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

Case No: 8389/2011

In the matter between:

DUMISANI PETROS XULU **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

Date of set down: 30 November 2021

Date delivered: 21 December 2021

This judgment will be delivered electronically by circulation to the parties' legal representatives by email publication. The date and time for hand-down is deemed to be 09h30 on 21 December 2021.

ORDER

The following order is granted:

Part A

1. It is declared that the plaintiff acts in a representative capacity as the uncle of Mr Andile Xulu, an adult male born on 22 December 1997 (the patient), and not in his personal capacity and has no personal claim to the award made by this court in respect of the injuries suffered by the patient.

2. The defendant is ordered to make payment of the sum of R9 384 383,95, directly into the plaintiff's attorney's trust account.

3. The defendant is directed to pay interest on the amount of R9 384 383,95 at the rate of 7 % per annum, from 14 days of the date of this judgment to the date of final payment.

4. The defendant is directed to provide an undertaking in terms of section 17(4)*(a)* of the Road Accident Fund Act 56 of 1996 in respect of the patient's future medical costs.

5. The defendant is directed to make payment of the plaintiff's taxed or agreed party and party costs on the high court scale. These costs shall include, but are not limited to:

5.1 the costs of two counsel, including their costs of preparation for the hearing of the matter, as well as the costs of the plaintiff's counsel and attorney consequent upon them attending upon any consultations with the under mentioned expert witnesses, in preparation for the hearing of this matter;

5.2 the fees and expenses incurred by the following witnesses (with the quantum of their fees to be determined by the taxing master) for, inter alia, the preparation of their reports and any supplementary reports, joint minutes and the RAF forms (where applicable), as well as the experts' qualifying fees, and their fees for attending upon necessary consultations with the plaintiff's counsel and attorney to enable them to testify at the trial to give evidence:

5.2.1 Dr S Nadvi - Neurosurgeon;

5.2.2 Ms Zethu Gumede - Educational Psychologist;

5.2.3 Dr D Bhagwan - Neurologist;

5.2.4 Ms Nicole Boreham - Occupational Therapist;

5.2.5 Prof T Lazarus - Neuropsychologist;

5.2.6 Ms Busi Pepu - Industrial Psychologist;

5.2.7 Ms Nicola Portela - Biokineticist;

5.2.8 Koch Consulting - Actuary (reports only).

5.3 the attendance costs of Ms Busi Pepu for trial on 29 and 30 November 2021.

6. The plaintiff:

6.1 in the event that the costs are not agreed upon, is ordered to serve a notice of taxation on the defendant's attorney of record; and

6.2 allow the defendant 14 court days to make payment of the taxed costs.

7. The defendant is directed to pay the aforesaid amount into the plaintiff's attorney's trust account, with details as follows:

Diedricks Attorneys Inc

Bank:	Standard Bank
Trust Account No.:	271757531
Branch Code:	057525
Ref:	1X0501

Part B

8. Advocate Ranjiv Nirghin is hereby appointed as *curator ad litem* to the patient, in order to consider the appointment of a *curator bonis* to the patient.

9. The *curator ad litem* is directed to report in writing to this court within 21 days of the granting of this order, on the desirability or otherwise of the appointment of a *curator bonis* to the patient.

10. The application for the appointment of a *curator bonis* is adjourned *sine die,* and the plaintiff is granted leave to supplement his papers insofar as might be necessary upon the receipt of the *curator ad litem's* report.

11. The costs of the application for the appointment of a *curator bonis*, including the fees of the *curator ad litem*, are reserved for the decision of the court hearing the application for appointment of the *curator bonis*.

JUDGMENT

MOSSOP AJ:

[1] On 1 March 2009, near Dambuza Road, Pietermaritzburg, a collision occurred between a motor vehicle bearing registration letters and numbers NP157398 and a minor child named Andile Xulu (the patient). The patient was a pedestrian at the time of the collision and was 11 years old. The patient was standing next to a bakkie when he was struck by a passing taxi. He suffered a serious head injury, the precise details of which will be considered more fully later in this judgment. The patient was taken by taxi to Edendale Hospital, then transferred by ambulance to Grey's Hospital and then transferred to Inkosi Albert Luthuli Central Hospital in Durban for treatment.

