IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3079/2015

In the matter between:

NOZIPHO LOVABLE MADELA Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, KWAZULU-NATAL Defendant

ORDER

The following orders will issue:

1. The defendant shall pay to the plaintiff's attorneys in respect of Amile Madela, the total amount of R **6 548 998.00** which amount is computed as follows:

(a) R 1,6 million in respect of general damages;

(b) R 4 948 998.00 in respect of loss of earnings.

2. The total amount mentioned in paragraph 1 is to be paid within thirty days from the date of this order, directly into the trust account of the plaintiff's attorney of record.

3. The defendant shall pay interest, if any, on the total amount at the legally prescribed rate operative on 30 May 2021 calculated from that date to the date of final payment.

4. The total amount of R **6 548 998.00** shall be retained by the plaintiff's attorneys in an interest-bearing account in terms of s 86(4) of the Legal Practice Act

28 of 2014 for the benefit of the minor child Amile.

5. The plaintiff's attorneys are directed to forthwith create a trust with a financial institution for the minor child, Amile, and notify the defendant of the particulars thereof.

6. The defendant is further ordered to pay 7.5% of the total amount in paragraph 1 toward the costs of the administration of the trust referred to in paragraph 5 above.

7. The defendant is to pay the plaintiff's necessary and reasonable costs, such costs to include:

(a) the report, reservation fee and costs of preparing the joint minute of Ms S Hill;

(b) the report and preparation of the joint minutes of:

  (i) Ms R Thanjan;

  (ii) Ms K Rupee;

  (iii) Ms M Read;

  (iv Ms S Somaroo;

(c) the cost of consultation with Ms Hill and counsel;

(d) preparation for trial, preparation of the stated case and heads of argument.

8. The defendant is directed to file any further reports pertaining to future medical expenses by 18 June 2021.

9. Neither party shall be entitled to lead the evidence of any expert whose report was given after the date in paragraph 8 above, unless the court has granted condonation in respect thereof on application, save that this shall not apply to supplementary reports.

10. The registrar is required to allocate a trial date in the fourth quarter of 2021 and allocate 3 days for trial.

11. The trial of the matter is adjourned *sine die.*

12. The matter is adjourned to continue judicial case flow management before Henriques J on 12 May 2021 at 09h00am.

JUDGMENT

HENRIQUES J

Introduction

[1] It is every mother's dream to hold a new born baby in her arms, to love them, nurture them and guide them. Children are seen as the future, not only to excel and reach beyond boundaries that their parents were not fortunate enough to do, but also to take care of their parents and to bring them joy.

[2] On 13 January 2010, Amile Sbhale Khoza (Amile) was born at Prince Mshiyeni Memorial Hospital. Unfortunately, during birth, she suffered intrapartum hypoxia and as a result of such hypoxia, a brain injury. Such was as a result of the negligence of hospital and medical staff employed by the defendant. What ought to have been a joyous event turned into months of confusion and pain for Amile's mother, Ms Nozipho Madela, until she was able to have Amile assessed at 14 months of age and a definitive diagnosis of cerebral palsy was made.

Judicial Case Management

[3] Given the long and protracted delay in narrowing and resolving the issues for determination, the matter was dealt with initially in terms of the case flow system (in 2018) and thereafter in terms of the judicial case flow management system. Liability has been resolved with the defendant agreeing to compensate the plaintiff for 100% of her proven or agreed damages.

Issues

[4] The parties have agreed that the heads of damages on quantum be separated. The matter proceeded on a determination of general damages and loss of earnings and the remaining issue, the future medical expenses are to stand over for determination at a later stage subject to further judicial case management. The parties have also submitted an agreed set of facts to facilitate the arguing and finalisation of these two heads of damages. I am indebted to counsel for their concise heads of argument and the authorities they have referred to as well as their oral submissions.

[5] The parties have further agreed, for purposes of the determination of general damages and loss of earnings, that Amile's life expectancy has been reduced and

she will live to 56 years of age. Both parties rely on the report of Dr Campbell in this regard. Dr Campbell completed his report on 5 November 2018, in which he used Koch's Table 2 as a reference life table in order to estimate Amile's life expectancy. At the time she was 8,8 years old and he estimated that her life expectancy was an additional 47,2 years.

[6] In respect of the heads of damages on quantum, various experts have assessed and compiled reports. For purposes of this part of the trial, the parties have handed in bundles (which are a matter of record) containing these reports and where possible, the joint minutes of these experts.

[7] The parties have agreed that the following joint minutes prepared by the respective experts may be utilised in argument, namely the joint minutes of:

(a) the speech and language therapists, Ms R Thanjan and Ms T Sishi;
(b) the occupational therapists, Ms K Rupee and Ms H Prinsloo;
(c) the industrial psychologists, Ms S Hill and Dr Z Mandlabana-Luthuli;
(d) the dieticians, Ms M Read and Ms P Mthembu, and
(e) the physiotherapists, Ms S Somaroo and Dr S Narain.

Agreed statement of facts

[8] In addition, the parties have also prepared an agreed set of facts setting out the sequelae arising from the brain damage which Amile suffered at birth. It is utilising these agreed facts that the assessment of the quantum of the general damages and loss of earnings must be done. I have borrowed extensively from the agreed facts for purposes of this judgment.

[9] As a consequence of Amile's brain damage, she suffers from cerebral palsy which is classified on the Gross Motor Function Classification System at level 1. As a result of the brain damage, she has moderate to severe mental and intellectual impairment, severe cognitive delay, a wide range of severe to profound neurological deficits and mild physiological limitations.

[10] In consequence of her neurocognitive deficits, she has poor insight and social

judgment, poor conceptual ability, and an inability for logical and abstract thought. She has short focus and concentration, is highly distractible and is impulsive, has impairments with visual tracking, is only able to carry out simple instructions, and has no concept or understanding of numbers, forms, colour, letters, left and right differentiation or spatial aspects.

