IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NUMBER: 4917/2008

In the matter between:

L[...] R[...] **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

GABRIEL AJ

The Claim and Issues

1. The applicant lodged a claim against the defendant arising from injuries he sustained on 12 June 2005. At that time the plaintiff was 11 and a half years old. By the time the matter came to trial, the plaintiff had turned 29: approximately 18 years had elapsed since the injury to the plaintiff.

2. This matter was first set down for three days from 24-26 April 2023. When the matter was called before me, it became apparent that the issues between the parties were limited.

3. The Road Accident Fund ("Fund") conceded liability on an apportionment of 80:20 percent in favour of the plaintiff. I learnt subsequently that general damages had been agreed upon and settled between the parties. Further, on

23 February 2023, the Fund agreed to make an interim payment of R1.6 million to the plaintiff, subject to its own conditions. With regard to past medical expenses, the plaintiff submitted its vouched claim, in the amount of R358 145.82 to the Fund but the Fund had not by then confirmed whether it admitted that claim.

4. Further, counsel for the parties informed me that the respective experts, the occupational therapists and industrial psychologists on behalf of each party, had met and had recently signed a joint minute stipulating their agreed assumptions and opinions. That bundles was handed up to me and marked exhibit “A”.

5. The Fund sought condonation for the late filing of its expert reports of Pratibha Bhagwan an occupational therapist and that of Dr Zandile Madlabana-Luthuli an industrial psychologist. By the end of argument, counsel for the Plaintiff indicated that the application for condonation was not opposed, save that the issue was relevant for the purposes of the punitive costs order sought by the Plaintiff.

6. The joint minute agreed to by the parties' occupational therapists on 22 April 2023, reflected that they had had regard to the medical records from Netcare Umhlanga Hospital, and to extensive medico-legal reports compiled by a range of professionals which included an orthopaedic surgeon, neurosurgeon and two neuropsychologists obtained from the time of the accident to September 2014. In addition, Ms Sewraj, the occupational therapist for the plaintiff, also had regard to the medico-legal report compiled by industrial psychologist, Mr S Krishna dated 7 March 2023.[1]

7. The joint minute agreed by the parties' industrial psychologists was finalised on 23 April 2023. These professionals had also considered various medico-legal reports applicable to and compiled in respect of the plaintiff's claim from the Fund, as they related to his injuries arising from the accident.

8. I return to these reports later.

[1] Ms Sewraj had regard to the report of the industrial psychologist Ms S Krishna dated 7 March 2023, after the compilation of her report. The joint minute records that Ms Sewraj’s assessment and findings of her medico-legal report remained the same and is consistent with it.

9. Therefore, when the matter was called before me, the sole issues remaining for determination related to:

(a) the pre-accident contingency applicable to the calculation of the plaintiff's earnings, had the accident not occurred; and

(b) whether the plaintiff has any residual earning capacity (post-accident) and if so, the contingency applicable to this calculation.

10. I enquired from counsel for the defendant, why the matter had been set down for three days, given the broad areas of agreement between the parties' respective expert occupational therapists and industrial psychologists.

11. I was advised that there had been delays in the Fund securing reports from its experts but that these experts had nevertheless met that very weekend so that the joint minutes could be presented at the trial.

12. It then emerged that counsel and the attorney for the defendant had yet to receive instructions on whether the defendant agreed with the scenarios and assumptions identified by the experts in their respective joint minutes. This legal team also indicated that they were still awaiting instructions on the issue of contingencies and 'injured earnings.'

13. I was concerned about the 18-year delay in the resolution of the plaintiff's claim. I regarded that period of time as unusually long for anyone to wait to receive the benefit of what is essentially a social security scheme.

14. This is particularly so given that the Road Accident Fund operates as a social-security scheme, and it has been long established that:

> "The Act constitutes social-security legislation whose primary object has been described as 'to give the greatest possible protection . . . to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle'."[2]

[2] *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC).

15. If the Fund had not opposed the matter, then the matter may well have proceeded without opposition and I have no doubt that the matter would have been resolved long before the 18 years it took for the matter to come trial. Yet, the matter had been set down for three days and the Fund had still not provided instructions to its own legal team.

