

**IN THE SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)**

**CASE NO: 07/2195**

In the matter between:

**NKOSI, MAQHINGA SALATIEL**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

---

**J U D G M E N T**

---

**MBHA, J:**

[1] The plaintiff sued the defendant in terms of the Road Accident Fund Act 56 of 1996 for damages suffered as a result of injuries sustained in a motor accident which occurred on 27 March 2004.

[2] The defendant defended the matter and it proceeded to trial on 24 February 2009. On the first day of the trial, the defendant conceded the merits in

favour of the plaintiff and agreed that it was liable for 100% of the plaintiff's agreed or proven damages.

[3] The defendant also agreed to:

- 3.1 furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the plaintiff's future medical, hospital and associated medical expenses;
- 3.2 pay the plaintiff R15 661,12 in respect of the plaintiff's past, medical and hospital expenses.

[4] The only issues that this Court is called upon to determine relate to the following issues:

- 4.1 the quantum of general damages;
- 4.2 the past and future loss of earnings of the plaintiff.

[5] The plaintiff led the evidence of the following witnesses:

- 5.1 The plaintiff.
- 5.2 Mr Ben Moodie – industrial psychologist.

[6] The following experts also furnished reports on behalf of the plaintiff:

- 6.1 Dr G O Read – orthopaedic surgeon.

- 6.2 Dr Shapiro – radiologist.
- 6.3 Mr Ben Moodie – industrial psychologist.
- 6.4 Algorithm Consulting – actuaries.

[7] The defendant only led the evidence of one witness, Mr Cornelius van der Merwe, the plaintiff's work supervisor.

### General Damages

[8] It is trite that in considering general damages, the following factors are relevant:

- 8.1 The nature, extent of the injuries and their *sequelae* flowing therefrom;
- 8.2 pain and suffering;
- 8.3 permanent disabilities;
- 8.4 disfigurement.

[9] It is common cause that the plaintiff sustained the following injuries in the accident:

- 9.1 chest injuries involving fractures to five of his ribs;
- 9.2 fractures of the third and fifth metacarpals of the right hand;
- 9.3 a concussion;
- 9.4 a laceration of the head.

[10] The plaintiff testified about his pain and suffering post-accident. The following evidence was of significance:

- 10.1 He was hospitalised post-accident for a period of seven (7) days.
- 10.2 His right hand was severely injured and placed in a plaster cast for three months. His right hand thereafter remained bandaged, was painful and swollen for a further three months. He continued to visit the hospital as an outpatient for chest X-rays and monitoring.
- 10.3 The plaintiff testified that he had difficulty breathing immediately following the accident and was placed on breathing equipment in hospital.
- 10.4 He testified further that for several months after the accident he was unable to laugh, cough or sneeze as it caused pressure on his chest resulting in severe pain.
- 10.5 He said that to date he still experiences pain in his chest when engaging in exercise and this has caused him to desist with his pre-morbid accident activity of jogging.
- 10.6 The plaintiff further testified that his hand was the worst pain he had ever experienced and that he was devastated when his medical aid benefits were exhausted as he could not receive further treatment.
- 10.7 He said that his hand was in a plaster cast for approximately three months and thereafter bandaged. His hand was in extreme pain and swollen for six months and he could not use it.

10.8 The plaintiff testified that he returned to work earlier than he should have, as he had used up all his sick leave and could not afford unpaid leave.

10.9 The plaintiff said he used to enjoy playing with his children, did running and played soccer before the accident but has been prohibited from continuing with such activities as a result of the accident.

[11] Dr Read (orthopaedic surgeon), in his reports, points out the following of significance:

