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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 28/12/2022

A Maier-Frawley

CASE NO: 2013/5202

In the matter between:

PHEKANI, LEONARD MASTER	First Plaintiff
KILLIAN, JOHAN MALHERBE (Curator ad litem)	Second Plaintiff
and	
MINISTER OF POLICE	First Defendant
SERGEANT HLABATHI	Second Defendant
CONSTABLE NETSHISAULU	Third Defendant

JUDGMENT

MAIER-FRAWLEY J:

1. The first plaintiff instituted action against the defendants for damages sustained by him, amongst others, as a result of having been unlawfully shot on 30 May 2012 by the second and third defendants whilst acting within the course and scope of their employment with the first defendant.

2. In respect of the first plaintiff, two separate claims were pleaded in the particulars of claim. Claim A is for damages suffered by the plaintiff as a result of injuries sustained by him in the shooting incident. Claim B is for damages suffered by him as a result of his unlawful arrest and detention arising out of the same incident. Claim B was previously settled between the parties. In respect of the second plaintiff, one claim (Claim C) was pleaded in the particulars of claim. Claim C is a claim for loss of support as a result of the unlawful shooting and consequent death of Mr MB Vintenga (the deceased) arising from the shooting incident. Claim C was settled between the parties previously and as such, the second plaintiff did not participate in the trial that was set down for hearing on 1 November 2022.

3. In claim A, the first plaintiff seeks damages in the sum of R10 117 482.00 made up as follows:

General damages:	R400 000.00
Future medical expenses;	R203 768.00
Past and future loss of earnings:	R9 513 714.00

4. On 6 June 2017, this court granted an order by agreement between the parties, which, in relevant part, provided as follows:

" 1. The Defendant concede[s] liability for plaintiff's (sic) proven damages.

2. The defendant shall pay to the 1st Plaintiff the amount of R100 000.00 (Hundred thousand rand)(sic) in full and final [settlement] for arrest and detention, in respect of claim B.

3. The defendant shall pay to the 2nd plaintiff the amount of R200 000.00 (Two hundred thousand rand) in full and final [settlement] for loss of support in respect of Claim C.

4. The quantum for the adjudication of the 1st Plaintiff's Claim A is postponed sine die.

5. The Defendant is ordered to pay the plaintiff's costs to date hereof, to be agreed upon or taxed, as between party and party costs on a High Court scale...

6. ..."

5. As the above order only refers to 'the Defendant', it remains unclear if it was the first defendant (through the doctrine of vicarious liability) who accepted liability in respect of the first and second Plaintiff's claims, although I will assume that to be the case.

6. On 25 February 2020, this court granted a further order in favour of the first plaintiff by agreement between the parties, which reads, in relevant part, as follows:

" 1. The Defendant shall pay the plaintiff an amount of R400 000.00 (Four hundred thousand rand) as an interim payment.

2. The amount referred to in the above paragraph is not in settlement of any heads of damages other than an interim payment.

3. ...

4. The matter is postponed sine die.

5. The defendant shall pay the plaintiff's costs on a party and party scale."

7. When the trial commenced on 1 November 2022, I was informed by counsel for both parties that only the first plaintiff's claim for past and future loss of earnings in claim A required adjudication by the court. For convenience, I will henceforth refer to the first plaintiff as 'the plaintiff' and the first defendant as the 'defendant' in the judgment.

8. In a pre-trial meeting held between the parties' legal representatives, it was agreed, amongst others, that *'there is no triable issue in this matter'*.[1] I thus questioned both counsel at the outset of the trial as to what precisely the court was required to adjudicate. An inability to concisely articulate the issues in dispute led to the matter standing down for counsel to formulate same. When the matter resumed the following day, the following issues in dispute were tabularized for determination by the court:

(i) Whether the plaintiff had discovered his bank statements;

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[1] See par 15 of the pre-trial minute filed at 044-6 of Caselines.

(ii) The value of the plaintiff's pre and post-incident income. In this regard, it was recorded that the plaintiff reported to the defendant's Industrial psychologist that he was earning R3000.00 to R5000.00 per month post-incident. In addition, the plaintiff also received rental income in respect of an immovable property situate in Malawi, which he had inherited;

(iii) Whether the plaintiff was rendered unemployable as a result of the shooting incident and injuries and sequelae arising therefrom.

