



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

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED:

Date:

Signature:

Case No: 38767/17

In the matter between:

GONENBABA SAFETY YASIN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAHOMED AJ:

INTRODUCTION

1. This is a claim for compensation for personal injuries sustained in a motor vehicle accident which occurred on 11 October 2016, at 18h30, in Pioneer Street Johannesburg Central. The accident report

confirmed that the insured driver had crashed into the side of plaintiff's vehicle, described as in "a T bone smash." The plaintiff sustained a fracture to his right clavicle bone. It was treated with an open reduction and internal fixative, which was later removed. A collar and cuff were used to keep the shoulder in place. Whilst being treated for his fracture, he needed to be treated for a pre-existing thyroid condition, which necessitated a longer stay in hospital. He spent two weeks in hospital. At the time of the accident, the plaintiff was employed as a production manager, in a sweet manufacturing company. He claims compensation for general damages, loss of earnings and future medical expenses.

THE CLAIM (AS AMENDED)¹

General damages	R 2 000 000.00	
Past Loss of Earnings	R 593 000.00	(based on salary earnings of R26 000p/m, not returned to work) ²
Future Loss of Earnings/capacity	R 5 074 000.00	(based on plaintiff is unemployable) ³
Past hospital medical expenses	R 10 000.00	(abandoned)
Future medical/hospital expense	R500 000.00	(agreed undertaking)
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	R8 177 000.00	
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¹ Caselines 25

² Caselines 25-5 particulars of claim paragraph 8.3

³ Case lines 25-5 particulars of claim paragraph 8.4

2. The pretrial minute⁴ reads, *“the parties record that the issue of future loss of earnings/income as well as general damages remains in dispute.”*

PROCEDURE/ COMPLIANCE WITH DIRECTIVES

3. I noted that the matter was certified ready for trial for quantum on two heads of damages, being General Damages and loss of income/capacity.
4. Advocate Mthembu appeared for the plaintiff and informed the court that only at the time the matter was allocated to this court, did the defendant raise certain disputes. He submitted that they were without basis.
5. The disputes raised on the morning of the trial, were:
 - 5.1. The merits, despite a concession made at the last pretrial which was held on 18 January 2022.
 - 5.2. The defendant raised a point in limine on prescription, despite the summons having been served timeously and no prejudice noted at the pretrial meeting.

⁴ carelines 0016-2 at 5.3

- 5.3. Furthermore, the defendant sought to argue its special plea that the RAF 1 Form was not completed by the treating doctor as provided for in s 24 of Act 56 of 1996. Mr Mthembu submitted this point is also without foundation in that the Act provides for a supervisor to complete the form, in the absence of the treating doctor. He submitted that the form was duly completed, by the medical supervisor at the hospital.
6. When the matter was allocated to my court, I was advised that the matter is defended and that parties were ready to proceed.
7. Advocate Mhlongo represented the defendant and agreed that the pretrial minutes recorded a concession of the merits and an agreement that neither party suffered any prejudice.
8. Her instructions were to demand that all medical witnesses be called, and to place all issues in dispute. However, she agreed her client had not filed any expert reports, and that she could not sufficiently argue on the medical evidence, particularly in that the objective facts support the orthopaedic injury suffered.

9. At case management, the parties were ordered to file a joint practise note failing which, the plaintiff was permitted to apply for the striking out of the defence.
10. In my view the defendant had several opportunities to raise its disputes well ahead of the trial date and failed to do so. Its approach can only be described as obstructive, and it is clearly not prepared for trial.
11. The plaintiff relied almost entirely on expert reports and the defendant filed no reports to counter the medical evidence.
12. I granted the application to strike out the defence and ordered that the matter proceed by default.
13. The plaintiff addressed the court on the quantum.

THE EVIDENCE

14. Mr Mthembu submitted that the amended particulars of claim was signed on 4 March 2022 and upon service and filing the pleadings were duly amended.
15. The injury sustained is a “right clavicular fracture injury.”

16. The plaintiff was treated at a hospital during the period 11 October 2016 to 19 October 2016 and he testified that he endured severe pain for a long time after the accident.
17. He returned to work, however only two and a half months after the accident.
18. When he sustained the injury, he was employed as a production manager, his main task was to attend to all planning for the production line and work on strategy. On occasion, he may sometimes have needed to attend to a machine if it malfunctioned. He had to be available 24 hours to ensure full production and he is standing most of the time. On the date of the accident, he earned R50 000 per month.
 - 18.1. The court was referred to copies of salary advises annexed to the pleadings.⁵
19. After the accident he held the position of assistant dispatch manager, his salary was reduced as he was no longer able to do his pre accident tasks, due to his injury. He now worked mainly from an office and for shorter hours, he could no longer be available for 24 hours, as he was before the accident.

