

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



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

Date: 10/11/2023

A Maier-Frawley

CASE NO: 36826/2009

In the matter between:

**KOTZE, JOHANNES STEPHANUS**

Plaintiff

and

**THE MINISTER OF SAFETY AND SECURITY**

Respondent

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J U D G M E N T

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**MAIER-FRAWLEY J:**

**Introduction**

1. The plaintiff instituted action against the defendant for payment of damages arising out of an incident in which he was shot several times by members of the South African Police Services ('SAPS').
2. Only the plaintiff's claim for loss of earnings and/or earning capacity came before me for adjudication at trial. Such claim consists of past and future

costs of an assistant and the property development loss suffered by the plaintiff.

3. On 28 August 2008, whilst in the process of fleeing from the scene of an armed robbery which was taking place inside his residence, members of the SAPS opened fire at the plaintiff's vehicle during the course of a botched intervention by the police to arrest the robbery. Both the plaintiff and his wife were inside his vehicle at the time of the shooting.
4. The plaintiff sustained no less than ten gunshot wounds in the incident and suffered multiple serious injuries (some permanent) in consequence.
5. Full details of the incident are described in the judgment of Hartford AJ who, after a lengthy trial, on 25 August 2011, determined the issue of liability in favour of the plaintiff, with the defendant being held liable for the plaintiff's agreed or proven damages arising out of the incident.
6. At the outset of the hearing the defendant's counsel indicated that the pertinent issue arising for determination was that of causation, i.e., whether the plaintiff's alleged loss was solely occasioned by the shooting incident. By the time that oral argument was presented, the issue of causation remained the only real controversy between the parties. This is because the affidavit and expert evidence tendered on behalf of the plaintiff remained largely undisputed; material agreements between the various experts, as recorded in their joint minutes, remained unchanged and unchallenged; the nature and extent of the injuries sustained by the plaintiff in the shooting incident, the sequelae arising therefrom, the treatment the plaintiff underwent and will in future be required to undergo and the effect that the injuries and sequelae had and would have on the plaintiff's ability to earn an income, were common cause between the parties; the nature and extent and quantification of the plaintiff's loss by the plaintiff's actuary and property

development experts, both in their expert reports and in oral evidence, including the assumptions relied upon by them for their conclusions and calculations, were also not disputed. Likewise, the postulated contingency deductions to be applied to the plaintiff's loss, as quantified, were accepted by the defendant as fair and reasonable. Save for the oral evidence of Ms Le Roux (erstwhile Absa Bank official), the factual evidence presented by the plaintiff and other witnesses remained uncontested and unrefuted.

7. In essence, the plaintiff's case is that he was in the process of completing a residential property development (referred to as the 'Gleneagles development' or 'erf 902' or 'the project' in evidence) at the time of the shooting. He purchased the land (erf 902) on which residential units were being constructed through the vehicle of a close corporation known as *Tsirir Properties CC* (hereinafter 'Tsirir' or 'the CC' or Tsirir CC) of which he was the sole member. The management of the project was conducted by him through the vehicle of a company known as *Kotze Lebotse (Pty) Ltd* (hereinafter 'Kotze Lebotsa') of which he was the sole director. Prior to the shooting, the plaintiff had sought loan funding from Absa bank with which to pay creditors, amongst others, the owner of erf 902 and the builder of the development, which loan had been approved by the bank subject to the registration of a mortgage bond over erf 902. The serious and extensive injuries sustained by the plaintiff in the incident rendered him physically and mentally unable to work or make vital business decisions for a protracted period of time during his recovery. With the prospect of the plaintiff's recovery from his injuries remaining unclear and uncertain by February 2009, Absa bank made a decision to withdraw the bond finance it had previously approved in respect of the project. This meant that the outstanding balance of the purchase price in respect of the sale of erf 902 could not be paid. Nor was the plaintiff in any condition at that stage to deal with legal action that had been instituted by the owner of the land. The action was ultimately

settled *inter alia* on the basis that the townhouses constructed on erf 902 would become the property of the landowner.<sup>1</sup> In the result, the plaintiff lost the development and all income he expected to derive from future sales or rental of the townhouses in the development. Amongst his other serious injuries, the plaintiff sustained a secondary organic brain injury from having undergone prolonged ventilation whilst in ICU, resulting in, amongst others, cognitive fall out, impaired memory, inability to concentrate and a lack of stamina. In addition, the severe trauma the plaintiff experienced by virtue of the shooting incident resulted in him developing a mood disorder and also to suffer from post-traumatic stress disorder and depression. In the result, he requires high level support in performing the work tasks he performed on his own prior to the incident and he therefore claims the cost of an assistant in addition to the damages he sustained by the loss of the development.

8. The defendant's case is in essence a denial that any losses sustained by the plaintiff (amongst others, the loss of the development and the subsequent loss of the income that was going to be derived from the sale or rental of the residential units in the development) were caused by the conduct of the SAPS in the shooting incident, it having been accepted that the defendant is vicariously liable for the conduct of the SAPS. This means that the plaintiff was required to prove that his alleged loss of earnings and/or earning capacity was causally connected to the shooting incident and consequences thereof. As discussed later in the judgment, the defendant has argued that the bank's withdrawal of finance and the plaintiff's decision to sign over the development each independently constitute a *novus actus interveniens*, such that the shooting cannot be considered to be a factual cause of the loss. As regards the cost of an assistant, the defendant contended in its written argument that the plaintiff failed to show that he is entitled to the costs of two assistants and the amount claimed in respect thereof. However, at the

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<sup>1</sup> The development was signed over on 4 March 2009.

conclusion of oral argument, the defendant conceded the necessity of an assistant<sup>2</sup> and the basis of the calculation in respect of the amount claimed, but maintained its stance that this cost was not shown in evidence to have been caused by the shooting incident

9. The plaintiff gave evidence at the trial and called the following witnesses to testify on his behalf: (i) Ms Karin le Roux (Absa bank official who looked after the plaintiff's business or corporate banking portfolio at Absa); (ii) Ms Nicolene Van der Walt (attorney & conveyancer); (iii) Mr Andre Meintjies (accountant); (iv) Mr Rudy Sinden (Plaintiff's son-in-law who is employed at one of the plaintiff's companies known as *KL Development*); (v) Ms Renee Van Zyl (Industrial psychologist); (vi) Mr John Wangenhoven (property development expert) (vii) Mr Whittaker (actuarial expert).
10. The defendant closed its case without calling witnesses or presenting any gainsaying evidence at the close of the plaintiff's case.

### **Common cause injuries and sequelae**

#### *Injuries sustained by Plaintiff in shooting incident*

11. The injuries sustained by the plaintiff in the shooting incident were serious and life-threatening.<sup>3</sup> The plaintiff sustained no less than 10 gunshot wounds in the incident, leaving him with injuries primarily to his torso, shoulder and hips.<sup>4</sup> The Occupational Therapists agreed in their joint minute that the injuries and sequelae had a significant impact on the plaintiff's health, emotional wellbeing and cognitive abilities. This was further complicated by the bank's withdrawal of financing due to the severity of the plaintiff's injuries, which then impacted on the development of his business. The incident-related injuries sustained by the plaintiff were the following:

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<sup>2</sup> The plaintiff has only however claimed the cost of one assistant.

<sup>3</sup> Joint Minutes, Occupational Therapists.

<sup>4</sup> Joint Minutes, Psychiatrists

- (i) Ten gunshot wounds:- 3 gunshot wounds to his abdomen; 1 gunshot wound to his right hip; 2 gunshot wounds to his left shoulder; 1 gunshot wound near his spine and into his lungs; 1 gunshot wound into his back and an exit wound in the left axilla; 2 gunshot wounds in his buttocks (left gluteus);
- (ii) Serious internal damage including damage to his intestines;
- (iii) Severe post-traumatic stress disorder;
- (iv) Major depressive mood disorder;
- (v) Organic brain damage resulting from prolonged ICU ventilation;
- (vi) General bruises and abrasions;
- (vii) Extensive scarring and disfigurement.

