

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 42353/2019

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

15 November 2023

Date: Signature

In the matter between:

**ADV. NASEEM MOTALA N.O.
W[...], K[...]**

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 15 November 2023.

HITCHINGS AJ:

INTRODUCTION

[1] The plaintiff is Adv Naseem Motala who acts in his representative capacity as *curator ad litem* of K[...] W[...] (“K[...]”), who was 14 years old on the day of the hearing before me. Adv Motala had been appointed as *curator ad litem* by Matojane J on 25 October 2021.

[2] The defendant is the Road Accident Fund.

[3] The plaintiff’s claim against the defendant arises out of a motor vehicle collision which occurred on 30 April 2019 at the intersection of General Pienaar and Ham Streets, Witpoortjie, Roodepoort. K[...], who was two months short of 10 years old at the time, was a passenger in one of the vehicles. The collision occurred when a vehicle which had been travelling in the opposite direction to the vehicle in which K[...] was a passenger, turned right and into the path of travel of the vehicle in which K[...] was a passenger. As a result of the collision, K[...] sustained various injuries which will be dealt with later in this judgment.

[4] These facts were deposed to by K[...]’s mother. It is not necessary for purposes of this judgment to give a detailed description of the collision, because on 25 October 2019 the defendant, correctly in my view, conceded that it was 100% liable for the plaintiff’s proven damages.

[5] In his particulars of claim the erstwhile plaintiff, Mr Pieter Wessels, who was

later replaced by Adv Motala (nothing turns on this) claimed a total of R4 220 000 in damages. This amount was made up as follows:

[5.1] Past medical expenses: R100 000

[5.2] Future medical expenses: R300 000

[5.3] Future loss of earnings: R2 970 000

[5.4] General damages: R850 000

[6] On 19 January 2023 the plaintiff gave notice of his intention to amend his particulars of claim. The defendant did not object to the proposed amendment, and the replacement pages were duly filed on 2 February 2023.

[7] The essence of the amendment was twofold. Firstly, it introduced two further injuries in paragraph 7 of the particulars of claim, namely a “sift (sic) tissue brain injury of the cervical spine” and a “speech impairment”. Secondly, it significantly increased the plaintiff’s claim to a total amount of R8 600 719.18. This new amount was made up as follows:

[7.1] Past medical expenses: R104 504.18

[7.2] Future loss of earnings: R6 946 215.00

[7.3] General damages: R1 250 000.00

[8] On 2 May 2023 the defendant’s defence was struck out by Strydom J, and the plaintiff was granted an order entitling him to approach the registrar for a date to seek default judgment against the defendant. I will return to the effect of such striking later

in this judgment.

[9] On 12 July 2023 the plaintiff's attorney, Ms Melissa van Tellingen, deposed to an affidavit in which she confirmed, amongst other things, that:

"2.2 the plaintiff has filed all of her (sic) medico legal reports including the actuarial calculation;"

"2.3 no further interlocutory applications are outstanding or anticipated;"

"2.5 all relevant pleadings, notices, expert reports and documents uploaded to case lines in specified sections..."

2.6 "the matter is trial ready in respect of quantum only and that the matter may be allocated a default judgement trial date". This affidavit was filed in compliance with the revised practice directive 1 of 2021;"

[10] On 12 September 2023 the plaintiff served his notice of set down of his application for default judgment to be heard on 13 October 2023.

[11] The plaintiff uploaded his heads of argument on 6 October 2023.

[12] On 11 October 2023, two days before the trial date, and despite Ms van Tellingen having certified in her affidavit of 12 July 2023 that the matter was trial ready and that no interlocutory applications were anticipated, the plaintiff served a second notice of his intention to amend his particulars of claim by further increasing his claim in respect of general damages by R250 000 to R1,5 million.

[13] The final paragraph of this notice reads, somewhat curiously, as follows:

"BE PLEASED TO TAKE NOTICE FURTHER that unless objection in writing is made to the proposed amendment on the Trial Date or

there after delivering this notice, the plaintiff shall amend accordingly.”

[14] This notice was uploaded to Caselines on 13 October 2023, the date of the hearing. On the same date the “Amended Pages” were also uploaded to Caselines, presumably in anticipation of the amendment being granted.

[15] The matter was heard by me on 13 October 2023. The plaintiff was represented by Mr J.F Grobler SC and the defendant was represented by Ms Ramjee, a state attorney.

EFFECT OF THE DEFENDANT’S DEFENCE HAVING BEEN STRUCK OUT

[16] It is perhaps apposite that I explain why Ms Ramjee was entitled to represent the defendant at the hearing, despite the defendant’s defence having been struck out.

[17] The striking out of a defendant’s defence constitutes no more than a bar to the defendant tendering evidence which had been pleaded in its plea¹. The defendant’s position is conceptually analogous to that of a respondent who has filed a notice in terms of Rule 6(5) (d) (iii) that it intends to oppose the applicant’s application on a question of law only.

[18] The plaintiff remains liable to prove both an entitlement to damages (generally

¹ *Minister of Police v Michillies* <https://www.saflii.org/za/cases/ZANWHC/2023/90.pdf> at paragraph [4]

referred to as “the merits”), and the quantum of such damages².

[19] The defendant is not precluded, in order to test the veracity of the plaintiff’s version, from cross-examining any witnesses which may be called by the plaintiff³. The defendant may not however put a different factual version to any witness because it is barred from leading evidence to substantiate its alternative version⁴. The striking out of a defence accordingly relates to issues of fact.

[20] Thus in the present case, the defendant was, by way of example, precluded from leading evidence in relation to the collision itself or any evidence to the effect that that K[...] had not sustained any injuries in the collision.

[21] But questions of pure law and mixed law and fact stand on a different footing⁵.

