REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 89111/2015

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

DATE: 08/11/2023

In the matter between:

TIYANI THEODORE MABOYA Plaintiff

And

THE MINISTER OF POLICE Defendant

JUDGMENT

NICHOLS AJ

Introduction

[1] The plaintiff, Mr Tiyani Theodore Maboya, suffered damages on 15 October 2013 when he was unlawfully shot by a member of the South African Police Services. A claim ensued against the Minister of Police (the Minister) and action was instituted in the above matter.

[2] The merits of the action have been resolved. The Minister conceded 100% (one hundred percent) liability in the plaintiff's favour as reflected in the court order for 27 August

2020.

[3] The parties agreed and resolved the plaintiff's future medical expenses in the total amount of R1 321 332 (one million three hundred and twenty-one thousand three hundred and thirty-two rand), subject to the application of contingencies to be determined by this Court.

[4] The parties agreed on an interim payment in the amount of R492 299.60 (four hundred and ninety-two thousand two hundred and ninety-nine rand and sixty cents) which was made an order of court on 7 June 2022.

[5] The plaintiff seeks judgment against the Minister in the amended cumulative amount of 25 million rand as a result of the injuries he sustained.

[6] The plaintiff delivered the expert reports of the following expert witnesses pursuant to the provisions of rule 36(9)(a) and (b):

(a) Dr Brian Van Onselen - Opthalmologist
(b) Dr M Vorster – Forensic Psychiatrist
(c)KE Radzilani – Educational Psychologist
(d) S Sebapu – Occupational Therapist
(e) G Sibiya – Clinical Psychologist
(f) Dr Thendo Netshiongolwe – Plastic Surgeon
(g) T Ntsieni – Industrial Psychologist
(h) Dr D Chula – Neurosurgeon
(i) Loi Loi Consulting – Actuary

[7] The Minister delivered the expert reports of the following expert witnesses pursuant to the provisions of rule 36(9)(a) and (b):

(a) Dr KJP Lubuya - Opthalmologist
(b) Dr GM Prag – Educational Psychologist
(c)L Marais – Industrial Psychologist
(d) P Radzuma – Occupational Therapist
(e) M Nagel – Clinical Psychologist
(f) Dr Melapi – Forensic Psychiatrist
(g) Manala Actuaries – Actuary

[8] Apart from the neurosurgeon and plastic surgeon, the parties' expert witnesses prepared and filed joint minutes with their counterparts setting out the issues on which they agreed and could not reach agreement upon. The Minister conceded the expert report and opinion by the neurosurgeon, Dr Chula. The parties conceded all experts witnesses as being qualified as experts in their respective fields of expertise.

[9] It is common cause that the plaintiff was born on 30 November 1988 and was 24 years old when the shooting incident occurred. His last year of schooling was in 2008 when he failed matric. At that stage he was 20 years old. The parties' ophthalmologists' have agreed in their joint minute that the plaintiff suffered the following injuries consequent upon being shot:

a) the plaintiff's right eye was enucleated and it is permanently blind;
b) Best corrected visual acuity in the left eye is 6/6 (100%);
c) he has reached maximum medical improvement (MMI);
d) His whole person impairment (WPI) is 16%; and
e) He will need yearly expenses to see to the health of his eye socket and prosthesis.

The issues

[10] The issues which require determination are the quantum of the plaintiff's claim for past and future loss of earnings / earning capacity, general damages and the contingency deduction applicable thereto.

The evidence

[11] The plaintiff gave evidence and led the evidence of his clinical psychologist, educational psychologist, occupational therapist and industrial psychologist in support of his contentions regarding the quantification of his claim. The Minister led the evidence of the clinical psychologist, educational psychologist, occupational therapist, and industrial psychologist on issues that were not agreed upon in the joint minute filed by these experts with their counterparts.

The plaintiff's evidence

[12] It is generally accepted that the usual practice is for expert witnesses to be called after

witnesses of fact, where they express opinions on facts dealt with by such witnesses.[1] In this matter the plaintiff's evidence was adduced after the evidence of Ms Sibiya, the clinical psychologist, Ms Radzilani, the educational psychologist and Ms Sebapu, the occupational therapist had been adduced. The industrial psychologist, Ms Ntsieni, was the only expert witness whose evidence was led after that of the plaintiff.[2]

[13] The plaintiff testified that the primary reason for his evidence was to establish the attempts made to obtain his code 14 driver's licence, to drive a horse and trailer. A code 14 driver's licence is the highest licence for the biggest vehicle. He wanted this licence to fulfil his dream to have a code 14 driver's licence and to drive Sasol fuel trucks.

[14] The plaintiff confirmed that he suffered injuries during a shooting incident which occurred on 15 October 2013, when his right eye was struck by a rubber bullet fired by the police. He was taken to hospital for treatment and his right eye was totally removed as a result of the injury to it. He testified that he failed and repeated grades 2, 4 and 7 and he failed his matric.

[15] He testified that he applied for his learner's licence and then paid for driving lessons. After his training, his instructor informed him that he could book a date to write the final driver's licence test. Although he initially testified that he did not recall the date obtained, he later testified that this date was allocated in October 2013 after 15 October 2013. By the time he was discharged from hospital after the shooting incident, his date had expired. Notably, he informed Ms Sebapu, the occupational therapist appointed on his behalf, that the date obtained for his final driver's licence test was in November 2013.

[16] He was informed that he could no longer obtain a code 14 driver's licence because he lost an eye. Going forward, he only qualified for a code 08 driver's licence with this disability. He then abandoned his attempts to obtain a code 14 driver's licence and threw away his learner's licence.

[17] He testified that he has never held a code 08 learners or driver's licence, notwithstanding his contradictory reports to both industrial psychologists. He testified that he started the process to obtain his code 14 learner's licence in August 2013. He attended Sheila's driving school for his code 14 driving lessons for about a month. He was taught how to drive a truck and informed by his driving instructor that he was competent to write the final test.

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[1] PriceWaterhouseCoopers Inc & others v National Potato Co-operative Ltd & another (451/12) [2015] ZASCA.
[2] 2 para 80.

[18] Under cross-examination, the plaintiff was asked to clarify the discrepancies in his reported employment history as recorded by the industrial psychologist, Mr Marais in his expert report. He confirmed that he was unemployed for approximately three to four years between 2008 / 2009 and 2012. He confirmed that he was employed between 2012 to 2015 by Carlton Spares as an assistant mechanic. He confirmed that between 2012 and 2015, he owned a car wash business. This employment history remains contradictory to the reports provided to other expert witnesses.

[19] He testified that Sheila's driving school still exists. He did not go there to obtain proof of his driving lessons in 2013 although he accepted that such information would provide crucial collaboration of his version. He testified that he did not do so because it was too traumatic for him and in any event, he did not think that they still had such information available now. In response to a clarifying question by this Court, the plaintiff testified that he could not recall whether he mentioned the name of the driving school to any of the experts that assessed him.

[20] He conceded that he referred to his code 14 licence to several of the expert witnesses and that he had not provided proof to support this to any of them. He testified that he would have sought to obtain such collateral information if he had been told to do so. He disputed that any of the experts asked him to provide such proof.

[21] In contradiction to his evidence in chief, he testified that he failed and repeated grades 2, 5 and 7 and he failed matric. This evidence also contradicted the reports made to both educational psychologists. He maintained, however that he would have able to obtain an NQF level 5 qualification before the shooting incident. He disputed the contentions that his highest pre-morbid level of qualification would have been an NQF level 4 qualification.

[22] He confirmed that he was 19 years old turning 20 years when he was in matric. He was unemployed after matric and did not attempt to repeat his matric. For five years between 2008 and 2013, he sought 'piece' jobs within the informal sector. He conceded that he did not intend to study further pre-morbidly, as evidenced on his version of his employment history. He also conceded that he was working in the informal sector when the shooting incident occurred in October 2013.

[23] He testified that he closed his car wash business because the water and soap was an irritant for his eye that caused him headaches. The proposition was put to the plaintiff that the

reason then recorded by the industrial psychologist, Ms Ntsieni, was clearly incorrect where she reported that he closed this business to pursue a plumbing certificate. The plaintiff's response was that the headaches caused by the soapy water caused him to close this business and he decided to then pursue the plumbing certificate. He conceded that this reason contradicted that reported by Ms Ntsieni.

[24] He confirmed that he resumed his car wash business after the shooting incident, but he could not recall when he closed this business. He estimated that it would have been during the latter part of 2014. He testified that he had employees working for him and he confirmed that he did not continue with the car wash business for too long after the shooting incident. He obtained employment elsewhere before he commenced with the plumbing certificate. His evidence regarding the closure of his car wash business contradicted the reports by the occupational therapists.

[25] He testified that he did not pursue the plumbing certificate immediately after closing his car wash business because he had to consult with his mother and provide her with quotes as she was financing the course for him.

[26] In re-examination, the plaintiff's certificate for his plumbing course was handed in as an exhibit and marked G1 to G3. He confirmed that these exhibits reflect that he completed a course and two training phases over the period February 2015 to January 2016. He confirmed that it was his intention to pursue the plumbing certificate when he closed his car wash business towards the end of 2014.

[27] In response to clarifying questions by this Court, the plaintiff testified that he provided the details of his car wash business to the industrial psychologists. He informed them of the number of people he employed, their names, the amount he earned, the amounts he paid his employees and how the soapy water affected his eyes. He did not provide them information regarding where he sourced and purchased the products that were used at the car wash.

The expert witnesses

[28] The SCA in *Bee v Road Accident Fund*[2] held that:

> '*The joint report of experts is a document which encapsulates the opinions of the experts and it does not lose the characteristic of expert opinion. The joint report must therefore*

be treated as expert opinion. The fact that it is signed by two or more experts does not alter its characteristic of expert opinion. The principles applicable to expert evidence or reports are also applicable to a joint report. The joint report before the court is consequently part of evidential material which the court must consider in order to arrive at a just decision.'

The Clinical Psychologists

[29] The joint minute filed by the clinical psychologists reflects their relevant points of agreement. It reflects very little substantive disagreement between these experts. They agreed that the plaintiff has been rendered psychologically vulnerable as a result of the injuries sustained from the shooting incident and its sequelae. They agreed that he had no significant issues pre-morbidly which affected their assessment and findings and that his highest level of education was grade 11.

[30] They agreed that post-morbidly the plaintiff presented with significant symptoms of Major Depressive Disorder (MDD) and symptoms of Post-Traumatic Stress Disorder (PTSD). He suffered a loss in his self-esteem. The plaintiff's recreational and interpersonal functioning has been negatively affected with concomitant sequelae, such as his increased irritability, anxiety and depressed mood and symptoms. He has been rendered psychologically more vulnerable because of the injury sustained from the shooting incident and its sequelae.

[31] The plaintiff's cognitive functioning has been adversely affected, however psychological difficulties and the plaintiff's pre-morbid intellectual functioning likely contributed to the demonstrated cognitive fallouts. The plaintiff's physical and psychological difficulties have contributed to a diminished quality and enjoyment of life and his occupational functioning has been negatively impacted. The plaintiff would benefit from psychotherapy.

[32] Ms G Sibiya, the clinical psychologist appointed on behalf of the plaintiff, confirmed that she prepared an expert report following her assessment of the plaintiff on 11 September 2020. She confirmed the contents of her expert report and the joint minute concluded with her counterpart on 30 March 2022.

[33] The following are the salient aspects arising from Ms Sibiya's expert report, the joint minute and her testimony. Ms Sibiya confirmed the consensus that post-morbidly, the plaintiff presented with significant symptoms of MDD and PTSD. She explained that a person

like the plaintiff would find that their functioning has been negatively impacted. This functioning includes interpersonal relationships such as with family and work colleagues. People in the position of the plaintiff will tend to isolate themselves socially and in fact the plaintiff reported his social isolation. This in turn impacts and affects their further personal and professional development.

[34] Ms Sibiya referred to the plaintiff's report of feelings of hopelessness and his bleak view for the future and loss of interest in his future. She testified that the plaintiff indicated that he had hopes of becoming a truck driver but could no longer achieve that dream because of his eye. He expressed anger at this. Her clinical assessment and findings were that the plaintiff presented with moderate symptoms of depression.