*Sequelae of Injuries sustained in shooting incident*

12. The undisputed sequelae or consequences of the Plaintiff's injuries are the following:

*Cognitive*

- (i) As a result of the secondary brain injury, the plaintiff suffers from neurocognitive difficulties, neuro behavioural changes and neuropsychiatric changes. The appointed clinical psychologists agreed in their joint minute that the secondary brain injury sustained by the plaintiff compromised his neuropsychological prognosis and no spontaneous improvement in cognitive functioning is expected as a result. Given the plaintiff's cognitive decline as a result of the sustained secondary brain injury the plaintiff's occupational functioning and earning potential is expected to have been compromised on a permanent basis. According to Dr Marus (Neurosurgeon), the plaintiff's current neurocognitive, neuropsychological and neurophysical functions would be representative of his permanent ongoing disability;

- (ii) Impaired ability to concentrate and memory loss;
- (iii) Difficulty with word finding in both Afrikaans and English so that the plaintiff finds it difficult to tell a story or to appreciate humour;
- (iv) Daily headaches;
- (v) It was reported to N Prinsloo (Psychologist) that the plaintiff has become physically and mentally slow and that he is very forgetful;
- (vi) The plaintiff presented with quite a poor affect and some of the experts found it quite difficult to communicate with him

#### *Physical*

- (vii) One bullet hit the plaintiff's spine and the shrapnel went into his lung. If he exercises or does any strenuous activities, he gets short of breath;
- (viii) Difficulty in picking things up especially above his head;
- (ix) The plaintiff's abdominal wall remains a challenge. He feels like there is a knife cutting across his lower abdomen when he tries to bend forward to do things. He has had to change all his clothing to stretch clothing. He has to control what he eats and cannot eat or drink anything that causes gas;
- (x) Painful left shoulder and abdomen (ongoing abdominal pain) causing loss of physical ability and agility;
- (xi) Some limitation of movement in the left shoulder, especially when it comes to the plaintiff doing things behind his back;
- (xii) Lumbar pain which is worse on exertion;
- (xiii) Plaintiff continues to have mesh which was inserted into his abdominal wound, which will require replacement in future;
- (xiv) On discharge from hospital Plaintiff was compromised physically with a hernia. The plaintiff has a recurrent abdominal hernia which is getting bigger and which will require surgical intervention in future;

- (xv) Heartburn, marked bloating after meals, bulging of the upper abdominal area with the use of abdominal musculature as well as shortness of breath on exertion;
- (xvi) Dyspersia (upper abdominal discomfort). Plaintiff will require lifelong treatment with proton pump inhibitor (to relieve acid reflux) and cannot drink any carbonated drinks;
- (xvii) Due to previous abdominal surgeries, the plaintiff has about a 30% risk of developing small bowel obstruction;
- (xviii) Possibility of lifelong supplementation with vitamin B12 injections – the need therefore is subject to confirmation of vitamin B12 deficiency as a result of a possible resecting of the small intestine;
- (xix) Plaintiff underwent multiple surgical procedures;
- (xx) Chronic headaches;
- (xxi) Occasional heartburn and abdominal cramps;
- (xxii) Previous sporting activities such as playing squash, social golf, jogging and attending gym have been discontinued and plaintiff will in future be unable to partake therein;
- (xxiii) Severe curtailment of enjoyment of life amenities due to abdominal injuries and sequelae thereof.

*Psychological*

- (xxiv) Plaintiff is suffering from depression and presents with symptoms of chronic post-traumatic stress disorder (PTSD) and major depressive disorder relating to the shooting and its aftermath;
- (xxv) Loss of self-esteem related to scarring and physical difficulties;
- (xxvi) Diminished quality and enjoyment of life due to physical and psychological issues;
- (xxvii) Plaintiff's recreational and interpersonal functioning has been negatively affected by the incident and the related sequelae, such as



his physical pain and limitations, increased irritability and financial difficulties;

- (xxviii) Plaintiff's occupational functioning has been negatively affected by the incident and sequelae thereof, with specific reference to his increased irritability, memory and concentration difficulties, depressed mood and reduced levels of energy and motivation;
- (xxix) Long term neuropsychological difficulties associated with secondary brain injury;
- (xxx) Plaintiff's psychological prognosis is guarded due to the significant period that has elapsed without psychological intervention as well as ongoing physical pain and limitations;
- (xxxi) Loss of interest and zest to continue with his businesses;
- (xxxii) Plaintiff has become withdrawn, socially isolated and mistrusts people since the incident and exhibits increased levels of aggression post-incident;
- (xxxiii) Inability to deal with conflict – plaintiff prefers to walk away from any conflict;
- (xxxiv) Plaintiff presents with feelings of guilt/worthlessness;
- (xxxv) Disturbed sleep due to pain and intrusive thoughts with reduced interest in sexual function and ability;
- (xxxvi) Further sequelae are as listed at pages 57 to 58 of the plaintiff's updated heads – these include, amongst others, poor emotional functioning, which has deteriorated into a chronic maladaptive pattern, hyper vigilance in respect of any threat or perceived threat, distrust of his environment and the police, feeling unsafe all the time and feeling tired all the time.

13. The medical treatment and various surgical procedures the plaintiff underwent in respect of his incident related injuries is a matter of record. It is

summarised in para 20 of the plaintiff's updated heads of argument. Needless to say, the plaintiff's recovery was protracted.

### **Evidence**

14. The trial ran for several days. The evidence of the witnesses who testified at the trial is a matter of record. I will therefore refer only to salient aspects of the evidence given by witnesses whose evidence impact on the issue of causation.<sup>5</sup>

#### *Ms Van der Walt*

15. Ms Van der Walt confirmed that she is the plaintiff's attorney of record. She has been the plaintiff's attorney for more than 20 years in respect of his various businesses. The Kotze Group comprises various companies and close corporations, including three family trusts.<sup>6</sup>
16. Prior to the shooting incident, the plaintiff was a self-employed business owner who ran and managed a range of diverse businesses that *inter alia* traversed different industries, including the beverage, construction and property development industries.
17. She was involved in the Gleneagles development in that she was mandated to attend to the opening of a sectional title register in respect of the development and to attend to the transfer of residential units to individual purchasers once sold. The plaintiff had purchased the land from Transacht, the landowner, to whom a portion of the purchase price was still owed. The plaintiff had appointed the builder Peakstar to construct residential units on the property. Monies were also still owed to the builder.

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<sup>5</sup> It should be noted that I reviewed the totality of the evidence presented at trial for purposes of judgment.

<sup>6</sup> Ms Van der Walt confirmed the contents of an organogram depicting the various entities within the Kotze group of companies at p00005-1 of the papers. The companies within the group include Sportsade Holdings (Pty) Ltd; Sportsade (Pty) Ltd ('*Sportsade*'); Kotze Lebotsa (Pty) Ltd ('*Kotze Lebotsa*'); Soloprop 1161 (Pty) Ltd. The close corporations within the group include Erf 213 Enphonria CC; Tsiris Properties CC ('*Tsiris*').

18. She learnt of the shooting incident two days after it occurred when she read about it in the newspaper. She visited the plaintiff one week after the incident whilst he was in ICU. She learnt that he was seriously injured. The plaintiff was in an induced coma at that stage, so he could not speak to or recognize anybody. He was in a very serious condition. She visited the plaintiff again two to three weeks later. He was no longer in a coma, however, he was being ventilated and was still in a very bad state. He was to some extent awake but not necessarily knowing what was happening around him. He sustained various injuries to his abdominal area. The area was kept open with only a plastic film covering his stomach, however, one could see the plaintiff's intestines through the film. It was a gruesome scene. The plaintiff did not know what was happening around him.
19. She confirmed having received a letter from attorneys representing Transacht in November 2008 in which they confirmed that a bond was granted by Absa bank and that the bond amount of R9 350 000.00 would be allocated towards payment of the purchase price of erf 902 once the funds were released. At that stage the plaintiff was out of hospital and was staying in a type of stepdown facility. He was still very seriously injured and not able to comprehend what was happening around him.
20. On 23 February 2009 she received a letter from Transacht's attorneys in which they advised that Absa bank had withdrawn the bond facility and was not proceeding with the registration of the bond of approximately R9 Million. She went to see the plaintiff and informed him that the bank had withdrawn the bond finance. She advised the plaintiff to take this up with the bank. She also informed the plaintiff of a settlement proposal that she had received from Transacht in respect of the legal action previously instituted by it

against Tsis Properties CC for payment of the outstanding purchase price owed to Transacht.

