



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

Not Reportable

Case no.: A139/2025

In the matter between:

MINISTER OF POLICE

**Appellant
(Defendant in court a quo)**

and

EDMUND SOYIZELA MDZINWA

**Respondent
(Plaintiff in court a quo)**

Coram: Da Silva Salie J, Thulare J and Pangarker J

Hearing date: 6 February 2026

**Additional notes: 9 February 2026 (appellant); 12 February 2026
(respondent)**

Judgment delivered: 1 September 2026

**Summary: Appeal against award for past and future loss of earnings –
*Respondent lost his eye in a shooting incident – Grounds of appeal attack the wide***

discretion of the trial court to award damages – Appellant proposes that trial court's application of 30% contingency differential should be replaced with 20% in respect of future loss of income – No misdirection committed by trial court – Appeal dismissed.

ORDER

The appeal is dismissed with costs which include the costs of the application for leave to appeal in the court *a quo*, and including costs of counsel on scale C.

JUDGMENT

PANGARKER J (DA SILVA SALIE J et THULARE J CONCURRING)

Introduction

[1] The appellant appeals, with the leave of the Supreme Court of Appeal (SCA), the order of the trial court which awarded the respondent damages for past and future loss of earnings in the sum of R1 967 425. The damages claim arose from an incident in 2011 in which the respondent was seriously injured by members of the South African Police Services (SAPS), with the result that he lost his right eye.

Amended Notice of Appeal and grounds of appeal

[2] The notice of appeal dated 3 April 2025 sought an order that the appeal be upheld and that the trial court's order be replaced with an order that the respondent's claim be dismissed with costs. Subsequently, in mid-January 2026, the appellant applied to amend its notice of appeal by deleting paragraphs 1 and 2 thereof and

replacing it with an order that paragraph 1 of the trial court's order be replaced as follows:

1. *An order upholding the appellant's appeal with costs.*
2. *An order that paragraph 1 of the order of the trial court should be replaced with the following:*
 - '1.1 *The defendant is to pay the plaintiff the sum of R31 156.92 in respect of past loss of earnings;*
 - 1.2 *In respect of future loss of income, the defendant used to pay the plaintiff an amount equal to 20% of the capitalised value of his future earnings calculated at 80% of Paterson A2 equating to R147 200 per year, from March 2024 (age 35) to March 2054 (age 65) allowing for earnings inflation until age 65 (as per the second bullet point of paragraph 6.1 of Report A).'*

[3] The application for leave to amend the notice of appeal as well as the filing of the additional volume 13A as part of the appeal record were not opposed by the respondent. The result was that the application to amend was granted at the commencement of the appeal and volume 13 A was admitted as part of the appeal record.

[4] The appeal centres solely on the trial court's quantification of damages. During the hearing, an opportunity was afforded to the appellant to formulate possible instructions to actuaries to recalculate the respondent's past loss of earnings pursuant to its arguments raised during the appeal. In this regard, counsel for the parties filed additional notes on this aspect for the court's consideration should it be minded to interfere with the quantification of damages for past and future loss of earnings.

[5] The appellant raises the following grounds of appeal:

[5.1] The trial court erred by relying on the respondent's evidence regarding his poor performance as a waiter at Grand West Casino, which did not align with the objective evidence and the court's reservations about his credibility.

[5.2] The trial court wrongly relied on the opinion of the respondent's expert, Dr Bredekamp, that the respondent suffered serious psychological sequelae.

[5.3] The trial court's assessment of the respondent's past loss of income as a full-time waiter was a misdirection.

[5.4] The evidence did not support a finding on the factual assumptions made by the trial court in respect of the respondents' past and future loss of income as a part-time DJ.

[5.5] The trial court overcompensated the respondent for future loss of income and applied an excessive contingency differential to the respondent's pre and post injured earnings which were not supported nor justified by the evidence.

