

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2010/14593

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
01/09/2026	
DATE	SIGNATURE

In the matter between:

FERNANDO UCUTO

PLAINTIFF

and

**THE PASSENGER RAIL AGENCY OF
SOUTH AFRICA**

DEFENDANT

JUDGMENT

DREYER AJ

[1] The Plaintiff, Mr Ucuto, sustained a severe compound fracture of his right humerus and an injury to his thoracic spine, when he fell out of a moving train

as the train carriage had open doors. The compound fracture necessitated an above elbow amputation of Mr Ucuto's right arm. The Defendant, the South African Rail Commuter Corporation (PRASA), owned and operated the train.

- [2] The parties have settled the merits. PRASA accepts it is liable for 50% of the Plaintiff's proven or agreed damages.
- [3] In November 2015, the parties settled both the general damages and the Plaintiff's loss of earnings. The Defendant paid the Plaintiff the sum of R1 250 000.00, being 50% of the Plaintiff's claim for general damages, and future and past earnings.
- [4] That leaves the determination of the Plaintiff's future medical and associated expenses.
- [5] In 2013, the Defendant made an interim payment to the Plaintiff in the sum of R300 000.00. This interim payment must be taken into account in the final quantification of the Plaintiff's damages.
- [6] On 6 December 2016, PRASA undertook to provide the Plaintiff with a prosthesis and to pay the costs of this prosthesis, together with the prosthetic rehabilitation programme. Mr Ucuto committed to ongoing monitoring and follow-up consultations for a period of 12 months following the completion of the prosthetic rehabilitation programme in order to assess his suitability for and use of the prosthetic. The agreement was made an order of court ("the 2016 order").

- [7] PRASA paid Mr Ucuto the sum of R1.6 million for the provision of the prosthesis in January 2018. The 2016 court order required that this payment be taken into account in the final quantification of the Plaintiff's damages.
- [8] Joint minutes were filed by all the experts where the parties engaged experts of a similar specialisation. By agreement between the parties, I am to accept into evidence both the reports of and the agreement reached by the respective experts, the orthopaedic surgeons, Dr RJL Stein and Dr GO Reid, who agreed that Mr Ucuto be provided with a prosthesis and the actuaries Mr R Immermann and Mr GA Whittaker.
- [9] The orthotists and prosthetists, Messrs Grimsehl, Fourie and Kuhn, agreed on all but one aspect in their joint minute (the Grimsehl-Kuhn minute). While both agree that Mr Ucuto should be provided with a myoelectric prosthesis and a spare prosthesis, Mr Grimsehl is of the view that the additional prosthesis should be a myoelectric prosthesis; Mr Kuhn is of the view that the additional prosthesis should be a cosmetic prosthesis.
- [10] Despite the agreement between the orthotists and prosthetists,¹ PRASA took issue with one paragraph in the Grimsehl-Kuhn minute, who agree that "*Mr Ucuto is a functional prosthetic user. He excels in functional use of his prosthesis in activities of daily living and uses the prosthesis for the function it was designed and manufactured to do*".² The Defendant disputed that Mr

¹ *Bee v RAF* [2018] ZASCA 52, where the Supreme Court held that while parties are generally bound by the joint minute of experts, the Court is not.

² Para 7.6 of the joint minute of 23 July 2025.

Ucuto is a suitable candidate for a myoelectric prosthesis. The Defendant contended that Mr Ucuto would be better served by a cosmetic prosthesis. The Defendant relied on the evidence of its occupational therapist, Ms Swart, to dispute this agreement recorded in the Grimsehl-Kuhn minute.

[11] In both the written and oral argument, the Defendant changed course, conceding that the Plaintiff was entitled to be awarded a myoelectric prosthesis. I will return to this.

[12] The parties agreed to the actuarial calculations of the capitalised values of the future medical and related expenses.³ The actuaries provided two schedules of the capitalised value of the future medical and related expenses. The first schedule was based on Mr Ucuto's future medical expense requirements, as set out in the report of Mr Grimsehl. These calculations make provision for one myoelectric prosthesis to be provided to the Plaintiff every five years, together with a spare myoelectric prosthesis that the Mr Ucuto could utilise when the first prosthesis was in for repairs or a service. The second schedule incorporated the expenses as identified by the Defendant's orthotist, Mr Kuhn, that Mr Ucuto only required one myoelectric prosthesis and that the spare prosthesis be a cosmetic prosthesis. Aside from this distinction, the calculations of the experts are identical.

[13] In the course of the trial, the parties agreed on the quantification of the future medical expenses to be awarded to Mr Ucuto in relation to psychiatric treatment

³ Caselines 006-36 to 006-40 Appendix I and Appendix II

and consultations as set out in the report of the psychiatrist, Dr Mashayamombe, in the sum of R152 115.00 (subject to contingencies), and R15 000.00 for psychotherapy as recommended by the occupational therapists, Ms Twala and Dr Peta.

[14] The respective occupational therapists, Ms Motake for the Plaintiff and Ms Swart for the Defendant, agree that Mr Ucuto be provided with a number of adaptive devices to assist him with his general daily activities. The necessity for these adaptive devices is not placed in issue. Ms Motake agrees with the assessment of the orthotists and prosthetists, that Mr Ucuto is awarded a myoelectrical prosthesis. Ms Swart does not; she contends for a cosmetic prosthesis.

[15] In addition to seeking the medical costs for the prosthesis, Mr Ucuto seeks further damages, which he styles as “*associated medical expenses*”, to accommodate his injury namely with the provision of adaptive housing, either to make his current home more accessible for him or to build a home that is specifically built to accommodate his disability; and providing Mr Ucuto with a motor vehicle that is adapted to take his disability into consideration. The Defendant admitted the calculation of the quantum of these damages but disputed the necessity for these damages to be awarded to Mr Ucuto.

[16] The issues I am called on to decide are:

1. the status of the combined joint minute between Heinrich Grimsehl for the Plaintiff and Riaan Fourie and Eluah Kuhn for the Defendant, dated 30 November 2016;
2. what type of prosthesis Mr Ucuto should be awarded – a myoelectric prosthesis or a cosmetic prosthesis, and the costs associated with the prosthesis awarded;
3. whether Mr Ucuto should be awarded the “associated medical costs” of the provision of the motor vehicle and accommodation;
4. the quantification of the Plaintiff’s future medical expenses and associated expenses; and, lastly,
5. the question of costs.

EVIDENCE FOR THE PLAINTIFF

Mr Grimsehl

[17] The Plaintiff’s first witness was Mr Grimsehl, an orthotist and prosthetist. Mr Grimsehl first assessed Mr Ucuto’s suitability for a prosthesis in October 2011. Mr Grimsehl’s observation, in conducting a physical assessment of Mr Ucuto, was that Mr Ucuto’s stump link was very short, only 10cm from the shoulder joint. The amputation site is well-healed with good skin coverage. Mr Ucuto has good shoulder and stump movement. The myo-testing indicated that the signals and functions were observed, indicating that myoelectrodes could be utilised and that Mr Ucuto was a good candidate for a prosthesis.

- [18] Mr Grimsehl recommended a myoelectric prosthesis given the high level of the amputation. A body-powered prosthesis required the amputee to expend energy to manipulate the cable and harness to allow the elbow to extend or flex the terminal device (the hand to open or close).
- [19] As Mr Ucuto has a very short stump, he would have less leverage available to control the body-controlled prosthesis. It would be difficult for Mr Ucuto to operate the body-powered prosthesis. Cosmetic prostheses have no functionality and serve only for aesthetic effect.
- [20] Mr Grimsehl built Mr Ucuto's prosthesis in 2020. The main component, the dynamic arm was obtained from the manufacturer, Ottobock, in Germany. The dynamic arm includes the portion from the elbow to the wrist, the wrist joint, the elbow joint and the charge. Additional items such as the cosmetic hand, the greifer, the harness and the glove were also obtained from Ottobock. The greifer hand has a stronger grip and is used for fine motor work as opposed to the cosmetic hand.
- [21] Mr Grimsehl manufactured the shoulder socket, the elbow and the wrist in his workshop. The shoulder socket is made from a glass mould of the patient's shoulder. It is necessary then to secure the dynamic arm to the socket and to fit on the other components.
- [22] Mr Grimsehl consulted with Mr Ucuto approximately 40 times over the past five-year period. He effected repairs to the prosthesis which were not covered by the warranty. In the five-year period that Mr Ucuto has had the prosthesis, the

recommended refit was not done after the two-and-a-half-year mark, as Mr Ucuto did not have the funds to do so.