[2] In due course, the patient's mother and guardian, Ms Sindiswe Rosemary Xulu, lodged a claim with the defendant and thereafter instituted an action against the defendant, in which she claimed as plaintiff, on the patient's behalf, the following amounts in respect of the following heads of damages:

(a) general damages in the amount of R1,7 million;

(b) estimated future medical expenses in the amount of R100 000; and

(c) estimated future loss of earnings in the amount of R9 414 972.

[3] After the trial, but before this judgment was delivered, the plaintiff delivered his amended pages arising out of an amendment to his particulars of claim. The amendment was not opposed and the amended pages were delivered with the defendant's consent. The effect of the amendment was to increase the patient's estimated future loss of earnings to the amount of R14 894 675, based upon the assumption that he would have succeeded in obtaining a degree had the injury not been sustained. The amendment arose out of an undisputed updated actuarial report relied upon by the plaintiff.

[4] As the matter inched its way towards trial readiness, the patient's mother regrettably passed away. Neither of the parties can provide a coherent explanation of how the present plaintiff, Mr Dumisani Petros Xulu, came to hold that position in her stead. There appears to be no documentation establishing that a substitution of plaintiff occurred, no one has any recollection of it having formally occurred and there is no record of it having occurred. This is, perhaps, one of the inevitable consequences of litigation taking an unnaturally long time to reach the stage when it is capable of being placed before a court for determination. That notwithstanding, the parties agree that the present plaintiff is the patient's uncle. No issue has been taken by the defendant regarding his *locus standi* in the matter. The patient is clearly no longer a minor but by virtue of the fact that he has suffered a significant brain injury which has resulted in life changing consequences for him, it appears to be accepted by both parties that he lacks the ability to conduct these proceedings on his own and requires assistance. However, the pleadings that reflect Mr Dumisani Petros Xulu as the plaintiff make no mention of him acting in a representative capacity. He is cited in his personal capacity. He personally has no claim to the money that is to be awarded for the injuries suffered by the patient. I accordingly deem it prudent to clarify this fact in the order that is to follow.

[5] The parties agreed to a separation of the issues and before I received the trial, the defendant conceded the merits of the claim. In addition, the defendant tendered a certificate in terms of section 17(4)*(a)* of the Road Accident Fund Act 56 of 1996 (the Act) in respect of the patient's future medical expenses.

[6] At trial, the plaintiff was represented by Ms Rasool and Ms Nursoo, and the defendant was represented by Mr Mkokeli. The plaintiff's counsel are thanked for the effort that they put into the matter.

[7] Both parties appointed experts and those experts, as they are required to do, produced joint minutes relating to their areas of expertise. Joint minutes were prepared in respect of the following expert witnesses:

(a) Ms B Pepu, for the plaintiff, and Ms L Hopkins, for the defendant, who are both industrial psychologists. A supplementary minute by these two experts was proposed by the plaintiff, but as will be explained later, was never agreed to by the defendant;
(b) Ms N Boreham, for the plaintiff, and Ms D Stirton, for the defendant, who are both occupational therapists;
(c) Dr S Nadvi, for the plaintiff, and Dr M Du Trevou, for the defendant, who are both neurosurgeons; and
(d) Professor T Lazarus, for the plaintiff, and Dr B Bosch, for the defendant, who are both neuropsychologists.
In some instances, supplementary joint minutes were also prepared.

[8] In addition, thereto, the defendant, in writing, admitted the plaintiff's expert reports authored by:
(a) Ms Zethu Gumede, an educational psychologist;
(b) Ms Nicola Portela, a biokineticist;
(c) Mr Michael Denton, a physiotherapist; and
(d) Dr S. Bhagwan, a neurologist.

[9] As mentioned, a supplementary minute was proposed and prepared by the plaintiff's industrial psychologist, Ms Pepu. It was not, however, signed by Ms Hopkins, who was instructed by the defendant. At the time that the supplementary joint minute was proposed, Ms Hopkins had left the country and was not available to evaluate the new evidence, nor was she able to sign it. The plaintiff's legal representatives thus found it prudent to lead the evidence of Ms Pepu at the trial. Indeed, her evidence was the only *viva voce* evidence led at the trial.

