HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

04-11-2020 P.A. Meyer
Date Judge P.A. Meyer

Case no: 9407/2017

In the matter between:

M First Plaintiff
ADV H KRIEL N.O. o.b.o. S Second Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT Defendant

***Case Summary*: Delictual claim – Medical negligence – quantification of general damages and loss of earning capacity.**

JUDGMENT

MEYER J

[1] This is a delictual claim for damages arising from the negligence of the medical and nursing staff at the JD Dumani Clinic on 30 of January 2012. Their negligence was the sole cause of the fetal distress of S ("the child"), resulting in partial prolonged intrapartum hypoxic ischemic injury of her term brain and she was rendered cerebrally palsied with a poor long-term neurodevelopmental outcome. On 6 June 2019 the

defendant, the Member of the Executive Counsel for Health, Gauteng Provincial Government, was found to be liable for all the proven damages claimed by the first plaintiff, M, who is the mother of the child (the mother), in her personal capacity and those of the child claimed by the second plaintiff, Adv H Kriel N.O., in his representative capacity as *curator ad litem* for and on behalf the child as a result the negligence of the medical and nursing staff at the JD Dumani Clinic.

[2] By agreement between the parties the quantification of the first plaintiff's personal claim and the quantification of the second plaintiff's representative claims in respect of future medical costs, hospital expenses and modalities were postponed *sine die* and separated from the quantification of the second plaintiff's representative claims in respect of loss of earnings, earning capacity and general damages. The parties prepared a summary of the facts and opinions on which they reached agreement (exhibit 'A') in respect of the questions to be determined presently - loss of earnings, earning capacity and general damages – and they elected not to call any witnesses but to merely argue those questions based on their summary of agreed facts and opinions. The issues between them were narrowed down to the appropriate contingency deduction that should be applied to the child's loss of earning capacity, the appropriate amount for her general damages that should be awarded, and whether the agreed rate of 7.5% to be allowed for the creation and administration of a Trust should be calculated on the capital amount awarded to the child or whether it should be calculated on the amount paid into the Trust. Furthermore, they agreed on a draft order, only leaving it open to me to complete the paragraphs dealing with the disputed issues.

[3] It is common cause that as a result of the negligence of the medical and nursing staff, the child suffers from a brain injury manifesting as cerebral palsy and mental retardation, spastic quadriplegia, microcephaly, severe developmental delay, permanent neuro-physical and intellectual impairment and the child is classified as a GMFCS level II (Gross Motor Functional Classification Scale).

[4] The parties specifically agreed on the facts, findings and opinions of the paediatric neurologist, Dr KM Rammego, who is a medical specialist and senior lecturer at Steve Biko hospital and the University of Pretoria, as set out in his medico-legal report obtained at the behest of the defendant. In their summary of agreed facts and opinions they agreed and quoted the following clinical and neurodevelopmental history obtained by Dr Rammego, the findings of his clinical and neurological examination and his classification of the child's physical impairment as GMFS level II.

[5] As to her clinical history, dr Rammego states that the child cannot take care of herself; is fully dependent in all activities of daily living; is not potty-trained and still in nappies on a full time basis; is non-verbal and communicates by way of using gestures only to familiar partners; has an abnormal gait; drags her right foot; walks at a slow pace and gets tired easily; holds onto a rail when going up a flight of stairs; can run and does not fall frequently as she is very cautious; has limited use of her hands and this affects her ability of gaining skills for self-care; does not transfer an object from hand to mouth or hand to hand; her right hand is relatively weak compared to the left hand and as a result she uses her left hand more; she can only hold objects in her right hand if they are placed by someone and is unable to pick objects up with her right hand; she has no understanding of basic concepts; has drooling of saliva; she feeds orally but her food must be of soft chewy texture to ensure safe and efficient swallowing; she drinks safely and efficiently without modification of fluids; and she retains all her food and drinks.

