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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

SIGNATURE DATE: 31 October 2022

CASE NUMBER: 21713/2017

In the matter between:

VUKUYIBAMBE STANLEY RADEBE Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

WILSON AJ:

1 On 11 December 2015, the Plaintiff, Mr. Radebe, was trying to board a train running from Daveyton to Johannesburg. The train started to move while he was boarding. That caused Mr. Radebe to fall. Mr. Radebe apparently fell with some force, because he sustained a midshaft fracture of his right radius and ulna. The radius and the ulna are the two principal bones of the forearm. Such was the severity of the fracture that Mr. Radebe had to remain in

hospital for four days, after which implants had to be inserted into his forearm to allow the bones to set properly.

2 The defendant, PRASA, which ran the train that Mr. Radebe was trying to board, tendered to pay half of Mr. Radebe's damages arising from the injury. Mr. Radebe accepted that tender in settlement of the merits of this claim.

3 The question before me is what those damages are. Mr. Radebe claims compensation for general damages for pain and suffering, loss of amenities of life and disability. He also seeks special damages for loss of earning capacity, and medical expenses arising from the injury.

General Damages

4 Mr. Radebe continues to suffer intermittent pain in his right forearm and shoulder, a weak right-hand grip and some surgical scarring. He also suffers pain in his upper-front chest area and in his right shoulder. Mr. Radebe has spent most of his working life as a labourer, but he can no longer labour for as long or as hard as he used to. He will continue to experience pain attributable to his injury for the foreseeable future.

5 It was conceded during trial that Mr. Radebe has pre-existing arthritis in his right shoulder. It was suggested, in cross-examination of Themisile Mahlangu, an occupational therapist called on Mr. Radebe's behalf, that at least some of the pain Mr. Radebe experiences arises from the arthritis, and not from his injury. Ms. Mahlangu very fairly accepted that it is not possible to apportion the pain Mr. Radebe experiences between his arthritis and his forearm injury.

6 Ms. Mahlangu pointed out, however, that the arthritis did not appear to prevent Mr. Radebe from performing fairly strenuous labour before his forearm injury. After that injury, however, his capacity to hold down labouring work has been markedly affected. He is undoubtedly weaker, slower and less able to tolerate sustained physical exertion because of the pain following from the forearm injury. In other words, it is the forearm injury that has made the critical difference to Mr. Radebe's quality of life. The arthritis was painful but tolerated. Mr. Radebe's pain after the forearm injury is debilitating.

7 To the extent that his pre-existing arthritis is material at all to the assessment of Mr. Radebe's general damages, its relevance lies in the fact that it was a burden he was able to carry before his forearm injury. Whether because of the direct physical consequences of the forearm injury, or because of its indirect effect on his ability to cope with his arthritis, it is the forearm injury rather than the arthritis that has caused the damage for which Mr. Radebe now seeks recompense. The full extent of the damage probably lies in the interaction between the forearm injury and the arthritis, but I need not consider that relationship in any detail. The dominant cause of Mr. Radebe's pain, suffering, disability and loss of amenity is the forearm injury, not the arthritis.

8 It follows that Mr. Radebe has suffered a fairly severe injury that has had a significant impact on his quality of life. Both Mr. Chabane, who appeared for Mr. Radebe, and Mr. Molojoa, who appeared for PRASA, relied on awards of general damages following forearm injuries like Mr. Radebe's. Those awards

established a range of possible figures, starting at R150 000, and rising to R540 000 (R746 000 having taken into account adjustments to the value of money since that award was made). Mr. Molojoa's suggested an award at the bottom end of this scale.

9 Mr. Chabane did not motivate for an award at the very top end, probably because the case that marked it involved a much younger man, who worked as a mechanic, and lost a great deal of fine motor skill because of the injury. The injury prevented him from pursuing a job he clearly loved, and cast him into a significant depression (see *Mohlaba v Road Accident Fund* [2016] ZAGPPHC 12 (21 January 2016). Consequences of that nature have not been established in this case.

10 I am nonetheless satisfied that, on the facts that have been proved, the quantum of general damages to be awarded to Mr. Radebe should be on the upper end of the range established in argument. I can find no reason not to accede to Mr. Chabane's submission that an award of R600 000 would be fair and reasonable in the circumstances.

Loss of earning capacity

11 Because of the way the evidence developed at trial, the computation of Mr. Radebe's loss of earning capacity is significantly more difficult. Loss of earning capacity claims usually follow a well-trodden evidentiary path. That path starts with a medical assessment of the nature and severity of the injury, before an occupational therapist identifies the physical and mental deficits the injury caused. Those deficits are then considered by an industrial psychologist, who establishes the range in which the plaintiff was earning

before the injury, the earnings the plaintiff could reasonably have expected to attract had the injury not befallen them, and the range of earnings, actual and expected, now possible after the injury. The picture is completed with actuarial calculations, which take the earnings evidence and compute the plaintiff's likely loss. In the case of future earnings, a "contingency" value approximates the diminution of the plaintiff's earnings attributable to unforeseeable but likely hazards we can all expect the future to hold. That value is deducted from the future earnings loss predicted purely as consequence of the injury.