[10] It is perhaps necessary at this juncture to question why this matter had to come to trial. No formal offer was made by the defendant until the last minute and I was advised by Ms Rasool for the plaintiff that it was made on an incorrect premise: having conceded liability at 100 percent, an offer based on 90 percent liability was made. There is no explanation for this other than an inattention to the details of the matter by the defendant. Most of the expert witnesses shared the same views about the patient,

his past achievements and his future prospects. On the score of future loss of earnings, no challenge was directed by the defendant at the actuarial report delivered on behalf of the plaintiff. When oral evidence was led, the only witness called, Ms Pepu, was asked four questions by Mr Mkokeli, none of which were relevant. The only issue that appeared to be genuinely contested was the quantum of general damages. In that regard, the gap between the parties was not unbreachable and could have been bridged without too much difficulty. The matter ought to have been resolved far earlier and at less cost.

[11] In support of the claim, the plaintiff's legal representatives prepared a series of affidavits, which were handed in by consent, in which the relatives of the patient were identified, and their levels of education described. These documents were referred to as the patient's 'family tree' and were submitted to allow the court to consider the likelihood of the patient having embarked upon some form of tertiary education, principally the likelihood of the patient having obtained a degree had he not suffered the injuries that he did.

[12] It seems to me that the issues that require determination are:

(a) whether the patient is presently employable or has been rendered permanently unemployable;

(b) what the patient's prospects were had the injury not been sustained;

(c) what the quantum of general damages should be; and

(d) what the patient's future loss of earnings are.

I shall consider each of these issues sequentially.

[13] Is the patient permanently unemployable? The two neurosurgeons who examined the patient agreed that he suffered a very severe and traumatic brain injury. When the patient arrived at the hospital after the collision, he was in a coma. His Glasgow Coma Score[1] then deteriorated from 7/15 to 3/15, the lowest possible score. There was radiological evidence of a large extradural haematoma. He underwent an

[1] The Glasgow Coma Scale (GCS) is used to objectively describe the extent of impaired consciousness in all types of acute medical and trauma patients. The scale assesses patients according to three aspects of responsiveness: eye-opening, motor, and verbal responses.

emergency craniotomy on the left side with evacuation of the acute extradural haematoma. During this surgery it was also discovered that he had a thin subdural haematoma. He thereafter endured a prolonged period of altered levels of consciousness and his recovery, and his injuries, were complicated by the development of hydrocephalus, meningitis and pneumonia. In addition, he apparently suffered an episode of hypoxia when his endotracheal tube became blocked. Both neurosurgeons agreed that it would be 'inevitable' that the patient would be found to be severely impaired by a neuropsychologist. The patient's abnormalities were to be regarded as permanent and they would impact upon his educational and vocational prospects. Both neurosurgeons agreed that the patient would be found to be unemployable in the open labour market. On the question of epilepsy, both concluded that it could be discounted given the passage of time from the occurrence of the injury. Except for the treatment of the patient's headaches, further neurosurgical expenses were not anticipated.

[14] The predictions by the neurosurgeons about the unemployability of the patient were subsequently found to be correct. All the experts, save for Ms Hopkins and the defendant's occupational therapist, are now agreed that the patient is unemployable. However, the neurosurgeons' prediction concerning the likelihood of the patient developing epilepsy was not correct. It appears that the patient began experiencing epileptic seizures shortly before the trial commenced.

[15] The occupational therapists instructed by the parties diverged as to what the consequences of the injuries suffered by the patient would be: the occupational therapist for the plaintiff, Ms Boreham, held that he would not be able to secure or hold down a job, whereas the occupational therapist for the defendant, Ms Stirton, believed that the patient would be limited to low spectrum unskilled employment that is basic and repetitive in nature, and which is performed under supervision, which she conceded would be difficult to find. She accordingly concluded that the patient would spend a large portion of his working years unemployed, and a much higher unemployment contingency should be applied in the post morbid scenario. However,

it does not appear that she has had the opportunity to consider the consequences of the patient's recent epilepsy.

[16] After being apprised of the development of the patient's epilepsy, the two neuropsychologists employed by the respective parties, Professor Lazarus and Dr Bosch, delivered a supplementary joint minute in which they agreed that the post traumatic seizures the patient now experiences, together with the deficits set out in their initial reports, precluded the patient from participation in the open labour market and that he was thus to be considered as being unemployable. In their reports, they found that the patient suffered from declined intellectual functioning with impairments in complex visual and verbal attention and in his learning and memory. The patient also displayed certain behavioural disturbances. He underwent a personality change due to the nature of the severe traumatic brain injury that he sustained. The cognitive and behavioural deficits that he retains are permanent.

