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

CASE NO: 605/2020

In the matter between:

A[…] S[…] obo M[…] M[…] Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, EASTERN CAPE PROVINCE Defendant

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JUDGMENT

Rugunanan J

[1] The plaintiff instituted action against the defendant for damages that arose from the negligent treatment which she and her minor child M[…] M[…] suffered on 4 April 2016 during the course of plaintiff's labour and birth of the child. M[…] suffered a prolonged partial hypoxic ischaemic encephalopathy resulting in cerebral palsy with gross motor

impairment, bilateral spasticity, and developmental delays. By order of court dated 19 March 2021 the defendant was held liable for all such damages as the plaintiff may prove in her personal and representative capacities which arose from the said negligent treatment.

[2] Where contextually appropriate, M[…] will hereinafter be referred to by name or 'the minor' or 'the child'.

[3] This is a judgment on quantum in which the damages component of the plaintiff's claims have been set aside for adjudication in terms of an agreed order of this court granted on 12 October 2022. It is worth recapitulating the main provisions of the order:

'1. The plaintiff's claim in respect of general damages, loss of income, carers, architectural services and transportation costs are separated from all other issues pertaining to the quantum of the plaintiff's claim.

2. The issues pertaining to general damages, loss of income, carers, architectural services and transportation costs are postponed for hearing to 21 November 2022 at the instance of the defendant.

3. The remaining issues pertaining to the quantum of plaintiff's claim are postponed sine die at the instance of the defendant.'

[4] At the commencement of the proceedings on 21 November 2022, plaintiff's counsel indicated that her personal claim for general damages and the claim for general damages on behalf of M[…] were settled by agreement, respectively for the amounts of R400 000 and R2 000 000. Adverting to paragraph 2 of the order, all claims on behalf of M[...] (i.e.

loss of income, carers, and architectural services) were in dispute and barring transportation costs (for a motor vehicle) the disputed claims stood to be adjudicated in these proceedings. Accordingly, the claim for transportation costs was postponed sine die in accordance with paragraph 3 of the above-mentioned order.

[5] At the commencement of the trial two bundles of documents were handed in at the instance of the plaintiff, namely exhibit bundle A and exhibit bundle B – respectively the plaintiff's expert reports and joint minutes, the exhibits being applicable to the adjudication of the component heads of damages identified above.

[6] I mention specifically exhibit J which is a joint minute by the parties' actuaries in which the agreed quantification for M[…]'s claim for loss of income amounts to R5 192 700 calculated on the basis of the average of two earnings scenarios postulated by the plaintiff's earnings expert Dr Badenhorst, and R3 318 200 calculated on the scenario proposed by the defendant's earnings expert Mr Gumede.

[7] The calculation of the claims for carers and architectural services are presented in an actuarial calculation dated 17 November 2022 by Independent Actuaries and Consultants (IAC)[1] per Annexure D4, item 124 (domestic assistance R91 241), item 127 (caregiver R9 192 706), and item 131 (architectural services for renovations and construction work in the provision of suitable accommodation, R1 714 247).

[8] In addition to her own testimony, the plaintiff led oral evidence from the following expert witnesses, namely: Occupational Therapist Ms Anneke Greef, Industrial Psychologist Dr Lieselotte Badenhorst, Educational

[1] Exhibit bundle A.

Psychologist Ms Zethu Gumede, and Mr Lizo Macingwane, an Architect. The experts testifying for the defendant, were Industrial Psychologist Mr Sabelo Gumede, Educational Psychologist Mr Xolani Fakude, and Mr Sikhumbuzo Mtembu, also an Architect.

[9] Given the considerable scope and intricacy of detail in the evidence traversed by the witnesses it is acknowledged that no judgment can ever be all embracing of the facts. For this reason this judgment will not be burdened by a repetition of gratuitous evidential material except for traversing that which is considered relevant for achieving a judiciously expedient outcome with the benefit of very helpful heads of argument presented by plaintiff's counsel, as also having listened to the submissions made by counsel for the defendant.

[10] In expediting the conduct of the trial neither of the parties disputed the experts' academic qualifications and experience – the parties accepting that their respective experts were competent to express the opinions communicated in their reports, subject of course to the court's determination as to their reasoning and the reliability of their conclusions.