Approach of appeal court

[6] An appeal lies against the order and not the court's reasons¹. In respect of the assessment of damages for loss of earnings, the Appellate Division recognised that such assessment involves inherent uncertainty.² Furthermore, in **Road Accident**

¹ Tavakoli and Another v Bantry Hills (Pty) Ltd 2019 (3) SA 163 (SCA) par [3]

² Generally, see Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 (A)

Fund v Guedes³, the SCA set out the principles applicable to an appeal court's approach to awards of damages by the trial court, as follows:

"[8] It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity (see for example President Insurance Co Ltd v Mathews). The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example Southern Insurance Association Ltd v Bailey NO. The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just (see for example the Bailey case and Van der Plaats v South African Mutual Fire and General Insurance Co Ltd. As pointed out by the learned authors Erasmus and Gauntlett with reference to a number of reported cases, the proper approach of an appeal court in appeals against awards of damages has often been set out, and the principles have been stated in different ways, some appearing to favour appellants, others respondents. Some of these principles which are of application in this matter are well summarised, again with reference to reported cases, by the learned authors in these succinct terms:

'(c) Where the amount of damages is a matter of estimation and discretion, the appeal court is generally slow to interfere with the award of the trial court – an appellate tribunal cannot simply substitute its own award for that of the trial court. However, once it has concluded that interference is justified in terms of the principles set out in (d) below, the appeal court is entitled and obliged to interfere.

³ 2006(5) SA 583 (SCA)

- (d) The appeal court will interfere with the award of the trial court:
- (i) where there has been an irregularity or misdirection (for example, the court considered irrelevant facts or ignored relevant ones; the court was too generous in making a contingency allowance; the decision was based on totally inadequate facts);
 - (ii) where the appeal court is of the opinion that no sound basis exists for the award made by the trial court;
 - (iii) where there is a substantial variation or a striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made. In order to determine whether the award is excessive or inadequate, the appeal court must make its own assessment of the damages. If upon comparison with the award made by the trial court there appears to be a "substantial variation" or a "striking disparity", the appeal court will interfere."
- (footnotes omitted)

[7] In **Bee v Road Accident Fund**⁴, the majority judgment emphasised two interrelated principles which an appeal court should observe in an appeal against an award of damages. The first is that the trial court's factual findings are presumed to be correct in the absence of demonstrable error. The onus is thus on the appellant to convince the appeal court that the trial court's factual findings were clearly wrong. The appeal court will thus only interfere in the trial court's assessment of oral evidence in exceptional circumstances⁵.

[8] Secondly, where damages are a matter of estimate, an appeal court will not interfere with the trial court's assessment unless that court committed a misdirection or there is a substantial variation between the trial court's award and what the appellate court would have awarded, or unless there is no sound basis for the award.⁶

⁴ 2018 (4) SA 366 (SCA) para [46]-[47]

⁵ Bee supra, par [46] and references; Roux v Hattingh 2012(6) SA 438 (SCA) par [12]

⁶ Bee supra, para [46]-[47]

[9] It is thus evident from the above authorities that the SCA has made it clear that room to interfere in the award of damages by a trial court is very limited. This court would first have to come to a finding that it is entitled to interfere in the damages award for past and future loss of income and in the event that it were to conclude that none of the bases or circumstances as set out above arise, then the appeal is to be dismissed.

The respondent's pre-incident circumstances

[10] When the incident occurred in September 2011, the respondent was very young and employed as a full time waitron at Grand West Casino from Mondays to Thursdays. He was regarded as one of the top performers, according to a colleague, Ms Mlotywa, and had a good rapport with customers. There was all-around positive feedback in relation to his work performance. The respondent was working in the Prive or VIP section of the Casino and he would earn between R800 to R2 500 per shift. As indicated during the trial, these sections of the Casino were frequented by the "high rollers".

[11] Prior to his employment at Grand West, the respondent worked at a call centre, but this seemed to have interfered with his dreams of becoming a DJ. He did not enjoy this work, thus further employment in a call centre was not pursued. While training as a waitron and bartender, the respondent developed an interest in becoming a DJ. At the time of the incident, he worked part-time as a regular DJ on Fridays through to Sunday nights.

[12] The evidence from his co-workers and the industrial psychologists (IPs) established that the respondent had undertaken short courses aimed at improving his marketability in the hospitality and entertainment job-market. The IPs agreed that the respondent displayed entrepreneurial qualities by working as a self-employed DJ and had used his wages earned at the Casino to purchase music and/ DJ equipment. Premorbidly, the respondent was a well-functioning individual.

The shooting incident and its consequences

[13] The respondent's evidence was that on 18 September 2011, while he was working as a DJ, members of the police (SAPS) arrived at the event and began shooting indiscriminately into the crowd. One of the police officers fired a rubber bullet at the respondent with the result that he suffered a severe injury which caused the loss of his right eye. Three months later he was fitted with an ocular prosthetic eye. One of the consequences is that the respondent has severe sunken eye appearance.

