



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

**CASE NO: 6176/2014**

In the matter between:

**EDMUND SOYIZELA MDZINWA**

**Plaintiff**

and

**MINISTER OF POLICE**

**Defendant**

|                                    |                                                                                                      |
|------------------------------------|------------------------------------------------------------------------------------------------------|
| <b>Coram:</b>                      | Acting Justice Holderness                                                                            |
| <b>Heard:</b>                      | 30 October 2023; 31 October 2023; 27 November 2023; 28 November 2023; 6 February 2024; 14 March 2024 |
| <b>Latest further submissions:</b> | 10 May 2024                                                                                          |
| <b>Delivered electronically:</b>   | 3 September 2024                                                                                     |
| <b>(Revision date)</b>             | 6 September 2024                                                                                     |

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## **JUDGMENT**

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**HOLDERNESS AJ:**

### **Introduction**

[1] This is a delictual action in which the plaintiff, Mr Edmund Soyizela Mdzinwa ('the plaintiff') claims damages arising from bodily injuries sustained by him on 18 September 2011, at the age of 22 years old, when he was assaulted by members of the South African Police Services ('SAPS'), resulting in the loss of his right eye ('the incident'). Mr Coughlan appeared on behalf of the plaintiff, and Mr O'Brien SC appeared on behalf of the defendant.

[2] The issue of liability was determined in favour of the plaintiff in a separated trial. The defendant was found to be liable to pay the plaintiff his proven or agreed damages.

[3] On 28 November 2023 an order was granted directing the defendant to pay an agreed sum of R800,000.00 to the plaintiff in respect of general damages and future hospital and medical expenses. The plaintiff abandoned his claim for past medical expenses.

[4] The only remaining issue for determination is whether the plaintiff's claim for future loss of earning capacity<sup>1</sup> should be upheld, and, if so, the quantum of such claim. In terms of the amended particulars of claim, the plaintiff claims an amount of R5,021,700.00 for future loss of earning capacity.

### **Evidence on behalf of the plaintiff**

#### **Dr Rosa Bredekamp – Counselling psychologist**

[5] Dr Rosa Bredekamp ('Dr Bredekamp') is a registered counselling psychologist, with a PhD in psychology. She has practised as a psychologist for more than 30 years. Her practice consists of forensic, medico-legal and clinical work.

[6] Dr Bredekamp assessed the plaintiff on 29 July 2019 to determine the nature, extent and severity of the psychological injuries and the *sequelae* thereof sustained by him in the incident, and to assess the impact of these injuries on his quality of life and ability to work. Dr Bredekamp prepared a detailed medico-legal report in respect of the plaintiff in August 2019, and an addendum thereto in January 2023.

[7] The plaintiff described the incident where he worked as a DJ on 18 September 2011 as a 'peaceful event.' He said members of the SAPS arrived at the event and

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<sup>1</sup> Often referred to as 'future loss of income.'

began shooting into the crowd for no apparent reason. One of the policemen shot him in the right eye with a rubber bullet. His right eye had to be removed and replaced with an ocular prosthetic eye three months later. As a result he has severe asymmetry and enophthalmos or 'sunken eye' appearance.

[8] After he was discharged from hospital, the plaintiff went to stay at his mother's house, as he was initially unable to care for himself. He told Dr Bredekamp that shortly after the incident he laid a charge against the police, and a week thereafter SAPS members arrived at his mother's house and assaulted him and sprayed him with pepper spray in front of her. As a result of these two incidents he has developed a deep seated fear and loathing of the South African police.

[9] According to Dr Bredekamp's first report, the contents of which she confirmed in her evidence, the plaintiff was friendly, engaging, open and co-operative. She described his thought processes as 'organised and clear'. She noted that he came across as 'calm and composed , but somewhat angry and depressed.'

[10] According to Dr Bredekamp the plaintiff expressed regret at starting his DJ business, as it 'ruined his life'.

[11] At the time of Dr Bredekamp's first report, the plaintiff was employed as a waitron at GrandWest Casino ('GrandWest'), where he worked before the incident, and was required to work a minimum of five eight-hour shifts a week.

[12] The plaintiff told Dr Bredekamp that he only managed three to four shifts per week, and that he did not go to work on the days that he did not feel up to it. He said that he can no longer deal with difficult customers and no longer wanted to serve customers in general. In his words, 'I don't have time for other people's problems, like customers who have lost money, as I have problems of my own.'

[13] Despite receiving a new prosthetic eye in 2018, the plaintiff is very unhappy about his appearance and has a lowered self-esteem. He is teased about his appearance, and always angry and moody. He was taken into custody for assaulting his girlfriend and he believes that this is because he was insecure in his relationship as his appearance had changed. He said that it was embarrassing to be taken into custody by SAPS, and to have his girlfriend lay a charge against him.

[14] The plaintiff is very self-conscious about the appearance of his prosthetic eye. He said at work he would frequently sneak into the bathroom to clean his eye to remove the discharge, which is a buildup of dirt and dust from the environment, that could draw attention to his eye.

[15] The plaintiff told Dr Bredekamp that he is 'very angry' with everyone and hates himself. He also now suffers from a heightened startle response and becomes anxious when there is a loud noise.

[16] Dr Bredekamp, after conducting a mental health status examination based solely on self-perception, reported that the plaintiff viewed himself as 60% disabled overall, and 80% disabled in respective work activities. Based on a self-reporting assessment for post-traumatic stress disorder ('PTSD') he presented as suffering from severe PTSD. At the time of the assessment, he presented as being mildly depressed. On all the tests which she administered, his self-acceptance measured very low.

[17] Dr Bredekamp's impression of the plaintiff was that he was struggling to put his life together and to deal with the overwhelming symptoms that he was experiencing.

[18] As a result of the trauma, the plaintiff felt like his 'life was under threat.' Dr Bredekamp's opinion was that this immediate fear reaction is manifested in the body and becomes part of the PTSD symptomology. She noted that he had no issues regarding self-esteem prior to the incident, nor was there any history of previous trauma or illnesses. Pre-morbidly he was a well-functioning person.

[19] According to Dr Bredekamp his PTSD and depression would impact the plaintiff's ability to deal with customers. This is exacerbated by how self-conscious he is about how he looks.

[20] Dr Bredekamp's diagnosed the plaintiff with residual PTSD and chronic depression,<sup>2</sup> with associated low self-esteem. She noted that these psychological symptoms would make the plaintiff vulnerable in his work environment.

[18] Dr Bredekamp further diagnosed the plaintiff with an adjustment disorder, as he has difficulty adjusting and fitting into society post-morbidly. Despite this, it is apposite to note that the plaintiff continued working for eight years after the incident.

[19] In Dr Bredekamp's opinion, the plaintiff was dealing with several issues and reached a 'tipping point' in December 2019, when he decided to resign from GrandWest. She said that it seemed it only 'dawned on him that the impact was so devastating when he decided to resign in December 2019.'

[20] When Dr Bredekamp was asked whether in her view the plaintiff was able to work when she reassessed him in January 2023, she stated that she believed he was struggling with psychological symptoms which needed to be resolved, in order for the plaintiff to plan towards a new career trajectory. Her view was that the plaintiff needs psychiatric intervention, psychotherapy, career counselling and a new career that will suit his disability, personality and interests.

[21] Dr Bredekamp is of the opinion that working in a call centre would not suit the plaintiff, as it is too noisy and busy and requires a high level of interpersonal skills, and

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<sup>2</sup> Meaning that symptoms do not improve with time.

that he would need a very high level of psychological and cognitive functioning to cope in such an environment.

[22] When asked whether the plaintiff would regain his pre-morbid psychological level of functioning with the necessary therapeutic intervention, Dr Bredekamp opined that he will always be psychologically vulnerable, as his symptoms have become entrenched, and the trauma may be re-triggered in certain instances.

[23] In cross-examination Dr Bredekamp confirmed that she would have spent two to three hours with the plaintiff at the first assessment, and thereafter the psychometrist at her practice would sit with him and take down his scores for the self-reported testing.

[24] She confirmed that she did not obtain any collateral for her report, which was based solely on her assessment of the plaintiff. She said she relied on the industrial psychologist to obtain the necessary collateral information, but conceded that the industrial psychologist would not deal with issues such as the plaintiff's anger.

[25] Mr O'Brien pointed out to Dr Bredekamp that the WHO Disability Assessment referred only to the thirty days prior to the assessment. This also applied to the other self-reporting tests and questionnaires administered. Dr Bredekamp could not rule out that the plaintiff suffered from emotional and psychological issues pre-morbidly as she never obtained collateral information from his family members, employees and friends in this regard.

[26] When asked whether she completed a test for malingering, Dr Bredekamp said that she did not and relied on the manner in which the plaintiff presented himself and what he told her, and accepted that it was a 'truthful account of his lived experience.' Mr O'Brien suggested to her that she could have conducted a MMPI test, which she conceded was one of the best tests to detect for malingering.

[27] When Dr Bredekamp was asked by the Court why she did not obtain any information regarding the plaintiff's pre- and post-morbid psychological functioning from collateral sources was not obtained, she conceded that she could have obtained same, however she chose not to do so as her mandate was to provide insight into the client's lived experience. Dr Bredekamp further confirmed that she did not perform a cognitive functioning test on the plaintiff.

### **Ms Norma Colley – Industrial psychologist**

[28] Ms Norma Colley ('Ms Colley') qualified as an industrial psychologist in 1995 and specialises in medico-legal work. Her thesis for her Master's degree focused on PTSD.

[29] Ms Colley and Mr Bernard Swart ('Mr Swart'), the defendant's expert industrial psychologist, filed a joint minute on 14 February 2020 ('the first minute') and a further joint minute on 12 October 2023 ('the second minute'). Ms Colley and Mr Swart will be collectively referred to as 'the IP experts.'

[30] Only the most salient aspects of Ms Colley's evidence will be highlighted, as for the purpose of this judgment the areas of agreement and difference between the two IP experts' opinions are paramount. I therefore summarise the findings and conclusions in the first and second minutes first.

### **The first minute**

[31] The IP experts agreed that were it not for the incident, the plaintiff would probably have continued to work as a waitron at GrandWest for the foreseeable future and would have continued to pursue more lucrative job opportunities.

[32] The plaintiff was unable to work for a period of three months after the incident, during which period he was only paid for a total of six days. He effectively suffered a complete loss of potential earning during this period. He required a further month off in 2018 for the fitting of a new prosthesis, during which period he continued to receive his regular salary but forfeited all tips.

[33] The IP experts further agreed that after the incident the plaintiff was left with significant ongoing physical and emotional deficits, and that the loss of his eye not only affected his vision, but also his appearance, confidence levels and ability to perform as a waitron, as confirmed by collateral sources.