[35] The assessment indicated that the plaintiff experienced some level of cognitive decline since his performance was not conclusive with his pre-morbid functioning. She opined that this was a direct result of the injury reported which was also exacerbated by the plaintiff's symptoms of MDD and PTSD. She opined that research suggests that PTSD symptoms are also associated with cognitive decline.

[36] She further opined that the plaintiff's overall quality of life has been significantly disrupted by his injury. The injury will continue to impact his functioning across all domains, including, *inter alia,* his cognitive abilities and interpersonal relationships. When his symptoms exacerbate his relationships will change and his enjoyment and quality of life will decline. She confirmed her opinion that the plaintiff is likely to develop mental health and self-esteem problems and he will therefore require psychotherapy going forward.

[37] Ms Sibiya testified that the plaintiff's psychological problems and difficulties are permanent. The psychological trauma that he suffered does not go away. In the future, if he is triggered by anything then he will be impacted. To be gainfully employed, the plaintiff requires the correct therapy and commitment. He's psychological problems may play an important factor with any future inability to retain employment. Should he be triggered at his workplace then the chances of being retained are minimal.

[38] Under cross-examination, Ms Sibiya confirmed that there was no real disagreement between the clinical psychologists on the joint minute. She confirmed that the purpose of prescribing future treatment was for the plaintiff to manage himself and his symptoms going forward in order to address his identified challenges. She also confirmed that an identified outcome of such treatment would be for him to cope with his trauma.

[39] She maintained, however that treatment would not necessarily address the plaintiff's challenges and she opined that the plaintiff may meet the diagnostic criteria for MDD in the future. She did concede that with therapy, the plaintiff might secure employment.

[40] Ms E Nagel, the clinical psychologist appointed by the Minister, confirmed her report dated 11 November 2021 following on from assessment of the plaintiff on 19 February 2021. She also confirmed the contents of her expert report and the joint minute concluded with her counterpart on 30 March 2022.

[41] The following are the salient aspects arising from Ms Nagel's expert report, the joint minute and her testimony. Ms Nagel testified that neurocognitive assessment indicated that although his language domain was intact, the plaintiff suffered fallouts in other domains like attention and concentration. She considered such fallouts as inconsistent in a healthy brain especially since the plaintiff did not report a loss of consciousness nor post traumatic amnesia and he was independent and capable.

[42] She opined that the plaintiff's neurocognitive deficits were largely pre-morbid. This opinion was supported by the fact that the plaintiff reported his highest level of education as grade 11 with three failed grades during his time at school and his self-report regarding his academic challenges. She explained that the plaintiff's previous scholastic history is a reflection of his pre-morbid cognitive functioning. She testified that the plaintiff's failure to achieve academically, did not mean that he could not function independently.

[43] Her opinion was further fortified by the educational psychologist's findings on his pre-morbid below average performance and the forensic psychiatrist's findings which indicated no impairment in the plaintiff's cognitive functioning. She opined further however, that the traumatic nature of the shooting incident rendered the plaintiff physically and psychologically vulnerable and such vulnerability could not be ruled out as exacerbating an already compromised neurocognitive functioning. She explained that when a person's suffers psychological difficulties like PTSD caused by an incident, this will tap onto existing cognitive issues and exacerbate his sequelae.

[44] She opined that the plaintiff's physical disfigurement adversely affects his subjective self-perception and mood. He had been self-medicating, drinking more and using cannabis and this in turn adversely affects his quality of life. The plaintiff reported that his alcohol intake had increased post-morbidly to drinking six to seven quarts of beer daily. He has been

smoking cigarettes since high school and reported to have been using cannabis since grade 10 although he stopped using it in 2019 since he felt that it worsened his memory problems. She testified that the quantity and quality of cannabis used affected the neurocognitive problems of people differently. It affected a person's mood and could make them vulnerable to psychosis. She testified that the plaintiff would benefit from psychotherapy for symptom resolution and that he would require psychiatric intervention as well.

[45] Under cross- examination, Ms Nagel agreed that the negative impact of the shooting incident related sequelae on the plaintiff's recreational and interpersonal functioning was significant. She opined that his suffering in loss of self-esteem could be measured as moderate because he still maintained his independence. She agreed that this was not insignificant.

[46] She opined that the plaintiff's diminished quality and enjoyment of life could be measured as moderate. For his future employability, she deferred to the expert opinion of the industrial psychologists and occupational therapists but opined that he would nevertheless experience limitations and would benefit from psychotherapy to function in the work environment.

[47] Ms Nagel agreed that the negative impact on the plaintiff's occupational functioning was not insignificant. However, should he fail to seek treatment for his PTSD and MDD, this would impact his interactions in a work environment.

[48] She testified that her impression on the plaintiff's reports regarding his history of alcohol consumption was that it was a form of self-medication. He lacked insight and it was likely a coping mechanism considering the incremental use. She noted that the plaintiff was 32 years old at the time of her assessment and he was 24 years old when the shooting incident occurred. She did not consider his reported pre-morbid alcohol consumption to be concerning.

[49] She testified that 'but for the incident', the plaintiff's pre-morbid alcohol and cannabis use was not uncommon. The plaintiff's report did not indicate that it was a problem for him or that he was functionally impaired. She further testified that the plaintiff did not present as having a genetic predisposition to psychosis or as falling into the category of people for whom cannabis use would present adverse effects.

The educational psychologists

[50] The joint minute delivered by the educational psychologists reflects their relevant points of agreement. The minute records that they had differing documentation at their disposal when they assessed the plaintiff and prepared their respective reports. It also records that neither expert had been provided with the plaintiff's scholastic / academic record when they prepared the joint minute.

[51] The joint minute notes that at the time of the shooting incident, the plaintiff owned a car wash business and he was a part time mechanic. It records that Ms Radzilani assessed and estimated the plaintiff's intellectual potential to fall within the borderline range – low average. Dr Prag, on the same assessment tools, estimated his intellectual potential to fall within the average range.

[52] They agreed that available reported information suggests a normal birth and milestone, speech and language development. The available information and the plaintiff's academic history suggests that pre-morbidly, the plaintiff presented with learning difficulties as he repeated three grades (4,9 and 12) but was able to successfully complete grade 11. A grade 11 level of education would qualify the plaintiff for admission to National Certificate (Vocational) (NCV 4) at an FET College which is equivalent to an NQF level 4 qualification.

[53] The joint minute notes that the plaintiff would benefit from psychotherapy and consultations with a psychiatrist to address his suicide ideation, anger regarding the shooting incident, his alcoholism challenges and low self-esteem.

[54] Post-morbidly, they agreed that the plaintiff's reported complaints likely exacerbated his learning difficulties. They postulated that he may obtain a NQF level 4 qualification (grade 12 equivalent) and access opportunities in entry-level employment.

[55] Ms K Radzilani, the educational psychologist appointed on behalf of the plaintiff, confirmed that she prepared an expert report following assessment of the plaintiff on 12 September 2020. She confirmed the contents of her expert report and the joint minute dated 24 May 2022 concluded with her counterpart.

[56] The following are the salient aspects arising from her expert report, the joint minute and her testimony. She testified that the nub of the disagreement in the joint minute, related to the plaintiff's pre-morbid functioning. In this regard, she opined, notwithstanding his learning difficulties, pre-morbidly the plaintiff could have completed his NQF level 4 and NQF level 5

qualifications. The plaintiff reported to her that he failed and repeated grades 2 and 10 and he failed grade 12.

[57] She testified that the basic requirement to pursue an NQF level 5 qualification is grade 9 and it was common cause that the plaintiff completed his grade 11. He had no reported problems at birth or with his developmental milestones. His family history also played a vital role and this indicated that members of his family had degrees and diplomas. She therefore opined that the plaintiff had the necessary pre-morbid potential to obtain an NQF level 5 qualification.

[58] Her counterpart disagreed with her opinion because the plaintiff did not provide any collateral documents to support this conclusion. Her counterpart required a review of the plaintiff's scholastic / academic record before she was prepared to concur with her views. The plaintiff's schoolbooks and reports were not made available for analysis. She noted in her expert report that these would provide an indication of the plaintiff's day-to-day functioning which could not be assessed for the plaintiff in their absence.

[59] However, during her testimony, she opined, that pre-morbidly there was nothing to suggest that the plaintiff was incapable of completing his NQF level 5 qualification. This opinion was premised on the fact that she has now seen and considered the plaintiff's grade 11 academic report and marks which served to reinforce her initial views. She considered this a pre-morbid likelihood as opposed to speculation because research has shown that individuals with low IQs are able to attain diplomas. She assessed the plaintiff as having an average intelligence and he therefore had the ability to complete an NQF level 5 qualification.

[60] She opined that post-morbidly, the plaintiff was psychologically more vulnerable. His low self-esteem affects his interactions with others, his motivation and how he would perform in a work environment. The plaintiff is not functioning as he was pre-morbidly and he has therefore been adversely impacted. For example, he reported feeling demotivated to do anything and closed his car wash business as a result. He also reported experiencing flashbacks of the shooting incident and that he usually gets drunk to numb his feelings.

[61] She testified that in 2015 the plaintiff completed a plumbing certificate post-morbidly through the Limpopo Economic Development Agency (LEDA) Training Centre. He reported that he would like to perform a job in a similar context. She opined that the plaintiff may have been able to complete this course because he was in a stable mental state at the time; the course was done through a SETA and not a higher education facility and this was not an

indicator that he would be able to complete a higher education program now.

[62] Under cross-examination Ms Radzilani agreed that the joint minute overrides her expert report. She clarified that the plaintiff reported that he failed grade 12 in 2008 when he was 20 years old. He commenced his plumbing certificate in 2015 and completed this in 2016. Between 2008 and 2015 the plaintiff had no academic history and did not study any courses or attempt to repeat his matric.

[63] She confirmed that the joint minute records agreement that based on the plaintiff's pre-morbid academic history, he presented with learning difficulties; and agreement that grade 11 would be the plaintiff's highest pre-morbid qualification.

[64] Ms Radzilani did not proffer a response to the proposition that her counterpart, having received and considered the limited collateral information provided, still maintained that pre-morbidly the plaintiff would not have obtained an NQF level 5 qualification.

[65] She opined that when a person has previous failures without any interventions, it would depend on the individual whether he will improve or not. Some individuals learn from their past mistakes and improve, and others still struggle. Regardless, intervention is essential at the stage when the failure occurs.

[66] Ms Mashele, who appeared for the Minister, described the plaintiff's common cause factual educational scenario as agreed in terms of the joint minute. He failed three grades; he had learning challenges prior to the shooting incident; he received no intervention for his academic difficulties; the incident occurred five years after he left school; and he did not attempt to repeat his grade 12 to obtain his matric certificate pre-morbidly.

[67] Ms Radzilani was asked to comment on this factual scenario and whether the plaintiff showed any motivation to study further at any point pre-morbidly. Her response was evasive at best. She contended that a lot of factors had to be considered. Based on these common cause facts, she was of the view that it would be difficult to say whether the plaintiff would have attempted to repeat his grade 12 because other reasons were not taken into consideration.

[68] Ms Radzilani disputed the contention that the common cause facts indicate that the plaintiff intended to pursue a business pre-morbidly. She stated that the collateral information provided does not suggest this. She did not go on to specify what this collateral

information entailed.

[69] She confirmed that the plaintiff reported having closed his car wash business and resigning as a part-time mechanic post-morbidly. Further that he did not provide any corroboration to her for his report that he was busy with his driver's licence when the shooting incident occurred. Her expert report was based on the plaintiff's *ipse dixit* and information obtained from other collateral information. She confirmed that she also had no verification or proof for the plaintiff's contention that he was unfit to complete his driver's licence post-morbidly.

[70] Ms Radzilani maintained her opinion that family history was a determinant of whether the plaintiff could acquire a NQF level 5 qualification. She testified that it was reported to her that no-one in the plaintiff's family had any challenges with repeating grades and repeating grade 12. She conceded, however that the plaintiff was an exception in the context of his family history because he repeated two grades and failed grade 12.