[22] Questions relating to jurisdictional facts are matters of pure law. Thus, by way of example, the Road Accident Fund (“the RAF”), as defendant, would in appropriate circumstances be entitled to argue that a plaintiff was precluded from pursuing the adjudication of a general damages claim since it (the RAF) had not accepted that the injury in question constituted a serious injury as contemplated in section 17(1A) of the Road Accident Fund Act 56 of 1996 (“the RAF Act”) and nor had the appeal tribunal contemplated in Regulation 3 of Road Accident Fund Regulations, 2008

² *Minister of Police v Michillies, supra*

³ *Minister of Police v Michillies, supra*

⁴ *Stevens and Ano v Road Accident Fund*
<https://www.saflii.org/za/cases/ZAGPJHC/2022/859.html> at paragraphs 8 to 12

⁵ Compare the judgment of the Court of Appeal of Singapore in *Sin Toh Wee Ping Benjamin and another Grande Corp Pte Ltd* [2020] SGCA 48 at paragraphs 37 to 47 which can be accessed at https://www.elitigation.sg/gd/s/2020_SGCA_48.

assessed such injuries as being serious⁶.

[23] Similarly, it seems to me that the same position would apply in relation to procedural issues which do not entail traversing the defendant's defence. Thus, *in casu*, the plaintiff's application to amend its particulars of claim was completely independent of the defendant's defence which had been struck out. The defendant was accordingly entitled to be heard in relation to the plaintiff's application for an amendment.

[24] It is by now trite that the determination of appropriate contingencies falls within the court's discretion which must be exercised judicially based on the surrounding facts and circumstances. This determination constitutes a question of mixed law and fact, because it involves the application of legal principles concerning the assessment of damages to a specific set of facts and circumstances. For this reason, the defendant was entitled to be heard in regard to the assessment of appropriate percentages to be applied in taking account of contingencies.

[25] The same principle applies in the assessment of general damages. An assessment of what would constitute an appropriate award for general damages is predicated upon the court applying legal principles to the facts relevant to quantum. The defendant was accordingly similarly entitled to make submissions relating to the assessment of general damages.

THE APPLICATION FOR DEFAULT JUDGMENT

⁶ *Knoetze obo Malinga and Another v Road Accident Fund (77573/2018 & 54997/2020)* [2022]

[26] At the commencement of his argument, Mr Grobler moved for an amendment of the particulars of claim so as to increase the amount claimed for general damages by R250 000. This proposed amendment was in the same terms as the plaintiff's notice of intention to amend served on 11 October 2023 already referred to above.

[27] I asked what the defendant's attitude was to the proposed amendment. Ms Ramjee noted the defendant's objection. Mr Grobler nevertheless persisted with his application.

[28] I accordingly turn to deal with the question whether the application for leave to amend should or should not be granted.

[29] The first issue that militates against the granting of the amendment is the fact that Ms van Tellinghen had, as set out above, deposed to an affidavit in which she unambiguously certified that the matter was trial ready in respect of quantum, and that no further interlocutory applications were outstanding or anticipated. She also confirmed that all medico-legal and actuarial reports had been filed and uploaded to Caselines.

[30] Mr Grobler explained from the bar that it was only whilst he was drafting the heads of argument that he had formed the view that the plaintiff's claim for general damages should be increased by R250 000. In response to my question whether the defendant should not have been given longer notice of the proposed amendment, Mr Grobler argued that since all the relevant medico-legal reports had already been in the possession of the defendant, it had been in a position to itself calculate the quantum of damages, and general damages in particular.

[31] This argument would perforce be equally applicable to the plaintiff whose

attorney had, with all the applicable medico-legal reports in her possession, certified under oath that she did not anticipate any further interlocutory applications. Thus on Mr Grobler's argument, Ms van Tellingén ought similarly to have been aware that the quantum of general damages ought to be increased by R250 000, and that the matter had in fact not been trial ready. She ought therefore not to have deposed to an affidavit certifying trial readiness because of an anticipated amendment. One would, at the very least, have expected Ms van Tellingén to have deposed to a further affidavit explaining why she had previously certified the matter as trial ready, whereas, two days prior to the trial date, a notice of intention to amend the particulars of claim was filed. No such affidavit was forthcoming, and nor was an explanation tendered from the bar.

[32] A further consideration is the wording of the notice itself which afforded the defendant an opportunity to object in writing to the proposed amendment "on the Trial Date or there after delivering this notice". It is difficult to understand what the words "or there after delivering this notice" mean. It is conceivable that the notice purported to afford the defendant a further opportunity to object to the proposed amendment even after the hearing. The unintelligibility (or at best, the ambiguity) of the notice ought not to prejudice the defendant.

[33] Be that as it may, the defendant did, as it was entitled to do, object to the proposed amendment at the hearing. I should add that, as much as the plaintiff moved the application to amend from the bar, it was open to the defendant to object to such application from the bar too.

[34] Even though I am of the view that the plaintiff has failed to tender an adequate explanation for his delay and his attorney having incorrectly certified the matter as

trial ready, the court can condone such failures⁷. Amendments will generally be allowed, no matter how neglectful or careless may have been the omission requiring an amendment, unless the application to amend is mala fide or such amendment would cause an injustice to the other side which cannot be compensated by costs⁸.

[35] I have considered the prejudice and potential prejudice to the defendant if I were to allow the amendment. Although Ms Ramjee did object to the proposed amendment she did not demonstrate in what manner the defendant would be prejudiced in its defence if the amendment were to be allowed.

[36] Therefore, although the plaintiff is not without blame for the late application to amend his particulars of claim, it seems to me to be interests of justice that I grant the application for leave to amend the plaintiff's particulars of claim. I accordingly do so.

UNIFORM RULE 38 (2) APPLICATION

[37] The plaintiff filed a substantive application for evidence to be adduced by way of affidavit in accordance with the provisions of Rule 38 (2). The defendant did not oppose this application, and having regard to the facts of the matter, I granted the application. Evidence was accordingly adduced by way of affidavit; this evidence related primarily to the opinions of the various experts⁹. In line with its defence having been struck out, the defendant did not adduce any evidence to counter that of

⁷ *First 3D (Pty) Ltd v Clem Coleman and Ano*
<https://www.saflii.org/za/cases/ZAGPPHC/2021/336.html> at paragraph [16]

⁸ *McDuff and Co (in liquidation) v Johannesburg Consolidated Investments Co Ltd* 1923 TPD 309 at page 310

the plaintiff.

