury as mild, moderate or severe describes only the acute insult. It measures what happened to the brain at the moment of trauma, not what the injury will do to the person over a lifetime. The two may diverge markedly, and they diverge most widely in the very young. An immature brain injured before the acquisition of language, scholastic and social competencies may sustain diffuse damage that is clinically mild yet developmentally decisive, because the injury does not merely impair an existing faculty but compromises the acquisition of faculties not yet formed. The disabling consequence is therefore latent at the time of injury and emerges only as the child is required, year on year, to do what the injury has rendered him less able to do. It follows that, in the assessment of general damages for a brain injury sustained in early childhood, the severity label attached to the primary injury

does not govern the enquiry and imposes no ceiling. The enquiry is governed instead by the proven, permanent effect of the injury on this claimant, assessed over the whole of his life and including its developmental dimension. The principle articulated for an adult in *Braun obo Tiripano v Passenger Rail Agency of South Africa* [2025] ZAWCHC 141, that a clinically mild injury may have a serious outcome and that it is the actual effects on the claimant that matter, applies with greater force, not less, where the claimant is an infant. The developmental dimension is a discrete aggravating feature, to be brought to account in its own right.

[20] That principle bears on the use of comparable awards. Where the comparators are, on the one hand, adults with more severe injuries and, on the other, children of similar age with more severe or progressively worsening injuries, they are not measures of equivalence for a young child with a clinically mild but developmentally significant injury. They serve rather to mark out the range within which the award must fall, the adult comparators indicating the level appropriate to comparable functional sequelae without the developmental dimension, and the more severe paediatric comparators indicating the upper reach that the category does not exceed. The court's task is to place the claimant within that range by reference to the developmental dimension and the permanence of the proven sequelae, not to match a figure to a severity label. With that approach in mind, I turn to the awards counsel placed before me.

[21] The authority closest in subject-matter to the present case is *Braun obo Tiripano* itself, where an adult who sustained a traumatic brain injury with neuro-behavioural sequelae and monocular vision loss received an award with a present-day value of approximately R1 025 000. The remaining authorities relied upon cluster, in present-day terms, between roughly R1 020 000 and R1 380 000. They include *Vakata v Road Accident Fund* 2014 (7A4) QOD 1 (ECP) (R1 118 000, adjusted), *Benjamin NO v Road Accident Fund* 2005 5 QOD B4-205 (C) (R1 221 000), *Mofokeng v Road Accident Fund* 2015(7B4) QOD 12 (GSJ) (R1 229 000), *Noble v Road Accident Fund* 2011 (6J2) QOD 54 (GSJ) (R1 248 000),

*Adlem v Road Accident Fund* 2003 5 QOD J2-41 (CA) (R1 280 000), *Smit v Road Accident Fund* 2013 (6A4) QOD 188 (GNP) and *Potgieter v Road Accident Fund* 2013 (6A4) QOD 195 (ECP) (each about R1 281 000), and *Nsibande v Road Accident Fund* 2022 (8B3) QOD 1 (GNP) (R1 379 000). Several involve more severe brain injuries or significant additional orthopaedic injury, which places them towards the upper end of that band.

[22] Counsel for the plaintiff also relied, correctly in my view, on a decision of this Division closer on its facts than any of the foregoing, *C.D.K obo C.L.K v Road Accident Fund* (1809/2022) [2025] ZAWCHC 149. The injured child there was three years and eleven months old at the time of the collision, a year older than I[...] but at much the same point in early childhood, and came, as I[...] did, from a family whose educational achievements pointed to a tertiary qualification but for the injury. The court awarded R2 000 000 in general damages. That authority does not, however, carry the plaintiff to the figure she seeks; instead, it points the other way. The primary injury in *C.D.K* was markedly more serious than I[...]’s, being a skull fracture with generalised brain swelling, and the sequelae worsened over time, with post-traumatic epilepsy, attention deficit and a documented deterioration on later assessment. I[...]’s injury, by the agreed classification of both neurosurgeons, is mild, and his sequelae, though permanent and serious, have not followed that progressive course. *C.D.K* is therefore most useful not as a measure of equivalence but as a marker of the upper reach of this category. A young child of much the same age, with a more severe injury and a worsening trajectory, attracted R2 000 000, which places I[...]’s milder, non-progressive injury appreciably below that level.

[23] Drawing these threads together, I[...]’s injury is, on the agreed expert classification, mild. But its permanent cognitive, behavioural and developmental consequences in a child injured before he had begun school are substantial and lifelong. He falls above the adult comparators, in which the developmental dimension is absent, but well below *C.D.K*, in which a child of much the same age suffered a more severe injury with a worsening course. His case belongs in

the upper part of the range marked out by the authorities' counsel placed before me, but not at or beyond its upper limit. Bearing in mind fairness to the defendant and the interrelationship between this head and the substantial award for loss of earning capacity, I consider an award of R1 100 000 to be fair and reasonable. That sum reflects the real and permanent impairment I[...] has suffered, including its developmental dimension, and accords with the pattern of comparable awards and his place within them. It is the amount I award.