[11] She has no awareness of her body parts and is unable to point them out. She cannot be educated in a main stream school, will never be able to receive vocational training of any kind, will only benefit from specialised schooling that will provide stimulation, will never be employable, and never be able to manage her finances or determine her needs and will constantly be reliant on someone else for her safety and care.

[12] Her mother, being unable to care for her and not quite appreciating the extent of her deficits, did not ensure that she consistently received intervention and therapy throughout her formative years, and it was only once she commenced attending a special school in 2015 that she began receiving the necessary intervention. However, in some instances this was a little too late. The experts agree that no matter the intervention she receives, although there is room for improvement, she will never function as a child who has not suffered a brain injury and does not have the intellectual ability to benefit from psychological intervention.

[13] Amile requires constant supervision and a caregiver, and has compromised oral and sensory motor impairment. She drools a lot and is classified on the Eating and Drinking Classification System at level III to II, meaning that she eats and drinks with limitation to safety, and is unable to chew her food, has difficulty swallowing, requires her food to be blended and has to be supervised during eating.

[14] She is classified on the Functional Communication Classification System at level IV, also needs assistance in most situations, especially with unfamiliar people and environments and is unable to verbally communicate her daily needs and wants with familiar people. She presents with severe limitations in expressive language and communicates with gestures. In consequence thereof, she will require alternative

and augmentative communication (AAC) devices and speech therapy to address her feeding and swallowing impairment, and AAC and language development.

[15] Given her neurological deficits and physiological limitations, Amile has mild hypertonia, particularly of her trunk and abdominal muscles which results in a slow tempo of movement, asymmetry of posture and compromised dynamic balance. She is able to mobilize independently and can stand on each foot, one at a time, for eight to nine seconds with poor balance. She can reach out without taking a step forward but both her right and left legs are impaired with the right being the worst. She has poor dynamic balance, tends to walk in a zig-zag fashion rather than in a straight line. Although she is able to jump up, down and forwards, this is not typical of a child of her age, and she is unable to jump backwards and is unable to hop.

[16] She has weakness of the right upper and lower limbs, but is independent on level surfaces. However, on the Manual Ability Classification System she presents at level III with an inability to use her hands functionally, requires assistance to prepare and modify activities, has less functionality in her right hand than left and does not handle objects in an age appropriate way. She has poor fine motor function of both hands and is incapable of self-feeding at all and must be fed all her meals. She requires moderate assistance with bathing, dressing and grooming and requires occupational therapy and physiotherapy.

[17] Given her inability to care for herself, Amile is unable to brush her own teeth and ensure her own oral hygiene. This, together with her neuro-cognitive deficits, results in her refusing to allow the proper brushing of her teeth and as a result, she suffers from halitosis, gross plaque and calculus. She will require a caregiver throughout her life.

[18] From the age of 14 months, Amile has received physiotherapy and speech therapy for a period of two years. However, she stopped having therapy in or about 2013 as the plaintiff moved away from the vicinity of the hospital and did not feel the need for Amile to continue therapy as she felt it was not serving any purpose. Since 2015 however, Amile had been receiving speech therapy from the Lower Umfolozi

Hospital and attending therapy every couple of months until May 2018. She has not been attending therapy regularly at the Lower Umfolozi Hospital as the plaintiff was unable to maintain such visits as it was costly and time consuming as she worked full time.

[19] As a consequence, Amile attended Zamimpilo Special School which had boarding facilities from February 2019 until September 2019. Zamimpilo is a state aided boarding school offering the services of caregivers, teachers' aids, physiotherapists, occupational therapists and psychologists and accesses speech therapy at the Ceza Provincial Hospital. The plaintiff did not follow home programmes given to her to supplement any of the therapy that Amile received and as a consequence, Amile's attendance at the supplementary health treatments was inconsistent and non-compliant. Consequently, Amile has surpassed the age for maximal benefit of therapy and has not received sufficient stimulation, nor has she been exposed to and taught any skills.

[20] Despite these disabilities, Amile has a happy disposition and does not exhibit behavioural irregularities. She can sustain her attention if she enjoys an activity, does not meet the criteria for an anxiety disorder and can use a toilet with some assistance. She is not on any medication, is stable when walking and can transition from sitting to standing, roll, jump and manoeuvre stairs. She can clear obstacles with some impairment and has never been hospitalised after her birth.

[21] She can understand and comprehend simple instructions, is capable of play, able to scribble, has no visual or audio impairment. She utilises non-verbal cues to express her needs and wants, and can utilise AAC equipment and will be able to be taught some communicative abilities.

General Damages

[22] I propose to deal firstly with the issue of general damages. The purpose of an award of general damages is to compensate a victim for all pain, suffering, shock and discomfort, suffered as a result of a wrongful act.

[23] There has been some debate as to whether, in assessing general damages, an awareness of the extent of the brain injury warrants a higher award. In *NK obo ZK v Member of the Executive Council for Health of the Gauteng Provincial Government*[1] Willis JA *quoted from Marine & Trade Insurance Co Ltd v Katz NO,* in which Trollip JA pointed out that 'in awards arising from brain injuries, although a person may not have "full insight into her dire plight and full appreciation of her grievous loss", there may be a "twilight" situation in which she is not a so-called "cabbage" and accordingly an award for general damages would be appropriate.'[2]

[24] This approach has been followed in a number of instances. However, in *Southern Insurance Association Ltd v Bailey NO,*[3] Nicholas JA held that the courts have not adopted a "functional" determination as to how general damages should be awarded. It has consistently preferred a flexible approach, determined by the broadest general considerations, depending on what is fair in all the circumstances of the case.

[25] In addition in arriving at an appropriate award, I do not have to determine what the award will be used for but I must consider Amile's loss of amenities of life, and her pain and her suffering. I was referred to the following comparative cases in considering the award of general damages.