[6] As to her neurodevelopment history: She sat independently when she was two years and six months old; she only bum shuffled; she stood independently at around four years of age and started walking when she was four years and six months old (gross motor domain). Her left hand is functional, but she does not use her right hand, not even to pick up objects (fine motor domain). She only makes sounds (speech and language domain). She started smiling before she was one year of age, started recognizing familiar faces when she was around two years of age; cannot feed herself; is not potty trained and does not indicate when her nappy is soiled (personal and social domain).

[7] Dr Rammego's clinical examination of the child revealed that she appears to be alert, well-kept and not ill looking; she has no understanding of basic concepts; is not cooperative at all; does not want to be touched, and fights and kicks with every attempt at touching her; she has excessive drooling of saliva; is non-verbal and just making cooing sounds and predominantly vowels; she has no dysmorphic features; and her vital signs are within the normal limits.

[8] His neurological examination revealed the following: (a) Higher cortical function: She is fully conscious; recognizes her mother in response by showing signs of excitement when interacting with her; has profound intellectual disability; due to a lack of understanding is not cooperative, fights and kicks during the examination and as a result, most of the clinical signs are based on observation. (b) Head: She is microcephalic. (c) Cranial nerves: She has normal visual tracking; her pupils are equal and reactive to light; she has normal extra ocular motility; right upper motor neuron facial nerve palsy evidenced by facial asymmetry with loss of nasolabial fold on the right; normal auditory response bilaterally to a rattle sound; no pseudobulbar palsy. (d) Motor system: There is clear asymmetry exhibited in her posture when walking in supine position; she has a right hemiplegic gait; her posture is in keeping with pyramidal motor weakness affecting her right side more than the left side; her power on the right extremities is graded as medical research council (MRC) 4 – 5; her power on the left side is MRC grade 4+; she has brisk deep tendon reflexes with sustained clonus bilaterally; she has positive Babinski bilaterally; and it is impossible to accurately assess her tone in the extremities due to lack of cooperation, fighting every attempt of passive movement. (e) Coordination: She has no ataxia; and rapid alternating movements could not be tested due to lack of cooperation. (f) Extrapyramidal system: She has involuntary hyperextension of the big toe on the right intermittently (striatal toe). (g) Sensory system: She response to tactile stimuli in all dermatomes. (h) Autonomic system: She has no autonomic instability. (i) Neurodevelopmental level: (i) Gross motor: She is functioning at a level of approximately three years old; ambulating independently; and cannot climb stairs normally but holds on to a rail when going up and down a flight of stairs. (ii) Fine motor: She is functioning at a level of less than nine months, and has an immature pincer grasp. (iii) Hearing and language: Her language development is severely delayed, she cannot utter a single word,

and she only communicates with gestures only to familiar partners. (iv) Personal and social domain: She has a social smile and recognizes familiar faces. (j) Skin: She has one hyperpigmented macule at the back. His neurological examination further revealed no neck and back deformities; a normal musculoskeletal system; normal hair distribution; normal health and ear, nose and throat systems; normal respiratory and cardiovascular systems; normal abdomen and genitourinary systems; and a normal endocrine system.

[9] Dr Rammego sums up his clinical findings thus: The child's level of function is graded as follows: Gross motor function classification system (GMFCS) II – she walks with limitations. Manual ability classification system (MACS) V – she does not handle objects and has severe limited ability to perform even simple actions. Communication function classification system (CFCS) V – she is a seldom effective sender and receiver with familiar partners. Eating and drinking ability classification system (EDACS) I – she eats and drinks safely and efficiently. Her motor impairment is associated with global developmental delay; congenital microcephaly; intellectual disability; excessive drooling of saliva; communication problems; and bladder and bowel control problems. Her physical impairment fits in with GMFCS level II.

[10] It was agreed between dr Rammego and the paediatric neurologist appointed by the plaintiffs, dr Debbie Pearce, that the child suffers from an asymmetric spastic quadriplegia. They both classified her as GMFCS level II, MACS V and GFCS V. They agreed that the child is capable of independent mobility and her comorbidities include profound intellectual disability, microcephaly, behavioral concerns, global developmental delay and that she is almost completely dependent on others for daily functioning.