12 In this case, though, no actuarial evidence was placed before me. Actuarial reports had been procured on Mr. Radebe's behalf, but PRASA did not admit them, and no joint minute of actuaries was filed. For reasons that remain obscure, Mr. Chabane closed his case without leading an actuarial expert. PRASA closed its case without leading evidence.

13 While an industrial psychologist did testify, his evidence must be treated with a degree of circumspection. The witness in question, Clement Bell, was not the only author of the industrial psychologists' report that he sought to authenticate. The lead author of the report was Dr. Zurayda Shaik. The report was compiled under her direction, and she signed the joint expert minute of industrial psychologists placed before me by agreement between the parties. Dr. Shaik was not called to give evidence, however.

14 A further reason to treat Mr. Bell's evidence with some caution is that – as he readily accepted – he did not actually examine Mr. Radebe. That was done by one of the report's other authors. Mr. Bell's contact with Mr. Radebe was

limited to a brief exchange when Mr. Radebe came to Mr. Bell's offices to be examined by someone else. It is not clear whether Dr. Shaik herself ever actually met with Mr. Radebe.

15 The available material on which to compute an award for loss of earning capacity is accordingly limited to the evidence of Ms. Mahlangu, the joint minutes of the orthopaedic surgeons, occupational therapists and industrial psychologists, and those portions of Mr. Radebe's industrial psychologists' report on which I can safely rely.

16 None of this means that I can decline to make an award. "[I]f it is certain that pecuniary damage has been suffered, the Court is bound to award damages" (*Hersman v Shapiro & Co* 1926 TPD 367 at 379). Actuarial evidence, though generally helpful, is not necessary before an award for loss of earning capacity is made. When considering a loss that will arise in future a court "must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess" (*Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) at 451B). Where actuarial evidence is not available, a judge is not precluded from making "a round estimate of an amount which seems to him to be fair and reasonable" even if "[t]hat is entirely a matter of guesswork, a blind plunge into the unknown" (*Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A), at 113H).

17 I have already summarised the nature of Mr. Radebe's injury, and much of what Ms. Mahlangu had to say about it. The only additional relevant observation that Ms. Mahlangu contributed was that Mr. Radebe's pre-injury working life was characterised by regular employment as a manual labourer.

His post-injury working life was much spottier, and was marked, in at least one instance, by his resignation from a job as a general worker because he was simply not up to its physical demands.

18 The joint minute of industrial psychologists records that Mr. Radebe's pre-injury earnings were likely above the median point for unskilled manual labourers (paragraph 1.12 of the joint minute). Although the joint minute is not clear on this point, median annual earnings for a manual labourer in 2015 appear to have been R18 600. The top of the scale was R53 500. The joint minute also records that Mr. Radebe's reported pre-injury earnings were R1200 a fortnight, or R28 800 per year. Mr. Radebe was working more or less full time – putting in 189 hours per month (paragraph 1.7 of the joint minute).

19 Mr. Radebe was 44 years old at the time of the injury. Although he was unemployed at that point, this was because his most recent contract had just ended. There is no suggestion that he would not have found another within a reasonable time. The joint minute of industrial psychologists records that the parties agree that Mr. Radebe had reached his "career ceiling". In other words, he would have continued to earn at about the rate he did just before the accident, allowing, of course, for inflationary adjustments (paragraph 1.15). Mr. Radebe would likely have retired between 60 and 65 years of age. While the parties' industrial psychologists were unable to agree on an exact retirement age, 63 seems consistent with what they did agree on.

20 It is difficult to say what Mr. Radebe's post-injury earning potential is. The job as a general worker paid him R500 per week, or R26 000 per year. Although

there is some obscurity in the evidence about exactly how that job came to an end, there is no real dispute that Mr. Radebe was not up to it. Mr. Radebe reports that he has also been able to attract R150 per day as a hawker, selling offal from a market stall, which he does for two days a week. That would give an annual income of R15 600. There is no suggestion that he was unable to cope with the physical demands of work of that nature and frequency.

21 The evidence is accordingly that Mr. Radebe's post-accident earning capacity has dropped from R28 800 per year to somewhere in the region of R15 600 to R26 000 per year. The evidence is that the R15 600 per year earnings arise from a job that Mr. Radebe can actually do, whereas the R26 000 per year earnings arising from a job with physical demands that apparently forced his resignation. I am accordingly inclined to adopt the lower figure – R15 600 – as representative of Mr. Radebe's actual post-injury earning potential.