[14] The evidence was that because of the incident and an occurrence at his mother's house after the incident which involved the police, the respondent experienced a deep-seated fear of the police. He struggled to accept his altered appearance which caused him to become self-conscious and ashamed. The testimony of a fellow DJ, Mr Mkosana, was that after the shooting incident, the respondent was no longer approachable and was easily upset and irritated.

[15] The respondent would become emotional and moody, would fight with and shout at customers and took long breaks, often worrying about the discharge caused by the prosthetic eye. He would be tardy, had difficulty sleeping, arrive late at work and would spend long periods in the bathroom attending to a discharge caused by wearing of a prosthetic eye. The impact and consequences of the incident and injury had affected his self-confidence and emotional state and cumulatively, these factors affected his work performance.

[16] The evidence was that the respondent's fellow waitrons were burdened by serving more tables or more waitrons would be employed in order to fill the gap left by the respondent's under performance. His performance had declined to the point where he had become one of the poorest performers in the workplace and he was thus moved from the Prive section to working day shifts in the non-smoking Sun lounge where he served refreshments to elderly patrons and made poor tips.

[17] The respondent sought help⁷, attended medical appointments where he expressed that he was stressed and experienced headaches due to a lack of sleep and nightmares. The evidence was that the employer, Grand West, was sympathetic to the respondent's plight, tried to accommodate him and did not formally reprimand him. As for the weekend DJ job, the respondent considered that it had ruined his life.

[18] The evidence indicates that the injury and loss of his eye affected the respondent immediately and had enduring consequences for his comfort, self-esteem, ability to engage with customers tolerate a busier and rowdier crowd on the casino floor at night.

The joint minutes of the industrial psychologists (IPs)

[19] In terms of the first joint minute of the IPs of February 2020, and despite having differing views on whether the respondent would have continued with part-time DJ and movie-extra work, the experts nonetheless agreed that in respect of his permanent employment, as a waitron, the respondent would in all likelihood have advanced to supervisory level at/around the median age of 35 years⁸. They also agreed that had he remained at Grand West he would have qualified for a salary of R120 000 per annum. The IPs were *ad idem* that the salary band for supervisors falls within the semi-skilled band for non-corporate employees, specifically between the median and upper quartile earnings.

[20] In their second joint minute compiled in October 2023, the IPs agreed that pre-morbidly (uninjured earnings), the respondent's monthly income comprised of tips and basic salary, which would have been R7 600 per month in 2019, made-up as follows: R4 400 basic salary plus R3 247 tips. Ms Colley noted that this excluded corporate benefits, while Mr Swart was of the view that it included a housing subsidy. The

⁷ At the Trauma Centre, Woodstock

⁸ Ms Colley, the respondent's expert IP, and Mr Swart, the appellant's expert, could not agree on the ages that the respondent would likely have reached supervisory level. Ms Colley proposed 30 – 40 years and Mr Swart was of the view that the age of 35 was considered the median age.

respondent also qualified for Provident fund and healthcare benefits, as well as a 13th cheque.

The trial court's acceptance of the respondent's evidence

[21] The appellant is of the view that the trial court erred when it accepted the respondent's evidence regarding his work performance at Grand West as it did not align with the objective evidence and that court's reservations about his credibility. There is no mistaking the fact that the trial court's 74-page judgment is detailed and reflects a comprehensive engagement with the evidence, its assessment thereof, the parties' submissions and the reasons why the court accepted the testimony of the respondent.

[22] The trial court certainly did not shy away from criticising the respondent where such criticism was warranted. For example, the trial court found that the respondent's version was not favourable in all respects and set out in which respects it considered that he exaggerated his evidence or that his testimony was not borne out by the objective facts.

[23] It is important to note, and as correctly submitted by the respondent's counsel during the appeal, that the trial court did not find the respondent to be either untruthful or an unreliable witness. He did not strike the court as completely dishonest nor was it persuaded that all his testimony should be disregarded. The trial court found that the expert evidence plus the evidence provided by collaterals, corroborated the respondent's version that he had suffered serious psychological *sequelae* as a result of the incident but that he had failed to satisfactorily explain the 'tipping point' which caused him to resign from Grand West 8 years after the incident.

[24] While he had attended a trauma centre after the incident, the respondent had not sought professional psychological treatment nor accessed any state facilities or taken up the offer through Life Assist provided by the employer. In this regard, the trial court found that he had failed to adequately explain his approach especially where the employer accommodated him in respect of shifts and moving him to a less busy area of the Casino.