21. Prior to the shooting incident, bond finance had been approved by the bank which was to be utilised to discharge Tsis's indebtedness to Transacht. After the shooting incident, Transacht proposed a settlement of the action on the basis that the plaintiff would transfer his right, title and interest in the development to Transacht so that it could take ownership of all units that had been built on its property and Transacht would then settle the outstanding amount owing to the builder. She sought instructions from the plaintiff in regard to the proposed settlement.
  
22. At that stage the plaintiff was still very ill and not in a state to deal with any of his businesses. He was certainly not in a position to deal with major crises', issues or decisions. He was scared of people and did not allow people to come and visit him. Arrangements had to be made in advance to allow the plaintiff to prepare himself for visitors. He did not want to talk about anything. He was very concerned about his family, his own health and staying alive. His wife had also been seriously injured in the incident and his children had undergone great trauma in the situation. He was just trying to stay alive, having to endure the medical procedures he had to go through. His stomach had to be opened and closed every second day. The plaintiff agreed to transfer his right, title and interest in the development to Transacht as he did not want to pursue the matter further. As Ms Van der Walt was not 100 percent sure that the plaintiff understood what was happening, she recorded the plaintiff's instructions in writing so that if something were to happen to him, she would have a record thereof, as confirmed by his signature.

23. During cross-examination, Ms Van der Walt confirmed knowing about the various entities within the Kotze group of companies. She described the plaintiff as a successful entrepreneur. He would decide on what project to embark upon and then follow it through from start to finish. Every decision and action that was needed would be taken by the plaintiff himself. He was hands on in all his various businesses.

*Ms Karin Le Roux (Absa Bank)*

24. In 2008 Ms Le Roux was employed as a relationship executive at Absa bank's business centre in Eastgate, Bedfordview. In 2008 she became the plaintiff's banker on the corporate side.
25. She described the plaintiff as a brilliant businessman with a diverse portfolio of businesses spanning across various industries. The bank viewed him as a very important client. He was seen as the jockey and driving force behind the various entities that he led. He had a good track record from a financial and business point of view.
26. Ms Le Roux was familiar with the Gleneagles development as the plaintiff had approached her for finance in respect of the project. She had gone on site to inspect the development in early August 2008, which was 98% complete. All 37 units had already been built. The bank valued the development at R25 million at the time and was willing to loan the plaintiff 75% thereof, being the amount of R17.5 million. However, the plaintiff only required approximately R9 million. The bank required a bond to be registered over the property and a bond for the amount of R9,457 million was already approved at the time of the shooting incident.
27. She was informed of the incident on the day it occurred. She informed her superiors thereof as in her view, it severely impacted upon the bank's risk.

28. She saw the plaintiff one to two weeks after the incident because the bank was required to amend the mandate so as to allow other person/s to have signing powers on the bank account of one or other of the plaintiff's businesses, so as to enable business to continue. She was shocked by the plaintiff's severely injured condition and was told to monitor the pace of the plaintiff's recovery.
29. Ms Le Roux obtained regular updates of the plaintiff's condition over the course of the first six months following the incident. It appeared that the plaintiff was not getting better. She had only ever dealt with the plaintiff with regards to the development, and believed that the plaintiff was the person who was in charge of the development and the person who made the decisions with regard to the development. She was not aware of anyone else working for the plaintiff who was dealing with or managing the project at erf 902 besides the plaintiff. The plaintiff also did not inform her that anyone else besides him was allowed to take decisions regarding the development.
30. She recommended to Absa not to proceed with the credit facility funding because of the plaintiff's adverse health condition. She considered that Tsiris and the property development company was now left without a head, with no-one being equipped to take over the plaintiff's duties and responsibilities. She could not speak to the plaintiff because he was not in a medical position to do so. Ultimately, funding a company without a head was too big a risk for the bank, i.e., to deal with a company that had no leadership so that nothing that had been planned could be executed.
31. During cross-examination it was put to the witness that she destroyed a highly successful business project based on her assessment to withdraw finance at a time when the plaintiff was still fighting for his life. Her response was that she was required to manage the bank's risk. She made a decision on

what was best for the bank and not on what was best for the plaintiff. She denied that she made the decision out of panic, reiterating that it was a calculated decision based on her risk assessment even though the plaintiff was a highly valued customer of the bank. She had no indication of how long it would take for the plaintiff to resume his position in the company or to recover or whether he would indeed recover. Moreover, the decision to withdraw finance was considered by various finance committees within Absa and all officials involved agreed that the loan ought to be withdrawn as it was simply too risky, given the plaintiff's dire and uncertain medical condition.

*Mr Johannes Stephanus Kotze*

32. At the time of the incident he was managing various businesses. He started a beverage business called *Sportsade (Pty) Ltd* in 1997 or 1998, which manufactured and distributed energy drinks both nationally and internationally. He was also involved in the construction business, which involved manufacturing steel structures and industrial development which involved constructing warehouses and office blocks and then renting out these facilities to various companies, as well as residential townhouse developments. He did this through his company called *Kotze Lebotse*. He started the company *Easychoice* in which he holds a 50% shareholding. This company owns a property development which has a warehouse and office component, which premises are rented out to national and international companies. He was '110% involved' in all these entities, working from 5 am until 11 pm from Mondays to Saturdays, resting only on Sundays.
  
33. 37 townhouse units were to be erected at the Gleneagles development. Once the Gleneagles development was completed, the plan was to complete another development on the adjacent erf 903. As a result of the shooting,

any development on the adjoining erf was stymied.<sup>7</sup> He purchased erf 902 through the vehicle of his close corporation, namely, *Tsirir Properties CC*, of which he was the sole member, whilst developing and managing the project through the vehicle of his company, *Kotze Lebotsa*. He chose Gleneagles because of its prime location. It is situated near OR Tambo airport with easy access to both the Johannesburg CBD and Pretoria. Gleneagles is designed as a security estate within a larger security estate. This type of development would offer the provision of extra security to residents and a unique and modern lifestyle, with various amenities,<sup>8</sup> amongst others, provision of wifi throughout the estate. It was to be competitively priced to cater for a particular clientele, such as first time buyers, pilots and international business clients who required overnight stays. His intention was to sell fewer units whilst retaining more units as rental stock with a view to a long term yield/recovery.

34. Prior to the shooting incident in August 2008, an amount of R5.5 million was still owing to *Transacht* in respect of the purchase price of the land. He approached Absa Bank for a loan of approximately R9 million, part of which was to be utilised to pay the landowner who had by then already issued summons for payment of the outstanding purchase price. Just before the shooting incident occurred, he received confirmation that the loan had been approved by the bank.
35. At the time of the shooting, all 37 units had already been built and the development was 98% complete.
36. The shooting incident occurred on 27 August 2008. He spent 40 days in ICU during which time he was in an induced coma. He was hospitalised for

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<sup>7</sup> Nothing more needs to be said about the adjoining erf, as this does not form part of the plaintiff's claim in these proceedings.

<sup>8</sup> Other amenities included several walkways, a lot of greenery in the park, a guardhouse and main entrance and a clubhouse.



approximately one and a half months whereafter he was sent to a step down facility for further care.