[38] The affidavits and reports of the following experts were accordingly introduced into evidence:

[38.1] Dr Fredericks (a general practitioner) dated 29 June 2021;

[38.2] Dr Fredericks (RAF4 Serious Injury Assessment Report) dated 10 December 2020;

[38.3] Dr Berkowitz (a plastic surgeon) dated 28 September 2020;

[38.4] Dr Berkowitz (RAF4 Serious Injury Assessment Report) dated 23 September 2020;

[38.5] Ms Gibson (a neuropsychologist) dated 25 August 2020

[38.6] Dr Naidoo (a psychiatrist) dated 11 May 2020;

[38.7] Dr Edeling (a neurosurgeon) dated 3 September 2020;

[38.8] Ms Lautenbach (an educational psychologist) dated 3 June 2021;

[38.9] Dr de Graad (an orthopaedic surgeon) dated 30 June 2020;

[38.10] Ms Doran (an occupational therapist) dated 15 June 2021; and

[38.11] Mr AC Strydom of SNG Argen (an actuary) dated 17 January 2023.

⁹ It will be recalled that the RAF had conceded that it was liable to pay 100% of the plaintiff's proven damages.

THE INJURIES SUFFERED

[39] Both Dr Fredericks (a general practitioner) and Dr Berkowitz (a plastic surgeon) completed RAF 4 serious injury assessment reports and confirmed that K[...] had suffered serious injuries as contemplated in section 17 of the RAF ACT.

[40] Dr Fredericks diagnosed K[...] as having sustained a *deep ± 7cm laceration diagonally across forehead with a with CT scan confirmation of an extradural haemorrhage and a comminuted depressed left frontal bone fracture with intracranial displacement of some of the bone fragments and resultant mass effect on the left frontal lobe of the brain*". Dr Fredericks found that K[...] suffers from a whole person impairment of 32% and in respect of the Narrative Test Guidelines he concluded that *"the significant negative impact of [K[...]’s] participatory abilities within the occupational, domestic and social domains of [K[...]’s] life, it is reasonable that [K[...]’s] injuries should be allowed to qualify as Serious Injuries under 5.1 and 5.2 of the Narrative Test."*

[41] Dr Berkowitz observed that K[...] has *"a pigmented scar measuring 50 mm lying obliquely across the left side of the forehead. The scar extends just into the left frontal scalp, where it is 10 mm wide. There is a swelling of the bone underneath the scar."* He concluded that that K[...] *"has been left with a serious permanent disfigurement as a result of [the] accident"* which constituted permanent serious disfigurement as contemplated in paragraph 5.2 of the Narrative Test Guidelines.

[42] On clinical examination, Dr De Graad, an orthopaedic surgeon, concluded *inter-alia* that K[...]:

[42.1] was mildly overweight;

[42.2] had a healed laceration on the frontal aspect of the skull on the left;
and

[42.3] was tender on palpation posteriorly over the C7/T1 area.

[43] Dr De Graad expressed the opinions that K[...]:

[43.1] would require conservative management of pain, and physiotherapy;
and

[43.2] could not, and never would be able to, function independently.

[44] Ms Gibson, a neuropsychologist, reported that, regard being had to his previous school reports, K[...] had not exhibited any academic issues in mainstream schooling, nor did he have any pre-existing intellectual or behavioural difficulties. K[...] had a pre-existing diagnosis of epilepsy which had led to *grand mal* seizures from the age of 8 and for which he was receiving specialist treatment.

[45] Ms Gibson stated that K[...] had suffered a mild complicated traumatic brain injury presenting with mild neurocognitive disorder, behavioural symptoms and analgesia abuse with moderate / class 2 abnormalities. She reported that K[...]’s epilepsy was less stable after the accident. K[...] has since the accident become lethargic and lacking in motivation, his attention span is shorter, he is easily distractible, he sleeps more and eats more (hence the weight gain) and has become less active. She opined that K[...] is less confident and needs constant reassurance, more supervision and that he tends to leave tasks incomplete. She reported that K[...] also suffers from severe, daily headaches and that he can be irritable, blunt and uncooperative. He had also developed enuresis.

[46] Ms Gibson performed neuropsychological tests which revealed that:

[46.1] K[...] has substantial neurocognitive difficulties in the following domains: attention; ability to remain on task without reassurance and supervision; working memory/complex attention; mental tracking; fine motor control and muscle tone; visuopraxis; expressive language; numerical reasoning and mathematics; language-based problem solving; ability to extract meaning from print; narrative memory; expressive language and executive functioning.

[46.2] K[...] has adequate functioning in the following areas: visual memory. non-verbal problem solving in the form of inferential reasoning and construction combined with problem solving.

[47] From a psychological perspective, Ms Gibson expressed the view K[...] is anxious and reliant on encouragement and supervision. He is emotionally insecure and anxious.

[48] Ms Gibson concluded that K[...] has neurocognitive difficulties, psychological and social difficulties, educational, language-based and numerical reasoning difficulties, together with memory and executive difficulties.

[49] Ms Gibson opined that the areas of the presented complaints which were associated with the head injury and confirmed on assessment, include hypodynamic, visuopraxis, lethargy, lack of motivation, inattention, distractibility, poor perseverance, tendency to fatigue, headache, lack of confidence, need for reassurance and supervision. She stated that head injuries such as those sustained by K[...], led to executive type difficulties in planning, perseverance, self-regulation and motivation.

She believed that these difficulties were likely to increase over time.

[50] Ms Gibson also stated that below-par educational performance was consistent with brain injury, and that in the present case, such below-par educational performance was confirmed by K[...]’s mother who was home-schooling him.