[34] They agreed that alternative job opportunities available to the plaintiff were limited due to the loss of his eye. For example, he could no longer apply for a C level driver's licence or do any work that required good bilateral eyesight. Mr. Swart pointed out that whilst the claimant can no longer apply for a C level driver's licence, he is not prevented from obtaining EB, A and PDP driver licences.

[35] The IP experts further agreed that GrandWest was an accommodative employer, who kept the plaintiff on as an employee, despite the fact that his performance levels declined after the incident.

[36] Mr. Swart pointed out that very little information is available regarding the plaintiff's pre-morbid work performance and deferred to collateral feedback from the plaintiff supervisors that he was not at any risk of forfeiting his employment.

[37] Ms Colley, in turn referred to extensive collateral information obtained from colleagues and supervisors, indicating a distinct decline in the claimant's performance after the incident. She noted ongoing severe symptoms of PTSD, as well as milder symptoms of depression.

[38] The IP experts agreed that as he was very young when the incident occurred, the plaintiff had the potential to advance in his career. This was supported by the fact that he had already made several attempts to improve his marketability in the job market by pursuing short courses.

[39] The plaintiff further demonstrated entrepreneurial qualities by working as a self-employed DJ using music equipment which he bought with his wages earned as a waitron.

[40] The experts differed regarding whether the plaintiff is likely to have continued with his part time DJ and movie extra work. Ms Colley's view was that he would have continued working as a regular weekend DJ, based on the collateral information which she obtained from the plaintiff's employer at the time. In her view he would also have continued at the agency doing movie extra and advertising work.

[41] Mr Swart was of the view that the plaintiff's reported pre-incident or pre-morbid earnings as a DJ and movie extra were not supported by factual and / or collateral sources. He believed it to be speculative to postulate on the plaintiff continuing in these roles and to draw any inferences regarding earnings in these capacities.

[42] Ms Colley proposed that to assess the plaintiff's realistic ongoing supplementary earnings, one should rely on the amount of R900.00 per night (in 2018) paid by the plaintiff's former part-time employer, a tavern owner known only as Mr Ta Bong, to his regular DJ. As the plaintiff paid his assistant DJ half of his earnings, Ms Colley suggested that the plaintiff would have earned R900.00 per weekend if he worked one night per weekend or had to share his earnings. As a movie extra he reported earnings of R300.00 per day (in 2011), which at 2018 value was between R600.00 and R850.00 per day, and between R2,500.00 and R3,500.00 per day for stunt work.

[43] Ms Colley agreed that earnings in the movie industry were generally speculative and seasonal, however based on her assumption and the plaintiff's experience and training, she is of the opinion that he could have earned an extra additional R2,500.00 per month, assuming he worked on average for one day as a stunt worker or four days as a regular extra per month.

[44] Mr Swart emphasised that Mr Ta Bong refused, on several occasions, to speak to him, and should have under subpoena confirmed the plaintiff's reported employment and earnings. He also expressed concern that there were no detailed reports of the plaintiff's pre-morbid earnings as an extra from Colt Agency ('Colt') and the fact that the records obtained from Colt only referred to work which he did after the incident, whereas the plaintiff indicated that he never returned to work as an extra after the incident.

[45] The IP experts agreed that the plaintiff would in all likelihood have advanced to a supervisory level. Their only point of departure was that Ms Colley was of the opinion that this would have occurred by age 30 and that he in all likelihood would have advanced further between the ages of 40 and 45. Mr Swart postulated that the plaintiff might have progressed to a supervisory capacity between the ages of 30 to 40 years. He regarded the median age of 35 years as being reasonable.

[46] The IP experts further agreed that had the plaintiff remained at GrandWest, he would have qualified for a total annual salary of R120,000.00 per annum.<sup>3</sup> Ms Colley's view is that he would have enjoyed corporate benefits once he qualified for a promotion to supervisory level. Mr. Swart was of the opinion that the plaintiff was still young, and it is highly likely that he would have attempted to secure some alternative positions for the remainder of his economically active years, however it is unlikely that he would have progressed beyond the supervisory level.

[47] The plaintiff previously trained for three months as a call centre operator, and two of his of his siblings are currently employed in this role. Ms Colley contended that it therefore seems probable that he might have elected to pursue this type of role again in the future. In this regard Ms Colley referred to the plaintiff's most recent employment history and career intentions as the more predictable indicator of his pre-injured career choices.

[48] The IP experts noted that had the plaintiff remained at GrandWest, his most recent hourly wages, of R26.00 per hour for four shifts per week, and average tips of R100.00 to R400.00 per shift (as reported by other staff members) would apply. They agreed that the salary band for supervisors falls within the semi-skilled band for non-corporate employees and specifically between the median and upper quartile earnings.

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<sup>3</sup> Current value.

[49] In Ms Colley's opinion, the plaintiff's regular income had the potential to eventually reach the top earning income level in this band, predicted by the Koch Quantum Yearbook (2020) to be R186,000.00 per annum. The IP experts agreed that he would have worked until the regular retirement age of 65 years old.

[50] Ms Colley recorded that according to his employer at GrandWest, the plaintiff had no prospects of promotion post-morbidly. Mr Swart however observed that there were a number of factors to consider before someone is promoted at GrandWest, most notably that one would have to apply for such a promotion, which the plaintiff never did.

[51] The IP experts further agreed that there was consistent collateral information from GrandWest employees that the plaintiff complained of light at the casino affecting his eye, that he was withdrawn and hesitant to deal with clients, that he tended to spill drinks, was regularly absent from or late for work, that he referred tables to other waitrons thereby forfeiting tips and that he appeared to have suffered from a loss of self-esteem. Only one of the plaintiff's colleagues, Ms Mlotywa, gave evidence in this regard.

[52] Ms Colley contended that these work-related behavioral patterns are typically associated with PTSD, whereas Mr. Swart was of the view that the abovementioned observations cannot be solely attributed to the incident.

[53] Mr Swart pointed out that extensive efforts were made to accommodate the plaintiff at work, as confirmed by various collateral sources, and that his subsequent resignation cannot possibly be solely attributed to the incident under review, as he continued in this role for more than eight years after the incident.

[54] Regarding the plaintiff's past losses in earnings, the IP experts agreed that he suffered a total loss of earnings for the first three months after the incident and continued to earn his basic salary for the period of convalescence in 2018, forfeiting only his tips during this period.

[55] Ms Colley recorded that the plaintiff is now unemployed and finds himself in a desperate situation where he would struggle to compete with able bodied job seekers. He may therefore remain unemployed for a significant period of time or rely on earnings in the informal labour market. In her view, the plaintiff's earnings for the time being are therefore more likely to reflect median earnings for self-employed people in the informal labour market at R28,300.00 per annum (age 25) and R41,000.00 per annum (age 45).

[56] Mr Swart is of the opinion that it would have been reasonable to expect the plaintiff to mitigate his circumstances and attempt to pursue a different line of work, where he is not necessarily required to engage face to face with clients on a daily basis. He was of the view that a call centre role remained an option, including a promotion to a supervisory role at 35 to 40 years, as he previously trained in this role and two of his siblings are currently employed as such.

[57] Mr Swart was of the opinion that the plaintiff has a 'compelling claim pertaining to loss of earnings when comparing his postulated pre- and post- morbid career progression. The postulation excluded the plaintiff's reported work as a DJ and extra, as in Mr Swart's view there was no evidence to support same.

### **The second minute**

[58] In the second minute the experts agreed, with regard to likely pre-morbid or uninjured earnings, that the plaintiff's monthly earnings, consisting of his basic salary and tips, would have amounted to approximately R7,600.00<sup>4</sup> per month in 2019 Ms Colley noted that this excluded corporate benefits, whilst Mr Swart pointed out that it included benefits such as a housing subsidy. The plaintiff also qualified for a thirteenth cheque, provident fund and healthcare benefits.

[59] The key areas of disagreement between the IP experts recorded in the second minute, were whether the plaintiff's earnings at GrandWest or corporate salary earnings should be used for actuarial postulation purposes.

[60] Ms Colley is of the opinion that:

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<sup>4</sup> R4,400.00 (basic) + R3,247.00 (tips).

60.1 Considering the plaintiff's confirmed earnings with corporate benefits, it appears that his income approximated the estimated Paterson A1 Median Quartile total package income. Koch<sup>5</sup> depicts this at R124,000.00 per annum.

60.2 Pre-morbidly, the claimant would likely have made straight line advances towards an A2 Paterson level role by age 35, and an A3 Paterson level role by age 45. Koch<sup>6</sup> depicts this at R180,000.00 and R200,000.00 respectively per annum.

60.3 Considering the plaintiffs young age at the time of the incident, it is feasible that he could have advanced towards B1 Paterson level role by age 45.

60.4 The plaintiff would probably have continued to work until the regular retirement age of 65 years old.

[61] Mr Swart disputed the use of corporate salary figures for postulation purposes *in casu*, as benefits earned by an employee do not dictate the use of corporate salary figures and the use of corporate salary earnings was never proposed or utilised by either expert for postulation purposes in their reports and addendums, nor in the joint

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<sup>5</sup> 2019.

<sup>6</sup> 2023.

minutes. In his view it is erroneous to extrapolate earnings, which include tips, to annual guaranteed package earnings on the corporate salary scales, as annual guaranteed package earnings exclude performance related bonuses, incentives, payments or commissions, and no additional information has become available to warrant the use of corporate salary scales.

[62] Mr Swart maintained that the career postulations set forth in his 2023 report, which make provision for progression to a supervisory level in the hospitality or call centre industry, remain intact, and the median of these two is proposed as the best indicator of the plaintiff's pre-morbid earnings.

[63] The IP experts were unable to agree on the plaintiff's post-morbid pre-resignation performance levels. Ms Colley emphasised that his average sales were less than half compared to his peers. Mr Swart pointed out that follow up investigations at GrandWest indicated that whilst it was an accommodative employer, there were never any problems with the plaintiff's work performance after the accident. In fact, his insistence on working the day shift would have undoubtedly impacted his earnings, and this accordingly needs to be considered.

[64] Ms Colley's view is that given his present unemployment status and the updated findings of Dr Bredekamp, previous predictions of the plaintiff's post-morbid career trajectory are considered optimistic. She concluded that it is therefore more likely that the plaintiff's future potential income will be limited to intermittent income in

the informal labour market and is likely to reflect estimated Lower Quartile earnings for unskilled people in the non-corporate labour sector, at R26,000 per annum.<sup>7</sup>

[65] Mr Swart criticised Ms Colley's view that the plaintiff will earn an intermittent income of R2,166.00 per month (2023 values) as improbable in light of the following established facts:

65.1 The plaintiff continued working at GrandWest for more than eight years after the incident before voluntarily resigning.

65.2 His remuneration at GrandWest is not remotely comparable to earnings in the informal sector and should have been utilised as the basis for his most probable post-morbid earnings.

65.3 There is no factual evidence that the plaintiff has ever earned a salary reflective of the lower quartile earnings in the unskilled sector.

