

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

5/9/2016

CASE NO: 2011/4407

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

STRYDOM, ADV J S, as *Curator ad Litem* for and on behalf of:

NHLENGETHWA: SAMKELO VUSI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

ADAMS AJ:

[1]. The plaintiff is the duly appointed *curator ad litem* for Vusi Samkelo Nhlengethwa (*'the patient'*). He claims delictual damages for and on behalf of the patient from the defendant in terms of the provisions of the Road Accident Fund Act number: 56 of 1996, as amended (*'the Act'*). The damages arise as a result of personal injuries sustained by the patient in a motor vehicle collision which occurred on the 301 May 2008 at the

intersection of Swartruggens Road and Monareng Street near Rustenburg.

[2]. The patient, whose date of birth is the [...] 1962, was 46 years old at the time of the accident, and he sustained a moderate to severe brain injury, a back injury, a laceration of the left parietal side of the head and soft tissue injuries to the shoulder, the left leg and the left side of the back. His age at present is 54 years old.

[3] The issue of the merits / negligence / liability, I am advised, was previously settled between the parties on the basis of a 50/50% apportionment, which means that the defendant is liable for 50% of the damages suffered by the patient as a result of the injuries sustained by him in the collision.

[4]. As far as future hospital and medical expenses are concerned, a previous Court Order was granted in terms whereof the defendant was ordered to furnish the plaintiff with a statutory Undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act number 56 of 1996 (as amended) (*'the Act'*). In view of the apportionment by agreement between the parties of the liability aspect, the said Undertaking would naturally cover the plaintiff in respect of future hospital and medical expenses, but limited to 50% of such costs.

[5]. This means that the only issues which remain unresolved between the parties and which I am required to adjudicate are that of the quantum of the plaintiff's general damages and the plaintiff's past and future loss of earnings / loss of income earning capacity / loss of employability.

[6]. This matter came before me on the basis that neither of the parties would lead oral evidence and that they would rely on the contents of the various medico - legal reports commissioned on behalf of the parties and joint minutes compiled by the overlapping experts. Most, if not all, of the facts are common cause and I am required to adjudicate the outstanding issues in dispute, which were further crystalized during argument, on the basis of the agreed facts.

[7]. The body of the evidence before me consists of a number of the medico- legal reports of the experts on behalf of both parties, as well as the joint minutes of the pre-

trial meetings held between some of the overlapping experts (all of which, by agreement between the parties, were admitted as evidence). No witnesses were called to testify by either party.

[8]. By the time I had heard submissions by Counsel for the plaintiff and the defendant, the issue relating to the quantum of the plaintiff's loss of earnings had been narrowed down further within this broad head of damages to an argument on the contingencies to be applied to the agreed pre - and post - morbid projected income of the patient.

THE FACTS:

[9]. After the accident on the 30th of May 2008, the patient was taken by ambulance from the scene of the collision to the Paul Kruger Hospital in Rustenburg. He was diagnosed with having suffered a fairly severe injury of the head and minor injuries to the back and lower limb.

[10] The patient was admitted and hospitalised for a period of 18 (eighteen) days from the date of the accident, being the 30th May 2008, to the 18th June 2008. On admission his Glasgow Coma Scale (GCS) was 10/15, improving to 14/15 on the 13th June 2008. Whilst in hospital, his laceration was sutured and he was kept in hospital for neurological observation. He remained restless, disorientated and confused until at least the 12th of June 2008. He required encouragement to eat on the 10th June 2008, and spilled from the left side of the mouth. A CT brain scan done had revealed that he had a small haemorrhage in the left parietal region. Intracerebral haematomas were seen in the superior aspect of the right parietal region.

[11]. The patient's main difficulty at present relates to his brain injury, which is described by the neurosurgeon of the defendant and the neurologist of the plaintiff in their joint minute of the meeting held between them as a '*moderate to severe diffuse brain injury*'. The patient also cannot hear properly with the right ear. He had multiple fractures of the transverse processes of the vertebrae and now has back pain.

[12]. The patient suffers from a mood disorder due to the traumatic brain injury, with moderate to severe personality, behavioural and cognitive changes indicated. With

regard to his cognitive ability, his neurocognitive profile demonstrates a number of difficulties relating to attention and concentration, memory and learning, and in his executive functioning.

[13]. At the time of the accident the patient was employed as a miner on a contractual basis at JIG Contractors, and was placed at Rustenburg Bofokeng South Mines. It was a yearly contract, and was renewed on an annual basis. As per salary advices for the periods April 2008, May 2008 and June 2008, he earned an average basic salary of approximately R10,553.00 per month, plus an average incentive / production bonus of approximately R25,118.00 per month and overtime of R422.00 as well as a contribution to his provident fund of R422.00 per month.

[14]. He also worked as a traditional healer during this time, but did this more to assist people

[15]. As a result of his injuries he was absent from work for a period of about 6 (six) months, and he was not paid during this time. He was only paid for the month of June 2008. He did not return to work until November 2008, when he '*absconded*' on 18th November 2008. Upon his return to work in September 2009, the patient failed a medical examination due to his injuries sustained in the accident. He has to date been unable to return to work and / or to resume work as a miner.

[16]. According to the Occupational Therapists, post - accident the plaintiff no longer meets the inherent physical requirements of his previous occupation as a miner, which often has heavy physical and excessive postural demands.