⁵ carelines 31

20. His evidence is that since the accident he earns R15 000 per month.
21. His complaints are that since the accident, he can no longer carry heavy items, he cannot work on machines. He can no longer stand for long periods and cannot be available on 24-hour call, for production of the sweets. Furthermore, he can no longer carry his child for too long and his personal relations with his spouse has been affected by the injury he sustained in the accident. He can no longer socialise with friends and enjoy soccer, go karting and horse riding.
22. However, he still drives himself to work daily and in fact longer distances, since the accident, as his place of employment has moved further from his home, almost double the distance from his previous place of employment. He however, misses driving a manual gear shift and is limited to driving an automatic transmission vehicle.
23. His further evidence was that he also suffers from depression due to the pain in his shoulder. He has become moody and due to his reduced salary; he can no longer support his family in Turkey.

Mr Musa

24. The plaintiff called his employer, Mr Musa to testify on his behalf. Counsel advised the court that given that the Industrial psychologist

was unable to contact the Human Resources head at the plaintiff's workplace, Mr Musa his employer could assist this court in relation to his earnings and his continued employment at his business.

25. Mr Musa testified that he continues to employ the plaintiff because he likes him. He indicated that the production line was computerised, and all set up to operate. It was the plaintiff's job to ensure production ran smoothly.
26. He confirmed that the plaintiff used to earn R50 000 and that he is now dispatch assistant and earned R16 898, with a net income of R15 000 per month. He confirmed the salary payslips are issued by his business. Mr Mthembu submitted it was sympathetic employment. His employ liked him and therefor placed him in this less strenuous position at a lower salary.

ORTHOPAEDIC EXPERT

27. Dr Kumbirai an orthopaedic surgeon completed a serious injury report on behalf of the plaintiff in which he assessed the plaintiff's whole person impairment at 2% and a final combined assessment of injuries at 3%.

28. In his opinion the plaintiff suffered a “*serious long-term impairment or loss of a body function*” and therefore in terms of the regulations the plaintiff qualifies for a claim for general damages.
29. In his report he noted that at the hospital his medical treatment included a radiological examination, an open reduction and an internal fixation of the right clavicle was done, and the hardware was subsequently removed. He further noted that a collar and cuff sling was used to assist the plaintiff until pain free. Other treatment included pain management, physiotherapy, and rehabilitation.
30. The expert referred to a radiological report.⁶
31. A x ray report, 5 years post-accident states:
- “there is a fracture of the midshaft of the clavicle which is united with no displacement or angulation. The joint spaces are intact, there is no abnormal calcifications or radio opacities in the surrounding soft tissues, there is generalised maintenance of normal bone density, the scapula is intact.”*
32. In his report, which he compiled 5 years after the accident, he stated: he is working as a production manager at OYA Sweets, his job involved the use of both upper limbs whilst managing production.”⁷

⁶ Case line 008-65 to 71

⁷ Caselines 008-75 at 4,2

33. He noted further that no hobbies, sports, or loss of amenities were reported⁸ and no change in his social life was reported⁹.
34. He conducted a clinical examination in which he records, “full *range of the right shoulder – no pain*”.¹⁰
35. In his prognosis and future morbidity, the expert sets out statistics of results, in which persons who suffered the plaintiff’s injury experience pain and discomfort at varying degrees.¹¹
36. In his opinion the pain should be managed with analgesics. The expert proffers that he will be limited in his choice of jobs in the future, in that he will not be able to work at jobs lifting heavy weights and he will therefore not be able to compete fairly in the open labour market. The expert records “the *claimant will have problems in engaging normally in activities which require lifting of heavy weights as he used to prior to the accident.*”
37. No operations will be required in the future, and he recommends non-steroidal anti-inflammatory drugs periodically to manage his pain, allocating R3000 per annum.