[66] Mr. Swart specifically referred to his workplace visit and meetings at GrandWest, noting the following:

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<sup>7</sup> Koch (2023).

- 66.1 The plaintiff requested to work the day shift and indicated that this was due to the effect of the casino lighting on his uninjured left eye. However, collateral evidence showed that the casino lighting would be precisely the same during the day or night shift. The plaintiff insisted on working the day shift for over eight years, knowing that his earnings from tips would have been significantly than the night shift.
- 66.2 Collateral information from multiple sources confirmed that the plaintiff never presented with performance related or disciplinary issues. This was supported by his disciplinary records.
- 66.3 Multiple sources confirmed that the plaintiff was an above average waitron, and his promotion prospects were as good as any other, however, he never took the initiative to apply for supervisory roles.
- 66.4 Collateral sources confirmed that the plaintiff was often late and absent from work, neither of which can be attributed to the incident.
- 66.5 Multiple collateral sources stated unequivocally that the plaintiff insisted on working the day shift and voluntarily resigned. Allegations by the plaintiff that his working conditions were made intolerable and that he forfeited his employment due to constructive dismissal were contradicted by various factual considerations.

66.6 Collateral information from various sources confirmed that were the plaintiff to reapply for employment at GrandWest, he would be successful. This aligns with his resignation letter, where he indicated that he would be happy to return to GrandWest once he attended to the issues referenced in such letter.

66.7 Since resigning he has not attempted to secure alternative employment and was clear that he would not do so once this case was complete concluded. He indicated to coworkers at GrandWest that he is expecting a multi-million-rand payout from his claim.

66.8 The plaintiff had indicated that once this case is concluded he will relocate to Mount Frere in the Eastern Cape and has no intention of finding new employment.

[67] Mr. Swart was of the firm opinion that, given the factual considerations and feedback from collateral sources, differential contingencies should deal with the plaintiff's loss of income, such as applying a slightly higher than usual post-morbid contingency on the premorbid career postulation.

[68] Ms Colley stated that the constructive dismissal debate which she raised in her report is not material, and that the physical challenges related to the loss of his eye and the severe psychological sequelae deprived the plaintiff of the proposed uninjured

career path set out earlier in the joint minute. She emphasised that the plaintiff would have sufficient significant losses in earnings, as confirmed by both experts in the first and reports.

### **Evidence of Ms Colley**

[69] In her evidence in chief, Ms Colley confirmed that the plaintiff was not persisting in his claim for loss of income as a movie and advert extra or stuntman.

[70] It was pointed out to Ms Colley that in her first report, dated 22 August 2019, she recorded under '*Post-Morbidly*' that the plaintiff '*will continue to work at GrandWest casino. He enjoys the job and feels comfortable in the role. The claimant feels more confident about his physical appearance since the most recent prosthetic fit and said that he has considered returning to work as a movie extra. However, he will not be able to consider any stunt work.*'

[71] Ms Zintle Mlotywa, a waitron and co-worker at GrandWest who was called to testify on behalf of the plaintiff, told Ms Colley that she had known and worked with the plaintiff since 2010, prior to the shooting incident. In her view, the changes in the plaintiff's work performance were significant after the incident. She said that prior to the incident he was fast and reliable. Following the incident, he complained of the lights in the casino and struggled with eye infections. His work performance deteriorated and was no longer the same before the incident. She stated that the

plaintiff's self-confidence had been affected and that he became stressed easily, even if he only had a few customers.

[72] Regarding the lighting in the casino being the same during the day and at night, Ms Colley indicated that the plaintiff would still take more strain physically due to normal circadian rhythms, and the fact that the casino would be busier and rowdier at night, due to higher liquor consumption.

[73] Ms Colley testified that she does not believe that the plaintiff is unemployable. She noted that the plaintiff unsuccessfully applied for a more senior role at GrandWest and applied for a position at the City of Cape Town but became paranoid that the interviewers were making fun of him and therefore could not complete the interview. She further indicated that she did not believe the plaintiff was suited to call centre work *'as he is now.'*

[74] Ms Colley said that when she referred to the constructive dismissal of the plaintiff, it was based on her view that GrandWest was accommodative but became less so after the plaintiff interviewed for a more senior role, and perhaps as a result of the decline in his sale figures. Ms Colley confirmed that the plaintiff wanted to relocate to the rural Eastern Cape as soon as the case was finalised. She stuck firm to her view that the plaintiff's potential future earnings were estimated to be R26,000.00 per annum.

[75] When questioned about Life Assist, the internal Wellness program offered by GrandWest, Ms Colley said that the suggestion that the plaintiff should have availed himself of this opportunity came across as a 'defence case' for in the event that the plaintiff took his employer to the CCMA. She said that in her experience these programs were not helpful and were there to 'keep the shareholders happy.' She acknowledged that the plaintiff may have been placed on permanent disability that said that this would be impacted by the fact that he was only formally appointed by GrandWest 2018, and she was not sure whether he knew this.

[76] When Ms Colley was asked to comment on an excerpt from Mr Swart's report, where Mr Denver Solomons, the employee relations manager who testified on behalf of the defendant, emphatically denied that the plaintiff's working conditions were made intolerable, and pointed out that this is contradicted by the fact that as a union member, the plaintiff never reported any problems to his shop steward and informed him instead that he was expecting an enormous payout from this claim, Ms Colley described this as *'nitpicking for a CCMA case.'* She said that in her view the plaintiff was not sufficiently resilient to enter into a grievance procedure.

[77] Ms Colley emphasised that the plaintiff also suffered from nightmares and struggled to sleep at night, and was very fatigued the next day, which resulted in regular late coming and absenteeism at work. The long-term effect of the lack of sleep which the plaintiff was suffering from should not be underestimated, as it would likely have prevented plaintiff's body and, more importantly, his brain from functioning

properly, and it would have impacted on his mood and his memory, and his ability to cope with stress would also have been reduced.

[78] This underscored the views expressed by Dr Bredekamp, who is of the opinion that the plaintiff's psychological symptoms have impacted on his cognition. Ms Colley testified that PTSD work-related symptoms include somatic (sleep) complaints, absenteeism, substance abuse, irritability, hostility, anger and outbursts, withdrawal, difficulty in trusting a team, decreased productivity, reduced energy, reduced ability to solve problems and make decisions, inefficiency, accident prone and high staff turnover.

[79] According to Ms Colley, the abovementioned difficulties are congruent with the collateral information which she obtained from the plaintiff's colleagues and managers at Grand West after his involvement in the incident, specifically with reference to his absenteeism, irritability, withdrawal, decreased productivity, reduced energy, and his inefficiency.

[80] During the follow up consultation on 14 February 2023, the plaintiff told Ms Colley that he resigned from his employment at GrandWest in December 2019, as things 'became intolerable' at work. He had been working day shifts in the Sun Lounge, which was less busy and less stressful than having to work night shifts, however he earned a third of what the other staff members earned.

[81] In cross-examination Ms Colley conceded that GrandWest was an accommodative employer. She accepted that apart from four instances over a period of nine years, the plaintiff's late coming and absenteeism was minimal, and would not be a basis upon which GrandWest would want him to leave his employment. She accepted that the plaintiff's claim that his employment had become intolerable was not substantiated by collateral sources, and that the reference to a possible 'constructive dismissal' should not have been included in her report as it detracted from the crux of the matter, his incapacity.

[82] When it was put to her that GrandWest is willing to reinstate the plaintiff, she said that this does not surprise her, as she can see his potential and that he is a likable person, however he is incapable of being an effective employee in that work environment.

[83] It was pointed out to Ms Colley that on the weekends even during the day shifts there would be bigger crowds and noisy machines, and yet the plaintiff coped with his work. She responded that he managed but it was despite his disability and that it took its toll.

[84] Regarding the scale upon which she based the plaintiff's future loss of earnings, Ms Colley accepted that fewer than 25% of companies in South Africa use the Koch Corporate survey, and that she did not refer to Koch at all in her first or second report, only in the joint minute. Ms Colley admitted that the plaintiff's income

decreased in 2017, but increased from November 2018 to December 2019, just before he resigned.

[85] At the end of her evidence Ms Colley said that she believed the 'tipping point' which caused the plaintiff to resign was the interviews by Mr Swart, which brought to light his poor performance.

### **Ms Phumla Mdzinwa**

[86] The plaintiff's sister, Ms Phumla Mdzinwa ('Ms Mdzinwa'), testified that prior to the incident the plaintiff was a 'calm and happy' person, and did not suffer from any emotional problems. Following the incident, she stated that her brother changed a lot. She confirmed that he lost his self-confidence and that he no longer socialises or sees friends.

[87] Ms Mdzinwa confirmed that the plaintiff worked as a DJ on weekends prior to the incident, but stopped afterwards. Since his resignation from GrandWest, Ms Mdzinwa and her siblings have been supporting him.

[88] Ms Mdzinwa is employed in a call centre. She believed that the plaintiff would definitely not cope working in such a stressful environment in his injured state, as he is quick to anger and is no longer the calm and patient person that he was prior to the incident.

### **Mr Gcinabantu Mkosana**

[89] Gcinabantu Mkosana ('Mr Mkosana'), who worked with the plaintiff as a part time DJ, testified that up until the time of the incident he had worked as a DJ with the plaintiff for Mr Ta Bong at his tavern, Tshepo's Place, on Friday, Saturday and Sunday nights. He testified that he and the plaintiff earned R250.00 per night, and a total of R 750.00 each per weekend. He confirmed that the plaintiff no longer worked as a DJ after the incident.

[90] According to Mr Mkosana the plaintiff was approachable before the incident, but after the incident he was easily upset and irritated.

### **Ms Zintle Mlotywa**

[91] The next witness for the plaintiff was Ms Zintle Mlotywa ('Ms Mlotywa'). Ms Mlotywa was employed as a waitron at GrandWest at the time of the incident. She often worked the same shifts as the plaintiff, both before and after the incident.

[92] Ms Mlotywa's evidence was that prior to the incident, the plaintiff was a good waitron and one of the top performers. He was the fastest waiter and he was able to serve several tables at a time. He had a good rapport with customers and received positive feedback from them. She confirmed that he did not suffer from any emotional problems and he did not miss shifts or arrive at work late.

[93] Ms Mlotywa's evidence was that she noticed a marked deterioration in the plaintiff's performance and behaviour at work after the incident. She said that he would forget orders or deliver incorrect orders. As a waitron he was supposed to pour drinks for his guests, but he would end up spilling the drinks, occasionally even onto the guests.

[94] According to Ms Mlotywa, after the incident the plaintiff became emotional and was 'always moody.' He would shout at and fight with customers and took long breaks. After the incident he was not reaching his targets, and went from being the top performer to one the poorest performers.