[11] From a reading of the various reports and evidence elicited, I understood that M[…]'s present condition and limitations are not in dispute, but with regard to the claims on his behalf each of the parties placed store on conflicting expert evidence. From what appears in this judgment the quantification of the claims for M[…] centres essentially on a determination of an appropriate contingency deduction against those claims once it has been decided which of the conflicting expert opinions is to be preferred.

[12] When confronted by conflicting expert opinions it is incumbent on the court to determine which of them to accept based on the reasoning and reliability of the expert witness. The extent to which an opinion is founded on logical reasoning underscores this process.[2]

[13] The opinion of an expert and the reasoning employed in arriving thereat must be informed by a properly laid factual basis. Before a court can assess the value of an expert opinion, it must know the facts on which it is based.[3] It follows that the facts on which an expert bases their opinion must be proved by admissible evidence.

[14] Considering that the plaintiff was the only factual witness, a summary of her evidence is set out at first instance because it provides an overview of the material which the experts have had to work with regarding her family background and living conditions.

[15] The plaintiff stated that she consulted with Ms Greef, Dr Badenhorst and Ms Gumede and apprised them of her personal circumstances and those of M[…].

[16] She resides in Payne location in the Mthatha area. She has no formal academic qualifications because she had to forego completion of her studies to work in the retail surveying market to support her family. She currently takes care of M[…] but wishes to embark on further studies at university if circumstances permit engaging the assistance of a carer.

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[2] *AD and another v MEC for Health and Social Development, Western Cape Provincial Government* [2016] ZAWCHC 116 para 39.

[3] *Twine and another v Naidoo and another* [2018] 1 All SA 297 (GJ) at 304f. In *Madela v MEC for Health, Kwazulu-Natal* ZAKZDHC [2021] 18 para [50] it was put thus: 'The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militate against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court.'

The child has cerebral palsy since birth and requires her attention and care on a full-time basis. Had he been born a normal child, she would have wanted him to progress like any other child to obtain a university education. This, she maintained, was a family aspiration that their children would attend university and obtain an appropriate tertiary qualification such as a degree.

[17] She is married to M[…]'s father. He has an LLB degree and is an attorney. They have another child born in 2005 currently doing Grade 11 and progressing well.

[18] Her mother has a Grade 12 certificate in fashion design and her father has a degree in theology. She has two sisters both of whom have diploma qualifications. She also has a brother who holds a certificate in mechanical engineering.

[19] Her parents-in-law are attorneys by profession – her father-in-law has an LLB degree and her mother-in-law is in possession of an LLM degree. All four of her husband's sibling sisters have academic qualifications. One of them holds a B.Sc. degree, the other has a Diploma in human relations. The remaining two are professionally qualified – one being a public prosecutor with an LLB qualification, the other is an attorney, also having an LLB qualification.

[20] She recalled that the family home was visited by two architects, one of them at the instance of the defendant. He noted in his report that 'there is no sign of people living at the home'. She disputed this. Indicating that the premises were occupied, she maintained that the place was fully furnished when he visited. She also denied that the place is being rented. She resides in the house with her husband and children but it is not

adequate for tending the needs of M[…]. Although electrified it has no inside toilet or bathroom. The kitchen is not big enough for a wheelchair and the rooms in the rest of the house are too small to allow for its ease of manoeuvrability. A wheelchair-bound person would in any event be unable to access the kitchen cupboards. The passages are narrow and the doorways cannot be widened. A full-time carer on a 24/7 basis cannot be accommodated in the existing structure. Although there is a yard outside, it is unsuitable for parking a vehicle. Her husband does not have a motor vehicle and if she has to go somewhere she has to get a vehicle to enable her to travel with M[…]. For the most she has to carry him wherever she goes and it is not possible to use public transport with his disability. Moreover, there is no wheelchair access into the house because it has a stepped entrance. The house has no storage facility to accommodate specialised equipment and accoutrements for M[…]. She acknowledged that she is not an architect but maintained that there is sufficient yard space that can be used for putting up a building. Overall the house is very old and its walls are cracked. She conceded that she has no expertise in home maintenance but her assessment was that anyone is capable of making an assessment that the building is dilapidated.