⁸ Caselines 008-75 at 4.3

⁹ Caselines 008-75 at 5.1

¹⁰ Caselines 008-77 at 7.4.5.1

¹¹ Caselines 008-82 at 8.2.1

OCCUPATIONAL THERAPIST

38. The plaintiff consulted an occupational therapist, 5 years after the accident.¹² The expert recorded his earnings at over R55 000 per month and that due to the accident he was demoted, and his earnings dropped to R15 000 per month.
39. On examination the expert opined that the plaintiff could do light work only. He was limited in that he could not do any medium or heavy work, due to his injury.
40. The expert records that he used to play soccer with friends, he enjoyed horse riding and go karting, but cannot partake in these activities any longer.
41. It is further recorded, *“he mentions to experience certain impairments when executing his job functions. It can be concluded that the accident in question has affected the plaintiff’s work ability.”*¹³
42. The occupational therapist recorded, *“he clearly presents with endurance impairments with regards to making use of right hand or bilateral arms during activities, as he experienced increasing degrees*

¹² Caseline 008-42

¹³ Caselines 008-52 and 53

of pain and fatigue when force is applied repeatedly or for longer periods.¹⁴ He presented with severe deviations which includes carrying box towards body, gait pattern change, increased breathing, increased heart rate.”

43. The occupational therapist further recorded that *“the plaintiff perceived himself as being moderately affected by the pain.”* No exaggeration was detected.
44. *“His quality of life has been considerably affected by the injuries, which he sustained, and he no longer experiences the satisfaction as he experienced prior to the accident.”¹⁵*
45. This expert, who examined him a day after the orthopaedic surgeon, defers to the industrial psychologist for his future potential and loss of earnings.¹⁶
46. The plaintiff’s *“physical capacity, rate of work and work qualification profile is presently suitable for sedentary, light to low ranges of medium types of work category.”¹⁷*

¹⁴ Caselines 008-54 at 16.6

¹⁵ Caselines 008 - 58

¹⁶ Caselines 008-

¹⁷ Caselines 008-59

INDUSTRIAL PSYCHOLOGIST

47. The plaintiff consulted the expert in December 2021, who read the reports of the other two experts.
48. The expert was unable to contact the plaintiff's manager and therefore defers to the factual information he obtained from the plaintiff and the reports.¹⁸ He recorded the plaintiff returned to work two and half months after the accident, he was not fully remunerated, (only R10 000 was paid to him) and he was "demoted" due to the sequelae of injuries that he sustained during the accident.¹⁹
49. In his report he recorded "*the level of education and technical/specialised training had most likely prepared him for skilled work in the open labour market. He would have dependent (sic) on his cognitive abilities to secure employment*²⁰." The plaintiff held a diploma in public relations from the University of Marmara, in Turkey.
50. Having noted the plaintiff held a diploma, he noted that plaintiff is left with 36 years of active involvement in the corporate sector until retirement at 65 years old.

¹⁸ Caselines 008-92 at 6

¹⁹ Caselines 008-89 "notes"

²⁰ Caselines 008-92 at 7.1

51. Pre accident he earned R600 000 per annum, which fell in the median and upper quartile on Paterson level C4. He would have grown his earnings to Level D1 Upper quartile to age 45 to 50 and thereafter he would have received inflationary increases to retire at 60 to 65 years old.
52. Due to the injury, he sustained from the accident and having only returned to work some two and a half months later, he was “replaced” and offered a position as dispatch assistant.
53. His payslip dated 30 September 2021, indicated earnings of R16 898 per month.²¹
54. His ability to progress would have depended on age, skill set, and work experience. He would have worked until age 65.²²
55. The expert opined, *“having to work with pains, discomforts and restrictions, will have a detrimental effect on his concentration and may negatively influence his ability to work to his full potential and render him prone to mistakes and will render him an unequal competitor in the open labour market.”*

²¹ Caselines 008 -94 at 7.2

²² Caselines 008-93

56. The expert having referred to the opinions of the orthopaedic surgeon, who assessed him *“at a 2% whole person impairment, and that his injuries resulted in serious long term impairments and loss of body function”*, together with the occupational therapists opinion that *“his rate of work and work qualification profile is presently suitable for sedentary, light to low ranges of medium types of work category,”* concluded that the plaintiff’s *“functional sequelae will exert an undesirable effect on his future employment prospects for all job demands.”*²³
57. This expert opined that if the plaintiff lost his current sympathetic employment, he would have trouble finding other work. He concluded that the plaintiff is due to the injury from that accident rendered him an *unequal competitor in the labour market and with his aches and pains he would always be an unattractive employee and therefor he would not reach his premorbid career potential.”*
58. He stated that the plaintiff suffered a loss in income, he annexed two payslips to his report which sets out, as follows,

Dated 30/09/2016

R50 000 gross

R37 019.28 nett

²³ Caselines 008 – 95 at bullet point 2

Dated 30/09/2021 (5 years later)

R 16 898.99 gross

R 15 000.00 nett

59. It is noteworthy that this expert failed to interrogate or even acknowledge the dates on the payslips. There is an unexplained five gap in the sequence of payslips relied upon to both prove and assess his loss.
60. An actuary calculated his loss as follows; 15% contingency applied:

Uninjured

Past loss	R1 580 256.02
Future Loss	<u>R7 189 672.80</u>
Total loss	R8 769 929,71

Injured income

Past loss	R 986 877.27
Future loss	<u>R2 115 488.56</u>
Total loss	R3 102 365.84
Total net loss	R5 667 563.24

61. Counsel submitted that the contingencies applied were fair, but he agreed that contingencies applied were at the discretion of the Court.

