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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: 1827/2013

In the matter between:

ADVOCATE PATRICK MaCKENZIE N.O.

(in his capacity as *Curator Ad Litem* to

Plaintiff

M[...] Y[...] B[...] ("Mr B[...]")

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is an action brought by a duly appointed *curator ad litem*, Advocate Patrick MaCkenzie (“the Plaintiff”) for compensation in terms of s 17(1) of the Road Accident Fund Act¹ for the loss or damage suffered by Mr M[...] Y[...] B[...] (“Mr B[...]”) as a result of bodily injuries which Mr B[...] suffered in a motor vehicle accident on 17 December 2008, when he was 16 years old. Mr B[...] was a pillion passenger on a motor cycle when it was struck by another vehicle.

[2] The issue of liability was conceded. The matter was partially settled at a previous hearing on 3 November 2021, in respect of general damages as well as an interim payment in respect of loss of earning. The remaining issues for determination included the claim for the balance of Mr B[...]’s past and future loss of earnings/earning capacity; the claim for the appointment of a *curator bonis* to Mr B[...]; alternatively, for the creation of a trust to administer the net proceeds of the awards granted herein on behalf of Mr B[...] and a claim for appropriate costs orders at the conclusion of the action.

[3] The Defendant was ordered to furnish the Plaintiff with a s 17(4)(a) undertaking in respect of the future costs of Mr B[...], which still remains outstanding. The Plaintiff seeks an order directing the Defendant to comply.

Historical Background

Hearing on 2 November 2021

[4] On 2 November 2021 an Order dated 3 November 2021, was agreed to between the parties; the salient terms whereof included *inter alia* that:

(a) The Defendant was ordered to pay the Plaintiff an amount of R2.9 million, which amount was subsequently paid by the defendant, comprising of the following two amounts:

¹ Act 56 of 1996.

(i) R1.5 million in full and final settlement of Mr B[...]’s claim for general damages and

(ii) R1.4 million towards Mr B[...]’s still to be determined claim for past and future loss of earnings/earning capacity.

(b) The Defendant was ordered to furnish the Plaintiff with a s 17(4)(a) undertaking in respect of the future costs of Mr B[...], which undertaking had not been furnished as at the time of the hearing of the matter. As previously stated, the Plaintiff seeks an order directing the Defendant to furnish the said undertaking.

[5] The trial was postponed for the determination of the Plaintiff’s remaining claims.

The curator bonis application

[6] Mr B[...]’s mother launched an application on 5 September 2019, under case number 14244/19 (“the curatorship application”) in terms of which an order was granted on 11 September 2019 (“the curatorship order”), that *inter alia* ordered:

(1) The Plaintiff is appointed as *curator ad litem* to the minor for the purposes of:

(i) assisting Mr B[...] in the management and conduct of this action;
and

(ii) investigating the question of whether or not Mr B[...] is capable of managing his own affairs.

(2) The Plaintiff was directed to furnish a report to the court indicating:

(i) whether a *curator bonis* ought to be appointed to administer Mr B[...]’s estate and any damages award that may ultimately be

made in favour of Mr B[...], as well as the necessity or otherwise of the said *curator bonis* being required to provide security to the Master; and/or

- (ii) whether a trust ought to be founded and registered for the administration of Mr B[...]'s estate.

(3) The Applicant in the curatorship application was granted leave, upon receipt of the reports of the *curator ad litem* and the Master of the Court, to make an application on the same papers, duly supplemented if necessary, for an order:

- (i) declaring Mr B[...] incapable of managing his own affairs;
- (ii) appointing a *curator bonis* to administer Mr B[...]’s estate and/or the founding and registration of a trust for the administration of Mr B[...]’s estate; and
- (iii) any necessary ancillary relief that the court may deem fit.

(4) It was further ordered that the costs of such application, the costs of the *curator ad litem* as well as the costs of the proposed application for the appointment of a *curator bonis* and/or the founding and registration of a trust for the administration of Mr B[...]’s estate, shall stand over for determination or settlement as part of a RAF action to be instituted against the defendant on Mr B[...]’s behalf, being the present action.

[7] Pursuant to the curatorship order, the Plaintiff claims the following costs, fees and expenses in this action:

- (5) The costs of the curatorship application to date hereof and any further costs still to be incurred therein, including but not limited to the following costs:

- (i) the costs of the *curator ad litem*;
 - (ii) the costs of counsel; and
 - (iii) the reasonable fees and expenses of any expert witnesses appointed for the purposes of such application.
- (6) The fees of any *curator bonis* appointed pursuant to the curatorship application, for his/her administration of the monies entrusted to him/her to administer on behalf of Mr B[...], calculated at the rate of 10% of the total capital amount.
- (7) The expenses, if any, incurred by any *curator bonis* appointed, in order to furnish security to the Master for his/her aforesaid administration.
- (8) Alternatively, and should a trust be established, the Plaintiff claims payment of the reasonable costs, fees and expenses (to be determined by the court) in relation to the creation and administration of a suitable trust to administer the net proceeds of the awards made in this action on behalf of Mr B[...] represented by the plaintiff herein.

Preliminary issues agreed to between the parties at the hearing

[8] The parties had considerably curtailed the issues for determination in relation to the claim for loss of earnings/earning capacity at the hearing. In this regard, the parties filed a joint minute in respect of the parties':

- (i) Occupational therapists, namely Ms Elise Burns-Hoffman for the Plaintiff and Ms Tarryn Cawood for the Defendant²;
- (ii) Clinical Psychologists, namely Ms Joalida Smit for the Plaintiff and Dr Frances Hemp for the Defendant³;

² Index B, pages 1 – 3.

³ Index B, pages 4 – 6.

(iii) Orthopaedic Surgeons, namely Dr McGuire for the Plaintiff and Prof GJ Vlok for the Defendant⁴; and

(iv) Industrial Psychologists, namely Dr Peter Whitehead for the Plaintiff and Ms DV Letsie for the Defendant⁵.

[9] At the commencement of the trial, Advocate Crowe, SC, Counsel for the Plaintiff made an application in terms of Rule 38(2) for an order that the evidence to be adduced at the trial in respect of 7 of the Plaintiff's expert witnesses, be given on affidavit. The Defendant's attorney, Ms Thomas, placed on record that the Defendant had no objection to the application, subject to the reservation that the Defendant did not regard itself as bound by the calculation of the Plaintiff's actuary and could contend for an alternative award.