[51] Dr Edeling, a neurosurgeon, stated that K[...] had sustained a soft tissue sprain injury of the cervical spine and a head injury with left frontal scalp laceration, depressed skull fracture, dural tear and extradural haematoma. He classified the injury as a complicated traumatic brain injury of severe degree. The head injury involved acceleration-deceleration forces as well as direct cranial impact, resulting in a primary diffuse (concussive) brain injury with loss of consciousness, as evidenced by loss of awareness and post-traumatic amnesia.

[52] Dr Edeling stated that the injury resulted in the following chronic impairments:

[52.1] a post-traumatic organic brain syndrome, with neurophysical-communication and mental impairments;

[52.2] chronic post-traumatic headaches;

[52.3] aggravation of pre-existing epilepsy;

[52.4] aggravation of a pre-existing mood disorder (with deference to psychiatrists);

[52.5] chronic post-traumatic vertigo (with deference to ENT surgeons);

[52.6] chronic spinal pain and physical impairment (with deference to

orthopaedic surgeons); and

[52.7] disfiguring facial scarring (with deference to plastic surgeons).

[53] Dr Edeling opined that, having persisted for sixteen months, the serious organic neurological sequelae of K[...]’s brain injury have become permanent. Although the severity of the above impairments could improve to some extent, the benefit of such improvement is likely to be negligible.

[54] He also stated that it is probable that K[...]’s learning impairment and mental disability would become increasingly apparent as he approaches maturity. K[...]’s headaches are expected to persist in variable degrees in the long term, although they should be amenable to reasonable control with appropriate treatment. K[...] would remain epileptic for the rest of his life. Seizures should, however, be amenable to reasonable control with treatment and monitoring by a specialist neurologist.

[55] Dr Edeling indicated that K[...]’s life expectancy has probably been truncated by three to five years as a result of his epilepsy.

[56] Dr Edeling concluded that it is unlikely that K[...] will develop the mental capacity for independent living or for independent management of his personal, financial or legal affairs.

[57] The educational psychologist, Ms Lautenbach, concluded that K[...] was “likely academically vulnerable pre-accident”. This statement must be borne in mind when considering Ms Lautenbach’s further views that, despite K[...]’s epilepsy, he had prior to the accident performed on an average to high average level. She stated that in her view K[...] would have obtained at least an NQF 4 level education, with normal

mainstream support. He would probably have studied towards and obtained an NQF 8 level education, bearing in mind that his father had obtained a tertiary qualification on an NQF 7 level and that a study had shown that children usually surpass their parents.

[58] Ms Lautenbach stated that her test results had revealed that after the accident K[...] fell in the low average range academically in comparison to his age group peers. Ms Lautenbach expressed the view the K[...] would struggle in a mainstream academic environment. K[...]’s head injury has impacted on his pre-accident academic vulnerability.

[59] Ms Lautenbach concluded that, in her opinion, and having regard to the injuries sustained in the collision, K[...] would probably attain an NQF 4 in a remedial/vocational schooling environment. He would most probably continue with a more practical approach and obtain an NQF 6 (Diploma) level.

[60] Ms Lautenbach opined that K[...]’s epilepsy should be taken into consideration when choosing a future career. To my mind, this opinion points to Ms Lautenbach’s belief that K[...] has the potential of having a career, and therefor of earning an income.

[61] Dr Naidoo, a psychiatrist, diagnosed K[...] with a mild neurocognitive disorder due to traumatic brain injury, with behavioural disturbance. Dr Naidoo explained that K[...]’s mental well-being bears an intimate relationship to his physical well-being. K[...]’s current circumstances provide a protective environment, which results in him not displaying greater disfunction. This is likely to change as his life circumstances and roles change. Dr Naidoo opined

that the plaintiff actually needs to be treated by a psychiatrist as his current medication needs to be optimised.

[62] Ms Doran, an occupational therapist, confirmed that on examination K[...] did appear to display overall difficulties with regards to the understanding of the task expectation. He demonstrated difficulties with mental flexibility. K[...] also appeared to have difficulties with some aspects of fine motor precision activities, manual dexterity and motor coordination. He also appeared to have difficulties with his overall strength, which again would relate to organic fatigability.

[63] K[...] also evidenced difficulties with his visual discrimination, spatial relations, form constancy, figure-ground and visual closure, all of which fell below the acceptable ranges.

[64] Ms Doran opined that the multifactorial difficulties experienced by K[...] would constitute long-term loss and related difficulties, especially during his adult life, which would constitute increased vulnerability to secure, and probably more so to retain employment, even in a semi-skilled position. This was due to K[...]’s neuro-behavioural, neuro-psychological and neuro-cognitive difficulties. These difficulties would have a negative impact on his motivation, perseverance as well as sustaining relationships, and thus, pose a risk for retaining of employment.

[65] Ms Rossouw, an industrial psychologist, reported that, according to K[...]’s mother who is his home-school educator, he had failed grade 7 in 2022, and was currently repeating grade 7 in 2023.

[66] Ms Rossouw postulated an uninjured scenario. She stated that, because K[...] was so young at the time of the accident, it was impossible to express a definitive opinion as what career K[...] would have followed had the accident not occurred. Ms Rossouw stated that she therefor had regard to, inter alia, the educational and career achievements of K[...]’s family members, as well as their socio-economic situation, the current tendencies in the labour market, and the general market conditions in the country.

[67] Having considered all the relevant factors, Ms Rossouw postulated that K[...] would probably have achieved a grade 12/NQF 4 level of education by the end of 2027, at age 18. Taking various factors into account, Ms Rossouw proposed that part-time studies should be considered for calculation purposes; she noted that this is regarded as a conservative scenario. Considering the poor economic climate of the country and the high unemployment rate, upon completion of his schooling (that is, by the end of 2027), because of lack of work experience, K[...] may well have experienced an initial period of unemployment of at most six months (i.e., from the beginning of 2028 until mid-2028). Once again, this is regarded as a conservative scenario.