[23] Mr Grimsehl explained the functionality of the prosthesis, with reference to a photograph of Mr Ucuto's. The harness goes across the shoulders to keep the arm in place. The socket devised by Mr Grimsehl is placed over the shoulder, which has sensors linked to the bi- and tricep muscles' nerves, which are used to operate the prosthetic arm. The prosthetic operates by the amputee deciding what movement is to be made which triggers the sensors, sending a pulse to the operation. This triggers a movement either to move the elbow joint up and down or to open and close the hand joint.

[24] Mr Grimsehl demonstrated Mr Ucuto's use of the prosthetic arm with Mr Ucuto as a model. Mr Ucuto was able to lift his arm up and down, specifically lifting the lower arm from the elbow joint and opening and closing his hand, as well as rotating his wrist from right to left and left to right. Mr Ucuto demonstrated that he is able to lift up a 500ml water bottle with the prosthesis, hold it in place, open the bottle top with his left hand and then pour the water into a glass held in his left hand. Mr Ucuto's hand movements were smooth.

[25] Mr Grimsehl addressed his costing for the prosthesis. A refit of the prosthesis, particularly the refit of the socket fitting over the shoulder, which houses the sensors, is necessary every two-and-a-half years within the five-year period. The 5% maintenance fee was to cover incidents and accidents which were not covered by the warranty of the prosthesis.

- [26] Mr Grimsehl recommended that a second myoelectric prosthesis be provided to Mr Ucuto to cover for instances when the prosthesis was in for repairs or maintenance. In addition, a second prosthesis would allow the amputee to rotate the prosthesis every week. This would result in lower maintenance costs overall.
- [27] In considering the joint minute between Mr Grimsehl and Mr Kuhn and Fourie, Mr Grimsehl identified that the only aspect of disagreement was the type of spare prosthesis. While Mr Kuhn recommended a myoelectric prosthesis for Mr Ucuto, he was of the view that a cosmetic spare be made available to Mr Ucuto and that a second myoelectric prosthesis was not required.
- [28] In Mr Grimsehl's view, given that loan units were not always available, it was not fair for Mr Ucuto to be expected to wait up to six weeks (which was the last waiting period the Plaintiff had to endure in the course of June 2025) while the prosthesis undergoes maintenance or repair. In the six-week period, the amputee would have to acquaint him or herself with the new prosthesis should a cosmetic prosthesis be made available, which would not be the case if the amputee had a second myoelectric prosthesis. After return of the prosthesis from repairs, the amputee would then have to re-learn how to utilise the prosthesis. In this period, the patient would lose functionality.
- [29] The prosthesis reached the end of its life in January 2025. In June 2025, Mr Grimsehl effected certain repairs to the prosthesis, as it was by then out of warranty. The repairs effected by Mr Grimsehl was to bring the prosthesis back to functionality. The repairs effected by Mr Grimsehl made the prosthesis

functional but it still had various glitches which impeded the functionality of the prosthesis.

[30] Under cross-examination, Mr Grimsehl accepted that he assessed the appropriateness of the prosthesis from the perspective of the wearer. In this scenario, Mr Grimsehl considered the value to the wearer if it added function and functionality to the wearer. Cost was, in Mr Grimsehl's view, a secondary function. These had to be within reason. Mr Grimsehl disputed the contention that the objective costs had to be compared against the functionality observed by the occupational therapist. Mr Grimsehl refuted that the necessity for the prosthesis is evaluated against what the amputee cannot do without the prosthesis. From Mr Grimsehl's perspective he always considered how the amputee's functionality can improve with the use of a prosthesis. This difference in perspective is central to the parties' respective positions on which prosthesis is best suited to Mr Ucuto.

[31] Under cross-examination, Mr Grimsehl accepted that he did not test Mr Ucuto in his home environment before suggesting the myoelectric prosthesis. Mr Grimsehl accepted that the myoelectric prosthesis is heavier than a cosmetic prosthesis due to its mechanical parts. However, as there is a shoulder socket and the prosthesis rests on the amputee's shoulder and pulls the shoulder down, the weight of the myoelectric prosthesis is not a factor.

[32] Mr Grimsehl disputed the high rate of rejection of prostheses by amputees. In his experience, the acceptance of a prosthesis in lower income communities is lower out of necessity. It was not suggested to Mr Grimsehl in cross-

examination that Mr Ucuto had rejected the prosthesis nor was it suggested that Mr Ucuto did not use the prosthesis.

[33] Mr Grimsehl was questioned on various delivery notes from Ottobock in cross-examination. Mr Grimsehl acknowledged that the delivery notes had been completed by persons from his workshop. However, as the documents presented to him were not dated, he was unable to identify the reason the prosthesis had been sent to Ottobock or the reason and period it took for a loaner unit to be provided. Mr Grimsehl iterated that the last time he requested a loaner unit from Ottobock was in about May 2025; the waiting period for a loaner unit was approximately six weeks. Mr Grimsehl accepted that, where a scheduled maintenance is booked in advance with Ottobock, a loaner unit can be secured. This is not possible, Mr Grimsehl testified, where there is an emergency.

[34] Mr Grimsehl stated that, after 24 months without a refit, the inside of the dynamic arm had buckled. This was caused by body odour, sweat and the heat. Mr Ucuto was unable to secure funds for a refit, so none had been done in the past five years.

Ms Motake

[35] The occupational therapist, Ms Motake, testified that she conducted a physical assessment of Mr Ucuto in October 2010. This was some six months after the accident. Ms Motake assessed Mr Ucuto's functional ability against the standard of a person with a bilateral function. Ms Motake recorded that

Mr Ucuto was ridiculed by persons in his community because he does not have an arm and, as a consequence, does not socialise and has poor self-confidence. Ms Motake recorded that Mr Ucuto had adopted to perform certain functions with his left hand, that he had previously either done with his right hand or with both hands. Ms Motake recommended that Mr Ucuto be provided with accessories to assist him with daily functions. Mr Ucuto's adaptations have been self-taught as he explores what he can and cannot do.

[36] Ms Motake has not assessed Mr Ucuto since he obtained his prosthesis, but was present during a home visit in July 2025 when Ms Swart conducted various tests. Ms Motake records that, in her interactions with Mr Ucuto, he depends on the myoelectric prosthesis for his self-image and self-confidence as, when he wears it, he feels normal. Mr Ucuto has explored the range of things he can do with the prosthesis.

[37] Before he had the prosthesis, Mr Ucuto told her that he was ridiculed a lot and called *isandla*, which means "*small handed person*". Mr Ucuto told her, he would still be considered a disabled person if he had a cosmetic prosthesis or a body-powered prosthesis, which would be difficult for him to operate given the shortness of the stump. Also, a body-powered prosthesis requires leverage, which he does not have.

[38] Persons living in a township are expected to attend functions as these are community building. If you do not attend, you are labelled as aloof. A body-powered prosthesis would attract attention, which Mr Ucuto would find demeaning and it would not be good for his self-esteem.

[39] Ms Motake observed that, at the home visit in July 2025, Mr Ucuto appeared to be nervous and self-conscious in the presence of four women. Mr Ucuto's breathing was heavy and he was far slower and deliberate in his movements. Ms Motake compared that to her recent observations of Mr Ucuto during a meeting with the lawyers, where she observed Mr Ucuto taking a water bottle and pouring water with fluid movements when he was not being closely observed.