[25] The trial court was of the view that at times, the respondent tended to exaggerate certain facts in order to suit his case and that he had adopted a supine attitude after his resignation from Grand West which did not accord with the view that he was taking steps to mitigate his damages. In this regard, the trial Court, having regard to the evidence of Dr Bredekamp, was of the view that there was an element of malingering even though it was not pleaded by the appellant.

[26] In my view, the trial court reasonably and correctly held the view that the respondent had exaggerated and embellished certain parts of his testimony⁹. In addition, his professed indication that he did not wish to work with customers directly, was inconsistent with his application to work as a guest relations officer at Grand West and the City of Cape Town. The trial court also rejected the testimony that he was constructively dismissed, which was not borne out by the evidence and expert reports.

[27] There were certainly shortcomings in the respondent's testimony, which the trial court had regard to in the overall assessment of the evidence. Its finding that the incident directly affected his physical and psychological capacity to perform his waitron function at the same level as he did pre-morbidly, was correct. The respondent's testimony was in large borne out by the expert reports as well as the evidence of a colleague.

[28] The trial court weighed up and tested the respondent's version against the probabilities and found that it favoured his version. Thus, despite the questionable exaggeration on certain aspects as highlighted in the judgment, in my view, the trial court was correct not to reject the respondent's testimony in totality.

⁹ For example, that the police approached him with AK47s.

[29] It bears emphasising that in order for an appeal court to interfere with the trial court's findings which depend upon the credibility of a witness, it would have to be convinced that such findings are "*plainly wrong*"¹⁰. In this regard, one must bear in mind that the trial court had the advantage of seeing and appraising the respondent during the trial, and was clearly alive to his shortcomings, as expressed in its judgment.

[30] It is evident from the record and the judgment, that the trial court's analysis and assessment of the respondent's evidence, and its credibility findings, were correct. In the result, I find that the appellant has failed to discharge the onus of showing that the trial court's factual findings in relation to the respondent were clearly wrong¹¹.

[31] The appellant took issue that the respondent had applied to work at the police, despite the evidence that he expressed a deep-seated fear of the police. In my view, this action should be seen in the context of the respondent's psychological diagnosis post-incident and his belief that were he to work for SAPS, he would eventually overcome his fear of the police. While the respondent has been criticised, my view is that this action or decision does not taint his evidence as being largely truthful and acceptable.

The acceptance of Dr Bredekamp's testimony

[31] The appellant also takes issue with the trial court's reliance, unreservedly so in its view, on the testimony of Dr Bredekamp, counselling psychologist. The first point to make is that the trial court recognised that the appellant, which was the defendant in the action, elected not to call a psychologist as an expert to provide an opinion regarding the respondent's post-morbid psychological functioning. Thus, the testimony of Dr Bredekamp and her diagnosis of the respondent as suffering from post-traumatic stress disorder (PTSD), mild depression and adjustment disorder, was therefore not gainsaid.

¹⁰ Santam Bpk v Biddulph 2004(5) SA 586 (SCA) par [5]

¹¹ Roux v Hattingh supra, par [12]

[32] The criticism of the trial court's acceptance of Dr Bredekamp's testimony must also be seen in the light of the *dicta* in **Ad Hoc Central Authority for the Republic of SA and Another v Koch N.O. and Another**¹², where the acceptance of an expert's testimony came under the spotlight, as follows:

"[110] As stated, Ms Pettigrew's evidence stands uncontroverted. That does not mean that it must simply be adopted. As in the case of any expert opinion evidence, it remains the task of a court to examine the evidence in order to determine whether it should be accepted. Whilst the court would not subject an uncontroverted expert report to the same kind of scrutiny as when evaluating a contested report, the opinion must be reasoned and be supported by the evidence on which it is based. If the unchallenged opinion is on the face of it based on sound logical reasoning, the expert has reached a defensible position supported by the basic facts and the probabilities, and there is no other reason not to accept the evidence, "... it is difficult to envisage a situation in which it would be appropriate to decide that it is wrong"."

(footnotes omitted)

[33] It is apparent from the above paragraph in **Koch NO**, that the Constitutional Court was clear that in respect of expert opinion evidence, it was the court's task to examine the evidence to determine whether it should be accepted or not. Dr Bredekamp's report was not contested nor was an alternative opinion provided by the appellant. It must also be remembered that at the time she testified, Dr Bredekamp already had 30 years' experience in the psychology field and her mandate was to provide a self-report analysis, which she duly fulfilled.

