



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

Case no: 5668/21

In the matter between:

XOLA MADUNA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Neutral citation: *Xola Maduna v Road Accident Fund* (Case no 5668/21)

[2025] ZAWCHC (01 September 2025)

Coram: MAYOSI AJ

Heard: 2 June 2025

Delivered: 1 September 2025

Summary: Damages claim for loss of earnings and earning capacity.

ORDER

- 1 Plaintiff is awarded damages in the amount of R2 629 204,68, which is made up as follows:

[1.1]	Past loss of earnings	–	R455 960,80
[1.2]	Future loss of income	-	R2 426 047,00
[1.3]	General damages	-	R1 500 000,00
[1.4]	SUB-TOTAL	-	R4 382 007,80
[1.5]	Less 40% apportionment	-	(R1 752 803,12)
[1.6]	TOTAL	-	R2 629 204,68

JUDGMENT

Mayosi AJ:

- [1] The plaintiff is an unemployed adult male who was born on 15 August 1991. He is 34 years old.
- [2] The plaintiff was involved in a motor vehicle collision on 15 September 2019, which occurred whilst he was a pedestrian. In these action

proceedings the plaintiff claims from the defendant damages pursuant to injuries sustained in the collision.

- [3] The merits have been settled on a 60% - 40% split in favour of the plaintiff. The parties have also settled the general damages in the amount of R1 500 000.00 less the 40% apportionment, resulting in an amount of R900 000.00 due to the plaintiff.
- [4] As a result, the only issue that remains in dispute is the plaintiff's claim for loss of earnings and earning capacity.

The plaintiff's request for a truncated hearing

- [5] At the commencement of the trial the plaintiff moved an application for an order seeking leave for the evidence of his actuarial and medical experts to be given on affidavit, rather than orally, in terms of Uniform Rule 38(2), which provides that –

The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

- [6] The application was not opposed by the defendant, which had appointed only an industrial psychologist and no other expert in support of its

defence of the case. The plaintiff argued that it would be a wasteful exercise to present the *viva voce* evidence of his experts in a situation where no similar expert was appointed by the defendant; and furthermore that it is in the interests of justice for a truncated trial to be conducted under Uniform rule 38(2), in terms of which this Court is empowered to make any order with regard to the conduct of a trial as to it seems meet, and thereby vary the procedure laid down in Rule 39.

- [7] Having considered the application, with reference to the pleadings and the issues raised in the action, this Court found that it was appropriate and suitable in the circumstances to allow a deviation from the norm of hearing the oral evidence of witnesses in action proceedings. As stated previously, the evidence of the experts that was sought to be placed before this Court by means of affidavit was uncontested by the defendant and the Rule 38(2) application was not opposed by it. When regard was had to the saving of time, costs and judicial resources attendant upon such a course, this Court found that in all the circumstances of this case it was fair and served the interests of justice to allow the expert evidence to be given by means of affidavit.
- [8] The court granted the plaintiff's application in terms of Rule 38(2), and made no order as to costs.
- [9] The Court then heard evidence regarding the only issue in dispute in the matter, namely, the plaintiff's claim for past and future loss of earnings.

The disputed past and future loss of earnings

- [10] The motor vehicle collision which forms the basis of these action proceedings occurred when the plaintiff was 28 years old. The plaintiff sustained a severe brain injury with permanent disabling cognitive and behavioural changes, together with post-traumatic seizures. The neurosurgeon, clinical psychologist, speech and occupational therapists who assessed the plaintiff are all in agreement that the serious nature of the plaintiff's injuries, and their continuing and permanent *sequelae* have rendered the plaintiff unemployable in any capacity, and that he can never again become a contender for employment. These *sequelae* include, but are not limited to, severe communication deficits as well as permanent and uncontrollable epileptic seizures.
- [11] The only expert report filed by the defendant is that of industrial psychologist Mr Lance Marais. He agrees with the plaintiff's industrial psychologist, Dr Hannes Swart, that the plaintiff was rendered unemployable by the accident and the injuries he sustained therein.
- [12] Where the industrial psychologists diverge in their opinions is with regards to the plaintiff's pre-morbid career path; i.e.; what level of earnings he would have reached, but for the accident. There is no divergence between them regarding the plaintiff's career path in his injured state.

- [13] It is in relation to this divergence that, at the trial, the *viva voce* evidence of Dr Swart was heard. The defendant did not call Mr Marais as a witness.
- [14] This Court is therefore called upon to determine the plaintiff's claim for loss of earnings and earning capacity, given the difference of opinion between the experts on, in the main, the plaintiff's pre-morbid earnings potential.