62. Counsel further submitted that a fair award for general damages would be R200 000, for a dislocated shoulder. He referred the court to *NGCOBO v KWAZULU TRANSPORT PTY LTD 1991 (4) QOD D3-1 KZN*.

JUDGMENT

63. The plaintiff testified on the sequelae of his injuries, his employer confirmed his earnings, and the plaintiff relied on medical experts to support his claim.
64. I noted that the experts relied only on his reporting, there was no evidence from any other collateral sources on his “residual” work capacity. This court is unsure as to whether he was “demoted, given sympathetic employment, reemployed 5 years after the accident” and therefor only payslips five years after the accident were presented as proof of earnings.
65. The hospital records confirm the injury sustained and that it was treated by way of an internal fixative which was subsequently removed. The plaintiff was given a collar and cuff, to support his shoulder until he was pain free.

66. An x ray report sets out that the fracture had healed, and the bone and surrounds were intact and normal.
67. The industrial psychologist confirmed that the plaintiff would rely in his cognitive abilities to obtain employment. His training is suited to work in the corporate sector, usually sedentary, light to medium work.
68. The judgment of the Supreme Court of Appeals in **MICHAEL v LINKSFIELD PARK CLINIC (PTY) LTD**²⁴, confirms our courts approach to expert evidence, and states:

“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.”

69. In **TWINE AND OTHERS v SHARON NAIDOO AND OTHER**²⁵, Valley J, stated:

“before a court can assess the value of an opinion it must know the facts on which it was based. If the expert has been misinformed, about the facts, or has taken irrelevant facts into consideration or has omitted to consider relevant ones the opinion is likely to be valueless”.

²⁴ 2001 (3) SA 1188 SCA

²⁵ (38940/14) ZAGPJHC 288

LOSS OF EARNINGS

70. The industrial psychologist reported that the plaintiff would have relied on his cognitive abilities to secure employment, given his qualifications. There is no evidence before this court that this expert ever interrogated the date of pay slips or called for pay slips during the period 2017 to August 2021.
71. He failed to contact the plaintiff's Human Resources Manager for more information on his "demotion, sympathetic employment, or possible reemployment."
72. No evidence of any UIF payments or income tax payments for the period is before this court.
73. I compared the job descriptions of the two positions²⁶ the plaintiff worked at and noted that the positions involve tasks that are more reliant on his cognitive potential rather than physical potential.
74. A production manager's role includes, planning, coordinating, and managing production schedules, assessing resource requirements, creating, negotiating, and managing budgets and timelines with clients

²⁶ [Indeed.com/hire/job description](https://www.indeed.com/hire/job-description)

and stakeholders, establishing, and managing quality control standards, ensuring health and safety regulations are met.

75. The position of a dispatch assistant, includes strong communication skills to collaborate with others, excellent clerical and organisational skills to keep track of schedules, routes and personnel, knowledge of computers for scheduling and other dispatching duties, ability to work under stress and remain calm and calm other people in times of changing circumstances, the ability to relay information in a fast paced environment, using telephones and two way radios to contact employees, keeping and organising work requests keeping of inventories and the like. Tasks that require almost entirely cognitive functioning and little or no physical work.

76. The plaintiff suffered an orthopaedic injury. He testified that he was responsible for the planning of production on the shopfloor, and his employer confirmed that the plaintiff would attend to programming of the computer equipment which then directed the production/manufacturing of sweets.

77. His evidence was that on occasion if a machine malfunctioned, he needed to attend to it, however I am not persuaded that he worked with heavy machinery.

78. I agree with the plaintiff's industrial psychologist, that he would rely on his cognitive abilities to obtain employment. I am not persuaded that his orthopaedic injury, now completely healed as per the x ray report, has compromised his pre accident work capacity to any appreciable degree.
79. This court is not persuaded that the reduced earnings, are because of the injuries sustained in the accident.
80. There is no explanation as to what ensued in the period of 5 years between the two sets of salary advises, which the plaintiff relies on as proof of earnings. The court was presented with salary advises dated July to September 2016, (pre accident) which reflect income at R50 000, and salary advises dated September to November 2021 (post-accident) which reflect income of R16 898.
81. The plaintiff testified that he returned to work two and half months after the accident, (although the pleadings allege, he did not return to work), which should have been in January 2017. There are no pay slips following that date for a period of 5 years. This "gap" presents difficulties for the court. The plaintiff has not established or proven the "causal link" between the accident and the injury sustained and therefore the loss suffered.