[34] Dr Bredekamp confirmed that she had not tested the respondent for malingering but the evidence and her report indicate that she had consultations with the respondent and observed him. In respect of her observations, her expert opinion was

¹² 2024 (3) SA 249 (CC). It is noted that paragraph [110] is part of the dissenting judgment. However, on reading the entire judgment, it is apparent that the general approach to an expert witness's testimony is not disputed in the majority judgment.

that there was no evidence to show that there was malingering. She had assessed the respondent twice and found that he was not feigning any mental disorders nor purposefully exaggerating any symptoms.

[35] Furthermore, her expert view that the respondent's psychological symptoms would render him vulnerable in the work environment, was also not challenged. She recognized that he would require psychiatric intervention, psychotherapy, career counselling and a new career to suit his disability, personality and interest.

[36] As with the respondent's testimony, the judgment of the trial court assessed Dr Bredekamp's oral testimony, report and thus her expert opinion. A psychologist provides an opinion based on observations of human behaviour and *"in response to a certain set of circumstances, which as a matter of logic must have an inherent uncertainty to it"*¹³. Dr Bredekamp was qualified and experienced to treat a mental health disorder, to diagnose the respondent and to furnish her professional opinion on the psychological disorders which he suffered as a result of the traumatic shooting incident and loss of his eye.

[37] Another significant point is that when considering the record and the reports, it is apparent that what the respondent had reported to Dr Bredekamp was consistent, on the whole, with what he had reported to the two industrial psychologists. Furthermore, his sister and fellow work collaterals also corroborated that he was suffering from significant psychological and behavioural problems after the incident and because of the self-consciousness, low self-esteem and pre-occupations with having to wear a prosthetic eye.

[38] Dr Bredekamp administered standard psychological tests and the respondent was required to complete a self-reporting questionnaire, which he did. Her testimony that he provided a true account of his psychological issues and was not over exaggerating his symptoms, was not countered during the trial, even in circumstances where a test for malingering had not occurred. In those circumstances, it is indeed

¹³ Koch NO supra, par [111]

questionable, as the respondent's counsel submits, as to the motivation and need to conduct a test for malingering.

[39] Furthermore, Dr Bredekamp diagnosed the respondent's psychological disorders based on the diagnostic criteria contained in the Diagnostic and Statistical Manual of Mental Disorders¹⁴. In respect of a cognitive impairment test, it was accepted that the psychologist was not performing a neuropsychological assessment on a person with a traumatic brain injury. The respondent's diminished cognitive function was a result of psychological symptoms.

[40] In my view, the trial court cannot be faulted on its approach and assessment of Dr Bredekamp's testimony. The judgment reflects a thorough consideration of the expert evidence, a clear indication that it was not considered in isolation, the psychologist's observations and the fact that a test for malingering was not done separately. The trial court also considered the testimony of the respondent's sister and co-worker, which in summary, sketched a picture of the marked decline in the psychological functioning of the respondent after the shooting incident, which was by all accounts, generally consistent with the doctor's diagnosis. Considered holistically, these factors and assessment, militated against a potential conclusion that the respondent's resignation and failure to obtain new employment could solely be contributed to malingering.

[41] In the circumstances, I thus agree with the respondent's submission that the trial court's finding insofar as Dr Bredekamp was concerned, was based on that court's view that the expert's opinion was based on sound logical reasoning, supported by material facts, probabilities and collateral evidence. There was no sound reason why the court should have rejected Dr Bredekamp's evidence and the submission that the trial court accepted Dr Bredekamp's opinion unreservedly, is certainly incorrect. To conclude this ground of appeal, in my view, the trial court committed no error when it accepted Dr Bredekamp's testimony.

¹⁴ See respondent's heads of argument

Past loss of income from full-time employment

[42] The appellant did not call an actuary nor was issue taken with the actuarial reports presented by the respondent. Munro Forensic Actuaries were requested to provide two further reports to recalculate the respondent's loss of income. There is nothing problematic about the trial court's request in this regard¹⁵.

[43] The trial court set out the basis upon which the updated actuarial reports were prepared and the adjustments to the respondent's future injured income¹⁶. The actuary was instructed to apply a contingency deduction of 7.5% on past uninjured income from the date of the incident to date of the updated calculation, based on Koch's sliding scale of 0.5% contingency deduction per year¹⁷.

[44] The judgment considered the actuarial reports and the three scenarios postulated therein in respect of the respondent's full-time employment. The trial court found the most realistic and fair scenario to be scenario 3. It did not agree with the respondent's proposed contingency deduction of 7.5% on past uninjured income but was of the view that a 15% contingency deduction was more appropriate. Overall, the increase in the contingency deduction took account of the fact that the respondent's cash tips would have been variable, and this reasoning cannot be criticised.