[68] With a Grade 12 level of education with an endorsement for degree studies, K[...]’s commencement total earnings would probably have been in the region of R72,000.00 per annum in 2023’s monetary value. The postulated earnings of R72,000.00 per annum fall between the lower quartile and the median for an individual with an NQF 4 level of education in the early career stage working in the formal sector, as per the Stats SA Earnings by Level of Education 2023 table, The Quantum Yearbook 2023, Robert J Koch.

[69] According to Ms Rossouw, K[...] would probably have commenced his part-time studies immediately upon securing employment. It would likely have taken him five years to obtain his NQF 7 level of education (that is, from mid-2028 until mid-2033). As he would have gained valuable experience in the workplace, it is probable that from commencing full-time employment until he would have obtained his NQF 7 level of education, his earnings would have increased over these five years (that is, from mid-2028 until mid-2033) to an estimated total earnings of R168,000.00 per annum at 2023's monetary value. Earnings of R168,000.00 per annum fall closest to the lower quartile of earnings for an individual in the early career stage with an NQF 7 level of education, as per the Stats SA Earnings by Level of Education 2022 table, The Quantum Yearbook 2023, Robert J Koch.

[70] Ms Rossouw believes that K[...] would probably have been selected for an Honours Degree (NQF 8 level of education) directly after obtaining his Bachelor's Degree/NQF 7 level of education. Honours Degree studies generally take two years to complete on a part-time basis. Therefore, K[...] would likely have commenced his studies towards an NQF 8 level of education, while working on a full-time basis, by the beginning of the 2034 academic year, and he would therefore have obtained his qualification by the end of 2035 at age 26.

[71] Upon obtaining his NQF 8 level of education, K[...] would probably have secured employment in line with his qualification. This would be by the beginning of 2036 at age 26, turning 27. His commencement total earnings would probably have been around R216,000.00 per annum at 2023's

monetary value. Earnings of R216,000.00 per annum fall between the lower quartile and the median of the earnings range for an individual with an NQF 8 level of education in the early-career stage, as per the Stats SA Earnings by Level of Education 2023 table, The Quantum Yearbook 2023, Robert J Koch.

[72] According to Ms Rossouw, from the age of 27, it is probable that K[...]’s earnings would have increased linearly up to an earning ceiling (at the age of 45 years) within the formal sector with total earnings of around R840,000.00 per annum at 2023’s monetary value. The indicated earning ceiling falls between the median and the upper quartile of the earnings range for an individual with an NQF 8 level of education in the late career stage, as per the Stats SA Earnings by Level of Education 2023 table, The Quantum Yearbook 2023, Robert J Koch. Annual inflationary increases would have applied until retirement age.

[73] Ms Rossouw then postulated an injured scenario. She stated that, based on the opinions of the various experts, it was apparent that K[...] has been severely compromised as far as his scholastic/academic potential and occupational prospects are concerned. Having regard to the opinions of the other experts, with probably a low-mark Grade 10 (NQF 2 level of education, K[...] would be limited to unskilled employment in the non-corporate sector, which generally entails physically demanding work.

[74] Ms Rossouw expressed the view that, although K[...] may theoretically (more so from a physical perspective) be able to secure such employment, excluding positions from which he would be barred because of his epilepsy, he would need to compete against other uninjured jobseekers in an already dire

economy with limited employment opportunities available. She aligned herself with the contents of an article published by SAGE on the 15th of June 2022, the youth unemployment rate in South Africa was 66.5% (Q4:2021), and the competition to secure employment, is thus fierce. As noted by Ms Doran, the plaintiff's mental exhaustion may impact on his ability to retain employment of a physical nature. Furthermore, should he develop epilepsy (as noted by Dr Edeling) in the future, the plaintiff would be excluded from a variety of jobs and working environments (as indicated by Ms Doran), which would further limit his employment prospects.

[75] Having regard to the opinions of Dr Edeling and Ms Gibson that the plaintiff requires inter alia sympathetic employment, Ms Rossouw noted that such employment opportunities are extremely scarce and are generally provided for only short periods of time. Sheltered employment, as an alternative presented by Dr Edeling, is extremely limited in South Africa.

[76] Ms Rossouw concluded that K[...] would most likely remain unemployed for his whole working life.

[77] Based on the postulations of Ms Rossouw, Mr Strydom, an actuary, calculated K[...]’s total loss of earnings to be R6 946 215.00. This figure does not take account of contingencies.

[78] As already stated, the defendant did not file any expert reports. Ms Ramjee limited her attack on the opinions expressed by the experts to pointing out that Ms Gibson’s (a clinical neuropsychologist) report had been prepared in 2020 and was therefore somewhat outdated. She questioned why Ms Gibson had confirmed her

2020 report in 2023 when it was clear that circumstances had changed. Whilst it would undoubtedly have been useful for Ms Gibson to have rendered an updated report, her opinions as expressed in her 2020 report remained valid within their own context. Indeed, her postulation that K[...]’s intellectual difficulties would probably increase over time turned out to be correct.

[79] I have carefully considered the reports of all the experts. I have doubts that K[...]’s future is as bleak as postulated by Ms Roussouw. That said, I have no reason to reject the experts’ evidence outright. In short, it is clear that K[...] sustained life-changing injuries which have rendered him potentially unemployable in the open market. My doubts that K[...] will be completely unemployable (whether in the open market or otherwise) will find expression in my assessment of an appropriate contingency percentage.

[80] Ms Ramjee also made submissions in relation to what would constitute appropriate contingencies. I will return to this aspect later.

HEADS OF DAMAGES

[81] I now turn to deal with each of the four heads of damages claimed by the plaintiff.

Past hospital and medical expenses

[82] The plaintiff's claim for past hospital and medical expenses amounts to R104 982.42.