[17]. According to the plaintiff's psychiatrist, Dr Mirriam Close, and his neurologist, Dr J A Smuts, the brain injury as well as chronic pain that the patient experiences has had an adverse impact on his ability to obtain and maintain employment as there are effects with regard to motivation, self- worth, ability to participate and cognitive features. There has also been a decline in his interpersonal functioning with regards to his social inappropriateness, cognitive impairment and aggressive behaviour, which has had an adverse effect on his occupational capacity as a traditional healer.

[18]. The clinical psychologists are in agreement that the deficits and changes identified in their assessments will keep the patient from performing at his pre - accident level and that he will in all probability not be successfully employed in the open labour market.

LOSS OF INCOME

[19]. On the basis of the joint minutes of the Industrial Psychologists, it is common cause between the parties that but for the accident, the plaintiff would have continued working in his pre - accident capacity as a miner until he reached the age of retirement agreed on as age 62.5 years. As indicated above, there was also agreement on his pre - morbid projected income and his post - morbid projected earnings.

[20]. The foregoing translated into an actuarial calculation by Human & Morris Actuaries in terms of which the net loss of earnings (past and future) of the patient before the application of any contingencies amounted in total to R5,958,712.00. The calculations were on the assumption that at the time of the accident the patient was earning R10,533.00 per month, plus a production / incentive bonus equivalent to 238% (R25, 118.00) of the basic salary and overtime equating to 4% (R422.00) of the basic salary. In projecting the income forward from the date of the accident, provision was made only for inflationary increases on the basis that by the time the accident happened, the patient had already reached his career and income ceiling. Updated to the 301 August 2016 the basic salary amounted to R17,067.00 per month.

[21]. The agreed post - morbid scenario of the calculations is based on the assumption that the plaintiff retained an income earning capacity of R38,491.00 per annum.

[22]. As I indicated above, these calculations and the net results have been agreed to by the parties and are based on the agreements reached between the Industrial Psychologists. The scenarios are also seemingly supported by the factual matrix and the circumstances in the matter, notably the fact that factually the patient has not returned to gainful employment after the accident.

[23]. In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*, 2001 (3) SA 1188 (SCA) at paras 36 and 37 the following is stated relative to expert evidence and

the opinions of expert witnesses:

'[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne- Wilkinson we respectfully agree. Summarised, they are to the following effect.

[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has logical basis, in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'.'

[24]. In making an assessment of the weight to be attached to the conclusions of experts, especially the Industrial Psychologists, relative to the projected earnings of the patient, and applying the above principles *in casu*, I have had regard to the objective and undisputed facts in this matter, and I came to the conclusion that, on the probabilities, the foregoing scenarios are accurate, subject to what I say hereinafter in relation to the application of contingencies.

[25]. In the premises, I find that the pre - and post - accident projected career paths and earnings of the patient are as per the foregoing calculations.

CONTINGENCIES

[26]. The only issue which I need to consider and to which I now turn my attentions is that of the determination of a suitable allowance for contingencies. Our courts have alluded to the difficulties in arriving at the proper allowance for contingencies. In *Goodall v President Insurance Co Ltd*, 1978 (1) SA 389 (WLD), Margo J remarked as follows (at par392H - 393A):

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.'

[27]. Mr Bischoff, Counsel for the plaintiff, urged me to apply 5% contingencies to both the pre - morbid and the post - morbid income of the patient when calculating the past loss of earning. This is the normal contingencies applied when calculating the past loss and there is no reason to deviate from this standard, so it was submitted on behalf of the plaintiff. As regards the future loss of earnings, Mr Bischoff submitted that it would be fair and reasonable to apply 15% in respect of the pre - morbid projected income and 20% on the post - morbid earnings.

[28]. Counsel for the defendant, Ms Pienaar, was of the view that higher than normal contingencies should be applied to the pre - morbid projected income when calculating both the past and future loss of earnings. She suggested 10% in respect of the past pre - morbid projected earnings and 20% in relation to the future pre - morbid income.

[29] I agree with the submissions made by the defendant's Counsel, and I say so mindful of the difficulties mentioned in the Goodall case and having regards to the following considerations:

29.1. At the time of the accident, the patient was 46 years old and he had reached his career and income ceiling. This was confirmed by the Industrial Psychologists for both the plaintiff and the defendant.

29.2. A substantial portion of the plaintiff's total monthly salary package of R36,093.00 was constituted by an incentive / bonus, being R25,118.00, therefore about 70%. This means that by far the largest share of the income was not part of his guaranteed earnings.

29.3. Furthermore, the pre - morbid projected income was based on the earnings of the patient at the time of the accident when he was in fact employed

on a contract basis, which contract was renewed on an annual basis. The point is that the job security of the patient was not as ideal as it should have been if the patient was in full time employment.

29.4. Defendant's Industrial Psychologist, Ms Marina Grove, draws attention to the fact that the mining industry has seen its fair share of volatility. There have been a number of much publicised retrenchments due to the effects of the global economic recession and sluggish improvement and falling commodity prices in key markets such as China. There have reportedly been 23,000 job losses in the South Africa's mining sector since April 2015. This is an aspect, so it was contended for on behalf of the Road Accident Fund, which ought to be dealt with by applying higher contingencies. I agree with this submission.