[10] The Court, after perusing the respective affidavits of the Plaintiff's experts, namely, occupational therapist, Ms Burns-Hoffman; clinical psychologist, Ms Joalida Smit; orthopaedic surgeon, Dr McGuire; neurologist, Dr Alison Richardson; psychiatrist, Dr Larissa Panieri-Peter; neurosurgeon, Dr Shafiek Parker and actuary, Mr Daniel Saksenberg,⁶ was satisfied that the deponents to all of these affidavits confirmed the contents of their expert reports, and where applicable, the contents of the Joint minutes which they conducted with their counterparts for the Defendant. In addition, they confirmed the opinions expressed by themselves therein and that the documents were compiled by them; were to the best of their knowledge and belief true and correct, were in their own words, were compiled for the assistance of the court, and accurately reflected their findings and opinions in the matter relating to Mr B[...].

[11] The Court, after considering the submissions made by the parties, in the exercise of my judicial discretion, ordered that the evidence of the aforementioned 7 expert witnesses of the Plaintiff be given at the trial on affidavit and admitted such

⁴ Index B, page 7.

⁵ Index B, page 8 – 17.

⁶ Index C, Items 1, 2, 4, 5, 6, 7 and 8; Plaintiff's Rule 38(2) affidavits by experts.

affidavits in evidence in terms of Rule 38(2). The court was accordingly satisfied that the Defendant had no objection to this procedure and that doing so would involve the saving of considerable costs and considerable time of the court. The Court was of the view that it would be ultimately fair in the circumstances to allow the evidence on affidavit.

[12] The Plaintiff's trial bundle was received into evidence as exhibit "A" on the basis that the documents contained therein are true copies of the originals and may be admitted in evidence without further proof to serve as evidence of what they purport to be as contemplated in rule 37(6)(k).

Opening Addresses

[13] Adv M Crowe, placed on record that the Plaintiff would rely on:

- (i) the evidence of the 7 aforesaid Rule 38(2) affidavits of the Plaintiff's experts;
- (ii) the aforesaid 4 joint minutes between experts for both parties;
- (iii) the documents in the trial bundle; and on the evidence of 2 witnesses, namely:
 - (a) Mr B[...] and
 - (b) the Plaintiff's expert industrial psychologist, Dr Peter Whitehead.

[14] Ms Thomas placed on record that the Defendant would not be calling any witnesses.

Summary of the Evidence

[15] **Dr Shafiek Parker** ("Dr Parker"), the Plaintiff's expert neurosurgeon, whose evidence was admitted by way of the Rule 38(2) affidavit, comprised of his expert

witness report dated 27 May 2010⁷. There was no joint minute as the Defendant did not appoint a neurosurgeon.

[16] Dr Parker, in his report stated that Mr B[...] was a passenger motor cyclist victim who was involved in an accident on 17 December 2008. He described that Mr B[...] suffered a head injury and a fracture of various bones in the left forearm and left hand and was taken to Tygerberg Hospital ("TBH") by ambulance where he received surgery to his left hand to reduce the fractures and insert K wires.

[17] Mr B[...] was admitted to TBH from the date of the accident until his discharge on 29 December 2008. Dr Parker consulted with him on 24 May 2010. Mr B[...] was treated by a neurosurgeon at TBH and a CT scan of the brain was taken which revealed a traumatic subarachnoid haemorrhage over the right parietal area, blood in the fourth ventricle and multiple punctate haemorrhages involving the right temporal, left frontal, right frontal and left temporal areas. The basal cisterns were patent and the midline central.

[18] Dr Parker further explained that Mr B[...] was given oxygen therapy, epanutin and was admitted to the neurosurgical ward for neuro observation. It was noted by the neurosurgeon that he had suffered diffuse axonal injury and what appeared to be subarachnoid haemorrhage. Mr B[...] had fractures of the radius and ulnar long bones in the forearm and his temperature was elevated at 37 degrees. His Glasgow Coma Scale ("GCS") score ranged from 12/14 to 14/14 over the period of his admission and by 27 December 2008 was 15/15 and the orthopaedic surgeons thereafter took over his management. Mr B[...] was thereafter discharged from the neurosurgery department.

[19] Dr Parker recorded that he consulted with Mr B[...]’s mother who was called to the scene of the accident where she found her son moaning and groaning but not recognising her or saying any audible words. She informed Dr Parker that the ambulance had already arrived. Mr B[...] was transported by ambulance to Groote Schuur Hospital, where he was seen in the trauma unit and thereafter transferred to

⁷ Index D, pages 1 – 17.

TBH. Mr B[...]’s mother explained that she accompanied him in the back of the ambulance to TBH. According to Mr B[...]’s mother, he still did not recognise her on the way to TBH. She further explicated that her son “*came round*” on Sunday 21 December 2008. It was only then that he recognised his parents and other people present, but he could not recall their names, he only recognised their faces. By the time Mr B[...] left the hospital, he seemed to be orientated, although his speech was somewhat slurred and physically he felt weak and had to be assisted to the car.

[20] Mr B[...] informed Dr Parker that he experienced *inter alia*, headaches at times and was also having back pain in the lumbosacral area and had no epileptic episodes. According to Dr Parker, Mr B[...] constantly repeated things, as if he had not mentioned them previously. At the time of his consultation Dr Parker observed that Mr B[...] had difficulty concentrating and focusing. He also had pain in his left hand, where he received surgery. Dr Parker further noted that Mr B[...] could not pick up heavy articles and could not grip properly with his hand. Mr B[...] mentioned to him that he forgets things.

[21] Mr B[...]’s mother reported to Dr Parker that he was very moody, quick tempered, impatient and had become stubborn. Mr B[...] expressed that he did not want to live at home with his parents. He was also suicidal.

[22] Further information recorded was that Mr B[...] was in Grade 12 at the time of the consultation, having never failed a grade. He explained to Dr Parker that despite working harder than before, he found it difficult to cope in terms of the volume of work. Mr B[...] expressed that he intended to study mechanical engineering at the College of Cape Town. Dr Parker articulated that Mr B[...] comes from a family which appears to be upwardly mobile; a level-headed family, where social norms and rules are applied

[23] Dr Parker’s assessment of Mr B[...]’s injuries were as follows:

- (i) A severe concussive head injury, explained by the significant CT scan findings and by the prolonged period Mr B[...] took before reaching a GCS of

15/15, and that he remained confused for a good few days (about 1 week if not longer);

- (ii) Mr B[...] also suffered injuries to the left hand and left forearm which left significant scarring around the left forearm;
- (iii) Four months short of 2 years after the accident Mr B[...] still had problems with concentration, namely memory disturbance, personality change in the form of being stubborn and quick tempered;
- (iv) He still gets occasional headaches when he concentrates for a long time and
- (v) He also has significant scarring around his left forearm.