[40] Under cross-examination, Ms Motake confirmed that her initial and final reports were in the same terms. Ms Motake did not conduct any tests with Mr Ucuto. Mr Ucuto is not fully functional as he does not have bilateral use of the arm. The prosthesis works to support the uninjured left arm. Ms Motake conceded that, in a number of instances, the support and stability achieved by the myoelectric prosthetic hand, such as buttering bread, opening a tin can and cutting up food, can be achieved with a cosmetic prosthetic hand and a non-slip mat.

[41] Ms Motake did not conduct any tests as to Mr Ucuto's activities of daily living. Ms Swart and Ms Motake did not discuss the conclusion reached by Ms Swart, that Mr Ucuto would be serviced just as well by a cosmetic prosthesis.

Mr Brummer

[42] The architect, Mr Brummer, testified in relation to the accommodation requirements for a person disabled in the manner of Mr Ucuto. His report recorded two options, firstly, the alterations and additions to a model 3-

bedroomed, 1-bathroomed township home and, secondly, for the erection of a new 3-bedroomed, 1-bathroomed home. The report is based on a concept house. Mr Brummer did not conduct a site inspection of Mr Ucuto's home where he resides at his aunt's house in Tsakane. Mr Brummer's design was aimed to assist the Plaintiff to live a full life. This would entail adaptation to the current living space, by having ramps and grab bars to assist mobility and non-slip tiles and water controls to deal with stability.

[43] Critical aspects to consider when designing a space for a disabled person is that there is a free flow of space to accommodate the disability. This is particularly important in the kitchen space as this is often where a family congregates on a daily basis.

[44] The concept home allowed for a third bedroom, which was also called a consultation room, as a space where Mr Ucuto could receive any form of therapy. This allocation did not require an extra bedroom but was based on a standard home with three bedrooms. The allocation of a garage was based on the assumption that Mr Ucuto would have a motor vehicle. The 2025 report merely updates the cost calculations.

[45] When challenged in cross-examination that the concept residence was more appropriate for a person who is disabled and using a wheelchair, Mr Brummer persisted that his design was correct as an amputation affects a person's balance. An amputee's balance is less stable than that of an able-bodied person.

[46] Mr Brummer, in understanding the scope of his brief, considered the occupational therapist's report, who identified the functionality limitations of Mr Ucuto. This informed his recommendations for a grab rail, extra storage, the spatial arrangement of the home and sliding doors for cupboards instead of swing doors.

[57] Mr Brummer conceded that had he been aware of Ms Swart's view that there was limited evidence of functional integration of the prosthesis and that Mr Ucuto would be better served with a high-quality cosmetic prosthesis with passive stabilisation features, he would have designed a different concept house. However, Mr Brummer testified that the concepts of stability and mobility should not be confused. The concept house meets Mr Ucuto's mobility limitations.

Ms Rich

[47] Mobility expert and occupational therapist, Ms Rich, testified on the costs required for adaptive driving by a person such as Mr Ucuto. Ms Rich accepted the assumptions of the initial mobility report, which was written by a Mr Rademeyer in 2015. Ms Riche was the author of the addendum to the report, updating the calculations. While Ms Riche states that Mr Rademeyer has retired from the practice and now acts as a consultant, no explanation was provided for his failure to testify.

[48] The expert opinion filed of record was that of Mr Rademeyer who did not testify. There is little value in Ms Rich's evidence, which I address below.

Mr Ucuto

- [49] Mr Ucuto testified that he was born in Mozambique but came to South Africa in 2003. In April 2010, when he fell out of open doors of a train, he was, at that time, employed on a construction site and living in Tembisa. After the accident, he moved to Tsakane to live with his aunt. He was fitted with the prosthesis in 2020. He learned how to use the prosthesis with Mr Grimsehl in Auckland Park. He practised using the arm and received training in 2020 to 2021.
- [50] Mr Ucuto testified that, on three occasions, he received a visit at his house from the occupational therapist, Ms Swart. The first one was in 2021 and there were two in 2025.
- [51] Mr Ucuto was asked how he felt about his injury and he said he felt hurt. He has no strength as he has no right hand. He wished he could do what other young people can do. He wanted to stay with his children, to be able to look after them and wanted them to grow up with him. Before he had the prosthesis, life was very difficult. Even eating was difficult. He had to peel a banana and open a water bottle with his teeth. He could not cut food on his own. He was ridiculed and called names. Mr Ucuto testified that the prosthesis helps him cope at home, it helps him to balance when he wants to do something or eat something, it helps him in doing everything to support his left hand. Earlier this year, he did not have the prosthesis for two to three weeks while it was being fixed in Germany. Mr Ucuto found it very difficult to cope without the prosthesis.

- [52] Mr Ucuto acknowledged that he has never had a driving licence but he said he bought himself a Nissan hard body truck after the accident. Someone else drove the car for him, but that person damaged it. Mr Ucuto could not remember the exact date of purchase, except that there was a payment from the Court.
- [53] Mr Ucuto was unclear whether he had received a loan prosthetic unit at any time. He acknowledged that, at one point, he had a temporary prosthesis, but he said it did not work. Mr Ucuto says he never wore it except when he went to church. It was, as he said, a decoration.
- [54] Mr Ucuto stated that when he travels by taxi, he has no balance when the taxi shakes and he is embarrassed when people look at him.
- [55] In cross-examination, the Defendant's counsel read various extracts from Ms Swart's report and asked Mr Ucuto to comment on the report. This required the interpreter to read the extract then translate the extract for Mr Ucuto to respond. The answers Mr Ucuto gave were at times nonsensical and/or did not relate to content of the paragraph which had been read in English. Mr Ucuto disputed the content of certain paragraphs of Ms Swart's reports. It was not clear whether the interpreter had correctly translated the relevant paragraph from Ms Swart's report or whether the witness understood what was asked of him. It was not clear to me where and what had been lost in translation. In any event, little value can be attached to this modality of cross-examination. Mr Ucuto was asked to comment on an expert report. Mr Ucuto is not an expert witness; he is the injured party. Mr Ucuto was not called to testify as an expert. His view

of Ms Swart's report is immaterial to determine what type of prosthesis would be suitable and what extent of damages he should be awarded.

[56] Mr Ucuto's evidence became clearer when the videos taken by Ms Swart were played to him. From the first video, showing Mr Ucuto picking up a bottle with the prosthesis and attempting to pour water, Mr Ucuto stated that the charge in the prosthesis was not a hundred per cent effective and the power was not enough. Mr Ucuto testified that he told Ms Swart this. He is not able to use the prosthesis to drink water as he cannot lift the prosthesis high enough to reach his mouth. From all the videos taken by Ms Swart in September 2021, Mr Ucuto's response was that the prosthesis was not properly charged and the arm was not working in the normal way.

[57] Mr Ucuto refuted that the good condition of the greifer charger was because it was never used. Mr Ucuto testified that he took care of the charger and put it away after use.

[58] With each task that Ms Swart asked Mr Ucuto to perform, he understood that he was to use his right hand, that is, the prosthesis. When it was pointed out that his movements were not smooth, he kept saying that he was trying and that he was training himself.

[59] Mr Ucuto stated that he uses the prosthesis to do things like tying his shoelaces but does not use it to put on his trousers or t-shirts. He wears the prosthesis all the time and only removes it when he sleeps.

[60] Mr Ucuto's response to the videos taken in 2025, that he moved deliberately, slowly and took time, was to state that the prosthesis is slow and does not operate like his hand.

[61] Mr Ucuto's competence with the prosthesis from the videos taken by Ms Swart, in 2021 and 2025, differs from those taken while Mr Ucuto was still in training in 2021. These were taken at the rehabilitation centre in Auckland Park. Then his movements were more fluid. Similarly, the fluidity of Mr Ucuto's use of the prosthesis is evident in the video taken by his cousin in March 2025, of Mr Ucuto sharing a family meal. The latter showed Mr Ucuto using his prosthesis in a life experience in real time and not the assessment in the presence of a therapist.