29.5. A major difficulty which the patient presently experiences from an occupational point of view relates to neurobehavioural fallouts. However, even before the accident the patient appears to have been experiencing social snags. For example, it was reported to the plaintiff's Clinical Psychologist, Mr Henk J Swanepoel, that during 2005 the patient was dismissed from his then employment '*due to a misunderstanding*'. At that stage he had been accused of substandard work. During 1992, 1996 and 2003 he suffered from and was treated for tuberculosis. Furthermore, to the Clinical Psychologists he reported that he was '*quick tempered*' even before the accident. When he was younger, he was reportedly arrested and jailed for being physically violent and for fighting. He was apparently arrested many times for such, and at some stage served a prison sentence for stabbing someone.

29.6. In their joint minute the Psychologists agree that the post - morbid deficient performances are not only related to the outcome of the moderately severe brain injury.

[30]. Normally, an appropriate allowance for contingencies in respect of the past loss would be 5%, which is the figure suggested by the plaintiff. For the reasons mentioned above I am of the view that this standard should be deviated from in relation to the pre - morbid projected past earnings. intend applying 15% contingencies.

[31]. As regards the future loss of income, the standard to be applied in respect of the pre - morbid income would be 5% based on the sliding scale (See *Robert Koch: The Quantum Yearbook: 2015*). For the reasons mentioned, I am of the view that relative to the pre - morbid projected income, I should apply a much higher than usual contingency. In that regard, and all things considered, I intend applying 30% contingencies in respect of the pre - morbid income, and the normal 5% in respect of the post - morbid income.

[32]. Having regard to the above factors, my view is that a contingency of 30% in respect of future pre - morbid earnings would be justified. I intend applying such a high contingency notwithstanding the relatively short remaining working life of the patient. What weighs heavily on my mind in that regard is the pre - existing behavioural problems with which the patient presented and the fact that objectively speaking his occupational security (he was on a yearly contract) was not as secure as it ought to have been. Also up to 2006 he was earning fairly modestly.

[33]. Post - morbid, it was submitted on behalf of plaintiff that a contingency higher than the one applied in the pre - morbid scenario should be applied to make provision for the risk associated with the fact that the plaintiff is now a more vulnerable employee and job seeker due to his physical difficulties. In the exercise of my discretion I will apply a contingency which is the same as the normal / standard contingency to be applied, therefore a contingency of 5%. Post - morbid, the patient is being pitched at an extremely low level at R38,491.00 per annum (R3,200.00 per month in 2009 monetary terms), which is based on the assumption that he is close to being completely unemployable.

[34]. Therefore, on the basis of the calculations as per the report by Human & Morris dated the 30th August 2016 and applying contingencies as aforesaid, the results of these calculations, after the application of the contingencies are as follows:

	UNINJURED	INJURED	NET
PAST INCOME	R3,390,180.00	R332,639.00	R3,057,541.00
Contingencies (15% & 5%)	R508,527.00	R16,631,95	R491,895.05

Net Past Loss of Income	R2,881,653.00	R316,007.05	R2,565,645.95
FUTURE INCOME	R3,278,897.00	R377,726.00	R2,901,171.00
Contingencies (30% & 5%)	R983,669.10	R18,886,30	R964,782.70
Net future loss of income	R2,295,227.90	R358,839.70	R1,936,388.20
TOTALS	R5,176,880.90	R674,846.75	R4,502,034.15

[35]. Therefore, under this head of damages I intend awarding the plaintiff the total amount of R4,502,034.00.

GENERAL DAMAGES

[36]. I now turn to the general damages suffered by the plaintiff.

[37]. The plaintiff's counsel suggested that a sum of R800,000.00 (pre - apportionment) should be awarded to the plaintiff. He relied on two cases for comparative purposes, one which dates back to 1976 and the other dating back to 2003. Counsel for the defendant submitted to me that an amount R600,000.00 would be a fair, just and reasonable award in respect of the plaintiff's general damages. She also referred to cases for comparative purposes.

[38]. The award in previous comparable cases is but one of the considerations which a court should take into account when considering the amount of damages to be awarded. I have summarised the injuries and *sequelae* of the patient herein before.

[39]. In making an award under this head of damages, I have had regard to the award as well as the comments by the SCA in the matter of *De Jongh v Du Pisanie*, 2005(5) SA 457 (SCA), in which matter an amount of R250,000.00 was awarded in respect of general damages for a head injury which led to brain damage of the same or similar severity as the injury sustained by the patient *in casu*. Updated to 2016 this award translates into about R550,000.00.

[40]. Plaintiff in the *De Jongh* matter sustained a head injury consisting of extensive fragmented fractures of the frontal skull extending into the orbits (eye sockets) and the zygomatic arches (cheek bones), as well as the jaw, causing extradural haematoma which led to unconsciousness and which had to be surgically removed.

[41]. Importantly, in this matter the SCA, quoting Holmes J, also pointed out the following fundamental principle relative to the award of general damages:

"The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour largesse from the horn of plenty at the defendant's expense."

[42]. *De Jongh* is also authority for the view that the evaluation of brain damaged persons depend more on how they actually handle their daily lives rather than how they perform on psychometric tests. See paragraph [21] of the judgment.