[11] The educational psychologists appointed by the parties, Ms BL Eybers-Purchase and Dr GM Prag, agreed that due to the significant brain injury as a result of loss of oxygen, she experiences the following difficulties: (a) although she is able to walk independently, she cannot manage long distances and needs to be carried if she and her mother go to the shops; (b) she will never be able to participate in sports or outdoor exercise; (c) she has insufficient motor control to learn to use her hands to feed herself, wash or dress herself or learn to use a toilet; (d) she cannot learn to speak or use an alternative method of communication; (e) she will be dependent on her mother or

alternative caregiver for all activities of daily living for the rest of her life; (f) she will not be able to be educated at any level; (g) she will require 24 hour care and supervision for the rest of her life; (h) she cannot play outside like other children and her social interaction with peers is curtailed; (i) she will not be able to understand or manage menstruation or pregnancy and the issue of sterilization must be addressed; and (j) she is an utterly vulnerable individual.

[12] They further agreed that taking her mother's educational background into account (she completed the Grade 12 National Certificate in 2013 as well as in-house mining qualifications at Marula mine in Limpopo where she is currently employed as a winch operator), who places a high value on education, she would have encouraged her child to complete her national senior certificate but for her disabilities. They are of the view that it can therefore be reasonably accepted that but for the birth trauma and resultant anoxia, the child would have completed Grade 12 (NQF 12). They also agreed that the possibility of the child completing an NGF 5 qualification cannot be excluded. They agreed that the child would have been able to study further by obtaining diploma courses (NQF 6) at a tertiary institute.

[13] The industrial psychologists appointed by the parties, Mr L Linde, Mr K Jooste and Dr M Malaka, agreed that, based on the agreement of the educational psychologists, the child would have been able to complete a National Diploma (NQF6) after completion of her secondary education, she would probably have performed part time or contract work for a period of one to two years earning within the Paterson A1 level (basic salary). She would then have entered the formal labour market within the Paterson B3 level (median, annual guaranteed package) progressing to the Paterson C3/C4 levels (median, annual guaranteed package following a straight line approach), until she reached the ceiling of her career at the age 40 to 45 years. Thereafter, she would have earned salary inflationary increases until her retirement. They agreed that the child would probably have been able to work until retirement at the age of 65. Post incident the industrial psychologists agreed that the child has been rendered unemployable and will require full time care for the remainder of her life. She has suffered a total loss of earnings and earning potential.

[14] The essential difference between the predictions of the child's life expectancy between the life expectancy expert appointed by the second plaintiff, dr APJ Botha, and by the defendant, prof PA Cooper, is that prof Cooper places her in the non-ambulatory category based on her profound intellectual impairment that would, in his opinion, make it unlikely for her to remain ambulatory at age 60 years while dr Botha did the calculations on the basis of her being in the ambulatory group. Dr Botha, however, conceded that an adjustment must be made for the severe cognitive impairment albeit, according to him, that only Himmelmann *et al* consider severe cognitive impairment as the strongest predictor of survival, the other studies do not. He was prepared to make a downward adjustment to a midpoint between their respective assessments to a life expectancy of 43.5 additional years after the child's current age of 8.5 years at the time, i.e. 52 years. Prof. Cooper agreed that prediction of the ability to walk at age 60 years is difficult and that translating life expectancy data from high income countries to the South African situation is an inexact science. He, therefore, agreed to make an upward adjustment to a midpoint of 42.5 additional years, i.e. to the age of 52 years.

[15] The parties also agreed on the actuarial calculations obtained by the defendant from Manala Actuaries and Consultants. Their calculation is based on the assumptions that: the child, but for the incident, would have finished matric at the end of the calendar year when she turns age 18 years, December 2030; from 1 January 2031 to 31 December 2033 (three years) she would have completed a diploma qualification; from 1 January 2014 she would have earned on the Paterson A1 (basic salary) lower quartile (R7 394 per month and R88 728 per annum in July 2020 money terms); after 1.5 years, 1 July 2035, she would have earned on the Paterson B3 (annual guaranteed package) median quartile (R285 885 per annum in July 2020 money terms); from age 42.5 years (1 August 2054) she would have earned on the Paterson C3/C4 (annual guaranteed package) median quartile (R651 457 per annum in July 2020 money terms (uniform linear real increases would have been received between the aforementioned last two earnings); thereafter she would have earned salary inflationary increases every July until her retirement age of 65 years. In the result they calculated the value of her pre-incident income at R5 133 756, of her post-incident income at R0 and hence her gross future loss of income at R5 133 756.