9. The first of these issues was resolved during the course of the proceedings with the plaintiff having uploaded proof of service of the bank statements upon the attorney dealing with the matter on behalf of the defendants and therefore requires no further mention.

10. The following issues were recorded as being common cause between the parties:

(i) Post-incident, the plaintiff did not resume conducting his pre-incident businesses;

(ii) Incident-related injuries are those recorded in the expert reports.

11. In a pre-trial minute dated 25 May 2022, the parties agreed that the expert reports (filed on behalf of both parties) together with the experts' joint minutes 'will without further proof serve as evidence of what they purport to be.'

12. As is apparent from the hospital records and the reports of the specialist surgeons (Prof Bizos and Prof Plani), the plaintiff was shot through the left lower chest and left flank. Prof Bizos, who examined the plaintiff on 21 October 2013, noted that the entrance wound was on the left lower chest whilst the exit wound was on the left flank. The gunshot wound required surgery, which included the insertion of an intercostal drain, a laparotomy, a

splenectomy, a repair of a hole in the diaphragm, a distal pancreatectomy and the placing of a pencil drain. The plaintiff was hospitalised for a period of 14 days and discharged home on 13 June 2012.

13. The experts were in agreement as to possible future post-operative complications that the plaintiff may experience. These are set out in the joint minute of the specialist surgeons and include: (i) the need for yearly pneumococcal vaccinations; (ii) the need to repair an incisional hernia by means of a mesh repair; (iii) possibility of post-laparotomy intestinal obstruction including a lifelong risk of developing adhesive bowel obstruction which may require surgery. No complications of the distal pancreatectomy were envisaged as there was no evidence of either exocrine or endocrine insufficiency during an 8 year period post-surgery.

14. When Prof Plani examined the plaintiff in August 2020, i.e., 8 years after the incident, as appears from his report, the plaintiff had not suffered any of the anticipated infections, had been receiving anti-pneumococcal vaccines and there were minimal physical findings in relation to his incisional hernia. The plaintiff reported pain in lifting heavy objects such as changing a tyre but experienced no discomfort in lifting anything up to a crate of beer.

15. The plaintiff filed the following expert reports: (i) specialist surgeon (Prof Bizos); (ii) clinical psychologist (Mr W Meerane); (iii) Industrial psychologist (Ms N. Shezi) and (iv) actuarial report of N. Mavimbela. The defendant filed the following expert reports: (i) specialist surgeon (Prof Plani); (ii) clinical psychologist (Mr D. Zar); (iii) Industrial psychologist (Ms R Ntuli) and (iv) actuarial report of GW Jacobson.

16. Notably, no expert report from an occupational therapist was obtained by either party.

Evidence at trial

17. The plaintiff himself testified at trial and presented the evidence of Ms Shezi, an Industrial psychologist, before closing his case. The defendant presented the evidence of Ms Ntuli, an Industrial psychologist, and thereafter closed his case.

Plaintiff's evidence

18. According to the plaintiff, the shooting incident occurred in Yeoville. It involved members of the SAPS (second and third defendants) embarking on a high speed chase of the plaintiff's vehicle and firing shots at his vehicle. One of these shots injured and killed the deceased who was a passenger in the vehicle driven by the plaintiff. After the plaintiff's vehicle came to a halt, he jumped out of his vehicle and tried to run away during which process he was shot, injured and ostensibly apprehended. He was taken from the scene to hospital where he underwent emergency surgery. During the period of his hospitalisation he was placed under police guard. He was however never taken to prison or prosecuted for the incident. Upon his discharge from hospital he was informed that he was free to go home.

19. The shooting incident was widely reported on social media and the whole Rastafarian community came to know about it. The plaintiff perceived that the majority of the Rastafarian community began shunning him due to his reported association with drugs and a gun that culminated in a police chase. The plaintiff felt that his reputation and character had become tarnished due to the incident. After the incident, he felt that he could not go back to the Rastafarian community because, in his words, 'the community does not know that I was not in the wrong. They believe I shot at the SAP and had drugs on me.'

