

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2024/127831

(1) REPORTABLE: YES / **NO**
(2) OF INTEREST TO OTHER JUDGES: YES / **NO**
(3) REVISED: YES / **NO**

21 APRIL 2026

DATE

SIGNATURE

In the matter between:

K[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKGATE AJ:

INTRODUCTION

[1] This action came before this Court as an application for default judgment against the Road Accident Fund ("the RAF"). Save for the issue of general damages which counsel for the Plaintiff requested that it be postponed *sine die*, the Plaintiff proceeded on aspects of merits, past and future loss of income. At commencement of the application, an order in terms of Rule 38(2) of the

Uniform Rules of Court was sought and granted, permitting the Plaintiff to present evidence on affidavit and by way of expert reports.

- [2] The brief chronological facts of the matter is that on or about 26 April 2023, at approximately 12h45, and at or near the corner of Piet Joubert Street and Wolmarans Street, Monument, Krugersdorp, the Plaintiff, then a 16-year-old pedestrian on a skateboard, was struck by a motor vehicle alleged to have been a grey Toyota Fortuner, the registration letters and numbers of which are unknown to the Plaintiff, and which was at the time driven by an unidentified insured driver.
- [3] The Plaintiff pleaded version is that the cause of the accident was the negligent driving of the insured driver in that he or she, amongst others, drove the insured vehicle at an excessive speed in the circumstances, failed to keep a proper lookout, failed to apply the brakes timeously, and failed to avoid the collision when by the exercise of reasonable care and skill, he or she could and should have done so¹.
- [4] As a result of the accident, the Plaintiff sustained a fracture of the midshaft of the right clavicle. He was conveyed to Life Flora Hospital where he was attended to and discharged the same day. The fracture was treated conservatively by way of immobilisation in a sling.
- [5] Pursuant the above, the Plaintiff then lodged a claim against the RAF. Summons were duly served on the RAF on the 09 December 2024². The requisite time within which to file a plea lapsed without any action being taken

¹ Amended POC, CL 01 - 19

² Caselines 01 - 1

by the RAF. Accordingly, the matter was properly enrolled to be heard as a default judgment application³.

[6] In this application, amongst others, the Plaintiff seeks an order in the following terms:

[6.1] That the RAF be held liable for 100% of the Plaintiff's proven damages;

[6.2] Compensation in the sum of R1 025 355.00 (One million twenty-five thousand three hundred and fifty-five rand), comprising of past and future loss of earnings and/ or earning capacity;

[6.3] An undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of future medical and related expenses;

[6.4] Payment of interest in the event the RAF fails to make payment within 14 days from the date of the order; and

[6.5] Costs on the High Court Scale B.

MERITS

[7] The Plaintiff's evidence on the merits is contained in the affidavit of his father, Mr H[...] H[...] K[...] ⁴, deposed to in his capacity as natural guardian, which

³ See notice of set down Caselines A 5

⁴ Caselines 02-30

records the version of events as relayed to him by the Plaintiff shortly after the collision occurred. The affidavit reads, in relevant part:

"On the 26 April 2023, at approximately 14:00, while at home, my son, M[...], returned home and he informed me that he was involved in an accident. He said that he was making his way down Piet Joubert Street on his skateboard when the accident occurred. A driver of a Grey Toyota Fortuner was driving along Wolmarans Street and as he approached the stop sign in the left lane of Piet Joubert Street, the driver suddenly made a turn, into the right lane from her perspective, he tried to avoid the collision by turning his skateboard, but was unsuccessful and the driver subsequently collided with him."

- [8] The Accident Report uploaded on Caselines⁵, together with the Plaintiff's own affidavit recorded at the South African Police Service, Krugersdorp, confirms that the collision did indeed occur at the place and on the date, and that the Plaintiff was a pedestrian struck by an unidentified motor vehicle.
- [9] It is trite law that in a pedestrian's claim, where the pedestrian was lawfully proceeding and was struck by a negligently driven motor vehicle, the duty of care squarely rests on the driver of the vehicle. The pedestrian, in the absence of any conduct on his part contributing to the collision, bears no liability for the accident. This principle is well established in our law and need not be discussed at length.
- [10] On the evidence placed before this Court, which is uncontested, the Plaintiff's version is that on the day in question, the insured driver *"came from the front driving in the wrong side of the road and knocked me down from my*

⁵ Caselines 02 - 25

skateboard.” According to the Plaintiff, the insured driver fled the scene without stopping.

[11] Based on the uncontested version of the Plaintiff, there is no basis why this version should not be accepted in totality. Accordingly, I find the RAF liable for 100% of the Plaintiff's proven damages.