16. Notwithstanding the explanation that there had been delays in the Fund obtaining reports from the occupational therapist and the industrial psychologist engaged by it, those experts had made the effort to agree joint minutes between them during the course of the very weekend before the trial.

17. The effect of the areas of admission in these joint minutes was settled by the Supreme Court of Appeal in March 2018, that is, approximately five years before the trial was called before me:

> "… Since it is common for experts to agree on some matters and disagree on others, it is desirable, for efficient case management, that the experts should meet with a view to reaching sensible agreement on as much as possible so that the expert testimony can be confined to matters truly in dispute. Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (ie fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue."[3]

18. I issued an Order on 24 April 2023 directing the defendant to provide instructions to its legal team by 14h30 on that day, and I instructed the legal team for the defendant to explain the consequences to the Fund of it not complying with such order. In doing so, I noted that there had already been:

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[3] *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) at paragraph 66. *See also* the comments at paragraph 67 to the effect that "…[T]he object should be just adjudication, achieved as efficiently and inexpensively as reasonably possible. Private funds and stretched judicial resources should only be expended on genuine issues."

(a) a plethora of medico-legal reports obtained by the parties during the ensuing 18 years; and

(b) two orders issued by the court during February 2023 and March 2023 obliging the Fund to take steps to facilitate the resolution of the plaintiff's claim.

19. Miraculously, when the matter resumed at 14h30 on 24 April 2023, counsel for the defendant informed me that they had received instructions from the Fund. Counsel for the defendant placed on record that her instructions were to accept the findings made by the experts in the joint minute and to accept the assumptions reflected therein (exhibit “A”).

20. I was then provided with three volumes, to be used during the course of trial, handed to me by the Plaintiff. Although those volumes made reference to actuarial calculations for the plaintiff and for the defendant, those calculations had not been included at that time. These were subsequently provided to me.

21. The mother of the plaintiff, S[...] R[...] was the only witness called at trial.

22. Mrs R[...] testified generally about the family, the family's educational qualifications, the fact that her son's sister has done relatively well in her academic path and that, prior to the accident, her son was on track to passing his school examinations and moving onto post-school academic opportunities. In other words, Mrs R[...] testified that her son, L[...] R[...], was a normal young man prior to the accident when he was 11 and a half years old.

23. Mrs R[...] testified generally about the change in her son before and after the accident. Mrs R[...] testified that the only fully functional limb that her son has at present is his right hand. Most of his other limbs had to have pins inserted into them. Mrs R[...] testified that the pins which remain cause her son great pain, particularly during cold weather.

24. L[...] R[...] has difficulty using his prosthesis and this causes blisters when her son uses it, making it uncomfortable. Even with crutches, her son has fallen and broken his nose twice. Mrs R[...] testified that her son spends

most of his time in a wheelchair at home.

25. Mrs R[...] explained that her son has become moody, depressed, he has failed at school and in his further attempts at obtaining academic qualifications. L[...] R[...] leads a solitary existence, apart from his family and he has no friends.

26. Mrs R[...] testified that her son has not sought employment in the open market. Her evidence was that his depressed state makes this impossible, his physical limitations, limited concentration levels and his levels of pain would make it very difficult, if not impossible, for him to secure employment in the open market.

27. The family has tried to give their son some reason to feel valued, by asking him to do various administrative tasks in his father's diesel mechanic business. Mrs R[...] testified that her son is barely able to cope with these basic administrative tasks, loses interest quickly and is unable to concentrate. When this happens, he gives up and goes home.

28. Mrs R[...] also testified that she started giving her son a monthly allowance of between R5,000 to R7,000 per month, from her funds, so that he is able to feel that he is 'earning' something for the tasks in the family business. She explained that she also wants her son to make his own decisions about spending that money for his needs and to encourage him to feel a sense of independence.

29. Mrs R[...] explained that the family's diesel mechanic business is the only means of income for the family. She and her husband are six years away from retiring. When they retire, L[...] R[...] will be unemployable on the open market.

30. In cross-examination, Mrs R[...] agreed that her son's lacerations on his head had healed and that he had not required an operation for his head injuries.