20. At the time of incident, the plaintiff owned a vegetarian restaurant in Yeolville where meals catering to the dietary preferences of the Rastafarian community were served and fresh vegetables and fruit were sold. His clientele included mainly Rastafarians. The restaurant also offered live music entertainment on occasion. The business was conducted through the vehicle of a close corporation known as 'The Sweetpot Trading CC'. He also owned a clothing shop in Braamfontein, trading as 'Fashion over Style,' where clothes manufactured at the plaintiff's behest were sold.

21. He employed one chef in the restaurant, being the deceased, who was shot and killed in the shooting incident on 30 May 2012. The plaintiff employed one sales person in the clothing store and used tailors to design and manufacture clothes that were sold in store.

22. The plaintiff personally bought all stock and supplies that were used and sold in the restaurant on a daily basis. This involved physical labour as he would pack and load the fruit and vegetables into his vehicle and then offload same at the restaurant. For a period of time, his brother assisted the plaintiff in offloading the stock, for which services his brother was paid. The plaintiff assisted in welcoming and serving customers and also assisted in the kitchen or area where fruit and vegetables were sold. As regards the clothing business, the plaintiff would collect bales of clothing from the manufacturer and return to the shop to offload same. The salesman would assist him to offload and unpack the clothes. The plaintiff did stocktaking twice a month and was responsible for the display of the clothes in the shop. The physical work performed by the plaintiff at the clothing store was less labour intensive and not performed with the same regularity as that performed in respect of the restaurant.

23. According to the plaintiff, he conducted the restaurant business on a cash basis. He paid his staff in both businesses in cash. He paid the monthly rental in respect of the clothing shop and restaurant in cash. People dining at the restaurant or buying fruit and vegetables paid in cash. He would use the cash generated in the restaurant business to pay for business expenses each week. Whatever monies were left over each week (after business expenses were paid) would be deposited by him into a bank account held at First National Bank and conducted by him under the name and style of 'The Sweetpot Trading CC'. He would usually deposit cash on a weekly basis at various ATM's, thus, deposits occurred 4 to 5 times a month. During the month, he would also withdraw cash at various ATM's from this account.

24. His monthly business expenses included staff salaries, stock purchases, monthly rental in respect of the premises and the like.

25. Post-incident, the Plaintiff did not resume his pre-incident business activities. During the period of his hospitalisation and recuperation, his staff did not maintain payment of the bills, resulting in the landlord seizing his equipment at the Braamfontein store, which was forced to close. No-one was managing the restaurant, the chef had died, and that business also closed.

26. According to the plaintiff, upon his discharge from hospital he was advised not to engage in physical labour. Post-incident, the plaintiff's family members assisted him financially. At some point he opened a hardware business in De Deur where products such as sand were sold. That business closed down after about two months as the plaintiff did not have the necessary equipment to load the sand. His girlfriend conducted a gum pole business from his property in De Deur and paid him between R2000.00 to R3000.00 a month in rental for using the premises. He did not assist in physically carrying the poles as he felt pain when lifting a pole. The gum pole

business closed down in January 2022. He also rented out a cottage for R1000.00 a month. In January 2022 the rental income increased to R1300.00.

27. During cross-examination, the plaintiff was asked to specify his business expenses. He testified that the monthly rental in respect of the premises from which he conducted the clothing and restaurant businesses, was somewhere between R7000 to R8000.00 per month. He gave his brother about R2000.00 a month for assisting him at the restaurant. He paid his chef (the deceased) somewhere around R5000.00 per month and the clothing shop sales person somewhere between R3500.00 to R4500.00 per month. No mention was made by him of the amount expended by him in respect of production costs in manufacturing the clothes that were sold in his clothing business. He did not pay tax to SARS as he was informed by SARS officials that he did not meet the threshold for paying tax. He did not personally draw a monthly salary from the restaurant business, stating that he was 'more interested in growing it,' however, he had sufficient money to pay for his personal expenses such as food, transport costs and school fees for his children each month. When asked how much on average he spent on his personal needs per month, he stated that it was hard to say as it depended on how much money was left over from what the business made at the end of a month.