EVIDENCE FOR THE DEFENDANT

Mr Clark

[62] The Defendant's first witness was Hugh Clark, a service manager at Ottobock. He testified that loaner prosthetic units were available for clients when the units were still under warranty. The units would be made available within one to two weeks. However, the waiting time to obtain loaner units for customers whose prostheses were out of warranty, or who wanted to consider the use of the prosthesis, could be longer. The process required a request to the Johannesburg office, which would make the request to Germany, which would then make available the loaner unit. The general delivery time for a loaner unit is one to two weeks. Mr Clark was unaware as to what Ottobock's usual policy

is. The service of the unit had a turnaround time of four to six weeks, depending on the nature of the service.

[63] Unfortunately, Mr Clark was not involved in the receipt of prostheses and sending them in for repairs. Mr Clarke had no knowledge when and whether Mr Ucuto was provided with loaner units. Mr Clarke had no knowledge what transpired in this matter. Mr Clark's evidence is of limited value.

Ms Swart

[64] Ms Swart, the Defendant's occupational therapist, stated that she assessed Mr Ucuto on three occasions. The first occasion was in 2015 at her rooms and the second and third occasions were home visits at Mr Ucuto's home, in September 2021 and in July 2025.⁴

[65] Ms Swart testified that, as an occupational therapist, she is a functional expert. In assessing Mr Ucuto, Ms Swart determined whether Mr Ucuto could meaningfully perform tasks, namely, activities in daily living, using the prosthesis. When she spoke of functional usage, she meant the ability to complete a task in a reasonable, practical time that does not require excessive cognitive thought. The task is the function, while the prosthesis is the tool to complete the function.

⁴ See the reported consultations and evaluation in 2015, 2021 and 2025, Caselines 005-54 to 005-100 (7 January 2025) 005-101 to 005-110 (9 October 2021) 005-111 to 005-126 (19 July 2025)

- [66] Ms Swart analysed Mr Ucuto's capacity to complete a task by considering his strength, his coordination and the environment in which he operated. Her assessment was a triangulation of her task analysis, interviews with the client and his support system. She had Mr Ucuto undergo a number of functional tests.
- [67] In her first report, Ms Swart did not recommend a prosthesis because of the position of the injury. Mr Ucuto had lost proprioception and there had been a long time delay between his injury and his self-rehabilitation. Ms Swart expressed the view that a prosthesis should be fitted as soon as possible before the amputee develops a level of independence with the remaining limb. By 2015, he was mainly independent, using his left hand.
- [68] In September 2021, during the home visit, Ms Swart was of the view that Mr Ucuto had not yet integrated the prosthesis into his daily activities. He was still mainly dependent on his left hand and arm.
- [69] Ms Swart's observations at the third assessment in 2025, were that Mr Ucuto's movements with the prosthesis had not improved, using the prosthesis was laboured and he showed difficulties with the control of the device. Ms Swart took the good condition of the prosthesis as an indicator that it was not frequently used but only used on occasions. This Mr Ucuto disputed. In Ms Swart's view, Mr Ucuto's functionality has decreased. This proposition was never put to Mr Ucuto to respond to.

- [70] In Ms Swart's view, there has not been significant change in Mr Ucuto's functionality with or without the prosthesis since her first assessment in November 2015. Ms Swart based this on Mr Ucuto's capacity to perform a daily living task – Mr Ucuto has not integrated the prosthesis into his daily living tasks and activities. The tasks he performs with the prosthesis were tasks he was able to perform without the prosthesis in her first evaluation in 2015. The myoelectric prosthesis has thus not increased Mr Ucuto's functionality.
- [71] In the intervening period between the train accident in 2010 to when the prosthesis was fitted in 2020, Mr Ucuto had reached an excellent level of functionality with his left hand. In Ms Swart's assessment, Mr Ucuto requires the prosthesis for psychological reasons to avoid the "loose sleeve" fear, which fear can be met by a cosmetic prosthesis. Mr Ucuto does not require a functional prosthesis, given his excellent adaptation to using his left hand for all his necessary daily living tasks.
- [72] When considering the various short videos Ms Swart took during her assessment of Mr Ucuto, Ms Swart insisted, under cross-examination, that each task Mr Ucuto performed and/or completed with the prosthesis was a task that he could do just as adequately or competently with his left hand.
- [73] Ms Swart testified that it was painful to watch Mr Ucuto performing tasks with the prosthesis, given his awkwardness in operating the prosthesis and the length of time it took for him to complete each task. In Ms Swart's opinion, Mr Ucuto has reached his maximum rehabilitation potential. He does not have automatic or fluid movements with the prosthesis. Mr Ucuto's shoulder mobility

is decreased with the myoelectric prosthesis. He has more shoulder mobility in his right shoulder when not wearing the myoelectric prosthesis.

[74] Ms Swart challenged Ms Motake's opinion that the prosthesis assists Mr Ucuto with his loss of functionality, including the psychological loss he feels.

[75] Ms Swart's opinion, as described above, were not aspects canvassed with Mr Ucuto in cross-examination. Mr Ucuto was not given an opportunity to respond to Ms Swart's conclusions, namely that his functionality has not increased in the five-year period.

[76] In Ms Swart's opinion, Mr Ucuto is not wearing the prosthesis. At best, she testified Mr Ucuto only wore his prosthesis some of the time. Ms Swart bases this view on the lack of wear and tear, such as to the socket and the prosthetic hand. She denied that Mr Ucuto's assertion that he wore it all the time could be correct.

[77] Ms Swart's evidence was that Mr Ucuto was predominately concerned with his appearance as a disabled person. A cosmetic limb and hand would mean Mr Ucuto no longer has to suffer the indignity of a loose or empty sleeve and would provide him with a counter-balance to hold items with when utilising his left hand in bimodal activities. Ms Swart conceded that no prosthesis could compensate for the hand that Mr Ucuto had lost. The best a prosthesis could do, is to compensate for his loss of functionality.

- [78] Ms Swart took issue with Ms Motake and Mr Grimsehl's opinion that the prosthesis assisted Mr Ucuto with balance. In Ms Swart's opinion, Mr Ucuto had excellent balance without the prosthesis when it came to sitting, standing, squatting and running, so both his static and dynamic balance, and there was no improvement to his balance with the prosthesis. These assertions of Ms Swart were not aspects that were canvassed with either Ms Motake or Mr Grimsehl, in cross-examination.
- [79] Ms Swart disputed that the removal of the myoelectric prosthesis after using one for a five-year period would negatively affect Mr Ucuto.
- [80] Ms Swart was unaware, at the time she conducted her evaluations both in November 2021 and in July 2025, that Mr Ucuto had not had the use of his prosthesis for some time before the assessment. The prosthesis was sent for repairs to Germany in 2021 for a period of three months prior to the November 2021 assessment. In 2025, Mr Ucuto did not have a prosthesis for a period of six weeks while his prosthesis was undergoing repairs in Germany. There were no loaner units available. This evidence is uncontested.
- [81] In Ms Swart's opinion, the hiatus in Mr Ucuto having the prosthesis before the assessment should not have affected her evaluation. In her opinion, where a patient does not have the use of a prosthesis for an extended period of time, such patient will return to the functionality the patient had prior to the hiatus within a period of about a week.