[71] Regardless, she maintained that since the plaintiff reported that he did not do well at school, other factors should be considered that could have played a role with his academic failure such as his environment, his personal motivation, the people he associates with etc. It was pointed out to Ms Radzilani that the existence of such factors constituted speculation on her part since she failed to explore these in her expert report. She testified that she did ask the plaintiff why he made no attempts to complete his grade 12 after 2008 and pre- morbidly. He reported to her that his father passed away in 2008 and he proffered no other explanation. Notably, Ms Radzilani's expert report records that the plaintiff's parents had been separated since his birth and he saw his father once a year from his birth until his father's passing.

[72] Dr G Prag, the educational psychologist appointed by the Minister, confirmed that she prepared an expert report dated 30 April 2021 following assessment of the plaintiff on 17 February 2021. She confirmed the contents of her expert report and the joint minute concluded with her counterpart on 24 May 2022.

[73] The following are the salient aspects arising from her expert report, the joint minute and her testimony. She disagreed with her counterpart that the plaintiff's pre-morbid gross- motor development was satisfactory. This was an unknown aspect in her view. It was common cause that the plaintiff failed a few grades and that indicated that he had learning challenges. No information was provided about, *inter alia*, the plaintiff's childhood medical conditions;

childhood traumas; his visual perception skills; his audio perception skills or his gross motor skills as a child. The plaintiff's writing skills indicated deficits in spelling. His primary school record was not made available. It was therefore difficult to determine where his learning challenges emanated.

[74] Dr Prag testified that the plaintiff, in a written self-assessment, reported on the grades that he repeated and failed (grades 4,9 and 12). He also reported that he had difficulty passing because he was not intelligent like the other children and received no academic assistance. This exercise provided his subjective view of himself and the world. He acknowledged that he was a slow learner and she formed the view that he was honest in his completion of the self-report. These points were noted as points of agreement in the joint minute.

[75] She noted the variation in reporting by the plaintiff on the grades which he failed. The plaintiff testified that he failed and repeated grades 2, 4 and 7 and he failed grade 12. He reported to her, on his written self-assessment, that he failed and repeated grades 4 and 9 and he failed grade 12. He reported to her counterpart that he failed and repeated grades 2 and 10 and failed grade 12. She testified that they both accepted his reports to them.

[76] Dr Prag testified that she was provided with some of the plaintiff's school reports as collateral documentation after the joint minute was concluded. She was provided with his November grade 11 report and his grade 12 report. She explained the manner in which learners' marks are assessed in grade 11. The plaintiff's grade 11 report indicated that he obtained less than 30% for two subjects which indicated that he did not qualify to move to grade 12. The fact that this report further noted that his result was 'promoted' was indicative of a condoned pass and not a pass on merit. She further opined that a comparison of his grade 11 and 12 marks indicated a decline in his academic performance. This was support for her view that untreated learning difficulties intensify and performance declines.

[77] Dr Prag opined that these two school reports did not provide support for her counterpart's opinion that the plaintiff had the pre-morbid potential to complete and achieve an NQF level 5 qualification. She supported her opinion further by referring to the plaintiff's reported dislike of school and his disinclination to study pre-morbidly. He made no attempt to obtain his matric and he impressed her as being a practical person who expressed the dream to own his own business. She maintained the point of agreement reflected in the joint minute that the plaintiff was better suited to an FET College only which would provide the equivalent of an NQF level 4 qualification.

[78] She testified that the plaintiff readily admitted his failings. In her opinion he had a practical ambition of being a business owner and he had no scholastic ambitions. The plaintiff reported that he attended the LEDA Training Centre in 2010 to complete a plumbing certificate. She therefore sought to establish collateral information from the LEDA Training Centre to determine whether this certificate was indicative of the plaintiff's attempt to improve his academic results pre-morbidly. She also noted that the plaintiff has not pursued plumbing at all.

[79] Pre-morbidly the plaintiff owned a car wash business. Post-morbidly he indicated his long term goal to own a construction company. At no point did he indicate that he wished to further his academic studies.

[80] She testified that her findings and assessment indicated that the plaintiff fell within the average range for global intelligence. The psychiatrist and the clinical psychologist noted that the plaintiff had no cognitive impairment. Therefore, she explained that the plaintiff's cognitive abilities were unaffected by the shooting incident.

[81] The plaintiff's self-report indicated that he had pre-morbid emotional, self-esteem and substance abuse issues. He reported his excessive use of alcohol from the age of 16 years old. He had learning challenges. He was older than most when he was at school.

[82] She testified that family history was not the sole determining factor to determine whether the plaintiff had the pre-morbid potential to acquire an NQF level 5 qualification. One had to consider a lot of factors. She noted that none of the plaintiff's siblings appear to have experienced the learning challenges that he did. His uncle is a janitor. The plaintiff's birth and developmental milestones are unknown and he reported that he was a slow learner. The plaintiff should be considered as an individual on a holistic basis and all these disparate variables should be taken into consideration.

[83] Under cross-examination, Dr Prag testified that the plaintiff's low self-esteem could be assessed on a number of indicators and not only the loss of his eye. Some of these factors were unrelated to the shooting incident and existed pre-morbidly. Her expert report addresses this aspect as well as her testimony regarding the school reports provided to her.

[84] Mr Hattingh, who appeared on behalf of the plaintiff, took exception to Dr Prag's conclusion that the plaintiff suffered from alcoholism from the age of 16 years. However, she conceded a lack of expertise on the issue of alcoholism and alcohol abuse and maintained

that her report on the excessive amount of alcohol consumed by the plaintiff arose from information reported by the plaintiff himself. He reported that 'I am best when – drunk'; that he and his brother have a 'drinking problem' since the age of 16 years; he drinks alcohol and gets money for alcohol by 'hustling' and / or doing 'peace jobs'.

[85] She maintained that the plaintiff could achieve an NQF level 4 qualification post-morbidly. She also maintained that the limited collateral documents provided and the plaintiff's behaviour post matric, do not support an inference that the plaintiff could have achieved an NQF level 5 qualification pre-morbidly. She testified that she would have preferred to see the plaintiff's complete academic record from grade 1 to grade 12. This would have helped ascertain when his learning challenges began.

[86] She testified that the plaintiff was told what documents she required him to bring to the assessment, but he arrived without any. She testified that she makes all those assessed complete a form which sets out the documentation and information that she requires. She also seeks permission to obtain additional documents.

[87] Dr Prag was criticized for her failure to consider the plaintiff's attempts to improve his qualifications post-morbidly. She testified that the plaintiff self-reported that he commenced and completed his plumbing certificate from 2009 to 2010. She was unaware that the plaintiff actually commenced and completed this course from 2015 to 2016, as indicated by the collateral documents provided by the LEDA Training Centre. These documents were provided to her after the joint minute had been concluded.

[88] Regardless, her own inquiries with the LEDA Training Centre established that the plumbing certificate was intended to assist individuals to obtain practical jobs. It was not a training course which qualified with the NQF requirements. It was a training centre and not an FET College. The plaintiff also gave no indication whether he made use of this qualification and performed any plumbing work.

[89] She disagreed with the proposition that her counterpart considered that the plaintiff had the pre-morbid potential to complete an NQF level 5 qualification because he obtained this plumbing certificate. She maintained that the plaintiff made no attempts to complete a NQF level 4 qualification and had not attended a FET College. His plumbing certificate did not advance his NQF qualifications and he was unemployed at the time of her assessment. She maintained her opinion that the highest pre-morbid level he would have attained would be an NQF level 4 qualification.

Occupational therapists

[90] The joint minute delivered by the occupational therapists reflects their relevant points of agreement and issues which were not agreed upon. They agreed that the plaintiff required occupational therapy and the costs of such therapy. No structural adjustments for his accommodation were indicated. The plaintiff suffered a permanent disruption to his life and has a permanent disability.

[91] Post-morbidly, they agreed the plaintiff is physically suited for heavy work demands. He has suffered a reduction in his functional capacity and his skill set and circumstances are such that he will struggle to secure employment commensurate with his residual function. During the course of the trial the occupational therapists reached further agreement on the number of hours of occupational therapy the plaintiff will require.

[92] Ms Sebapu, the occupational therapist appointed on behalf of the plaintiff, confirmed her assessment of the plaintiff on 2 August 2017 followed by her expert report dated 11 January 2021. She confirmed the contents of her expert report and the joint minute concluded with her counterpart on 8 April 2022.

[93] The following are the salient aspects arising from Ms Sebapu's expert report, the joint minute and her testimony. The joint minute reflects disagreement on several issues. Her counterpart disagrees that the plaintiff will require assistance in the home; that the plaintiff is independent and requires assistance to reach his amenities and unfamiliar places independently.

[94] During the assessment, the plaintiff reported the following information to her. There are no structural impediments in and around his home. He does not have a driver's license but had been due to test for a code 14 driver's license in November 2013. Post-morbidly he experienced no difficulties accessing facilities and services in his area. He had a grade 11 level of education and he obtained a plumbing certificate in 2015.

[95] Pre-morbidly he was self-employed as a car wash owner. He continued this business for approximately three years post-morbidly until about February 2016. He closed this business because it suffered losses and the water and soap affected his eye socket. Following a period of unemployment, he was self-employed as a vendor until 2018. Between 2018 and December 2020 he was employed as a labourer in the construction sector.

[96] The physical demands of his employment pre-morbidly can be described as light to lower ranges of medium work. Post-morbidly, he experienced various physical difficulties when working. His right eye would get teary and painful due to dust. He suffered from headaches that required frequent rests. He struggled with depth perception which made it difficult for him to estimate heights. He was short-tempered and became emotional when he was not treated sympathetically by his employer. Ms Sebapu opined that these difficulties may be described as incident-related fallouts which affected the plaintiff's global functioning.

[97] The plaintiff reported his aspirations of becoming an artisan and studying construction management. He complained that the weather conditions worsen the pain in his eye. He has to wear sunglasses daily. His night vision is poor. Due to his difficulties with depth perception, he has to be careful on unfamiliar ground. He suffers from memory loss and he feels self-conscious about his facial appearance because of the appearance of his right eye.

[98] Ms Sebapu noted that the plaintiff presented with a visible enucleated right eye socket. He was observed during her assessment to intermittently compensate for the right eye fallouts by tilting and rotating his head to the right. His complaints of pain were congruent with his injury.

[99] According to her recommendations, the plaintiff would benefit from assistive devices like a heat pack, sun hat and smart phone. Domestic and personal assistance for tasks with which he struggles due to his sustained injuries. He should be compensated for gardening and maintenance tasks that he will struggle with as a result of his injury and concomitant limitations. Allowance should be made for a companion to accompany the plaintiff when he travels to unfamiliar environments.

[100] Although the plaintiff was physically assessed as having the residual physical aptitude commensurate with heavy work demands, she opined that the difficulties he experienced because of his eye injury would be determinative of his functional aptitude. For example, he would have difficulties working at heights; working with tools and machinery; working in the elements and working on fine tasks.

[101] She opined that the plaintiff has significant long standing emotional / psychiatric fallouts which will negatively impact his cognitive functioning. He was self-conscious about his appearance and his diagnosis of PTSD and Depressive Disorder would affect his long- term functional abilities negatively. The plaintiff will, as a result, find it difficult to cope with the job

market and to function optimally.

[102] He will also struggle to present himself adequately and appropriately in the open labour market which would impact his ability to obtain employment. His reported difficulties like headaches and poor depth perception indicate that he is at risk of not being able to function optimally and this would affect his ability to retain employment. She opined that the plaintiff would face prejudice and discrimination because of his appearance when job seeking. People with obvious disabilities are generally discriminated against. The plaintiff was already self-conscious about his appearance and it was not unexpected that his self- confidence would be negatively affected when he was required to engage with the greater public. She testified that her counterpart had not assessed these components and had confined her assessment of the plaintiff to physical and musculoskeletal components.

[103] Ms Sebapu testified that a consideration of all these issues indicate that the plaintiff will struggle to find and obtain employment post-morbidly. She opined that the plaintiff is not functionally unemployable however, his prospects of securing employment to match his residual functioning are limited or minimal.