28. He was also asked why he had not employed someone to assist him in running his businesses after the incident. He stated that upon discharge from hospital, he was still in a lot of pain and felt shocked and traumatised. He spent some months recuperating from his injuries and surgery. His main focus was on healing himself. His health was his priority at that point in time.

29. The plaintiff was then asked what had stopped him from doing business in the ten year period that had elapsed since the shooting incident. He stated

that 'to run a proper business you need to know what your target market is.' He explained that whilst there were some supporters and sympathisers within the Rastafarian community, the majority in the community did not believe his version and blamed him for the death of his chef. They believed he was a criminal. He felt there was a stigma against him and that is why he did not go back to that community. He stated that 'if this case was closed and sealed I would be able to approach the community again and provide details for the conclusion that I am not guilty.'

30. When asked whether he intends *not* to work for the rest of his life, the plaintiff stated that 'if I was in a position to work physically and financially, I would,' adding that he was in a lot of debt and could not do what he did before the incident as he no longer had the physical ability to pick up and carry things. He stated that finances permitting, he could start another business or re-open his restaurant 'if opportunity permits', adding however that the chef he employed at the restaurant 'is irreplaceable'. The clientele at the restaurant were health conscious people, 95% of whom were Rastafarians.

31. When asked by the court to clarify what it was that has prevented him from working, he initially stated that it was firstly a lack of finances and secondly, identifying work that did not require 'physical hands on work'. Later he stated that he owns land in De Deur. He wants to do farming on the land but needs equipment to do so. He admitted that although farming requires physical labour, he could employ labourers to do that and it is really only a lack of finances that has prevented him from conducting such business. In the interim he has been collecting copper/cables to sell.

32. During re-examination, the plaintiff acknowledged that he had been industrious in starting businesses in the past.[2] When asked why that had changed, he stated that apart from his physical disability, the restaurant business required him to be in public which was uncomfortable for him as he was still traumatised from having been wrongfully shot. He prefers to be away from people and the city. When he hears police sirens or sees blue lights, he panics. He has not received psychological help to cope with his anxiety, which he needs, and cannot get over the fact that the incident happened to him.

Evidence of the Industrial Psychologists

Ms Shezi

33. Ms Shezi consulted with the plaintiff in June 2019. She was referred to her report wherein she described the plaintiff as having been industrious and enterprising prior to the incident. Her conclusion, namely, that the plaintiff is unlikely to reach his pre-incident earnings, was based on the opinion of the clinical psychologist that the Plaintiff suffers from Post Traumatic Stress Disorder (PTSD) and anxiety and depression, including the physical sequelae of the plaintiff's injuries as described by the specialist surgeon (prof Bizos) in his report, in which regard she was cognizant that the plaintiff still needs to undergo a hernia operation as a result of the gunshot he sustained. The plaintiff reported that he has not been gainfully employed since the shooting incident. In her view, cognisance would have to be taken of the plaintiff's psychological difficulties when he re-enters the open labour market.

34. The plaintiff reported his pre-incident earnings as approximately R25 000, derived from his restaurant business and clothing business. She did not

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[2] For example, prior to the restaurant business, he had sold arts and crafts in Bruma Lake. When competition got high and crime levels rose, he closed the business and opened a music bar and juice bar. He had also busked on street corners and sold food outside clubs at night. He ran the Yeopville restaurant for 8 to 10 years before the shooting incident despite not having a matric qualification.

obtain verification of this figure as no documents were provided to her and she thus indicated in her report that she 'defers to factual information in this regard.' The plaintiff reported to her that he did not draw a salary at the end of the month. He would buy what he needed to buy for his businesses and pay expenses and then deposit what was left over each week. He estimated depositing approximately R25 000.00 per month.

35. The plaintiff's reported earnings exceeded the rate of earnings for people employed in the informal sector. In her view, the plaintiff's pre-incident earnings were more closely aligned with the earnings of semi-skilled workers.

Ms Ntuli

36. Ms Ntuli consulted with the plaintiff in June 2020. He reported that he earned between R17 000 and R20 000 per month pre-incident. This was the reported profit he made after paying expenses in his businesses per month. The plaintiff did not provide any proof of his income, such as financial records, and hence she did not verify these figures.