[43]. I have also had regard to the unreported judgment (dated 30th March 2012) of Wepener J in the matter of *Nicholson v RAF*, Case no: 07/11453 (SGJ). In that matter the plaintiff sustained a severe traumatic brain injury coupled with soft tissue injuries to her back and neck. Therefore, her brain injury was more or less the same, if not worse than that suffered by the patient in the present matter. Ms Nicholson was awarded R400,000.00 during March 2012.

[44]. Also in: *Hurter v RAF*, 2010 (6A4) QOD 12 (ECD) - 2nd February 2010, the plaintiff suffered extensive facial fracturing as well a severe diffuse axonal injury to her brain, which included a brain contusion and fracture of the base of the skull. She only regained consciousness fully about ten days after the accident. As a result of the severe traumatic brain injury, the plaintiff was left with significant cognitive, socio - emotional and socio - behavioural difficulties. She had inter alia become irresponsible and indifferent; she uses inappropriate language and was often confrontational, aggressive and inappropriate when interacting with others. Hurter, a 20 year old female student was awarded R500,000.00 during 2010. Updated to 2015, this award translates into R665,000.00.

[45]. I have also had regard to *Modan N O v RAF*, C & B [Vol VI] A4-123 - December

2011, in which Maluleke J awarded R350,000.00 for general damages to a three year old who suffered a concussive brain injury, a fractured nasal bone; soft tissue injury to the forehead with scalp haematoma. Updated to 2015 this award is worth R443,000.00.

[46]. More recently on the 29th August 2013 Kathree - Setiloane J in the matter of *Mathys N O v RAF, C & B, A4 - 273 [Vol VI]*, awarded general damages of R500,000.00 to a plaintiff, who suffered a severe brain injury and minor orthopaedic injuries. He was admitted to hospital with a GCS of 10/15. Updated to 2015 this award equates to R566,000.00.

[47]. Accordingly, I am of the view that, following the awards in the above matters, the plaintiff s general damages should be R600,000.00, which amount should adequately compensate the plaintiff for general damages.

FINDINGS

[48]. In the premises, the monetary award which I intend to make in favour of the plaintiff comes to R5,102,034.15, which is computed as follows:

- 48.1. General damages: R600,000.00;
- 48.2. Past loss of earnings: R2,565,645.95.
- 48.3. Future loss of earnings: R1,936,388.20.

[49]. To this total should be applied the 50/50% apportionment in respect of the liability issue, which means that the said total will be reduced by 50% resulting in the final amount of the judgment to be granted in favour of the plaintiff of R2,551,017.08.

[50]. At the hearing of the matter, I was presented with a draft order, which *inter alia* provides for an order for the creation of a Trust so as to protect the funds. This provision was in accordance with recommendations of the medico - legal experts, all of whom expressed the view that the patient is incapable of managing his own financial affairs. The *Curator ad Litem*, as well as the defendant, are in agreement with the creation of a

Trust as well as with the rest of the provisions of the Draft Order, subject to the amount to be awarded by the Court. I therefore intend making the Draft Order an Order of Court.

ORDER

In the result, I grant Judgment in favour of the plaintiff against the defendant for payment of the sum of R2,551,017.08 (Two million, five hundred and fifty one thousand, and seventeen rand, and eight cents), payment of cost and other relief as per prayers 1 to 12 of the Draft Order, which I have marked 'X', signed and dated.

L ADAMS

*Acting Judge of the High Court
Gauteng Division, Pretoria*

HEARD ON: 30th August 2016
JUDGMENT DATE: 5th September 2016
FOR THE PLAINTIFF: Adv Bischoff
INSTRUCTED BY: Kritzinger Attorneys
FOR THE DEFENDANT: Adv Pienaar
INSTRUCTED BY: Mathie Jooma Sabdia Incorporated

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

Case No. 4407/11

Before: Judge Adams AJ

On **30 August 2016**

In the matter between:

ADV. JS STRYDOM N.O.
(ON BEHALF OF PATIENT
SV NHLENGETHWA)

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

The following is made an order of Court:

- 1.1. The Defendant is ordered to pay the capital amount of R 2,551,017.08 (TWO MILLION, FIVE HUNDRED AND FIFTY ONE THOUSAND AND SEVENTEEN RAND; EIGHT CENT) in delictual damages within 14 days to the credit of the trust account of the Plaintiff's attorneys of record, Podbielski Mhlambi Inc, Carletonville, whose trust account details are as follows:

Name of account holder:	Podbielski Mhlambi Inc
Bank Name:	Nedbank
Branch Name:	Western Gauteng
Branch Code:	187 505
Account Number:	[...]
Type of Account:	Trust Account

- 1.2. The aforesaid capital amount will not bear interest unless the Defendant fails to effect payment thereof on the specific date, in which event the capital amount will bear interest at a rate of 10,5% per annum, calculated from and including the 151 day after the date of this order, up to and including the date of payment thereof;
2. Plaintiff's attorneys are given leave to invest the said amount on behalf and for the benefit of the patient, following having received the capital amount in an interest bearing account as envisaged in Section 78(2)(A) of the Attorney's Act, until a trust as set out hereinunder is established and registered.
3. The Plaintiff s attorneys are ordered to pay the capital amount, less provision for attorney and own client fees, expenses incurred and accounts rendered by

experts and counsel employed, as well as the *curator ad litem* to the trustees of a trust to be established of which **SAMKELO VUSI NHLENGETHWA** (hereinafter "the patient") is to be the sole capital and income beneficiary following the registration of the said trust with the Master of the High Court and following the furnishing of security by the trustee to the satisfaction of the Master of the High Court as stipulated hereinunder.