[21] It would perhaps be convenient to comment on the merits of the plaintiff as a witness before proceeding to deal with the expert evidence on the claims in issue. Though not a formal requirement of law[4] her evidence regarding the academic and professional qualifications of various family members is uncorroborated. While firmly of the view that her evidence necessitated that her cross-examination ought to have been conducted rigorously, I nonetheless held an impartial impression of her. She

[4] Schwikkard Van Der Merwe, *Principles of Evidence*, Juta 4th ed at 570.

testified fairly straightforwardly and without contradiction. Given that she is the person who has the closest relationship or bond with Mpho her evidence – largely undisputed in cross-examination – assumes weight where it provided insight into her living conditions and her family background as a measure for his potential had he been born a normal child.

[22] I turn to deal with the claims in issue.

Loss of income

[23] It is common cause that M[…] is currently functionally unemployable due to the incident at birth and what falls to be determined is his premorbid income earning potential.

[24] Beginning with the evidence of Ms Gumede, she compiled a psychological assessment report on 23 August 2021 supplemented by an addendum dated 28 September 2022. With focus directed at the child's family educational and socio-economic background she postulated that, intellectually, he would have developed normally and functioned within the above average to superior range of intelligence. Had the incident at birth not occurred the child would have been employable in the open labour market as a skilled professional person. He would have progressed through the mainstream school system, matriculating and then proceeding to obtain at least a 3 year university degree as a tertiary qualification. A university degree would equal his father's academic achievement though it is probable that he would have done better and exceeded the level attained by his father.

[25] Ms Gumede's evidence is encapsulated in the following summation extracted from her addendum report:

> 'The child's premorbid estimate of at least average ability is consistent with the ability to acquire requisite knowledge, skills and values age appropriately; it is also consistent with functioning at a level where he could have progressed through the mainstream school system, matriculated and proceeded to obtain a tertiary qualification, at least a 3 year university degree. However, it is probable that he could have done better and surpass the level of his father achieving a university degree or better than his father.

[26] On the latter aspect Ms Gumede acknowledged that her previous assessment was underweighted because her prediction therein offered no indication that the child would excel beyond his father. She goes on to state that:

> 'Had the incident at birth not occurred, M[…] would have coped with the mainstream school system up to Grade 12, and thereafter proceeded to tertiary institution. He would then have been employable in the open labour market as a skilled professional person.'

[27] Dr Badenhorst supplemented her initial report of 27 August 2021 with an addendum dated 14 October 2022 – the last mentioned necessitated by Ms Gumede's addendum. Commenting on M[…]'s pre-incident earnings/employability potential and given that the incident occurred at birth, Dr Badenhorst makes the observation that it is extremely difficult to ascertain the child's educational potential, his career path and earnings capacity prior to the birth incident, except for taking his family background and the opinion of the educational psychologist into account. She postulates two generic earnings scenarios. Shorn of technical detail and vocational nomenclature these entail:

- Scenario 1: Completion of matric thereafter attaining a university degree (benchmarked as National Qualifications Framework level 7 (NQF 7).

- Scenario 2: Completion of matric thereafter attaining a university degree (benchmarked as NQF 7 and above). Put differently, this scenario contemplates attaining a basic degree plus a further tertiary qualification.

[28] The earnings progression common to both scenarios commences upon completion of university studies at the end of 2036 and is charted according to the Paterson job grading scale commencing at level A1/A2 (lower quartile basic salary R95 000 to R111 000 per annum), proceeding after 2 to 3 years with earnings at level B4/B5 (lower quartile basic salary R218 000 to R254 000). In scenario 1 there is a further progression to level D1+ at age 45/55 until retirement at age 65 (median salary R1 006 000). In Scenario 2 earnings at level B4/B5 are achieved but a further progression to level D3/D5 (median salary R1 411 000 to R1 691 000) is foreshadowed at age 45/55 until retirement at age 65. Both scenarios are subject to inflationary increases until retirement.

[29] Having charted these scenarios and progression of earnings, Dr Badenhorst defers to actuarial calculations. In her view a conservative outcome would be a calculation based on the average income of the two scenarios. I mention that M[…]'s earnings progression factors a life expectancy of 43 years according to paediatrician Dr Kara (Exhibit I paragraphs 2.1.3 to 2.1.4).