The legal approach to claims for loss of earnings / earning capacity¹

- [15] In determining the correct amount for loss of earnings / earning capacity in personal injury claims, the court engages in what is, in essence, a speculative exercise, albeit with some parameters as set out by the courts in previous cases.
- [16] The *ratio* of the Appellate Division (as it then was) in **Southern Insurance Association v Bailey NO (Bailey)**,² and the authorities cited therein, is seminal in this regard, and remains incisive in relation to the nature of the enquiries to be made into a damages claim for loss of earning capacity, and the approach to be adopted by this Court.

¹ In an action for damages based on negligence, the head of damages for loss of earnings is more properly described as "loss of earning capacity". The Appellate Division (as it then was) in Bailey, at 98H. See full citation for Bailey in footnote below.

² 1984 (1) SA 98 (AD)

[17] The AD held:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.³ In a case where the Court has before it material on which an actuarial calculation can usefully be made,

³ See *Herman v Shapiro & Co* 1926 TPD 367 at 379 per STRATFORD J: Monetary damages having been suffered, it is necessary for the Court to assess the amount and make the best use of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. And in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A) Holmes JA is reported as saying at 451B-C: “I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see *Pitt v Economic Insurance Co Ltd* 1957 (3) 284 (N) at 287 and *Turkstra Ltd v Richards* 1926 TPD at 282 in fin-283.

*the first approach does not offer any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" as to what is fair and reasonable is nothing more than a blind guess."*⁴

- [18] As far as I am aware, Bailey remains good law in relation to the principles set out above. These principles are of relevance to the sole issue for determination in this matter; i.e.; what level of earnings the plaintiff would have reached if the accident had not occurred for the purposes of determining his damages claim.

The evidence of the industrial psychologists

- [19] It is common cause between the experts that the plaintiff left school while he was in grade 10, in 2007. Grade 9 is therefore his highest level of education. He began his foray into employment in 2010, when he secured casual employment at Marko Metals in Parow. He worked as needed and generally worked two to three days per week. The plaintiff told Dr Swart that he did this for about two months and earned R100.00 per day.

⁴ Page 99A D

- [20] The plaintiff also joined a cultural arts group named Rainbow Art wherein he played marimba, drums and keyboard and danced in productions, as and when required. He worked for them until 2016, and could earn from R1 500,00 up to R2 000,00 per month. The arts were a passion of the plaintiff's that he had wanted to pursue. His work for Rainbow Art was, however, not consistent employment and occurred only on an *ad hoc* basis.
- [21] From 2016 onwards, the plaintiff participated in projects facilitated by the Extended Public Works Programme (EPWP) for the City of Cape Town (**the City**). He worked irregularly during this time. He was involved in cleaning the streets and fixing drains for contractors employed by the City.
- [22] During the period when he first ventured into the employment space - from 2010 until 2016 - the plaintiff pursued this type of general work, doing what can best be characterised as temporary and intermittent work. He himself described these as "piece jobs". Both industrial psychologists agreed that this type of work fell in the unskilled category.
- [23] In about 2017 the plaintiff secured employment with Lawula Systems (**Lawula**), based in Stikland, Cape Town in the position of a general worker where he assisted in repairing traffic lights that were out of order and required new globes. This position was full-time; and although the plaintiff was yet to sign a contract with Lawula when the

accident occurred, he was serving a six-month probation period at the time. Dr Swart testified that the fact that the plaintiff was serving a probationary period strongly suggests that his employers were considering him for permanent employment. The industrial psychologists are *ad idem* that the plaintiff's employment with Lawula can be characterised as permanent employment. He had stability and was enjoying a fixed income. This was interrupted by the accident in September 2019.

- [24] After recovering from the accident, the plaintiff returned to work at Lawula in late 2020. However, in February 2021 he suffered an epileptic seizure whilst at work and was told not to return. He was handed a letter to claim from the Unemployment Insurance Fund (UIF).
- [25] He has been unemployed since. From the contents of the expert reports filed, to say that this state of affairs is a source of great frustration for him would be an understatement.

Plaintiff's probable career path, but for the accident

- [26] This is where the experts differ. It is what this Court is called upon to determine for the purposes of arriving at what is a fair and reasonable sum to award the plaintiff for his loss of earnings and earning capacity.
- [27] In the opinion of Dr Swart, if the accident had not occurred, the plaintiff would have either remained at Lawula after his probationary period, or would have gone somewhere else similar. Given his age at the time of

the accident (28 years), the current labour market and his career aspirations, Dr Swart's opinion is that the following career path would, under the circumstances, have been a reasonable and attainable one for the plaintiff:

- [27.1] The plaintiff would have retained his position at Lawula or moved on to a similar position. From a payslip furnished to Dr Swart by the plaintiff, in 2019 he earned R2 852.45 per fortnight at Lawula. His annual income was R77 020.96. This would have increased yearly by inflation.
- [27.2] The plaintiff would have progressed to a semi-skilled level by 40 to 45 years of age earning R191 000.00 per annum (based on 2019 values), recalculated by applying annual earnings inflation thereafter.
- [27.3] The plaintiff would retire at the age of 65 years of age.