[24] **Dr Alison Richardson**, (“Dr Richardson”), the Plaintiff’s expert neurosurgeon provided a report following a consultation with Mr B[...] on 1 November 2018⁸. Her evidence was admitted by way of rule 38(2) affidavit⁹. There was no joint minute with the Defendant’s neurologist, Dr Kessler, who had passed away in the interim. Dr Richardson’s sources of information included the joint minutes between the parties’ clinical psychologists and the neurological assessment report of the Plaintiff’s expert clinical psychologist.

[25] Dr Richardson noted the following in relation to the head injury and sequela of Mr B[...]. In this regard she stated that Mr B[...]’s GCS on admission was 10/15, with a protracted period of reduced consciousness, a 5 day stay in ICU, and extended post-traumatic amnesia for approximately 2 weeks; indicating a moderate/severe concussive head injury. She added that a CT scan showed a significant head injury with a right parietal traumatic subarachnoid haemorrhage, and multiple punctuate haemorrhages in the right temporal, left frontal, right frontal and left temporal areas. She stated that his head injury was classified as severe.

⁸ Index D, pages 79 – 93.

⁹ Index C, pages 10 – 12.

[26] She further noted the following during her assessment. Behaviour during testing was somewhat fatuous (over friendly) and a little immature (which was also noted by the defendant's clinical psychologist). Dr Richardson observed that Mr B[...] talked off topic. His autobiographical memory was poor and insight varied. On formal testing, Mr B[...] was fast and fluent on easy items but plateaued quickly with complexity. His verbal reasoning and information processing were borderline impaired, well below pre-morbid abilities, which the clinical psychologists had estimated in their agreed joint minute to have been in the average range before the accident. Dr Richardson's cognitive assessment confirmed a head injury with left frontal (executive functioning), temporal (verbal memory and new learning) and subcortical (learning and complexity) impairments.

[27] Mr B[...] showed prominent frontal lobe injury, involving:

- (i) Poor initiation of verbal responses and access to semantic knowledge;
- (ii) Impaired working memory for complex verbal information;
- (iii) Weak cognitive flexibility (switching between responses);
- (iv) Borderline impaired verbal abstract reasoning;
- (v) Weak organisation of complex information;
- (vi) Weak motor skills mapping onto frontal motor and premotor areas;
- (vii) Prominent error pattern on mazes and list learning and
- (viii) Slow learning of new information in the absence of a frank memory impairment.

[28] Dr Richardson's findings were consistent with reported changes in personality, behaviour and sociability. She also observed Mr B[...]’s self-reported tendencies to withdraw and avoid meaningful relationships despite being cheerful on

the surface. He displayed increased frustration and anger outbursts at home and evidence of paranoid ideation association with over interpretation of others' intentions. His variable social judgment and insight into his own behaviour were also observed during the assessment.

[29] Dr Richardson mentioned that the Defendant's clinical psychologist, Dr Hemp, had a more positive prognostic outlook based on Mr B[...]s success at the time as a Call Centre Operative at Amazon, but noted that he was summarily dismissed from Amazon on 1 March 2021 as a result of the following:

- (i) during October 2020 he made 229 phone contacts where he disconnected first; and
- (ii) during January 2021 there were 2 incidences where he made "*unprofessional behaviour towards customers, colleagues and suppliers (including visitors or clients of amazon)*", and
- (iii) on 1 occasion "*discussed personal medical information*".¹⁰

[30] Dr Richardson's prognostic outlook was more cautious, based on the age and extent of the injury, his behaviour during the assessment and reported personality changes consistent with a frontal lobe injury occurring in the context of weak information processing impacting new learning. She commented that a frontal lobe injury combined with diffuse/subcortical injury usually has a poor prognostic outcome due to the additive effect of inflammatory processes affecting white matter recovery over time due to diaschisis. This was explained to mean a process where brain functions can worsen in the longer term as poor neuronal firing in the affected area results in weakening of intact brain areas away from the site of injury. She commented that an injury in adolescence, when the white matter architecture supporting frontal lobe development proliferate, together with poor neuronal firing to and from those areas, results not only in poorer long-term recovery, but a deterioration in areas not directly affected by the original injury. She stated that the

¹⁰ Trial bundle, letter of dismissal letter dated 1 March 2021 at pages 17-18.

likelihood of further slow deterioration with age due to these processes was a real possibility and could not be ruled out.

[31] Regarding work related factors, Dr Richardson commented that Mr B[...]’s head injury is both subtle and prominent. It is subtle because some executive memory and reasoning abilities are preserved. However, higher order functions did not develop in line with his chronological age, given the enduring frontal lobe deficits as a result of the injury. Thus, at nearly age 30 at the time of the assessment, Mr B[...] presented with difficulties negotiating complexity, was slow to learn new information (but when learnt can retain that); his multitasking and problem solving was weak (but when given a structured plan he could execute this) and his social judgment was variable depending on the level of stress he experiences; under pressure self-monitoring skills cannot be recruited and therefore inappropriate social interactions are more likely. She considered the position as a Call Centre Operative to be ideal for Mr B [...], but nevertheless, had reservations as to how this may play out in the longer term. Dr Richardson stated that Mr B[...] would not cope with a more senior role and that he had plateaued in his career; that his frontal lobe injury made him vulnerable to unemployment as he may not cope well with change or additional pressure; that his thinking style of high paranoia, limited insight and slow processing may make him vulnerable to mental breakdowns. This may be more likely with stress. As a result, Mr B[...] may be vulnerable to psychiatric breakdown in the future. Dr Richardson requested that a *curator ad litem* be appointed due to the complexity of the legal process and stated that a *curator bonis* may be required in the future, should there be changes associated with his cognitive and/or emotional functioning.

[32] Regarding future prognosis, Dr Richardson stated that Mr B[...]’s frontal lobe injury and poor information processing means that he struggles to cope, both cognitively and emotionally with complexity. This was explained to mean, it would impact Mr B[...]’s ability to multitask, to adapt to change in his environment, cognitive flexibility, problem solving and managing the competing demands of everyday life. Mr B[...] was considered to be a highly vulnerable adult because of his mild expressive difficulties and childlike interaction style. He had a limited capacity for abstract, complex problem solving.