[104] Under cross-examination, Ms Sebapu declined to concede that her use of the words ‘attempted several construction jobs post-incident’ is an incorrect descriptor of the plaintiff’s employment history as it implies that he did not obtain any of these positions and does not address that his reasons for leaving these positions were unrelated to the fallout from his injury. She also maintained that as an occupational therapist, issues regarding emotional and / or psychological fallout fell within her area of expertise.

[105] Ms Radzuma, the occupational therapist appointed by the Minister, confirmed that she assessed the plaintiff on 27 January 2021 and prepared an expert report dated 13 November 2021. She confirmed the contents of her expert report and the joint minute concluded with her counterpart on 8 April 2022.

[106] The following are the salient aspects arising from Ms Radzuma’s expert report, the joint minute and her testimony. During assessment, the plaintiff reported that he resides with his mother and brother. His home environment is accessible and he is able to access all his facilities without limitation. He completed his grade 11 qualification and he reported that he repeated grades 4, 9 and 12. He reported having obtained a plumbing certificate from the LEDA Training Centre but did not specify when he obtained this certificate. He was in the process of obtaining his code 14 driver’s license when the incident occurred and he could

not continue with this because he no longer qualified for a code 14 driver's license because of his one eye.

[107] Ms Radzuma noted that the ophthalmologist recorded the plaintiff's visual mobility will be slower than normal, however he is suitable for a code 08 driver's license. He is not suitable for a code 10 driver's license and will experience night driving problems. He should wear protective glasses for his healthy eye.

[108] Pre-morbidly, he was self-employed as a car wash owner from 2012 to 2013. He was unable to continue this business due to his injuries. He was employed as a mechanical assistant from 2013 to 2015. Post-morbidly, during 2014 he was employed to fit glass at a glass centre for six months. He was employed as a general worker for the latter six months in 2014 by the Collins Chabane Municipality. From 2018 to 2020 he was employed as general worker in the construction sector. He requires protective eye wear and reasonable accommodation measures of rest breaks and working in the shade.

[109] The plaintiff's post-morbid employment profile allowed her to assess his functional prognosis. He held five different jobs. The work of a motor mechanic is high risk for an individual with the plaintiff's disability, but he was able to continue with this job for quite a period post-morbidly. Glass fitting requires accuracy. He left all his jobs for better prospects. His longest employment post-morbidly was in the construction sector. This is a high risk sector.

[110] Ms Radzuma testified that all of the above indicated that the plaintiff has a positive post-morbid employment history for a person with one eye. He demonstrated versatility and has a positive functional diagnosis. It indicates that he has a good residual work capacity. She opined that the accommodation measures which the plaintiff requires, such as goggles and face mask to protect his eye, were required by legislation in the construction sector. He was not precluded from obtaining a code 08 driver's licence. The plaintiff was not fired or dismissed from any of his reported pre-morbid employment. She opined that the nature of contract work is that it is periodical and this was also evidenced by the plaintiff's report.

[111] The plaintiff reported recurring headaches which require frequent rest breaks, reduced self-esteem and a short temper. He cannot tolerate dusty weather and wind. He presents with a disfiguring of the right eye due to the absence of the eyeball. He displayed pain behaviour throughout the assessment.

[112] The plaintiff's pre-morbid level of work was medium work requiring a high level of physical and cognitive endurance, agility and multi-limb use. On assessment, his performance fell within light work requiring good agility, endurance for static positions, continuous multi-limb use and prolonged positions. He displayed the physical ability to handle the physical demands of his previous work, however, to be productive and safely perform his work he will require reasonable accommodation measures of protective eye wear and adjusting light. He is therefore less competitive in the open labour market for various manual work.

[113] The plaintiff meets the physical demands for sedentary work, light work, low and mid-range medium work. His ability to meet the demands for end-range medium work is within sheltered labour with correlating physical endurance. The plaintiff has no physical limitations, but he complains of headaches when performing end-range medium work which affects his pace and productivity. He is therefore less competitive in the open labour market for pure medium work. He is also less competitive for sedentary work requiring basic cognitive function in the open labour market.

[114] Ms Radzuma testified that she did not detect any cognitive limitations on assessment testing and disagreed with her counterpart in this regard. The plaintiff's cognitive performance declined with heightened headache complaints. She also noted that the forensic psychiatrist, Dr Melapi, reported that the plaintiff had no cognitive impairment.

[115] Ms Radzuma opined that the plaintiff has good insight into his condition although he has unrealistic expectations of his functional abilities and functional limitations. She noted that he has a good support structure from his family. He is independent in all his self-care activities and household chores. His participation in leisure, social and community activities has declined because of his inability to assist with activities that affect his eye and because exposure to certain elements heighten the pain in his eye and his headache.

[116] She testified that she did not agree with her counterpart's assessment regarding the plaintiff's emotional / psychological fallouts. This is because the plaintiff demonstrated a positive employment history post-morbidly. Further, as occupational therapists, their training and expertise in this regard was limited and views on these aspects should be deferred to the appropriate expert.

[117] The issues regarding the plaintiff's appearance were not insurmountable. He already demonstrated that he was resilient and he had a positive employment history. Therefore, the

appropriate therapy would assist him to address any discrimination he may encounter because of his appearance and his self-esteem and confidence related to his appearance.

[118] Ms Radzuma opined that the plaintiff did not require any assistive devices or adaptations. These were adequately addressed by the ophthalmologists' report. She deferred to the opinions of the forensic psychiatrist, clinical psychologists, ophthalmologists and educational psychologists on the future medical and surgical intervention required.

[119] She opined that the plaintiff is highly reliant on his physical abilities to secure employment and his injury to his eye limits his employability options. However, he is functionally employable. He demonstrated his ability, post-morbidly, to secure employment that would even be considered high risk for him. He demonstrated that he can still work in an open labour market.

[120] Under cross-examination Ms Radzuma confirmed that the plaintiff reported contradictory post-morbid employment to her and her counterpart. However, they each report and record the information as reported to them by the plaintiff.

[121] She confirmed the disagreement on the plaintiff's residual work capacity. Her counterpart's opinion that the plaintiff was not independent and required to be accompanied in certain circumstances. She maintained her opinion that the plaintiff was independent in every way and that her conclusion on the plaintiff's residual work capacity was based upon his employment history and his daily activity profile.

[122] She maintained her opinion that although the plaintiff had suffered a reduction in functional capacity, he performed when he did secure employment and surprisingly, he performed well in employment which would be considered high risk for him.

[123] She confirmed her assessment of the plaintiff's cognitive abilities and agreed he had limitations but maintained that these did not prevent him from performing in the open labour market.

[124] She maintained that as occupational therapists, their ability to comment on a person's emotional / psychological issues was limited. Occupational therapists should defer to and make use of the opinions of other more appropriately qualified experts in this regard.

Industrial psychologists

[125] The joint minute filed by the industrial psychologists reflects the documents at their disposal at the time of the conclusion of their respective reports and the joint minute; their relevant points of agreement and the issues where they did not reach agreement.

[126] Pre-morbidly, the industrial psychologists agreed that the plaintiff would have most likely continued working within the self-employed domain and maintained his self-employed earnings until he acquired better prospects. They disagreed on the nature of these prospects. They agreed the plaintiff's academic history suggested that he presented with learning difficulties, but he completed grade 11, which qualified him for admission to NCV 4 at an FET College, which is equivalent to an NQF level 4 qualification. They disagreed on whether he would have obtained further qualifications. They agreed the plaintiff would have retired at the age of 65 years and if he remained self-employed, his retirement would be at the age of 70 years.

[127] Post-morbidly, they agreed that from a physical perspective, the plaintiff is suited for heavy work demands but he suffered a reduction in his functional capacity. Having regard to his lower level of education, as well as his skill set, he will struggle to secure employment matching his residual functioning. His injuries negatively impacted his level of physiological, psychiatric, psychological, learning and occupational functioning. The plaintiff is now an unequal competitor for gainful employment, as well as a vulnerable employee having to compete with well-bodied individuals.

[128] They agreed the plaintiff currently has grade 11 as his highest level of education accompanied by a plumbing certificate. The plaintiff is no longer performing at his pre-morbid potential as a result of the shooting incident. They disagreed on the nature of the future loss of earnings and earning capacity suffered by the plaintiff.

[129] Ms Ntsieni, the industrial psychologist appointed on behalf of the plaintiff, confirmed her assessment of the plaintiff on 11 September 2020, followed by her expert report dated 26 January 2021. She confirmed the contents of her expert report and the joint minute concluded with her counterpart on 26 and 27 May 2022.

[130] The following are the salient aspects arising from Ms Ntsieni's expert report, the joint minute and her testimony. She had the benefit of the expert reports prepared by other experts when preparing her expert report. She considered the reports by the psychiatrist, Dr Vorster and clinical psychologist, Ms Sibiya as relevant to her evaluation of the plaintiff's

injuries on his employment prospects and earning potential.

[131] Although she was not provided with collateral documents to support the plaintiff's report on his educational qualifications when preparing her expert report and the joint minute, she has subsequently seen the plaintiff's grade 11 report.

[132] Pre-morbidly, the plaintiff reported he was self-employed as a car wash owner from 2011. He earned approximately R2500 profit per month. He operated this car wash business from his home. He employed two assistants who were paid between R100 to R200 per day, depending on the number of cars they washed. She was not provided with any collateral information or documentation to confirm the plaintiff's reported monthly income. She noted that, like most self-employed individuals in the informal sector, the plaintiff did not keep a record of his earnings, however she opined that these reported earnings were within the range of the self-employed person scales in the informal sector. She also testified that these earnings were above the median quartile and formed the basis for her later assessments.

[133] Ms Ntsieni opined that pre-morbidly, the plaintiff would have completed further studies to obtain an NQF level 5 qualification or diploma. This opinion was founded upon the following. The plaintiff was 24 years old when the incident occurred. He was therefore still in the explorative stage of his career. He expressed an interest in pursuing a code 14 driver's licence. He had the potential to become a truck driver. The educational psychologist, Ms Radzilani, opined that an NQF level 5 qualification represented the plaintiff's pre-morbid potential. Notwithstanding Dr Prag's contrary opinion, Ms Ntsieni shared Ms Radzilani's opinion on the plaintiff's pre-morbid potential to obtain an NQF level 5 qualification. The plaintiff's post-morbid completion of the plumbing certificate reinforced her view and was an indicator of his pre-morbid potential to obtain an NQF level 5 qualification.

[134] She opined that the plaintiff would have remained self-employed until he obtained better employment prospects in accordance with an NQF level 5 qualification or diploma qualification, alternatively as a code 14 truck driver. She disagreed with her counterpart that the plaintiff would have likely remained in the unskilled bracket.

[135] Industrial psychologists should interpret and apply the opinions of other experts. In this regard, she noted the educational psychologist, Ms Radzilani's opinion that the plaintiff would have attained an NQF level 5 qualification pre-morbidly. Applying this, she opined that the plaintiff had time to grow in his career. Once he completed his studies, he would have likely secured employment in the formal sector with his earnings progressing on the Patterson

level of formal earnings.

[136] The plaintiff reported that he wanted to obtain a code 14 driver's license when the incident occurred. He indicated that he had a code 08 learner's licence and a code 14 learner's licence. Although the plaintiff did not provide documentary evidence to support these assertions, Ms Ntsieni testified that his *ipse dixit* was sufficient for her to consider and pursue the various postulations that would flow from such a scenario.

[137] She testified that she tested and confirmed the veracity of reports to her by considering the collateral information and documentation provided on work experience. Even without a learner's licence the plaintiff could still pursue a career as a truck driver because of his youth. She did not comment on the dearth of collateral information and documentation actually provided.

[138] She testified that the plaintiff reported closing his car wash business at the end of 2014 to pursue his plumbing certificate. He did not report that water and soap were affecting his eyes, although this was the reason reported to the occupational therapist, Ms Sebapu for closing the business. She opined that the pursuit of his plumbing certificate was probably the more critical reason for closing his car wash business, which is why he reported it as such to her.