[16] The parties are *ad idem* that the plaintiffs' attorneys should cause a Trust to be established for and on behalf of the child in accordance with the provisions of the Trust Property Control Act 57 of 1988. They also agree that it would be reasonable that an amount equivalent to 7.5% should be allowed for the creation and administration of the Trust. They, however, differ on whether the rate of 7.5% should be calculated on the capital amount awarded to the child or whether it should be calculated on the amount paid into the Trust. I am of the view that the rate of 7.5% should be calculated on the capital amount awarded to the child. (See *PM obo TM v MEC for Health, Gauteng Provincial Government* [2017] ZAGPJHC 346 (7 March 2017) para 61.)

[17] I now turn to the quantification of the second plaintiff's representative claim for general damages. With reference to past awards for general damages in comparable cases of cerebral palsy children, inflation and the CPI, the second plaintiff contends that an amount of R2 200 000 would be a fair and reasonable amount to be awarded as compensation for the child's general damages in all the circumstances of this case. Also with reference to past awards made in comparable cases of cerebral palsy children, inflation and the CPI, but emphasizing that the child in this instance is classified as a GMFCS Level 2 cerebral palsy child, the defendant contends that an amount between R1.7 million and R1.9 million would rather be a fair and reasonable amount to be awarded as compensation for the child's general damages in all the circumstances of this case. The GMFCS is an internationally accepted scale of needs of individuals suffering from cerebral palsy. A more severe GMFCS might reduce life expectancy. In my view the GMFCS classification of a child suffering from cerebral palsy is but one of the multiple factors to be taken into account in awarding general damages.

[18] Counsel referred me to: *Singh v Ebrahi(1)* [2010] 3 All SA 187 (D), where general damages awarded were R1 200 000.00; *Matlakala v MEC for Health, Gauteng Provincial Government* 2015 (7A4) QOD 22 (GJ), where general damages awarded were R1 500 000.00; *S (obo S) v MEC Health Gauteng* [2015] ZAGPPHC 605, where general damages awarded were R1 800 000.00; *AD and IB v MEC for Health and Social Development, Western Cape Provincial Government* 2016 (7A4) QOD 32 (WCC), where general damages awarded were R1 800 000.00 in respect of a cerebral palsy child with

a classification of either GMFCS Level II or Level III; *ZK v MEC for Health, Gauteng Provincial Government* 2018 (7A4) QOD 80 (SCA) where general damages awarded were R1 800 000.00; *Khoza v MEC for Health, Gauteng* (216/17) [2018] ZASCA 13 (15 March 2018), where general damages awarded were R1.8 million; *MP obo SP v MEC for Health, Eastern Cape Province* 2018 (7A4) QOD 87 (ECM), where general damages awarded were R2 000 000.00; *N Mngomeni obo EN Zangwe v MEC for Health, Eastern Cape Province* 2018 (7A4) QOD 94 (ECM), where general damages awarded were R2 000 000.00; *CS (obo TGS) v MEC for Health, Gauteng* 2018 (7A4) QOD 104 (GNP), where general damages awarded were R1 800 000.00; *PM obo TM v MEC for Health, Gauteng Provincial Government* (A5093/2014) [2017] ZAGPJHC 346 (7 March 2017), where general damages awarded were R1 800 000.00; *MSM obo KBM v MEC for Health Gauteng* (delivered on 18 December 2019 in this division (case no 431/2015)), where general damages awarded were R2 000 000 for a cerebral palsy child classified on GMFCS Level 5, and to *Janse van Rensburg v MEC for Health and Social Development Gauteng Province* (handed down on 1 July 2020 in this division (case no. 12933/2015), where general damages of R2, 200 000 were a awarded where the child suffering from cerebral palsy was classified on GMFCS Level II with life expectancy 51.5 years. I need not refer to the similarities and inevitable differences that arose in each case. The general tendency in present day money value appears to be awards of general damages to children suffering from cerebral palsy of between R1 800 000 and R2 200 000.