[28] The defendant's Lance Marais, who did not give oral evidence, holds a different opinion regarding the plaintiff's pre-morbid prospects. He opines that:

- [28.1] Based on the plaintiff's occupational experience and general skills and abilities, the plaintiff would have continued working as an unskilled worker until retirement, or for as long as his health permitted.
- [28.2] The plaintiff had reached his career ceiling and

earning potential, as an unskilled worker, before the accident.

- [29] The crux of the difference of opinion between the experts is whether or not the plaintiff would have progressed until semi-skilled level had the accident not occurred or whether, as Mr Marais opines, he would have remained in the unskilled bracket until retirement, as he had already reached his fullest potential when the accident occurred.

Analysis of the evidence before the Court

- [30] After assessing the information that he had been given by the plaintiff regarding his work history from 2010 until he obtained employment with Lawula in about 2017, which information is in material respects consistent with the information given to Dr Swart, Mr Marais in his report concluded that the plaintiff's occupational experience falls within the unskilled occupational group. I have no difficulty with this conclusion based on the evidence before this Court, and both experts are *ad idem* that this was the nature of the plaintiff's work experience from 2010 until the Lawula job.
- [31] What Mr Marais has not considered, however, and what his report does not cover, is the impact on the probabilities of the fact that the plaintiff moved from casual work from 2010 onwards to securing permanent employment with Lawula from 2017 until the accident occurred.

- [32] In this regard, the oral evidence of Dr Swart was that a person like the plaintiff whose highest educational qualification is grade 9 would typically enter the job market as an unskilled worker and gradually acquire skills on the job, and secure better employment as occurred in this particular matter.
- [33] When the accident occurred in 2019 the plaintiff had been in employment for nearly 10 years. Whilst he entered the job market as an unskilled worker, over the years he gradually improved to a higher skills level that had the distinct potential to progress towards a semi-skilled level which, in the opinion of Dr Swart, was the level where the plaintiff was in his full-time position at Lawula when the accident occurred.
- [34] So, the picture for the plaintiff and his prospects changed when he secured and retained the position at Lawula. It changed from an unskilled level where he was doing “piece-jobs” with various employers and no job security, to a level where was in stable, fixed, full-time employment, performing relatively more technical tasks and where he was being considered for permanent employment. The description of the nature of his employment then changed from unskilled, intermittent casual work to stable, full-time, fixed employment. In his report, Mr Marais does not appear to have considered the implications of this progression on the probabilities for the plaintiff’s career, and therefore earning prospects going forward, had the accident not occurred.

- [35] Moreover, the plaintiff's payslip demonstrating his earnings at Lawula at the time of the accident tells a story which Mr Marais in his opinion did not take into account. Dr Swart's evidence of his analysis of the plaintiff's payslip when he worked at Lawula, which was not disputed, was that the plaintiff earned wages at a rate of R32.05 per hour which was 60% higher than the minimum wage which, in 2019, stood at R20 per hour. Dr Swart surmised that the fact that he was earning 60% higher than the minimum wage was an indication that, at that time, he had progressed from the unskilled worker that he was when he first entered the job market. Then he would have been earning or have been entitled to earn the minimum wage as an unskilled worker.
- [36] Dr Swart's uncontested evidence was to the effect that the plaintiff had therefore progressed from unskilled and had acquired such further skills as had enabled him to earn more than the minimum wage earned by workers at the unskilled level, because his general skills were no longer basic.
- [37] Dr Swart's further analysis of the plaintiff's payslip was that the plaintiff was paid on a fortnightly basis and that if, at the time of the accident he was earning – as he was - 60% higher than the minimum wage this placed his earnings in the upper quartile of unskilled workers; or equivalently, at the median for semi-skilled workers. His annual earnings in 2019 were R77 020.96. The uncontested evidence was that if he had progressed to that level after 10 years in the job market, and he still had 37 years ahead of him until his retirement age of 65 years, then there was a real likelihood that at his career peak which was

accepted would occur between the ages of 40 to 50 years, his earnings would have progressed, and peaked, in the upper quartile of semi-skilled workers and remained at this level until he reached retirement age.