[45] The trial court applied various assumptions. For instance: (i) for the period 17 September 2011 to 1 May 2024, the respondent's injured income was based on the assumptions that he earned a level basic monthly salary from the date of incident until his resignation; (ii) from the date of incident until resignation in December 2019, the respondent earned less tips per month compared to the monthly tips which he would have earned in the uninjured scenario; (iii) there was a total loss of income from January to March 2020 due to his resignation and having remained unemployed until the end of March 2020; (iv) there was no claimable loss of income for the period April 2020 to end December 2020 due to COVID; and, (v) there would be a further total

¹⁵ See, for example, *Southern Insurance Association Ltd v Bailey* NO1984(1) SA 98 (A) p99

¹⁶ Judgment para 237-238

¹⁷ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) par [9]

loss of income from the beginning of January 2021 until 1 May 2024 which was the date of actuarial calculation.

[46] The appellant takes issue with the assumptions which the trial court relied upon to arrive at a contingency deduction. It must be stated that the respondent's uninjured basic salary of R4 400 per month was based on an agreement which the IPs had reached in the joint second minute. In this regard, the majority in *Bee*¹⁸ made it clear that experts' joint minutes limit the issues on which evidence is required and absent fair notice of repudiation of such minutes, the other party is entitled to proceed on the basis that those matters agreed between the experts, are not in issue between them. There was no repudiation of the joint minutes, and the court was entitled to accept the amounts as per the minutes to calculate the respondent's uninjured monthly salary as a waitron.

[47] The appellant accepted that but for the incident occurring, the respondent would have earned a basic salary of R4 400 per month plus tips of R3 247 per month. According to the actuarial report, the monthly salary of the respondent as a waitron after the incident was R2 973 per month. This amount was derived from the payslips for the period 2016 to 2019 with an inflation adjustment.

[48] The trial court correctly assumed the basic monthly salary of R2 973 per month in the injured scenario as it was based on the respondent's actual post-incident salary. On the question of cash tips earned after the incident, the trial court accepted that the amount would have reduced particularly as the respondent was moved from the Prive or Premium area of the Casino to the Sun lounge, and working day shifts would have impacted on his earnings.

[49] The trial court was also correct to rely on the assumption in the actuarial report¹⁹ that but for the incident, the respondent would have earned cash tips of R3 247 per month, and after the incident, he earned tips of R246 per month²⁰. On the question of

¹⁸ Supra, par [66]

¹⁹ 8 April 2024 report

²⁰ Average per month based on pay slips from 2016-2019

his resignation, the trial court recognised that the respondent was not coping at work and under-performing, and that the employer was accommodating him.

[50] The submission by the respondent's counsel that by resigning in 2019, the respondent attempted to mitigate his damages, rather than inflate it (in which case, he most probably would have resigned earlier), has merit. Having regard to the matter, in my view there was no error in the facts and assumptions relied on by the trial court which would call for a recalculation of the respondent's past loss of income from full-time employment.

Respondent's loss of earnings as a DJ

[51] The appellant's further ground of appeal is that the trial court misapplied the principles related to the respondent's decision to stop working part-time as a DJ and questions its calculation of loss of earnings under this stream of income. It is common cause that being a DJ was part-time work and a secondary source of income at the time the incident occurred. The trial court found²¹ that the respondent's decision to cease work as a DJ after the incident was reasonable and understandable.

[52] The appellant submits that there was no cogent evidence that the respondent's psychological functioning was impacted to such an extent that he could no longer perform as a DJ and that his version that he struggled with crowds and had difficulty with his self-awareness was contradicted by the fact that he had sought work as an extra in adverts, which would involve crowd scenes. Furthermore, he had indicated to Ms Colley that he had still worked as a DJ in 2019. It is further submitted on the appellant's behalf that the respondent failed to prove that his injury rendered him incapable of performing as a DJ and hence, he failed to prove damages in respect of loss of income from this secondary source.

²¹ Judgment, par 193

[53] The first point to make is that the appellant does not take issue with the method of calculation adopted by the trial court in respect of the loss of income as a part-time DJ. A contingency deduction of 20% was applied to the respondent's past uninjured income, and a 35% contingency deduction to his future uninjured income as a DJ. The trial court's rationale was that the latter was a higher contingency deduction as these earnings were more speculative than the respondent's full-time earnings as a waitron. Furthermore, there was no guarantee that he would have continued to work every weekend as a DJ until he reached the age of 40.