[19] In *Sandler v Wholesale Coal Supplies Limited* 1941 AD 194 at 199, Watermeyer JA said that-

'[I]t must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money, which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair, in all the circumstances of the case.'

[20] I also respectfully agree with the Rogers J in *AD and IB v MEC for Health and Social Development, Western Cape Provincial Government* 2016 (7A4) QOD 32 (WCC) that-

'[m]oney cannot compensate AD 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 . . . '

[21] It is trite that awards in previous cases can only offer broad and general guidelines in view of the differences that inevitably arise in each case. The process of comparison is not a meticulous examination of awards and should not interfere upon the court's general discretion (See, for example, *Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535H-536A). In *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms* 1980 (313) QOD 105 (A), Botha AJ said-

'. . . dat dit in die algemeen nie gerade is nie om 'n aanpassing vir die verminderde waarde van geld te maak deur die slaafse navolging van syfers wat in die Verbruikersindeks voorkom nie. Dit kan die beweegruimte van 'n verhoorhof by die vasstelling van die quantum van algemene skadevergoeding te veel aan bande lê.'

And in *Erdmann v Santam Insurance Co Ltd* 1985 (312) QOD 516 (C) at 525, Fagan J said this:

'I am aware that the facts in the cases quoted differ from those in the present case. I am aware that, even if the facts were similar, the awards in those cases are not to be slavishly followed but are guidelines only. I am aware of the warnings against rigid application of the consumer price indices in comparing earlier awards.'

In *De Jongh v Du Pisanie NO* 2005 (5) SA 457 (SCA) para 60, after noting that the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the Supreme Court of Appeal reaffirmed conservatism as one of the multiple factors to be taken into account in awarding general damages.

[22] I realise that money cannot compensate the child for everything she has lost. But, guided by the past awards and applying the principles to which I have referred, I am of

the view that an amount of R2 000 000 represents a fair and reasonable amount to be awarded as compensation for the child's general damages in all the circumstances of this case.

[23] I now turn to the appropriate contingency deduction that should be applied to the child's loss of earnings. The parties are *ad idem* that the calculation of the child's gross future loss of income in the amount of R5 133 756.00 is fair and reasonable. The second plaintiff contends that a contingency deduction of 20% should be applied. The defendant, on the other hand, contends that even though the application of a contingency percentage of 20% in the case of minor children, such as the child in question, appears to be the norm, a 35% contingency deduction should be applied in this instance taking into account the anticipated life expectancy of 43.5 additional years after the child's current age of 8.5 years at the time of the life expectancy experts' assessments, i.e. 52 years.

[24] In *NK v MEC for Health, Gauteng* 2018 (4) SA 454 (SCA), Willis JA said this:

[16] The leading case, in recent years, of the meaning of 'arbitrary' is *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* [2002 (4) SA 768 (CC)]. Ackermann J, delivering the unanimous judgment of the court, emphasised that, although 'arbitrary' may often mean without any 'rational connection between means and ends', it does not always carry the same meaning, and context is important [paras 61-69. Ackermann J was also referring to the interpretation of a statute and not a word used in a judgment. To my mind, simply taking the median between what the respective parties ask for on the deduction or contingencies without any further explanation is indeed devoid of any rational connection between the means by which the decision was made and the result (or end) of the decision-making process. Nevertheless, in context, something more reasoned is required, not only if a court is to depart from the normal range of between 15% and 20%, but also simply to take the median of what the respective parties asked for. It is like the rolling of a dice. A court is not a casino. Of particular relevance is that there are no special circumstances present to indicate that, but for his perinatal asphyxia, the vicissitudes of ZK's life are likely to be more adverse than the norm. Conjecture may be required in making a contingency deduction, but it should not be done whimsically.