[95] Ms Mlotywa testified that after the incident she had complained about the plaintiff's behaviour on numerous occasions to her supervisors, who would then have taken it up with the managers. He became a burden to work with and none of the other waitrons wanted to work shifts with him. He would hide in the toilets, which meant that the other waitrons would have to serve more tables, and the supervisors would sometimes have to appoint more waitrons to assist.

[96] She confirmed that after the incident the plaintiff was always coming to work late because he was not sleeping properly. She said that he would definitely not have coped as a supervisor after the incident, and she described him after the incident as being a '*ticking bomb*'.

[97] Ms Mlotywa said that the plaintiff was disciplined because of his poor behaviour and performance at work. In this regard, she confirmed that he was moved from

working night shifts in the Privé section, where the tips are good, to working day shifts in the non-smoking Sun Lounge, where you 'just serve tea and coffee to the grannies who are sitting there watching TV', and make very poor tips. According to her, working in the non-smoking Sun Lounge was a demotion for the plaintiff.

[98] When asked in cross-examination why these alleged infractions did not appear on his disciplinary record, which only recorded four or five incidents of absenteeism and late coming, Ms Mlotywa said that it may have been due to problems with clocking in or out for work. She disagreed with Mr Chris Temba ('Mr Temba'), the food and beverage manager, who informed Mr Swart that the plaintiff could readily be reemployed at GrandWest without hesitation, as in her view '*he was not making things right for guests.*'

[99] Ms Mlotywa confirmed that she knew about the Life Assist wellness program, but did not ask the plaintiff why he did not make use of the program as she was not close to him and he 'was not well mentally.'

[100] Ms Mlotywa conceded that she never complained about the plaintiff to management, as she 'always tried to him serve the correct order', as she wanted to work as a team.

**Mr Soyisele Edmund Mdzinwa**

[101] The plaintiff testified that his highest grade passed was Grade 12, which he self-studied while doing DJ and agency work. He did agency work from Grade 10 and was working as a DJ when he trained as a waitron and bartender at GrandWest, as he was told that he could earn between R500.00 and R800.00 per day. He saved the money that he earned to buy his own sound system for his DJ work.

[102] In 2009 he trained to work in a call centre for three months, but did not pursue this line of work as said that the customers were very rude to him, and because he would have to work on the weekends which interfered with his dreams of becoming a DJ. When asked if he would now consider working for a call centre, he said that it is not for him, as *'it is not for me to beg customers to buy a product, it won't work for me.'*

[103] The plaintiff testified that at the time of the incident he was working on the casino floor in the Prive or VIP area, where the 'high rollers gamble'. In the non-smoking Prive section he could earn between R800 and R1 200 per shift, and in the smoking Prive are he could earn between R800 and R2 500 per shift. He said that he did not have any issues before the incident, that he *'earned lots of money and was on top of the world.'*

[104] He testified that on his first day back at work after the incident, he had to leave the casino floor as there was too much light. He recalled that when a guest ordered still water, he did not know what it was, as after the incident he was *'lost in his mind.'*

[105] The plaintiff testified that the incident, and the assault by the police shortly thereafter, had a major impact on his emotional state, which affected his ability to work as a waitron.

[106] He became pre-occupied with the incident, had trouble sleeping and had recurrent nightmares. He had difficulty concentrating and he lost confidence. He also thought that customers were staring at his prosthetic eye, and worried excessively about the discharge from his eye, which caused him to frequently go to the bathroom to try to clean it. In his words, after the incident *'he lost his smile.'*

[107] The plaintiff testified that after the incident he complained to his supervisor, Mr Themba and also to Mr Ncube, the Food & Beverage Manager at Grand West Casino. He said that Mr Ncube was very sympathetic, and would cover for plaintiff if he did not come to work, which is why he did not receive formal warnings. As far as he could recall he was contacted by someone from the Life Assist program who asked him basic questions. He said this did not assist him in any way.

[108] According to the plaintiff, after the incident he was disciplined at work for his poor work performance, absenteeism and late coming. He said that he received informal warnings from his supervisors and managers. The incident caused problems in all spheres of his life and he therefore decided to seek professional help from the Trauma Centre in Woodstock. The plaintiff also mentioned that he went to see a doctor on numerous occasions following the incident. He would explain to the doctor that he was stressed and suffering from a headache, because he was not sleeping and was experiencing nightmares.

[109] The plaintiff testified that were it not for the incident, he would have continued working as a DJ. He also explained that because his ongoing depression and PTSD, he is not in a position to entertain people as a DJ any longer.

[110] The plaintiff's evidence was that he could have worked as a stuntman and as a heavy duty truck driver, which jobs are now no longer available to him. He said that he is no longer able to work as an extra on movie sets or in TV commercials because of his sunken eye, which has altered his appearance and which has caused him to lose confidence.

[111] The plaintiff said that he could not work in a call centre agent in his injured state, as he would find it too pressurised. He also stated that he is no longer capable of working as a waiter, because you need to be able to smile and you need to have self-confidence, both of which he is lacking since the incident. He explained that he needs to finalise the court case against the defendant, and that he needs to resolve his mental problems (from the incident) before he will be able to work again.

[112] The plaintiff confirmed that he had never filed any grievances with GrandWest after the incident, because they were just asking him to do his job, which he was not coping with. He was not aware of the Life Assist Programme at GrandWest, nor was he ever told that he could apply for temporary or permanent disability.

[113] According to the plaintiff he sought alternative employment following the incident and while he was still employed at GrandWest. He applied for a position in customer relations within GrandWest, and for a job at the City of Cape Town dealing

with customer complaints, both of which applications were unsuccessful. He said that he had recently applied for a job as an air steward, which was also unsuccessful.

[114] When cross-examined about his psychological issues after the incident, the plaintiff said that he is quick to anger and thinks that other people are thinking or saying things about him behind his back. He said that he watched colleagues making money and kept thinking that it was supposed to be him.

[115] The plaintiff admitted that he had never faced any formal disciplinary proceedings, and that all that happened was managers or supervisors would speak to him to ask him what was happening. He insisted however that there were many times that he 'needed to be disciplined'.

[116] The plaintiff admitted that from 2015 until he resigned in 2019, he never went to his manager or supervisor to say that he could not perform his work, his supervisors and managers spoke to him and that but rather told him that he did not want to work a particular shift.

[117] The plaintiff testified that the only time that he had been happy since the incident was for 'about an hour on the 15th of August 2017', when judgment on the merits was granted in his favour.

[118] Mr. O'Brien suggested to the plaintiff that he tended to exaggerate, citing as an example when he testified in chief that the police came towards him brandishing AK-47s. The plaintiff said that there were six or seven police officers coming towards them,

and that at the time he thought it was an AK47, but subsequently found out that it was a shotgun, with a rubber bullet.

[119] The plaintiff was constrained to concede that there was nothing in his resignation letter to suggest that work had become tolerable at GrandWest , or that he had been demoted or victimised in any way during this employment there.

[120] The plaintiff further acknowledged that he subsequently applied for customer facing positions at GrandWest and the City of Cape Town and confirmed that he wanted to work in customer relations.

[121] The plaintiff was directed to the report of Ms Colley, where he confirmed to her that he felt comfortable in his job at GrandWest at the time of the interview. He furthermore admitted that the lighting is the same in the casino in the day and at night.

[122] In conclusion, when asked why he continued in his employment for eight years after the incident, he said that it was because he could not secure a job elsewhere.

### **Evidence for the defendant**

#### **Mr Denver Solomons**

[123] Mr Denver Solomons ('Mr Solomons'), the employee relations manager at GrandWest since 2005, testified first on behalf of the defendant.

[124] Mr. Solomons confirmed that Life Assist is the Wellness partner which GrandWest is contracted to, and that their services are communicated to GrandWest employees at roadshows four times a year, and on posters and pamphlets posted in various locations at the premises. He confirmed that the employees make use of such services on a regular basis, and that in 2015 there was a re-orientation of all employees at GrandWest when all benefits, including Life Assist, were clearly communicated to them.

[125] Mr Solomons testified that if an employee was experiencing difficulties at work and did not respond to Life Assist, the first step would be to apply for temporary disability for such employee for a maximum of two years, and if this were to be insufficient, the employee could apply for permanent disability, which would be lifelong. Sanlam, the insurer for GrandWest, would send the employee for all the necessary medical and sociological assessments. If a person was declared to be permanently disabled for example for mental illness, they would receive 75% of the benefits to which they were entitled.

[126] Mr Solomons confirmed that if the plaintiff's performance at work had been affected by the incident and if there had been issues regarding misconduct, this would have been reported to his line managers and there would have been disciplinary proceedings, which would have reflected on his personnel file.

[127] According to Mr Solomons, the plaintiff would not have been permitted to only work day shifts, as there were certain requirements for him to be exempted from working any night shifts.

[128] He emphatically denied that the plaintiff was victimised by being forced to work in the GrandWest 'spaza shop' and said that as a paid-up member of the SACCAWU trade union he would have been fully informed of his rights.

[129] He further testified that the plaintiff had eight years to raise any issues through the union manager or human resources, and that GrandWest has an open-door policy.

[130] Mr Solomons confirmed that as the plaintiff is classified as disabled, GrandWest would have been very keen to retain or re-employ him, if necessary, in a non-customer facing role such as switchboard or back of house, as it would have helped them to close the gap in the number of disabled employees which they employ.

[131] When confronted in cross examination with the plaintiff's dismal sales records, Mr. Solomons emphasised that sales records have nothing to do with performance, as GrandWest customers are 'punters', and it is the interactions with guests, and not sales, that are important. He said that a waitron's performance is not rated according to sales.

[132] Mr Solomons initially testified that the plaintiff had a good disciplinary record and that there were only a few minor isolated incidents of absenteeism or poor timekeeping from 2016 and 2017. When presented with the plaintiff's shift schedule for the period 01 July 2019 to 31 December 2019, which he produced under subpoena, he appeared surprised that the plaintiff missed approximately 30% of the shifts which he was scheduled to work in July 2019, which he was not disciplined for. When

confronted with these facts Mr Solomons stated that he had been unaware of the extent of the problem.

[133] It appeared from the plaintiff's shift schedule that his shifts changed in December 2019, when he only had two day shifts, six day-to-night shifts, and nine night shifts. The nine night shifts included three back-to-back night shifts, which the plaintiff's counsel contended would have been impossible for him to cope with.

[134] Mr Solomons also provided the Court with the plaintiff's job profile at GrandWest, which confirmed that he had been employed in the non-smoking Sun Lounge since 2015.

[135] He confirmed that GrandWest is a corporate employer, and provided Grand West's Job Grading System for junior level employees, which indicates that Sun International uses Corporate Job Grading Scales, namely the Hay's & the Paterson Job Grading System, for waitrons.