[54] The appellant contends that the loss of his eye and vision would not have prevented the respondent from working part time as a DJ. The difficulty with the appellant's argument, however, is that it ignores the evidence from other witnesses and Dr Bredekamp that after the incident, the respondent became self-conscious; he had difficulty with his appearance and his sunken eye; he did not like people looking at him; he was preoccupied with his looks, and that his psychological functioning was impacted to such an extent that he could not perform any longer as a DJ.

[55] Clearly, the impression gained from the evidence presented during the trial is that as time passed, it became more difficult for the respondent to cope in certain environments, including loud and busy areas, and that the DJ job was a reminder of the traumatic incident and how, according to the respondent, his life was ruined by the shooting incident.

[56] The post-traumatic stress disorder had impacted on him in the workplace and significantly, a fact that cannot be downplayed, it was while operating as a DJ in 2011, that the police attack occurred which rendered him injured to the extent that he lost his right eye *in toto*. The evidence that performance as a DJ reminded him of the incident, cannot be ignored. Dr Bredekamp's view that his psychological function was severely diminished by the incident was, as mentioned above, not gainsaid.

[57] The trial court clearly took account of the evidence that post-incident, he was moody, lost self-confidence, was angry, suffered from an inferiority complex, had

difficulty in his personal relationship, and suffered from anxiety and fear. All these behavioural changes would not fit the picture of a DJ who is required to be energetic, entertaining and engaging with crowds. In my view, the appellant's IP could not offer an alternative view as to why the respondent had ceased performing as a DJ.

[58] The trial court was alive to the significance of the severity of the incident and injury and its sequelae which had far reaching consequences and effect on the respondent who was very young at the time. In my view, the trial court correctly found, after considering all the evidence, that the psychological effects of the loss of his eye were ongoing and had rendered the respondent incapable of performing as a DJ. The trial court's calculation of this stream of income is not erroneous, and I am satisfied that the respondent had indeed proved his damages during the trial.

Contingency differential applied to future loss of earnings

[59] The trial court found that the respondent's future loss of income from full-time employment was calculated by using differential contingencies. In this regard, the trial court had regard to the actuarial report A²². The respondent's postulated future pre-morbid earnings of R3 330 700²³ was accepted and used as the base figure in the pre- and post-morbid scenario, then applying differential contingencies of 15% and 45%²⁴ in the uninjured and injured scenarios which resulted in a 30% contingency differential. This amounted to a net future loss of earning capacity/earnings from full-time employment of R999 210²⁵.

[60] The appellant agrees that the trial court's overarching methodology of determining the loss of future income and application of a differential contingency to

²² Volume 13A, p1312.35

²³ Report A, par 6.5

²⁴ In respect of the future uninjured income, the trial court applied a 45% contingency deduction based on a sliding scale of 1.5% per year to retirement 30 years x 1.5% per year% = 45%

²⁵ Future uninjured income: R3 330 700 – 15% contingency deduction = R 2831 095

Future injured income: R3 330 700 – 45% contingency deduction = R1 831 885

30% contingency differential – future loss of earning capacity = R999 210

Judgment, par 242

the same assumed future income stream was in line with established authority as well as the approach of the IPs. The appeal, however, is directed at the contingency differential of 30% which the court applied and which it says was not justified.

[61] The appellant maintains that the psychological sequelae pursuant to the injury sustained in the incident, is questioned/questionable. This aspect, which overlaps with the ground that the trial court accepted Dr Bredekamp's testimony unreservedly, has already been considered and as stated, the trial court did not misdirect itself when it accepted Dr Bredekamp's diagnosis.

[62] It is trite that general contingencies encompass a wide range of considerations which differ from case to case²⁶. As is evident from the authorities referred to at the outset of the judgment, contingency deductions lie within the discretion of the trial court and also depends upon the judge's impression of the case. The judge's assessment is grounded on the assumptions rooted in the evidence before it. These assumptions would vary from "*strongly probable to speculative*"²⁷. Ultimately, the trial court has a wide discretion to award what it considers right²⁸.

[63] During the trial it was submitted on behalf of the appellant that it would be fair if the trial court applied a 25% contingency differential to calculate the respondent's future loss of income. On appeal, however, the argument is that a 20% contingency differential would be in line with Mr Swart's expert opinion that a slightly higher than normal post-injury contingency should be applied.