37. He heard from his attorney, Ms Van der Walt, that Absa Bank was withdrawing the loan funding but could not recall when this was. At the time, he was in recovery and could not concentrate on anything that was happening in the business.
38. When asked why he signed over the project to Transacht, he stated that the fight he was in, was for living, not for money or business or for any business responsibilities at that point in time. In signing over the project, he also lost an amount of approximately R10 million (financed through loans and his personal funds) which amount had already been paid to the builder.
39. As regards his envisaged retirement age, he stated that he used to love working and therefore had not considered a retirement age prior to the shooting. But thinking away the incident, he may have retired at age 75.
40. During cross-examination he was questioned about his management style in his property development business Kotse Lebotsa in relation to the Gleneagles development. He stated that he operated the business with a small team, being himself, a financial manager and a professional assistant. He made all the decisions in the business and anyone involved in the project had to deal with him. The financial manager handled payments and prepared paperwork that required his decision, whilst he would instruct his professional assistant on certain administrative tasks. All financial decisions were made or approved by the plaintiff. His son-in-law, Mr Sinden, was employed in the business but he was still in training and only dealt with maintenance tasks at the development at the time of the shooting. Mr Sinden was still very inexperienced in property development at the time of the shooting. After the shooting, he was isolated for a long period, during

which time he was without a phone, so he did not speak to his financial manager or personal assistant in that period. Neither of these persons could deal with the bank in regard to the bank's loan withdrawal. He recalled having to sign a bank document to change the signatory on the bank account so that the one business could keep operating, i.e., so that small payments could be made in the course of business when invoices were received.

41. Absa bank had a personal surety from the plaintiff in respect of loans to his various businesses. Ms le Roux was not his private banker at Absa bank. She was his banker on the commercial side.
42. It was put to the plaintiff that it was not necessary for the bank to withdraw the facility as the property development itself had sufficient value to cover the loan, having been valued at the instance of the bank at R25 million, whilst the plaintiff also had sufficient other assets to cover the R9 million loan and that the loan facility was withdrawn because Ms Le Roux had 'panicked'. The plaintiff responded by stating that he was busy dying and he therefore did not know whether the bank felt their risk was too high. The R9 million loan was to be used to settle the outstanding purchase price for the sale of the land and to pay for land registration and transfer costs.
43. Later during cross-examination the plaintiff testified that the bank's withdrawal of the loan was shocking, however, he was not in a state to defend or to take hold of the situation or to follow up with the bank in order to query or challenge their decision. His focus was on surviving – saving his life – not to fight to retain any development. He heard words being spoken but could not translate them into action. Thus he was willing to let go of the property. He also lost the money he had personally put into the project (about R10 million) but his focus was on fighting another fight, being the fight for his life. He made that decision so that he could be around for his

family. He did not ask his son-in-law or staff members to assist him by engaging with the bank. They rather assisted him by not interfering with him whilst he was fighting for his life.

44. The court sought to clarify who it was that performed project management functions apropos the development. The plaintiff testified that it was him. He wore two caps in respect of the project, one as project manager and the other as developer.

*Mr Rudy Sinden*

45. He is employed at KL Development.<sup>9</sup> He confirmed that the plaintiff was very involved as the key player in the company and nothing happened in the business without the plaintiff's knowledge. At the time of the shooting Mr Sinden was still in training, learning about the business and everything to do with property development from the plaintiff. He was a qualified electrician and his role in the company at that stage was to look after maintenance and do repair work if required at the Gleneagles development.
46. According to Mr Sinden, the plaintiff worked long hours and was very ambitious, always looking for the next project, the next opportunity, prior to the shooting incident. The plaintiff was a great leader and was quick to make decisions.
47. As regards the Gleneagles development, Mr Sinden was only involved therewith in a very limited respect, namely to perform maintenance tasks thereat. He did not deal with creditors and did not have any knowledge about bond approval, nor did he have any dealings with the bank. Mr Sinden

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<sup>9</sup> Prior to the shooting incident the company was known as *Kotze Lebotsa*. According to Mr Sinden's affidavit evidence, he joined the Kotze Group in 2006, initially assisting with warehouse maintenance at *Easy Choice* and on the production side at *Sportsade*. The property development company, performed project management functions by overseeing the construction and architectural drawing at the Gleneagles development.

did not deal with Transacht at all and was not involved with any of the payment arrangements that were made with Peakstar (the builder).

48. After the shooting incident, the plaintiff was not as hands on as before in the business. The plaintiff spent only two to three or four hours a day at work, instead spending time at his farm or staying at home. It took the plaintiff longer to make decisions and sometimes he forgot that he had made certain decisions or that he had given certain instructions. He noticed that the plaintiff was having memory problems and struggling to concentrate. The plaintiff could not perform all the tasks he had performed prior to the incident. Mr Sinden took over some of the tasks and other employees assisted in other tasks.
49. It took ten to twelve years for Mr Sinden to be able to perform the work of a property developer. At present, Mr Sinden performs 90 to 95% of the property development work at KL Development (previously Kotze Lebotsa). He confirmed his salary package, which was R1 285 180.00 per annum in 2020 and R1 359 252.00 in 2022.
50. According to Mr Sinden, the plaintiff physically returned to work towards the end of 2009. Prior thereto, he would give telephonic instructions to Mr Sinden regarding the tasks Mr Sinden had to perform and Mr Sinden would provide progress reports to the plaintiff thereon.

*Ms R. Van Zyl (Industrial Psychologist)*

51. Ms Van Zyl confirmed her qualifications and expertise as well as the contents of her four expert reports, including the joint minute and addendum thereto between her and her counterpart.
52. She described the plaintiff as 'unique in terms of his visionary and entrepreneurial skills'. The plaintiff worked long hours and had a lot of

energy prior to the incident. To fill his shoes (assuming the plaintiff had passed away in the shooting incident), she testified that 'one would need to appoint different people to perform different tasks.' Because his various businesses operated within different industries, one would have to appoint a managing director in each of these entities - someone having specific skills required for the specific industry - for purposes of sustaining existing operations - not necessarily to fill the gap for future opportunities for business growth.

53. After the shooting incident the plaintiff did not resume working for about year. He struggled on an emotional, cognitive and behavioural level. The Gleneagles project did not continue, as bank funding was withdrawn. The Sportsade deal with Clover did not materialise. Therefore new business opportunities had to be generated after the incident.
54. It was agreed between the Industrial Psychologists that the Plaintiff requires assistance in the management of his businesses, having regard to his injuries and sequelae thereto. In her view, the plaintiff needs high level managerial support be put him back in his pre-morbid position. Those appointments would be at Patterson C5/D1 level. In 2022 terms it is R878,290.00 per annum. This presupposes 2 appointments in respect of 2 different companies operating in different industries. However, the plaintiff's claim is limited to one assistant with a cost to company of R1,359,252.00 per annum.
55. Self-employed business owners do not have to retire at a certain age and will continue working as long as their health permits. An Industrial psychologist would normally use age 70 for quantification purposes.
56. Her counterpart (Dr Malaka) proposed that clerical support would suffice, on the level of semi-skilled worker (financial management) at a rate of between R36 000 and R82 000 per annum. According to Ms Van Zyl, a salary of

R36 000 per annum equates to R3000 per month, which is what a cashier at a hardware store would typically earn in the informal sector. A salary of R82 000 per annum equates to R6800 per month, which is typical for a cleaner in the non-corporate sector. Support at this level would thus not support the plaintiff in running his businesses.

57. During cross-examination, the witness was asked about the qualifications that are needed to be an entrepreneur. She stated that no formal qualifications are needed but the individual must be able to identify opportunities and pursue them before others would and cognitive ability would be needed to function within the complexity of the business the person is running.
58. She was asked about her understanding of a non-executive director as opposed to an executive director. She stated that a non-executive director has a financial involvement in the business without being involved in the day to day running of the business.
59. It was put to the witness that Mr Sinden had testified that before the plaintiff returned physically to work, he consulted the plaintiff daily for instructions although the plaintiff made all the decisions, including financial decisions regarding the business. The witness was asked to comment on the type of assistance needed after the incident if the plaintiff was able to give instructions and to make decisions apropos the running of the business. She replied that she had no information of what happened in 2009 when the plaintiff was still recuperating at his farm and that she also had no knowledge of what kind of decisions were made and at what level of complexity the decisions were made. She was also not aware of what projects Kotze Lebotsa was involved in during 2009 and KL development is a different business. In

her opinion, the plaintiff would not have been able to function at his pre-morbid level after the shooting incident.