31. It was put to Mrs R[...] that more effort could have been made by the family to secure earlier psychological assistance for L[...] R[...], which would have prevented or at least reduced the extent of her son's psychological

deterioration.[4] Mrs R[...] explained that the family had sought therapeutic assistance for their son but that they had no money for that treatment beyond a year.

32. In cross-examination, Mrs R[...] accepted that the Fund had made an interim payment and had given an undertaking to pay medical expenses. In respect of the interim payment, she testified that this money had been used for her son's immediate medical needs.

33. In re-examination Mrs R[...] explained that the undertaking by the Fund to pay proved medical expenses had only been made in 2016, some 11 years after her son's accident. She explained further that an interim payment received by the Fund had been used to meet her son's immediate medical needs, such as obtaining the prosthesis and removing the pins in his limbs.

34. Mrs R[...] testified that prior to the undertaking and interim payment from the Fund, the family paid for L[...]'s medical expenses and that they had little money leftover for any further treatment for him.

35. In my view, Mrs R[...] was a clear, genuine and credible witness. Her evidence and the manner in which she delivered it, conveyed not only her anguish but also her quiet resignation as a mother, who had done all she and the family possibly could have done to assist their son, with the limited resources at their disposal and despite the belated assistance from the Fund. I have no difficulty in accepting her evidence in all respects.

Further Hearings and Argument

36. After evidence in the trial had been led, I called for further argument and submissions from the parties on the issue of "gratuitous payments" or "benevolent earnings." This arose from my research into matter and arising from the treatment of these concepts in the cases which follow. I asked counsel for further submissions with respect to these concepts and their treatment in those decisions. I also asked counsel for further information

[4] No evidence of this nature was led by the Fund, nor did any of the joint minutes point to any concrete steps which could have been taken in this regard and what the possible outcome of those further steps might have been with respect to L[...] R[...]'sdepressed psychological condition.

including a chronology of the litigation steps that had been taken in the matter since the claim had first been instituted in court.

37. Counsel provided me with their further written submissions and the further information requested. A further hearing was held on 4 May 2023 for counsel to argue these additional matters. I am grateful to counsel for their further assistance in this regard.

38. After hearing argument on this issue, I advised the parties of my decision in respect of the disputed contingency issues. In my view, the plaintiff has no residual earning capacity so the issue of contingencies does not arise. In respect of the calculation based on past loss of earnings, I considered that a 5% contingency deduction pre-accident and 15% contingency deduction post-accident were appropriate in and fair with respect to the plaintiff. I asked counsel to have their actuaries determine the final amounts based on these figures and to provide those and their final draft orders to me thereafter.

39. Those calculations and a draft order were provided to me on 22 May 2023.

40. I came to my decision on the following bases.

Occupational Therapists Joint Minute

41. The joint minute by the occupational therapists reflects their agreement that the plaintiff sustained the following injuries as a result of the accident:

(a) a fracture to his left humerus;

(b) a right tibia/fibula fracture;

(c) a traumatic amputation of the right foot;

(d) a fracture to the left tibia/fibula; and

(e) a mild head injury.

42. The occupational therapists agree that the plaintiff has "serious mobility

challenges," as a result of various injuries to his limbs his balance is compromised, he suffers phantom limb pain, there is significant muscle atrophy at the right thigh and knee and that he has "mood, volitional and self-esteem disturbances."[5] In the result, they agree that the plaintiff's "overall physical work capacity will now be significantly impacted."

43. The occupational therapists agree that the plaintiff's "neurocognitive deficits" limited the plaintiff's ability to continue his academic or learning career and that he will fall into the "unskilled category," he will require sedentary work but his ability to secure that work "will be significantly difficult" as he does not have the necessary "work knowledge and skill."

44. The joint minute records that the plaintiff's "neurocognitive deficits will hamper his ability to cope with this type of work."

45. Both occupational therapists agree that the plaintiff's "only occupational experience is positioned as an administrator on an ad hoc basis at his father's company in a sympathetic/compassionate capacity" and they "agree that [the plaintiff] is only suited to sympathetic employment with the necessary supervision and preferably in this current environment."