37. The plaintiff reported earning between R3000.00 to R5000.00 per month after the incident. He reported that he was involved in a hardware business and selling gum poles.

38. In her report, she deferred to the opinion of an Occupational therapist and psychiatrist for purposes of determining the plaintiff's residual physical capability and functioning to enable her to determine the plaintiff's future employment options.

39. She had regard to the report of the clinical psychologist (Ms Zar) and the latter's conclusion that the plaintiff reported symptoms met the criteria for a diagnosis of PTSD and moderate depression. When asked what impact such

diagnoses would have on the plaintiff's capacity to earn future income, she stated that this would likely affect the plaintiff's inter-personal relationships. The clinical psychologist recommended 52 sessions of psychotherapy including a consultation with a psychiatrist to manage the plaintiff's mood pharmaceutically. She referred to par 6.4.6 of her report where she recorded that '*I am led to believe that the Mr Phekane will struggle in the workplace if he does not receive the recommended treatment. In terms of self-employment and running his own businesses, he would also be at an advantage if he receives the recommended treatment. It seems with finances available, Mr Phekane will likely be able to restart his businesses but he will have to work within his limitations. He reported that he has to receive [a] vaccination every two years to strengthen his immune system. ... It is perceived that Mr Phekane will experience future loss of income. I defer to relevant experts to comment on Mr Phekane's physical residual capacity and to comment on the accident he said occurred a year after the incident.*' She stated that these conclusions were informed by the opinion of the clinical psychologist that the plaintiff needs treatment and by the plaintiff's own subjective reports.

40. The plaintiff reported that he prefers to stay away from public places and that he decided to isolate and stay out in the farms for sanity. [3]

41. In her view, pre-incident, the plaintiff would have been in a position to grow his businesses further. His career was at its achievement state. Since the incident, the plaintiff reported that he was not able to restart his businesses as he lacked the capital to do so.

Evaluation

[3] As noted in paras 5.3 and 6.4.5 of her report.

42. The plaintiff's counsel argued that the court can accept that the plaintiff's physical capacity has been diminished as a result of the shooting incident. Both businesses conducted by the plaintiff prior to the incident were labour intensive, involving physical carrying and lifting of stock, which the plaintiff cannot perform post-incident, given his weakened physical state after the incident. Furthermore, as a result of his compromised mental condition - typified by the diagnosis of PTSD and depression post-incident - the plaintiff lacked the drive and motivation to trade or conduct business or to apply himself in terms of running a business as he had before the incident and therefore he has and is unable to reach his pre-incident income earning potential.

43. The difficulty with this argument is that no medical or other verifiable factual evidence was presented to support the conclusion that the plaintiff has become physically weakened as a result of the injuries sustained by him in the shooting incident. The plaintiff chose not to appoint an occupational therapist to assess his physical strength and capability. In relation to the plaintiff's loss of earnings, the specialist surgeons recorded in their joint minute that *'we agreed these cannot be quantified and ascribed directly to the injuries sustained but rather to a series of circumstances that fall outside the domain of a medical assessment.'* In other words, the doctors did not ascribe any loss of earnings to the injuries or sequelae sustained by the plaintiff in the shooting incident. The Industrial psychologists who testified at trial were unable to conclude, on the available evidence, that the plaintiff has been rendered unemployable as a result of injuries and sequelae sustained in the shooting incident. This is hardly surprising, given the factual scenario and deficiencies in the plaintiff's evidence as highlighted below.

