



**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: 15 December 2022

**CASE NUMBER: 21713/2017**

In the matter between:

**VUKUYIBAMBE STANLEY RADEBE**

Plaintiff

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

Defendant

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**JUDGMENT: LEAVE TO APPEAL**

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**WILSON J:**

- 1 The defendant, PRASA, seeks leave to appeal against my order of 31 October 2022. In that order, I assessed the damages sustained by the Plaintiff, Mr. Radebe, at R1 178 372 (one million, one hundred and seventy-eight thousand three hundred and seventy-two rand), and I directed PRASA to pay half that amount.

- 2 My award was made up of three principal components: general damages, loss of future earning capacity, and future medical and related expenses. PRASA submits that there is a reasonable prospect that a court of appeal will find that I was mistaken in the amounts I awarded for each one of these components.

### **General Damages**

- 3 Mr. Sadiki, who appeared for PRASA to argue the leave to appeal application, submitted that the award I made for general damages was not comparable to awards made in similar cases. However, he did not suggest that I was wrong when I found that the range established in the cases for injuries of the kind Mr. Radebe sustained was between R150 000 and R746 000. He argued instead that my assessment of Mr. Radebe's damages as being on the upper end of that scale was flawed, because I failed to take into account that Mr. Radebe can expect his injury to heal completely with appropriate rehabilitative treatment.
- 4 Had that been the evidence, I would agree. But that was not the evidence. The evidence was that, while Mr. Radebe's bones had fused, the injury he sustained will result in a loss of strength in his right arm, and is likely to result in chronic, if intermittent, pain for at least the foreseeable future.
- 5 PRASA challenged none of this evidence. Mr. Radebe's inability to do heavy labour in future was an uncontested assumption of the evidence given by all of the expert witnesses. It was also acknowledged in the joint minutes of the orthopaedic surgeons, by which PRASA is bound. Given that Mr. Radebe labours for a living, and given the likelihood of chronic pain in future, I assessed Mr. Radebe's damages in the upper part of the range established in

argument - though not at the very top end, because I was not convinced that the consequences of Mr. Radebe's injuries were comparable to the most serious consequences featured in the cases at the top of the scale.

- 6 Mr. Sadiki was unable to point to any respect in which the evidence was in tension with or failed to support this assessment. It follows that, given the broad discretion accorded to trial courts in the quantification of general damages, there are no prospects of success in an appeal against this aspect of my award.

### **Future Earning Capacity**

- 7 Mr. Sadiki submitted that I was wrong to accept the basic figures with which I calculated Mr. Radebe's pre-accident earning capacity. These figures were based on aspects of industrial psychologists' and occupational therapists' evidence that were not challenged in cross-examination, and on aspects of the joint minutes which were, of course, not open to challenge. Mr. Sadiki nonetheless suggested that Mr. Radebe had failed to prove his pre-accident capacity because (a) he was not working at the time of the accident and (b) he could not produce documentary evidence of his pre-accident earnings.
- 8 It is true that Mr. Radebe had been retrenched from his job shortly before his accident. But that obviously does not mean that he had no earning capacity before he was injured. It is in the nature of a labourer's work that they will have to endure periods of unemployment between contracts. That fact makes no difference to my assessment of what Mr. Radebe was earning, as a fact, in the months and years leading up to his injury.

- 9 It is also in the nature of the type of work that Mr. Radebe does that it is seldom well-documented. It is common for unskilled labourers to be paid in cash. Poor working people in Mr. Radebe's position generally find it difficult to provide a precise accounting of their income. It was necessary, in these circumstances, for me to rely on the best evidence available. That evidence was the unchallenged contents of expert reports submitted on Mr. Radebe's behalf.
- 10 Had Mr. Radebe's failure to provide documentary evidence of his income been raised at trial, or had PRASA led any evidence to contradict the figures supplied on Mr. Radebe's behalf, things might have been different. But I cannot conclude on the case as it was presented and argued that there is any prospect that a court of appeal will find that I was wrong to adopt these figures.
- 11 Mr. Sadiki then suggested that the calculation I performed using the figures supplied in the expert evidence and joint minutes was flawed. However, I was unable to ascertain in what respect Mr. Sadiki found my calculations wanting. It was said that I did not follow the steps set out in unreported High Court decision of *Sweatman v Road Accident Fund* (a decision of the Cape High Court, Griesel J presiding, under case no. 17258/2011, decided on 3 December 2013). Save for my decision not to apply a contingency deduction to the figure I arrived at, Mr. Sadiki was unable to point out in what respect my method departed from that of Griesel J, and I could otherwise see none. Griesel J's decision was later confirmed on appeal in *Road Accident Fund v Sweatman* 2015 (6) SA 186 (SCA). The Supreme Court of Appeal's decision appears to me to be entirely consistent with the approach I adopted in this case.