[136] Mr Solomons explained that plaintiff's job as a waitron was graded as a Grade 7 job on the Hay's Scale, which corresponds with a Paterson B1 Job Grade. He said that job evaluation is defined as the process of assessing the relative worth of jobs in an organisation using an objective and reliable rating system. Job evaluation or grading systems are used by many organisations to measure jobs according to their content and to establish the comparative worth between jobs

[137] Mr Solomons said that GrandWest would be willing to rehire the plaintiff as a waitron based on his above average in this capacity, however he took issue with the suggestion by the plaintiff that he had been victimised or that his work situation had become intolerable, and said that the plaintiff had been dishonest in this regard.

**Ms Julie McKay**

[138] Ms Julie McKay ('Ms McKay') testified that she has worked in the Human Resources department at GrandWest since 2014.

[139] Ms McKay confirmed that the plaintiff handed his resignation letter to her. Upon receipt thereof she enquired from him what his reason was for resigning, and he told her that he was not coping with work, and needed time to 'deal with his issues.'

[140] She advised him that he could make use of the Life assist program, however he declined this offer. She testified that if he had availed himself of this opportunity he would at the outset have been referred to a psychologist for five paid up therapy sessions. She further advised him that he could apply for temporary disability. Under cross examination she stated that she did not explain to the plaintiff what temporary disability would involve.

[141] According to Ms McKay the plaintiff was not interested and 'had made up his mind to resign'. She said the plaintiff further informed her that he 'had a court case to attend to.'

### **Mr Bernard Swart – Industrial psychologist**

[142] Mr Swart, who was called by the defendant as an industrial psychologist expert, registered as an industrial psychologist in 2015, after graduating with his Honours and Masters in industrial psychology. He has been involved in medico-legal work since 2016, and to date has completed approximately 1400 medico-legal reports.

[143] His first report in this matter was filed on the 15 of November 2019 and his second or supplementary report was filed on 27 of March 2023. He confirmed the contents of both reports and the first and second joint minutes.

[144] Mr. Swart testified that the education level of the plaintiff's siblings was relevant in matter such as this, particularly in *casu* where both of the plaintiff's siblings had attained Grade 12 and worked as call centre operators.

[145] He confirmed that he attempted to gather as much collateral information as possible, to establish a sound factual foundation upon which to base his opinion, in order to assist the court, and to ensure that his opinion was not merely speculative.

[146] According to Mr Swart, the collateral evidence indicates that after the incident, the plaintiff was an above-average waitron at GrandWest and that his promotion chances were as good as any other waitron, but that he never took the initiative to apply for supervisory roles. Although the collateral information indicated that the plaintiff presented with bouts of late-coming and absenteeism from work, Mr Swart felt that this could not be solely attributed to the incident.

[147] When asked for his view on the plaintiff's evidence, namely that he would sign in and out with Colt and not actually work, his response was that if this is the case, it amounted to dishonesty in one form or another.

[148] Mr. Swart expressed concern regarding certain aspects of the evidence of Ms Colley, in particular when she placed reliance on collateral information which she said was provided by Mr Ncube in determining the plaintiff's pre-morbid performance and career progression. He stated that he had a serious issue with this from an ethical standpoint, as Mr Ncube never knew the plaintiff before the incident. He pointed out that Ms Colley did not clear up this discrepancy in her examination in chief, but only in cross-examination. Mr Ncube was not called as a witness, therefore any collateral information obtained from him remains hearsay.

[149] According to Mr Swart, after obtaining extensive collateral information from employees at GrandWest, there was no evidence or report of poor work performance by the plaintiff. To the contrary, the collaterals informed him that they would accommodate his progression, and that he would not be hampered in applying for certain positions. He confirmed that the general tenet was that the plaintiff had potential, and he therefore based his postulation on him being promoted within the organisation.

[150] Mr Swart prepared two pre-morbid career postulations, one in hospitality and the other in a call centre, both providing for progression on the part of the plaintiff. He utilised the median of the two, as there was no guarantee that the plaintiff would remain in hospitality. He included the call centre postulation as the plaintiff's siblings were

employed in the call centre, and the plaintiff himself worked in a call centre before GrandWest.

[151] Mr Swart specifically excluded the plaintiff's part time work as a DJ, as he was unable to confirm with any collaterals that the plaintiff was working as a DJ immediately before the incident, and Mr Ta-Bong in particular refused to take his calls.

[152] Mr Swart consulted with the plaintiff on the second occasion specifically to investigate the allegations of constructive dismissal. He said that the plaintiff attended the second consultation with several handwritten pages and told him that he had been demoted several times. He reported being specifically placed on night shift in order to be caught drinking with colleagues, which did not make sense. Mr. Swart emphasised that he needed to carefully interrogate the suggestion that the plaintiff had been constructively dismissed, as this was highly relevant to his claim for loss of earnings.

[153] Mr Swart further pointed out that the plaintiff was first employed by Headline Management ('HLM') from 2011 to 2015, and then by Sun International from 2015 to 2019 ('Sun'). He noted that Sun would have been well aware of the plaintiff's work performance, and yet elected to offer him permanent employment. He further confirmed Mr Solomon's collateral that Sun was not contractually obliged to take over all employees as permanent employees, but that there was no history of performance issues on the part of plaintiff when he was employed by HLM.

[154] Mr Swart's view was that the collateral evidence indicates that the plaintiff elected to resign voluntarily. He disputes Ms Colley's view that plaintiff's working

conditions were made intolerable and that the termination of his employment may have amounted to a constructive dismissal. Ms Colley conceded that her suggestion that plaintiff's decision to resign from Grand West *might* have constituted a constructive dismissal, detracted from the real issue, which was whether the plaintiff was able to cope with his job as a waitron.

[155] According to Mr Swart, the collateral evidence which he obtained confirms that if the plaintiff re-applied for employment at GrandWest, he would be re-employed, which he says also aligns with the plaintiff's resignation letter, wherein plaintiff stated that he would be happy to return to GrandWest once he had attended to his mental health issues.

[156] Mr Swart acknowledged that although the plaintiff might have initially found it challenging to adjust to his erstwhile employment position due to his eye injury, he would have been reasonably expected to mitigate his circumstances. He does not believe that the plaintiff mitigated his circumstances, because of his insistence on assuming employment in a day shift capacity at a lower rate of remuneration, his voluntary resignation and his failure to seek alternative employment.

[157] Mr Swart concluded that based on the factual considerations and the feedback from the collateral sources, it would be more appropriate to calculate the plaintiff's loss of income by applying differential contingencies.

[159] In this regard, he proposed applying a slightly higher-than-normal post-morbid contingency on the plaintiff's pre-morbid career postulation and earnings, given that

he accepts that the plaintiff's injury may affect his ability to secure an alternative occupation.

### **Loss of earning capacity - Relevant legal principles and evaluation**

[160] The court is indebted to counsel for their detailed heads of argument and supplementary submissions, which have greatly assisted in the preparation of this judgment.

[161] In *Dippenaar v Shield Insurance Co Ltd*,<sup>8</sup> the SCA articulated the legal position relating to a claim for diminished capacity, as follows:

'In our law, under the *lex Aquilia*, 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. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.'

[162] In *Prinsloo v Road Accident Fund*<sup>9</sup> a person's earning capacity was described by Chetty J as follows:

'A person's all-round capacity to earn money consists, *inter alia*, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, *in casu*, considerations of equity. A court has to construct and compare two hypothetical

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<sup>8</sup> 1979 (2) SA 904 (A) at 917 B-D.

<sup>9</sup> 2009 (5) SA 406 (SE) para 5.

models of the plaintiff's earnings after the date on which he/she sustained the injury. In *casu*, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss..'

[163] A physical disability which impacts on a person's capacity to earn an income does not, on its own, reduce the patrimony of an injured person. The plaintiff must prove that the reduction in the income earning capacity will result in actual loss of income.

[164] In attempting to forecast the future to determine future loss of earning capacity, the Court is essentially 'pondering the imponderable'<sup>10</sup> in that it is enjoined to reach the best decision it is able to on the evidence placed before it, however it is not 'tied down by inexorable actuarial calculations.'<sup>11</sup>

[165] In *Southern Insurance Association Ltd v Bailey NO*<sup>12</sup> ('Bailey') the Appellate Division (as it then was) observed that a Court, in determining such future damages, 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.

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<sup>10</sup> *Anthony and another v Cape Town Municipality* 1967 (4) SA 445 (A) at 451 B-C.

<sup>11</sup> *Id.*

<sup>12</sup> 1984 (1) SA 98 (A) 113 G- H.

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.'

[166] In my view that the latter approach is preferable is self-evident. As pointed out by the Court in *Bailey*, while the result of an actuarial computation may amount to an 'informed guess', it is an attempt to ascertain the value of what was lost on a logical basis, rather than the trial Judge's 'gut feeling' as to what is fair and reasonable is nothing more than a blind guess.<sup>13</sup>

[167] The Court has 'a large discretion to award what it considers right.'<sup>14</sup> One of the elements in exercising that discretion is the making of a discount for contingencies or the 'vicissitudes of life.' These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case.<sup>15</sup>

[168] In *Road Accident Fund v Kerridge*<sup>16</sup> ('*Kerridge*') the Court noted that 5% and 15% for past and future loss, respectively, have become accepted as 'normal contingencies'.<sup>17</sup> This generality notwithstanding, the assessment remains 'largely

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<sup>13</sup> *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 920.

<sup>14</sup> *Per* Holmes JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F; *Bailey* at p116.

<sup>15</sup> See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 – 5 as cited in *Bailey* at 116.

<sup>16</sup> 2019 (2) SA 233 (SCA) at para 30.

<sup>17</sup> *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) at para 30; *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A).

arbitrary' and must depend upon the trial Judge's impression of the case. As pointed out by *Bailey*, the vicissitudes of life may be either adverse or favourable.<sup>18</sup>

[169] In *Guedes v RAF*<sup>19</sup> the SCA referred to the 'sliding scale approach to contingencies' at ½ % per year as follows:

'The author Koch describes his work as 'a publication of financial and statistical information relevant to the assessment of damages for personal injury or death'. The page in question is headed 'General Contingencies'. It states that when 'assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court; . . . There are no fixed rules as regards general contingencies. The following guidelines can be helpful.' Then follows what is termed a 'sliding scale' and the following is stated:

**'Sliding Scale:** ½ per cent for year to retirement age, i.e. 25 per cent for a child, 20 per cent for a youth and 10% in middle age.<sup>20</sup>

In the *Goodall* case which is relied upon by Koch for a suggested deduction of 10 per cent the plaintiff was aged 45 whereas the plaintiff in this matter was only 26 at the relevant time. An application of the author's sliding scale to this matter would have led to a contingency deduction of 19.5 per cent. It is true that immediately after referring to the passage in Koch, Boruchowitz J said:

'Having regard to the relevant facts, the plaintiff's age and station in life, I am of the view that in the "but for" scenario a contingency deduction of 10% would be fair and reasonable.'