44. The fact of the matter is that the plaintiff's residual physical ability and functioning has never been assessed. That fact was specifically highlighted in

the reports of the Industrial psychologists and Ms Zar, as mentioned above, the plaintiff's failure to undergo a physical assessment by and Occupational therapist remained wholly unexplained. On the reports of the clinical psychologists, the plaintiff suffered no cognitive impairment in the shooting incident. Nor did the clinical psychologists conclude that the plaintiff was rendered unemployable by virtue of the fact that he meets the criteria for a diagnosis of PTSD, anxiety and depression.[4] The diagnosis of depression, anxiety and PTSD was itself based on self-reported symptoms by the plaintiff when he was assessed some 8 and 9 years after the shooting incident by the respective clinical psychologists. But more astonishingly, although the reports of the specialist surgeons and Ms Zar make mention of a motor vehicle accident in which the plaintiff was involved one year after the shooting incident - in which he broke his neck and injured his spine, requiring surgery - the impact or effect of these injuries upon the plaintiff's physical, psychological or emotional functioning, if any, was not further explored in the expert reports, nor were the accident and accident-related injuries even mentioned by the plaintiff or other witnesses during their testimony at trial. The defendants specialist surgeon, Prof Pleni, was the only expert who mentioned in his report that *'It is inappropriate to evaluate his [plaintiff's] whole person impairment without considering the impairment derived from his subsequent unrelated motor vehicle accident with cervical spine dislocation/ fracture dislocation which required an anterior spinal fusion presumably between C4 and C6/C7.'* As mentioned earlier, Ms Zar stated in her report that she defers *'to relevant experts to comment on Mr Phekane's*

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[4] In supplementary heads of argument filed on behalf of the plaintiff, it was conceded that 'there is no evidence placed before this Honourable Court that Mr Phekane has become unemployable because of the shooting incident'.

physical residual capacity and to comment on the accident he said occurred a year after the incident.'

45. During his evidence in chief and under cross-examination, the plaintiff was asked on more than one occasion about why he has not resumed his business activities for the past ten years. He attributed his inability to work primarily to a lack of finances and secondarily to his alleged weakened physical condition. The plaintiff's say-so concerning his physical condition remains unsubstantiated (as he was never assessed) and is unsupported by medical evidence. Rather, his say-so was based on hearsay evidence of what he had allegedly been told upon his discharge from hospital and his own experience of pain on an occasion when he tried to lift a pole. Later he blamed his self-perceived rejection by the majority of the Rastafarian community in Yeoville, including the self-perceived irreplaceability of his chef, on his inability to re-open his restaurant. He did not ascribe this to any depression or physical disability as may have been experienced by him post-incident. It was only during re-examination that he mentioned for the first time, the trauma he says he continues to suffer as a result of the shooting incident, acknowledging that he requires psychological help to deal with it. This evidence was no doubt elicited so that an inference could be sought to be drawn that the plaintiff was not able to resume or sustain employment post-incident as a result of the impact of the shooting incident and injuries sustained therein upon his psychological functioning.

46. Yet it is common cause that the plaintiff previously received half a million Rand in this matter (R100 000.00 in 2017 and another R400 000.00 in 2020), which monies he utilised, on his version, to pay unspecified debts, rather than to resume his business activities or to seek psychological help which he himself recognised was needed.

47. It is noteworthy that the plaintiff reported his pre-incident earnings to Ms Shezi as approximately R25000.00 a month whilst he reported his pre-incident earnings to Ms Ntuli as between R17000.00 and R22 000.00 per month. He also reported post-incident earnings (derived from his involvement in a gum pole business) of between R3000.00 and R5000.00 to Ms Ntuli, in contra-distinction to his evidence at trial that he was only receiving rental of between R2000.00 and R3000.00 from his girlfriend without having been involved the gum pole business.

48. The plaintiff testified that he had run the restaurant in Yeoville for a period of 8 to 10 years prior to the shooting incident. He discovered only six months' worth of bank statements at trial.[5] He was taken through the bank statements during his evidence in chief. Despite his evidence that he conducted his restaurant business on a cash basis, the bank statements reflect a variety of debits (other than cash withdrawals) that were deducted from the business account each month. On a simple calculation of all the cash deposits made each month, the average amount of cash deposited during the 6 month period in question was R22 000.00 per month and not the reported profit of R25 000.00 per month. In order to determine the plaintiff's profit each month, all business expenses paid by him would have to be taken into account, including other debits appearing in the bank statements. Such an exercise has not seemingly ever been performed. In order for such an exercise to be performed, one would have to know what all the expenses in both the restaurant and clothing store amounted to. The plaintiff's evidence was based on estimates and not actual verifiable costs. It is not insignificant that the costs of manufacture of the clothes sold in the clothing store were not stipulated and thus not all expenses incurred in the running of the businesses are known. No explanation was either provided by

[5] For the months of December 2011 to May 2012.

the plaintiff for why he only produced 6 months' bank statements at trial. Summons was issued in February 2013. The plaintiff thus had 10 years in which to prepare his case in respect of a trial that would unquestionably involve proof of his earnings and expenses.