- [82] Ms Swart's failure to consider the hiatus in Mr Ucuto's use of the prosthesis prior to her 2021 and 2025 assessment is concerning. Her opinion is premised on the evaluation conducted a week after Mr Ucuto recommenced use of the prosthesis. There is no evidence that Ms Swart's assessment was conducted a week after Mr Ucuto recommenced use of the prosthesis. Ms Swart's report is silent on this score.
- [83] Ms Swart acknowledged that she did not expect an upper arm amputee like Mr Ucuto to be able to open a bottle with the prosthesis. Nor did she expect that Mr Ucuto would be able to iron. Ms Swart did not explain why Mr Ucuto was assessed for functionality on tasks he was not expected to execute. Ms Swart's report did not record that the completion of such tests was not expected from an upper arm amputee.
- [84] Ms Swart did not accept that her report failed to provide a balanced view and that it was not objective. Ms Swart was of the view that the question of objectivity had to be decided by another occupational therapy professional with experience. Ms Swart was not prepared to comment that her report had not been considered objective by Ms Motake.
- [85] I agree with the Plaintiff's representative that Ms Swart's report only highlights her negative assessment of Mr Ucuto and not the positive. Ms Swart's explanation, that she only recorded the negative aspects in her report, as these raised flags that Mr Ucuto's functionality was below average, does not meet muster. Ms Swart has not articulated in her report that, where no flag is raised, the functionality of Mr Ucuto meets the standard of the test Mr Ucuto was

required to perform. The role of an expert is to assist the Court to understand issues within the realm of the expert's expertise. Absent an expert laying the parameters of the tests performed, the recordal of only the negative aspects in the results and conclusions drawn reflect a bias. It does not assist the Court.

[86] Under cross-examination in December 2025, Ms Swart was adamant that certain cosmetic prostheses have limited functionality and, as a result, such a prosthesis would be adequate for Mr Ucuto's needs. Ms Swart testified that a functional cosmetic prosthesis is sophisticated and is capable of small movements with manual manipulation of the functional limb. The difference between such a functional cosmetic prosthesis and a myoelectric prosthesis is that the myoelectric prosthesis allows the patient to grip and to flex the hand.

[87] This is not an aspect that Ms Swart addressed in her evidence-in-chief. When asked by the Court to identify where she addressed such a prosthesis in her 2021 and 2025 reports, Ms Swart conceded she had not addressed the question of a functional cosmetic prosthesis in either report. This is not a matter that was canvassed in cross-examination by counsel for the Defendant, with either the orthotist, Mr Grimsehl, Mr Ucuto, or with the occupational therapist, Ms Motake. There is no mention of a cosmetic prosthesis with limited functionality in the July 2025 joint minute of the occupational therapists, Ms Motake and Ms Swart.

[88] Mr Grimsehl was the only technical witness in that field who could assist the Court in determining whether a cosmetic prosthesis with limited functionality was better suited for Mr Ucuto than a myoelectric prosthesis. The suitability of

a cosmetic prosthesis with limited functionality is not addressed in the Grimsehl-Kuhn minute. Ms Swart did not assess Mr Ucuto wearing a cosmetic prosthesis with limited functionality. There is no evidence before me that such a cosmetic prosthesis with limited functionality is at all suitable for Mr Ucuto. Ms Swart's opinion as to Mr Ucuto's suitability for and capacity to utilise such a prosthesis is speculative. I do not accept Mrs Swart's opinion as to the suitability of a cosmetic prosthesis with limited functionality for Mr Ucuto.

[89] The parties agreed on the actuarial calculations of all the future medical expenses including costs of two myoelectric prosthesis, as proposed by Mr Grimsehl and one myoelectrical prosthesis with a cosmetic prosthesis proposed by Mr Kuhn. Absent from the agreed actuarial calculations is the quantification of damages for a cosmetic prosthesis with limited functionality. There is no quantification of damages for a cosmetic prosthesis with limited functionality.

[90] It appears to me that the introduction into evidence of a functional cosmetic prosthesis, an issue canvassed for the first time on day six of trial, is not incidental, but rather is an intentional attempt to make out a case not made on the pleadings, not considered by the expert orthotists and prosthetists or canvassed in evidence-in-chief or tested in cross-examination. It is litigation by ambush. I say no more.

IS THE DENDANT BOUND BY THE GRIMSEHL-KUHN JOINT MINUTE

[91] The role of an expert witness is to assist the Court by laying a factual basis for their conclusion and explain their reasoning to the Court. Courts are not bound by the view of any expert, including that contained in the joint minute. Courts make the ultimate decision on issues on which the expert provides opinion.⁵

[92] In *Glenn Marc Bee v The Road Accident Fund*,⁶ the Supreme Court of Appeal approved the position taken by Sutherland J in *Thomas v BD Sarens (Pty) Ltd*:⁷

“Where two or more experts meet and agree on an opinion, although the parties are not at liberty to repudiate such an agreement placed before the court, it does not follow that a court is bound to defer to the agreed opinion.”

[93] Where a litigant does not wish to be bound by the limitation of the agreement of the joint minute of experts, fair warning must be given to the other litigant.⁸

[94] The Defendant gave notice to the Plaintiff of its repudiation of the conclusion in the Grimsel-Kuhn report that *“Mr Ucuto is a functional prosthetic user. He excels in functional use of his prosthesis in activities of daily living and uses the prosthesis for the function it was designed and manufactured to do.”* The joint practice note records the status of this minute as an issue for determination.

⁵ *Road Accident Appeal Tribunal and Another v Gouws and Another* [2018] 1 All SA 701 (SCA), at para 33

⁶ 2018 (4) SA 366 (SCA), at para 24

⁷ 2012 ZAGPJHC 161, at para 30

⁸ *Bee v The RAF*, at para 66

[95] The Defendant conducted the trial on the basis of this repudiation. Relying on the opinion of their occupational therapist, Ms Swart, the Defendant asserted that Mr Ucuto would be better suited to a cosmetic prosthesis, as the myoelectric prosthesis did not increase Mr Ucuto's functionality. After seven days of evidence, the Defendant made an about turn in its written and oral submissions, conceding in principle that Mr Ucuto is entitled to a myoelectric prosthesis.

[96] In light of the Defendant's belated concession, it is not necessary for me to determine whether the Defendant is bound by the Grimsehl-Kuhn minute.

WHAT DAMAGES ARE TO BE AWARDED TO MR UCUTO

[97] The Plaintiff claims the sum of R31 388 076.00, in respect of the capitalised costs of the following medical and related expenses:

1. two myoelectric prostheses to be replaced every five years
2. four cosmetic gloves per annum (two per myoelectric prosthesis)
3. maintenance costs calculated at 5% per annum of the cost of the prosthesis
4. one refit for the prosthesis every five years
4. a Greifer attachment for the prosthesis

6. psychiatric treatment and psychotherapy costs
7. occupational therapy costs
8. travel costs to attend to the psychiatric psychological and occupational therapy consultations
9. various assistive devices to accommodate his disability
10. mobility costs for an adaptive motor vehicle
11. construction costs, alternatively the additions and alterations to his residence

[98] The purpose for awarding damages is to:

*“compensate the victim in money terms for the loss suffered. A plaintiff must allege and prove the quantum of damages suffered because of the defendant’s wrongful act. In other words, in this instance the plaintiff must lead evidence which establishes the reasonable and necessary cost of future medical and hospital expenses.”*⁹

[99] Whether these damages the Plaintiff seeks are reasonable and necessary are subject to the test for awarding medical expenses:

“whether it has been established on a balance of probabilities that the particular item of expenditure is reasonably required to remedy a condition or to ameliorate it. Where

⁹ *Mashinini v MEC for Health, Gauteng* 2023 (5) SA 137 (SCA), at para 9

*(as in Broom and Another v Administrator of Natal 1966 (3) SA 505 (D) and Knight v Conroy 1948 (1) E6 QOD 444 (T), the expenditure was incurred for a different, albeit commendable, purpose or is out of proportion to the condition it was incurred to eliminate or abate, it will be irrecoverable. It will then not be regarded as reasonable. Of course, in the final analysis, it is the function of the Court to determine whether the expenditure, past or proposed, measures up the criteria of reasonableness. In so doing, it will be guided, inter alia, by the evidence.*¹⁰