[170] Age is therefore clearly a relevant consideration in determining contingencies. As the SCA said in *Bee v Road Accident Fund* ('Bee'),<sup>21</sup> *'the younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path'*. In that case, where the

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<sup>18</sup> *Bailey* at p116.

<sup>19</sup> 2006 (5) SA 583 (SCA) at para 9.

<sup>20</sup> See *Goodall v President Insurance* 1978 (1) SA 389 (W).

<sup>21</sup> *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) (*Bee*) para 116.

claimant was a 48 year old male, a contingency of 15% for future loss of earnings over a work life span of 11 years was found to be appropriate.

[171] In both *Bee* and *Kerridge* the contingency which the Court considered to be somewhat high, was driven by factors peculiar to each case, such as the fact that the claimant in *Kerridge* suffered from adverse health conditions and participation in sport that was considered dangerous.<sup>22</sup> In *Kerridge* the plaintiff was young, however he was almost halfway through his work life span. In comparing the facts to *Bee*, the Court found that whilst as a motor mechanic he would have worked with relatively heavy machinery, his occupation would be considered as high risk as the surfing and cycling pastimes that the claimant in *Bee* engaged in pre-morbidly.<sup>23</sup>

[172] As pointed out in the minority judgment in *Kerridge*.<sup>24</sup>

‘The role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information. Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demur. The facts upon which the experts rely can only be determined by the judicial officer concerned. An expert cannot usurp the function of the judicial officer who is not permitted to abdicate this responsibility — the court should actively evaluate the evidence. Ideally, expert evidence should be independent and should be presented for the benefit of the court. It is not the function of an expert witness to advocate the client's cause and attempt to get the maximum payout, as most seem to believe.’<sup>25</sup>

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<sup>22</sup> At para 34.

<sup>23</sup> *Bee* para 117.

<sup>24</sup> *Kerridge* at para 50 (from the minority dissenting judgment of Dambuzza JA, Mocumie JA concurring).

<sup>25</sup> *Whitehouse v Jordan* [1981] 1 All ER 267 (HL) at 276.

[173] It cannot be disputed that the plaintiff was, by all accounts, a physically and psychologically healthy young man when he was the victim of a brutal and senseless assault at the hands of the SAPS. He was a go-getter who demonstrated entrepreneurial qualities. The trauma of losing of an eye in such circumstances should not be understated.

[174] The defendant elected not to call a psychologist as an expert to render an opinion regarding the plaintiff's post-morbid psychological functioning. The expert evidence of Dr Bredekamp, specifically her diagnoses of the PTSD, mild depression and adjustment disorder, has therefore not been gainsaid.

[175] A central theme in the defendant's cross-examination of Dr Bredekamp was that she should have tested for malingering. I accept that ideally she should have administered such a standardised test, however it was clear from her evidence that that she tested for malingering, and that in her opinion there no evidence to show that the plaintiff was indeed malingering. On both occasions when she assessed the plaintiff, Dr Bredekamp found that he was not feigning his mental disorders or purposefully exaggerating any of his symptoms. This evidence remains uncontroverted as the defendant elected not to call an expert psychologist as a witness.

[176] Citing the well-established principles set forth in *Stellenbosch Farmers Winery*

*Group v Martel et Cie*,<sup>26</sup> Mr O'Brien contended that if regard is had to the plaintiff's credibility and veracity as witness and the cogency of his evidence, serious doubts exist about his truthfulness as a witness.

[177] In support thereof, the defendant cited *inter alia* the fact that the plaintiff downplayed or misrepresented facts adverse to his case, that he tended to exaggerate, for example describing the gun which he was shot with as an AK47, that he relied on an alleged inability to cope with his duties as an afterthought, that his evidence regarding being demoted was untrue and that he was never formally disciplined at GrandWest.

[178] My impression of the plaintiff as a witness was not favourable in all respects. Whilst I have no reason to reject his evidence as a whole, I agree that at times he tended to exaggerate certain facts to suit his case and downplay facts or events adverse to his case. However, he did not strike me as a completely dishonest witness, nor am I persuaded that all of his evidence should be disregarded. It is clear that he suffered serious psychological sequelae as a result of the incident, however, to my mind he failed to satisfactorily explain what the 'tipping point' was which caused him to resign after eight years of gainful post-morbid employment at GrandWest.

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<sup>26</sup> 2003 (1) 11 (SCA) para 5.

[179] Moreover, since his resignation the plaintiff has not sought further psychological treatment, which he could have accessed at no cost at State facilities, or through Life Assist had he remained employed. He failed to adequately explain his failure to do so, or to work either in a self-employed capacity, or for another accommodative employer which may have gladly employed a disabled employee in a non-client facing role.

[180] In this regard I am of the view that the supine attitude of the plaintiff after his resignation shows that he did not take available steps to mitigate his damages, and that he appears, to a certain extent, to have been malingering and waiting for his anticipated payout. This was never expressly pleaded by the defendant, however the plaintiff's failure to mitigate his damages was canvassed in his evidence and to a certain extent in the evidence of the IP experts and of Dr Bredekamp.

[181] Mr O'Brien contended that the evidence of certain of the plaintiff's witnesses, including Ms Mdzinwa and Ms Mlotywa, should be treated with caution as they clearly showed bias towards the plaintiff. It was argued that the evidence of Ms Mlotywa was inconsistent with the objective facts, namely that if the plaintiff were not performing due to incapacity, there would have been an inquiry possibly followed by a disability assessment.

[182] There was no evidence of a personal relationship or friendship between Ms Mlotywa and the plaintiff, nor was a factual basis established to show that she was biased towards the plaintiff. I accept that there were issues with the plaintiff's

performance, however this has to be viewed in context of the fact that it is common cause and indeed the view of both Ms Colley and Mr Swart that GrandWest was an accommodative employer.

[183] There are certain incongruous elements to the plaintiff's evidence, such as his application to work at the SAPS in circumstances where they were the cause of his injuries, and where he had previously testified that he had a deep-seated fear of the organisation. His evidence that he applied to work as a guest relations officer at GrandWest and for a role at the city of Cape Town flies in the face of his earlier evidence that he was impatient, irritable and could not work with customers as a waitron at GrandWest. The plaintiff's evidence was that he also applied to be an air steward after he left.

[184] It appears to be undisputed that the applicant has not worked in any capacity since 2020, and that he plans to relocate to Mount Frere in the Eastern Cape after the trial, presumably only if he is successful in his claim, and has no intention or reentering the formal employment market, notwithstanding the fact that even Ms Colley is of the opinion that with appropriate therapeutic intervention he is capable of being employed again.

[185] In my view, it is highly improbable that the plaintiff was not aware of the Life Assist Wellness program offered at GrandWest. If he was so aware, it is inexplicable why, if he were he not coping in his role, he would not have made use of this program and if necessarily applied for disability. The plaintiff, as a long-term

employee of Grand West ought to be aware of his rights in this regard and should have had recourse to his Union, SACCAWU, to enforce his rights as an employee and union member.

[186] The fact that the plaintiff had a clean disciplinary record despite there being instances of late coming and absenteeism only proves that GrandWest was a sympathetic and accommodative employer, and that the plaintiff was a 'good enough' employee. The suggestion by the plaintiff that he was victimised or constructively dismissed, does not bear scrutiny.

[187] Moreover, it is clear from the plaintiff's resignation letter that, whilst he referred to having mental problems, there is no suggestion that he was incapacitated or incapable of performing his functions as a waitron. In this regard, the evidence of Ms McKay, namely that she informed the plaintiff of Life Assist when she received his resignation letter is uncontested. The plaintiff nevertheless insisted on resigning.

[188] It appears from the objective evidence placed before the court that the plaintiff was able to perform his functions as a waitron for eight years after the incident, had a clean disciplinary record and only approximately six instances of late coming in absenteeism, passed the relevant performance appraisals and managed adequately in his role as a waitron. Indeed, there was no record of the plaintiff being unable to cope in his employment and yet he claimed that the tipping point occurred when he did the night shift towards the end of 2019. It is however clear that he had been

working night shifts during the eight years he worked at GrandWest after the incident.

[189] It was argued on behalf of the defendant that after the plaintiff started seeing the experts in 2019, he consciously resigned so that he would not have to explain why he continued his employment, as this would have meant that he had no loss of earning capacity. The plaintiff had a judgment on the merits in his service since August 2017, and after that he continued to perform his duties.

[190] It is, however, clear from both sales records and shift lists placed before the Court, that after the incident the plaintiff was underperforming compared to his peers, and that he missed or arrived late for several shifts in the weeks and months leading up to his resignation. In 2019 he missed 30% of his shifts.

[191] I cannot accept that this can be solely attributed to the fact that he met with the experts for this matter in 2019. According to the report of Mr Swart, the plaintiff told him In November 2019 that he was 'thinking about resigning every day.'

[192] In my view the plaintiff's capacity to perform his function at the same level as he did pre-morbidly was clearly impacted by the incident. This is borne out by the reports and evidence of Ms Mlotywa. The IP experts agree that the plaintiff's employer was accommodative. This clearly means that he needed to be

accommodated. In the circumstances I am satisfied that the plaintiff's resignation was casually connected to the incident.

[193] I agree with Mr Coughlan that the plaintiff's decision to no longer work as a DJ after the incident is reasonable and understandable. He was working as a DJ when he was shot in the eye. The DJ equipment which he purchased with his savings was confiscated and damaged beyond repair. I accept that there successful, disabled DJs, however this matter is clearly unique, as the plaintiff suffered his disability as a result of the traumatic events which unfolded while he was working as a DJ at an event.

[194] The fact that the plaintiff worked for eight years and was not promoted further supports view that his earning capacity was diminished. I accept that he never applied for supervisory roles after the incident, however I cannot disregard the fact that by all accounts, pre-morbidly he was a top performer, and that he clearly possessed entrepreneurial qualities and a strong work ethic, which in all probability would have meant that uninjured he would have been promoted and would have had a successful career at GrandWest or wherever he chose to work.

[195] Ms Colley and Dr Bredekamp agree that in his current psychological state, the plaintiff is unemployable in the open labour market and that he should undergo psychological and career counselling, and if necessary, be prescribed psychotropic medication, to enable him to re-enter the labour market in the future.

[196] I also cannot ignore the impact that his changed appearance has had on the plaintiff's self-confidence and self-perception, and the psychological sequelae of such a traumatic injury. It is clear on a conspectus of all the evidence that the plaintiff's career had not and will not flourish as it in all probability would have but for the injury. He is likely to have continued working as DJ, and his decision to no longer do so is reasonable and understandable.

[197] The collateral evidence of the plaintiff's sister and coworker clearly demonstrated that there was a marked decline in his psychological functioning after the incident, consistent with the diagnosis made by Dr Bredekamp which mitigate against a conclusion that his resignation and failure to obtain new employment can be attributed solely to malingering.