60. When it was suggested to her that the plaintiff was able to make decisions after the shooting and that there was therefore no need for him to have any assistant to do whatever Mr Sinden was already doing in the business, the witness stated that the need for assistance to enable the plaintiff to continue running his businesses was in fact agreed between both the parties' Occupational Therapists and Industrial Psychologists. As the plaintiff could not continue to make decisions at the same level as before the accident, as is evident from the contents of her report.<sup>10</sup> Mr Sinden had to take over work that the plaintiff had done before the incident and if he were not employed in the company, someone else would have had to be employed to assist the plaintiff. Prior to the incident, the plaintiff was able to run every business in which he was involved. After the incident, he could not function at the same level. The plaintiff needs support on a practical managerial level. Her opinion is based on a capacity loss due to the plaintiff's cognitive, mental, and emotional impairment as a result of the shooting incident. What the plaintiff could do himself pre-morbid, he can no longer do himself alone post-morbid.
61. During re-examination the witness agreed that as a result of the incident and injuries sustained by the plaintiff therein, erf 902 development was not a success in the plaintiff's absence; the Sportsade business suffered, culminating in the partnership with Clover not being sustained. The effect of the plaintiff's absence from being hands on in the businesses was the catastrophic failure of the erf 902 project for Kotze Lebotsa and Sportsade's closure.

## **Discussion**

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<sup>10</sup> Report at pages 00006-700 to 00006-703 of the papers.

62. In the case of a delict suffered by a plaintiff, damages seek to restore the plaintiff to the position he or she would have been in had the wrong not been done to him or her.<sup>11</sup> The litigant sues to recover the loss he or she has sustained because of the wrongful conduct of another, in other words, that the amount by which his patrimony has been diminished by such conduct should be restored to him or her.<sup>12</sup>
63. In *Dippenaar v Shield Insurance Co Ltd*,<sup>13</sup> the Appellate Division put it thus:
- “ In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss of impairment of that capacity constitutes a loss, if such loss diminishes the estate...
- ...It is correctly argued that, in a case of personal injury as a result of a delict, the court must calculate, on the one hand, the present monetary value of all that the plaintiff would have brought into his estate had he not been injured, and, on the other hand, the total present monetary value of all that the plaintiff would be able to bring into his estate whilst incapacitated by his injury.”
64. This exercise invariably requires a determination or postulation of what would likely have happened in the future if the damage causing event did *not* occur (pre-morbid scenario). Apropos a claim for loss of earnings or earning capacity, a calculation will then be performed of the value of the pre-morbid earnings. A similar exercise will be performed in respect of the post-morbid scenario. The pre and post-morbid scenario will then be deducted from one another to arrive at the likely loss of earnings.
65. The question which arises, is whether the injuries sustained by the plaintiff in the shooting, and their consequences, impacted adversely on his income and/or earning capacity? The question is to be answered in the affirmative, having regard to the factual evidence of the plaintiff himself and that of Mr

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<sup>11</sup> *Billion Property Developments (Pty) Ltd v Rhino Log Furniture and Lapas CC and Another* (51992/2016) [2019] ZAGPPHC 53 (4 March 2019), per Unterhalter J at par 45,

<sup>12</sup> *Trotman v Edwick* 1951 (1) SA 443 (A) at 449.

<sup>13</sup> *Dippenaar v Shiled Insurance Co Ltd* 1979 (2) SA 904 (A) at 917B-F.



Sinden, including the conspectus of expert reports and joint minutes referred to further below.

66. The plaintiff's claim for loss of earning capacity is made up of two tranches, viz:
- (i) The need for an assistant post-morbid as agreed between the Industrial Psychologists and Occupational Therapists; and
  - (ii) The loss of profit sustained in respect of the Gleneagles development that the plaintiff had embarked on through the auspices of Tsiris Properties CC pursuant to the shooting incident.

*Claim for cost of an assistant*

67. There is no dispute about the fact that, prior to the shooting incident, the plaintiff independently and efficaciously performed the work of multiple CEO's or MD's in respect of the various companies he managed within the Kotze Group. The plaintiff was described in evidence as the mastermind and driving force behind his various businesses, the person who took virtually all business decisions in each business, not least of all, in Kotze Lebotsa (the property development company) and Tsiris CC, and a person who was exceedingly astute in making decisions. The plaintiff was able to and did multitask on a daily basis. He was perceived as a quick thinking visionary. There is also no dispute about the fact that the businesses were eminently successful with the plaintiff at the helm as the 'hands on jockey'. The plaintiff had a proven track record as a successful businessman. That is, after all, why he was considered to be a very important client of Absa Bank and why the bank decided to back him financially as and when required.
68. Post-incident, the unrefuted factual evidence in regard to the plaintiff's functional work performance was to the effect that he became indecisive, required assistance in taking decisions, and, for an extensive period of time,

only managed to spend a few hours at the office each day. He effectively became a shadow of the person he used to be before the incident. He has experienced ongoing memory and concentration difficulties and seemingly lost the ability to multitask and to function with the same stamina, drive, productivity and ambition as at his pre-incident occupational level.

69. From a cognitive perspective, the unrefuted evidence was that the plaintiff lost the ability, post-incident, to function mentally at his pre-incident level.<sup>14</sup> This in turn has adversely affected his work performance, such that he is not able to function post-incident without the necessary support and assistance. The plaintiff's cognitive limitations as well as the mood and stress disorders that the plaintiff developed post-incident have also impacted upon his work capacity and efficiency.<sup>15</sup>
70. In the defendant's heads of argument, it was submitted that the plaintiff suffered no neurological impairment,<sup>16</sup> such that his decision making was affected as a result of the incident. Thus, for example, it was submitted that the plaintiff was able to make an appropriate decision when it came to changing the signatories to the company bank accounts whilst in hospital and when giving Mr Sinden instructions on the tasks required to be performed during the period that the plaintiff was still recuperating from his injuries.<sup>17</sup> This argument is however directly contradicted by the admitted

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<sup>14</sup> The cognitive deficits, which are outlined in the reports of the clinical psychologists and which were confirmed by neuro-psychometric testing, were, in the opinion of Dr Marus (Plaintiff's Neurosurgeon), likely caused by a secondary brain injury which the plaintiff sustained as a result of having undergone prolonged ventilation in ICU.

<sup>15</sup> See par 3.1 of Neurosurgeon's expert report ( Dr Marus) at p 00006-173 of Caselines and addendum joint minute of Clinical Psychologists.

<sup>16</sup> The neurosurgeons agreed that the plaintiff has normal physical neurological functions. However, Dr Marus noted that abnormal mental function was recorded in the hospital records after tracheostomy was removed. He opined that if on cognitive testing a profile of organic brain damage is present, then it could be concluded that cerebral insult occurred that during the plaintiff's prolonged period of ICU ventilation.

<sup>17</sup> Ironically, neither the content of the plaintiff's instructions or the nature

or extent of the plaintiff's 'decisions' were canvassed in evidence or elicited from Mr Sinden during his testimony. The proffered argument remains speculative at best.

medical evidence as to the impact and effects of the organic brain injury the plaintiff sustained as a result of his accident-related injuries. The fact that the plaintiff signed a document at the request of Ms Le Roux of Absa bank whilst hospitalised, does not in and of itself demonstrate that the plaintiff suffered no cognitive impairment. Cognitive testing by the Clinical Psychologists revealed the presence of cognitive deficits consistent with a profile of organic brain damage.

71. As regards the impact of the plaintiff's cognitive fallout, the clinical psychologists agreed in their addendum joint minute that a secondary brain injury is expected to result some long-term neuropsychological difficulties. The secondary brain injury would be expected to have contributed significantly to his demonstrated cognitive deficits. The identified cognitive deficits could also be attributed to the psychological syndromes he presented with after the incident, as cognitive difficulties can also be commonly associated with PTSD.
72. The Occupational Therapists agreed as follows: "note is made of the reported difficulties and changes [the plaintiff] has experienced which have led to changes in his roles and reduction in his involvement...[The] claimant would be expected to continue to maintain physical competency to meet his occupational duties, his emotional/affective fallouts related to the incident under discussion would be expected to impose deleterious impact to his functioning...[It] is probable that the claimant will not be able to fully regain his pre-incident levels of functioning, having regard to the type of trauma he suffered as well as the time that has lapsed since the incident under discussion...With successful treatment and rehabilitation, he is at least expected to maintain his current levels of functioning and should be able to continue with his business ventures in the long term. Some high level business/management support would probably be necessary..."