[83] Ms Maria Stevenson, a team leader employed by Discovery Medical Scheme deposed to an affidavit in which she certified that the medical aid scheme had paid the claimed amount to "healthcare practitioners and health establishments for the treatment of injuries sustained by the plaintiff in a motor vehicle accident which occurred on 30 April 2019." She also confirmed that the costs were reasonable and the treatment necessary.

[84] Ms Stevenson certified the correctness of the schedule of vouchers attached to her affidavit which reflected how the claimed amount of R104 982.42 was made up.

[85] The defendant did not take issue with the contents of Ms Stevenson's affidavit, but adopted the defendant's oft-repeated contention that, by virtue of an internal directive, it was not liable to pay a claimant such as the plaintiff for past hospital and medical expenses in circumstances where such past hospital medical expenses had been paid for by a medical aid scheme.

[86] The defendant's contention was unambiguously rejected in *Discovery Health (Pty) Ltd v Road Accident Fund & another*¹⁰. On the date of the hearing of this matter, both the High Court and the Supreme Court of Appeal had dismissed the defendant's application for leave to appeal. The defendant's application to the Constitutional Court for leave to appeal was still pending. The Constitutional Court

¹⁰ 2023 (2) SA 212 (GP)

has in the meantime stated that it “*has considered the application for leave to appeal and has concluded that it does not engage the jurisdiction of the court. Consequently, leave to appeal must be refused.*” The status quo is therefore that the judgment in *Discovery Health* stands.

[87] I am in terms of the doctrine of *stare decisis* bound to follow the *Discovery Health* judgment unless I am of the view that it is clearly wrong. Not only am I not of the view that the judgment is clearly wrong, I am of the respectful view that it is clearly correct.

[88] In the result, I find that the defendant is liable for the plaintiff’s claim for past hospital and medical expenses which amounts to the sum of R104 982.42.

Future Hospital and Medical Expenses

[89] The parties were *ad idem* that the defendant should be ordered to give the customary statutory undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act for 100% of the plaintiff’s accident-related future medical, medical and related expenses. The order that I propose to make reflects this.

General Damages

[90] On the day of the trial the defendant conceded that K[...]’s injuries were serious in the sense contemplated in section 17 of the RAF Act. In line with its concession in relation to the merits, the defendant accordingly conceded in writing that it was liable to the plaintiff for general damages.

[91] The parties were unable to agree on what would constitute an appropriate quantum for such general damages. They presented me with their arguments relating

to quantum, with the plaintiff contending that R1,5 million would be the appropriate measure, whilst the defendant proposed a sum almost half of that, namely R800 000.

[92] As set out above, Dr Fredericks reported that K[...] had sustained a deep ± 7cm laceration diagonally across forehead, an extradural haemorrhage and a comminuted depressed left frontal bone fracture with intracranial displacement of some of the bone fragments and resultant mass effect on the left frontal lobe of the brain. Dr Fredericks found that K[...] suffers from a whole person impairment of 32%. He also concluded that K[...]’s injuries have had a significant negative impact on his ability to participate normally within the occupational, domestic and social domains of his life.

[93] Dr Berkowitz observed that the accident has left K[...] with a serious permanent disfiguring scar on his forehead.

[94] The various reports of the experts set out above confirm that the accident resulted in K[...] being severely compromised as far as his scholastic and academic potential are concerned.

[95] I have had regard to the various judgments which Mr Grobler referred me to. I have also had regard to the SCA judgment in *NK v MEC for Health, Gauteng*¹¹ where the following was said:

[11] We endorse the following position which Rogers J held in AD & another v MEC for Health and which was followed by the full court in PM obo TM v MEC for Health: ‘Money cannot compensate IDT [the minor on behalf of whom the claim had been made] for everything he has lost. It does, however, have the

¹¹ 2018 (4) SA 454 (SCA). Footnotes have been omitted.

power to enable those caring for him to try things which may alleviate his pain and suffering and to provide him with some pleasures in substitution for those which are now closed to him. These might include certain of the treatments which I have not felt able to allow as quantifiable future medical costs . . .’

[12] Compensation for pain and suffering – to the extent that one can ever ‘compensate’ for it – is neither a duplication of the amount awarded for past and future medical and hospital expenses, nor for loss of amenities of life. ...

[13] Counsel for the respondent submitted that this court should not, without further ado, make an award that accords with other awards made by the high court in various divisions and, especially, this court should guard against assuming that all brain injury cases deserve the same award. Of course, this court will scrutinise past awards carefully and, in each case before it, make its own independent assessment. It is trite that past awards are merely a guide and are not to be slavishly followed, but they remain a guide nevertheless. It is also important that awards, where the sequelae of an accident are substantially similar, should be consonant with one another, across the land. Consistency, predictability and reliability are intrinsic to the rule of law. Apart from other considerations, these principles facilitate the settlement of disputes as to quantum. We have had particular regard to the cases upon which counsel for the appellant has relied and, especially AD & another v MEC for Health and PM obo TM v MEC for Health, where the issues are substantially similar to those before us...

[96] Taking all the facts and circumstances of this matter into account, I am of the view that an amount of R1,25 million would be an appropriate award to compensate

K[...] for his general damages sustained as a result of the accident.

Loss of Earning Capacity¹²

[97] Given K[...]’s age, there is understandably no claim for past loss of earnings.

[98] I have already stated that K[...] sustained life-changing injuries which have rendered him potentially unemployable in the open market and have expressed my doubts that K[...] will be completely unemployable (whether in the open market or otherwise). Ms Rossouw postulated K[...]’s earnings, but for the accident, to be R6 946 215.00, excluding contingencies. The actuary, Mr Strydom, accepted this postulation for the purposes of his calculations.

[99] The plaintiff submitted that 25% would be an appropriate percentage for contingencies. The defendant contends for the significantly higher figure of 50%.

[100] In order to succeed in a claim for loss of earning capacity, the plaintiff must prove that he or she suffered physical disabilities which resulted in the loss of learning capacity, and also, that he or she suffered actual patrimonial loss. *Rudman v Road Accident Fund 2003(SA 234) (SCA)*.