[17] It appears that the patient has made a good physical recovery. However, the other sequelae occasioned by the trauma he suffered has left him in an unenviable condition. Dr Bosch, for the defendant, describes the patient's deficits as extending to his cognitive, emotional and intellectual functioning, all of which are consistent with brain injury. After considering the reports and joint minutes of the respective experts, and particularly in the light of the findings of the defendant's witnesses Dr du Trevou and Dr Bosch, who both believe the patient to be unemployable, I find that on a balance of probabilities the patient is unemployable and will not be able to find or hold down a job because of the injuries that he suffered.

[18] As regards the patient's premorbid career prospects, this is rendered difficult to assess because of the patient's young age at the time of the collision. At the time of the collision, he had not laid down much of a track record that could be used to predict his future career prospects. In the joint minute of the two industrial psychologists that they did sign, Ms Pepu, for the plaintiff, suggested two possible scenarios premorbidly, namely promotion with a diploma certificate and promotion with a degree. The plaintiff suggests that the patient could have obtained a degree given the achievements of

those family members mentioned in his 'family tree'. On the other hand, the defendant's industrial psychologist, Ms Hopkins, indicates in the joint minute that she was informed that the patient had, in fact, failed grade 4 in 2006. This would, obviously, impact on his prospects of achieving some form of tertiary education. The plaintiff's occupational therapist, Ms Boreham, also mentioned this fact in her primary report. Ms Pepu makes no reference to the patient failing grade 4. Ms Rasool, for the plaintiff, argued that the patient could not have failed any grade. The basis for this submission was that at the time that the patient suffered the injury he was 11 and in grade 6. This was not disputed. Had he failed a year, he could not have been in grade 6 – he would have had to be in a lower grade. I cannot fault the logic of Ms Rasool's submission, and I am inclined to accept her argument as being correct in the circumstances.

[19] There is agreement between the two industrial psychologists that after the patient had recovered from his injuries, he returned to school after sustaining the injuries with poor outcomes: he failed grade 8 once, failed grade 9 twice and he failed grade 12 in 2018, whereupon he left school.

[20] In the joint minute that they did sign, both Ms Pepu and Ms Hopkins are ad idem that had the patient chosen to study after leaving school and had he not sustained the injury that he did, and had the opportunities to do so existed, he may have pursued tertiary studies from 2017 to 2019, after having matriculated in 2016. Neither of them expressed an opinion on whether it was more likely that the patient would have studied for a diploma or a degree. However, Ms Gumede, an industrial psychologist instructed by the plaintiff, sheds some light on this aspect. Her assessment of the patient's premorbid school functioning, which is unchallenged, is that he fell within the average range of intelligence. She speculates that he could have progressed through the mainstream school system, matriculated, and then proceeded to obtain a tertiary qualification in the form of a three-year diploma.

[21] In a supplementary report, Ms Pepu appears to revise what she stated in her initial report. In her evidence, she explained that she had revised her position because she had received details of the 'family tree'. She now made a holistic appraisal of the

patient and his immediate and extended family. That having been done, she now believed that the patient would have acquired a degree and not a diploma had he not suffered the injuries that he did. There was no evidence led by the defendant in rebuttal of Ms Pepu's oral evidence. Notwithstanding that fact, there are no reports by any expert, other than by Ms Pepu, that suggests that the patient could have obtained a degree.

[22] The patient's 'family tree' to which Ms Pepu referred in her evidence, and the content of some of the reports of some of the experts, helps to construct a tapestry of the patient's extended family and their educational achievements. It emerges that the patient's mother left school in grade 10 when she fell pregnant. She never pursued any form of study thereafter. The patient's father, now deceased, achieved a standard ten level of education and at one stage was employed as a driver. The patient's sister, Nontobeko, however, has applied to the Walter Sisulu University for admission in 2022 to study teaching. The result of that application is not known. Ms Gumede, the plaintiff's educational psychologist, reported that the patient's maternal grandfather worked as a driver and that he and his wife had six children and none of those children acquired any form of tertiary education. The plaintiff, the patient's maternal uncle, has stated under oath that he has six children. One of them has a teacher's diploma and one is studying towards a diploma in information technology. Another is apparently enrolled for a Bachelor of Science degree. A brother of the plaintiff, Sehla Xulu, had one child who studied for a nursing diploma. A sister, Makhosi had three children, one of whom obtained a teaching diploma and one of whom is studying at an FET college. A sibling of the plaintiff, Mduduzi Xulu, has a child that is studying towards a law degree.