46. From an analysis of this minute, the evidence of the plaintiff's mother and on a conspectus of the evidence as a whole, I have no difficulty concluding that the plaintiff is unemployable, other than in his present sympathetic and ad hoc employment at his father's diesel mechanic business.

47. My conclusion is fortified by the joint minute filed by the parties' industrial psychologists.

Joint Minute of Industrial Psychologists

48. This minute is dated 23 April 2023.

49. These experts considered the previous medical reports prepared in the matter.

[5] These are set out in the respective minute dated 22 April 2023, in greater detail than I have summarised in this judgment.

50. As with the minute of the occupational therapists, I summarise only the essential features of that minute and their conclusions.

51. On the plaintiff's pre-accident earning potential, the industrial psychologists recorded their areas of agreement as follows.

52. The industrial psychologists agree that "had the accident not occurred, the claimant had the potential to pass matric and enrol for tertiary studies towards a Diploma level study."

53. The industrial psychologists agree in the formulae applicable to plaintiff's earning potential in the uninjured state.[6]

54. On the post-accident scenarios, the industrial psychologists agree that after the accident, the plaintiff's academic progress declined and that he failed Grade 10, which he passed on the second attempt. The plaintiff failed Grade 11 and then left school.

55. Although the plaintiff enrolled for further studies, the N2 in Electrical Engineering, he failed all his modules and discontinued this course of study.

56. They agree that it is unlikely that the plaintiff would have passed Grade 12 and that his physical disabilities would restrict his vocational options.

57. In so far as the plaintiff's further earning capacity is concerned, the industrial psychologists record their view that the plaintiff's "vocational ability is significantly jeopardised:"

> "Realistically, L[...] is 29 years old with no work skills and he would have to compete with other able-bodied persons and hence he would have difficulty finding a sympathetic employer … Furthermore, should he not find suitable employment within a sympathetic environment,

[6] Set out at paragraph 2, page 8, where it is noted, *inter alia*, that the plaintiff would have entered the labour market at the Meridian Quartile as per Stats SA earnings at the level of education for persons with a Grade 12 level of education and with a Diploma in the formal sector at the early stage of his career. These industrial psychologists agree that there would have been straight line increases thereafter, with annual and inflationary increases until the normal retirement age of 65.

there is a greater chance that he could remain unemployed."

58. Following on this, those experts' view is:

> "We agree that the claimant may continue with his compassionate and ad hoc engagement as an administrator at his parent's business earning an allowance until his parents turns 65 and opt to retire and therefore the claimant's compassionate engagement will come to an end."

59. The industrial psychologists agree that once the plaintiff's parents retire (in six-years' time), "the claimant may remain unemployed thereafter."

60. The report goes on to present certain formulae with respect to such compassionate employment.

Conclusion on Post-Accident Earning Capacity

61. In my view, the evidence is overwhelmingly clear that the plaintiff has no future earning capacity.

62. I have no difficulty concluding on the evidence before me as a whole that the monthly allowance that the plaintiff presently receives is a gratuitous benefit which ought to be excluded from his claim against the Fund.

63. Similarly, I have no difficulty concluding that that the fact that the plaintiff is asked by his parents to perform administrative tasks at his father's business, arises more out of a sense of sympathy for their son and their parental need to give him a sense of worth and value in his adult life, rather than as a result of any actual value that the plaintiff brings to that business. I am of the view that this must be left out of his claim against the Fund.

64. I am supported in this conclusion by the clear principles which have emerged in this regard in:

(a) *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA), at paragraphs 100-104, read with the authorities cited in footnote 2; and

(b) the decisions in *Fulton v Road Accident Fund* 2012(3) SA 255 (GSJ) (Full Bench), at paragraph 59.[7]

65. It follows that I therefore agree with Counsel for the plaintiff (Mr Aboobaker SC) that the money that the plaintiff receives from his mother constitutes gratuitous payments and the limited administrative tasks performed in the family business constitute gratuitous or benevolent employment, which must be excluded from the calculation of the plaintiff's earning capacity and his claim against the Fund.