[101] In making lump sum awards, the courts make allowances for future contingencies. The general principles applicable to claims for the loss of earning capacity and the determination of appropriate contingency allowances bear repeating.

[102] In one of the seminal cases dealing with claims for loss of earnings, Nicholas

¹² Using the terminology preferred in *Southern Insurance Association Ltd v Bailey NO 1984 (1)*

JA in *Southern Insurance Association Ltd v Bailey NO* explained as follows¹³:

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.

It has open to it two possible approaches.

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

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. ...

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of

¹³ 1984 (1) SA 98 (A) 113 F to114E. The authorities cited by the learned judge have been excluded.

appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. ...

It is true that, in the case of a young child, the assessment of damages for loss of earnings is speculative in the extreme. Nevertheless I do not think that even in such a case it is wrong in principle to make an assessment on the basis of actuarial calculations.

[103] Contingency deductions allow for the possibility that the plaintiff may have less than normal expectations of life and that he may experience periods of unemployment by reason of incapacity due to illness, accident or labour unrest or even general economic conditions¹⁴.

[104] Both favourable and adverse contingencies must be taken into account. In *Southern Insurance Association Ltd v Bailey* NO¹⁵ Nicholas JA approved the following statement, Windeyer J in the Australian case of *Bresatz v Przibilla*¹⁶:

"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

¹⁴ *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392H

¹⁵ *supra* at 117 C – D

¹⁶ (1962) 36 ALJR 212 (HCA) at 213

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.”

[105] The longer the period over which unforeseen contingencies could play a role in the assessment of what the probable income of the plaintiff would have been, the higher the contingencies that have to be applied.¹⁷

[106] In the oft-cited case of *Road Accident Fund v Guedes*¹⁸, Zulman JA, after setting out the general principles in relation to the assessment of appropriate contingencies, approved and applied the basic guideline proposed by Robert J Koch, in his work *The Quantum Yearbook*, 2004, at page 106 (which has subsequently been updated by various further editions), namely a sliding scale: 0,5% per year to retirement age. This translates to 25% for a child, 20% for a youth and 10% for a middle aged adult. This basic guideline scale has stood the test of time. It is however important to bear in mind that this approach is at the end of the day only a guideline, because the assessment of applicable contingencies, is by its very nature, a process of subjective impression or estimation rather than objective calculation¹⁹.

[107] This then brings me to the assessment of contingencies to be applied to the present matter. Ms Rossouw does express the view that K[...] may be employed in a sympathetic or sheltered employment environment. The possibility of K[...] being gainfully employment has not been taken into account by Ms Rossouw or Mr Snyman in the calculations of K[...]’s loss of future earning capacity. I propose to take

¹⁷ *Goodall v President Insurance Co Ltd*, *supra* at 392H – 393G

¹⁸ 2006 (5) SA 583 (SCA)

¹⁹ *Phalane v Road Accident Fund* (48112/2014 [2017] ZAGPPC 759 (7 November 2017) at [17] to [19]

account of this possibility in assessing an appropriate contingency to be applied.

[108] Mr Grobler referred me to a number of judgments in which various contingency percentages were applied, and suggested that that it could be argued that an appropriate contingency percentage could be 20%. He nevertheless proposed that a contingency deduction of 25% should be applied. He pointed out that this higher contingency would in fact favour the defendant.

[109] Ms Ramjee argued that if regard be had to K[...]’s age, the possibility of future employment should not be underrated. She also contended that an allowance should be made for K[...]’s pre-morbid epilepsy. She contended that that a deduction of 50% would in the circumstances be more appropriate.

[110] At the time of this judgment, K[...] is 14 years old. If one accepts Ms Rossouw’s postulation that K[...] would have commenced earning an income at age 19 on 1 July 2028, and Mr Strydom’s postulation that K[...] would have retired at age 65, then K[...] would have had a 46-year income-earning period. Applying Koch’s sliding scale, the applicable contingency calculation would be $0,5 \times 46 = 23\%$.

[111] Mr Strydom has suggested a contingency allowance of 25% - a figure echoed by Mr Grobler.

[112] I am alive to the fact that K[...]’s eanupre-existing epilepsy could (not would) have played a role in a “but for” scenario, and also that there is some possibility that K[...] may periodically earn an income in a sheltered or sympathetic environment.

[113] Taking all the surrounding circumstances into account, my overall view is that a contingency percentage of between 25% and 30% would be appropriate – thus

27.5%.

[114] In the result, the amount payable to the plaintiff in respect of his loss of earning capacity is the sum of R6 946 215.00 less a contingency amount of R1 910 209.12 which equals R5 036 005.88.

PROTECTION OF THE AWARDS

[115] Mr Motala, K[...]’s *curator ad litem*, has recommended that the awards be paid to a trust created for the benefit of K[...]. I agree.

[116] The provisions relating to the envisaged trust were suggested to me by the plaintiff in a draft order and are encapsulated in my order set out hereunder.

CONTINGENCY FEE AGREEMENT

[117] Mr Motala informed me that no valid contingency fee agreement was entered into between the plaintiff and the plaintiff’s attorneys.

[118] I take this opportunity to thank Mr Motala for his comprehensive report and recommendations.

[119] I accordingly make the following order which is largely modelled on the draft order furnished by the plaintiff:

ORDER

1. By agreement between the parties, the defendant is held liable for 100% of the plaintiff's proven damages.

2. The defendant shall pay the plaintiff the amount of R6 390 988.30 (six million, three hundred and ninety thousand, nine hundred and eighty eight Rand and thirty Cents) within 180 days from the date of the granting of this order, such amount being made up as follows:

2.1.	Loss of earnings:	R 5 036 005.88
2.2.	General damages:	R 1 250 000.00
2.3.	Past medical expenses:	R 104 982.42

3. Interest on the aforesaid amount shall be payable by the defendant at the rate of 10.25% per annum, payable within 180 days from the date of granting of this order.