[26] In *Torres v Road Accident Fund,*[4] the plaintiff was a 24-year-old male who was 20 years old at the time he sustained his injury. He suffered a severe diffuse brain injury, a soft tissue injury to the neck and soft injuries to the face and chin. He suffered significant neuro-cognitive and neuro-behavioural deficits associated with concentration, working memory, impulse control and abstract reasoning. He suffered from depression and an adjustment disorder. An award of R600 000 was made for general damages at that time, with the equivalent value in 2020 being R1,2 million.

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[1] *NK obo ZK v Member of the Executive Council for Health of the Gauteng Provincial Government* 2018 (4) SA 454 para 7
[2] Ibid at 983A-G.
[3] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 119D-H.
[4] *Torres v Road Accident Fund* 2010 (6A4) QOD 1 (GSJ).

[27] In *Megalane NO v Road Accident Fund*,[5] the victim, an 11-year-old school boy at the time of the accident, suffered a severe brain injury with diffuse and focal brain damage in the form of a subdural haematoma. This resulted in cognitive impairment characterised by poor verbal and visual memory, poor concentration and distractibility. He also had impaired executive function characterised by frontal lobe disinhibition, causing inappropriate behaviour, speech difficulties characterised by dysarthria and word retrieval difficulties; and lastly bilateral hemiparesis with severe spasticity of all four limbs and left facial paralysis as well as aphasias.

[28] After suffering the injuries, he was confined to a wheelchair and his intelligence level was that of a young child. Prior to the accident, he was an above average scholar. Subsequent to the accident, he was left with severe permanent physical and mental disabilities rendering him unemployable. An award of R1 million was made for general damages, with the equivalent value in 2020 being R2,2 million.

[29] In *MSM obo KBM v MEC for Health, Gauteng*,[6] a judgment delivered on 18 December 2019, the minor was seven years old at the time of judgment and had a reduced life expectancy of 24,6 years. The judgment did not set out a list of disabilities and deficits suffered by the minor child, and an award of R2 million for general damages was made.

[30] In *Matlakala v MEC for Health, Gauteng Provincial Government,*[7] a medical negligence matter, the child, as a result of incorrect resuscitation procedures at a provincial hospital, suffered from spastic dystonic cerebral palsy which was irreversible. The minor was totally incommunicative and had never learned to sit, stand or work and was regarded as uneducable, had the lowest level of gross motor function classification and only produced sounds, no words and was incapable of social activity. The minor child needed constant care for his most basic functions. An award of R1,5 million was made.

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[5] *Megalane NO v Road Accident Fund* [2006] ZAGPHC 116; 2006 (5A4) QOD 10 (W).
[6] *MSM obo KBM v MEC for Health, Gauteng* [2019] ZAGPJHC 504; 2020 (2) SA 567 (GJ).
[7] *Matlakala v MEC for Health, Gauteng Provincial Government* [2015] ZAGPJHC 223; 2015 (7A4) QOD 22 (GJ).

[31] In *ZK v MEC for Health, Gauteng Provincial Government,*[8] a boy suffered a hypoxic-ischaemic incident during birth and suffered severe brain damage which manifested itself in spastic cerebral palsy, quadriplegia, mental retardation, epilepsy, marked delays in development, speech deficits, general spasticity, compromised respiratory function, subluxation of the hip, scoliosis of the spine and behavioural problems. The little boy would be incontinent for his entire life, would have to use nappies and would have to be changed constantly by caregivers. He experienced pain and discomfort and would have to undergo physiotherapy requiring the regular use of a hoist in later years. He had difficulty eating and had to be forced fed and was not in a state of 'unconscious suffering'. An award of R1,8 million was made for general damages.

[32] In *MP obo SP v MEC for Health, Eastern Cape Province,*[9] the child suffered from cerebral palsy as a consequence of a hypoxic ischaemic injury to the brain which affected him in a quadriplegic manner involving the trunk of his body. He was unable to stand without assistance and was only able to roll, scoot or crawl in order to move. He was unable to feed himself or perform his personal hygiene. His speech had been severely affected. His brain functions however, were at a much higher level than his body enabled him to express, which was found to be a factor aggravating his suffering. There had been a devastating loss of enjoyment of ordinary amenities of life, although he would be able to attend a school and operate an iPad. Full time care was required. An award of R2 million was made for general damages.

[33] In *Mngomeni obo EN Zangwe v MEC for Health, Eastern Cape Province,*[10] the child suffered from spastic quadriplegic cerebral palsy, was severely mentally and physically retarded and permanently disabled. He had been rendered unemployable in the open market and suffered a catastrophic loss of the amenities of life and was dependent on assistance in all personal care and activities of daily living, requiring

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[8] *ZK v MEC for Health, Gauteng Provincial Government* [2018] ZASCA 13; 2018 (7A4) QOD 80 (SCA).
[9] *MP obo SP v MEC for Health, Eastern Cape Province* [2018] ZAECMHC 28; 2018 (7A4) QOD 87 (ECM).
[10] *Mngomeni obo EN Zangwe v MEC for Health, Eastern Cape Province* 2018 (7A4) QOD 94 (ECM).

24-hour care and supervision. The minor child would need continuous medical care and treatment as well as specialised equipment, devices, accommodation and services to accommodate his special needs for the remainder of his life. An award of R2 million was made for general damages.

[34] In *CS (obo TGS) v MEC for Health, Gauteng*,[11] the minor child was born with cerebral palsy and suffered permanent severe brain damage resulting in severe motor and cognitive impairment in the form of quadriplegia, complicated by contractures leaving him permanently disabled and disfigured. A muscular scoliosis deformity had to be surgically addressed. He had a disfigured claw-like right hand, could not walk or talk and his hearing and vision were severely reduced. He had a pulmonological disability, resulting in frequent ear infections and faced a number of orthopaedic, gastro-enterological, neurosurgical and dental surgical procedures in the future. His life expectancy was reduced to 30 years. An award of general damages in the sum of R1,8 million was made.