[100] The awarding of medical damages is a balancing act between whether the particular item of expenditure is reasonably required to remedy the condition or ameliorate it balanced against whether, while the item is commendable, its purpose is out of proportion to the condition it seeks to eliminate or abate. In making this determination, regard is to be had to the quantification of general damages as stated in *Dhlamini v Government of the Republic of South Africa*:

“If I were to have assessed the damages for the non-patrimonial elements in isolation, I would have arrived at an award considerably in excess of the figure at which I have arrived. I have grappled with the question what, in law, logic or equity, underlies my conviction that there must be some interaction between the awards for patrimonial loss on the one hand and the award for non-patrimonial loss, on the other. Whatever may be the rationale in principle or in other cases, it appears to me, in this case, and on its particular facts, that I cannot ignore the very substantial awards made [for special damages] when I come to assess general damages for pain and suffering, loss of amenities of life, disability and disfigurement. Those awards were considered reasonable for the very reason that they served to ease the plaintiff’s painful shuffle

¹⁰ *Dhlamini v Government of the Republic of South Africa* 1986 WLD per Kriegler J as reported in Corbett and Buchanan “Quantum of Damages in Bodily & Fatal Injury Cases” 2nd edition, Vol III (1989) at p 554

*across this mortal coil. They were intended to reduce the suffering, the loss of amenities of life and general disablement that the plaintiff will have to live with. I cannot ignore them when assessing those very elements under what is a different head of damage, but forms part of one and the same award.”*¹¹

[101] The parties’ 2015 agreement on general damages does not distinguish between the amount allocated for pain and suffering and the amounts allocated for loss of the amenities of life, disability, and disfigurement. The quantum for the general damages is included in the lump sum for past and future loss of earnings. The calculation of the amount was not subject to judicial scrutiny. The determination of the quantum for general damages was not a matter for me to decide. There are no facts for me to apply the considerations for the distinction between special and general damages as set out in the decision of *The MEC for Health, Gauteng Provincial Government v AAS obo CMMS*,¹² where the Supreme Court of Appeal recognised as correct, the approach in *Dhlamini*.

[102] Consequently, I will determine the quantification of these special medical expenses, without reference to the award of general damages which was not a matter before me.

¹¹ Ibid at 587

¹² 2025 (6) SA 152 (SCA) at paras 55 to 58

Myoelectric prosthesis or a cosmetic prosthesis

[103] It is trite that orthotists and prosthetists determine the suitable prosthesis required by a patient, while the occupational therapist assesses the functionality of the patient.

[104] The Grimsehl-Kuhn joint minute concluded that:

- “7.1. the prosthesis is well-worn and shows signs of daily regular use;
- 7.2. given that the amputation stump leaves such a short residual limb, it can be classified as a shoulder disarticulation that necessitates a specific socket design that eliminates the shoulder movement and range of movement;
- 7.3. the function of the prosthesis is not to be the dominant hand;
- 7.4. the prosthesis is indicated to, firstly, provide an opposing force and, secondly, provide functions more basic than the sound side;
- 7.5. Mr Ucuto will not be able to functionally operate a body-powered prosthesis with ease with his short residual limb, functionally classified as a shoulder disarticulation;
- 7.6.

7.7. Mr Ucuto is more functional with the use of his myoelectric prosthesis than he is without his prosthesis;

7.8. the use of a body-powered prosthesis will require a lot more energy and effort to operate than Mr Ucuto's current myoelectric prosthesis."

[105] While Kuhn did not testify, the Defendant did not challenge these conclusions in cross-examining Mr Grimsehl.

[106] The 2016 Grimsehl-Kuhn minute records the agreement that Mr Ucuto is a good candidate for a prosthesis and recommends a myoelectrical prosthesis, subject to Mr Ucuto's acceptance of the prosthesis. The rejection rates do not apply to Mr Ucuto as he is a proficient prosthetic user. The Defendant raised no objections against this report. the Defendant did not repudiate or give notice of repudiation of any portion of this report.

[107] Mr Ucuto received his prosthesis in 2020 and has used it in his daily living ever since. There was no evidence that Mr Ucuto has rejected the prothesis. There is no evidence that he does not use it nor is there evidence that it does not improve his quality of life.

[108] Mr Ucuto's skill with the prosthesis was demonstrated in Court. Various video clips were used in Court to demonstrate Mr Ucuto's level of proficiency with the prosthesis. Ms Motake observed that Mr Ucuto's level of proficiency was higher when he was in consultation with his legal team when compared to when he was being assessed. This was apparent in the video taken by Mr Ucuto's

cousin, recording him in a familiar family environment. Ms Motake was not challenged on this opinion.

[109] I do not accept Ms Swart's opinion that Mr Ucuto does not use or rarely uses the prosthesis. Ms Swart conceded that her report only recorded the instances where Mr Ucuto could not use the prosthesis or used it belabouredly, as these were "red flags". Ms Swart conceded that she assessed Mr Ucuto for functions she would not expect an upper arm amputee to perform, such as opening a bottle or ironing. Yet these were two instances Ms Swart used to highlight deficiencies in Mr Ucuto's functionality with the prosthesis. Given these concessions belatedly made, I do not accept Ms Swart's opinion that Mr Ucuto has not reached a competent level of functionality with the prosthesis.

[110] The Defendant conducted the trial on the premise that the myoelectrical prosthesis was not appropriate to be awarded to Mr Ucuto. Once the Defendant made the concession that a myoelectric prosthesis was the appropriate prosthesis, little weight can be given to the evidence in support of the premise that it was not.

[111] The Plaintiff is awarded the capitalised costs of one myoelectric prosthesis every five years. The undisputed evidence was that Ottobock, the manufacturer of the myoelectric prosthesis, provides a five-year warranty. Ottobock makes available loaner units for customers when their prosthesis is repaired or serviced under the warranty. There would be limited occasions when repairs would not be covered by the warranty. The provision for maintenance costs to

cover costs falling outside the manufacturer's warranty is both reasonable and necessary.

[112] In the limited periods that loaner units are not made available by Ottobock or the repairs fall outside the warranty, it is reasonable to make provision for a spare prosthesis. Mr Grimsehl's evidence was that two prostheses of the same type is optimal. I find that given the limited periods when Mr Ucuto will be without his myoelectric prosthesis or a loaner myoelectrical prosthesis, Mr Ucuto will be adequately compensated by a cosmetic prosthesis. The provision for maintenance costs for the cosmetic prosthesis is both reasonable and necessary.

[113] The joint minute of the orthopaedic surgeons records that a stump revision may be required. Such a revision would require a prosthesis refit. Even without taking such stump revision into account, the Grimsehl-Kuhn minute records agreement for a prosthesis refit every 2.5 years. It is plain that a person's body shape changes as one ages. The provision for a prosthesis refit every 2.5 years is reasonable and necessary. The provisions relate to both the myoelectric and the cosmetic prosthesis.

[114] The myoelectric prosthesis is fitted with a hand and a glove for general movement or gripper for fine motor movements. I find that these are necessary and reasonable to compensate Mr Ucuto for the loss of his arm and hand.

‘Associated costs’ of an adaptive motor vehicle and accommodation

[115] The Plaintiff claims damages for the associated costs, namely the provision of an adapted motor vehicle and the costs associated with a residence specifically built to accommodate his disability, alternatively adjustments to his current residence to accommodate his disability. The claim for these associated costs are not foreshadowed in any of the expert reports filed on behalf of the Plaintiff. This is in contrast to the facts in *Phillip Mzolo v PRASA*,¹³ where such costs were included in the damages award. In the *Phillip Mzolo* matter the necessity for both accommodation and a motor vehicle was addressed by both the orthopaedic surgeon and the occupational therapist in their expert reports.

[116] PRASA disputes that either of these expenses are appropriate or reasonable. I agree. Mr Ucuto has lived with his aunt for the past 15 years since his injury without incident, a home which has not been adapted to accommodate his disability. Mr Ucuto does not have a driver's licence and never drove prior to his accident. His employment as a general worker in the construction industry, prior to the accident did not require that he acquire either a driver's licence or a motor vehicle.