[23] The 'family tree' would tend to show that this is an extended family that has recognised the value and importance of education. But it is equally evident that studying towards a university degree is the exception, and not the norm. Most of the progeny of the patient's uncles and aunts, if they studied further after school, tended to enrol for diplomas.

[24] I was presented with an actuarial calculation which considered two scenarios: one scenario was based upon the assumption that the patient would have embarked upon tertiary education that would have allowed him to achieve a diploma and the other scenario was based upon the proposition that he would have obtained a degree. Had he been uninjured, I am advised by the actuarial report that he could have earned an amount of R9 794 264 over the span of his working life had he acquired a diploma, and R14 894 675 had he obtained a degree. Ms Rasool, for the plaintiff, contends that the latter scenario is to be preferred. After a careful consideration of the expert reports, I am unpersuaded that this is probable. In my view, considering the patient's abilities, which were within the average range, and the educational achievements of his family, both immediate and extended, it seems to me more probable that he would have studied towards a diploma and not a degree. In so finding, I have considered Ms Pepu's view that South African children often obtain higher levels of education than their parents. Obtaining a diploma would accord with that proposition. I have also had due regard to the 'family tree', but that tends to demonstrate that the obtaining of a degree is an exception for this extended family.

[25] I now deal with the various heads of damages. I do not deal with the patient's future medical expenses by virtue of the defendant's tender of a certificate in terms of section 17(4)*(a)* of the Act.

[26] As regards general damages, it is trite that a court enjoys a wide discretion to award what it considers to be fair and adequate compensation to a party. Holmes J in *Pitt v Economic Insurance Company Ltd*[2] said in this regard that any award

'must be fair to both sides - it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense.'

Although there is a modern tendency to increase awards for general damages, the assessment of the *quantum* of general damages primarily remains within the discretion of the trial Court.

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[2] *Pitt v Economic Insurance Company Ltd* 1957 (3) SA 284 (D) 287E-F.

[27] Awards in comparable cases serve only as a guide in this regard, as no two cases can be exactly alike. In their respective heads of argument, the plaintiff has proposed an amount of R1,6 million for general damages and the defendant has proposed an amount of R1,3 million. The former amount is based upon a consideration of previous cases where largely comparable injuries to those sustained by the patient were also suffered. Ms Rasool referred me to several cases of comparable injuries in which the range of the award varied from R1,2 million to R2 million.[3] How the latter amount of R1,3 million proposed by the defendant is calculated is not clear. The authorities that Mr Mkokeli referred me to do not deal with comparable injuries suffered by the patient. All appear to relate to persons who, in addition to suffering a head injury, also suffered the loss of an eye or blindness in an eye, an injury that the patient did not sustain. They are not on point, as was ultimately acknowledged by Mr Mkokeli.

[28] At the time that he sustained his injuries, the patient was young. The injuries were severe and life changing. The nascent promise of his future was snuffed out in an instant and forever ruined. He underwent a life and personality altering experience, which was not pain free. Mr du Trevou, the defendant's neurosurgeon, estimates that the patient would have suffered a moderate degree of pain for approximately ten days to three weeks. He has also suffered, and continues to suffer, psychological pain according to Dr Bosch, the defendant's neuropsychologist, which includes conscious pain and suffering, mental anguish, and the awareness of poor function and of injury. According to her, the patient continues to suffer psychological distress given his probable reduced intellectual capacity, his self-image disturbance, his emotional, personality and behavioural changes, his reduced social functioning and his physical complaints, pain and fatiguability. Dr du Trevou also makes mention of the fact that the patient suffers from headaches when the weather is hot. Considering what he went through and is going through and the permanent deficits that he must now live with, I am persuaded after considering the authorities and the submissions of counsel, that the amount of R1,5 million is a fair and reasonable sum in respect of the patient's general damages.

