IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

09/06/2026 [redacted]

DATE SIGNATURE

Appeal Case No.A159/2023

Court a *quo* Case No:22926/14

THE MINISTER OF POLICE **Appellant**

and

ZIMELE MAXWELL NDOBE **Respondent**

JUDGMENT

THE COURT

Introduction

1] This appeal comes before this Full Court with leave of the Supreme Court of Appeal. The appellant, the defendant in the court *a quo*, has noted an appeal against the order granted by Moshoana J awarding the respondent[1] compensation in an amount of R893 859.00 – as well as interest and costs - for damages resulting in the loss of the use of his Nissan bakkie (the bakkie) when it was destroyed in a fire whilst in the possession and under the control of the appellant.

Background

2] It is common cause that on 29 January 2012 and near Ficksburg, Free State Province, the respondent was arrested by members of the appellant. At the time of his arrest, his bakkie was confiscated by them and impounded as an SAP13 exhibit at Ficksburg. He was charged with possession of dagga. On 17 September 2012, the charges were withdrawn. Despite making several enquiries about his bakkie and seeking its return thereafter, it was only during April 2013 that the respondent was informed that his bakkie had been destroyed in a fire that had broken out in the compound where his bakkie was impounded by the appellant.

3] During March 2014 the respondent instituted action against the Minister of Police for material damage to the bakkie as well as compensation for loss of income (referred to in the pleadings as "loss of profit"). He alleged that prior to his arrest he ran a transportation business, that he had used the bakkie to transport stock for his spaza business and for the transportation of clients' goods. He pleaded that this was his only means of income.

4] During April 2018 the appellant conceded the merits of the respondent's claim. At the trial on the quantum of the respondent's claim, the claim for material damage was

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[1] The plaintiff a quo

not pursued. The loss of profit from the spaza shop was abandoned during the trial. Thus, the trial proceeded before Moshoana J on the following heads of quantum:

a) whether the respondent proved his loss of income;

b) if so, what amount should he be awarded.

5] In support of the respondent's case, the trial court heard the evidence of the respondent himself, a former customer of his (Mr Lawrence Nkosi), and that of an industrial psychologist, Mr Nqapela. The appellant presented no evidence to rebut the respondent's case at all – there were no expert reports, and no other evidence was presented by the appellant. At the end of the evidence presented by the respondent's three witnesses, the respondent handed in an updated actuarial calculation which calculated the respondent's loss. The actuary was not called to give evidence because no objection to this report (in any form) was made by the appellant. In fact, the submission was

> "Mr Mashaba: Our case...There is no loss. But anyway, there is no objection, Your Lordship. For the actuary to come and testify is going to be a waste of time, Your Lordship."

6] The essence of the appeal is whether the respondent had established a monthly profit of R8 000.00 from an informal transport business he had been conducting when the bakkie was destroyed in the fire. The secondary question is whether the trial court, in awarding compensation for loss of profit, ought to have applied a 50% deduction for contingencies as opposed to the 30% deduction applied.

The evidence

The respondent

7] The respondent testified that he held a Grade 11 in schooling, had received a Security Grade B certificate, attended an armed reaction course, had worked at PickitUp in Selby as a general worker from 2006 until 2007 and had then obtained employment at Kloof-Leeudoorn Mine where he had received training in plumbing and welding.

8] During approximately 2007, the respondent purchased the bakkie. The purpose of this was to earn extra income and to provide for him eventually when he stopped working. He would transport people, rent the bakkie out and would pick up and drop off goods for people over the weekend or after hours to supplement his income.

9] In 2011 he was diagnosed with epilepsy and had to stop working at the mine. It was then that the bakkie was used as his sole source of income.

10] In his evidence, the respondent identified five regular clients. He transported fruit and vegetables, tools, clothing, building materials and rubbish, as well as chickens for them. He also transported children for one of his clients. From time to time, he had occasional clients. Sometimes, he hired out the bakkie to clients. The respondent estimated what his regular clients paid him monthly. The amounts could fluctuate depending on the distance to the delivery destination.

11] He stated that his income was R8 000 for his transport business,[2] that business was a cash business and was operated without a bank account – he thus had no records or proof of income (or expenditure) at all. Of course, once he was arrested in 2012 and his bakkie confiscated, all of this ended abruptly.

12] Much was made of the respondent's varying versions vis-à-vis his income in cross-examination. The questions were pointedly aimed at the version he had given to the Industrial Psychologist, Mr Nqapela which was detailed in a report penned by the latter. This is a rather interesting tactic given that the appellant had refused to admit the report during the pre-trial conference. But cross-examination on the issue of the respondent's income yielded little result, other than the evidence that the bakkie yielded him an income of R8 000 per month. When challenged on the veracity and reliability of this evidence, especially given that there were no records of his income or expenditure, the respondent specifically pointed out that he had managed to purchase assets, build a house and maintain his family with only the money received from this source – this was not challenged by the appellant.