[35] In *JR v The MEC for Health, North West Province*,[12] a minor child suffered septicaemia which resulted in cerebral venous thrombosis which led to permanent brain damage and right sided hemiparesis. The minor child was severely cognitively and intellectually compromised to such an extent that this would have a significant impact on his capacity to learn and his future employability. He suffered from impaired speech and had some elementary aspects of communication. He was unemployable and would need to be placed in a special school requiring permanent caregivers and supervision. An award of R800 000 was made for general damages.

[36] In *Booyse v MEC for Health, Gauteng Province,*[13] the court awarded R1,5 million for general damages. The child had passed away during the course of litigation at the age of nine.

[37] Ms Moodley, who appeared for the defendant, submitted that having regard to

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[11] *CS (obo TGS) v MEC for Health, Gauteng* [2015] ZAGPPHC 605; 2018 (7A4) QOD 104 (GNP).
[12] *JR v The MEC for Health, North West Province* 2018 (7B4) QOD 80 (NWM).
[13] *Booyse and another v MEC for Health, Gauteng Province* [2019] ZAGPPHC 363.

the nature of Amile's injuries, an award of between R1,2 to R1,5 million is fair. In her submission, she aligned herself with the principles enunciated by Willis JA in *ZK*,[14] specifically at paragraph 13. Mr Oliff, who appeared for the plaintiff, submitted that given the nature of the injuries, although Amile's condition is not as bad as the authorities he referred to, it is sufficiently serious for it to warrant an award of between R1,6 and R1,8 million.

[38] The parties relied on a number of decisions dealing with similar circumstances in support of their contentions as to the appropriate amount to be awarded for general damages. Despite these, I am mindful of the words of Rogers J in *AD and another v MEC for Health and Social Development, Western Cape Provincial Government,*[15] where he held the following:

> 'Money cannot compensate [the minor on behalf of whom the claim has been made] for everything he has lost. It does, however, have the 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. . . '

[39] The approach adopted by Rogers J was referred to in *PM obo TM v MEC for Health, Gauteng Provincial Government.*[16] Our courts have warned that when considering past awards, each must be scrutinised carefully and a court must make its own independent assessment as past awards are merely a guide and are not to be slavishly followed.[17]

[40] In *Singh v Ebrahim,*[18] in a minority judgment Snyders JA held the following in relation to the assessment of damages involving children:

> 'The conservative approach to the assessment of damages is an approach based on

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[14] *ZK v MEC for Health, Gauteng Provincial Government* [2018] ZASCA 13; 2018 (7A4) QOD 80 (SCA).
[15] *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government* [2016] ZAWCHC 181 para 618.
[16] *PM obo TM v MEC for Health, Gauteng Provincial Government* [2017] ZAGPJHC 346 para 56.
[17] See *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) paras 17-19 and *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26.
[18] *Singh and another v Ebrahim* [2010] ZASCA 145 para 128.

> policy considerations. Those policy considerations take account of the fact that when a court assesses damages, particularly for loss of future earning capacity and medical expenses, it has been said to be "pondering the imponderable". It in essence makes an assessment of what the future holds. Fairness to a defendant when an uncertain future is assessed at a time when the injuries caused by the defendant is known and could give rise to an overly sympathetic assessment of the plaintiff's damages, has also to be borne in mind. The general equities in the case need to be given due weight to achieve fairness, not only to the defendant, but the plaintiff and the public at large. The latter, because awards made affect the course of awards in the future, overly optimistic awards may promote inequality and foster litigation.' (Footnotes omitted.)

[41] I have had regard to the various comparable cases referred to by both parties. In arriving at the award, I have borne in mind that no two cases are exactly the same and awards in past decisions only serve as a rough guide. Each matter must be decided on its own set of facts. In determining the amount of general damages to award, I have taken into account the sequelae agreed on by the parties in the agreed set of facts. I accept that Amile sustained severe neurological and cognitive deficits which are permanent.

[42] Amile has serious and permanent brain damage and is intellectually impaired and suffers from neuro-cognitive deficits. She will require permanent assistance and caregivers for the remainder of her life. In addition, she has a reduced life expectancy and is dependent on others for activities forming part of daily living. In addition, she will have to attend a special school. Having considered all the above and the submissions of the parties' legal representatives, I am of the view that an award of R1,6 million in respect of general damages is appropriate in the circumstances.

[43] On the facts of this particular matter, this would be a fair award to make. Many counsel in medical negligence matters rely on the decision of *PM obo TN v MEC for Health, Gauteng Province,*[19] which has set the bar for general damages in cerebral

[19] *PM obo TM v MEC for Health, Gauteng Provincial Government* [2017] ZAGPJHC 346.

palsy cases at R1,8 million. However, as already indicated, the injuries which the minor child suffered in *PM* were greater than the injuries suffered by Amile and each case must be decided on its own set of facts. In *Minister of Police v Dlwathi,*[20] the court held that the assessment of an appropriate award of general damages is a discretionary matter and has as its objective to fairly and adequately compensate an injured party.[21] The court referred to the decisions in *Protea Assurance Co Ltd v Lamb,*[22] and *Road Accident Fund v Marunga*.[23]

The joint minutes of the expert industrial psychologists

[44] Both parties have obtained reports in relation to the loss of earnings: the plaintiff by Ms Sonia Hill (Ms Hill) and the defendant by Dr Zandile Madlabana-Luthuli (Dr Luthuli). The defendant, in its heads of argument submitted that the aspect of loss of earnings ought to stand over for determination at a later stage, together with the determination of future medical expenses.

[45] On the morning of the trial, prior to its commencement, the legal representatives indicated that a belated joint minute had been prepared by the respective industrial psychologists. They suggested that in light thereof, the court should have regard to the joint minute and not independently apply its mind to the proposed career paths and progressions to calculate loss of earnings. All the court would have to consider are the contingencies to be applied.