73. The Industrial Psychologists were in agreement that the plaintiff is occupationally compromised as a result of the incident and that he should be afforded assistance with the day-to-day management of his various businesses. Ms Van der Walt recommended that the comparative earnings of a site/construction manager (Patterson C5/D1 – 50<sup>th</sup> percentile of package) should be used for quantification purposes whilst the defendant’s expert (Dr Malaka) proposed that factual information be obtained as to Mr Sinden’s salary, with the suggestion that, rather than using the Patterson figures, regard should be had to the actual salary package of Mr Sinden. The plaintiff agreed to use Mr Sinden’s salary package to compute this claim. Factual evidence of Mr Sinden’s salary package was provided at the trial (through Mr Sinden’s testimony supported by documentary evidence) in support of the amount claimed by the plaintiff.<sup>18</sup>
74. Accordingly, the need for an assistant, the level of assistance required by the plaintiff in his injured state, the basis on which to quantify the cost thereof and the actual cost thereof, all became areas of common ground in the matter, if not before, then at least by the time that oral argument was presented.
75. As was held by the Supreme Court of Appeal in *Bee*,<sup>19</sup> agreements recorded in the expert joint minute should correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (i.e., fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue. In the

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<sup>18</sup> Mr Sinden confirmed his salary package during his oral testimony.

<sup>19</sup> See *Bee v Road Accident Fund* 2018 (4) SA 366 SCA, par 66. At par 73 of the judgment, the following was said: “...where experts in the same field reach agreement...a litigant cannot be expected to adduce evidence on the agreed matters. Unless the trial court itself were for any reason dissatisfied with the agreement and alerted the parties to the need to adduce evidence on the agreed material, the trial court would, I think, be bound, and certainly entitled to accept the matters agreed by the experts.”

present case, the defendant did not seek to repudiate the agreements recorded in the joint minutes of competing experts in the same field.

76. The right to claim for the cost of an assistant has been recognised and endorsed by the Supreme Court of Appeal in *Terblanche*.<sup>20</sup> The plaintiff has restricted his claim under this rubric to the cost of only one assistant at an appropriate managerial level, being Mr Sinden's cost to company in 2020.<sup>21</sup>
77. I deal with appropriate contingency deductions later in the judgment.
78. The issue of causation aside, the defendant argues, apropos the claim for the cost of an assistant, that Mr Sinden 'stepped up' and is fulfilling the role of an assistant. In other words, an existing employee has fulfilled this purpose anyhow and therefore the defendant should not be ordered to pay any amount in this regard. The argument in my view misses the point.
79. In order to put the plaintiff in the position that he would have been in but for the damage causing event, an assistant had to be appointed to assist the plaintiff with high level business management. The assistant could either have been appointed externally or could have been promoted internally to fulfil the role post-incident that the plaintiff was singularly able to fulfil before the shooting. The fact that this void was filled by promoting Mr Sinden internally, does not entitle the defendant to avoid liability to pay such cost.
80. The claim for the cost of an assistant was quantified by means of uncontested actuarial calculations performed by Mr Whittaker on behalf of

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<sup>20</sup> See *Terblanche v Minister of Safety and Security and Another* 2016 (2) SA 2019 (SCA), par 17.

<sup>21</sup> The amount is based on Mr Sinden's salary at the appropriate managerial level - being that of a fully-fledged property developer - after having undergone several years of on the job training in all aspects of property development. At this level Mr Sinden was able to perform most if not all of the tasks (save for taking financial decisions) (post-incident) that the plaintiff himself had performed single-handedly in his uninjured state but which the plaintiff is no longer able to perform without help in his injured state.

the plaintiff, which were based on the actual income of Mr Sinden, as agreed by the Industrial Psychologists.

81. Mr Whittaker calculated the costs of an assistant , prior to any contingency deductions, in the following amounts:

Past costs of an assistant:	R7,490,313.00
Future costs of an assistant:	<u>R4,954,064.00</u>
Total:	R12,444,377.00

82. The Industrial Psychologists further agreed that a contingency deduction should be applied to Mr Sinden's earnings to address his involvement in the plaintiff's businesses, regardless of the shooting incident.<sup>22</sup> Mr Whittaker applied a 15% contingency deduction in respect of the past costs and 25% in respect of the future costs of an assistant. The parties are in agreement that these percentage deductions are apposite and reasonable. I agree. After contingency deductions, the past cost of an assistant reduces to R6,366,766,00 and the future cost reduces to R3,715,548.00. The total after these contingency deductions, amounts to R10,082,314.00.

83. The loss has been computed using a retirement age of 70. Such an age is supported by the plaintiff's undisputed evidence, is uncontroversial in this matter and has also been endorsed, in so far as businessmen are concerned, in various decisions in this division.<sup>23</sup>

84. In addition to the contingency deductions aforesaid, the Plaintiff has calculated his claim by deducting a further 5% general contingency to the past and future cost of an assistant. Thus, in respect of the past cost of an

<sup>22</sup> The Industrial Psychologists in effect, accepted that there are certain advantages to the employment of an assistant to make up for the plaintiff's shortcomings from the shooting. The assistant also represents an added advantage to the business. Thus, special contingency deductions would be applicable to cater for this.

<sup>23</sup> See, for example, *Herbst v Road Accident Fund* 2010 (6A4) QOD 7 (GSJ); *Mogale v Road Accident Fund* [2014]ZAGPJHC 263 (14 October 2014); *Bester v Road Accident Fund* [2016] ZAGPPHC 1240 (11 November 2016).

assistant, a 20% contingency deduction is proposed (being 15% +5%) and a 30% contingency deduction is proposed in respect of future costs of an assistant (being 25% +5%). After contingency deductions, the claim for past costs of an assistant further reduces to R5,992,250.40<sup>24</sup> and that in respect of future costs of an assistant to R3,467,884.80.<sup>25</sup> The total claim in respect of the costs of an assistant, after all contingency deductions, amounts to R9,460,095.20

85. The percentage contingency deductions applied as aforesaid were not disputed by the defendant. The additional amount of 5% appears to me to be reasonable, given that a retirement age of 70 was used – the Plaintiff’s undisputed evidence was that he probably would not have retired at all, at least not soon. He was 62 years of age at the time of the trial and had he not been injured, he would likely have continued working till at least age 75, if not longer. Further, there is ample authority to substantiate a contingency deduction of 0.5% per year until the retirement age is reached.<sup>26</sup> Applying the Guedes approach, a future contingency deduction of 0.5% per year till age 70 (i.e., 7 years) would result in a deduction of 3.5%. The additional 5% deduction thus seems fair and reasonable.

*Loss of income – The development loss*

86. The plaintiff was in the process of completing the Gleneagles development on erf 902 in Glen Erasmia when the shooting incident intervened. The uncontested evidence at the trial was that the development was virtually complete at the time of the shooting and would in all likelihood have been a resounding success. This is because erf 902 was a sought-after property in an upmarket estate, offering access to all sorts of amenities, including the

<sup>24</sup> Past cost pre-morbid figure of R7,490,313 – 20% = R5,992,250.40 per actuarial calculation.

<sup>25</sup> Future cost pre-morbid figure of R4,954,064 – 30% = R3,467,844.80 per actuarial calculation.

<sup>26</sup> See, for example, *Road Accident Fund v Guedes* 2006 (5) SA 588; *Swanepoel v Road Accident Fund* 2008 (5A3) QOD 40 (NC); *Nicholson v Road Accident Fund* (Wepener j, unreported, GP, case no. 11453/07; 30 March 2012); *Bismilla v Road Accident Fund* 2018 (7B4) QOD 64 (GSJ); and *YZ v Road Accident Fund* 2019 (7E2) QOD 14 (WCC).

added security that comes with being a security estate situate within a larger security estate. The estate would have been the first of its kind to enjoy the provision of wi-fi throughout the development, which is but one example of the plaintiff's forward thinking prowess in relation to the development. The estate was ideally situated for a target market comprising young executives, small families, first time buyers and international businessmen, being close to the airport, close to Johannesburg and Pretoria, and was projected to be more affordable than the Serengeti estate, being the only other security estate in the surrounding area.