[139] She testified that a code 14 driver's licence would qualify the plaintiff for truck driving positions. His earnings would start from the lower quartile of the truck drivers' scales, with growth postulated towards the upper quartile of the truck drivers' scale. She disagreed that the plaintiff, on this scenario, should be retained on the lowest level of the truck drivers' scales. Her main reason for disagreeing was the plaintiff's youthfulness.

[140] Pre-morbidly the plaintiff's had two career paths postulated by an NQF level 5 qualification or truck driver position. Both were equally probable because the plaintiff was at the explorative stage of his career and the earnings for both are also aligned. She declined to place one of these careers as more likely than the other.

[141] For the plaintiff's post-morbid scenario, Ms Ntsieni testified that the joint minute reflects their agreement to acknowledge the agreement reached by the educational psychologists and to record the points of this agreement in their (the industrial psychologists) joint minute. She postulated two likely post-morbid scenarios for the plaintiff.

[142] On the first scenario, with his current educational background, the plaintiff is likely to secure short contracts with his earnings starting from below to within the lower quartile of the unskilled labourers' scale. Growth is postulated at within the median quartile of the unskilled labourers scale at the approximate age of 45 years.

[143] On the second scenario, the plaintiff may obtain an NQF level 4 qualification (grade 12 equivalent). This will provide opportunities for him in entry-level employment. His earnings will start from the lower quartile of the semi-skilled workers' scale. Growth is postulated at within the median quartile of the semiskilled workers' scale at the approximate age of 45 years.

[144] Under cross examination, Ms Ntsieni conceded that her postulations regarding the plaintiff's ability to obtain a pre-morbid NQF level 5 qualification, were not based on facts presented to her. These postulations were premised on Ms Radzilani, the educational psychologist's, expert report and the joint minute provided by the educational psychologists. She conceded that Dr Prag required collateral information and documentation before accepting this pre-morbid postulation. She also conceded that the collateral information provided was insufficient to persuade Dr Prag. She testified that this scenario should therefore be agreed by the experts or decided by this Court.

[145] She agreed that the plaintiff's post-morbid residual work capacity should be taken into consideration when postulating his post-morbid employment scenarios. She testified to using the earning scales referred to in Koch to ascertain the truck drivers' salaries. She did not refer to the road freight industry scales governing truck drivers' salaries. She did not agree that the salaries of truck drivers are regulated by the road freight industry.

[146] Ms Ntsieni was unable to comment on or confirm the plaintiff's evidence that he provided her with the names of his two employees because this information does not appear in her expert report. She also testified that she did not verify the plaintiff's report on his self-employment by obtaining collateral information and/or documentation. She relied solely on the plaintiff's *ipse dixit* in this regard.

[147] Mr Marais, the industrial psychologist appointed by the Minister, confirmed his assessment of the plaintiff on 22 February 2021, followed by his expert report dated 12 November 2021. He confirmed the contents of his expert report and the joint minute concluded with his counterpart on 26 and 27 May 2022.

[148] The following are the salient aspects arising from Mr Marais' expert report, the joint minute and his testimony. The objective of his assessment was to evaluate the effects of the shooting incident and its sequelae on the plaintiff's employability and earning capacity.

[149] The plaintiff reported a grade 11 level of education. He struggled at school and reported failing grades 4,10 and 12. He obtained a plumbing certificate in 2015 through the LEDA Training Centre in Giyani. Mr Marais was only provided with the plaintiff's grade 11, matric report and plumbing course confirmation during the course of the trial. He nevertheless noted that the plaintiff's grade 11 pass was poor and his overall result was 'promoted' and not 'passed'.

[150] The plaintiff reported that he had a code EC driver's licence although no documentary proof was provided in support. Mr Marais explained that a code EC is a lesser code than a code 14 driver's licence. A code 08 driver's licence is a code EB. The plaintiff also reported that he was unable to qualify for a heavy truck driver's licence due to the injury to his eye.

[151] The plaintiff reported his pre-morbid career aspirations to have been to pursue a career as a contractor. He reported being self-employed in a car wash venture earning R3000 per month. He was also concurrently employed by a friend as an assistant mechanic earning R200 per day worked. The plaintiff was in the initial phases of building his career and his occupational experience fell within the unskilled occupational group.

[152] Mr Marais did not accept the plaintiff's report on his pre-morbid earnings as no collateral documentation or information was provided. He noted the inconsistencies on the plaintiff's employment history as reported to the various experts. He therefore did not agree with Ms Ntsieni who accepted the plaintiff's reported earnings and determined his salary scale accordingly.

[153] He opined that it was unlikely the plaintiff would have furthered his studies pre-morbidly. When the shooting incident occurred, the plaintiff was almost 25 years old. At the time of his assessment, he was almost 33 years old. The plaintiff was already working and earning an income. He explained that generally, people who are working do not go back to study. Additionally, the plaintiff's scholastic performance was poor and he also reported that he failed at school and did not enjoy school or studying.

[154] He did not consider the plaintiff's plumbing certificate in isolation when determining his pre-morbid potential to obtain an NQF level 5 qualification. He also considered the plaintiff's

behaviour. Whether he would have had the time to study and whether he used the skills acquired. He commented that the plumbing certificate appeared to be of a practical nature as opposed to theoretical nature.

[155] He opined that the plaintiff's pre-morbid employment prospects fell within the range of skilled and semi-skilled work, which would have represented the plaintiff's career ceiling and earning ability. His poor schooling, limited occupational experience and general skills and abilities indicated that he would have continued operating his car wash business or secured employment as an unskilled to, at most semiskilled worker until retirement.

[156] The plaintiff reported that he wanted to start construction business. He also reported that he wanted to purchase a truck to sell vegetables and he reported that he wanted to become part of a supply chain, to supply stationary. Although he presented these concepts, these plans could not be verified as the plaintiff could not provide any strategy or business plan or documentary proof of any form of planning or strategy regarding his pursuit of the three scenarios reported by him.

[157] Mr Marais opined that it was extremely unlikely the plaintiff would have secured sedentary, administrative or clerical-type employment pre-morbidly. His level of education, limited to no occupational experience, and general skills and ability militated against this. Such positions were also highly competitive in the labour market and employers tended to employ candidates with a minimum of a grade 12 level of education to these positions.

[158] He testified that he did not believe the plaintiff would have furthered his studies pre-morbidly. He would have maintained self-employment earnings until he retired. As a self-employed person he would have retired after the age of 65 years. Following on from this, he disagreed with his counterpart's postulation of earnings on the Patterson formal earnings scale as he maintained the plaintiff would not have moved into the formal sector.

[159] The plaintiff reported to him that he had a code EC driver's license, yet he made no use of such licence and continued with his car wash business pre-morbidly. Mr Marais testified that truck drivers' salaries are determined in accordance with the road freight agreement concluded by the unions. These earnings are commensurate with the Patterson B2 formal earnings scale. Truck drivers remain on this rate with negotiated increases from time to time. These earnings are fixed and do not progress year on year, except for the negotiated increases. He also explained that the road freight salary scales are the actual salary scales published in the government gazette representing the minimum payment allowed for this

industry. The Koch values are not based on actual legislated values for truck drivers. He testified that only medical professionals used the Koch salary scales for truck drivers. Employers in the industry use the scale and earnings which they agreed on.

[160] He opined that the plaintiff's post-morbid employment was similar to his pre-morbid employment because it was of an unskilled nature. This indicated that the plaintiff wanted to work within his abilities. Post-morbidly, the plaintiff should have been able to generate an income from his car wash business if he had employees as indicated by him.

[161] The plaintiff reported his post-morbid earnings from his car wash business as being the same as his pre-morbid earnings from this business. However, the plaintiff could not clarify and prove these actual earnings. Mr Marais was therefore unable to establish whether the plaintiff suffered an actual loss of earnings without any factual information to support the car wash business' turnover, profit, and income generated per partner, pre and post-morbidly.

[162] Mr Marais opined that the plaintiff's plumbing certificate enhanced his skills on certain tasks. It did not increase his level of education because the LEDA Training Centre did not rate this certificate in terms of the NQF qualifications levels.

[163] Post-morbidly, the plaintiff would be an unskilled worker moving to semi-skilled work. Pre and post-morbidly the plaintiff retained the ability to work as an unskilled worker and earn accordingly.

[164] The joint minute reflects his opinion that the plaintiff had pre-morbid learning challenges which were exacerbated by his injuries and its sequela. He has, therefore, probably not sustained a potential future loss of employment potential or earnings, due to the shooting incident and its sequelae. The plaintiff has, however been negatively affected and his occupational choices reduced. He is now an even more vulnerable individual. For these reasons, he disagreed with the post-morbid scenario postulated by Ms Ntsieni which was linked to a higher educational qualification.

[165] He opined that the plaintiff's probable post-morbid scenario involved unskilled work. Once he takes measures to address his symptoms and trauma in accordance with the recommendations by the various experts, he will improve his employability to semi-skilled work similar to what he could have secured and maintained pre-morbidly. These measures include, *inter alia,* a prothesis, possible cosmetic surgery and psychotherapy.

[166] He differed with his counterpart's opinion that the plaintiff is likely to suffer a future loss of earnings which may be calculated as per the difference between his pre-morbid earning potential and his current earnings. He opined that the plaintiff secured the same work both pre- and post-morbidly. His condition would also improve on treatment as recommended.

[167] He agreed, per the joint minute, that the plaintiff is no longer performing at his pre-morbid potential because of the shooting incident. The plaintiff has been occupationally compromised. However, he worked unskilled jobs both pre and post-morbidly. He reported a code EC licence to him, which he never used. He did not perform any heavy physical type of work pre-morbidly. The unemployment statistics coupled with his deficits reduce his employability, although it was evident that the plaintiff wants to work, makes an effort and does secure employment.

[168] He positioned the plaintiff's residual work capacity in the unskilled and semi-skilled occupation group. The plaintiff requires therapy and assistive devices to improve his vulnerabilities and enhance his post-morbid employment scenarios.

[169] He agreed with scenario postulated at 1C on the actuarial joint minute. This scenario was based on his expert report that pre-morbidly the plaintiff would have remained in the unskilled to semi-skilled worker group.

[170] He agreed with the scenario postulated at 2C on the actuarial joint minute. This calculation accounted for periods of unemployment and should be adjusted to reflect semi-skilled work from 50 years onwards.

[171] Under cross-examination, he confirmed his assessment and consultation with the plaintiff was conducted in English with no assistance. He accepted that the plaintiff may not know about a code EC licence because he used a conversion table. He also accepted that the plaintiff could have said code 14 which the conversion table recorded as code EC. He conceded that this could represent a designation lower than code 14 but maintained that it was not equivalent to or lower than a passenger car. The code EB represented passenger cars.

[172] Mr Marais could not dispute the contention that the plaintiff had no driver's licence at all and he only obtained a code 14 learner's licence pre-morbidly. He testified that he recorded the plaintiff's report to him and noted that no documentary proof was provided in support. He

disputed a possible communication difficulty with the plaintiff may have resulted in a misunderstanding when the plaintiff made this report.

[173] He disputed the plaintiff's contentions if he stated that he reported only a learner's licence to him. He pointed out that the plaintiff reported different employment to the different experts. He was demonstrably inconsistent with a few inconsistencies and differences inreporting. It was therefore less likely that his interpretation of the plaintiff's report was incorrect.

[174] He conceded that the scenario postulated at 1A of the actuaries' joint minute could be a likely pre-morbid projection if the plaintiff could establish that he possessed his code 14 learner's licence; had driver training; the shooting incident prohibited him from obtaining this licence and he could have secured employment as a truck driver.

[175] He testified further, that all earnings postulated on this scenario should be based on the road freight industry scales. On these scales, a driver's salary was determined by the type of vehicle he drove and not whether his employer was a large corporate entity or not. This information was more reliable than the Koch truck driver salaries scales, as it was gazetted and used by the majority of employers.

[176] Mr Marais explained that the information reported to him indicated the plaintiff possessed a licence to drive a truck and he made no use this licence. He did not prepare a comparison of the truck driver salary scales vis-à-vis the road freight industry figures because this employment scenario was not postulated on the information provided by the plaintiff. He did not report that pre-morbidly he aspired to become a truck driver in the fuel or mining sector.