[46] I had some reservations about this approach and raised this with counsel. These reservations stemmed from what Dr Luthuli indicated in her report that during the course of preparation, she did not have access to any collateral information, nor did she have the benefit of interviewing Amile or her mother. The basis upon which she drew the conclusions in her report were based on her having regard to other expert reports that had been filed. In my view therefore, in the absence of a supplementary report and her indicating what formed the basis for signing the joint minute and agreeing to the conclusions by Ms Hill, I was of the view that this would

[20] *Minister of Police v Dlwathi* [2016] ZASCA 6; [2016] JOL 35451 (SCA).
[21] Ibid para 8.
[22] *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 534H-535A.
[23] *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA).

not be a prudent course to follow.

[47] In the result, I indicated to counsel that I did not consider myself bound by the joint minute and would not place any reliance thereon, nor could I place any reliance on the report of Dr Luthuli. Ms Moodley agreed that I was not bound by the joint minute and relied on the judgment in *Bee v Road Accident Fund.*[24] I was of the view that the most appropriate way in which to deal with the aspect of loss of earnings was to consider the report of Ms Hill. These are my reasons.

[48] The responsibility of expert witnesses has been the subject matter of a number of decisions and the duties and responsibilities of expert witnesses, specifically in civil matters was dealt with in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("the Ikarian Reefer"),*[25] where the court held the following:

> 'The duties and responsibilities of expert witnesses in civil cases include the following:
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> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v Jordan, [1981] 1 WLR 246 at p 256, per Lord Wilberforce).
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> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd v Commercial Union Assurance Co Plc, [1987] 1 Lloyd's Rep 379 at p 386 per Mr Justice Garland and Re J, [1990] FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.
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> 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J sup).
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> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
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> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the

[24] *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA).
[25] *National Justice Compania Naviera S. v Prudential Assurance C. Ltd ("the Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 at 81.

> opinion is no more than a provisional one (Re J sup). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report. . . .'

[49] The SCA had cause to consider the role of experts in *Bee v Road Accident Fund.* The court held the following at para 22:

'It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning.' In *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[26] the SCA said as follows:

> 'Lastly, the expert evidence lacked any reasoning. An expert's opinion must be underpinned by proper reasoning in order for a court to assess the cogency of that opinion. Absent in reasoning the opinion is inadmissible.'
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> 'In *Road Accident Appeal Tribunal and others v Gouws and another* [2018 (3) SA 413 (SCA) ([2018] 1 All SA 701; [2017] ZASCA 188) para 33, this court said: "Courts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion."
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> (See also *Michael and another v Linksfield Park Clinic (Pty) Ltd and another* 2001 (3) SA 1188 (SCA) ([2002] 1 All SA 384 (A)) para 34).

[50] 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.[27]

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[26] *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd and another* [2015] ZASCA 164; 2016 (2) SA 586 (SCA) para 15.

[27] See *Jacobs and another v Transnet Ltd t/a Metrorail and another* [2014] ZASCA 113; 2015 (1) SA 139 (SCA) paras 15 and 16, and *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F-G.

[51] In *Bee* para 24 the court held the following:

'[24] In *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 para 13, Sutherland J said:

"Where two or more experts meet and agree on an opinion, although the parties are not at liberty to repudiate such an agreement placed before the court, it does not follow that a court is bound to defer to the agreed opinion. In practice, doubtlessly rare, a court may reject an agreed opinion on any of a number of grounds all amounting to the same thing; ie the proffered opinion was unconvincing."

In *Malema v Road Accident Fund* [2017] ZAGPJHC 275 para 94 Molahlehi J expressed the same view.'

[52] In *R v Jacobs,*[28] Ramsbottom J said the following:

'Expert witnesses are witnesses who are allowed to speak as to their opinion, but they are not the judges of the fact in relation to which they express an opinion; the Court . . . is the judge of the fact. . . In cases of this sort it is of the greatest importance that the value of the opinion should be capable of being tested; and unless the expert witness states the grounds upon which he bases his opinion it is not possible to test its correctness, so as to form a proper judgment upon it.'

[53] As indicated, I had some concerns about merely accepting the joint minute signed by the industrial experts. Dr Luthuli had not interviewed the plaintiff or the minor child, nor had she subjected the minor child to any assessments. In fact, her report was explicit that she reserved her right to supplement it if she was required to do that. Her report appears to have been based on information obtained from having regard to the other expert reports filed by the various experts. There was no factual basis underpinning her reasoning or conclusions.

[54] Given the authorities referred to earlier in this judgment, I did not accept her report nor did I consider myself bound by the joint minute, as the reliability of Dr Luthuli's opinion as well as her ability to sign a joint minute when the reliability thereof could not be tested was questionable. In addition, the defendant indicated that it would not be calling Dr Luthuli as a witness.

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[28] *R v Jacobs* 1940 TPD 142 at 146-147.

[55] I am mindful of the words expressed by Rodgers AJA (as he then was) in *Bee*[29] where he held the following:

> 'In my view these pronouncements indicate that if an expert witness cannot convince the court of the reliability of the opinion and his report, the opinion will not be admitted. The joint report of experts is a document which encapsulates the opinions of the experts and it does not lose the characteristic of expert opinion. The joint report must therefore be treated as expert opinion. The fact that it is signed by two or more experts does not alter its characteristic of expert opinion. The principles applicable to expert evidence or reports are also applicable to a joint report. The joint report before the court is consequently part of evidential material which the court must consider in order to arrive at a just decision. The court, in such instance, will be entitled to test the reliability of the joint opinion, and if the court finds the joint opinion to be unreliable, the court will be entitled to reject the joint opinion. The court is entitled to reject the joint report or agreed opinion if the court is of the view that the joint report or opinion is based on incorrect facts, incorrect assumptions or is unconvincing.'