- 12 That leaves Mr. Sadiki's criticism of my decision not to apply a contingency deduction to the value I assigned to his loss of future earning capacity. However, Mr. Sadiki was unable to say on what basis I could have applied a contingency deduction, given that I heard no evidence on which a reasonable contingency deduction could have been calculated. Contingency values cannot and should not be plucked from the air. Having elected to challenge neither the evidence of Mr. Radebe's past earning capacity, nor the evidence of Mr. Radebe's pre- and post- morbid future earning capacity, it was open to PRASA to lead evidence of what vicissitudes of life Mr. Radebe could expect apart from the injury for which it was partly responsible. On that basis a contingency deduction could have been made. But PRASA led no such evidence (indeed, PRASA elected to lead no evidence at all).
- 13 In these circumstances, I cannot conclude that there is any prospect of a court of appeal interfering with my award for loss of future earning capacity.

### **Future Medical and Related Expenses**

- 14 The third and final part of my award concerned Mr. Radebe's future medical expenses. There was no dispute that an award of R20 000 should have been made to pay for rehabilitative surgery on Mr. Radebe's right arm. There was likewise no dispute that Mr. Radebe would require the assistive devices listed paragraph 4.3 in the occupational therapists' joint minutes. That these devices would have to be replaced at various intervals specified in Mr. Radebe's occupational therapist's report was likewise unchallenged. It was also agreed (in paragraphs 4.4.3 and 4.4.4 of the joint minutes) that Mr. Radebe would need the assistance of a handyman at the cost of R3000 per annum, and a

gardener, albeit one whose likely annual cost does not appear from the joint minutes.

15 The only aspect of Mr. Radebe's claim that was disputed at trial was his need for domestic assistance. I dealt with that dispute in my trial judgment, and Mr. Sadiki did not suggest that I was wrong to dispose of it in the way that I did.

16 Ultimately, based on the joint minutes and on the contents of Mr. Radebe's expert reports, Mr. Chabane, who appeared for Mr. Radebe, calculated Mr. Radebe's future medical and related expenses at R228 242. PRASA objects that this figure was advanced without supporting evidence.

17 It emerged during argument on the application for leave to appeal that Mr. Chabane had borrowed, in performing his calculations, from actuarial reports that were not in evidence before me. But I do not think that matters. Mr. Chabane's calculations were based on figures and needs that were in evidence, and which were, as I have pointed out, largely undisputed. Neither Mr. Chabane's calculations nor the figure he arrived at were subjected to any criticism at trial. In these circumstances, there can be no appreciable prospect of a successful appeal.

18 As I pointed out in my trial judgment, once I was satisfied that loss had been suffered, I was not at liberty to decline to make an award to compensate Mr. Radebe for it, even if my assessment was "very little more than an estimate" (see *Hersman v Shapiro* 1926 TPD 367, 379). There of course has to be evidence to support the estimate, and the question will always be one of sufficiency. Where the evidence permits a reasonable estimate, then an award

should and will be made. Where it does not, the defendant will be absolved from the instance.

19 In this case, I was satisfied that the evidence, though not perfect, was sufficient for a reasonable estimate to be made of Mr. Radebe's damages in all the components on which I have made an award. Having accepted liability for half of Mr. Radebe's proven losses, then having declined to challenge much of the evidence led in quantification of that loss, and then having decided to lead no evidence of its own, there are limits to the extent to which PRASA can reasonably expect to challenge the assessments I have made on appeal.

20 In any attempt to do so, PRASA must show more than the mere possibility that other Judges might have made different awards based on the same evidence. That is an acknowledged feature of cases like this one. What PRASA must show instead is some demonstrable error in the chain of reasoning I deployed to assess Mr. Radebe's award as I did. PRASA has identified no such error, and its application must fail as a result.

21 The application for leave to appeal is dismissed with costs.



**S D J WILSON**  
Judge of the High Court

This judgment was prepared and authored by 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 15 December 2022.

HEARD ON:	8 December 2022
DECIDED ON:	15 December 2022
For the Plaintiff:	VJ Chabane Instructed by Tsiestsi-Dlamini & Mahlathi
For the Defendant:	KG Sadiki Instructed by Jerry Nkeli and Associates