[177] Without taking into account the pre-morbid truck driver scenario, the plaintiff's pre and post-morbid employment scenarios are very similar. His loss of earnings should therefore be addressed by the application of contingencies. On the truck driver scenario, he accepted that the plaintiff would suffer a loss of earnings.

[178] He maintained that the plaintiff is not less likely to reach a semi-skilled level post-morbidly. He did not suffer any head injury. The trauma which he suffered is treatable and the success of his treatment will determine any delay in reaching semi-skilled level.

[179] He further maintained that the plaintiff's plumbing certificate could not be regarded as a

formal qualification. An interpretation of this certificate indicates that it does not state what type of certificate it is and it is practical. It is training intended to enhance work in the semi-skilled sector. It therefore increases the plaintiff's employment level post-morbidly to that of lower-level semi-skilled worker.

Psychiatrists

[180] The joint minute compiled by the psychiatrists on 26 May 2022 notes their agreement that the plaintiff is suffering from MDD and PTSD following the shooting incident and his injuries. He sustained a loss of employment potential as a result and would benefit from psychiatric treatment.

Actuaries

[181] The joint actuarial minute is premised on the experts' joint minutes and expert reports. It depicts three calculations for the plaintiff's past and future loss of income. These calculations are premised on the scenarios provided by each party's industrial psychologist.

Loss of Earnings

[182] The issue of loss of earnings / earning capacity turns on the parties' divergent contentions regarding the plaintiff's likely pre-morbid and post-morbid career paths. Mr Hattingh submitted that on the pre-morbid scenarios referred to in the actuaries' joint minute, the likeliest scenarios are those depicted firstly by scenario 1B and secondly scenario 1A. These scenarios are premised on the contention that pre-morbidly the plaintiff would have furthered his educational qualifications up to a NQF level 5 qualification, alternatively he would have qualified as and pursued a career as a heavy truck driver.

[183] Regarding the post-morbid scenarios referred to in the actuaries' joint minute, he contended that the likeliest scenarios are those depicted firstly by scenario 2A and secondly scenario 2B. These scenarios are premised on the contention that post-morbidly the plaintiff is confined to an unskilled, alternatively semi-skilled career path, both with significantly limited career prospects.

[184] Ms Mashele argued the likeliest pre-morbid scenario for the plaintiff is that reflected by scenario 1C which is premised upon the plaintiff continuing and remaining in the unskilled to semi-skilled worker group. The likeliest post-morbid scenario is that reflected by scenario 2C which is premised upon the plaintiff remaining an unskilled worker, moving to semi- skilled. The plaintiff demonstrably secured the same work both pre and post-morbidly.

[185] It is trite that the plaintiff bears the onus to prove his case on a balance of probabilities. In a claim for loss of earnings or earning capacity, the plaintiff is required to prove the physical disabilities resulting in the loss of earnings or earning capacity and also the actual patrimonial loss.[3] The mere fact of physical disability does not necessarily reduce the estate of the injured person because it does not follow from proof of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity.[4]

[186] An individual's ability to earn an income is determined by several factors. These include, *inter alia,* his individual talents, skill, educational qualifications, present position, future plans and external factors over which he has no control. To determine the extent of the plaintiff's patrimonial loss and whether the injury sustained compromised his earning capacity, the evidence adduced must be considered and evaluated holistically to determine whether the onus has been discharged.

[187] The parties rely on the evidence of expert witnesses to support their divergent contentions. An expert witness' opinion and evidence must be considered holistically during the evaluation of the expert opinion.[5] The evaluation of expert testimony requires a consideration and determination of whether and to what extent the opinions advanced have a logical basis and are premised on logical reasoning.[6]

[188] The limitations to expert opinions are well known and courts cautious to assess the value of expert opinions without a consideration of the facts upon which it is based. If it is determined that the facts are incorrect then it follows that the expert opinion is flawed.[7] In the case of *S v Mthethwa*[8] the court stated the following:

> '*The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value.'*

[189] It is also apposite to mention the English decision of *R v Turner,*[9] which reasoning has

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[3] Rudman v Road Accident Fund 2003(SA 234) (SCA) para 11.
[4] Union and National Insurance Co. Ltd v Coetzee 1970 (1) SA 295 (A) at 300A; Sanlam Versekerings Maatskapy Bpk v Byleveldt 1973 (2) SA 146 (A); Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A) at 917 B-D; Rudman v Road Accident Fund 2003(SA 234) (SCA) para 11.
[5] Life Healthcare Group (Pty) Ltd v Dr Abdool Samad Suliman [2018] ZASCA 118 para 18.
[6] Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA) para 36-37.
[7] Ndlovu v RAF 2014 (1) SA 415 (GSJ) para 35.
[8] S v Mthethwa [2017] ZAWC 28 para 98.
[9] R v Turner [1975] 1 ALL ER 70.

been applied with approval by our courts in the evaluation of expert witness opinions. In that matter Lawton LJ stated:

> '*Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless.*'

[190] In *Bee v Road Accident Fund*[10] the court quoted from the judgment in *The State v Thomas* (CC 19/2015) [2016] NAHCMD 320 (19 October 2016) which referred to the expert reports of two psychiatrists and said:

> *'When dealing with expert evidence the court is guided by the expert witness when deciding issues falling outside the knowledge of the court but within the expert's field of expertise; information the court otherwise does not have access to. It is however of great importance that the value of the expert opinion should be capable of being tested. This would only be possible when the grounds on which the opinion is based is stated. It remains ultimately the decision of the court and, although it would pay high regard to the views and opinions of the expert, the court must, by considering all the evidence and circumstances in the particular case, still decide whether the expert opinion is correct and reliable.'*

[191] It is also trite that the role of the expert witness is to assist the court in reaching a decision. A court is not bound by, nor obliged to accept the opinion of any expert witness.[11] The facts relied upon by the expert in his evidence must be capable of being reconciled with all the other evidence.[12] In addition, the facts on which the expert witnesses rely must be established during the trial. The exception relates to facts drawn as a conclusion by reason of the expert witness' expertise from other facts that have been admitted or established by admissible evidence.[13]

[192] In *Jacobs v The Road Accident Fund,*[14] the court held that:

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[10] Bee v Road Accident Fund 2018 (4) SA 366 (SCA) (29 March 2018) para 29.
[11] Road Accident Appeal Tribunal & others v Gouws & another [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33; Bee v Road Accident Fund 2018 (4) SA 366 (SCA) para 22.
[12] Bee v Road Accident Fund 2018 (4) SA 366 (SCA) (29 March 2018) para 23.
[13] Mathebula v RAF (05967/05) [2006] ZAGPHC; PriceWaterhouseCoopers Inc & others v National Potato Co-operative Ltd & another (451/12) [2015] ZASCA 2 para 99.
[14] Jacobs v The Road Accident Fund 2019 JDR 0934 (FB) para 25.

> '*Where experts in a joint minute reach an agreement on an issue, they signify that such an issue need not be adjudicated upon as the initial dispute simply does not exist. Unlike in an expert report where the factual basis upon which the expert opinion hinges is indicated, parties to a joint minute do not indicate such factual basis. They in essence simply agree that a fact or opinion is not in dispute and it will in the normal course of events not be open for a court to cut the veil of such an agreement and question the veracity of the facts or opinion contained therein. By having reached an agreement, they put the dispute beyond the need for adjudication.'*

[193] It is apparent from the aforementioned exposition on the applicable principles that a distinction can be drawn between the facts upon which an expert's opinion is based and the expert's actual opinion. In this matter, the Minister challenges the veracity of both these aspects in relation to the evidence tendered.

[194] Before turning to the evaluation of the evidence, it is appropriate to record the following. As mentioned, the plaintiff's evidence was adduced after the evidence of three expert witnesses called on his behalf had been led. This occurred on the third day of the trial. As recorded, the plaintiff's plumbing certificate was handed in as an exhibit during his re-examination and it was confirmed it had not been made available to any of the expert witnesses when they prepared their respective expert reports or joint minutes.

[195] Proof of the learners' licences issued by the Department of Transport was tendered during the trial, after the plaintiff's case had been closed. By agreement, a copy of this document was handed in as exhibit 'H'. Mr Hattingh submitted that the document indicated the plaintiff was in possession of a code 14 learner's licence during 2013. He submitted further that a summary of this document reflected that a learner's licence, valid for two years, was issued to the plaintiff on 15 August 2012. Prior to this, a learner's licence valid for two years was issued to the plaintiff on 31 March 2010. Both learners were for a code 14 learner's licence.

[196] Mr Hattingh did not address the third aspect of this document which reflected that a learner's licence valid for two years was issued to the plaintiff post-morbidly on 1 February 2018. This licence does not appear to be for a code 14 learner's licence but rather another type of code.

[197] The plaintiff's matric certificate and grade 11 report were also handed in as exhibits 'I1' and 'I2' respectively. It is common cause that these were not available to the expert

witnesses when they prepared their respective expert reports and joint minutes.

Evaluation of evidence

[198] Where the expert reports and testimony regarding their opinions are premised on facts reported by the plaintiff, it is necessary to consider whether the plaintiff has established and proven the factual basis that ultimately allows for an actuarial calculation to determine the quantum of his loss.[15] This determination must be made on a balance of probabilities, based on the evidence that has been placed before the court. Such determination is especially required when the plaintiff has provided inconsistent and contradictory information which forms the basis for certain of the expert reports and opinions.[16]

[199] I accept the plaintiff was injured during the shooting incident and his injuries are as agreed by the ophthalmologists in the joint minute. However, as explained further on, very little reliance can be placed on the plaintiff's evidence. Even on the factual scenario, which he purported to confine his evidence, the account provided was inconsistent.

[200] There are glaring inconsistencies and discrepancies between the plaintiff's evidence; his account of that information to the various expert witnesses; and the collateral information or documentation. The plaintiff did not attempt to explain or reconcile these discrepancies.

[201] When asked to explain and clarify the discrepancies regarding his employment history, he provided a version that remains inconsistent, particularly with the account provided to Ms Ntsieni, the industrial psychologist appointed on his behalf.

[202] The plaintiff did not provide an explanation for the inconsistencies on his reported scholastic / academic record to the various expert witnesses. Nor did he proffer any plausible explanation for his failure to provide a full scholastic / academic record to the expert witnesses. His explanation that he was not asked to do so is implausible and rejected. Without any corroboration, his evidence that he only failed and repeated three or four grades is unreliable. It provides no certainty on his scholastic performance. He could have failed and repeat more alternatively less grades. This affects the opinion on his pre-morbid potential to obtain an NQF level 5 qualification or diploma and the concomitant career paths postulated in this regard.

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[15] Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 2 SA 146 (A);
[16] Ndlovu v RAF 2014 (1) SA 415 (GSJ) para 36.

[203] The plaintiff did not explain why the collateral documents, limited though they were, were only provided at such late stages. For example, it has been recorded that the collateral document to corroborate the plaintiff's learner's licence, a key point of dissension, was provided to the Court during the trial and after the plaintiff's case had been closed.

[204] I accept the Minister's acceptance of this document and agreement to it being handed to the Court as an exhibit. However, the plaintiff is not absolved by this from an obligation to explain and clarify the discrepancies between his evidence, the account provided to the expert witnesses and the document. For example, he testified that he started the process to obtain his learner's licence in August 2013. He testified having no other learner's licence and reported to the industrial psychologists further contradictory accounts. The document reflects that he initially obtained a learner's licence in March 2010, that this expired two years later and he then obtained another learner's licence in August 2012. He did not explain the nature of the third learner's licence obtained post-morbidly and, in the circumstances, I am not entitled to and disinclined to speculate on it.

[205] A holistic consideration of the plaintiff's evidence leads me to the ineluctable conclusion that his evidence was unreliable and in material respects contradicted his earlier statements. The explanations for these contradictions are absent, alternatively unsatisfactory. The plaintiff is therefore regarded as being an unreliable witness and little reliance can be placed on his evidence.