66. On this basis, I therefore have no difficulty rejecting the actuarial calculation presented to me by the Fund, on this issue. That actuarial calculation flowed from instructions from the Fund that the plaintiff has residual earning capacity, whereas I have found that he does not.

67. As to the actuarial calculation presented by the plaintiff, the parties are in agreement that a continency deduction of 5% ought to be applied to the pre-accident calculation of past loss of earnings and that such figure is generally consistent with previously decided cases.

68. Where the parties disagree is on the continency applicable in respect of the post-accident component of the past loss of earnings calculation.

69. I have had regard to the principles established by the appellate courts which guide my discretion in this matter. I have also had regard to comparable cases presented to me by both counsel, including the latest guideline reflected in the 2023 edition of Koch's *Quantum Yearbook.*

70. In my view, an appropriate contingency deduction on this aspect is 15%.

71. As noted, I advised counsel on 4 May 2022 to provide me the calculated figures based on the respective contingencies of 5% and 15% respectively with respect to the calculation of past earnings.

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[7] *See also* the decision in *Coughlan v Road Accident Fund* 2015 (4) SA 1 (CC), where the Constitutional Court held that child foster grants and child support grants must be excluded from loss of support claims which arise from the death of a breadwinner. This was upon the basis, *inter alia,* that "the purpose of the RAF is to give the greatest possible protection to claimants" (at paragraph 59).

72. That calculation was provided to me on 22 May 2023 and it is reflected in the Order at the end of this judgment.

Other matters

73. There remain the following additional issues.

74. I asked the parties to provide me with a chronology of the litigation steps in this matter from the time the claim was instituted in court. The plaintiff provided that chronology.

75. That chronology of events reveals the shocking extent of needless delays caused by the Fund. It seems to me that somewhere along the line the Fund may have forgotten that it exists to administer a social security scheme, which is funded by taxpayers. If the litigation chronology in this matter is anything to go by, then it would appear that the Fund believes that it is dispensing its own largesse, as opposed to serving the public through a publicly funded social security scheme.

76. Apart from this, the Fund appears to believe that it may routinely instruct counsel and legal practitioners to oppose matters without proper instructions.[8] This is a flagrant abuse of the court system and of court procedure. Taxpayers' pay for the functioning of the courts and wasting time in court constitutes a waste of taxpayers' money. The public is therefore bearing a double burden because of the apparent ineptitude of the Fund.

77. If I am correct in this assessment, then the Fund has failed its social assistance mandate, at least in so far as L[...] R[...] is concerned. And, this is leaving aside for a moment the avalanche of decided cases from courts in this country, which collectively depict a Fund which is consistent in only one respect it seems, that is, to obstruct, retard and fail to render its social assistance mandate. The Fund is subject to the values in our Constitution, which require that it perform its public assistance functions openly,

[8] I know so, because I had several such matters on my roll during the court of my stint as an Acting Judge. Young, inexperienced junior counsel were sent to court without instructions from the Fund. This places an impossible burden on those legal practitioners who are officers of the court. In most of these matters I had to issue Orders directing the Fund to provide instructions to their legal teams. There are many decisions deploring this conduct by the RAF elsewhere in the country.

transparently and diligently.[9]

78. Nevertheless, on the facts and the chronology presented in this case, I am satisfied that the applicant ought not to be deprived of the costs that he and his family have had to incur in this litigation. I therefore intend to make an award in favour of the applicant with attorney client costs, as is set out in the Order at the end of this judgment.

79. The Act makes provision for payment of these claims to be made within a period of 14 days. Nevertheless, the Fund has had notice of the terms of my proposed order from 4 May 2023 and there can be no prejudice to it if it is kept to this statutory payment standard but relaxed upon the payment terms required by the Plaintiff and on the dates set out in the Order at the end of this judgment.

80. The Order I make is therefore based on the final draft Order submitted to me by the parties, on 22 May 2023.

Accordingly, **I grant the following Order**:

1. Judgment is granted in favour of the Plaintiff in the sum of R5 357 018.44.

2. Interest is payable on the aforesaid sum at the rate of 11.25% per annum upon any sum unpaid upon the expiry of a period of fourteen (14) days from the date of this judgment.