The right hand

11.1 The plaintiff is right-hand dominant and therefore the plaintiff injured his primary hand.

11.2 The plaintiff sustained fractures of the third and fifth metacarpal with shortening on his right hand.

11.3 The plaintiff suffered from and continues to suffer from post-fractured syndrome following the accident.

11.4 The plaintiff has weakness in his right hand and cannot make a fist properly.

11.5 The plaintiff can only type for ten to fifteen minutes before experiencing severe pain and discomfort.

11.6 The plaintiff suffers from ongoing intermittent pain in his right hand.

- 11.7 The plaintiff's right hand will initially need to be treated by way of conservative treatment in the form of physiotherapy, analgesics, muscle relaxants and anti-inflammatories.
- 11.8 The plaintiff should further be submitted for surgery by way of a corrective osteotomy to straighten the third metacarpal and plating of the fracture.
- 11.9 The plaintiff should then be operated on again a year later to have the internal fixatives removed. He will require two to three months off work to receive the necessary treatment.
- 11.10. The plaintiff remains markedly symptomatic and has experienced considerable pain and suffering.
- 11.11 The plaintiff is currently moderately disabled, mainly as a result of the function of his right hand.
- 11.12 The plaintiff has been unable to continue gardening, house maintenance or vehicle maintenance as a result of the accident.

#### The chest injury

[13] Insofar as the plaintiff's chest injury is concerned, Dr Read stated the following:

- 13.1 The plaintiff suffered fractures to five of his ribs which have solidly healed.

13.2 The plaintiff has a post-fracture syndrome and the symptoms should be treated conservatively with analgesics, anti-inflammatories and muscle relaxants.

13.3 It is not anticipated that the plaintiff will ever require surgery for his post-fracture chest pain.

[14] Dr Read reports that as far as the head injury is concerned, this has resolved with no *sequelae*.

[15] Taking all the aforesaid evidence into account, it is necessary to have a look at case law to gain guidance as to what an appropriate award of damages should be.

[16] In considering the damages to be awarded, it is important to have reference to what was stated in the case of *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA), where the SCA confirmed the position adopted in *Wright v Multilateral Motor Vehicle Fund*, where Broome DJP stated:

*"I consider that when having regard to previous awards one must recognize that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than in those countries."*

[17] During argument I was referred to the arbitration forum case of *Newhouse v Road Accident Fund*, a 2003 case where the arbitrator awarded R180 000,00 to the plaintiff in respect of injuries involving fractures of the metacarpals. I am informed that in current terms (per Robert J Koch) this award would amount to approximately R261 000,00. In this case an operation involving plating an insertion of K-wires was necessary, as well as an operation to later remove the K-wires.

[18] In my view the nature of the injuries and the *sequelae* therefrom differ considerably from those of the plaintiff in this case.

[19] The plaintiff in the *Newhouse* case sustained multiple fractures, avulsions and dislocations of metacarpals of the right hand, as well as severe lacerations of both the palm, the ulnar border and the dorsum of the same hand, and damage to muscle of hypothenar eminence (the fleshy prominence of the palm below the little finger) and to the neurovascular bundle of the little finger. She then underwent a 9 hour operation by a plastic and reconstructive surgeon. There was insertion of K-wires and she was hospitalised initially for 13 days but she was re-admitted a month later for removal of the wires and for further reconstruction, which was followed three weeks later, by further surgery comprising plating and bone grafting. The little finger subsequently developed a flexion contracture and deviation which interfered with flexion of the adjoining ring finger and this led to the ultimate amputation of the little finger at the pip joint. Future surgery, treatment and medication followed. The subsequent loss of hand

function rendered the claimant unable to continue her duties of being a kitchen manager and front of house manager which she had shared with her husband in their restaurant.

[20] As can be clearly seen the injuries and *sequelae* of the injuries sustained by the claimant in *Newhouse* were extremely severe as compared to those of the plaintiff in this case.

[21] In my view a more comparative case is that of *Holland v Bendix* 1954 (1) SA (CPD) Corbett and Buchanan. In this case the plaintiff suffered the following injuries in a motor collision:

- 21.1 a laceration and fracture of all fingers of the right hand;
- 21.2 a fracture of the left clavicle;
- 21.3 bruising on the right side of the chest with five fractured ribs;
- 21.4 lacerations on the forehead.

[22] The plaintiff was awarded a total of £1,025, 11 shillings and 6 pence in respect of hospital and medical expenses and for general damages and the remainder being for general damages. I am informed the current value of that award is the monetary equivalent of R148 000,00.

[23] Taking the aforesaid into account, and all the factors pertaining to the plaintiff's injuries, I am of the view that an award in the order of R250 000,00 is appropriate.

Loss of earnings

[24] Insofar as loss of earnings are concerned, the plaintiff relies on the evidence of both himself and Mr Ben Moodie, industrial psychologist.