4. The Plaintiff's attorneys are authorised to make any reasonable and necessary payments, until such time as the trustee is able to take control of the capital amount and to deal with same in terms of the trust deed, to satisfy the needs of the patient that may arise and that is required in order to satisfy any reasonable need for treatment and/or equipment as may be necessary in the interim period.
5. It is recorded that the above Honourable Court has already ordered on 9 September 2014 that the Defendant shall furnish the Plaintiff with a Section 17(4)(a) undertaking in terms of the Road Accident Fund Act, 56 of 1996, in which the Defendant undertakes to pay 50% of the costs of future accommodation of the patient in a hospital or nursing home, or treatment of, or rendering of a service or supplying of goods to him resulting from a motor vehicle accident on or about 30 May 2008 after the costs have been incurred and on proof thereof.
6. The Defendant to pay the reasonable costs of the trustee appointed in terms of paragraph 8 hereof, including the costs of establishing the trust and any other reasonable costs that the trustee may incur in the administration thereof including his/her fees, which fees will include and be subject to the following:-
 - 6.1. The fees and administration costs shall be determined on the basis of the directives pertaining to a curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Estate Act, Act 66 of 1965, as amended from time to time;
 - 6.2. The premium that is payable in respect of the insurance cover which is to be taken out by the trustee to serve as security in terms of the trust deed;
 - 6.3. The costs associated with the yearly audit of the trust by a chartered

accountant as determined in the trust deed;

6.4. All the above-mentioned costs shall be limited to payment of the reasonable costs which the Defendant would have had to pay in respect of the appointment, remuneration and disbursements had the trustee been appointed as a curator *bonis*.

7. The nett proceeds of the payment referred to above together with the Plaintiff's taxed or agreed party and party costs payable by the Defendant, after deduction of the Plaintiff's attorney and own client legal costs (the capital amount), shall be payable to a trust, which trust will:

7.1 contain the provisions as fully set out in the draft trust deed attached hereto marked Annexure "A";

7.2 have as its main objective to control and administer the capital amount on behalf of the patient;

7.3 have Constant Wilsnach, a practising attorney and director of Pretorius Wilsnach Attorneys, as its first trustee, with powers and abilities as set out in the draft trust deed attached hereto marked Annexure "A", and the trustee will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the trust and for the due compliance of all his obligations towards the trust.

8. The trustee of the trust is authorised to pay the Plaintiff's attorney and own client costs out of the trust funds insofar as any payments in that regard are still outstanding at that stage.

9. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs of the action on the High Court scale up to date hereof, up and including the trial on 30 August 2016 and the costs of making this Order an Order of Court on 30 August 2016

9.1 in the event that the costs are not agreed:

- 9.1.1. the Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;
- 9.1.2. the Plaintiff shall allow the Defendant 14 Court days from date of the allocation to make payment of the taxed costs;
- 9.1.3. should payment not be affected timeously, the Plaintiff will be entitled to recover interest at a rate of 10,5% on the taxed or agreed costs from date of allocation to date of final payment.

9.2 The costs referred to in paragraph 9 shall *inter alia* include but not be limited to:

- 9.2.1. the costs incurred to obtain payment of the amounts in paragraphs 1.1, 1.2 above and the amounts in this paragraph 9 and obtaining of the undertaking in terms of Section 17(4)(a);
- 9.2.2. the costs of senior-junior counsel for the action, including costs for the trial date on 30 August 2016, further including but not limited to costs of senior-junior counsel's attendance to all scheduled pre-trial conferences and pre-hearing pre-trial conference in open court (if any), as well as preparation for same and drafting of pre-trial agenda, questions and minutes for all pre-trial conferences;
- 9.2.3. the costs of the Plaintiff's expert reports and addendum reports (if any) RAF4-reports (if any), joints minutes (if any), taxable qualifying, reservation and preparation fees (if any) to be determined by agreement or by the Taxing Master of the Plaintiff's following experts, further including all reasonable costs in obtaining the said reports:
 - 9.2.3.1. Dr. HB Enslin - Orthopaedic Surgeon;
 - 9.2.3.2. Dr. JA Smuts - Neurologist;
 - 9.2.3.3. Dr. M Close - Psychiatrist;
 - 9.2.3.4. Dr. Henk Swanepoel - Clinical & Neuro Clinical Psychologist;
 - 9.2.3.5. H Roos - Occupational Therapist;

- 9.2.3.6. Dr. Ben Moodie - Industrial Psychologist;
- 9.2.3.7. R Gous - Audiologist;
- 9.2.3.8. Dr. DP Rossouw - ENT Surgeon;
- 9.2.3.9. R Emmerich - Optometrist;
- 9.2.3.10. Human & Morris - Actuaries.