Mr Nkosi

13] Mr Nkosi testified that he was a regular customer and former client of the respondent. He confirmed that the respondent owned a cream coloured bakkie which "he would use for his own survival": he would use it to help people out, would rent it out sometimes, would use it to load goods for people and on occasion he would buy stock which he sold at his spaza shop. He also used it as a general transport business and

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[2] His evidence was that he earned R6 000 for the spaza business but as that claim was abandoned, that income is not relevant for present purposes and was used in cross-examination to ultimately argue that his evidence was speculative and unreliable

would transport people from the location to uMzimkhulu, Matiele and other places. This all came to a halt when the bakkie was taken away from him. No inroad into Mr Nkosi's evidence was made at all during cross-examination. This then corroborated the respondent's version that he used the bakkie as his source of income.

Mr Nqapela – the Industrial Psychologist

14] Mr Nqapela's report is dated 17 July 2019. He used collateral information of the respondent's clients and the respondent's version to opine on the respondent's loss of income[3]. He opined that the respondent operated a micro-business in the informal sector which he testified is typical in the townships. His evidence was that from 2015 to 2017 he was a township economist specialist. He conducted research into more than 52 businesses particularly in Soweto, Orlando West and Orlando East. Of those 52, 12 were considered to be informal businesses according to the model under a project called the Township Revitalization Strategy.

15] The research he conducted demonstrated that these informal businesses do not use any form of invoicing, do not generate statements nor have any written form of stocktaking or purchases. They are also not registered for UIF and operate as a cash business.

16] Mr Nqapela is a disk jockey over the weekends when he rents a truck. His evidence was that not once has he been issued with any form of invoice.

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[3] Who had given affidavits detailing the work that the respondent had done and the amounts that they paid him – he did not conduct interviews with any of them, but their evidence was introduced via cross-examination by the appellant

17] His evidence as regards the respondent's income was that, given the number of clients of respondent that had provided affidavits, and considering the possibility that he may have had other clients, the income of R8 000 is conservative. He also opined that businesses such as that of the respondent expand over time and that the respondent's business had potential.

18] The nub of Mr Nqapela's evidence as set out in paragraph 17 supra was not disturbed at all in cross-examination.

The actuarial calculation

19] Given that the respondent had abandoned the claim for damages pertaining to the loss of income relating to the spaza shop, the respondent handed in new actuarial calculations, by Mr Jacobson, at the end of his case. As stated, these calculations were not disputed by the appellant.

20] Mr Jacobson calculated the respondent's loss on his income of R8 000 per month in the amount of R1 310 816. He postulated three scenarios:

a) <u>scenario 1</u>

Value of income but for incident	R1 310 816
15% contingency deduction	R 196 622
	R1 114 194
Value of income having regard to the incident	R 24 960
5% contingency deduction	R 1 248

	R 23 712
NET PAST LOSS	**R1 090 482**

b) scenario 2

Value of income but for incident	R1 310 816
20% contingency deduction	R 262 163
	R1 048 653
Value of income having regard to the incident	R 24 960
5% contingency deduction	R 1 248
	R 23 712
NET PAST LOSS	**R1 090 482**

c) Scenario 3

Value of income but for incident	R1 310 816
30% contingency deduction	R 393 245
	R 917 571
Value of income having regard to the incident	R 24 960

5% contingency deduction	R 1 248
	R 23 712
NET PAST LOSS	**R 893 859**

21] None of these calculations was disputed by the appellant.

The appellant's case

22] The appellant chose not to call any witnesses or present any evidence of an expert to rebut the case that had been presented by the respondent. There was thus nothing before court to contradict the respondent's case.

The legal position

23] At the end of the day, the court *a quo* correctly found that the evidence before the court, on a preponderance of probabilities, established that the appellant should be held liable for the respondent's loss – this was, in any event conceded prior to the commencement of the trial.

24] In deciding what amount of damages to award the respondent the court must balance the evidence presented on the issue of the respondent's loss of income. Whilst it was argued *a quo*, and again before us, that the respondent had presented contradictory and unsubstantiated evidence as to his income, what the appellant loses sight of is that there was no challenge at all before court as regards the respondent's case on his nett income: his testimony, whilst without documentary corroboration, withstood the scrutiny of cross-examination. Added to this was Mr Nkosi's evidence, which was not challenged. The final nail was the evidence of the respondent's expert who testified that an income of R8 000 in the informal sector was, in fact, conservative.

25] The appellant argued before us that Mr Nqapela had relied on incorrect and unverified information regarding the respondent's income of R8 000 per month. It argued that, although affidavits had been given to him from respondent's clients, he had not personally contacted him and therefore that information was unverified. He also argued that Mr Nqapela had failed to take into account the data and/or statistics about earnings in the informal sector set out by Robert Kock in his book Quantum Yearbook,[4] and specifically that the learned author states that in the year 2012, from a number of 2 645 790 sampled self-employed employees, only 3,6% earned a salary between R88 410 – R113 200 per year.