MEDICO-LEGAL EVIDENCE

[12] As a result of the collision, the Plaintiff sustained bodily injury, being a midshaft fracture of the right clavicle. The Plaintiff has obtained reports from several medico-legal experts in support of his claim, which I summarise below.

DR GEOFFREY READ & DR TAPESHWAR AJODHA – ORTHOPAEDIC SURGEONS

[13] Dr Read and Dr Ajodha jointly examined M[...] K[...] approximately one-year post-accident, at which time the Plaintiff was 17 years old. They confirmed that the Plaintiff was a pedestrian on a skateboard when struck by a motor vehicle on 26 April 2023, and that he sustained a single injury, a fracture of the right clavicle which was managed conservatively by way of a sling.

[14] The clinical examination revealed mild asymmetry over the right clavicle due to malunion, but no scarring, no draining sinuses, no neurovascular deficit of either upper limb, no tenderness on palpation, and full pain-free range of movement of the shoulders. Radiological investigation confirmed a malunited midshaft clavicle fracture with approximately 65 degrees *postero*-superior

angulation of the apex and approximately 2cm shortening of the right clavicle compared to the left, with no plain X-ray evidence of degenerative change in the shoulder area.

[15] The orthopaedic surgeons concluded that the prognosis is good. They recommended provision for a possible corrective osteotomy of the clavicle should the Plaintiff be so inclined (estimated cost R80,000.00) together with conservative treatment for residual right shoulder symptoms (estimated cost R10,000.00), all to be covered by an undertaking from the Road Accident Fund.

[16] They opined that the Plaintiff may have been severely to considerably disabled for up to four months following the accident, but at present he has no significant orthopaedic disability and this should not change in future. Crucially, they recorded that the right clavicle fracture does not preclude him from working, that it will not have any significant long-term effect on his income or employment prospects, and that his retirement age is unaffected.

DR MILTON E. TOBIAS – RADIOLOGIST

[17] Dr Tobias performed and reported on radiological imaging of the Plaintiff's right shoulder and clavicle on 7 May 2024 at the request of Dr Read. The findings confirmed a malunited fracture of the right clavicle slightly beyond mid-shaft level, with up to 65 degrees *postero*-superior angulation of the fracture apex. As measured on the AP panoramic view, the right clavicle was 13.5cm in length compared to 15.7cm on the left, confirming approximately 2cm shortening of the right clavicle because of the malunion.

[18] Dr Tobias further noted that the right acromioclavicular joint was mildly widened in comparison with the left (5mm on the right versus 2mm on the left) but with no step deformity. The sternoclavicular, coracoclavicular and glenohumeral relationships were normal, with no dystrophic calcification noted. Importantly, there was no plain X-ray evidence of degenerative change in the shoulder area, and the right upper ribs appeared normal. The radiological findings therefore objectively confirmed the orthopaedic surgeons' diagnosis of a malunited midshaft clavicle fracture without any associated joint pathology or signs of progressive degenerative disease.

**MS DESIRÉ L. VAN ONSELEN (MARIA GEORGIU INC.) – OCCUPATIONAL
THERAPIST**

[19] Ms Van Onselen assessed the Plaintiff's functional capacity using the WorkWell FCE V.2 protocol and clinical assessment procedures. She recorded that the Plaintiff was working for his uncle's business, R & R Electrical, as a Home Maintenance Worker at the time of the accident, that the work falls within the medium physical demand level with aspects of heavy and very heavy work, and that the Plaintiff was absent from work for 8 to 10 weeks following the accident.

[20] On testing, the Plaintiff demonstrated below-normal grip strength of his right (dominant) hand (17.4kg versus a normal range above 32.6kg) and was able to safely lift 17.5kg in the waist-to-floor lift, which placed him at the mid-range medium physical demand level. He reported pain of his right clavicle and shoulder during elevated work and material handling. There was no cognitive or psychological fallout identified.

[21] Ms Van Onselen concluded that the Plaintiff retains the physical capacity to perform sedentary to mid-range medium physical demand work with pain, but that he no longer meets all of the physical demand aspects of his pre-accident work as a Home Maintenance Repair Worker, particularly tasks requiring right hand strength and endurance, elevated work, bi-manual dexterity and load handling. She nevertheless expressly recorded that, given the favourable prognosis provided by the Orthopaedic Surgeons and following the recommended intervention, rehabilitation and use of assistive devices, the Plaintiff's pain levels and physical demand achievement should improve and he should achieve a better job match in relation to his current work.

[22] Most pertinently, she opined that he should not be precluded from pursuing a career of his choice, and that it is anticipated that the Plaintiff's employment prospects should improve following successful intervention. She recommended an allowance of R36,000.00 to R38,000.00 for occupational therapy in the first year and provision for various assistive devices, all to be covered by an undertaking.