[30] The attempt in cross-examination to have Dr Badenhorst concede that M[…] would be placed at Paterson scale B1 on the basis that he would have passed grade 12 and subsequently attained a diploma, was rebuffed – the witness maintaining (and correctly in my view) that she could not supplant the views expressed by Ms Gumede regarding the child's pre-morbid intellectual development.

[31] At the instance of the defendant, Mr Fakude prepared a report dated 20 April 2022.[5] He explicitly acknowledges that the child's family educational background rendered it likely that M[…] would have received good support and role modelling and that he would have been expected to study through matric and tertiary education. Postulating developmental milestones based on normality with an assumed low average to average range of intellectual ability he opines that the child would have progressed through primary and senior mainstream education, and given the educational profile of the family, it is probable that he would have passed Grade 12 and achieved a diploma level of education at a tertiary institution.

[32] In deferring to this hypothesis, Mr Sabelo Gumede opines that had the child been born in a normal way, he would have likely finished Grade 12 in 2033. M[…]'s subsequent progression would have entailed attaining a diploma and entering the semi-skilled open labour market at Paterson level BI earning a median salary thereafter proceeding to a higher semi-skilled level B3 (also earning a median salary) eventually achieving a median earnings position graded at B5, and ultimately reaching (at age 45) a skilled position at level C1 attracting upper median earnings with inflationary adjustments until age 65.

[5] Exhibit bundle F.

[33] It is obvious from the above-mentioned summary of the evidence that the forecasts by the parties' earnings experts are pillared on the views expressed by the respective educational psychologists to whom they defer. The assumption by Mr Fakude of a low average to average range of intellectual ability is at odds with the recognised standard of logical reasoning[6] where there are no facts to support his assumption. Under cross-examination he was unable to justify his assumed position. It does not gain traction in the light of an overall acknowledgement in the experts' reports (including his own) of a strong family background of high achievers in a stable family environment having a strong educational ethos. The plaintiff's (unchallenged) evidence establishes this as a fact.

[34] It is therefore my view that the assumption is misdirected and renders the postulations by Mr Fakude and Mr Gumede irrelevant, unreliable and inadmissible. Due to the anomaly in Mr Fakude's reasoning, Mr Gumede was hard-pressed to make several concessions; notably, that it can in general be expected that a child will outperform or exceed the achievements of its parents, and that in the event of it being found that M[…] would in all likelihood have obtained a degree qualification the predictions in his report would fall away since his report was constructed on the findings by Mr Fakude who proposed a diploma for the child.

[35] Despite having noted their inflexibility during cross-examination I do not intend subjecting Mr Fakude and Mr Gumede to any trenchant criticism. Their experience of the courtroom is unknown, and where they may have appeared to have faltered I can perhaps attribute this to

[6] *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at 1200I.

the wearying length of the trial and possibly the finer aspects of the evidence which at times befogged the main issues. My sense is that no practical purpose would be served by traversing the minutiae of the evidence elicited during their evidence-in-chief and in cross-examination – this will divert attention from a proper appreciation of the key issues which I think have been succinctly set out in the hereinabove abridgement of the material contained in the reports that were dealt with in oral evidence.

[36] In the final analysis the evidence by Ms Gumede and Dr Badenhorst assumes weight and is preferred. It is underpinned by a properly laid factual foundation and is relevant and reliable.[7] It does not involve considerations of their credibility, but rather an examination of their opinions prefaced on the essential reasoning employed by each of them.[8]

Carers / domestic services and accommodation requirements

[37] Ms Greeff prepared a report dated 16 August 2021[9] supplemented by a further report on 29 September 2022. She concluded a joint minute with her opposing counterpart for the defendant Ms Cheryl Rooy on 8 November 2022.[10]

[38] The joint minute makes it plain that M[…] needs a caregiver on a full-time basis. In addition he requires the assistance of a part-time domestic worker. There is also agreement that he will require: lifelong occupational therapy intervention; lifelong access to therapeutic equipment inclusive of wheelchairs (appropriate positioning devices) as

[7] *Twine and another v Naidoo and another supra* at 303e.
[8] *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at 1200E.
[9] Exhibit bundle A.
[10] Exhibit bundle B.

well as a shower/bath chair; splinting; transportation to attend related interventions for his cerebral palsy condition; accessible accommodation; lifelong caregiving; lifelong case management; and specialised education.