[117] No evidence was led in support of these claims for damages. The Plaintiff has failed to discharge his burden of proof that these claims are reasonable and necessary.

¹³ Unreported decision of the Gauteng Local Division, Johannesburg, 2010/34255 handed down on 9 March 2027

Quantification of future medical expenses

[118] The parties reached agreement on the future medical expenses. I include these amounts in the damages award.

[119] The full extent of the damages awarded are those quantified in the schedule Appendix 1 “Capitalised value of Future medical and related expenses” as calculated from the report of Mr Kuhn,¹⁴ excluding damages related to accommodation and a motor vehicle, and subject to the contingencies, I address below.

What contingency should be deducted from the damages award

[120] Contingencies discount the vicissitudes of life. The extent of discount and the determination of a suitable contingency deduction falls within the discretion of the Court. In *Dlamini v The Road Accident Fund*,¹⁵ the Court applied the guidelines referred to by the author, Koch, in *The Quantum Yearbook*, which calculated normal contingencies at a deduction of 5% for past life and 15% for future life.

[121] The Plaintiff contends that no contingency should be applied to the award. The Defendant, by comparison, contends for a sliding scale from a 50% contingency in respect of some costs to a 15% contingency in respect of other costs.

¹⁴ Caselines 006-38 to 006-40

¹⁵ [2015] ZAGPPHC 646

[122] The Defendant's main contention for disputing Mr Ucuto's entitlement to the myoelectric prosthesis, and the application of a 50% contingency, was that Mr Ucuto was well adjusted to his disability before the prosthesis was provided. In a similar vein, the Defendant contends that a 25% contingency should be applied to the prosthetic refit. The Defendant contends that none is needed as there has been no refit since Mr Ucuto acquired the prosthesis more than five years ago.

[123] It was uncontested that Mr Ucuto did not have the financial means to secure a prosthesis before the actualisation of the 2016 order, in January 2018. Given Mr Ucuto's meagre financial circumstances, his adaptation to his disability, was a matter of necessity. The Defendant's position seeks to justify a lower award of damages based on the necessity of the circumstances of an indigent litigant is cynical.

[124] The Defendant's further contention for a 50% contingency to the capitalised cost of a myoelectric prosthesis is based on Ms Swart's opinion that Mr Ucuto does not use the prosthesis or does not use it regularly, as it is in good condition. I do not accept Ms Swart's opinion. It is contrary to the Grimsehl-Kuhn report. Mr Ucuto testified he wears it daily.

[125] The Defendant argues that the allocation for maintenance costs should be reduced by a 25% contingency, as the prosthesis is covered by a warranty from the manufactures, Ottobock. The Defendant argued the Plaintiff damaged the prosthesis in a way not covered by the warranty, which was indicative that the Plaintiff was not caring for the prosthesis.

[126] Apart from the fact that these contradictory submissions by the Defendant cannot be true at the same time, the evidence does not support the Defendant's arguments. The uncontradicted evidence of the Plaintiff is that he does use the prosthesis and uses it every day. There is no evidence that the Plaintiff had damaged the prosthesis. Mr Ucuto was not given an opportunity to respond to this contention on which the Defendant relies as a basis to substantially reduce Mr Ucuto's quantum of damages.

[127] The vicissitudes of life call for the application of a contingency. There is no evidence to convince me to depart from the normal contingency of 15% for future expenses. I am of the view that a 15% contingency for all the prosthetic related expenses and psychiatric treatment is reasonable and appropriate. No contingency is applied to the agreed future medical expenses, namely psychological counselling, the occupational therapy, domestic assistance and the costs for assistive aids and equipment.

[128] Based on the agreed actuarial calculations, the Plaintiff is awarded damages in the sum of R5,127,593.23 comprising:

Future medical expenses (lines 1-20)	R211,508.00
Psychiatric treatment (line 64)	R152,115.00
Less 15% contingency	-R22,817.25
Subtotal: psychiatric expenses	R129,297.75
Myoelectric Prosthesis (lines 21-34)	R11,502,893.90
Prosthetic refit (lines 35-40)	R973,222.07

Cosmetic Prosthesis (lines 41-49)	R1,071,826.58
Annual costs (lines 50-51)	R79,444.00
Annual costs (lines 52-53)	R740,988.00
Cosmetic arm annual costs (lines 54-55)	R73,816.00
Annual costs (lines 56-57)	R1,071,256.00
Prosthetic refit (lines 58-63)	R621,119.00
<u>Subtotal prosthesis expenses</u>	<u>R16,134,565.55</u>
Less 15% contingency	-R2,420,184.83
Subtotal: prosthetic expenses	R13,714,380.72
Total: future medical + psychiatric + prosthetic	R14,055,186.47
Less: 50% apportionment	-R7,027,593.23
Less payments received	-R1,900,000.00
Total Damages	R5,127,593.23

COSTS

[129] The Plaintiff has been substantially successful. It is trite that costs should follow the result. The purpose of an award of cost to a successful litigant is:

*“to indemnify him for the expense to which he was put through having been unjustly compelled to initiate or defend litigation as the case may be. Owing to the operation of taxation, however, such an award is seldom a complete indemnity, but that does not affect the principle on which it is based.”*¹⁶

¹⁶ *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at p 488

[130] The Plaintiff argued that he should be awarded costs on an attorney client scale. In light of the manner the Defendant litigated this matter, I agree.

[131] The Plaintiff instituted these proceedings in 2010. The Defendant conceded the merits. The parties agreed that the Plaintiff would be entitled to his proven damages, subject to a 50% apportionment. The 4 November 2015 court order records this agreement, in relation to settlement of the general damages and past and future loss of earnings. On 26 November 2016, Messrs Grimsehl and Kuhn agreed that Mr Ucuto should be awarded a myoelectric prosthesis, subject to his acceptance of the prosthesis. The 6 December 2016 court order required the respondent to provide and pay for the Plaintiff's first prosthesis, together with the costs of the prosthetic rehabilitation. The Defendant paid the plaintiff R1.6 million for the provision of the prosthesis in January 2018.

[132] The Defendant's repudiation of the Grimsehl-Kuhn minute is recorded in the July 2025 pretrial minute.

[133] In *Bee*, Rogers AJA cautioned that:

*"...litigants should not be encouraged to repudiate agreements for tactical reasons. Whatever may have been the attitude to litigation in former times, it is not in keeping with modern ideas to view it as a game. The object should be just adjudication, achieved as efficiently and inexpensively as reasonably possible. Private funds and stretched judicial resources should only be expended on genuine issues."*¹⁷

¹⁷ *Op cit* at para 67

[134] Judge Rogers' caution manifests itself in this matter. The Defendant gave the Plaintiff due notice of its intention to repudiate one of the conclusions reached by the Grimsehl-Kuhn minute. A seven-day trial ensued. The Defendant's about turn on day eight, in its written and oral submissions, that the Plaintiff's principal entitlement to a myoelectric prosthesis and that the award of such prosthesis, the value of which was capitalised in the agreed minute of the actuaries and the schedules recording the capitalised valuations, should merely be subject to a contingency deduction, is the very antithesis of effective and inexpensive adjudication.

[135] Seven days of court time was expended canvassing an issue that the Defendant conceded on day eight. The Plaintiff, unemployed since the accident in 2010, due to his injury, was subjected to seven days of legal costs unnecessarily.

[136] I agree with the Plaintiff's submission that once the Defendant had conceded the merits it should have made a reasonable offer. Instead, the Defendant resisted the claim for 10 years, before conceding it on the eighth and last day of the trial. This is a cynical approach to litigation, aimed to exhaust the opposing litigant and, in this instance, a person with far lesser means.

[137] The Defendant's written and oral arguments call on this Court to make adverse inferences against the Plaintiff and his witnesses. The Defendant's legal representative did not, in cross-examining the Plaintiff or his witnesses, confront these witnesses with the proposition on which the adverse inference is based. These witnesses were not given an opportunity to respond. This is the very

essence of testing the veracity of a witness's evidence in cross-examination.¹⁸

I have recorded a number of examples.