[25] It is common cause that the plaintiff worked for August Lapple SA (Pty) Ltd (*“August Lapple”*), a motor vehicle component manufacturer, at the time of the accident, as a human resources co-ordinator.

[26] It is the plaintiff’s case that he has suffered a past loss of earnings as a result of the accident and will suffer a future loss of earnings by virtue of the fact that he will still need to undergo two operations to his hand and will only be effectively able to re-enter the labour market once he is fully rehabilitated.

[27] It is further common cause that the plaintiff will require two to three months off work to attend to future medical treatment.

[28] The plaintiff testified that his job entailed training of operators in all aspects of the company’s operation, which included the loading of dies and tools for the manufacture of body panels. He was also responsible for preparing training material and facilitation of theoretical training.

[29] In terms of his administrative functioning, the plaintiff testified that he was required to perform computer-based work, which he explained he could not carry out properly due to the limitations associated with his right hand. He said he

experienced drastic problems in carrying out his work functions, as a result of the fact that he could not effectively use his right hand and continues to suffer pain and disability.

[30] In terms of the operational side of his job, the plaintiff explained that he could not properly carry out the physical aspects of his training functions by virtue of the fact that he could not pick up heavy objects and could not use spanners. He said that the aforesaid limitations resulted in him having problems carrying out his core functions which led him to neglect his duties and to perform poorly.

[31] The plaintiff testified that prior to the accident he was promoted very quickly during the period of his employment and in fact achieved and exceeded his employment targets resulted in his remuneration nearly doubling in five years. He stated that he was very aware of his shortcomings and was actually approached by his immediate superiors and informed that his performance was not satisfactory and needed to be improved. He stated that albeit he was not formally disciplined, he was under the impression from his superiors that if his performance did not improve he could lose his job.

[32] He informed the court that as he could not improve his physical limitations he began seeking alternative employment which would be less physical in nature.

[33] Under cross-examination the plaintiff explained that he did not request to be accommodated elsewhere at August Lapple as being in human resources

himself he knew no suitable alternative positions which would accommodate his physical limitations, existed. He also explained that he did not blame the company for his plight which was solely due to the accident and did not want to burden the company.

[34] Under further cross-examination the plaintiff explained that while he was never threatened with dismissal outright but that he knew that such threats were not outwardly made in the human resources environment and he further knew when the time to leave had arrive. He explained that it was expressly to avoid the tarnish on his reputation of a dismissal and permanent damage to his clean 25 year work history that he resigned of his own accord. He stated that as a result of working in human resources, he knew companies were very reluctant to hire an employee that had been dismissed in the past, and therefore he took steps to avoid any possibility of dismissal.

[35] The plaintiff testified that he eventually secured alternative work with manufacturing, engineering and related services sector ("SETA") in February 2005. He then resigned from August Lapple and gave them a month's notice and commenced work with SETA on 1 April 2005.

[36] His salary at the SETA was between R16 000 to R17 000 per month. It must be noted that at August Lapple he earned a basic monthly salary of R13 169,43 and a monthly car allowance of R3 660,00.

[37] The plaintiff testified that in his view he took a drop in earnings of approximately R6 000,00 at the SETA as compared to the salary he had received

at August Lapple. He explained that the only reason he had accepted such a drop in earnings was that he could not afford to continue working at August Lapple and face a possible dismissal due to poor work performance and that such a dismissal would ruin his excellent work track record to date.

[38] After taking up employment at SETA, the plaintiff learned that his function was not purely sedentary and actually involved *inter alia*:

1. physical assessment of learners at F.E.T. colleges;
2. significant administrative typing work, including assessment reports.

[39] Insofar as the physical assessment of learners was concerned, the plaintiff explained that he had to assess the learners by performing product valuation which his physical hand limitations prevented him from properly doing as he could not use spanners or to pick up heavy objects.

[40] Regarding the administrative side the plaintiff stated that he had to type out assessment reports which he was unable to do properly as he could only type for ten to fifteen minutes at a time before experiencing excruciating pain in his right hand and having to rest same for nearly an hour before continuing.

[41] The plaintiff testified that the F.E.T. colleges began complaining to his superiors and he was confronted by management.

[42] He said he had failed to inform management of his physical limitations prior to taking out employment with the company and they were not sympathetic to his plight.