[39] Ms Greeff's evidence traversed issues relating to the qualifications, competence level and skill of a caregiver (specialising in the needs of children with cerebral palsy) as also the monthly cost of the caregiver inclusive of transportation fees. She stated that the caregiver must be of a 'high calibre' – a layperson would not be up to the task for the reason that M[…] is unable to do anything for himself and requires a high level of active care (i.e. being busy with him) and passive care (i.e. being in the room and watching over him). The costing for the caregiver is indicated in a quotation from Mfudumalo Healthcare which she testified has its head office in Johannesburg and though not having fixed offices in Mthatha the establishment does render specialised caregiving services in the area. In addition, Ms Greeff testified that she is a case manager in a number of matters in the Mthatha region and is, as such, aware of the rates or charges of caregivers in the locality.

[40] The costing of the caregiver and domestic services required for M[…] are set out in her report/s which she confirmed in oral evidence. As per items 124 and 127 of the calculation by actuaries IAC, the sum of the caregiver and domestic services amounts to R9 283 949. Although, seemingly, in cross-examination, an attempt was made to demonstrate that the recommendations by Ms Greeff are unfeasible in the sense that they are either exorbitant or unreasonable, it is startling that no attempt was made to lead countervailing evidence on behalf of the defendant. In particular, evidence of the cost of caregiving agencies which Ms Rooy

had recommended as operating in the Mthatha area was not introduced to contradict Ms Greeff to justify a truncated award (if that is what cross-examination was intended to achieve). In any event, her answer to the agencies recommended by Ms Rooy was that they care only for elderly folk and have no expertise in the care of children with cerebral palsy.

[41] A further aspect of Ms Greeff's evidence relates to her recommendation that M[…] should reside in accommodation that meets the South African Bureau of Standards (SABS) criteria for disabled individuals. In principle there is agreement thereover in the joint minutes but the parting shot is that each expert postulates differing accommodation requirements.

[42] In her report, Ms Greeff recommends the following accommodation requirements: access to running water and related reticulation; a bedroom with additional area for the caregiver and with sufficient space for a therapy mat and stimulation equipment; a basic wet room area with a detachable showerhead; a storage area for additional equipment; ramps to all exits and entrances to the house; a levelled entrance to the house with continuous floor and nonslip floor coverings; access to the house and garage and walkways around the house should be concreted or suitably paved; a garage to allow for parking of a dedicated vehicle; and a social area inside the house as well as outside (covered). These recommendations were yet again not meaningfully disputed nor was countervailing evidence tendered. Whether they overlapped with Ms Rooy's recommendations or whether they are what the plaintiff herself intends to effect once compensation is forthcoming, was not properly queried.

[43] In argument is was submitted that Ms Greeff's evidence stood uncontested and should be accepted. My own observation is that she testified on subject matter for which she was appropriately qualified and experienced. Her evidence is therefore relevant. I am cognisant that her evidence was uncontested but in holding this view I have borne in mind the admonishment that a court should guard against a subtle displacement of its value judgment with that of the expert witness.[11]

Architectural services

[44] In the amended particulars of claim, the claim under this head is included in future hospital, medical and related expenses, various modalities of therapy and special adaptive aids and devices for M[…] and is for the renovation and construction of suitable accommodation recommended in the architectural report, of Mr Macingwane and calculated in the amount of R1 714 247 by actuaries IAC per item 131.[12] His recommendations are in line with SABS standards and are compliant with the proposals by Ms Greeff.

[45] Mr Lizo Macingwane and Mr Sikhumbuzo Mtembu both had the opportunity to visit the plaintiff's homestead in Payne location. Their respective positions are divergent as is evidenced in their respective reports dated 14 October 2021[13] and 28 September 2022[14], as well as a joint minute dated 6 October 2022. Whereas Mr Macingwane recommends renovation and construction (quantified as above) Mr Mthembu testified that he recommends a low-cost proposal on the basis that 'alterations' to the existing house are possible at a cost of R255 000

[11] *Holtzhauzen v Roodt* [1997] 3 All SA 551 W at 557i.
[12] Amended particulars of claim paragraphs 24.1, 25 and 25.10.
[13] Exhibit bundle A.
[14] Exhibit L.

for accommodating the needs of Mpho as opposed to a new building for augmenting the standard of living of the family.