[64] In **Road Accident Fund v Kerridge**²⁹, referring to Koch's *The Quantum Yearbook*, the SCA stated that a 5% to 15% contingency is generally a normal contingency for past and future loss of earnings, respectively. The trial court evaluated the evidence, considered the actuarial calculations provided by the actuaries, the variables and assumptions applicable to the matter and was of the view that a higher

²⁶ The Quantum Yearbook RJ Koch (2017) at p126

²⁷ Bailey NO supra, 113G-H

²⁸ Legal Assurance Co Ltd v Botes 1963 (1) SA 608 (A) at 614F

²⁹ 2019 (2) SA 233 (SCA) par [30]

contingency differential would be fair and reasonable in light of the respondent's employment history, his age and the uncertainties inherent in the projection of future earnings.

[65] While much is made of the fact that the respondent continued working for a period of about 8 years after the incident before he resigned from Grand West, this fact does not impact on his post-incident vulnerability. He was accommodated at work but the evidence supports a view that there were declining performance, tardiness and lateness.

[66] The trial court's assumptions regarding the respondent's career advancement were not speculative but thoroughly deliberated and due regard was given to all the views presented in the trial, and the actuarial calculations. In all the circumstances, I am satisfied that the 30% contingency differential applied in the specific circumstances of the respondent did not fall outside the range of what is fair and reasonable. I agree with the respondent's counsel that the trial court considered the matter holistically.

[67] The criticism that the trial court did not explain how it arrived at a 30% contingency differential is unjustified as the judgment sets out its reasoning for the application of the contingency differential and its calculation of damages for past and future loss of earnings/income in respect of full-time and part-time DJ employment³⁰. The trial court had a wide discretion when it assessed the claim for loss of earning capacity and I am satisfied that the discretion was exercised fairly and reasonably³¹.

[68] This court is not inclined to interfere with the trial court's award where the difference suggested by the appellant in respect of the contingencies percentage may be 5% or 10%. Furthermore, none of the factors or circumstances mentioned in **Guedes and Bee**³² (as referred to earlier in the judgment) which would warrant an

³⁰ Judgment, p71-73

³¹ Guedes supra, par [8]

³² Supra

interference in the trial court's award, present itself in this appeal. Accordingly, I find that there is thus no room to interfere with the trial court's exercise of its discretion.

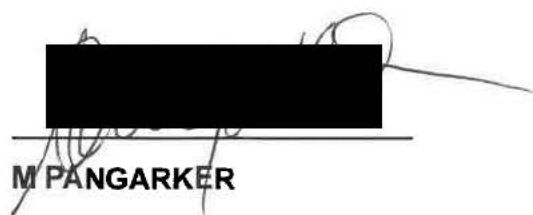
Costs

[69] The appeal initially sought a dismissal of the respondent's claim and as indicated, the grounds of appeal were amended. A further calculation was suggested during the appeal and this meant that the parties were afforded an opportunity to provide a further note on the newly suggested actuarial calculation by the appellant. In view of the above findings, the appeal shall be dismissed and there would be no need to consider alternative actuarial calculations. Lastly, costs shall include costs of the leave to appeal application with counsels' fees on scale C.

Order

[70] In the result, I would grant the following order:

The appeal is dismissed with costs which shall include the costs of the application for leave to appeal in the court *a quo*, and including costs of counsel on scale C.

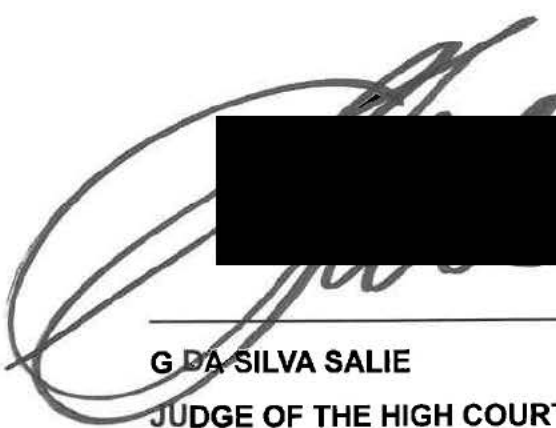


M PANGARKER
JUDGE OF HIGH COURT

I agree.


D THULARE
JUDGE OF THE HIGH COURT

I agree and it is so ordered.



G DA SILVA SALIE
JUDGE OF THE HIGH COURT

Appearances:

For appellant: BDJ Gassner SC
Instructed by: State Attorney
Cape Town
Per: S Shaik

For respondent: WS Coughlan
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