[138] The Defendant, in its written submission, refers to a decision of *Dubazana Vusi v SARCC and Metro Rail*, an unreported decision where Hussain J had criticised Mr Grimsehl (the Plaintiff's expert) on the frequency of the replacement of prostheses, to dispute the necessity of a five-year prosthesis replacement. Mr Grimsehl was not confronted with this criticism in cross-examination. Mr Grimsehl was not afforded the opportunity to respond.

[139] The Defendant argues that the Grimsehl-Kuhn minute is a mere iteration of a prior minute of 30 November 2016, four years before the Plaintiff first attempted to use the myoelectric prosthesis. The Defendant argued that that was indicative that the opinion was not an analysis of the facts or consequences. The inference the Defendant sought to be drawn was never put to Mr Grimsehl in cross-examination. Mr Grimsehl was not given the opportunity to respond. The Defendant raised this repudiation of the entire substratum of the Grimsehl-Kuhn minute (not merely one paragraph) in argument. It is contrary to the notice requirement articulated by the Supreme Court of Appeal in *Bee v RAF*.

[140] The Defendant argues that the impartiality of Mr Grimsehl as an expert is questionable as he was the treating prosthetist. This proposition was not put

¹⁸ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), at paras 61 to 64

to Mr Grimsehl in cross-examination. Mr Grimsehl was never given the opportunity to respond to this.

[141] The Defendant asks the Court to draw an inference that the Plaintiff did not use or practice with the prosthesis, or follow the instructions of his treating team. These propositions were not put to Mr Ucuto in cross-examination for him to respond to.

[142] The Plaintiff was never given an opportunity to counter the conclusion the Defendant makes, that he has failed to care for the prosthesis and had damaged it.

[143] The methodology the Defendant adopted in cross-examination of the Plaintiff and his witnesses by reading large swaths of Ms Swart's report and asking the witness to comment on it, has limited value. The witnesses were not directed to any particular aspect. The witnesses were not asked a specific question. The expert opinion of Ms Swart, remained that. Reading the opinion to the Plaintiff, Mr Grimsehl and Ms Motake did not change that. Ms Swart's evidence-in-chief was lead in a similar vein, with Ms Swart reading her report into the record. The reading into evidence of the expert report does not elevate its status. Nothing changes when that report is read into the record multiple times. Such methodology of leading evidence only extends the duration of the hearing.

[144] This is a trial. The leading of viva voce evidence is critical. The matter cannot be decided on the opinion of the Defendant's expert summaries filed of record,

as the Defendant appears to postulate in both its written heads and in oral submissions.

[145] The Defendant was represented by senior attorney, senior counsel and senior junior counsel all with extensive experience in personal injury litigation. This is telling. The manner the litigation unfolded was deliberate and calculated.

[146] The awarding of costs lies within the discretion of the Court. Given the manner in which the Defendant conducted itself in this litigation, I am of the view that an adverse costs order is merited.

[147] The Plaintiff seeks the costs of the following experts:¹⁹

Mr Heinrich Grimsehl (Orthotist); Ms Catherine Motake (Occupational Therapist); Mr James Brümmer (Architect); Dr Amanda Peta (Psychologist); Dr L L Mashayamombe (Specialist Psychiatrist); Rita Henna & Partners Inc. (Rehabilitation Occupational Therapist); Ms Jessica Morris (physiotherapist); Hlabaki HLD (Pty) Ltd (Industrial Psychologist); Ms Khanyisile Twala (Social Worker); Mr G J Wentzel (Physiotherapist); Dr Geoffrey Read (Orthopaedic Surgeon); Neville Cohen (Mobility Consulting Expert); Dr M Malaka (Industrial Psychologist); Dr Morris Shapiro (Diagnostic Radiologist); Gerhard Jacobson Consulting (Actuary); and G W Jacobson Consulting (Actuary).

[148] The Defendant accepted its liability for the Plaintiff's general damages, past and future loss of earnings when these were settled in 2015. It follows therefore

¹⁹ Rule 70(3) of the Uniform Rules of Court

that the Defendant is liable for the costs including the qualifying costs of the experts, in relation to these damages. This includes the costs and qualifying fees of the industrial psychologist, the physiotherapist and social worker namely, Hlabaki HLD (Pty) Ltd, Dr Malaka, Mr Wentzel, Dr Twala.

[149] As a result of the agreement between the orthopaedic surgeons and the actuaries recorded in their joint minutes, these experts were not called to testify, the parties agreed that I take into evidence both the reports of and the agreement reached between these experts. It follows therefore that the Plaintiff is entitled to recover the costs including the qualifying costs of orthopaedic surgeon Dr Reid and the consulting actuaries Gerhard Jacobson Consulting (Actuary); and G W Jacobson Consulting (Actuary), including the costs related to the updated actuarial report filed of record. There was no dispute between the parties on the report of the diagnostic Radiologist. The costs including the qualifying fees of Dr Shapiro are allowed.

[150] In the course of the trial the parties reached agreement on Mr Ucuto's need for and the costs related to psychiatric treatment, psychotherapy and occupational therapy. Consequently, I am of the view that the Plaintiff is entitled to recover the costs including the qualifying fees of these experts, Dr Mashayamombe and Dr Peta. The parties agreed on the opinions in the report of the occupational therapist, Ms Morris of Rita Henna and Partners. It follows that the Plaintiff is entitled to recover her qualifying costs.

[151] The Plaintiff called Mr Grimsehl, Ms Motake, Mr Brummer and Ms Rich to testify to address the issues in dispute at the commencement of the trial, namely what

type of prosthesis should be awarded to the Plaintiff and the extent of the quantum of future medical and associated costs. I find that all these experts, save for Ms Rich, were necessary witnesses. The Defendant is liable to pay the qualifying fees and any fees relating to their attendance at Court.

[152] Both parties were represented by a senior and junior counsel. Given the number of issues in dispute at the commencement of the trial, the employment of two counsel is reasonable.

[153] In the result I make the following order:

1. The Defendant is ordered to pay the Defendant the sum of R5,127,593.23
2. The Defendant is to pay the Plaintiff's costs on an attorney, client basis including the costs of:
 - 2.1 The costs including the qualifying fees of the following experts:
 - Dr Amanda Peta (Psychologist);
 - Dr L L Mashayamombe (Specialist Psychiatrist);
 - Rita Henna & Partners Inc. (Rehabilitation Occupational Therapist);
 - Ms Jessica Morris (physiotherapist);
 - Hlabaki HLD (Pty) Ltd (Industrial Psychologist);
 - Dr Khanyisile Twala (Social Worker);

Mr G J Wentzel (Physiotherapist);

Dr Geoffrey Read (Orthopaedic Surgeon);

Neville Cohen (Mobility Consulting Expert);

Dr M Malaka (Industrial Psychologist);

Dr Morris Shapiro (Diagnostic Radiologist);

Gerhard Jacobson Consulting (Actuary); and

G W Jacobson Consulting (Actuary).

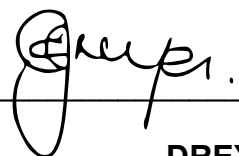
- 2.2 The qualifying fees and the fees for the court attendance of the following experts:

Mr Heinrich Grimsehl (Orthotist);

Ms Catherine Motake (Occupational Therapist);

Mr James Brümmer (Architect);

- 2.3 two counsel in Scale C.


DREYER JA
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff:

Adv Gift Shaokane SC

Assisted by Ms Ngomane

Instructed by: Denga Inc Attorneys

For the Defendant:

Adv J Wessels SC

Assisted by Ms Vallaro

Instructed by: Norton Rose Attorneys

Date of hearing:

23 to 25 July 2025, 31 July 2025, 1 August 2025, 8, 9
and 10 December 2025

Date of judgment:

1 September 2026