[206] I am satisfied, after hearing the evidence, that each recordal of the plaintiff's report to the various experts is accurate. The information provided by the plaintiff to the expert witnesses, is materially contradictory with regard to critical aspects of the matter. In accordance with the principle that the value of an expert opinion is inextricably linked to the reliability of the subject in question, I accept the opinions and conclusions of the expert witnesses as recorded in the joint minutes and where the factual account and information attributed to the plaintiff has been verified by the plaintiff's evidence or collateral information and / or documents underpinned by logical and rational reasoning.

[207] I now turn to consider the evidence by the expert witnesses. It is well established that an expert witness' opinion: -

> *'represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some competent witnesses. Except possibly where it is not controverted, an expert's bald statement of*

his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'[17]

[208] The point of divergence between the clinical psychologists relates to Ms Sibiya's opinion that the plaintiff experienced a level of cognitive decline as a direct result of the injury sustained. She opined that research suggests that PTSD symptoms are also associated with cognitive decline. This opinion was advanced without reference to clinical records or developmental history records.

[209] The plaintiff's evidence, although adduced after the testimony of Ms Sibiya, did not establish any facts to support this opinion either. To the contrary, his evidence on his learning challenges which he experienced throughout his schooling career lend support to the opinion of Ms Nagel her counterpart.

[210] Ms Nagel opined that the plaintiff's neurocognitive deficits were largely pre-morbid. She also explained how trauma associated with the shooting incident could exacerbate an already compromised neurocognitive functioning. Her opinion was based on her assessment, the plaintiff's medical records and the expert reports of other expert witness. She noted that the plaintiff had no reported loss of consciousness after the shooting incident nor post traumatic amnesia. The plaintiff's self-report of academic challenges, confirmed by his evidence, reflected his pre-morbid cognitive functioning. This was supported by the educational psychologists' joint minute regarding agreement on the plaintiff's pre-morbid academic challenges and the forensic psychiatrist's findings which indicated no impairment in the plaintiff's cognitive functioning.

[211] In the circumstances, the evidence and expert report of the clinical psychologist, Ms Nagel is preferred to that of Ms Sibiya on the aspects of disagreement between these expert witnesses. Ms Sibiya's opinion is based on assumptions whereas Ms Nagel has properly set out the facts and reasoning for her opinion which is considered to have a logical and rational basis.

[212] The nub of the disagreement between the educational psychologists, related to their respective opinions on the plaintiff's pre-morbid potential. Ms Radzilani, the educational psychologist called on behalf of the plaintiff, opined that pre-morbidly, the plaintiff had the potential to achieve an NQF level 5 qualification. Post-morbidly, she opined that the plaintiff

[17] Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung MbH 1976 (3) SA 352 (A).

had been adversely affected and would be unlikely to complete a higher education program.

[213] It was common cause between the educational psychologists that the plaintiff had, at a minimum, failed three grades; he had learning challenges prior to the shooting incident; his highest qualification was grade 11; the shooting incident occurred five years after he left school; and he did not obtain his matric certificate pre-morbidly. These common cause facts were also established by the plaintiff's evidence, the limited collateral documents and were recorded in the joint minute.

[214] It was also common cause between the educational psychologists that neither had been provided with the plaintiff's scholastic / academic record or plumbing certificate when they prepared their respective expert reports and opinions and compiled the joint minute. During their evidence, they both confirmed having been provided with and having considered the plaintiff's plumbing certificate and the two schools reports.

[215] It is apparent that Ms Radzilani formed her opinion regarding the plaintiff's pre-morbid potential without the benefit of any collateral documentation. Although she noted in her expert report the deleterious consequences of not providing a scholastic / academic record for review and analysis, she nevertheless proceeded to form an opinion on the plaintiff's educational potential without this pivotal information. She was also dismissive of her counterpart's insistence on collateral documentation to support her conclusions and opinion.

[216] Ms Radzilani's opinion is premised on the plaintiff's *ipse dixit;* the fact that he completed grade 9; is alleged to have no birth or developmental milestone difficulties; has a family history where the members of his family have degrees and diplomas; the plaintiff's post-morbid plumbing certificate and a consideration of his grade 11 report and marks. She posited the plaintiff's pre-morbid potential as a likelihood. Her responses during cross-examination were indicative of an obdurate committal to her views rather than a desire to assist the Court. The factual basis for the opinion is unsupported and her reasoning for her conclusions are not logical. For example, her insistence that family history is determinative of a person's pre-morbid potential to achieve a higher qualification is contradicted by her concession that the plaintiff was the exception in his family because of his pre-morbid history of academic challenges which no-one else appeared to have.

[217] By contrast, her counterpart Dr Prag, opined that the highest pre-morbid level the plaintiff would have attained would be an NQF level 4 qualification. Mr Hattingh was quite critical of Dr Prag's evidence. However, this criticism was unfounded. Dr Prag's qualifications

were not called into question. She testified that she has been an educational psychologist since 1998 when she obtained her Master's degree. She received her PHD in 2005. Her area of expertise is remedial therapy and educational psychology. She commenced her career as an educator and guidance counsellor.

[218] Both her expert report and the joint minute record her insistence on collateral documentation and information to substantiate and support the plaintiff's reported factual scenario. Her testimony reflects a proper consideration of the limited collateral documentation provided and her professional reasoning for her opinions. Although she was incorrectly advised by the plaintiff that he concluded his plumbing certificate pre-morbidly in 2010 and he did not provide collateral documentation in support, she nevertheless took steps to verify whether the certificate would enhance his qualifications by contacting the institution to clarify whether the plumbing course qualified with the NQF requirements.

[219] Dr Prag was a credible and reliable witnesses, who took measures to verify information and substantiate her opinion. She provided rational and credible reasons for her opinions and views. She properly deferred issues beyond her area of expertise to the appropriate experts for comment and conceded her lack of expertise in areas when required. Dr Prag's expert report and testimony is preferred over Ms Radzilani on aspects that have not been agreed by them in the joint minute.

[220] The divergent opinions of the occupational therapist revolved around the plaintiff's ability to function optimally post-morbidly. Ms Sebapu opined that the plaintiff's post-morbid physical challenges caused by his injury and its sequelae affected his global functioning. She recommended various assistive devices for the plaintiff and domestic and personal assistance for task with which he struggles. This included the recommendation of a companion to accompany the plaintiff when he travelled to unfamiliar environments.

[221] She opined he would struggle to work at heights, with tools and machinery, in the elements and on fine tasks. She also concluded that the plaintiff suffered emotional / psychiatric fallouts which negatively impacted his cognitive functioning. Although the plaintiff was not functionally unemployable, his prospects of securing employment are limited or minimal.

[222] She declined to afford a positive consideration to the plaintiff's post-morbid employment history which evidenced his independence, resilience and ability to secure employment notwithstanding his reduced functional capacity. She also did not afford any consideration to

the fact that the plaintiff's reasons for leaving his post-morbid employment were unrelated to any functional inabilities to perform the work. Although she maintained her qualification to comment on the plaintiff's emotional / psychiatric fallout, she did consider this holistically in the context of the plaintiff's post-morbid employment history.

[223] The approach adopted by Ms Radzuma, the occupational therapist appointed by the Minister, impressed me as being practical and holistic. She considered the nature of the plaintiff's reported employment both pre and post-morbidly, to determine his residual work capacity. She explained why considered him to be fully independent, versatile and in fact functioning well in the jobs he secured post-morbidly.

[224] She disagreed with her counterpart's assessment on the plaintiff's cognitive limitations and deferred this discussion to the appropriate experts. Where appropriate, she declined to duplicate efforts and deferred to the opinions of the appropriate experts. For example, she did not agree with her counterpart on the assistive devices proposed, not because these may not be required but because they should properly be determined by the ophthalmologist.

[225] I accept Ms Radzuma's opinion and views that the plaintiff was functionally independent, notwithstanding his reduction in functional capacity. Her evidence and expert report set out the motivation for her conclusions in a compelling and objective manner. I consider her opinion and conclusions to be reliable.

[226] The conflicting opinions of the industrial psychologists related primarily to their divergent contentions regarding the plaintiff's likely pre and post-morbid career paths. Ms Ntsieni conceded that her postulations on the plaintiff's pre-morbid potential was premised on the report and findings of Ms Radzilani. In light of my findings on the reliability of the other expert witnesses, it is apparent the factual basis for the pre and post-morbid career paths postulated by Ms Ntsieni are therefore premised on incorrect information. *A fortiori*, the actuarial calculations premised on these scenarios are placed into question.

[227] Ms Ntsieni made no attempt to independently establish the nature or manner in which the plaintiff operated his business. She did not interrogate the options which would have been open to the plaintiff as a business owner with employees or whether his injuries and its sequelae precluded him from continuing with his pre-morbid employment as a business owner.

[228] Her expert report and opinion focused on the plaintiff's employability in the formal

sector and as a heavy duty truck driver. This focus was caused by the resolute reliance and unquestioning acceptance of the expert opinion and conclusions advanced by Ms Radzilani, the educational psychologist appointed on behalf of the plaintiff. It ignored the agreed fact that pre and post-morbidly the plaintiff operated his own business. She failed to properly assess the reasons for the closure of his business and whether he retained the ability to operate this business.

[229] She disregarded his accounts to other expert witnesses about his business and the divergent views provided regarding his pre-morbid plans to continue as a business owner regardless of the form that business took.

[230] When considering his occupational prospects, she focused on his ability to drive a heavy duty truck as an employee alternatively formal employment. Whether the plaintiff could operate his own business, post morbidly and the form that business could entail was not properly interrogated. Instead, she positioned him as likely only to secure employment of an unskilled nature.

[231] Ms Ntsieni did not question the plaintiff about the activities associated with his business or the steps taken to secure employment in line with his plumbing certificate. She did not seek corroboration from any person or document on the plaintiff's pre and post- morbid employment history. She was satisfied that the explanation that the plaintiff failed to keep proper records, like most informal workers, would suffice. It does not. More is expected of an industrial psychologist who is tasked with postulating realistic career paths for a plaintiff.

[232] She did not address whether any attempts were made to confirm the plaintiff's assertions regarding employment by various employers, whether he operated a bank account, the manner in which he was paid and in turn paid his employees and suppliers to his business.

[233] Her failure to properly establish the facts regarding the pre and post morbid employment scenarios that she relied on, in the face of significant contradictions on the expert reports in her possession, is cause for her opinions and conclusions to be viewed with scepticism.

[234] Little evidential value may be placed on the mere fact of the plaintiff's plumbing certificate, without more. The plaintiff obtained this certificate in 2015 and gave no account of having applied these practical skills as a plumber or in associated employment. One would

therefore be remiss to infer from the mere fact of the plumbing certificate, that the plaintiff intended a career as a plumber.

[235] By parity of reasoning, the evidential weight to be attached to the *ipse dixit* of the plaintiff on his code 14 learner's licence, without more, is very limited. The document supporting this learner's licence was only provided during the trial. Based purely on the plaintiff's *ipse dixit,* Ms Ntsieni concluded that a career as a heavy truck driver was plausible and postulated a career projection on this basis. This conclusion, which self-evidently lacks a proper factual basis, leads me to conclude not only that her opinion and conclusions are unreliable, but also that Ms Ntsieni as an expert witness lacks impartiality and objectivity. In the circumstances, Ms Ntsieni's opinions and conclusions are rejected where and to the extent they differ to those in the joint minute.

[236] By contrast, Mr Marais impressed me with the methodology and approach adopted in his assessment of the plaintiff and preparation of his opinion and expert report. He provided an imminently reasonable explanation for failing to consider an employment scenario premised on the heavy duty truck driver scenario. This ambition was not disclosed to him when the plaintiff spoke about his career plans and there is no collateral information or documentation to support such an assertion.

[237] It is highly unlikely Mr Marais would diligently record reference to the three plans mentioned to him and only omit this potential career path. This unlikelihood is further compounded when one considers that Mr Marais had no problem postulating such a career path when pressed to do so. He in fact did so in a more diligent fashion by explaining to the Court how the salaries of truck drivers are determined and that reliance on Koch in this regard would be erroneous. His concession that such a career postulation could be likely was well made. However, it is notably his further underlying requirements for such career postulation to occur, have not been established.