[33] According to Dr Richardson, Mr B[...] is emotionally at risk of paranoid thinking, volatility and emotional outbursts as the frontal lobe mechanisms required to process and inhibit these factors are prone to decompensation during stress. Mr B[...]’s role as a carer, supporting his mother who was his main support before her illness, will have a negative impact on his coping over time. Dr Richardson’s is of the view that the likelihood of a psychiatric breakdown in the future is high. In addition, she stated that a spiral of unemployment, isolation and lack of stimulation could ensue, resulting in poorer cognitive functions with age. Dr Richardson recommended that all efforts should be made to support Mr B[...]’s independence, reduce his stress in order for him to maintain employment and put the necessary support in place to provide care for his mother, thus lessening the burden of caregiving on him. She opined that overall, in the long term, Mr B[...]’s long-term prognosis is poor. Dr Richardson expressed concern that with Mr B[...]’s vulnerability and without specific support at home, financially, emotionally and at work he may not be able to maintain his current functioning in the very long term.

[34] Dr Richardson recommended the appointment of both a *curator ad litem* and a *curator bonis*, stating that Mr B[...] is unlikely to cope with the family finances, running the household and remaining employed, that he is a vulnerable adult who may be prone to exploitation, that his insight and social judgment is limited. She further recommended psychiatric treatment in the future, homecare support for his mother and that psychological therapy should be made available, as it may prevent future psychiatric complications. It was suggested that every stress mitigating effort should be made to ensure that Mr B[...] stays in employment, to prevent isolation and lack of stimulation.

[35] **Ms Joalida Smit** (Ms Smit), the Plaintiff’s expert clinical psychologist, also provided evidence by way of her Rule 38(2) affidavit, which comprised of 2 expert reports, dated 2 November 2018¹¹ and 27 April 2022¹² respectively as well as the joint minute¹³ between herself and the Defendant’s expert psychologist, Dr Hemp.

¹¹ Index D, pages 40 – 65.

¹² Index D, pages 66 – 78.

¹³ Index B: pages 4 – 6.

[36] The joint minute dealt with Mr B[...]’s condition pre-accident in terms of which they agreed that Mr B[...] had average potential pre-morbidly, could have passed Grade 12 and could have completed college courses. While Dr Hemp did not think that Mr B[...]’s school marks indicated university potential, Ms Smit considered that his dream of becoming an electric/mechanical engineer was not unrealistic, given his aptitude for mathematics prior to the accident, his passion for fixing cars and all things mechanical. The high value placed on education in the family and his oldest sister obtaining a Master’s Degree in nuclear engineering.

[37] They noted further that Mr B[...]’s initial GCS and GCS on admission to hospital (10/15 and 11/15) would rate his diffuse brain injury as moderate, but the fact that he remained confused throughout his time in hospital and an estimated post-traumatic amnesia of 2 weeks, would classify the brain injury as severe. In addition, they noted that Dr Parker had considered the injury was severe as there were significant CT scan findings.

[38] Mr B[...] managed to pass Grade 12 on the second attempt, but needed to change his mathematics subject from pure mathematics to mathematics literacy. He did not obtain an endorsement or attain the University level entrance requirements. Furthermore, they agree that Mr B[...] would have been able to achieve a higher level of education in his pre-morbid state.

[39] In the assessment findings the experts agree on the following:

- (i) that, despite variations in score patterns, Mr B[...] suffered a moderate to severe brain injury, with frontal impairment accounting for his difficulties with executive functions, and frontal and right parietal impairment producing enduring personality changes;
- (ii) they recommended psychotherapy/psychiatric treatment should be available when needed. They also recommended the appointment of a *curator ad litem* as Mr B[...] may not understand the complexity of legal procedures, and they stated that it is not clear that Mr B[...] needs a *curator bonis* as he is working

and independent in many of the instrumental activities of daily living, but some protection of any funds awarded was recommended.

[40] It was submitted that inasmuch as Mr B[...] had already been compensated for general damages, the orthopaedic injuries he suffered to his left arm have a more limited relevance to the claim for loss of earning capacity. The orthopaedic injuries as encapsulated in the joint minute of the occupational therapists¹⁴ included that Mr B[...] suffered a fracture of the distal third of the 2 long bones in the left forearm which connect the elbow to the wrist, namely the radius and the ulnar. He also suffered an intravenous articular fracture of the base of the thumb metacarpal. He also suffered dislocations of the bases of the second and third carpometacarpal joint.

[41] It was further recorded that Mr B[...] underwent 2 surgical procedures and treatment. They noted that Mr B[...] has residual functional limitations with regard to:

- (i) reduced range of movement in the left wrist on flexion and extension;
- (ii) reduced grip strength in the left hand; and
- (iii) he experiences pain in the left upper limb when working against resistance.

[42] In relation to his functional ability, they agree that Mr B[...] is capable of independent self-care, transportation to and from work, attending to a sedentary up to light duty position of work; and following and attending to the routine demands of work in a call centre, as was his position at the time of their assessment.

[43] With regard to Mr B[...]’s employability, they agree that he is suited to a position of light physical demand, made up of routine and repetitive components and is unsuited to work of any heavy physical demand and/or that requires the consistent engagement of higher cognitive executive functioning with regard to sustained concentration, memory recall, judgment, problem solving and decision making.

¹⁴ Index B, pages 1 – 3.

[44] In their joint minute¹⁵ the expert orthopaedic surgeons for the parties agree that there are already minor degenerative changes in the left wrist and fracture areas; that the radius and ulna fractures have healed, and that the instrumentation must be removed in the future. They noted that Mr B[...] has a full range of movement in the left forearm with slight restriction of movements of the left wrist. Furthermore, they agree that the degenerative changes are progressive and be treated conservatively. There is a 50% chance for an arthrodesis which is a surgical procedure to fuse 2 or more bones together to form a single solid bone to move a joint of the left wrist in future. They also agree that Mr B[...] will be able to work until retirement age in the open labour market, however due to his left wrist he will have difficulty in doing heavy labour type of work, but can do lighter clerical work until retirement age. There is no reason for early retirement due to his orthopaedic injuries. For his head injuries, they refer to the relevant experts.