[17] In regard to the deduction for contingencies, the appellant enjoined us to have particular regard to the judgment of this court in *Singh v Ebrahim* [2010] ZASCA 145 (26 November 2010)], in which a 15% contingency deduction was approved, and *PM obo TM v MEC for Health*

[[2017] ZAGPJHC 346 (7 March 2017)] para 51], in which 20% was deducted. The appellant made it plain that she would consider 20% to be eminently fair and reasonable to both parties.'

[25] In *AD* (supra) paras 586-599, Rogers J considered a number of decided cases and the factors to be taken into account, also that the child's life expectancy of 48 additional years was significantly longer than that of the child in *Singh*, and a contingency deduction of 17,5% was applied to the minor child's award for loss of earnings. Something more than merely the child's life expectancy of 43.5 additional years is required *in casu* for this court to depart from the normal range of between 15% and 20%. There are no special circumstances present to indicate that the vicissitudes of the child's life are likely to be more adverse than the norm. Here too, the second plaintiff made it plain that he on behalf of the child would consider 20% to be fair and reasonable to both parties.

[26] I consider a 20% contingency deduction to be fair and reasonable in all the circumstances of this case. The agreed actuarially calculated gross income should, therefore, be reduced by a contingency deduction of 20%, resulting in an award of R 4 107 004 (R 5 133 756 minus 20% = R 4 107 004).

[27] In the result the following order is made:

(a) Quantification of the first plaintiff's personal claim and of the second plaintiff's representative claim in respect of future medical costs, hospital expenses and modalities are separated from the balance of the issues in terms of Rule 33(4) of the Uniform Rules of Court, and postponed *sine die*.

(b) The defendant shall pay to the second plaintiff in his representative capacity on behalf of the child the amount of R6 107 004 together with interest *a tempore morae* calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, made up as follows: -

  (i) Future loss of income: R4 107 004

  (ii) General damages: R2 000 000.

(c) The amounts referred to above shall be paid in accordance with the provisions of Section 3(3)(a)(i) of the State Liability Act 20 of 1957 as amended and shall be paid directly into the following trust account of the plaintiff's attorneys of record:

  Account Name : Edeling Van Niekerk Inc

Bank	:	Nedbank
Branch	:	Business Banking
Account number	:	1286083516
Branch code	:	128605

The aforesaid amounts shall be retained in an interest-bearing account in terms of the provisions of Section 86(4) and (5) of the Legal Practice Act 28 of 2014, for the sole benefit of the minor child.

(d) In order to ensure that the monies awarded to the second plaintiff in his representative capacity are suitably protected, as contemplated by the relevant experts, the attorneys for the second plaintiff, EDELING VAN NIEKERK INCORPORATED of Block A, Clearview Office Park, Wilhelmina Avenue, Constantia Kloof, ROODEPOORT are ordered:

(i) to cause a trust ("the TRUST") to be established in accordance with the Trust Property Control Act No 57 of 1988, such Trust to be a "special trust" as defined in Section 1 of the Income Tax Act, No 58 of 1962 (as amended);

(ii) to pay all monies held in trust by them for the benefit of the child to the TRUST;

(e) The trust instrument contemplated in paragraph 4 above shall make provision for the following:

(i) the child shall at all times be the sole beneficiary of the TRUST;

(ii) the trustee(s) and their successors are to provide security to the satisfaction of the Master;

(iii) the powers of the trustee(s) shall specifically include the power to make payment from the capital and income for the reasonable maintenance of the beneficiary, or for any other purpose which the trustee(s) may decide to be in the beneficiary's interest, and if the income is not sufficient for the aforesaid purpose, that the trustee(s) may utilize capital;

(iv) the ownership of the trust property vest in the trustee(s) of the TRUST in their capacity as trustees;

(v) a procedure to resolve any potential disputes, subject to the review of any

decision made in accordance therewith by this court;

(vi) the exclusion of any and all benefits (income and/or capital) accruing to the child as beneficiary of the TRUST from any community of property and/or accrual system in any marital regime;

(vii) the suspension of the minor child's contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the second plaintiff;