87. The uncontested evidence of Ms Van der Walt was that, by the time the shooting incident occurred, there were several interested buyers who had signed sale agreements, one of which was presented in evidence.<sup>27</sup> Moreover, creditors of the project<sup>28</sup> were amenable to accept ownership of townhouses in the development in lieu of money. To that extent there would have been a guaranteed number of sales even before the development was complete.
88. Mr Wangenhoven was tasked to determine whether the development would likely have been financially feasible in the absence of the shooting, and if so, what the likely outcome would have been. The plaintiff's loss would then be calculable on the most probable outcome option, which he concluded involved the sale of 19 units (Type A units at R1 199 000.00, Type B units at R1 150 000.00) with the balance of 18 units being rented out. Indeed, Ms Sepato for the defendant agreed that this option was both viable and achievable in terms of the projected rates of sale and rental and that the selling prices which Mr Wangenhoven had assumed, were achievable and reasonable. She also agreed that the assumed rate of sales for Erf 902, as projected by Mr Wangenhoven, was reasonable and likely and that the

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<sup>27</sup> The sale agreement signed by a buyer, Mr Nicolaides, appears at 005-83 of Caselines.

<sup>28</sup> The builder (Peakstar) and the landowner (Transacht).



assumed number of sales in respect of Erf 902 (19 sales) was 'a fair reflection of a most probable outcome on the development.' There was also agreement on the likely rental incomes, including current rentals, and on the average rate of rental escalation.

89. Ultimately, the uncontested and unrefuted expert evidence of Mr Wangenhoven for the plaintiff established the amount of the loss sustained by the plaintiff (as sole member of Tsiris properties CC) pursuant to the shooting incident and its concomitant consequences, not least of all, the resultant implementation of the settlement agreement between Tsiris and Transacht in terms of which the plaintiff ultimately lost the development. As a result of losing the development, the plaintiff lost the income that would have accrued to Tsiris Properties CC of which he was the sole member.
90. The plaintiff's claim in respect of the development costs is based on Mr Wangenhoven's 'most probable outcome option'.<sup>29</sup> In terms of this option, as many of the possible factors that could influence the project at the time would be taken into account in order to try and determine the most probable outcome on the development. Having performed this exercise, Mr Wangenhoven concluded that the plaintiff would likely have decided on something of a median between the outright sales and the sales to break-even options, in terms of which, in respect of erf 902, he would have sold until he reached a point where he was still in a capital loss situation, but one which was affordable from a cash-flow point of view, whereupon he would have rented out the remaining units, This would have achieved the ideal situation in which the nett rental income would gradually, and in the medium term, first start to approach and then cancel out, and then incrementally exceed not just the capital loss but also the financing and rental expenses.

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<sup>29</sup> In his report, he dealt with the 'outright sale option' whereby all 37 units on erf 902 would be sold and the 'sales to break-even option' in terms of which the plaintiff (through Tsiris) would have sold units until he reached the profitability break-even point, and then have rented out the rest. In terms of this option, it was postulated that the plaintiff would have sold 31 units and retained 6 as rental stock.

He concluded that had the plaintiff not been injured in the shooting, had the bank not withdrawn the financing, the plaintiff would have been able to viably proceed with the development of erf 903 but that with all of the financial options open to him, the 'most probable outcome option' was the best and thus the most likely. Ms Sepato for the defendant agreed with Mr Wangenhoven on all of the critical issues in this regard.<sup>30</sup>

91. The plaintiff testified that his primary aim was to generate long-term rental income, which would in the nature of things be accompanied by capital growth. The more units that could be rented out, the more lucrative financially for the plaintiff. This evidence was buttressed by Mr Wangenhoven's evidence. On Mr Wangenhoven's calculations, the more units that are retained as rental stock, the larger the plaintiff's claim would be.
92. Mr Wangenhoven's calculations based on the 'most probable outcome option' were summarised in a slide show that he presented during his testimony. His presentation contained several examples of a conservative approach having been applied by him, for example, the overprovision of expenses that would necessarily result in a more conservative calculation of the loss.
93. Two scenarios for calculating the amount representing the plaintiff's loss were canvassed in evidence. In scenario 1, the loss is determined by having regard to the current value of the unsold units, which represents what the plaintiff would have had as at today. In 2020, the value of the unsold units amounted to R40,628,546.30. In 2023 (date of trial) the value amounts to

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<sup>30</sup> She agreed that the development would likely have been sectionalized; that the selling prices assumed by Mr Wangenhoven were reasonable and achievable. She agreed that the assumed rate of sales, as projected, is reasonable and likely and that the assumed numbers of sales in respect of erf 902 are 'a fair reflection of a most probable outcome on the development'. There was also agreement on the likely rental incomes, including current rentals, average rate of rental escalation and current likely value of the rental units.

R50,543,176.03. Applying a 20% contingency deduction, the development loss amounts to R40,434,540.00. In scenario 2, the rental income that has been lost is actuarially calculated, to which the amount of funds that the plaintiff put into the development himself (R10,219,298.25)<sup>31</sup> must be added, as too, the loss of increase in value. The loss of rental income was calculated at R22,559,102.00. The loss of funds put into erf 902 was R10,219,298.25. The loss of increase in value amounted to R32,299,316.40.<sup>32</sup> The total loss in scenario 2 amounts to R65,077,716,60.<sup>33</sup> The plaintiff, in adopting a conservative approach, relies on the amount calculated in terms of scenario 1. These figures, Mr Wangenhoven's methodology, and the assumptions and postulations made by him in calculating the loss, including the contingency percentage deduction to be applied thereto, were ultimately not in dispute.

94. Whilst the loss is technically that of Tsisiris, such loss is claimable by the plaintiff.<sup>34</sup> The plaintiff was the sole member of the close corporation and the

<sup>31</sup> This amount is made up of the lost deposit on erf 902, payments totaling R15,000,000.00 paid to the contractor less the loan by the contractor to plaintiff of R5 million =R10,219,298,25

<sup>32</sup> Value of unsold unit at 2023 (R50,543,176.00) minus value at 2009 (R18,243,859.65) = R32,299,316.40

<sup>33</sup> The amount of R65,077,716,60 is calculated as follows: loss of rental income (R22,559,102.00 + loss of funds put into erf 902 (R10,219,298.25) + loss of increase in value (R32,299,316.40) = R65,077,716.60

<sup>34</sup> See, for example, *Van der Walt v Road Accident Fund* 2002 (5J2) QOD 149 (AF) where it was recognised that any loss to the close corporation would result in the direct pecuniary loss to the claimant in circumstances where the claimant was the sole member of the close corporation,

See too:

*Otto v RAF* [JOL]12627 (W) at p7, it was recognised that as sole shareholder in a company, there was a direct traceable connection between any loss sustained by the company and the claimant;

*Miles v Road Accident Fund* 2013 JDR 1534 (KZP) at paras 25 & 26, where the following was said: "... there is substantial convergence of the plaintiff's personal interests and those of the CC. This is so because of the Plaintiff's ownership of 99 percent of the member's interest in the CC, his control of the affairs of the CC, and its dependence on the Plaintiff's physical exertion and performance... I find therefore, on this aspect of the case, that it is appropriate to use performance, including turnover, and profitability of the CC...as yardstick to determine the plaintiff's personal loss of income and earning capacity."