[46] Mr Mthembu testified that in preparing his report and in formulating his recommendations he had regard to the occupational therapy reports by Ms Greeff and Ms Rooy. While it is clear that he does not find favour with the recommendations by Ms Greeff, the anomaly in his evidence is that Ms Rooy was never called upon to testify to validate her recommendations. The position adopted by him therefore is informed by his idiosyncratic view of what he believes would suffice to satisfy the needs of a child with cerebral palsy. The disconnect between his evidence and that of an experienced and competently qualified professional (Ms Greeff) to express a view on the specific needs of a handicapped child such as Mpho, is glaring. It is inconsistent with the standard of logical reasoning and detracts from assuming relevance. My observations in this regard renders it unnecessary to deal in any particular depth with the contents of Mr Mthembu's report.

[47] In a report initially prepared on 3 March 2022 it bears mentioning that Mr Mthembu agreed with Mr Macingwane's contention that alterations to the existing house would be unfeasible and that the costs of building a new house ought to be allowed for. In cross-examination he was correctly criticised as having clearly departed from a report that complies with occupational therapy requirements to a report that does not. That this, as he testified, is attributed to ownership in the property not being vested in M[…]'s parents is an illogicality that defies comprehension. In my view if the quantum of the claim was to be assailed on this basis, a properly mounted a challenge to ownership ought to have been foreshadowed in the defendant's pleadings with

recourse to the discovery processes provided for in the uniform rules of court and a scrupulous cross-examination of the plaintiff.

[48] To conclude, I am unable to place any store on the evidence of Mr Mthembu. Mr Macingwane confirmed the contents of his report which for the sake of brevity ought to be read as if incorporated herein. His evidence assumes relevance firstly, because his observation of the state or condition of the property which he detailed in his report is to a large extent consistent with the plaintiff's testimony; and secondly, for the reason that his recommendations are not out of kilter with those of Ms Greeff.

Contingencies

[49] The calculations arrived at for the claims abovementioned must necessarily be subject to a deduction for general contingencies. Contingencies cover a wide range of considerations that vary from case to case. The usual considerations include life's unknown future hazards though not all contingencies or vicissitudes of life are negative or harmful. A trial court has a wide discretion for determining contingencies for the reason that they are arbitrary and highly subjective.[15] Hence, the percentage of a contingency deduction cannot be assessed on a calculated basis and will inevitably depend upon the judicial officer's impression of the case.

[50] In claims for loss of income it has become customary for the court to apply the so-called 'sliding scale' to contingencies, which entails a deduction by half a percent for every year to retirement.[16] In argument

[15] *Road Accident Fund v Kerridge* [2018] ZASCA 151 paras 42 and 43.
[16] *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 588B-C.

the parties advanced differing contentions as to the percentage deduction to be applied – the plaintiff contending for so-called nominal contingencies ranging from 5% to 15% or at best 17.5% and the defendant on the other hand contending for 25% applied across the board to all heads of damages.[17] While I have given consideration to the cases referred by the parties' counsel, I see no impediment to applying the 'sliding scale' formula, in a case such as the present where the minor child has a life expectancy of 43 years. My sense is that it provides a rational basis[18] on which the court can base its assessment without imposing precedential limitations on the court's discretion – and it seems eminently sensible to apply this formula across the board to all heads of damages.

[51] Before setting out the quantified damages hereafter I pause to mention that it is common cause that M[…]'s award ought to be protected. Consequently an amount of 7.5% of the capital amount to be awarded to the plaintiff on behalf of Mpho shall be in respect of the costs for the establishment, registration and administration of a Trust.

[52] That said, the full award of M[…]'s damages is set out as follows with contingency adjustments rounded off to 20% where applicable:

General damages	R2 000 000
Loss of income (R5 192 700 less 20%)	R4 154 160
Caregiver and domestic services (R9 283 947 less 20%)	R7 427 158
Architectural services (R1 714 247 less 20%)	R1 371 398

[17] As in *Madela v MEC for Health, Kwazulu-Natal supra.*
[18] *SJ obo SJ v Road Accident Fund* [2022] ZAECBHC 41 paras 10-12.