MR DAVID DE VLAMINGH – INDUSTRIAL PSYCHOLOGIST

[23] Mr de Vlamingh interviewed the Plaintiff and obtained collateral feedback from the Plaintiff's uncle and employer, Mr R[...] K[...] of R & R Electrical. He recorded that the Plaintiff completed Grade 7 as his highest level of education in 2019, repeated Grade 3, attempted Grade 8 in 2020 and the first term of Grade 8 in 2021 but did not complete it, and thereafter left school due to "family drama." The Plaintiff has no further formal qualifications and no driving licence. He commenced employment at R & R Electrical in November 2022 and was earning R175 per day (approximately R3,792 per month, plus overtime of R400 bringing the total to R4,192 per month at 2023 values), which placed him just above the median for unskilled workers in the non-corporate sector.

[24] Mr R[...] K[...] confirmed that the Plaintiff was a hard worker and one of his best employees. Following the accident, the Plaintiff convalesced for 8½ weeks without compensation, attempted to return to work for a few days but could not cope, and has remained unemployed since.

[25] Mr de Vlamingh postulated that, but for the accident, the Plaintiff would have continued in unskilled work in the non-corporate sector and would have reached a peak at the upper quartile (R9,583 per month in 2025-rand value) by approximately age 45.

[26] Post-accident, he opined that the Plaintiff would remain unemployed until completion of the recommended treatment by approximately January 2027, after which he should be able to return to the labour market in a similar but reduced capacity (restricted to mid-medium work) doing lighter maintenance work, starting at the median for unskilled workers in the non-corporate sector (R4,500 per month in 2025-rand value) and reaching a lower earnings peak between the median and upper quartile (R7,000 per month in 2025-rand value) by age 45.

[27] He accepted the orthopaedic surgeons' opinion that the Plaintiff's retirement age is unaffected and recommended that his residual vulnerability to periods of unemployment and reduced earnings be addressed by application of a moderately higher than normal post-accident contingency deduction. The asserted loss therefore turns on the assumption that the Plaintiff will not derive the predicted benefit from the recommended intervention, an assumption which itself rests on the experts' own "favourable" and "good" prognoses.

ANALYSIS – LOSS OF EARNINGS AND EARNING CAPACITY

[28] It is trite that the loss of earnings or earning capacity is assessed on the basis that the Defendant must make good the difference between the value of the Plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. See *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150 B-D and *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917 B-D.

[29] As a result, there must be proof that the disability gives rise to a patrimonial loss. This in turn will depend on the occupation or nature of the work which the Plaintiff did before the accident or would probably have done if he or she had not been disabled. The mere existence of an injury does not, without more, equate to a loss of earnings or earning capacity. The injury must be shown to have impaired the income-producing potential of the Plaintiff in a meaningful and quantifiable way.

[30] Having regard to the aforesaid, the inquiry is not whether the Plaintiff was injured, but whether the accident has caused, or will cause, a patrimonial diminution of his earning capacity. What therefore needs to be determined is whether the Plaintiff has suffered a loss of earnings, either actual or probable. The evidence presented must demonstrate that the Plaintiff is, or will be, worse off in the labour market than he would probably have been but for the accident.

Pre-morbid earnings

[31] The evidence relating to the Plaintiff's pre-accident earnings is as per the letter dated 19 May 2023 and on a letterhead bearing the name "R & R Electrical", in which the Plaintiff's uncle, Mr R[...] K[...], attests that the Plaintiff has been

working for him "from 2020/01/22 until now and we pay day by day R 150.00"⁶. the Plaintiff was paid in cash and received no documentary proof of his earnings.

[32] The dates given in the proof of income are inconsistent with that contained in the Industrial Psychologist's report which records that the Plaintiff commenced employment in November 2022. Further, the Plaintiff's father stated in his affidavit that the Plaintiff was working at R & R Electrical on parttime basis⁷ "in preparation of completing his electrical apprenticeship upon his attainment of majority" and earned R150.00 per day. As to when did the alleged employment commenced, and on what basis, is unclear.

[33] On the most favourable view of the evidence, the Plaintiff was earning R150 per day on a "no work, no pay" basis. He had no contract of employment, no statutory benefits, and no formal vocational qualification. The total monthly earnings on this version, even allowing for weekends overtime (2 Saturdays per month) and on a simple calculation, did not exceed R4,192.00 as opined by the IP in his report. The evidence reflects, at most, that the Plaintiff was absent from work for a period of approximately eight to ten weeks following the accident.