[56] Further, at para 31, the court held the following:

> 'The court cannot base its decision on unreliable evidence. There is no valid reason why a court should be precluded from considering and taking into account reliable evidence placed before it. For the court to ignore reliable and credible evidence tendered, in my view, defeats the ends of justice . . . The court can only make a proper determination of the appropriate compensation to award if it takes into account all the relevant evidential material and is not restricted to the joint minute of experts, which joint minute is based on erroneous assumptions and incorrect facts. . .'

[57] The SCA in *Jacobs and another v Transnet Limited t/a Metrorail and another*,[30] summarised the position in relation to the role of an expert witness as follows:

> 'It is well established that an expert is required to assist the court, not the party for whom he or she testifies. Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an appellate court can test his or her underlying

[29] *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 30.
[30] *Jacobs and another v Transnet Limited t/a Metrorail and another* 2015 (1) SA 139 (SCA) para 15.

reasoning and is in no worse a position than a trial court in that respect. Diemont JA put it thus in *Stock v Stock*:

"An expert . . . must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial court was."' (Footnotes omitted.)

[58] Davis J*,* in *Schneider NO and Others v AA and Another*,[31] held the following:

'In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.'

[59] In the matter between *Mathebula v Road Accident Fund*,[32] the following was stated:

'An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence. . .'

[60] In *PriceWaterhouseCoopers Inc and others v National Potato Co-operative Ltd and another*,[33] the Supreme Court of Appeal considered the admissibility of an expert opinion and the duties and responsibilities of an expert witness in civil cases:

'Opinion evidence is admissible "when the Court can receive "appreciable help" from

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[31] *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) at 211J-212B.
[32] *Mathebula v Road Accident Fund* [2006] ZAGPHC 261para 13.
[33] *PriceWaterhouseCoopers Inc and others v National Potato Co-operative Ltd and another* [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) para 97.

> that witness on the particular issue." . . .
>
> As to the nature of an expert's opinion, in the same case, Wessels JA said:
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> ". . . an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."'

[61] In *AD and another v MEC for Health and Social Development, Western Cape Provincial Government*,[34] a decision of Rogers J delivered on 7 September 2016 at paras 39-45, he deals with opinion evidence. At para 39 he held the following:

> 'When faced with conflicting expert opinions, the court must determine which, if any, of the opinions to accept, based on the reasoning and reliability of the expert witnesses. The court must determine whether and to what extent an opinion is founded on logical reasoning. An expert's function is to assist the court, not to be partisan. Objectivity is the central prerequisite (see *Michael & Another v Linksfield Park Clinic (Pty) Ltd & Another* 2001 (3) SA 1188 (SCA) paras 37-39; *Jacobs & Another v Transnet Ltd t/a Metrorail & Another* 2015 (1) SCA) 139 paras 14-15). The expert must not assume the role of advocate. If the expert's evidence is to assist the court he or she must be neutral. The expert should state the facts or assumptions from which his or her reasoning proceeds (*PriceWaterhouseCoopers Inc & Others v National Potato Co-Operative Ltd & Another* [2015] 2 All SA 403 (SCA) paras 97-99.)'

And further at para 42, he held the following:

> '. . . The expert must demonstrate to the court that he or she has relevant knowledge and experience to offer opinion evidence. If such knowledge and experience is shown, the expert can draw on the general body of knowledge and understanding of the relevant expertise. . .'

[62] The report of Dr Luthuli however, did not involve any assessment or evaluation of Amile and her mother, nor an interview with them. Her report was based purely on the review of expert opinions regarding the minor as contained in

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

various export reports, copies of which she was provided with. In addition, much of the information provided in relation to the career path and education of the maternal family was unverified, specifically in respect of Amile's mother's education and work history, and no corroborating documents were provided either.

[63] The report of Dr Luthuli was unreliable given the lack of facts and collateral information. There was no factual basis to support the conclusions. Both parties' representatives were agreeable to my approach. In addition, as Ms Hill was reserved for the day, the defendant was given the opportunity to cross-examine her on her report should they not be satisfied with the scenario she postulated. Ms Moodley declined the opportunity to cross-examine Ms Hill, and indicated that she was desirous of arguing that a higher than normal contingency ought to apply rather than challenging the scenario postulated.

[64] The plaintiff's industrial physiologist, Ms Hill, prepared a report on 16 November 2018 and in doing so, apart from having regard to the various expert reports that were available and health records, held interviews and informal assessments with Amile as well as her mother, the plaintiff. Collateral information was provided in relation to the family history by the plaintiff which was verified.

[65] Having regard to the lack of pre-incident educational potential as the problems arose at birth, Ms Hill concluded that it was likely that Amile would have attended a main stream school and had the potential to complete a grade 12 level of education. In addition, as long as she enjoyed continued family support and given the greater opportunities for tertiary education, she was of the view that Amile would have probably been capable of obtaining a grade 12 level of education and furthering her education and had the potential to progress from a semi-skilled level to a skilled-level of employment.

[66] Given the uncertainty and the lack of pre-incident information, Ms Hill relied on the Deloitte National Remuneration Survey as at 1 June 2018. She postulated the following career path for Amile:

(a) After completing her school at the end of 2028, she would have enrolled for

further studies such as a three year course and during such period may have worked and competed for part time jobs as a student, earning a minimum wage of R20 per hour and in the region of approximately R400 per week.

(b) After completing her studies in 2032, she would have obtained employment as a graduate earning at the lower quartile of Peromnes grade 12, at a basic income of R13 990 per month (total remuneration package of R18 874 per month).

(c) After three years she would have progressed to the mean of Peromnes 12/Paterson at a basic monthly income of R16 167 (total monthly remuneration package of R21 675).

(d) After five years she would have progressed to the mean of Peromnes 11/Paterson B5/C1 (ie at a more supervisory level or junior management level) at a basic monthly income of R21 420 (total remuneration package of R28 671 per month).

(e) After three to five years, she would have progressed to the mean of Peromnes 10/Paterson C2 at a basic monthly income of R24 848 (total remuneration package of R33 574 per month).