(viii) any amendment of the trust instrument is to be subject to the leave of this court;

(ix) the termination of the TRUST upon the death of the child, in which event the trust assets shall pass to the estate of the child;

(x) the trust property and the administration thereof is to be subject to an annual audit;

(f) Until such time as the trustees are able to take control of the capital amount and to deal therewith in terms of the provisions of the trust, the second plaintiff's attorneys are authorized and ordered to pay from the capital amount:

(i) any reasonable payments that may arise in order to satisfy any reasonable need for treatment, therapy, care, aids, equipment or otherwise that may arise;

(ii) such other amounts as reasonably indicated and/or required for the wellbeing of the child and/or which are in his best interest which a diligent *curator bonis* would have authorized and paid had a *curator bonis* be appointed.

(g) The second plaintiff's attorney shall be entitled to make payment of expenses incurred in respect of *inter alia* accounts rendered by expert witnesses as identified in paragraph (i) hereunder as well as counsel's fees from the aforesaid funds held by them for benefit of the child.

(h) The second plaintiff's attorney shall be entitled to payment, from the aforesaid funds held by them for the benefit of the child, of their fees in accordance with their written fee agreement.

(i) The defendant is to pay the second plaintiff's agreed or taxed High Court costs

as between party and party, such costs to include –

(i) all costs in obtaining all medico-legal reports and an actuarial report in respect of loss of income. The second plaintiff filed the following expert reports: Dr APJ Botha (Specialist Physician); Dr PJ Lofstedt (Dentist); Dr A H van den Bout (Orthopaedic Surgeon); Dr JS Bouwer (Ear Nose and Throat Surgeon); Ms T Kaltenbrun (Dietician); Dr K Levin (Speech Therapist); Ms BL Purchase (Educational Psychologist); Dr D Bizos (Gastroenterologist); Ms P Jackson (Physiotherapist); Dr BA Longano (Psychiatrist); Alison Crosbie Incorporated (Occupational Therapist); Mr H Grimsehl (Medical Orthotist and Prosthetist); Mr D Ceronio (Architect); Dr F van Wijk (Urologist); Dr L van der Merwe (Ophthalmologist); Mr L Linde (Industrial Psychologist); Dr D Pearce (Paediatric Neurologist); Mr D Rademeyer (Mobility Expert); Ms M du Plooy (Audiologist); Dr Botha (Life Expectancy Expert); M Schussler (Economist); and Algorithm Consultants CC – Actuary.

(ii) the qualifying, consultation, preparation and participation in joint expert meetings in respect of the quantification of the second plaintiff's claims in his representative capacity on behalf of the child for loss of earnings and general damages;

(iii) the costs in respect of the employment of counsel and appointment and employment of the curator *ad litem*.

(iv) in addition, the defendant shall pay to the second plaintiff an amount equivalent to 7.5% being the costs of creation and administration of the trust and based upon the total amount awarded in favour of the second plaintiff in his representative capacity on behalf of the child.

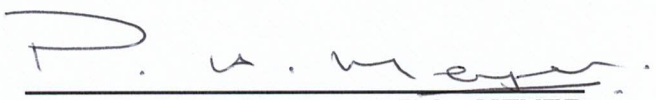
(j) Should the defendant fail to make payment of any of the amounts referred to in this order, interest will commence to accrue on the amounts payable from the due date at the applicable *mora* interest rate until date of final payment.

(k) The second plaintiff shall, in the event that the costs are not agreed, serve the notice of taxation on the defendant's attorneys of record.

(l) The second plaintiff shall allow the defendant 14 (fourteen) days to make

payment of the taxed costs.

(m) There is a valid contingency fees agreement in existence with the attorneys of record.



P.A. MEYER
JUDGE OF THE HIGH COURT

Heard:	19-20 August 2020
Judgment:	4 November 2020
Plaintiffs' counsel:	Adv P Uys
Instructed by:	Edeling Van Niekerk Inc., Roodepoort
Defendant's counsel:	Adv DJ Joubert SC
Instructed by:	State Attorney, Johannesburg