[45] **M[...]** **Y[...]** **B[...]**, (“Mr B[...]”), in essence confirmed and expounded upon his personal and family background; education and training as well as his employment background as encapsulated in the report of the Plaintiff’s industrial psychologist, Dr Peter Whitehead, dated 2 March 2023.¹⁶

[46] In that regard, his father had a Grade 6 qualification and worked as a qualified boilermaker/pipe fitter and his mother completed a Grade 11 qualification and worked as a regional secretary for Sage Life. Mr B[...]’s father is deceased and his mother had suffered a stroke. He has 2 older sisters. His elder sister, Wardah, has a Grade 12 qualification and a Master’s Degree in nuclear power from UCT, a National Diploma in commercial administration and a B. Tech in office management and technology from the Cape Peninsula University of Technology. She also has a diploma in paralegal studies as well as a higher diploma in educational practices and adult learning from UNISA. In addition, she has an entry level nuclear power plant operator’s certificate and senior reactor operator certificates from Koeberg. She presently lives Abu Dhabi in the UAE. The younger of his 2 sisters, Rukeyh, completed a Grade 12 qualification and a call centre agent short course and

¹⁵ Index B, page 7.

¹⁶ Index D, pages 180 – 218, see in particular para’s 6 – 8.

currently works at an investment company in Johannesburg. Mr B[...] testified that he was married in 2023 and lives in his own home with his wife.

[47] Mr B[...] narrated that the accident occurred on 17 December 2008 after he had written his Grade 10 examinations. He articulated that he passed Grade 10 and was promoted to Grade 11 in 2009. His Grade 11 term 1 and term 2 results indicated that there was a significant fall of his results and that he had failed term 2.¹⁷ Mr B[...] further orated that he managed to pass Grade 11 and then failed Grade 12 at the first attempt in 2010. He then adjusted his mathematics subject from pure mathematics to mathematics literacy and managed to pass Grade 12 at the second attempt in 2011. Mr B[...]’s matric certificate dated December 2011, indicated that he met the minimum requirements for admission to diploma or higher certificate study.¹⁸

[48] Mr B[...] further testified that since leaving school he attempted a 3-month bridging course in mechanical and electrical engineering in an attempt to reach the minimum requirements for admission to university, but was unsuccessful. He also did a 3-month occupational readiness course at the College of Cape Town, which he passed.¹⁹ It came to light that when Mr B[...] was assessed by Dr Whitehead in May 2022 and February 2023, he was doing a 3-month data science short course at Damelin College, but had not completed it. Mr B[...] provided an exposition on his post-morbid vocational career and earnings since leaving school as at the end of 2011 to date.

[49] **Dr Peter Whitehead** (“Dr Whitehead”), tabulated Mr B[...]’s post-morbid career path using Mr B[...]’s earning data as sourced from collateral information obtained from employers and from Mr B[...]’s payslips from his various employers such as Capita, Amazon, Sigma and his current employer, WNS Global; which span the period from 31 August 2018 to 31 May 2024. ²⁰ The said two post-morbid career tables were further refined and were included again in the joint minute of the industrial psychologists.²¹ It is apparent that these refined results have been utilised

¹⁷ Index D, para 7, pages 187 – 188.

¹⁸ Trial Bundle, Exhibit “A”, page 2.

¹⁹ Trial Bundle, Exhibit “A”, Certificate, page 3.

²⁰ Index D, Table 12 and 13, pages 213 – 214.

²¹ Index D, pages 12 – 16; See also Index D, Tables 3 and 4, pages 8 – 17.

by the actuary as the basis for his calculation of Mr B[...]’s post-morbid earnings in the actuarial report dated 18 July 2024, as per the actuary’s Rule 38(2) affidavit²².

[50] The income earned by Mr B[...] in the aforesaid post-morbid career has been agreed upon by the industrial psychologists in their joint minute.²³ The industrial psychologists agree that on average, during the period from December 2022 until May 2024, he earned R8 450.53 per month (R8 019.47 per month by way of salary and benefits plus an average monthly commission of R431.06).²⁴ This calculation is predicated on Mr B[...]’s earnings in his present employment at WNS Global, which is based on Mr B[...]’s payslips. The actuary considered the figure of R8 450.53 to calculate Mr B[...]’s annual income to amount to R101 400.00 (R8 450.00 x 12 months), since October 2022.

[51] Dr Whitehead testified that Mr B[...]’s pre-morbid career path was agreed upon by the industrial psychologists for the parties in their joint minute, and as set out in table 1 and table 2 thereof.²⁵ In amplification, Dr Whitehead explained during evidence that he and his counterpart for the Defendant had agreed to the less optimistic pre-morbid scenario of the Defendant’s expert psychologist Dr Hemp, namely Mr B[...] achieved a post-matric national diploma or certificate, as opposed to the more optimistic scenario postulated by the Plaintiff’s expert psychologist that envisaged Mr B[...], obtaining a university degree and becoming an electric/mechanical engineer.

[52] Therefore, in considering Mr B[...]’s average pre-morbid potential, he would have completed his Grade 12 qualification and would have met the requirements for a national diploma or certificate studies which would have allowed him to work in both the corporate and non-corporate sector. Due to his youth, they agreed to consider a generic career path to determine Mr B[...]’s most likely career progress and earnings. They agreed to use the Paterson Job Grading System to predict future career growth and earnings. Dr Whitehead further explained that system in his

²² Index D, pages 166 – 179; See also Index C, pages 22 – 24;

²³ Index B, pages 14 – 16 as per table 4: Post-morbid earnings to date based on the payslips contained in the Plaintiff’s Trial Bundle.

²⁴ Index D, page 173; Actuarial Report, page 8.

²⁵ Index B, pages 9 – 11.

evidence with reference to the “*corporate survey earnings*” table, and explained the meaning of the various salary grading bands from the A band up to the F band, and beyond that.²⁶

[53] They further agreed that with increased work experience, knowledge, skills and abilities Mr B[...] would have experience upward career mobility and increased earnings, probably until between the age of 45 and 50, whereafter his employment career and earnings would have plateaued. They tabulated the agreed likely pre-morbid career path in tables 1 and 2 of the joint minute,²⁷ with the agreed Paterson Grading System B3, C1, C2 and C3 earnings in Table 2 thereof being the median “*total package*” earnings set out in the 2023 “*corporate survey earnings*” table²⁸ which Dr Whitehead proved in evidence, as follows:

January 2011 to December 2014	He would have completed a 3-year national diploma, for which they allowed an additional year for the completion of a diploma in the event of illness/failing of subjects.
January 2015 to December 2016 (2 years)	Commence employment as a trainee in the corporate sector on a 2-year fixed term contract, probably only earning basic salary of R6 500 per month, but with no additional benefits.
January 2017 to December 2023 (6 years)	He would have commenced permanent employment on a Paterson B3 Grade earning R303 000 <i>per annum</i> , as per the aforesaid corporate survey earnings table and including additional benefits.
January 2024 to December 2030 (6 years)	He would have commenced employment on a Paterson C1 Grade earning R505

²⁶ Plaintiff’s trial bundle, pages 47 – 48.