[43] Eventually the plaintiff received a verbal warning from the company warning him that if he could not improve his performance he could face disciplinary action.

[44] Once again believing that he could not improve his performance due to his physical limitations and in order to avoid dismissal on his employment record, the plaintiff said he chose to resign giving notice on 1 September 2006 and eventually left the employer of SETA on 30 September 2006.

[45] The plaintiff said thereafter he was not formally employed and that he only performed limited subcontract work. While he could not place an accurate figure on such earnings, he estimated such earnings to average out to a maximum of R5 000,00 per month from September 2006 to his last contract in June 2008.

[46] The plaintiff testified that since June 2008 he has essentially been unemployed.

[47] The plaintiff's witness Mr Ben Moodie, the industrial psychologist testified to the following issues of relevance regarding the plaintiff's pre-accident career:

- 47.1 The plaintiff had a good steady history in the human resources field for 25 years prior to the accident.
- 47.2 Mr Moodie in his report regarding the plaintiff's pre-morbid ability states: *"The claimant has demonstrated an upward mobility and the ingenuity to capitalise on opportunities presented by the current equity legislation operating in the labour market. There is no reason, but for the accident why he would not have stayed on that trajectory."*
- 47.3 Mr Moodie stated that at the time of his resignation from August Lapple the plaintiff was earning on the equivalent of the Patterson scale C5.

[48] Regarding the plaintiff's post-accident career and in respect of past losses Mr Moodie testified as follows:

- 48.1 The accident was a catastrophic event that essentially devastated a promising career.
- 48.2 A person would not lightly choose to abandon a high paying job for a lower paying job without good reason.
- 48.3 He postulated that as the plaintiff had over 25 years track record of continually improving his career the only real explanation for a significant step backwards in his career will be the problems he encountered as a result of the accident.
- 48.4 Mr Moodie explained that in his opinion as an industrial psychologist that the impairment created by physical injuries not

only limits a person in achieving their work goals but also mentally affect employees and makes them see themselves as worthless and unworthy individuals in the work place.

48.5 Mr Moodie stated that the past loss of earnings suffered by the plaintiff should be determined by calculating the difference between the plaintiff's earnings at the C5 level and what he actually earned from the date of the accident to date of trial.

[49] Regarding the plaintiff's future loss of earnings Mr Moodie raised the following issues of relevance:

49.1 The claimant must be afforded an opportunity to undergo the surgical and rehabilitative treatment to his right hand as recommended by Dr Read.

49.2 Once the plaintiff has received the recommended treatment to his hand a full year of rehabilitation should be provided for.

49.3 Mr Moodie provides for the fact that the plaintiff will re-enter the labour market in March 2010.

[50] Mr Moodie confirmed that all his assessment of the plaintiff was purely based on what plaintiff had told him when he interviewed him. He confirmed that he never had an opportunity to verify what the applicant had told him with applicant's employer, specifically August Lapple. Furthermore he had only got an opportunity to speak with one Mrs Steyn at August Lapple on the day before the trial who confirmed to him that the plaintiff had resigned from the company of

his own accord. At the time Mrs Steyn was in possession of the plaintiff's letter of resignation.

[51] Mr Christopher Jakobus van der Merwe was the defendant's sole witness. He was the applicant's direct supervisor at August Lapple.

[52] He said that the plaintiff directly reported to him and that they would meet with each other at least twice on each day.

[53] At some point the plaintiff went off work after he was involved in a motor collision.

[54] To the best of his recollection the plaintiff was given all the necessary support whilst he received medical assistance. The plaintiff always performed to his maximum and he was never couched for poor performance. There were never any complaints relating to the plaintiff's work performance.

[55] As far as he knew the plaintiff performed normally and that the plaintiff fully recovered from his injuries. At no point did the plaintiff ever complain that he could not perform his normal functions because of the injuries that he has sustained in the motor accident.

[56] The plaintiff had two warnings during the period he was employed at August Lapple and these were not work-related. One was for late coming and the other was for leaving the work place without authorisation.

[57] Mr Van der Merwe stressed that the plaintiff resigned from of his own accord saying that he had found another job at the SETA.

[58] Mr Van der Merwe was not cross-examined at all. As such his testimony is unchallenged.