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[3] *Torres v Road Accident Fund* 2010 (6A4) QOD 1 (GSJ); *Herbst v Road Accident Fund* 2010 (6A4) QOD 7 (GSJ); *M v Road Accident Fund* [2018] ZAGPJHC 438; *Stephenson, NO v General Accident Fire and Life Assurance Corporation Ltd* 1974 (4) SA 503 (RA).

[29] Turning to consider the vexed question of estimated future loss of earnings, in *Southern Insurance Association Ltd v Bailey NO*,[4] the following was said:

'Any enquiry into damages for loss of earning capacity is of its nature speculative . . . All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent.'

[30] To claim loss of earnings or earning capacity, a plaintiff must prove the physical disabilities that he suffered resulted in a loss of earnings or earning capacity and occasioned actual patrimonial loss.[5] This, in turn, will depend on the occupation that the plaintiff would probably have pursued if he had not been disabled.[6] In order to determine this, it is necessary to compare what the claimant would have earned 'but for' the incident with what he would likely have earned after the incident. The future loss represents the difference between the pre-morbid and post-morbid figures after the application of the appropriate contingencies.

[31] I have already found that the patient is unemployable and that it is probable that he would have acquired a three-year diploma.

[32] Contingencies must be applied to the loss of future income suffered by the patient. Contingencies are the normal consequences and circumstances of life, which afflict every human being and which directly affect the amount that a plaintiff would have earned.[7] The extent of the period over which a plaintiff's income must be established has a direct influence on the extent to which contingencies have to be accounted for. The longer the period, the higher the contingencies that must be

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[4] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113G-114A.
[5] *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA).
[6] *Union and National Insurance Co Ltd v Coetzee* 1970 (1) SA 295 (A) at 300A.
[7] *AA Mutual Insurance Association Ltd v Van Jaarsveld (1)* 1974 (2A2) QOD 360 (A) at 367.

applied.[8] The generally applied rate is a sliding scale of 0.5 percent per year over the period in which the applicable income must be calculated, as proposed by Robert J Koch in his work, *The Quantum Yearbook*. This approach was considered by the Supreme Court of Appeal in *Road Accident Fund v Guedes*.[9] Zulman JA approved of the approach proposed by Koch.

[33] When a court is called upon to exercise a discretion that is largely based on speculative facts, it must do so with the necessary caution and circumspection. As was said in *Mathaba v Road Accident Fund,*[10]

‘In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.’

[34] I am mindful of the fact that the patient’s claim covers his entire working life, the injury to him having occurred at a young age before he was able to enter the labour market. Many things can happen over such a long period of time that could not have been predicted or anticipated. Ms Rasool has proposed that a contingency of 5 percent be applied to past loss of income in the ‘but for’ scenario and a contingency of 20 percent be applied in respect of lost future income in that scenario. This appears to accord with the approach advocated by Koch. In my estimation, I consider that to be a fair measure of the contingencies to be applied in this matter. If this is applied to the figure in the plaintiff’s undisputed actuarial report that estimates the patient’s future earnings where he is possessed of a diploma, 5 percent would have to be deducted from the patient’s past loss of income of R326 485 and 20 percent would have to be deducted from the future loss of income of R9 467 779. The first calculation amounts to a deduction of R16 324,25 from R326 485, leaving the past loss of earnings at

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[8] *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392H-393G.
[9] *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) paras 9-10, and 17.
[10] *Mathaba v Road Accident Fund* [2015] ZAGPPHC 926 para 32.

R310 160,75. The second calculation amounts to a deduction of R 1 893 555,80 from R9 467 779, leaving the future loss of earnings at R7 574 223,20. The sum of the past and future loss of earnings is thus R7 884 383,95.

[35] By virtue of the fact that the patient is incapable of being employed, there is nothing to be deducted from the amount of R7 884 383,95, which is thus his loss of future earnings.

[36] To the aforesaid amount must be added the general damages in the amount of R1,5 million. The total damages are thus R9 384 383,95.

[37] It was common cause that any award made to the patient should be protected because of the nature and consequences of the injury that he sustained. An application to this effect was brought at trial and was not opposed by the defendant. I intend granting that order.