²⁷ Index B, pages 9 – 11.

²⁸ Plaintiff’s Trial Bundle, pages 49 – 50.

	000 <i>per annum</i> , as per the aforesaid corporate survey earnings table and including additional benefits.
January 2031 to December 2037	He would commenced employment on a Paterson C1 Grade earning R550 000.00 <i>per annum</i> , as per the aforesaid corporate survey earnings table and including additional benefits.
January 2038 to age 65	His career would have plateaued on a Paterson C3 Grade earning R641 000.00 <i>per annum</i>, as per the aforesaid corporate survey earnings table and including additional benefits. They agreed that that his employment career and earnings would have reached a plateau at that level, which would have then remained constant in real terms (i.e., taking inflation into account until he retired 20 years later at age 65.

[54] Dr Whitehead testified that he and his colleague took a conservative, middle of the road approach in formulating this pre-morbid career path and in agreeing upon the likely earnings in that career path. Their agreed findings, in tables 1 and 2 of the joint minute²⁹ was utilised by the actuary in the tables contained in paragraph 4(a) with heading “*But for the accident*” in the actuarial report³⁰ and in the actuarial calculation.³¹

[55] During cross-examination, Dr Whitehead was asked to clarify why he elected to use the figures based on Mr B[...]’s total package per year and not the basic salary. To this he responded that when employees become permanent, they receive certain benefits which increases their package per annum. He was also questioned

²⁹ Index B, pages 10 – 11.

³⁰ Index B, pages 167 – 169.

³¹ Index B, page 169.

about why he projected that Mr B[...] would be promoted three times in his lifetime before age 45, every 6 years, to which he responded that it was reasonable. Dr Whitehead used the analogy of a person who was employed in the army or in the police force to illustrate his reasoning in this regard. He was challenged on the basis that Mr B[...] was not functioning in that vocation.

[56] In reference to the collateral information pertaining to the Plaintiff's past and current employer, it was highlighted that Mr B[...]’s employers didn't have any complaints about him in the workplace. His work ethic was good and nothing extraordinary was observed with regards to his personality. In this regard, Dr Whitehead orated that there is a possibility that Mr B[...] will not be able to do his job in future because of the injuries that he sustained in the accident.

Submissions by the Plaintiff

[57] Counsel for the Plaintiff submitted that the agreements between the industrial psychologists in their joint minute are, to some extent, based on the agreed opinions expressed by the occupational therapists, clinical psychologists and orthopaedic surgeons for the parties as minuted in their aforesaid joint minutes. These agreed figures were utilised by the actuary in his calculations in the actuarial report.³²

[58] It was further submitted that the court should accept:

- (i) the basis 2 calculation (based on a 50% contingency deduction being applied to the post-morbid uninjured career path), alternatively
- (ii) the basis 1 calculation (based on a 40% contingency deduction being applied to the post-morbid uninjured career path); alternatively
- (iii) a figure midway between the basis 1 and 2 calculations.

³² Index B: pages 178 – 179.

Principal Submissions on behalf of the Defendant

[59] It was highlighted on behalf of the Defendant that regard be had to the reasons why the Plaintiff left his various employments, which were not due to the accident. The Plaintiff testified that he was able to do physical work for a period of two years. It was only after being asked if the injuries didn't affect him, when he responded that it did. Furthermore, the Plaintiff was dismissed at Amazon which was not due to the accident.

[60] It was further contended that the Plaintiff's mathematics results pre-accident, indicated below average results. In this regard, his final average result for mathematics in Grade 10 was 49.29%.

[61] The Defendant contended that a 50% contingency is not justified as there has already been a time lapse of 16 years post-accident. It was argued that Mr B[...] was able to secure employment over the years. It was noted that he changes jobs often, but there is no evidence that it was due to the accident. It was acknowledged that Mr B[...] was a good witness. He was able to understand and comprehend what was going on in court as well as the questions that was put to him. The Defendant contended that this corroborates the collateral information obtained by Dr Whitehead from Mr B[...]’s employer. It came to light that Mr B[...]’s employer is willing to give him more responsibilities and/or duties in future considering his performance.

[62] It was furthermore submitted that the court is to have regard to the fact that Mr B[...], has not lost any employment as a consequence of the accident. This, it was argued, was confirmed by Mr B[...] himself. It came to light during the testimony of Mr B[...] that he was given a final written warning at work, however, no evidence was led as to the reasons therefor and/or whether it was related to the accident. Furthermore, Mr B[...] was able to complete a short course after the accident. It was also argued that his grade 10 results showed nothing extraordinary; which results were not much different from his matric results.

[63] Ms Thomas, on behalf of the Defendant argued that 50% contingency is not justified if regard is had to the good references received from Mr B[...]’s employers.

She opined that Mr B[...] is doing well for himself. The court was referred to the matter of *Lubisi v Road Accident Fund*³³ wherein the court indicated that reliance is to be placed on the evidence at hand.

Further submissions by the parties

[64] The court permitted the parties to make further submissions in clarification of the suggested contingency calculations as set out in their respective proposed draft orders. In this regard, the Defendant submitted that standard contingencies ought to be applied, namely a 5% contingency deduction be applied to the pre-morbid past earnings and 15% to future pre-morbid earnings. The Defendant furthermore applied 35% contingency to the post-morbid uninjured career path. On the Defendant's calculation, it was submitted that an amount of R3 4 85 205.35 be awarded to Mr B[...] for loss of earnings.

[65] Counsel for the Plaintiff conceded that the Plaintiff's actuary had not applied the 5% contingency deduction to the pre-morbid past income and furthermore conceded that it would be appropriate to do so. Two alternative recalculations were prepared.

[66] Counsel for the Plaintiff identified a fundamental error in the Defendant's calculation in that:

(a) It is contrary to the express agreement between the industrial psychologists for the parties. In this regard, the Defendant utilised the pre-morbid future career path not only in the pre-morbid scenario but also in the post-morbid scenario.

(b) This, it was contended, is prejudicial to Mr B[...], as it falsely increases his post morbid earnings and thereby serves to substantially reduce his damages.

³³ (1484/2019) [2024] ZAMPMBHC 51 (19 July 2024).