[38] I have no reason to gainsay Dr Swart's evidence as stated above. Furthermore, given the determination to remain gainfully employed which the plaintiff had demonstrated since he left school in grade 10, first working on an *ad hoc* basis until he secured full-time employment at Lawula, combined with the fact that after the accident he returned to work at Lawula, it is not a stretch to assume that if the accident had not occurred he would have continued working at Lawula or moved to similar employment (he expressed a wish to Mr Marais of securing employment at the City's Sanitation Department); and that over time he would have sustained that motivation and improved his skills as he went along, until he reached the semi-skilled level postulated by Dr Swart. Given that he had slowly progressed from doing unskilled work to securing full-time employment at Lawula where he was stable and earning a fixed income and had real prospects of permanent employment, I have no reason to doubt that the plaintiff would have perpetuated this trend for the rest of his working life until he reached his peak and ended up with earnings in the upper quartile of semi-skilled workers, and remained at this level until he retired.

[39] Dr Swart's hypothesis as to the plaintiff's pre-morbid prospects, which this Court accepts as reasonable, is not without flaws. But for the plaintiff's employment with Lawula which in my view shows a

progression in skills level as well as in his future prospects of improvement, continued employability and stability, as well as the payslip showing what he earned at Lawula at the time of the accident, there is not much else to corroborate of the plaintiff's claims. This concern was expressed by Ms Thomas who appeared for the defendant, and she was justified in doing so. In determining the issue that is before this Court, it is in essence called upon to ponder the imponderable and such an exercise can only be enriched and aided by the availability of as much evidence as can be obtained. The paucity of collaterals and other corroborating evidence introduces even more uncertainty for this Court to contend, as it attempts to pronounce as definitively as it can in an exercise that essentially is characterised more by "what ifs" and looking into the future. In such a case, the question of what contingencies are appropriate to apply to the plaintiff's past and future uninjured earnings, as a mechanism that seeks to balance the impact of these uncertainties, comes to the fore.

- [40] In awarding damages for future loss our courts usually make provision for contingencies. Contingencies include any possible relevant future event which might have caused the damage or a part thereof, or which may influence the extent of the plaintiff's damage. In a wide sense, contingencies are described as *'the hazards that normally beset the lives and circumstances of ordinary people.'*⁵ This may, for example, imply that provision is made for the fact that the prospective loss which is possible at the time of assessment of damage might in any event

⁵ See AA Mutual Ins Co v Van Jaarsveld 1974 (4) SA 729 (A) (Corbett & Buchanan II 360, 367)

possibly have occurred independently of the alleged delict in question. Hence it is important to consider whether, and if so, on what basis and in what percentage contingencies should be applied.

[41] The usual effect of an adjustment based on contingencies is that the amount of damages is reduced by a percentage which may vary between 10% and 50%.⁶ Provision for contingencies falls squarely within the subjective discretion of a court guided by what is reasonable and fair, based on the information before it.

[42] In this case, this Court has the benefit of actuarial reports quantifying both the scenario posited by Mr Marais and Dr Swart. This Court has accepted the scenario posited by Dr Swart, on behalf of the plaintiff, as being more probable than that of Mr Marais for the reason more fully set out in this judgment. The presence of the actuarial reports enables this Court to determine the issue on some objective and logical basis, rather than purely on the Court's gut feel.

[43] In my view in this case, when regard is had to the uncertainties inherent in the plaintiff prospects and potential had the accident not occurred, and their impact on his past and future loss of earnings, a contingency of 20% and 35% on the plaintiff's past and future uninjured income respectively, is appropriate.

[44] As stated previously, the parties have reached agreement in regard to all other heads of the plaintiff's damages claim, including costs as well

⁶ See *Van der Plaats v SA Mutual and Fire General Ins* 1980 (3) SA 105 (A) at 114-5

as an undertaking to be furnished by the defendant in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, and this Court has made an order by agreement in regard to all those remaining aspects of the claim.

[45] In the circumstances, it would be fair and reasonable to award the plaintiff damages in the sum of R2 629 204,68, made up as follows:

[45.1]	Past loss of earnings	-	R455 960,80
[45.2]	Future loss of income	-	R2 426 047,00
[45.2]	General damages	-	R1 500 000,00
[45.4]	SUB-TOTAL	-	R4 382 007,80
[45.5]	Less 40% apportionment	-	(R1 752 803,12)
[45.6]	TOTAL	-	R2 629 204,68




NT MAYOSI
JUDGE OF THE HIGH COURT

Appearances

For plaintiff:	W Coughlan
Instructed by:	Lester & Associates, Cape Town
For defendant:	C Thomas of the State Attorney, Cape Town