49. Aside from estimating the value of monthly business expenses such as rental, staff salaries and stock purchases, the plaintiff was unable to produce any financial records, other than 6 months' worth of bank statements, to enable verification of his business expenses. He could not state the amount of his personal expenses each month at all, thereby precluding an accurate calculation of his monthly earnings after payment of *all* his monthly expenses. During cross-examination, the plaintiff testified that he had informed the Industrial psychologists of what his business expenses such as rentals, stock purchases, staff salaries and the consumption of electricity and water amounted to each month. He conceded that there would have been no reason for him *not* to have provided documentary proof thereof to these experts. However, the Industrial psychologists testified that whilst documentary proof was requested, no such proof had been provided by the plaintiff.

50. Despite the shortcomings in the Plaintiff's evidence – which failed to establish that his failure to resume employment post-incident was caused by his physical injuries or any emotional/psychological vulnerability - and the fact that he had on his own version continued to receive post-incident income, the plaintiff's counsel urged me nonetheless to accept actuarial calculations that quantified the plaintiff's loss of earnings on the basis that he had been rendered totally unemployable as a result of injuries sustained in the shooting incident, including that his pre-incident earnings in fact amounted to R25 000.00 per month. The calculations by the actuaries were based on incorrect assumptions which were devoid of factual foundation, as

illustrated above. The evidence presented at trial simply did not establish a factual basis for a conclusion that the plaintiff was unable to work post-incident due to a compromised mental condition and/or weakened physical state. None of the experts appointed by the parties opined in their reports that the plaintiff has been rendered unemployable as a result of the shooting incident. More specifically, the clinical psychologists did not opine that the plaintiff was unfit to work as a result of stress, anxiety or depression. They recommended psychological and psychiatric treatment to manage his reported symptoms, which were not said to be untreatable. As such, the actuarial calculations cannot be relied upon to compute any past or future loss of income.

51. In his evidence, the plaintiff identified farming as a new business that he wishes to embark upon, citing only a lack of finances with which to start such a business. The failed hardware business that he opened and ran post-incident was attributed to a lack of finances to buy the necessary equipment required to lift sand and not to a lack of drive or motivation on his part to resume his business life. He testified that he is selling copper/cables in the interim. The plaintiff's own evidence established that he can work and in fact has worked post-incident, contrary to the information provided to and assumptions relied by the actuaries. His evidence that he is awaiting the conclusion of this trial in order to vindicate himself to the Rastafarian community (of which he is a member) beggars belief. A concession of the merits of the case meant that the defendant accepted liability for the unlawful actions of the SAPS members in shooting the plaintiff and his chef. No employee is indispensable no matter the plaintiff's perception to the contrary. During cross-examination of the plaintiff, it was put to the plaintiff that the merits of the matter were conceded several years earlier, at which time the plaintiff would have been vindicated from all liability in the shooting

incident. He was thus well equipped then to return to the Rastafarian community. He simply chose not to do so. Having been confronted with these facts, the plaintiff then testified for the first time, during re-examination, that he avoids members of the public and public places due to his ongoing trauma and anxiety, presumably for purposes of justifying his failure to resume the restaurant business at all. Yet his untreated psychological condition did not seemingly interfere with his business activities in De Deur, in the course of which he would ordinarily have been exposed to members of the public, nor was it proffered as a reason for the failed hardware business or an inability to start another type of business.