[67] It was further contended that there is no basis for the Defendant to ignore the post-morbid career path and earnings agreed upon by the industrial psychologists. Furthermore, it was argued that the Defendant seeks to decimate the actual damages suffered by Mr B[...] by not applying his agreed post-morbid career path, which is substantially lower than the agreed pre-morbid future career path. It was also illuminated that the Defendant failed to consider the prior interim payment of R1.4 million from the damages on its calculation which ultimately translates into an outstanding amount of R2 085 205.35.

[68] The revised calculation by Plaintiff amounts to R4926 583 and R4 896 598 respectively on the 40% and 50% contingency calculations respectively.

Legal Principles

[69] The seminal judgment of ***Southern Insurance Association Ltd v Bailey***³⁴ succinctly deals with the court's approach to the enquiry into damages for loss of earning capacity. In this regard, the court held:

'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. But the Court cannot for this reason adopt a non possumus attitude and make no award.'

³⁴ 1984 (1) SA 98 (A) 113G-114A

[70] It is trite that a court has a wide discretion in allowing contingencies. In **Phalane v Road Accident Fund**³⁵ the court crystallised the considerations as follows:

‘Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Ins Co v Van Jaarsveld reported in Corbett & Buchanan, The Quantum of Damages, Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (Shield Ins Co Ltd v Booysen 1979 (3) SA 953 (A) at 965G-H). Contingencies for which allowance should be made, would usually include the following:

- (a) the possibility of illness which would have occurred in any event;*
- (b) inflation or deflation of the value of money in future; and*
- (c) other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event (Corbett, The Quantum of Damages, Vol I, p 51).’*

[71] The matter of **RAF v Kerridge**³⁶ distils the general rules that have been established in regard to contingency deductions.

‘Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings, they include inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill-health, death, and the myriad of events that may occur in one’s everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the

³⁵ (48112/2014) 2017 ZAGPPHC 759 (7 November 2017) at para 17; See also *AA Mutual Insurance v Van Jaarsveld* 1974 (4) SA 729 (A).

³⁶ 2019 (2) SA 233 (SCA) at para 44.

assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of a claimant. This Court, in Quedes, relying on Koch's Quantum YearBook 2004, found [that] the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but it is a convenient starting point.'

Discussion

[72] The contingencies ordinarily accepted by the RAF is 5% for past loss and 15% for future loss of earnings. The claim for the balance of Mr B[...]’s past and future loss of earnings/earning capacity is based on the expert reports filed of record and the joint minute of the Industrial Psychologists for the parties dated 17 July 2024³⁷, and is calculated in the actuarial report of Ivan Kramer CC, the consulting actuaries dated 18 July 2024³⁸. As earlier indicated, these figures were revised after the concession made on behalf of the Plaintiff that the actuary had not applied the 5% contingency deduction to the pre-morbid past income of Mr B[...].

[73] It is apparent from the joint minute of the expert industrial psychologists for both parties³⁹, namely Dr Peter Whitehead for the Plaintiff and Ms DV Letsie for the Defendant, that they agree on all issues relating to the claim for Mr B[...]’s loss of earning capacity. The only issue for determination by the court in respect thereof is the question of the contingency deductions to be applied to the actuarially calculated loss of earnings based on the said joint minute, being the actuarial report of the Plaintiff’s actuary dated 18 July 2024⁴⁰.

[74] Mr B[...] made a good impression on this court. He was able to give a detailed, logical and chronological exposition of events. However, the court considers that the long-term prognosis, as evident from the Joint Report of Dr Letsie

³⁷ Index B, joint minutes, pages 8 to 17.

³⁸ Index D, pages 166 to 179.

³⁹ Index B, pages 8 – 17.

⁴⁰ Index D, pages 166 – 169.

and Dr Whitehead, appears to be poor in that Mr B[...] will probably struggle to maintain his current level of functioning in future.

[75] Mr B[...]’s post-morbid career after matriculating supports this prognosis as is evident from the table below:

January 2012 to July 2012	He was unemployed.
August 2012 to 15 February 2013	He worked at Game (Kenilworth Centre) as a sales assistant/cashier and stock controller.
16 February 2013 to 2 July 2013	He was unemployed.
3 July 2013 to 30 May 2014	He worked at Metropolitan Health doing a learnership, where he worked in medical claims assessing and premium membership.
31 May 2014 to 25 August 2014	He was unemployed.
17 October 2014 to 10 January 2015	He worked at Amazon.com as a customer services associate.
11 January 2015 to 6 August 2017	He performed piece jobs, such as electrical wiring, mechanical work, plastering and woodwork.
7 August 2017 to 30 August 2018	He worked at Capita in customer service.
31 August 2018 to 1 March 2021	He worked at Amazon.com as a retail associate. The evidence is that he was dismissed from such employment and the dismissal notice dated 1 March 2021 is at pages 17 to 18 of the trial bundle.
2 March 2021 to 25 April 2021	He was unemployed.
26 April 2021 to 30 September 2021	He worked as a customer service associate at Webhelp SA.
1 October 2021 to July 2022	He worked as a customer service associate at Sigma SA.

August 2022 to September 2022	He was unemployed.
October 2022 to present	He has worked as a customer service agent at WNS Global.

[76] Although it was argued by the Defendant that the underlying reasons for the changes to Mr B[...]’s employment does not appear to be as a consequence of the accident, this court is to have regard to the test for a claim for loss of earnings or earning capacity which has been aptly encapsulated in ***Rudman v Road Accident Fund***⁴¹ where the court held:

‘To claim loss of earnings or earning capacity, a plaintiff must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss’.

[77] The measure of proof is a preponderance of probabilities, which entails proving that the occurrence of the loss is more likely than not. In the matter of *Union and National Insurance Co Limited v Coetzee*⁴² the court held that there must be proof that the disability gives to a patrimonial loss, which in turn will depend on the occupation or nature of the work which Mr B[...] did before the accident or would probably have done if he had not been disabled.

[78] From the assessments conducted by the expert psychologists for the Plaintiff and for the Defendant and their joint minute, it is apparent that Mr B[...] had suffered a moderate to severe brain injury with frontal impairment accounting for his difficulties with executive function, coping with complexity and enduring personality changes. The clinical psychologists accepted that Mr B[...] had average academic potential pre-morbidly as stated earlier. The pre- and post-morbid careers of Mr B[...] was agreed upon by the industrial psychologists for the parties, as well as the income which Mr B[...] has earned in the post-morbid condition to date. Furthermore, they agree as to the income which Mr B[...] will probably earn in the future in the

⁴¹ 2003 (2) SA 234 (SCA)

⁴² 1970 (1) SA 295 (A) AT 300 A

post-morbid condition, as well as the income which he probably would have earned in the pre-morbid condition. Moreover, the experts agreed to consider a generic career path to determine Mr B[...]’s most likely career progress and earnings for reasons aforestated. They agreed to use the Paterson Job Grading System to predict future career growth and earnings.