### **The plaintiff's postulated pre-morbid and post-morbid earning capacity**

[198] The parties agree that the plaintiff must be compensated for the three months he was unable to work after the injury, and for the month when he had the new prosthetic eye fitted.

[199] [191] It is clear from the evidence of both Ms Colley and Dr Bredekamp that with proper treatment the plaintiff has residual employability. The IP experts however disagreed regarding which methodology should be applied for purposes of calculating the plaintiff's loss of income. According to Ms Colley, it would not be

appropriate to apply contingency differentials, as proposed by Mr Swart, as this presupposes that plaintiff's post-morbid career path will follow the same career path as in the pre-morbid state, which she emphasised was clearly not the case.

[200] In her supplementary medico-legal report of 23 February 2023, Ms Colley referred to the STATSSA earnings by level of education as a minimum guide. In this regard, she specifically states that: "*it is suggested to apply at least STATSSA earnings by level of education...*" This was an attempt to reach a compromise with Mr Swart and to steer clear of specific roles and specific industries and to circumvent the debate on whether the plaintiff would have remained working as a DJ or a truck driver or call centre agent, and to base his earnings on his educational level instead.

[201] When the IP experts compiled their second joint minute, dated 12 October 2023, they had received a number of the plaintiff's pay slips which they did not previously have , and which indicated that the plaintiff qualified for thirteenth cheque as well as a housing subsidy, and a provident fund and health care.

[202] The plaintiff's pay slips indicated that he had receiving corporate benefits for the last few years. In the circumstances, Ms Colley was of the opinion that, based on the plaintiff's confirmed earnings with corporate benefits and the fact that Grand West operates as a corporate business that is part of the Sun International Group with shares on the stock market, it would be more appropriate to use the corporate salary surveys.

[203] Mr Colley's evidence was that in so doing, she was relying on the actual facts of the matter and the new information which the industrial psychologists had obtained, and that Mr Swart was incorrect to state in the second minute that no additional information had become available to warrant the use of corporate salary survey earnings.

[204] It was further contended on behalf of the plaintiff that the use of the corporate survey earnings is also justified based on recent information obtained from GrandWest, which confirms that they use the use Paterson / Hay salary scales, and that it would accordingly be fair and reasonable to use the corporate salary surveys earnings to postulate the plaintiff's uninjured income, bearing in mind that the plaintiff had been working at GrandWest for many years, including post-morbidly.

[205] Ms Colley was of the opinion that in the uninjured scenario the plaintiff would have been able to progress towards earning at least in line with a Paterson A3 package of R207,000.00 per annum, and possibly even a Paterson B1 package of R241,000.00 per annum by 45 years old.<sup>27</sup>

[206] In the injured scenario, Ms Colley postulates that the plaintiff will be limited to lower quartile earnings for people in the non-corporate labour sector, earning R26,000.00 per annum.

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<sup>27</sup> 2023 values.

[207] Mr Swart's postulated only pre-morbidly for only a single career progression between the age of 22 years and 65 years, with eventual earnings of R120,000.00.<sup>28</sup> This would limit the plaintiff to estimated lower quartile earnings for employees with a Grade 12 education.

[208] Mr. Coughlan argued that there was no basis laid for the assumption that the plaintiff would have been a below average employee with a below average career progression, given the work ethic displayed and the collateral evidence of his pre-morbid work performance. I am inclined to agree.

[209] Mr Coughlan also took issue with Mr Swart only allowing the plaintiff's earnings to peak at R120,000.00 at age 40 in an uninjured scenario, as in his injured state as a waitron at GrandWest he was already earning a total package of R128,466.00 per annum in 2019. This amounts to R137,047.00, taking inflation into account, in 2024 terms. He contended that there is no reason to believe that the plaintiff would have worked or been promoted in the call centre industry, as he did not work in this sector before the incident, apart from three months training, and had no interest in pursuing such a career.

[210] In essence Mr Swart proposes a maximum average uninjured earning capacity of approximately R12,000.00 per month (in 2019/2020 terms) between the ages of 30 and 40 years, which remains unchanged for the remainder of his career.

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<sup>28</sup> 2019 terms.

[211] I am prepared to accept that as the plaintiff was working for a corporate employer at the time of the incident, he is likely to have continued to have earned more than just a basic salary, and that as he was in the career exploration stage of his working life at the time of the incident he would in all probability have made more permanent and lucrative career choices between the ages of 25 and 30 years old, and that his earnings would have increased at least twice, while working and earning in the corporate sector, before reaching a career plateau in his mid to late 40s.

[212] In a supplementary note prepared for the benefit of the Court, Mr O'Brien submitted that, but for the incident, the plaintiff would likely have had the following career path:

212.1 He would have earned a basic income of R4,400.00 per month and tips of R3,247.00. He might have progressed to a supervisory position between 30 to 40 years in the hospitality or call centre sector, earning R120,000.00 per annum, with annual inflationary increases until his retirement at 65 years;<sup>29</sup> and

212.2 Alternatively the plaintiff would have earned R7,850.00 monthly as a call centre operator and progressed to a supervisory / team leader in the call centre sector between 30 and 40 years, earning R14,020.00

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<sup>29</sup> All 2019 values.

monthly, with annual inflationary increases until his retirement at 65 years.

[213] The defendant submits that the median of these two premorbid scenarios would be fair to the plaintiff.

[214] Mr Swart proposes a differential contingency with regard to the plaintiff's loss of income, which he based on the scenario where the plaintiff might seek alternative occupations or might be excluded from certain of the abovementioned positions. The defendant noted that the standard contingency differential in dealing with loss of income usually equates to 10% and submitted that based on the median scenario a 25% contingency differential would be fair.

[215] I was referred by the defendant to the decisions of *Prinsloo* and *Povey v Road Accident Fund* ('*Povey*')<sup>30</sup> where the claimant who lost his wife and unborn child in a collision in which he was the driver, was diagnosed post-morbidly with depression and PTSD. After considering expert evidence the Court found that in circumstances where the plaintiff had *inter alia* failed to undergo treatment to improve his condition 17 years after the accident and failed to provide proof of his pre-and post-morbid income, he failed to make out a case for past and future loss of income. The Court emphasised that the plaintiff must prove that the patrimony of his estate has been

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<sup>30</sup> (63390/16) [2022] ZAGPPHC (18 January 2022).

diminished or compromised as a result of the sequelae of the accident, citing *Rudman v Road Accident Fund*<sup>31</sup> in this regard.

[216] In *Prinsloo* the plaintiff, a white female inspector in the SAPS, suffered soft tissue injury of the lumbar spine in a motor collision. The court held that the uncontroverted evidence that prospects for promotion for white female police officers were negligible was completely at variance with the expert's assumptions that the plaintiff would have risen to the ranks postulated by him. The expert further failed to establish a rational basis to suggest that there was less likelihood of promotion in work of the sedentary nature. The Court held that the plaintiff had therefore failed to discharge the onus resting upon her to show that her earning capacity had been compromised by her injury.

[217] It is trite that in certain circumstances the Court can award a plaintiff a percentage of his uninjured income to compensate him for his future loss of earning capacity. For example, where the plaintiff has not suffered any actual loss of income at the time of the trial and has continued working in the same capacity as pre morbidly, but with some ongoing difficulties which could affect his earnings or employability in the future.

[218] In the *Quantum of Damages*,<sup>32</sup> the following is stated in relation to future loss of earning capacity:

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<sup>31</sup> (370/01) 2002 ZASCA 129.

<sup>32</sup> Volume 1, 4<sup>th</sup> edition at page 8.

'Allowance for a prospective loss necessarily introduces a speculative element into the assessment of damages. While the general rule is that loss must be established upon a balance of probabilities, it has been held that justice may require that a contingency allowance be made for a mere possibility of certain forms of loss. In this regard the distinction is drawn (in principle, and not without difficulties) between causation and quantification.'

[219] In instances where there is a possibility of the plaintiff suffering a future loss of income, but which is difficult to quantify in precise monetary terms, the Court can award the plaintiff a portion (calculated as a percentage) of his future uninjured income, in order to account for the fact that he may in future suffer a reduction in his earnings because of his injuries, as was done in the cases referred to below.

[220] Where a plaintiff claims damages in respect of a loss of earning capacity, the plaintiff's pre-morbid earnings are usually utilised as the base figure in the post-morbid scenario as well. The loss of earning capacity is then calculated by applying different contingencies (different percentage deductions) in the pre- and the post-morbid scenarios.

[221] The difference in the contingency deduction in the pre- and post-morbid scenario (expressed in percentages) is what is referred to as 'the contingency differential.' Depending on the particular facts of a matter, a higher-than-normal contingency deduction can be applied in the injured scenario in order to calculate a person's future loss of earning capacity.

[222] I accept that the plaintiff will now have to compete against younger, fitter and likely better qualified candidates for any job positions when he attempts to re-enter the labour market and is likely to have to re-enter in an entry level role if and when he is able to obtain alternative employment.

[223] In instances where there is a possibility of the plaintiff suffering a future loss of income, but which is difficult to quantify in precise monetary terms, the Court can award the plaintiff a portion (calculated as a percentage) of his future uninjured income, in order to account for the fact that he may in future suffer a reduction in his earnings because of his injuries, as was done in the cases referred to below. In this regard the *Guedes* case referred to above provides valuable guidance.

[224] Depending on the specific facts of a case, a higher-than-normal contingency deduction can be applied in the injured scenario in order to calculate a person's future loss of earning capacity.

[225] In *Chinappa v Sentrasure Ltd*<sup>33</sup> the plaintiff, who after sustaining a whiplash injury in a collision was able to continue with his pre-morbid employment as an area manager, was unable to perform to his full potential and that this would affect future prospects of promotion, his choice of jobs would be more limited, and he would be at a disadvantage should he seek alternative employment. There was also expert evidence to the effect that the plaintiff had been disabled to the extent of 10% to 15% as compared with his pre-accident function. In light of the risk factors to the plaintiff's

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<sup>33</sup> 1996 (4C3) QOD 86 (C).

future employment, the Court awarded him a sum equivalent to 10% of his future uninjured earnings.

[226] A similar approach was adopted in *Kerspuy v Road Accident Fund*.<sup>34</sup> The claimant was a female hairdresser who had injured her left leg in an MVA. As a hairdresser, she was no longer able to stand for long periods of time, as it increased the pain in her leg. She was therefore not able to work to her full capacity. The claimant was, however, expected to respond well to conservative treatment to the extent that she would achieve 80% of her former function. In light of the risk factors mentioned above, the learned Arbitrator felt that these risk factors could have a negative effect upon the claimant's employment in the future, and he accordingly awarded the claimant a sum equivalent to 15% of her future uninjured earnings in order to compensate her for her expected loss of earning capacity.