26] The problem with this argument is that the information as regards the respondent's clients was placed before the court during the appellant's cross-examination of the respondent. In any event, the court did not rely on that information when deciding the matter. Furthermore, the appellant failed to give Mr Nqapela an opportunity to respond to the argument on the opinion raised by Robert Kock in his publication – he simply failed to raise it with Mr Nqapela at all, and he is therefore precluded from arguing this issue now:

> "[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention

[4] 2012 edition at page 107

to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

[64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where "a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box."[5]

27] In my view, the court *a quo* correctly applied the test set out in *SARFU* supra.

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[5] President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) – footnotes excluded.

28] It is also so that even in cases where damages are difficult to determine, this does not oust a plaintiff's claim for damages: the court must still assess the evidence that has been produced to assess the quantum of loss.[6]

> "...the fact is that the courts habitually have to grapple with problems of this nature where resort must be had to estimates and speculation in order to arrive at a figure which the court considers to be as fair as possible to both sides. This is clear from the well-known and much-quoted *dictum* by Nicholas JA in *Southern Insurance Association Ltd v Bailey NO*:
>
> > 'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. .
> > It has open to it two possible approaches.
> > One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.
> > The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.
> > It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.' "[7]

29] In so doing, the court a quo was therefore correct in accepting the respondent's

[6] De Jongh v Du Pisani 2005 (5) SA 457 (SCA)
[7] Bane & Others v D'Ambrosi 2010 (2) SA 539 (SCA)

version that he had suffered a loss of income of R8 000 per month for which he had to be compensated as there was no other information placed before the court to demonstrate that doing so was incorrect. Any inconsistencies in the respondent's evidence were of such a nature, given all the other corroborating evidence, as set out supra, that it does not disturb the overall probabilities in favour of the respondent.

30] Ultimately, the appeal lies against the amount of damages awarded to the respondent. The appellant argues that the court should have applied a 50% contingency instead of the 30% it ultimately applied. It is settled law that an appeal court does not lightly interfere with awards of damages made by a trial Court unless there is a 'substantial variation' or a "striking disparity" between the award of the trial court and what the appeal court considers ought to have been awarded.

31] In *De Jongh v Du Pisane*[8] the court found that contingency factors cannot be determined with mathematical precision but are rather discretionary in nature.

32] In considering whether to apply a 50% contingency deduction or any of the scenarios postulated by the respondent's uncontested actuarial report, the court a quo stated:

> "As is always the case in matters of this nature parties quibble over contingencies to applied over a fair and reasonable award. Mashaba urged this Court to apply a 50% contingency. In support of that urge, he submitted that because the evidence of R8000 per month was not satisfactory, a higher contingency deduction was warranted. With considerable regret, I disagree with his submission. As a general

[8] 2005 (5) SA 565 (SCA)

approach, contingencies provide the means by which to blend the scientific and the equitable. Such involved a process of subjective impression or estimation rather than objective calculation. It is not based on the strength of the evidence seeking to prove the loss. Generally, in determining the contingency, the court is required to take into account both positive and negative contingencies."[9]

33] I cannot fault the reasoning of the court *a quo*. At the end of the day, the 30% contingency applied is in favour of the appellant, especially in circumstances where it admitted the updated actuarial calculation into evidence without disputing the content, and it failed to present any other evidence of its own on this issue.

Conclusion

34] In our view, the court *a quo* did not misdirect itself and this appeal must therefore fail.

Costs

35] The respondent argued that as the appellant had employed senior counsel to argue the matter the matter was clearly of importance and it was not the ordinary merits and contingency arguments that are usually before court.

36] Given the complexities of the argument presented before us, costs on Scale C are thus justified.

[9] Shield Insurance Company Limited v Booysen 1979 (3) SA 953 (A); Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A)

A last issue

37] The court has not dealt with the application for reinstatement of the appeal brought by the appellant on 14 December 2023, which included an application for condonation for the late filing of the appellant's heads of argument. This application was not opposed and the parties agreed that it should be granted so that the merits of the appeal could be disposed of.

ORDER:

1. The application for condonation is granted and the appeal is reinstated.
2. Condonation is granted for the late filing of the appellant's heads of argument.
3. The appeal is dismissed with costs, which costs are to be taxed in accordance with Scale C.

[redacted]

S A M BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

[redacted]

B NEUKIRCHER

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

[redacted]

SK HASSIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 June 2026.

Appearances

For Appellant	:	Adv. Mashaba SC
Instructed by	:	The State Attorney, Pretoria
For Respondent	:	Adv C van Onselen
Instructed by	:	Nabane Attorneys
Date heard:	:	6 August 2025
Date of Judgment:	:	9 June 2026