52. In my view, the evidence provided by the plaintiff at trial falls short of the standard of proof required for purposes of accurately assessing or quantifying his loss of earnings. The plaintiff failed to prove that he has been rendered unemployable as a result of the incident and incident-related injuries. Moreover, the fact that he sustained serious injuries in a motor vehicle collision a year after the shooting incident cannot be overlooked or wished away. The accident related injuries must have affected his ability to work, at least during the period of his recuperation. How long it took the plaintiff to recover from such injuries however remains a mystery. Despite receipt of R500 000.00 during the extended period that it took for this matter to come to trial, which the plaintiff failed to utilise to obtain the psychological help he requires or to become economically productive in one or another type of business, he sat back ostensibly in the hope and expectation of being awarded another R9 million at the conclusion of this trial. If there was any incentive not to work, that was surely it. I have not been favoured with any information as to why this matter (i.e., claim A) has not come to trial for a period of 10 years or which party is to blame for the

delay. However, as the plaintiff is *dominus litus,* it is he that ought to have expeditiously spearheaded the trial to finality.

53. During his period of recuperation after discharge from hospital, which the plaintiff testified was some months, I will accept that the plaintiff could not return to work and hence suffered a past loss of earnings. He lost his clothing business due to the fact that the sales person employed thereat lack the financial ability to maintain payment of expenses during the plaintiff's absence and hence the shop closed. The restaurant closed as the plaintiff perceived that his existing client base would not support his business, hence he did not resuscitate it after the death of his chef. This, despite retaining some support from members of the Rastafarian community and despite the fact that he could have targeted other health conscious members of the public, such as Vegetarians who are not necessarily Rastafarians, as a client base.

54. Accepting that the plaintiff has suffered a loss of earnings based on the fact that his restaurant and clothing businesses closed as he was not able to return to these businesses during the period of his recuperation from the injuries sustained in the shooting incident, and accepting that he will have to undergo hernia surgery in the future, as a result of which he will have to be hospitalised with some time allowed for recovery, during which period he will not be able to work, the question then arises as to how to quantify the amount to be awarded to him.

55. In this regard, the law sanctions two approaches. In *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A) at 113 G-I the following was said:

"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 of course 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. ... In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers 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' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."

56. The plaintiff's counsel urged me to accept the actuarial calculations, despite the assumptions relied on by the actuaries being unsound and the plaintiff's pre-incident earnings not being accurate, and to apply higher than usual contingency deductions to cater for the various uncertainties that plague the calculation of the plaintiff's pre-incident earnings. Counsel submitted that 'R25000 was not unreasonable amount if it is considered that this was a total profit he made out a restaurant, clothing store music/entertainment business combined.' But as I have been at pains to point out, the figure of R25 000.00 is palpably inaccurate and is unsupported by the limited documentary evidence produced at trial. The assumption relied on by the actuaries, namely, that the plaintiff has been rendered unemployable as a result of the shooting incident, is not supported by the evidence and remains unsound.

57. That means that I will have to make a blind guess as to what is fair and reasonable to award. The defendant's counsel suggested a round figure of

R450 000.00. I bear in mind what was stated by Holmes JA, as he then was, in *Pitt v Economic Insurance Company,*[6] namely, that *'The court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour out largess from the horn of plenty at the defendant's expense.'*

58. In my view, a fair and reasonable award is the sum of R500 000.00. The general rule is that costs follow the result. I see no reason to depart therefrom.

59. The plaintiff claims payment of damages from the first, second and third defendants. The particulars of claim (both prior to and pursuant to its amendment) do not specify whether this is claimed on a joint or joint and several basis. The assumption is that the first defendant has assumed vicarious liability for the actions of the second and third defendants. Therefore I will order the award to be paid on a joint and several basis.

60. In the circumstances, the following order is granted:

ORDER:

1. The defendants ordered, jointly and severally, the one paying the other to be absolved, to pay to the plaintiff:
    a. the sum of R500 000.00; and
    b. interest on the aforesaid sum at the legally permissible rate from date of judgment to date of final payment;
    c. Costs of suit limited to the adjudication of the plaintiff's claim for past and future loss of earnings forming part of claim A.

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[6] 1957 (3) SA 284 D

AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	1 November 2022
Judgment delivered	28 December 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 28 December 2022.

APPEARANCES:

Counsel for Plaintiff:	Adv J Luvuno
Attorneys for Plaintiff:	HC Makhubele Attorneys
Counsel for Defendant:	Adv Z. Buthelezi
Attorneys for Defendant:	The State Attorney, Johannesburg.