[227] In the case of *Chakela v Road Accident Fund*<sup>35</sup> ('*Chakela*') the Court accepted that a person's earning capacity is part of a person's patrimony and that a person is entitled to be compensated if his loss of earning capacity has been compromised to the extent that his patrimony will be diminished. The Court explained that the test to determine whether a plaintiff should be compensated for his or her loss of earning capacity is as follows:

'There is a conceptual difference between the question whether a plaintiff has suffered an impairment of earning capacity, and the question whether a plaintiff will in fact suffer a loss of income in the future. The answer to the former question is determined on a balance of probability, and the plaintiff has the onus to discharge. The latter is a question

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<sup>34</sup> 2002 5 E7 QOD (AF).

<sup>35</sup> 2017 JDR 1037 (GJ).

of assessment in respect of which there is no onus in the traditional sense. This assessment involves the exercise of quantifying as best one can the chance of the loss actually occurring. Put differently, the answer to the former question is, 'at least theoretically, answered affirmatively if the plaintiff will have established a 51% chance of the impairment being present; the answer to the latter question is provided by the best match between the likelihood of a loss being suffered, and a fraction expressed as a percentage.'

[228] After considering the relevant factual and expert evidence, the Court in *Chakela* concluded that although it was clear that the plaintiff was not the same person that she used to be, the extent to which, if any, these changes would impact her future earnings, was uncertain. The Court noted that she would likely always have some residual chronic pain, but that with optimal treatment she would be able to continue her current work until retirement age. However, the Court accepted that she had been rendered an 'at risk' employee, and in the circumstances the Court felt that it would be fair to make some allowance for a possible truncation in her career. When considering the contingency differential to apply (in other words, when considering the chance of monetary loss actually occurring in the future), the Court was of the view that the plaintiff's earning capacity had only been slightly impaired. Her pain was not a persistent presence and it could be medically treated. In the circumstances, the Court awarded the plaintiff in that case a 10% loss of earning capacity.

[229] During closing argument, I indicated to counsel that I had a difficulty accepting that the plaintiff will, in his injured state, only be able to earn an income of R 47,000.00 per annum (2023 value) in the future, which is based on the median quartile earnings of unskilled workers working in the non-corporate sector, as his earnings at

GrandWest were significantly higher than this, and there was no factual evidence that he has ever earned a salary at this low level.<sup>36</sup>

[230] Mr Coughlan thereafter provided updated actuarial calculations in terms whereof the plaintiff's future injured income was adjusted upwards, in other words, to allow for higher earnings in the injured scenario in the future.

[231] In determining the appropriate adjustments, I have had regard to the evidence as a whole, and specifically to the points of agreement in the first and second expert joint minutes of the IP experts. It is apposite to note that the IP experts agree that were it not for the incident, the plaintiff would have continued to pursue more lucrative job opportunities, had the potential to advance in his career in all probability to a supervisor-level role.

[232] They further agreed that the plaintiff's monthly earning, comprised of his basic salary and tips, would have amounted to approximately R7,600.00 per month in 2019, which is approximately R9,323.00 in 2023 values,<sup>37</sup> excluding corporate benefits<sup>38</sup>, save for a housing allowance.

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<sup>36</sup> Koch Quantum Yearbook 2023, at page 129.

<sup>37</sup> <https://inflationcalc.co.za/?date1=2019-12-02&date2=2023-12-02&amount=7600>

<sup>38</sup> The plaintiff qualified for a 13<sup>th</sup> cheque, provident fund and healthcare benefits in addition to the housing allowance, described by Ms Colley as 'fringe' or 'corporate benefits.'

[233] The IP experts agreed the plaintiff was left with significant ongoing physical and emotional deficits, as the loss of his eye affected not only his vision but also his appearance, confidence levels and ability to perform as a waiter, as confirmed by collateral sources.<sup>39</sup> They further agreed that alternative job opportunities were limited due to the plaintiff's lost eye. For instance, he could no longer apply for a C level driver's licence or do any work that required good bilateral eyesight. The plaintiff was accommodated in his employment at GrandWest after the incident.

[234] Mr Swart proposed applying a slightly higher than usual post-morbid contingency on the pre-morbid career postulation to cater for the scenario where the claimant's injury might affect him following alternative occupations.

[235] The plaintiff contended that as the plaintiff's past and future loss of income is extensive, it would be manifestly unfair to simply postulate that he will earn 10% or 20% less than what he would have earned had he not been involved in the incident, and for that reason the approach which has been adopted by Ms Colley in postulating the plaintiff's loss of income is the more sensible and logical approach, which should be followed.

### **Adjustment of actuarial calculations**

[236] The defendant never called an actuary to give evidence, nor did it take issue with the reports of the actuaries instructed on behalf of the plaintiff. The plaintiff

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<sup>39</sup> Mr Swart noted that this should not be taken out of context as whilst it applied for his initial return to work, no performance related problems were noted by collateral sources during follow-up investigations.

provided two further actuarial reports (hereinafter referred to as 'Report A' and 'Report B') from Munro Forensic Actuaries, both dated 08 April 2024, in terms of which the actuary was requested to alter the assumptions and to recalculate the plaintiff's loss of income.

[237] The updated actuarial reports were prepared on the basis that the plaintiff:

237.1 Was unable to return to his part-time work to date.

237.2 Was unable to return to his full-time work immediately after the incident.

237.3 Has reduced earnings since the incident.

237.4 Might only be able to find a lower paying job in the future.

237.5 Is not expected to reach the suggested pre-incident career potential; and

237.6 Might suffer losses that are not directly quantifiable and should be addressed via contingencies.

[238] The actuary adjusted the plaintiff's future injured income in the actuarial reports, as follows:

238.1 It was assumed that the plaintiff will obtain the necessary medical treatment during the course of 2024, which will allow him to re-enter the labour market and to resume working again in 2025;

238.2 As from January 2025 the plaintiff will find part time work, earning in line with the National Minimum Wage of R 27,58 per hour, working 8 hours

per day, 2½ days per week for a period of 2 years (which equates to R 220.64 per day / R 551.60 per week / **R 28,684.00** per year); and

238.3 As from January 2027, the plaintiff will find full time employment and his earnings will increase in straight line increases, so that by age 45 years he will earning at the midpoint of Koch's median to upper quartile earnings for non-corporate workers (R 49,800.00 – R 110,000.00 = **R 79,900.00** per year) (2024 figures), with annual inflationary increases thereafter until his retirement at the age of 65 years.

[239] I have relied on Report A, which I consider to be appropriate in this matter, as it allows for 20% lower uninjured earnings, in order to account for the fact that the plaintiff may not have always worked and earned in the corporate sector.<sup>40</sup>

[240] Both actuarial reports contain three separate scenarios in respect of plaintiff's full-time employment. In my view for the reasons set out above, the most realistic and fair scenario is Scenario 3, as based on the evidence it appears likely that the plaintiff would have exceeded A3 earning. Scenario 3 postulates that the plaintiff's future uninjured earnings peak at age 45 at 80% of a Paterson A3/B1 which equates to **R 184,400.00** per year (inclusive of benefits).

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<sup>40</sup> The assumptions in the two reports differ in that Report B allows for 100% uninjured earnings in the corporate sector, whilst Report A allows for 80% uninjured earnings in the corporate sector

plaintiff's past uninjured income (in respect of his fulltime employment) is 15%, which results in a net past loss of income of **R458,455.00**.<sup>41</sup>

[242] The plaintiff's future loss of income from full-time employment is calculated by using differential contingencies. This is done by using the plaintiff's future pre-morbid earnings (of R 3,330,700.00)<sup>42</sup> as the base figure in the pre- and the post-morbid scenario, and then by applying differential contingencies of 15% and 45% in the uninjured and injured scenarios respectively - which results in a 30% contingency differential, and which amounts to a net future loss of earnings / earning capacity of **R999,210.00**, which amount is arrived at as follows:

| <b>Future Uninjured Income</b>                                                           | <b>Future Injured Income</b>             |
|------------------------------------------------------------------------------------------|------------------------------------------|
| R 3,330,700.00                                                                           | R 3,330,700.00                           |
| Minus a <b>15%</b> contingency deduction                                                 | Minus a <b>45%</b> contingency deduction |
| R2,831,095                                                                               | R1,831,885                               |
| <b>30% Contingency Differential - Future Loss of Earning Capacity =<br/>R 999,210.00</b> |                                          |

<sup>41</sup> This is calculated based on Report A, which provided for past uninjured at R1,296,300.00 less 15% = R1,101,855.00, less R643,400.00 (past income).

<sup>42</sup> See paragraph 6.5 of Report A on pg. 9 thereof, which reflects a future uninjured income of R 3 330 700.00.

[243] In respect of the plaintiff's part time earnings as a DJ, a contingency deduction of 20% has been applied to his past uninjured income, and a 35% contingency deduction to his future uninjured income, which is higher as these earnings are more speculative than his full time earnings, and there is no guarantee that the plaintiff would have continued to work every weekend as a DJ until he reached the age of 40 years.

[244] I am of the view that in respect of the plaintiff's part time loss of earnings from being unable to work and earn as a DJ, it would be fair and reasonable to award the plaintiff the net amounts (after contingencies) as reflected in Scenario 3 of Report A, which reflects a net past loss of income of R 356,880.00 and net future loss of income of R152,880.00, which amounts to total net loss of R509,760.00

[245] In the circumstances I deem it appropriate to award the plaintiff damages in an amount of **R 1,967,425.00** in respect of his past and future loss of income and earning capacity, which amount is made up as follows:

|                                         |                       |
|-----------------------------------------|-----------------------|
| Past Loss of Earnings (full time):      | R 458,455.00          |
| Future Loss of Earnings (full time):    | R. 999,210.00         |
| Past Loss of Earnings (part time DJ):   | R 356,880.00          |
| Future Loss of Earnings (part time DJ): | R 152,880.00          |
| <b>TOTAL</b>                            | <b>R 1,967,425.00</b> |

[246] The plaintiff has been substantially successful and there is no reason why the costs should not follow the event. The defendant is accordingly liable for the plaintiff's costs of suit, as taxed or agreed, including the qualifying and reservation fees of the plaintiff's experts who filed medico-legal reports and who testified at the trial.

[247] The supplementary submissions were drafted before 12 April 2024.<sup>43</sup> Rule 67A therefore does not find application in this matter.

## **ORDER**

[248] In the circumstances the following order shall issue:

1. The defendant is to pay to the plaintiff an amount of **R 1,967,425.00**
2. The defendant is to pay the plaintiff's costs of suit, including the qualifying and reservation fees of Dr Rosa Bredekamp, Dr Norma Colley, and Munro Consulting.



**M Holderness**

Acting Judge of the Western Cape  
High Court

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<sup>43</sup> The latest submissions appear to have only been emailed to my registrar on 10 May 2024, but were dated and signed on 10 April 2024.

APPEARANCES:

Plaintiff's counsel:

Adv W Coughlan

Instructed by:

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