4. Payment will be made directly into the trust account of the plaintiff's attorneys, the details of such trust account being as follows:

Holder	[...]
Account Number	[...]
Bank & Branch	[...]
Code	[...]
Ref	[...]

5. The defendant shall furnish the plaintiff and/or the trustees referred to in paragraph 9 below (“the trustees”), with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (“the undertaking”) to reimburse the plaintiff and/or the trustees 100% of the costs of K[...] W[...] (“the minor child”) for future accommodation in a hospital or nursing home, or treatment of, or the rendering of a service, or the supplying of goods to him, arising out of the injuries sustained by the minor child in the motor vehicle accident that occurred on 30 April 2019, after such costs have been incurred and upon proof thereof.

6. The plaintiff’s attorneys of record shall retain the aforesaid amount, net of the attorney’s costs, in an interest-bearing account in terms of Section 86(4) of the Legal Practice Act, 2014 for the benefit of the plaintiff, pending the creation of the trust referred to in paragraph 8 below (“the trust”), and the issuing of letters of authority.

7. From the aforesaid amount, an amount of R100 000.00 (one hundred thousand Rand) shall be paid by the plaintiff’s legal representatives to the minor’s parents and not to the trust.

8. The plaintiff’s attorneys shall endeavour to establish the trust within 6 months, alternatively within a reasonable period of time after being placed in a position to do so.

9. The plaintiff’s attorney of record shall pay the amount set out in paragraph 2 above, together with any accrued interest, over to the trustees of the trust, in respect of which trust the following shall apply:

9.1. The trust shall be created in accordance with the trust deed which shall contain the provisions set out in annexure "A" hereto and which is to be established in accordance with the provisions of the Trust Property Control Act, number 57 of 1988, in favour of the plaintiff as sole beneficiary.

9.2. The Trust shall have the following as its trustees:

9.2.1. The first trustee shall be Ferox Estate and Trust Administration Services (Pty) Ltd, registration number 2014/161824/07, who shall be the professional independent trustee with the powers and duties set out in Annexure "A" hereto.

9.2.2. The second trustee in the trust shall be a parent or the guardian of the minor child. The nominated second trustee is J[...] W[...] (identity number [...]) who is the mother of minor child.

9.3. In the event of the second trustee passing away, then the surviving parent will replace the deceased parent as the second trustee.

9.4. In the event of both parents passing away, then the guardian for the minor child will replace the deceased parents as the second trustee.

9.5. Only the independent professional trustee administering the trust funds on behalf of the beneficiary will be obliged to render security to the satisfaction of the Master of the High Court.

9.6. The professional independent trustee shall:

9.6.1. be entitled, in the execution of its duties and fiduciary responsibilities towards the beneficiary of the trust, to have the attorney and own client costs and disbursements of the plaintiff's attorneys on record taxed, unless agreed;

9.6.2. be entitled to administer on behalf of the minor child, the undertaking referred to in paragraph 5 above and to recover the costs covered by such undertaking on behalf of the trust for the benefit of the trust;

9.6.3. at all times administer the trust to the benefit of the minor child.

9.7. The trust shall not be capable of being amended without leave of the court.

9.8. The trust shall terminate by order of court, or upon the death of the beneficiary, in which event the trust property shall pass to the estate of the beneficiary, or if all the assets of the trust have been depleted, whichever occurs earlier.

10. The trustees are authorized to recover from the Road Accident Fund for the benefit of the trust, all costs incurred by them which are payable by the Road Accident Fund including the costs of the creation of the trust and the costs of furnishing security.

11. The costs and charges relating to the administration of the trust fund, and the costs and the charges incidental to the formation thereof shall be borne by the trust

out of the capital and/or income as the independent professional trustee may deem appropriate, subject to the above, as set out in in clause 25 of Annexure A.

12. The defendant shall pay the plaintiff's agreed or taxed High Court costs as between party and party, subject to the discretion of taxing master, such costs to include, but not be limited to the following:

12.1. the costs in respect of the preparation and compilation of the following expert reports, including addendum reports:

12.1.1. Dr Mayaven Naidoo;

12.1.2. Ms Margaret Gibson;

12.1.3. Dr Gavin Fredericks;

12.1.4. Dr De Graad;

12.1.5. Dr Herman Edeling;

12.1.6. Elna Rossouw;

12.1.7. Dr Berkowitz;

12.1.8. Mari Lautenbach;

12.1.9. Michelle Doran;

12.1.10. SNG Argen.

12.2. The costs in respect of the reservation of the aforesaid expert

witnesses, if applicable;

12.3. the plaintiff's reasonable travel and accommodation costs to attend to the plaintiff's experts;

12.4. the costs in respect of the employment Senior Counsel;

13. All past reserved costs, if any, are hereby declared costs in the cause and the plaintiff as well as subpoenaed witnesses are declared necessary witnesses.

14. The plaintiff shall, in the event that the costs not being agreed upon, serve a notice of taxation on the defendant's attorney of record.

15. The plaintiff shall allow the defendant 14 days to make payment of the taxed costs after service of the taxed bill of costs; provided that interest on the taxed costs shall be payable by the defendant within 14 days from service of the taxed bill of costs at the rate applicable on the day of taxation, or the day on which agreement is reached.

16. There is no valid contingency fee agreement in existence between the plaintiff and his attorneys.

17. This order must be served by the plaintiff's attorneys on the Master of the High Court within 30 days from the date of receipt of this order from the registrar in typed form.

HITCHINGS AJ

Acting Judge of the High Court of South Africa

Gauteng local division, Johannesburg

Date of Judgment: 15 November 2023

Plaintiff's Legal Practitioner: Adv F Grobler SC

Instructed by: De Broglio Attorneys

Defendant's Legal Practitioner: Attorney Ms Y Ramjee

Instructed by: State Attorney