[238] Mr Marais noted the plaintiff's failure to pursue plumbing, notwithstanding his certificate and correctly, without more, failed to postulate a career path on this basis. The plaintiff provided no collateral information to support the confirmation of his pre and post- morbid income. Mr Marais was alive to the discrepancies and inconsistencies provided by the plaintiff in his various accounts.

[239] In the circumstances, Mr Marais impressed as being a reliable witness. His opinion and conclusions are accepted as the plaintiff's likely pre and post-morbid career paths. His pre-

morbid career path postulation is reasonable and enures to the plaintiff's benefit. His opinion that pre-morbidly, the plaintiff would have continued as a business owner or secured employment as an unskilled to, at most semi-skilled worker until retirement is accepted. His post-morbid postulation that the plaintiff would remain in the unskilled moving to semi-skilled work is also accepted.

[240] Actuarial reports and calculations are tools intended to assist the court in the determination of the quantum of a claim and do not prescribe the manner in which a court may exercise its discretion in this regard.[18] An actuary's calculations are based on the assumptions and scenarios provided by the industrial psychologist and / or instructing attorney. If these assumptions and scenarios are rejected, then those calculations must perforce fall away.

[241] I am satisfied that the postulations emanating from scenarios 1C and 2C of the actuarial joint minute is the most appropriate calculation having regard to the evidence and the plaintiff's factual circumstances.

[242] The application of contingencies, to any amount calculated is a task, which falls within the court's discretion.[19] In the case of *Road Accident Fund v Guedes,*[20] the court referred with approval to *The Quantum Yearbook*, by R Koch under the heading 'General contingencies', where it states that when:

> *'[in] 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 '*

[243] The advantage of applying actuarial calculations to assist in this task was emphasised in *Southern Insurance Association Ltd v Bailey NO,*[21] where it was stated that: *'any inquiry 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*

[18] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 116G – 117A.
[19] Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) para 9.
[20] Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) para 9.
[21] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 113F – 114A.

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 each 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'.

[244] Mr Hattingh argued that the appropriate contingencies should be 5% on past and 15% on future earnings for the pre-morbid scenario. He argued that a 50% contingency on post-morbid earnings would be appropriate. He also contended for a 10% contingency on the agreed future medical expenses.

[245] Ms Mashele argued that a contingency deduction of 15 % and 25% would be most appropriate for the 'but for' scenario with a 25% contingency on the 'having regard to' scenario. She also contended for a 15% contingency on the agreed future medical expenses.

[246] On a consideration of all the evidence, together with the various expert reports, I am of the view that the appropriate contingencies to be applied to scenario 1C are 5% and 20% respectively with the appropriate contingency to be applied to scenario 2C of 25%. Applying these contingencies, the plaintiff should therefore be awarded a nett amount of R1 087 464 (One million eighty-seven thousand four hundred and sixty four rand) for his past and future loss of income / earning capacity.

[247] I am further of the view that the appropriate contingency for the plaintiff's agreed future medical expenses is 10%.

General damages

[248] The plaintiff sustained injuries as a result of the shooting incident. He was hospitalised and has an enucleated right eye that is permanently blind. He has certain physical limitations that will endure for the remainder of his life. He suffered MDD and PTSD. The expert witnesses concur that he has suffered a loss of amenities of life and he will require future medical treatment and surgical procedures.

[249] I accept that the injury and its sequelae has adversely affected the plaintiff as discussed and set out in the reports by the various experts witnesses. The plaintiff experiences headaches which affect his mood, demeanour, social network and productivity. He no longer enjoys leisure activities because he cannot fully participate. He is self-conscious about his appearance which has compounded his poor self-esteem.

[250] In *Pitt v Economic Insurance Company Ltd,*[22] Holmes J noted that an award for general damages *'must be fair to both sides. It must give just compensation to the plaintiff but must not pour out largesse from the horn of plenty at the defendant's expense'*. Although there is a modern tendency to increase awards for general damages, the assessment of the quantum of general damages primarily remains within the discretion of the trial court.

[251] Mr Lebeko, who appeared with Mr Hattingh on behalf of the plaintiff, contended that the amount of R850 000 would represent an appropriate award for general damages. In support of this contention, he referred to the following cases. In *Matjee v RAF*,[23] the plaintiff was hospitalized for approximately five weeks. He did not return to work after the accident. He sustained severe bodily injuries, including a head injury with loss of consciousness; a dislocation of the left elbow; degloving of the cubital fossa; and a severe laceration of the brachial artery resulting in a flaccid left arm. He was awarded R650 000 in July 2017.

[252] In *Dlamini v RAF*,[24] the plaintiff sustained a severe brain injury with intracranial bleeding and multiple contusions; a comminuted fracture of the mandible; and facial injuries. The sequelae of the injuries were hospitalisation and medical treatment; he suffers from ataxia; a diminution in his cognitive capacity; he suffered shock, pain, suffering, discomfort and disability with anticipated future suffering for further pain, discomfort and disability; he suffered a loss of the amenities of life; and a loss of earnings. He was awarded R1 350 000 in September 2015.

[253] In *Ntsukanyane v RAF*,[25] the plaintiff suffered head and facial injuries to such an extent that he lost his left eye and was rendered completely blind. He suffered some facial scarring which required further surgery. He regularly suffered from headaches. He had a disc lesion with early arthritis at the C3/4 and C4/5 level, which would require future surgery. He suffered a severe chest injury resulting in severe thoracic pain as well as scarring. He suffered from depression. He was unable to take care of his four children and as a result they had to live with his deceased wife's family. The loss of his family greatly affected him. He was rendered unemployable. He was awarded R1 350 000 in December 2016 which equates to R1.7 million in 2022.

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[22] Pitt v Economic Insurance Company Ltd 1957 (3) SA 284 (D) 287 E-F.
[23] Matjee v RAF (8758/2016) (14 July 2017).
[24] Dlamini v RAF (59188/2013) (3 September 2015).
[25] Ntsukanyane v RAF (30173/2014) [2016] ZAGPPHC 1217 (6 December 2016).

[254] In *Eggeling and Another v Law Union and Rock Insurance Co Ltd and Another,*[26] the plaintiff was a minor and six years old when the accident occurred. He sustained a fracture at the base of the skull causing injury to or complete severance of the facial nerve controlling the muscles on the right side of his face. He was hospitalized for a total of four weeks. He was treated by a physiotherapist for about six months. He suffered from vomiting at first and some pain from headaches. He lost six months of schooling. The impairment of the facial nerve resulted in a complete paralysis of the right side of his face. Further deterioration was expected as the muscles on the right side of his face atrophied from disuse, making his face more asymmetrical. He suffered a permanent, intermittent deafness of the right ear. No impairment of vision was expected, though the movement of the right eyeball could become erratic. His mastication was slightly impaired. The court accepted that he would have a grossly distorted face for the rest of his life. He was awarded £5000 in 1958 which is equivalent to R1 062 788 in 2021 terms.

[255] Both parties referred to *Matladi v Road Accident Fund*,[27] where the plaintiff suffered a fracture of the jaw, facial injuries, a ruptured right globe resulting in the loss of his right eye, and a whiplash injury. The plaintiff lost all vision in the right eye which also reduced his binocular field vision. He lost consciousness as a result of the accident and was hospitalised for about two months. He was awarded R210 000 in June 2010.

[256] Ms Mashele also referred to the following cases in support of her contention that an appropriate award for general damages would be R500 000. In *Mthembu v Minister of Law and Order,*[28] the plaintiff was awarded R55 000 for the complete and permanent loss of vision in one eye from a gunshot. The plaintiff retained his job but was vulnerable in case of damage to his good eye. The present value of this award is R377 000.

[257] In *Mdunge v Multilateral Motor Vehicle Accident Fund*,[29] the plaintiff sustained multiple injuries embracing left shoulder, arm and hand, loss of all useful vision in the left eye and significant facial lacerations and disfigurement. The nerves that conduct signals from the spinal cord to the left shoulder, arm and hand were damaged rendering his left arm flail and completely useless. The plaintiff was awarded an amount of R180 000 in 1998 which equates to R 550 000 in 2020 terms.

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[26] Eggeling and Another v Law Union and Rock Insurance Co Ltd and Another 1958 1 QOD 285 D.
[27] Matladi v Road Accident Fund (2010) ZAGPJHC 173.
[28] Mthembu v Minister of Law and Order 1991 (4130 QOD 1 (D).
[29] Mdunge v Multilateral Motor Vehicle Accident Fund 1998 (4j2) QOD 145 (N).

[258] In *Sadoms v A A Onderlinge Assuransie Assosiassie Bpk,*[30] the plaintiff sustained the loss of sight in one eye. He also suffered intense pain for about three weeks for which he received a separate award. The general damages for the loss of his eye was assessed at R 9 500 in 1979 which has a present day value of R298 000.

[259] It is trite that previous awards in comparable matters are intended to serve only as a guide. Each case should be determined based on a consideration of its own facts. Having considered the facts of this matter and the authorities that have been referred to, I am of the view that a fair and reasonable amount of compensation for the plaintiff's general damages is the amount of R550 000.

Costs

[260] The general rule in matters of costs is the successful party is entitled to be awarded costs, and this rule should not be departed from except where there are good grounds for doing so.

[261] Mr Hattingh contended that the engagement of two counsel was justifiable given the complexity and value of the claim. I do not agree. He also requested the plaintiff's costs for 26 October 2022. The matter was set down for trial on this day and could not proceed due to the unavailability of the Minister's witnesses.

[262] There is no reason for the plaintiff not to be awarded his costs of trial and for such costs to include the wasted costs of trial when the matter could not proceed on 26 October 2022.

Order

[263] In the result the following order is made:

(a) The defendant is ordered to pay the plaintiff the total amount of R2 826 663.00 (Two million eight hundred and twenty six thousand six hundred and sixty three rand), which amount is calculated as follows:

(i) Future medical expenses - R1 189 199.00 (One million one hundred and eighty nine thousand one hundred and ninety nine rand);
(ii) General damages - R550 000 (Five hundred and fifty thousand rand); and

[30] Sadoms v A A Onderlinge Assuransie Assosiassie Bpk 1979 (313) QOD 35.

(iii) Past and future loss - R1 087 464.00 (One million eighty-seven thousand four hundred and sixty-four rand).

(b) The amount of R492 299.60 (four hundred and ninety-two thousand two hundred and ninety-nine rand and sixty cents) previously ordered as interim payment in respect of future medical expenses, shall be deducted from the amount referred to in paragraph (a) above.

(c) The total amount referred to in paragraph (b) above, shall be paid into the following account nominated by the plaintiff:

Name of Account Holder:	DH GOLELE ATTORNEYS
Bank:	First National Bank
Branch:	Carlswald
Account Number:	6[....]7
Ref:	

(d) In the event of default on the above payment, interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo rate on the date of this Order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum calculated from due date until date of payment.

(e) The defendant shall pay the plaintiff's agreed or taxed party and party costs on the High Court scale, such costs to include (but not be limited to), and subject to the discretion of the Taxing Master:

(i) The costs of senior counsel only on preparation and appearance for trial on 24, 25, 26, 27 and 28 October 2022, preparation of heads of argument and appearance for final argument on 23 and 30 November 2022.

(ii) The reasonable taxable costs in obtaining all medico-legal reports and follow up reports by the plaintiff's medico-legal experts, which were furnished to the defendant; preparation of joint minutes as well as preparation and reservation fees, if any as the Taxing Master may on taxation determine, of the following experts:

- Dr Brian Van Onselen - Opthalmologist
- Dr M Vorster – Forensic Psychiatrist

- KE Radzilani – Educational Psychologist
- S Sebapu – Occupational Therapist
- G Sibiya – Clinical Psychologist
- Dr Thendo Netshiongolwe – Plastic Surgeon
- T Ntsieni – Industrial Psychologist
- Dr D Chula – Neurosurgeon
- Loi Loi Consulting – Actuary

T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 8 November 2023.

HEARD ON:	24, 25, 27 and 28 October 2022 and 30 November 2022
JUDGEMENT DATE:	8 November 2023
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