[34] The Industrial Psychologist records that, after the convalescence period, the Plaintiff returned to work for his uncle for a few days before discontinuing because he could not cope with the physical demands of the work. His uncle confirms that the Plaintiff is welcome to return to work for him once he has recovered. The Plaintiff has thus not been dismissed nor is he unemployable; the evidence is that he is unemployed by election while he convalesces.

⁶ Caselines 05 - 2

⁷ Caselines 02 – 31, para 5

Future loss of earnings

- [35] The experts' evidence does not, on a proper analysis, support a future loss of earnings. The Orthopaedic Surgeons' evidence is unequivocal in that the right clavicle fracture does not preclude the Plaintiff from working. His retirement age is unaffected, his Whole Person Impairment is rated at 1%, and the prognosis is good. Save for the malunion of the clavicle and the minor cosmetic asymmetry, the Plaintiff has, at present, no significant orthopaedic disability related to this accident, and this should not change in future.
- [36] The Occupational Therapist's evidence supports the Orthopaedic Surgeons' opinion. She concludes that the Plaintiff retains capacity for sedentary to mid-range medium physical demand work and that, following the recommended intervention, his employment prospects should improve and he should achieve a better job match. She expressly states that the Plaintiff should not be precluded from pursuing a career of his choice.
- [37] The Industrial Psychologist's postulation of a reduced earnings ceiling rests, fundamentally, on two assumptions, namely, first, that the Plaintiff would have continued indefinitely as a low-paid maintenance worker, and second, that following the accident he is now permanently restricted from heavy physical work.
- [38] Both assumptions are open to question. The first ignores the fact that the Plaintiff, having left school in Grade 7 at an early age and by his own choice, has demonstrated no inclination towards skills development or formal training. The second is contradicted by the Orthopaedic Surgeons' opinion that, following recommended treatment, the Plaintiff should have no significant long-term effect on his income or employment prospects.

[39] Critically, the Industrial Psychologist himself records the prognosis to be "fair" and the Occupational Therapist describes it as "favourable". The asserted future loss therefore depends, in large measure, on a hypothetical post-treatment scenario in which the Plaintiff fails to derive the predicted benefit from the recommended intervention. That hypothesis is speculative and is not borne out by the medical evidence.

[40] Having regard to the above, my considered view is that the Plaintiff has not discharged the onus of proving the loss of future earnings and/ or earning capacity as claimed in that the Orthopaedic Surgeons have opined that the right clavicle fracture does not preclude the Plaintiff from working and also the Occupational Therapist opinion that, following the recommended intervention, the Plaintiff's employment prospects should improve and he should achieve a better job match.

[41] Considering the above, this Court is not willing to exercise its discretion and grant default judgment against the RAF in respect of the Plaintiff's claim for loss of future earnings and/ or earning capacity. The rationale being that, in my view, the outcome of the recommended medical intervention that the Plaintiff is yet to undergo is important for the determination of this aspect.

[42] In the circumstances, it may well be that the Plaintiff has a potential claim for some component of loss of future earnings and/ or earning capacity, however, on the available evidence, the Court has its own doubts about the quantum thereof. As a result, the aspect of loss of future earnings and/ or earning capacity requires a trial. In that way, the interests of justice would be better served.

[43] There is however some past loss of earnings attributable to the convalescence period. The Plaintiff claims a past loss of earnings in the amount of R152 570.00. This is in terms of the Actuarial calculations, which the Court is prepared to award.

COSTS

[44] Costs ordinarily follow the result. The Plaintiff has been successful on the merits, section 17(4)(a) undertaking and a claim for past loss of earnings. He has, however, not been successful in respect of the future loss and/ or earning capacity claim and the general damages have been postponed *sine die*.

[45] In the exercise of my discretion and having regard to the matter, costs on the High Court Scale B is appropriate.

[46] In the result, the following order is made:

Order

1. The Defendant is held liable for 100% (one hundred percent) of such damages as the Plaintiff may agree or prove.
2. The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of future accommodation of the Plaintiff in a hospital or nursing home or

treatment of, or rendering of a service to, or the supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on 26 April 2023, after such costs have been incurred and on proof thereof.

3. The Defendant is ordered to pay the Plaintiff an amount of **R152 570.00. (One hundred fifty-two thousand five hundred seventy rand)** in respect of a claim for past loss of earnings.
4. The application for default judgment in respect of the Plaintiff's claim for future loss of earnings and/ or earning capacity is refused, with leave to the Plaintiff to enrol the matter for trial in respect of such relief.
5. The Defendant is ordered to pay the Plaintiff's costs to date on the High Court Scale B.

T J MAKGATE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff: Adv H Schouten instructed by Wim Krynauw Attorneys.

Date of Hearing: 26 February 2026.

Date of Judgment: 21 April 2026.