[38] Finally, the plaintiff has requested that I award costs consequent upon the employment by him of two counsel. The trial was of very limited duration, with only a single witnesses evidence being led. That may invite the conclusion that there was no important interest or principle at stake and that the factual and legal issues were not of such complexity as to warrant the engagement of two counsel. Such a conclusion would not be correct in my view. This matter is of considerable importance to the plaintiff and the patient.[11] The quantum claimed was in a substantial amount. That the defendant would have capitulated on the issue of liability and would have called no witnesses at trial on the issue of quantum could not have been certain when two counsel were instructed by the plaintiff's attorneys. There were a number of expert witnesses who could potentially have testified in the matter for the plaintiff and their evidence had to be ascertained and the opposing expert reports digested and understood. The court file, replete with the summaries of the experts, is voluminous.

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[11] *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) para 47.

In my view, the employment of two counsel by the plaintiff was a wise and sensible precaution.[12]

[39] I accordingly grant the following order:

Part A

1. It is declared that the plaintiff acts in a representative capacity as the uncle of Mr Andile Xulu, an adult male born on 22 December 1997 (the patient), and not in his personal capacity and has no personal claim to the award made by this court in respect of the injuries suffered by the patient.

2. The defendant is ordered to make payment of the sum of R9 384 383,95, directly into the plaintiff's attorney's trust account.

3. The defendant is directed to pay interest on the amount of R9 384 383,95 at the rate of 7 % per annum, from 14 days of the date of this judgment to the date of final payment.

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5. The defendant is directed to make payment of the plaintiff's taxed or agreed party and party costs on the high court scale. These costs shall include, but are not limited to:

5.1 the costs of two counsel, including their costs of preparation for the hearing of the matter, as well as the costs of the plaintiff's counsel and attorney consequent upon them attending upon any consultations with the under mentioned expert witnesses, in preparation for the hearing of this matter;

5.2 the fees and expenses incurred by the following witnesses (with the quantum

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[12] *Van Wyk v Rondalia* 1967 (1) SA 373 (T) 376G.

of their fees to be determined by the taxing master) for, inter alia, the preparation of their reports and any supplementary reports, joint minutes and the RAF forms (where applicable), as well as the experts' qualifying fees, and their fees for attending upon necessary consultations with the plaintiff's counsel and attorney to enable them to testify at the trial to give evidence:

5.2.1 Dr S Nadvi - Neurosurgeon;

5.2.2 Ms Zethu Gumede - Educational Psychologist;

5.2.3 Dr D Bhagwan - Neurologist;

5.2.4 Ms Nicole Boreham - Occupational Therapist;

5.2.5 Prof T Lazarus - Neuropsychologist;

5.2.6 Ms Busi Pepu - Industrial Psychologist;

5.2.7 Ms Nicola Portela - Biokineticist;

5.2.8 Koch Consulting - Actuary (reports only).

5.3 the attendance costs of Ms Busi Pepu for trial on 29 and 30 November 2021.

6. The plaintiff:

6.1 in the event that the costs are not agreed upon, is ordered to serve a notice of taxation on the defendant's attorney of record; and

6.2 allow the defendant 14 court days to make payment of the taxed costs.

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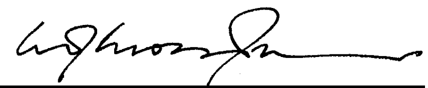
Part B

8. Advocate Ranjiv Nirghin is hereby appointed as *curator ad litem* to the patient, in order to consider the appointment of a *curator bonis* to the patient.

9. The *curator ad litem* is directed to report in writing to this court within 21 days of the granting of this order, on the desirability or otherwise of the appointment of a *curator bonis* to the patient.

10. The application for the appointment of a *curator bonis* is adjourned *sine die,* and the plaintiff is granted leave to supplement his papers insofar as might be necessary upon the receipt of the *curator ad litem's* report.

11. The costs of the application for the appointment of a *curator bonis*, including the fees of the *curator ad litem*, are reserved for the decision of the court hearing the application for appointment of the *curator bonis*.



MOSSOP AJ

APPEARANCES

Counsel for the applicant	:	Ms Z Rasool with Ms N Nursoo Instructed by: Diedericks Attorneys Inc. 78 Taunton Road Wembley Pietermaritzburg
Counsel for the respondent	:	Mr Mkokeli Instructed by: Road Accident Fund Embassy Building Anton Lembede Street Durban
Date of Hearing	:	30 November 2021
Date of Judgment	:	21 December 2021