### **Protection of the award and the position of the minor**

[24] I[...] is a minor whose cognitive functioning falls within the mild range of intellectual disability and who has significant behavioural difficulties. As the upper guardian of the minor, the court must ensure that the award is protected and applied for his benefit. The protection of the award was not raised on the pleadings but was raised by plaintiff's counsel at the hearing. That is no obstacle. The pleadings define the cause of action and the substantive relief in issue between the parties, but they do not exhaust the court's jurisdiction. The manner in which a sum awarded to a minor is to be secured engages the power of the court as the upper guardian of every minor, a position rooted in the common law and reinforced by s 28(2) of the Constitution, which makes a child's best interests of paramount importance in every matter concerning the child, and given practical effect in a case such as this by Rule 57 of the Uniform Rules of Court. In that capacity, the court is not confined to the relief the parties have chosen to seek. It may, and where the minor's interests require it must, act of its own accord to see that money awarded for the child reaches and benefits the child. Neither the absence of a prayer to that effect nor the availability of a willing natural guardian is decisive. What matters is the court's own assessment of what the interests of the minor require. The expert evidence raises a genuine doubt as to whether he will be able to manage a substantial capital sum, whether as a major or at all.

[25] The proper course is for the plaintiff's attorneys to bring an application under Rule 57 for the appointment of a *curator ad litem* to investigate and report on whether a *curator bonis* or trust is required. I have taken the more conservative of the courses open to me. Rather than appointing a *curator bonis* myself, or directing the creation of a trust, on the strength of the present record, I direct only that the question be investigated and reported on, and I secure the capital in the meantime. That leaves the substantive decision to a process in which the Fund, the plaintiff and the *curator ad litem* may each be heard, and it prejudices no one. The capital is to be retained in the attorneys' trust account pending the outcome of that application and is not to be paid over in the interim. The application must be brought within 90 calendar days of this order, failing which the Registrar is directed to bring the matter before me for further directions.

#### **Costs, including counsel's fees**

[26] The plaintiff seeks costs on the High Court scale, with counsel's fees on Scale C. Counsel submitted that the value of the claim, the involvement of multiple expert disciplines and the seniority at which he practises justify the higher scale, and that a lower scale would erode the minor's award through irrecoverable fees. The defendant's attorney contended for Scale A, the matter having been disposed of on the papers.

[27] This was a substantial quantum matter concerning a minor with permanent neuro-cognitive and behavioural sequelae. Its proper resolution called for the evaluation of several expert fields and a detailed actuarial analysis, which tells against the lowest scale. But it was ultimately decided without oral evidence following the Rule 38(2) order, which tells against the highest. The scale that fits the work actually required, while remaining proportionate and protective of the minor's interests, is Scale B. I award counsel's fees on that scale.

#### **Order**

In the result, I make the following order.

1. The defendant shall pay the plaintiff's attorneys the sum of R5 220 425.00 (five million two hundred and twenty thousand four hundred and twenty-five rand) ("the capital"), made up of R4 120 425.00 for the future loss of earning capacity and R1 100 000.00 for general damages, by electronic transfer into the trust account identified in paragraph 9 below.
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3. The defendant shall pay the plaintiff's taxed or agreed costs on the High Court scale as between party and party, which costs shall include but not be limited to —
  - 3.1 the qualifying, reservation, preparation and attendance fees (where applicable) of the plaintiff's experts Dr Z Domingo (neurosurgeon), Ms Debbie Lopes (educational psychologist), Dr D Ogilvy (speech and language therapist), Ms E Auret-Besselaar (industrial psychologist) and Munro Forensic Actuaries, together with the costs of their reports and any addenda;
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  - 3.4 the costs of the plaintiff's attorney attending the Rule 37(8) pre-trial conferences and the costs of the Rule 38(2) application;
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7. Pending the determination of the application referred to in paragraph 8, the capital shall be retained in the trust account of the plaintiff's attorneys and shall not be paid over to the plaintiff personally, save for any disbursements necessarily incurred, or required, for and on behalf of I[...] N[...].
8. The plaintiff's attorneys are directed to bring an application in terms of Rule 57 of the Uniform Rules of Court, within 90 calendar days of the date of this order, for the appointment of a *curator ad litem* to investigate and report on whether I[...] N[...] requires the appointment of a *curator bonis* or a trust to administer the capital. If compliance with this direction is not achieved within the stated period, the Registrar is directed to bring the matter before me for further directions.
9. Payment of the capital and of the costs shall be made into the following trust account:

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Branch code: 210651

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**M FRANCIS**

Judge of the High Court

**Appearances:**

For Plaintiff: Adv Wayne Coughlan

Instructed by: DSC Attorneys

For Respondent: Mr Muhammed Arbee

Instructed by State Attorney (Cape Town)