3. The aforesaid sum of R5 357 018.44 shall be paid in three instalments (including interest) the first payment to be made within 14 days of the date of this Judgment, and thereafter on the corresponding day of the next two months.

4. All amounts payable under this order shall be paid directly into the account of the Plaintiff's Attorneys the details of which are set out below:

[9] It need only remind itself of the founding values in section 1 of the Constitution, the principles binding organs of state to the Bill of Rights and the general standards applicable to the public administration in section 195 of the Constitution.

Account Name: PG Naidoo & Associates Incorporated
Account No: 2[...]
Branch code: 0[...] (Overport City Branch)
Bank: Standard Bank

5. It is recorded that the Defendant has delivered to the Plaintiff an Undertaking in terms of Section 17 (4) (1) (a) of the Road Accident Fund Act, 1996, for the payment of all costs of the Plaintiff's future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff resulting from the injuries sustained by him in a motor vehicle accident on the 12 June 2005, after such costs have been incurred and upon proof thereof. The undertaking shall be limited to 80% of such costs.

6. It is recorded that the issue of the quantum of past medical expenses has not yet been resolved and will be determined at a separate hearing if not agreed between the parties.

7. The Defendant is ordered to pay the costs of this action including costs to date and reserved costs (if any) on the attorney and client scale such costs to include:

7.1 the costs attendant upon the obtaining of the payment of the amounts referred to in paragraph 1;

7.2 the costs consequent upon the employment of Senior Counsel such costs to include the costs of preparation limited to 3 days;

7.3 the costs of Senior Counsel for preparation and attendance at the pretrial conference;

7.4 the costs of obtaining the medico-legal reports (and supplementary reports, if any) provided to the Defendant and where applicable the reasonable preparation, qualifying, reservation, joint minutes, and appearance fees of the following experts as indicated below:

a) Dr G Govender – Neurosurgeon; (report only)

b) Nirvernie Elder & Associates – Neuropsychologist; (report only)

c) Prof Theophuilus Lazarus – Clinical Psychologist; (report only)

d) Huda Ebrahim – Speech and Language Therapist; (report only)

e) Dr Niel van Eeden Inc – Orthopaedic Surgeon; (report only)

f) Brenda Talbot – Educational Psychologist; (report only)

g) Rob McCann – Industrial Psychologist; (report only)

h) Areshnie Sewraj – Occupational Therapist (preparation and qualifying fees);

i) Sashini Krishna – Industrial Psychologist (attendance fee on 24 April 2023, preparation, qualifying and appearance fees); and

j) ARCH Actuarial Consultants (actuarial reports only).

7.5 the costs of the said experts and the Plaintiff's legal representatives (attorney and counsel) for consultation between the experts and the said representatives;

7.6 the costs of perusal by the Plaintiff of the Defendant's medico-legal reports and any addendum thereto and the joint minutes of the following experts where applicable:

a) Collen Kisten – Occupational Therapist;

b) Gideon De Kock – Industrial Psychologist;

c) Pratibha Bhagwan – Occupational Therapist; and

d) Dr Zandile Madlabana – Industrial Psychologist.

7.7 The costs of preparing the summaries of the reports of each of the experts as required by the Practice Directive.

8. The Plaintiff is directed, in the event of agreement not being reached on the questions of costs:

a) to serve the Notice of Taxation on the Defendant; and

b) to allow the Defendant thirty (30) days to make payment of the taxed costs.

10. The Defendant is directed to pay interest on the taxed costs referred to in paragraph 7 hereof at the rate of 11.25% per annum calculated from the date of allocatur to date of payment.

(CIRCULATED ELECTRONICALLY TO THE PARTIES AS AGREED)

Gabriel AJ

30 June 2023

CASE INFORMATION:

DATE OF HEARINGS: **23-24 April 2023**

4 May 2023

(final Orders received on 22 May 2023)

DATE OF JUDGMENT: **30 JUNE 2023**

FOR PLAINTIFF: Mr T Aboobaker SC

Instructed by:

PG Naidoo and Associates
REF: NM/rg/HC1162

FOR DEFENDANT: Ms K Bheemchund

Instructed by:

State Attorney, KZN
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