9.2.4. the costs of all joint meetings between the parties' experts and the preparation of joint minutes in respect thereof (if any);

9.2.5. the reasonable costs incurred by and on behalf of the patient in attending the medical legal examination of all experts from both parties, including both fees for travelling time, accommodation and disbursements incurred in such amount as allowed by the taxing master;

9.2.6. Attorney's traveling costs to court on day of trial for 30 August 2016 and attorney's correspondent's fees on a High Court Scale, as allowed by the taxing master;

9.2.7. The reasonable costs of the appointment of the *curator ad litem*;

9.2.8. the costs of the *curator ad litem*, including costs of preparation, consultations, attendance of pre-trial meetings and costs of his reports and as well as his costs for the day and attendance to court on all trial dates on the basis of his day fee per day.

10. In the event that costs are agreed, the party and party costs are payable within 14 days from the date of taxation, *alternatively* date of settlement of costs, whereafter interest will be payable at 10,5% per annum from date of taxation *alternatively* date of settlement of costs to date of payment.

11. Plaintiff's attorneys shall take all necessary steps to assist the trustee in the formation and registration of the trust for the benefit of the patient to ensure, *inter alia*, the proper protection, administration and management of the financial and/or

related affairs of the said patient according to law.

12. It is recorded that the Plaintiff entered into an hourly fee agreement with his attorney of record and **not** a contingency fee agreement.

REGISTRAR

TRUST DEED

WHEREAS

A The High Court of South Africa has on the 5/9/2016 ordered that :
(l) the nett proceeds of the settlement in the matter of **SAMKELO VUSI NHLENGETHWA** case number 4407/2011 form part of the trust to be administered, which trust is hereby created by the **Founder**, Constant Wilsnach;

AND WHEREAS

B. For the purpose of certainty and for the better administration of the Trust to be created the following terms shall govern the administration of the Trust.

1. NOW THEREFORE IT IS CONFIRMED :

Once the Deed has been registered with the Master of the High Court and Letter of Authority have been issued to the Trustee, the nett proceeds ("**the proceeds**") of the settlement of the matters referred to in A(i) above being a common law action for compensation for injuries sustained by the **Beneficiary** shall pursuant to the direction / order of the said Honourable Court be paid to the Trustee in trust on the terms and conditions hereinafter set out, which proceeds shall thereupon vest in the Trustee and which proceeds the Trustee by his signature to this Deed undertakes to accept for and on behalf of the **Beneficiary** upon the terms and conditions hereinafter set out herein.

2. NAME OF TRUST

The trust shall be known as the **SAMKELO VUSI NHLENGETHWA TRUST.**

3. **INTERPRETATION**

In this Deed, unless the context otherwise requires, words importing the singular shall include the plural, and visa versa, and words importing the masculine gender shall include the feminine gender, and visa versa. The following expressions used in the Deed shall have the meaning hereinafter assigned to them unless the context shall otherwise require:-

3.1 **"Beneficiary"** shall mean **SAMKELO VUSI NHLENGETHWA** or any other person as set out in paragraph 6 below. The Beneficiary shall be entitled to receive the income and capital of the Trust upon the terms and conditions set out in the Deed and shall be entitled to the capital of the Trust upon its termination.

3.2 **"Trust Fund"** shall mean the sums to be settled on the Trustee in terms of the said order of Court, in particular the award referred to in paragraph 1 hereof together with any additions or accruals thereto; all assets which shall from time to time be acquired by the Trustee for the purpose of this Deed including, without being limited thereto, capital assets and all income thereon whether capitalised or not.

3.3 The phrase "maintenance, education and advancement if life" shall be interpreted in the widest sense wherever it appears in this Trust Deed so as to include for example, attendance at schools, colleges, finishing schools and universities anywhere in the world; remedial teaching of any nature whatsoever, specialised tutoring, occupational therapy of any nature whatsoever, training in craft hobby or trade, music, art, dancing, sports, as well as sciences, travel, both national and international, accommodation lodgings, food, clothing and medical expenses and general well-being of the Beneficiary including the setting up in business or profession.

4. **APPOINTMENT OF TRUSTEE**

CONSTANT WILSNACH, an attorney and partner in the firm of Pretorius & Wilsnach

Incorporated or his successor in practice, or failing him a partner nominated by the managing partner of Pretorius & Wilsnach Incorporated is hereby nominated as first administrative and sole Trustee for the purpose of this Deed and shall be authorised to sign all documents relating to the administration and investment of the Trust capital and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust. The said **CONSTANT WILSNACH** by his signature to this Deed accepts office as such and undertakes to carry out all the duties and obligations encumbered upon them hereunder.

5. **INCOME**

The Trustee shall collect the income accruing from the investment of the Trust Capital and, after making provisions for payment of all necessary expenses, interest due, taxation, premium of the bond of security and Trustee's commission, the nett income shall be accrued to and invested as part of the Trust Capital, for the benefit of the **Beneficiary**. Provided that the Trustee may in his entire discretion pay the whole of such nett income or any portion of the Trust Capital as may be necessary to the **Beneficiary** and/or apply the same for maintenance, education and advancement in life of the **Beneficiary** and may at their discretion (whilst any **Beneficiary** is still a minor) make payment to such **Beneficiary's** parent or guardian on his/her behalf, in such manner and upon such conditions and in such proportions and at such times as the Trustee may in his absolute discretion decide.

The Trustee may in his entire discretion allow the **Beneficiary** hereunder free use and enjoyment of all assets owned by the Trust and may decide whether the Trust or the Beneficiary concerned should be responsible for the maintenance of such assets and also for the payments of any rates, insurance premium and other similar charges.