Total	R14 952 716
Add 7.5%	R1 121 454
Grand total	R16 074 170

The order

[53] In the result the following order issues:

1. The defendant shall pay to the plaintiff the agreed amount of R400 000.00 in her personal capacity, as an for damages, together with interest thereon at the prevailing legal rate from a date 30 days after the grant of this order to date of payment thereof.

2. The defendant shall pay to the plaintiff, in her representative capacity as mother and natural guardian of M[…] M[…], the sum of R16 074 171.00 together with interest thereon at the prevailing legal rate from a date 30 days after the granting of this order to date of payment thereof, which amount is made up as follows:

General damages	R2 000 000
Loss of income (R5 192 700 less 20%)	R4 154 160
Caregiver and domestic services (R9 283 947 less 20%)	R7 427 158
Architectural services (R1 714 247 less 20%)	R1 371 398
Total	R14 952 716
Add 7.5%	R1 121 454

Grand total R16 074 170

3. It is recorded that the above amount includes the costs associated with the establishment, registration, administration and management of a Trust to be established for the benefit of M[…] M[…].

4. The claim for transportation costs is postponed sine die for determination with the remaining issues pertaining to quantum as contemplated in the order of this court granted on 12 October 2022.

5. The amounts referred to in paragraphs 1 and 2 above, together with all interest payable thereon, shall be paid into the trust account of the plaintiff's attorneys, M Dayimani Inc., with the following details:

   Account Name: M Dayimani Inc. Trust Account

   Bank: […]

   Account Number: 6[….]

   Branch Code: 2[….]

6. The defendant is further ordered to pay the plaintiff's costs of suit, together with all reserved costs, if any, together with interest thereon at the legal rate from the date of *allocatur* or agreement to date of payment, which costs shall furthermore include:

   6.1 The costs of two counsel were utilised;

6.2 The reasonable travelling and accommodation costs of plaintiff's legal representatives attending court, pre-trial conferences and consultations with witnesses;

6.3 The reasonable costs of the preparation for consultations, pre-trial conferences and trial;

6.4 The costs for the preparation of heads of argument;

6.5 The costs of the hearing of the matter including counsels' day fees on the various hearing dates;

6.6 The reasonable travelling costs, reservation and appearance fees, if any, together with the costs of consultations and the preparation of their reports and joint minutes, if any, and the qualifying fees, if any, of the expert witnesses in respect of the separated issues in respect of whom the plaintiff filed rule 36 (9) (a) and (b) notices.

7. It is ordered that the net balance remaining after paying and recovering all costs and expenses for which the plaintiff is liable, including her fees as between attorney and own client, will be dealt with as follows:

7.1 M Dayimani Inc. Attorneys are directed to cause a Deed of Trust, to be named the M[…] M[…] TRUST to be registered by the Master of the High Court incorporating the provisions normally to be found in an *inter vivos* trust within 6 (six) months of date of this order, or such longer period as the

Master may on application direct, with the following additional provisions;

7.2 The Trustee to be appointed, or the successor in title, will, if possible, be a corporate Trustee and shall have the powers of assumption;

7.3 In the event of it not being possible to appoint a corporate Trustee, the Trustees to be appointed, or there successor in title, will, in so far as is reasonably possible, consist of 3 (three) Trustees, being the plaintiff, a chartered accountant and an attorney, and shall have the powers of assumption;

7.4 It shall be left in the discretion of the Master of the High Court whether the trustees shall be exempt from furnishing security;

7.5 The Trustees shall hold and administer the trust fund for the benefit of M[…] M[…];

7.6 The Trustees shall apply the net income of the trust fund for the maintenance and benefit of M[…] M[…] and, if at any time it is not adequate for the purpose, the capital thereof;

7.7 The Trust shall terminate on the death of M[…] M[…], alternatively in accordance with the Trust Deed;

7.8 The provisions of this paragraph shall, in accordance with the provisions of the Trust Property Control Act 57 of 1988, as amended, be subject to the approval of the Master of the High Court;

8. This order must be served by the plaintiff's attorney on the Master of the High Court.

_____

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

APPEARANCES:

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Dates heard:	21, 22, 23, 24 and 25 November 2022, and 5 December 2022.
Date delivered:	02 March 2023.