[59] It is the plaintiff's case that he left his work at August Lapple because he could no longer perform his normal functions as he felt he was physically limited in doing so as a result of the injuries he sustained in the motor collision. Furthermore, management at August Lapple were unhappy with his work performance.

[60] It is so that the plaintiff has based his claim for past and future loss of earnings on what he earned at August Lapple.

[61] The question that has to be answered is whether or not he left his employment at August Lapple as a result of the injuries which he sustained in the motor accident.

[62] On the plaintiff's own version he was never dismissed from his employment. Never was he ever threatened with dismissal. Furthermore it is clear that no one ever complained to him about any poor work performance. In

this regard Mr Van der Merwe's evidence was never challenged. Mr Van der Merwe was clear in his testimony that there was never ever any complaint relating to the plaintiff's work performance. To the best of his recollection the plaintiff performed all his work functions normally. The plaintiff was never counselled nor couched concerning his work performance.

[63] Mr Ben Moodie's opinion as to why the plaintiff left his employment is based surely on what the plaintiff had told him. Mr Moodie quite mysteriously omitted to verify what the plaintiff had told him with his employers at August Lapple. He said he only spoke to a Mrs Steyn at this company on the date before the trial and this person confirmed that the plaintiff resigned from the company of his own accord.

[64] Clearly the plaintiff never indicated to his work superiors that the accident caused him not to perform optimally. Furthermore the plaintiff was never counselled because of poor performance resulting from the accident. The two written warnings he had received whilst working at August Lapple were for arriving late at work and for leaving the workplace without authorisation.

[65] Most importantly the plaintiff did not put down his reason for resignation as accident related. The documented reason for resignation was for "*other*" reasons, specifically that he had found work at SETA.

[66] The plaintiff's evidence that there were complaints about his work at the SETA was never corroborated. No one from this company was called to testify on the plaintiff's behalf. Neither did Mr Moodie do attempt to do so. In fact Mr Moodie said that he was under the impression that the plaintiff's engagement at the SETA was purely sub-contractual.

[67] What however emerges clearly, based on the plaintiff's own version is that he similarly resigned from the SETA purely of his own accord. He was never ever dismissed from the SETA.

[68] On the facts before me, I find that the plaintiff has failed to prove that his resignation from work, specifically from August Lapple was directly linked to the accident, or that the hand injury caused his productivity to decline. In fact, the employer was never made aware by the plaintiff that he was experiencing a decline in productivity due to the plaintiff. To the contrary the employer's representative testified that there was never any complaint about the plaintiff's work performance. In the circumstances I find that the plaintiff's claim for loss of earnings as alleged cannot succeed and falls to be dismissed.

[69] The plaintiff will require a period of two to three months off work to recuperate after he has undergone corrective surgery to his right hand. He is entitled to be compensated, for loss of future earnings and his loss will be computed on what he earned at August Lapple:

R13 169,43 + R3 660,00 x 3 months = R50 488,29.

[70] I accordingly, make an order as follows, that:

70.1 The defendant shall pay the plaintiff the amount of R316 149,41.

70.2 The defendant shall provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the plaintiff's future medical, hospital and associated medical expenses.

70.3 The defendant shall pay the plaintiff's taxed party and party costs on the High Court scale, such costs including but not limited to:

- (a) the cost of counsel including the preparation of the heads of argument;
- (b) the cost of the medico-legal reports and addendum report of Dr G O Read and Dr Shapiro (radiologist);
- (c) the cost of the medico-legal report as well as the attendance fees and qualifying fees of Mr Ben Moodie;
- (d) the attendance fees and qualifying fees of Dr C Kahanovitz;
- (e) the cost of the actuarial reports of Messrs Algorithm Consulting;
- (f) the perusal and preparation costs of the bundles;

---

**B H MBHA**  
**JUDGE OF THE HIGH COURT**

DATES OF HEARING	: 24-26 FEBRUARY 2009 & 18 MARCH 2009
DATE OF JUDGMENT	: 24 APRIL 2009
COUNSEL FOR THE APPLICANT	:ADV M VAN DEN BARSELAAR
INSTRUCTED BY	: JOE HUBBART ATTORNEYS
COUNSEL FOR THE RESPONDENT	:ADV N MABENA
INSTRUCTED BY	: KEKANA HLATSHWAYO RADEBE INCORPORATED