22 A reasonable estimate of Mr. Radebe's post-injury loss of earning capacity is accordingly the difference between R28 800 and R15 600 multiplied by the number of years between Mr. Radebe's injury and his probable retirement. That calculation yields a figure of R250 800. Adjusted for inflation of around 5.7% over that period, Mr. Radebe's likely post-injury loss of earning capacity is R350 130.

23 To this it is customary to apply a contingency. Contingencies are far more value-laden and subjective than actuarial reports make them sound. They are, effectively, a judicial estimate of the impact that the vicissitudes of life

will have on a plaintiff's future earning potential. Those hardships, so it is assumed, would have been encountered by the plaintiff whether or not they had been injured, and should accordingly not be compensated for by the defendant.

24 My calculation not being actuarial in nature, it does not seem to me to be appropriate to apply a contingency to the figure I have reached. I have some doubt about my ability, in the absence of any evidence, to understand, much less quantify, the hardships likely to afflict a manual labourer in South Africa, nursing at least two infirmities that I am aware of, over the course of the second half of his working life.

Future medical expenses

25 The parties agree that Mr. Radebe will require R20 000 to pay for the removal of the implants currently bonding the fracture in his forearm.

26 What remains in dispute is the cost of assistive devices, therapy and domestic assistance Mr. Radebe will need to enable him to function with the reduced physical capacity his injury has caused. Both the need for the devices, therapy and assistance, and their cost, has been placed in dispute. However, having regard to the principle stated in *Hersman*, to which I have already referred, if I am satisfied that a device, therapy or assistance is needed as a result of Mr. Radebe's injury, I am required to award something reasonably approximating their likely cost.

27 In her report, Ms. Mahlangu set out a range of assistive devices she believes Mr. Radebe will need to continue to perform basic daily chores at home and

beyond. Ms. Mahlangu also set out the nature and cost of future therapy Mr. Radebe will need, and the cost of domestic assistance Mr. Radebe will have to rely on if his current partner is unable or unavailable to provide it for any reason. Finally, Ms. Mahlangu recommended that provision be made for a handyman to be paid to assist Mr. Radebe with maintaining his home.

28 This list of requirements was not in itself seriously challenged in cross-examination, but it was suggested that Ms. Mahlangu had not done a home visit when she should have done, and that there were people in Mr. Radebe's household, other than his current partner, who could assist Mr. Radebe if need be.

29 Ms. Mahlangu said that she would only ordinarily undertake a home visit if it was likely that some sort of renovation to a patient's existing home might be necessary. There was no indication of that possibility in this case.

30 I would have some difficulty in reducing Mr. Radebe's award solely to allow for the possibility that he might be able to rely on his family's unpaid domestic labour to assist him. That labour, while traditionally unpaid, is labour that would not be necessary but for Mr. Radebe's injury. Wherever it comes from, it is work of value, and ought to be reflected in the damages awarded. At the very least, the time Mr. Radebe's family spends caring for him is time that they could spend earning their own living, or resting after the necessity of going out to do so.

31 In any event, the parties' joint minute of occupational therapists sets out an agreed list of post-injury therapy, assistive devices, and other assistance that

Mr. Radebe will require. It also provides a range of costs that attach to some of the therapeutic interventions required.

32 Based substantially on these joint minutes, and on Ms. Mahlangu's report, Mr. Chabane tabulated and calculated a total amount to be awarded for future medical and related expenses of R228 242. Nothing has been done to cast any serious doubt on this calculation, which is reasonable having regard to the nature and impact of Mr. Radebe's injury.

Costs

33 The parties agreed that the question of costs should be addressed in supplementary written submissions to be delivered once the value of the award is known.

The award

34 For all these reasons, I find that Mr. Radebe's proven damages amount to R1 178 372 (one million, one hundred and seventy-eight thousand three hundred and seventy-two rand). PRASA is liable for half of that amount.

35 Accordingly, I make the following order-

35.1 The defendant will pay R589 186 (five hundred and eighty-nine thousand one hundred and eighty-six rand) to the plaintiff.

35.2 The defendant will pay interest on that amount, at the prescribed rate, to run from 14 November 2022 until the day it is paid.

35.3 The parties will make written submissions on the appropriate costs order by no later than 7 November 2022. Those submissions must be e-mailed to the Registrar of Wilson AJ and uploaded to the entry for this case on the Caselines system.

S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. 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 31 October 2022.

HEARD ON:	3, 4 and 6 October 2022
FURTHER MATERIAL RECEIVED ON:	14 October 2022
DECIDED ON:	31 October 2022
For the Plaintiff:	VJ Chabane Instructed by Tsiestsi-Dlamini & Mahlathi
For the Defendant:	B Molojoa Instructed by Jerry Nkeli and Associates