[79] Significantly higher than normal contingencies have been suggested for all earnings into the future. This, it was argued, is because the contingency is to apply for future earnings projected over the next 33 years. Therefore, the longer the period, the higher the contingency. This is predicated on the aforestated prognosis that Mr B[...] is unlikely to sustain employment. It bears mentioning that Dr Richardson’s prognosis is that Mr B[...] is at risk of unemployment and emotional decompensation, which was further premised on Mr B[...]’s recently experienced negative life events which included the loss of career progression and his mother’s stroke and ill health as well as his father’s passing. She anticipated that if Mr B[...]’s mother’s condition deteriorated, it would impact on his ability to cope at work.

[80] I interpose to mention that although the court was referred to *Lubisi (supra)*, that matter is distinguishable from the matter in *casu*. In that matter the industrial psychologist’s instruction to the actuary were based on facts that were not supported by any evidence and inconsistent with any evidence led. It was held that the facts that reliance was placed on should have been proved by admissible evidence. The court could therefore place no reliance on the opinion of the industrial psychologist insofar as it related to the information provided to the actuary. The court found that past loss and future loss of earnings were therefore not proven.

Conclusion

[81] It is trite that a court has a very wide discretion with regard to contingencies that must, be founded on a consideration of all the relevant facts and circumstances of the matter. I am mindful that this discretion may not be usurped by the evidence of the experts. An actuary’s evidence essentially serves as a guide to the Court.⁴³

⁴³ RAF v Guedes 2006 (5) SA 583 (SCA) at para 8

Courts must jealously protect their role and powers as they are the ultimate arbiters in any proceedings.⁴⁴

[82] It is apparent that 3 out of the 4 contingency deductions to be made from the actuarial calculations are common cause, namely:

82.1 5% contingency deduction to the pre-morbid past income;

82.2 15% contingency deduction to the pre-morbid future income and

83.3 0% contingency deduction to the post-morbid past income.

[83] The contingency deduction which remains in dispute is the deduction to be made to the post-morbid future income. Counsel on behalf of the Plaintiff submitted that it is not necessary to obtain a further actuarial calculation as the Plaintiff's arithmetical estimates of the proposed contingency deductions, favour the Defendant in that both calculations yield a net amount of damages still payable to Mr B[...] which is slightly less than would be calculated actuarially. The Plaintiff is prepared to waive that slight difference.

[84] Mr B[...]’s physical impairment as borne out by the expert reports are uncontroverted. In order for justice and fairness to prevail, it is incumbent on the court to ensure that contingencies be applied in relation to the proven facts of the case. Mr B[...] has been identified as a vulnerable adult. Whilst it may appear that he is doing well now, the future prognosis appears to paint a very different picture. To reiterate, Dr Richardson opined that Mr B[...] is unlikely to make further progress career wise and is vulnerable to unemployment.

[85] If regard is had to the current age of Mr B[...], and the risk period of approximately 33 years, I agree that a higher than normal contingency is to be applied. However, to my mind, the proposed 50% alternatively 40% contingency being applied to the post-morbid uninjured career path, is excessive, if regard is had

⁴⁴ Radebe v The Road Accident Fund (2457/2017) 2020 ZAFSHC (unreported) at para 24-26.

to benchmarks set. Even the proposed midway proposition, in my opinion, is not in keeping with the normal contingencies. Therefore, considering the proven admissible evidence, I am of the view, in the exercise of my judicial discretion that a 35% post morbid contingency deduction be applied.

Appointment of a *curator bonis*

[86] The Plaintiff instituted a claim in respect of the appointment of a *curator bonis* to Mr B[...], alternatively for the creation of a trust to administer the proceeds of the claim on behalf of Mr B[...]. Pursuant to the curatorship order granted on 11 September 2019, the Plaintiff claims costs, fees and expenses in this action. In the alternative, should a trust be established, the Plaintiff claims payment of the reasonable costs, fees and expenses, to be determined by the court, in relation to the creation and administration of a suitable trust to administer the net proceeds of the awards made.

[87] In my view it will be appropriate that the consideration for the appointment of the *curator bonis* alternatively the creation of a trust be dealt with in a separate application as proposed by the Plaintiff. It will be prudent for the Plaintiff in his capacity as the curator *ad litem* to file his report to the court prior to such application. The parties are otherwise *ad idem* with the remaining issues as per the attached draft order, save for the scale of costs.

[88] In the circumstances I deem it appropriate to adjourn the matter for the representatives to obtain a further actuarial calculation. The second phase of the judgment in which the court will ultimately determine the quantum of the balance of Mr B[...]'s claim for his loss of earnings/earning capacity will thereafter be handed down.

Costs

[89] It is trite that costs ordinarily follow the result. Rule 67A(3) which came into effect on 12 April 2024, requires that party-and-party costs in the High Court be

awarded on Scale A, B or C, respectively. This amendment applies prospectively in relation to work done on a matter after 12 April 2024.

[90] Rule 67A addressed itself only to awards of costs as between party-and-party with the purpose to exercise control over the rate at which Counsel's fees can be recovered under such an award. Advocate Crowe for the Plaintiff contended that the issues were reasonably complicated having regard to the amount of expert evidence as well as the Rule 38(2) evidence, thereby warranting Counsel's fees on Scale C. Ms Thomas, contended that Scale B would be appropriate as the matter was not complex and essentially only turned on the contingencies to be applied.

[91] Both parties are *ad idem* that interest will only accrue from the 181st day on amounts not paid timeously. I do however, deem it appropriate to make a pronouncement on costs when final judgment is delivered upon receipt of the updated actuarial report.

Order

[92] In the result, the following order is made:

1. The matter is adjourned until 26 November 2024.
2. The representatives are to obtain a further actuarial calculation based on a 35% contingency deduction being applied to the post-morbid uninjured career path;
3. Costs are to stand over for later determination.

ANDREWS, AJ
Acting Judge of the High Court, Western Cape Division

Appearances

For the Plaintiff:

Adv Mike Crowe SC

Instructed by:

Mr J Cohen of
Jonathan Cohen and Associates

For the Respondent:

Ms Claireese Thomas

Instructed By:

State Attorney

Date of Hearing:

4 September 2024 and 29 October 2024

Date of Judgement:

5 November 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.