(f) After five years, Amile could have then progressed to the mean of Peromnes 9/Paterson C3 at a basic monthly income of R29 372 (total remuneration package of R40 718 per month).

(g) Thereafter, Amile would have continued receiving inflationary increases until the normal retirement age of 65 years.

[67] Everyone agrees that now that the incident has occurred, Amile is unemployable. Although I was advised that her mother has received a disability grant of some R2 000 a month which has varied over the years, this is not a factor to be considered in the calculation of loss of earnings as Amile is young and not employed. However, I am advised that the plaintiff has been made aware by her legal representatives that the effect of the order would be that she would no longer be eligible for such disability grant in respect of Amile.

[68] Having regard to the contents of Ms Hill’s report, I am of the view that it is an extremely conservative approach and a likely scenario. In addition, an appropriate contingency will give the eventual award balance and fairness by taking into account

various factors.

Contingencies

[69] It is trite that in deciding on the appropriate loss of earnings, one needs to determine a contingency to be applied for past as well as future loss of earnings. In *Southern Insurance Association Ltd v Bailey NO*,[35] it was stated as follows:

> '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.'.

[70] The court went further at 114C-E to hold as follows:

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

[71] When assessing damages, the amount to be allowed by way of a deduction for contingencies is variable and is dependent on the circumstances of a particular case in which a trial judge is asked to exercise her discretion. Arbitrary considerations inevitably come into play. This was expressed by Margo J in *Goodall v President Insurance Co Ltd*[36] as follows:

> 'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.'

[72] Contingencies allow for the unknown possibility that the plaintiff may have

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[35] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113F-G.
[36] *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392H-393A.

less than normal expectations of life and that he/she may have experienced periods of unemployment, illness, accident or general economic conditions. These relate to what is often referred to as imponderables and speculation about the future. Age is an important factor in calculating contingencies.[37]

[73] The well renowned author, Mr Robert Koch, in his book, Quantum of Damages, deals with the contingencies to be applied and how they ought to be applied. The approach to the application of contingencies by Koch was adopted in the decision of *Road Accident Fund v Guedes*[38] as follows:

> 'The author *Koch* describes his work as "a publication of financial and statistical information relevant to the assessment of damages for personal injury or death". The page in question is headed "General contingencies". It states that when
> "assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court. . . . There are no fixed rules as regards general contingencies. The following guidelines can be helpful."
> Then follows what is termed a "sliding scale" and the following is stated:
> "Sliding Scale: ½% for year to retirement age, ie 25% for a child, 20% for a youth and 10% in middle age. . ."'

[74] Mr *Oliff* submitted that I ought to consider applying a contingency of half a percent per year for the remainder of Amile's working life. He submitted that given her life expectancy which is up to 55 years, it would be unfair to apply a normal contingency to the remaining 10 years of her life, being from age 45 to 55 as the last 10 years is when one usually has an increase in salary. Her early death has been taken into account in the current calculations and if one applies the rule of thumb, one arrives at a contingency of 22%. However, he submitted that one must apply a lower than normal contingency based on the following:

(a) She ought not to be punished for the last 10 years of her working life, given that her life expectancy is reduced;

(b) She would incur travelling expenses and travelling risks; and

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[37] Ibid.
[38] *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 588.

(c) Her mother has not been able to advance in her career as she has had to look after Amile.

[75] He submitted that considering the fact that Ms Hill applied a conservative approach, the rule of thumb ought to be departed from and I ought to apply a contingency of between 15-17%.

[76] Ms *Moodley* on the other hand submitted that I ought to apply a higher than normal contingency and depart from the rule of thumb. Her reason for this is based on the following factors, namely:
(a) If one accepts Ms Hill's career path, although the figures are extremely conservative, she is of the view that the progression from one level to the next may be overly optimistic given:
(i) her family's situation;
(ii) the current economic climate in South Africa, and
(iii) the effects of the Covid-19 pandemic.

[77] She indicated that a contingency of 35% ought to be applied as if one considers the family history, both her mother and her mother's siblings qualified with a senior certificate. Although they appeared to be settled in their careers, they took a considerable period of time to advance in their chosen professions and there appears to be some delay in advancement.

[78] It is correct that much reliance is placed on the guide set out by Koch when applying the rule of thumb to half a percent per year to retirement age. That is normally in relation to an adult. In respect of a child, the 'normal contingency is 25%'. Even though I accept that Ms Hill's figures are conservative and that she has applied a stepped progression in relation to the premorbid scenario, one has to accept that in relation to a child, one is engaging in pure speculation.

[79] A contingency adjustment is called for in that I must consider that the premorbid scenario of Amile in respect of her earning capacity may have been cut short or interrupted for unrelated causes like the South African economy whether

because of domestic or international circumstances, may not perform sufficiently well for her to advance as suggested, and the high unemployment rate in South Africa, specifically in relation to female graduate professionals that prevails. One of the considerations must also be that every single member of her family on the maternal side qualified with a senior certificate however, this was not without some delay in some instances. Their progression are also somewhat delayed in their career path and I cannot discount this, given the fact that Amile's mother is a single mother raising a child on her own.

[80] In *Bailey supra*, which concerned a child who was injured at the age of two, the loss of earnings was based on the fact that she would have worked to the age of 60. Although Nicholas JA observed that the fortunes of life are not always adverse, he interfered with the trial judge's contingency deduction of 10% on the grounds that it was 'unduly generous' and increased it to 25%.[39] A similar deduction was made in *Nanile v Minister of Post and Telecommunications*.[40] In *S v Road Accident Fund* [2015] ZAGPPHC 1125, Fourie J, having regard to these and other cases, made a contingency deduction of 25% from the premorbid earnings of a child who was injured at the age of three and would have worked to the age of 65.