In the event of the Trust continuing after the death of **SAMKELO VUSI NHLENGETHWA** as provided for in clause 6 below, the provisions hereof shall mutatis mutandis apply in respect of any other **Beneficiary**. Notwithstanding anything contained in this Deed unborn children shall not be recognised as having any rights under this Deed or the Trust Fund and the Trustee shall not be required to take any account of unborn children in his administration of the Trust or any decision affecting the Trust.

6. **TERMINATION OF TRUST**

In the event of the **Beneficiary** dying intestate the Trust Capital shall devolve according to the terms of Intestate Succession. The Trust shall continue for the benefit of his dependants and shall terminate on the date of such dependant reaches the age of eighteen years. In the event of any dependant dying before reaching the age of eighteen years such dependant's share shall devolve upon such dependant's issue per stirpes. If such dependant died without issue, such share shall devolve upon the remaining dependants of **Beneficiary**.

In the event of **Beneficiary** dying but leaving a valid Will, then the Trust Capital shall be distributed to his estate and shall be dealt with in terms thereof.

In the event of **Beneficiary** dying intestate and leaving no surviving issue the Trust Capital shall devolve according to the Laws of Intestate Succession.

7. **POWER OF TRUSTEE**

The Trustee shall be vested with powers:

7.1 To invest and re-invest the Trust Capital in such manner and in such assets whatsoever as they in his absolute discretion may deem fit (with power to realise or vary any investment from time to time) and in particular, without derogating from the generality of the powers here conferred, to invest the Trust Capital in shares of public companies and private companies and any other companies which, because of the wasting nature of their assets or otherwise, may or may not be construed to be securities of a Trustee nature, or non-income producing assets and in the purchase of movable and immovable property.

7.2 To form companies for the purpose of the Trust and to act as initial subscriber thereto.

7.3 To purchase or otherwise acquire any assets whatsoever movable or immovable, on such terms as to payment and with or without security or pledge of all or any of the assets of the Trust as they in his absolute discretion shall think fit.

7.4 In his absolute discretion to exchange, sell, lease or otherwise deal with any of the assets from time to time forming part of the Trust Capital.

7.5 To borrow upon security or otherwise and at interest or otherwise in such manner as the Trustee may deem fit

7.6 For and on behalf of the Trust, to commence and prosecute or defend action, suit, compulsory sequestration, liquidation or other proceedings before any Court or any other competent body or person.

7.7 To accept further amounts in terms of any new or further judgement and/or any further gifts and bequests from any other person in favour of the Trust without the necessity of entering into a formal Deed of Donation.

7.8 To acquire and/or purchase and/or effect life assurance policies on the life of any party with an interest of whatsoever nature in the Trust and pay all premiums thereto.

7.9 To sign as surety for and on behalf of a **Beneficiary** of the Trust, or any company in which the Trust or **Beneficiary** may have an interest, as the Trustee in his absolute discretion may think fit.

7.10 To open bank and building society accounts in the name of the Trust and to maintain and run such accounts in such a manner as the Trustee deems fit.

7.11 To pass bonds over any immovable property held in Trust by him.

7.12 To execute any act of deed required to be lodged, or registered in any deed Registry or Mining Title Office and generally to do or cause to be done any act whatsoever in any such office.

7.13 To exercise all voting or other rights attaching to shares and other securities from time to time forming part of the Trust Capital in such manner as he shall consider fit and to cause or consent to any re- organisation, consolidation or merger of any company or its capital in which the Trust holds shares and securities from time to time.

7.14 To determine, as he shall consider fit, whether receipt shall be treated as capital in respect of any liquidation dividend or return of capital paid by companies in respect of shares forming part of the Trust Capital, and generally to decide by apportioning in such manner as he may deem fit, should any difficulty arise, as to what constitutes capital and what constitutes income.

7.15 To change the name of the Trust.

7.16 In the event of a national calamity in the Republic of South Africa or elsewhere or of a **Beneficiary** emigrating from the Republic or for any reason which in the discretion of the Trustee renders it expedient or desirable so to do, provided the necessary exchange control approval is obtained, to create or cause to be created a Trust or Trust the world upon the same terms as this Trust mutatis mutandis for the benefit of any **Beneficiary** of this Trust who shall be natural persons only and to transfer to any such Trust or Trusts such portion of the Trust Capital as shall in the sole and absolute discretion of the Trustee represents the share of the **Beneficiary** concerned in this Trust.

7.17 To enter into contracts on behalf of the Trust.

7.18 Resolutions in writing signed by the Trustee shall have the same force and effect and be as binding as a resolution taken at a meeting of Trustees.

7.19 All documents of transfer in respect of the purchase or sale of stock, shares and securities and immovable property shall be signed by the Trustee provided that the Trustee has by resolutions agreed the purchase or sale of the asset in question and the terms of purchase or sale thereof.

7.20 To adopt, ratify confirm with or without modification any contract entered into for and on behalf of the Trust prior to its creation.

7.21 The powers and authorities herein granted to the Trustee may be exercised in any part of the world and not only within the Republic of South Africa.

7.22 The Trustee or any members or partner of his firm may be employed to act in any matter relating to the administration of the Trust and shall in addition to any remuneration payable to such Trustee in his capacity as such, be entitled to charge and be paid for any services rendered by him or his firm in a professional capacity.