82. There is no other evidence before this court to prove that link other than the plaintiff's say so. His employer did not impress me as a reliable witness, he had trouble understanding English and had to be assisted by the plaintiff in the Turkish language.

83. The occupational therapist confirmed that the plaintiff was suited to work of a light to medium strength. In my view he retains a similar physical strength to his position pre accident given his successful employment as dispatch assistant.

84. Much has happened in global history and economics in the period between 2017 and 2021, including an economic meltdown in our country well ahead of the pandemic, which itself posed serious health and economic challenges for the entire world. The plaintiff bears the onus to prove his claim.

85. At this juncture, it is necessary for the court to point out the state of the pleadings.

86. The particulars of claim present a different case on the loss of earnings.

87. At paragraph 8.3 of the amended particulars of claim,²⁷ the plaintiff sets out:

*“estimated past loss of earnings/loss of earning capacity/
R593 000*

At the time of the accident the plaintiff was employed at Oya Sweets shop, earning a salary of approximately R26 000 per month. The plaintiff has not returned to work since the accident.”

88. The plaintiff testified he returned to work two and a half months after the accident. This is noted in the Industrial Psychologists who has considered this fact when his Paterson scales were assessed. The estimations and calculations for his loss, if valid, are based on incorrect facts and this must compromise the value of his report.
89. The plaintiff claims to have been earning R50 000 per month at the date of the accident, which is not the case pleaded, even after an amendment.
90. There is no explanation as to why the pay slips reflecting the decrease in salary commences as off September 2021, some 5 years after the accident.

²⁷ Caselines 25-5

91. The plaintiff sought to argue that he was demoted and forced to accept a lower salary, in that his injury had compromised his earning capacity. There is also a case of sympathetic employment that was advanced.
92. The long gap in salary advises is inexplicable and brings into sharp focus the probabilities in the case and the value of the industrial psychologist's report and the actuarial calculations.
93. Obviously, the plaintiff bears the onus to prove his injuries and loss. In my view he has failed to prove his loss.

GENERAL DAMAGES

94. An award for this head of damage is subject of the injury being assessed as serious, in terms of the regulations to the Road accident Fund Act 56 of 1996.
95. Dr Kumbirai completed a serious injuries report, in which he assessed the plaintiff's whole person impairment to be 2% but concluded that the plaintiff suffered a serious long-term impairment or loss of a body function and therefore in terms of the regulations the plaintiff qualifies for a claim for general damages.

96. On the facts before me, I am not persuaded that the plaintiff herein suffered a serious injury, given that he continues to work he continues to drive longer distances now, he still carries his child, albeit for allegedly a shorter time than before, he has use of his right arm and shoulder.

97. In **RAF v Faria**,²⁸ the SCA confirmed, in an appeal on the award of general damages,

“the amendment Act, read together with the regulations, has introduced two paradigm shifts, that are relevant to the determination of this appeal, (1) general damages may only be awarded for injuries that have been assessed as serious in terms thereof, and (ii) the assessment of injuries as serious has been made an administrative rather than a judicial decision. ... the assessment of damages as serious is determined administratively in terms of the prescribed manner and not by the courts.”

98. I noted that Dr Kumbirai does not record loss of amenities as recorded by the occupational therapist, albeit that the plaintiff consulted with them only a day apart. Dr Kumibrai has not reported any loss of amenities or changes in the plaintiff's social life.

99. Given the inconsistencies and bearing in mind the purpose of an award of general damages, I am of the view that the Road Accident

²⁸ (567/13) [2014] ZASCA 65 (19 May 2014) para 34

Fund, must be permitted to exercise its “administrative function” in the assessment of general damages.

100. On the facts I am not persuaded on the seriousness of the injury.

I make the following order:

1. The plaintiff’s claim for loss of earnings is dismissed.
 2. General damages are postponed sine die and is referred to the Road Accident Fund for procedural compliance with the Act as to the seriousness of the injury.
 3. The Defendant is ordered to provide the plaintiff with an undertaking in terms of s17 for future medical expenses.
 4. The Defendant is to pay all proven past medical expenses.
 5. Costs are reserved.
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MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10 October 2022.

Heard on: 4 August 2022

Delivered on: 10 October 2022

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