[81] In *NK v MEC for Health, Gauteng*,[41] the court, in referring to the judgment of Nicholas JA in *Bailey,* remarked that

> 'the deduction for contingencies is meant to take into account the "vicissitudes of life". These include
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> "the possibility that the plaintiff may in the result have less than a normal expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions".' (Footnotes omitted.)

In respect of the vicissitudes of life, 'the rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.'[42]

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[39] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 117E-F.
[40] *Nanile v Minister of Posts & Telecommunications*1990 (4A4) QOD 30 (E).
[41] *NK v MEC for Health, Gauteng* [2018] ZASCA 13; 2018 (4) SA 454 (SCA) para 15.
[42] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 116H-117A.

[82] Further, at 461G-H, Willis JA remarked that:

> '[contingencies are like] the rolling of a dice. A court is not a casino. . . Conjecture may be required in making a contingency deduction, but it should not be done whimsically.'

[83] In *Buys v MEC for Health and Social Development of the Gauteng Provincial Government*,[43] the court summarised the position with regard to contingencies as follows:

> '[96] Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Ins Co v Van Jaarsveld (1), The Quantum of Damages, Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (Shield Ins Co Ltd v Booysen 1979 (3) SA 953 (A) at 965 G-H). Contingencies for which allowance should be made, would usually include the following:
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> - the possibility of errors in the estimation of life expectation;
> - the possibility of illness which would have occurred in any event;
> - inflation or deflation of the value of money in future; and
> - other risks of life, such as accidents or even death, which would have become a reality, sooner or later, in any event.'

[84] In my view, based on the contents of the report of Sonia Hill, the submissions of the parties and the family history, I am of the considered view that a contingency of 25% is the most appropriate in the circumstances.

Costs

[85] The defendant has acknowledged that it is liable for the costs of the hearing in respect of the determination of loss of earnings and general damages. However, Ms Moodley indicated that she had no instructions to agree to the defendant paying for the costs resulting from the formation of the trust for Amile. The creation of such trust is governed by the provisions of the Administrations of the Estates Act.[44] The costs of the creation of such trust have also been predetermined and constitute 7,5% of the total amount payable to the trust. Consequently, there is no basis for me to depart

[43] *Buys v MEC for Health and Social Development of the Gauteng Provincial Government* [2015] ZAGPPHC 530 para 96.
[44] Administration of Estates Act 66 of 1965.

from the set fee applicable and the defendant will be liable for the costs of the creation of the trust at the rate of 7,5% of the total sum awarded.

Order

[86] At the hearing of the matter, Mr *Oliff* handed up a draft order which Ms *Moodley* had no difficulty with. Much of what was contained therein was agreed to by the parties save for the quantum of general damages and loss of earnings which I was required to determine.

Conclusion

[87] There has been a delay in the delivery of this judgment. This has been as a consequence of the fact that I do not have a permanent registrar assigned to me and the lack of administrative support. This has been brought to the attention of the Judge President and the offices of the Chief Justice. In addition an updated actuarial calculation had to be obtained.

[88] In the result, the following orders will issue:

1. The defendant shall pay to the plaintiff's attorneys in respect of Amile Madela, the total amount of R **6 548 998.00** which amount is computed as follows:

(a) R 1,6 million in respect of general damages;

(b) R 4 948 998.00 in respect of loss of earnings.

2. The total amount mentioned in paragraph 1 is to be paid within thirty days from the date of this order, directly into the trust account of the plaintiff's attorney of record.

3. The defendant shall pay interest, if any, on the total amount at the legally prescribed rate operative on 30 May 2021 calculated from that date to the date of final payment.

4. The total amount of R 6 548 998.00 shall be retained by the plaintiff's attorneys in an interest-bearing account in terms of s 86(4) of the Legal Practice Act 28 of 2014 for the benefit of the minor child Amile.

5. The plaintiff's attorneys are directed to forthwith create a trust with a financial institution for the minor child, Amile, and notify the defendant of the particulars thereof.

6. The defendant is further ordered to pay 7.5% of the total amount in paragraph 1 toward the costs of the administration of the trust referred to in paragraph 5 above.

7. The defendant is to pay the plaintiff's necessary and reasonable costs, such costs to include:

(a) the report, reservation fee and costs of preparing the joint minute of Ms S Hill;

(b) the report and preparation of the joint minutes of:

(i) Ms R Thanjan;

(ii) Ms K Rupee;

(iii) Ms M Read;

(iv Ms S Somaroo;

(c) the cost of consultation with Ms Hill and counsel;

(d) preparation for trial, preparation of the stated case and heads of argument.

8. The defendant is directed to file any further reports pertaining to future medical expenses by 18 June 2021.

9. Neither party shall be entitled to lead the evidence of any expert whose report was given after the date in paragraph 8 above, unless the court has granted condonation in respect thereof on application, save that this shall not apply to supplementary reports.

10. The registrar is required to allocate a trial date in the fourth quarter of 2021 and to allocate three days for trial.

11. The trial of the matter is adjourned *sine die.*

12. The matter is adjourned to continue judicial case flow management before Henriques J on 12 May 2021 at 09h00am.

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HENRIQUES J

Case Information

Date of Set Down	:	16 and 17 September 2020
Date of Judgment	:	30 April 2021

Appearances

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Instructed by Plaintiff's Attorneys	:	Justice Rechlin Ramsamy Attorneys Suite 1403, 14th Floor Metlife Building 391 Anton Lembede Street (Formerly Smith Street) Durban Email: jrr@jrr.co.za Tel: 031 582 5000 Ref: JRR/nm/M2545/MAT117
Counsel for the Defendant	:	Ms M Moodley
Instructed by Defendant's Attorneys	:	Mr S Ndlovu Assistant State Attorney KZN 6th Floor Metlife Building 391 Anton Lembede Street (Formerly Smith Street) Durban Tel: 031 365 2531 Ref: 24/004682/15/M/P27

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand down is deemed to be 09h30 on 30 April 2020.