7.23 Generally, the Trustee is in fact to have the same absolute control over and unfettered powers of investment and re-investments of the Trust assets as if he had been absolutely and beneficially entitled to the Trust Capital and he is specially indemnified against any claim arising from the loss of income or capital as a result of the bona fide exercise of the discretion hereby granted to them.

8. **LIABILITY**

The Trustee shall :

8.1 perform his duties and exercise his powers with care, diligence and skill, which can reasonable be expected of a person who manages the affairs of another and shall be liable for breach of trust where he fails to show the degree of care, diligence and skill as requested;

8.2 be liable for losses as may arise from or be occasioned by his own dishonesty, wilful misconduct or his negligence or that of his employees;

8.3 subject to the provisions of section 9 of the Trust Property Control Act number 57 ("the Act") of 1988, not be liable for any act of dishonesty or any other misconduct committed by any of his agents unless he knowingly allowed it or was an

accessory thereto;

8.4 subject to the provisions of section 9 of the Act, be indemnified out of the Trust assets against all claims and demands of whatsoever nature that may be made upon him arising out of the exercise or purported exercise of any of the powers hereby conferred upon him.

8.5 The Trustee holding office shall be required to furnish either individually or collectively to the Master of the High Court or any other government official, security for the administration of the Trust hereby created, as the Master deems fit.

9. **NOMINEE REGISTRATIONS**

All investments or other assets acquired by the Trust may be registered in the name of the Trust without specifically naming the Trust, or in the name nominee company, or in such manner as the Trustee may deem expedient from time to time.

10. **EXCLUSION OF MARITAL POWERS**

The rights of any amounts paid to any **Beneficiary** under this Trust shall in no way from party of any community of property or joint estate or accrual system of such **Beneficiary**, and the husband of a female **Beneficiary** shall, whether his marriage to her be in or out of community of property, not have or acquire any marital powers, control or power of administration over any such rights or amounts.

11. **INDEMNITY - INCOME TAX**

In the event of the **Beneficiary** hereunder becoming legally liable in any statutory year to tax upon the whole or any portion of the income arising from the Trust Fund to which he has not received the benefit by reason of any provision in any law hereafter in force, in terms of which the aforesaid person is rendered liable for tax on such income, then, in such circumstances, it shall be competent for the Trustee to pay out of the income or capital of the Trust, the amount of the additional tax which the **Beneficiary** is obliged to

pay as aforesaid. For the purposes of this clause the expression “tax” shall be deemed to include all Income Tax, Imports and other duties levied by the State or other competent authority.

12. **ACCOUNTING**

The Trustee shall cause proper records, which may be wholly or partially computerised to be kept of all affairs and dealing of the Trust. The records of the Trust shall be submitted to Accountants to be audited and vouched at the end of each financial year, which shall be regarded as being the last day of February, or any other day which may be selected by the Trustee and shall be submitted within six months of each financial year end.

13. **PAYMENT AND DELIVERY**

In paying out of any amount of capital or income of the Trust to or for the benefit of a **Beneficiary**, the Trustee shall be empowered to make the said payments in whole or in part be delivery of an asset or assets or share in an asset or assets having a value equivalent, in the opinion of the Trustee, to the payment effected by such delivery.

14. **UNDERTAKING**

The undertaking contemplated by section 17(4)(a) of Act 56 of 1996 as set out above, will be administered by the Trustee, and the Trustee will be entitled to payment of 100% of the prescribed remuneration for the administration of the undertaking and the defendant will pay such remuneration to the Trustee under the aforesaid undertaking contemplated by section 17(4)(a) of Act 56 of 1996 as set out above.

15. **AMENDMENTS**

This Trust Deed may not be amended or added to, save by way of an order of court.

16. **GENERAL**

14.1. The interest of the **Beneficiary** in terms of this Trust shall not be capable of being ceded, assigned, transferred, pledged, hypothecated or in any way alienated without the prior written consent of the Trustee and the Master of the High Court or by order of Court.

14.2. The rights, benefits or interests conferred on the **Beneficiary** under this Deed shall not be capable of being exercised or claimed in any way by anyone other than such **Beneficiary** or being attached at the instance of any creditor or vesting in any other person in whomsoever in any capacity.

14.3. Until any benefit or reward is actually paid over to the **Beneficiary** nothing herein contained nor any resolution, deed or act of the Trustee shall create or confer upon any person any claim or right enforceable at law to any benefit or award hereunder.

14.4. Howsoever or wherever the assets may be held or registered they shall be held on and for the account of the Trust and at no time shall the Trustee be deemed to acquire for himself or his personal account any vested right or interest in the Trust Fund.

AND the said **CONSTANT WILSNACH** declared to accept office as Trustee and promised to undertake diligently to perform the duties hereinbefore imposed on him.

THUS DONE AND SIGNED at Pretoria this 16th day of September 2014.

AS WITNESSES :

1. _____

2. _____

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 4407/2011

In the matter between:

SAMKELO VUSI NHLENGETHWA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

CONSENT

I, the undersigned,

CONSTANT WILSNACH

do hereby consent to act as Trustee to **SAMKELO VUSI NHLENGETHWA** should the above Honourable Court deem fit to appoint me as such.

DATED at PRETORIA on the 16th of September 2014.

AS WITNESSES

1. _____
2. _____