In *Road Accident Fund v Ronaasen* NO 2007 JDR 0593 (E), a full court decision, the court similarly had to decide whether the loss of the CC was a loss the Plaintiff who was the sole member thereof. At para 8, the following was said:

"Juan [claimant] was the driving force behind the one-man closed corporation which operated the shorts shop. The amount of his take home pay and the amount of profit generated by the closed corporation...was an indication of what he could have earned if he had operated the same business,

sole person who managed, conducted and controlled its affairs. The close corporation's profitability was for that reason wholly dependent on the plaintiff's skill and performance, and all retained profits or income would ultimately have been available to the plaintiff. The evidence was that the plaintiff himself was the business. As regards the development, the plaintiff was very hands on. He was the person who took all pivotal decisions, dealt with the builders and negotiated with the creditors.<sup>35</sup> The success of the plaintiff's businesses including the close corporation was due to the plaintiff's forward-looking decision-making prowess. It stands to reason that by virtue of his sole shareholding, any loss to the close corporation of property owned by it and any concomitant loss of profits generated by whatever income producing activities were to be conducted on such property by the close corporation would result in direct pecuniary loss to the plaintiff.

#### *Causation*

95. The plaintiff contends that the development was ultimately lost as a direct result of the shooting incident and injuries and sequelae sustained by him in consequence thereof.

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*not through the medium of a closed corporation but as a sole proprietorship run for his own account. Looked at in that light, it was perhaps as good an indication of his earning ability as could be found. In my view, the court a quo quite properly had regard to this evidence for that purpose and held, in my opinion correctly, that the principle in Rudman's case was distinguishable...*"

*Road Accident Fund v Oberholzer 2005 JDR 0426 (E) at par 24, where the following was said: "Can the plaintiff, in order to establish that he has personally suffered a loss, rely on the fact that the profitability of the company would have been greater if the plaintiff had himself been able to render his services to the company? In my judgment this question must be answered in the affirmative. There can be no doubt that the company is a "family" company in the true sense. The evidence makes this abundantly clear. The income derived from the company's business activities is income which, through the company and the trust, is available to the family and therefore the plaintiff. As was pointed out by the trial judge, had the plaintiff not been injured he would have been able to do the work, which he had previously done, for the company. This would have done away with the need to employ the three persons referred to. This, in turn, would have resulted in further income being available to be used by the plaintiff for the benefit of himself and his family. Such income has been lost to the plaintiff. He has thus suffered, and will continue to suffer, patrimonial loss."*

<sup>35</sup> Mr Sinden had only worked for the plaintiff for one and a half years at that stage and only assisted with maintenance tasks at the development, such as fixing taps and roofs and the like.

96. The defendant contends that the shooting incident did not cause the loss of the development and the subsequent loss of the income that was going to be derived from it. In oral argument, it was submitted that the plaintiff in any event failed to prove that the defendant caused this loss. This is because the evidence established, so it was contended, that the development continued under the supervision of Mr Sinden (as instructed by the plaintiff) whilst the plaintiff was in hospital, and, by the time he was at the step down facility to continue with medical treatment and recuperation, he continued to conduct the affairs of his development business and to make all the important decisions in relation thereto. As soon as he was in a physical condition to resume his business operations, the plaintiff did so. Thus, at all material times he was and remained in control of his business, including the development. As regards legal causation, the defendant's argument is to the effect that (i) the Bank's withdrawal of the credit facility<sup>36</sup> and (ii) the plaintiff's decision to forego the development<sup>37</sup> were unforeseen intervening acts that caused the plaintiff to suffer loss independent of the shooting incident. As such, the plaintiff's loss was too remote to render the defendant liable for damages.
97. It is trite that causation consists of two elements, namely, factual and legal causation.<sup>38</sup> 'Generally, the enquiry as to factual causation is whether, but for the defendant's wrongful act, the plaintiff would not have sustained the loss in question; whether a postulated cause can be identified as a *causa sine qua non* of the loss. The second enquiry, legal causation, is whether the wrongful

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<sup>36</sup> This resulted in and bond registration not proceeding and funds not being available to the plaintiff and ultimately in the inability to pay Transacht for the land on which the development was constructed.

<sup>37</sup> This occurred when the plaintiff ceded all his rights to Gen Eagles development to Transacht in settlement of the money that Tsisir Properties CC owed Transacht. Defendant contends that this was the Plaintiff's own decision which he took irrespective of his

<sup>38</sup> *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA).

act is linked sufficiently closely or directly to the loss for legal liability to ensue; or whether the loss is too remote.<sup>39</sup>

98. Causation can be interrupted by means of an interrupting act, referred to as the *novus actus interveniens*. This is an independent event which, after the wrongdoer's act has been concluded, either caused or contributed to the consequences concerned. As such, a *novus actus* breaks the chain of causation.
99. The defendant contends that the withdrawal of the credit facility by the bank broke the chain of causation and brought with it its own consequences.<sup>40</sup> The chain or link between the incident and the loss was broken when the bank took its decision and communicated it, which decision the defendant freely elected not to challenge. Moreover, the plaintiff also caused his own loss when he failed to challenge Absa on its decision and when he accepted the settlement proposal by Transacht and ceded his right in the development to Transacht. By doing so, he gave up his rights to the development and all financial benefits from it.
100. The question then arises as to whether the evidence established that the plaintiff continued to conduct business, irrespective of his injuries and the effect of such injuries, both during the period of his hospitalisation and whilst recuperating at the step down facility and /or whether the completion of the development continued under the supervision of Mr Sinden. On a proper

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<sup>39</sup> *MEC for Health, Eastern Cape v Mkhitha and another* (1221/2015) [2016] ZASCA 176 (25 November 2016) at para 13.

<sup>40</sup> The defendant reasons that part of the funding would have been used by the plaintiff to pay the outstanding purchase price for the land. Has this happened, there would have been no settlement to talk about with Transacht. Therefore, the bank's decision had a domino effect on the plaintiff's plans. The plaintiff's election not to challenge the bank's decision, which was his own choice and decision, culminated in the inability to pay Transacht, and the ultimate settlement of Transacht's action against Tsisir in terms whereof the Plaintiff handed over a viable development that was virtually complete to Transacht, thereby losing what he had invested financially therein and any income that was to be derived from the development.

consideration of the evidence, in context, and with regard to the relevant timelines, the evidence did not establish what the defendant contends for.

101. The Plaintiff's uncontested evidence regarding his decision to hand over the development was that '*I was not in the state to defend or take hold of the situation and to follow up and ask the bank why they withdrew the whole thing.*'<sup>41</sup> This was corroborated by Ms Van der Walt's evidence.
102. The suggestion that the development continued unaffected under the supervision of Mr Sinden, is at variance with the uncontested evidence which was to the effect that Mr Sinden was still in training and was only involved in the development in a very limited respect - to perform maintenance tasks - however, he had no dealings with any of the creditors (being Peakstar and Transacht) or the bank, nor was he equipped to do so. With the plaintiff gone, there was no one who could oversee the development<sup>42</sup> and no-one to step into the shoes of the plaintiff.
103. The suggestion that before the development was lost, the plaintiff continued to manage the development from his hospital bed and the step-down facility is likewise at variance with the uncontested evidence of the plaintiff and Ms Van der Walt. The evidence was that as at February 2009 and earlier, the plaintiff was fighting for his life and he could hardly talk to Ms Van der Walt. In fact, her uncontested evidence was that she was not even sure whether the plaintiff understood what she had said when the development was signed over to the owner of erf 902.
104. The suggestion that the plaintiff continued to consult with his staff and especially Mr Sinden and to make all the important decisions irrespective of his dire medical condition, including his fragile psychological state, was

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<sup>41</sup> Transcript, p0-310, read together with the plaintiff's evidence, as summarized in para 40 above.

<sup>42</sup> Transcript at p0-342 to 0-343.

likewise not borne out by the evidence. The relevant timeline established in evidence was that the plaintiff was away from work for approximately 18 months after the incident. In fact, the uncontested evidence of the plaintiff was that he was mentally isolated from the Kotze group of entities for many years after the shooting. It took up eight or nine years after the incident before he could engage and give high level instructions in his business.<sup>43</sup> As at February 2009 and prior thereto, the plaintiff was not in any fit condition to deal with any of his businesses as he was still fighting for his life.<sup>44</sup> During cross-examination, Mr Sinden was not questioned about the content of his business discussions with the Plaintiff and therefore it could not be concluded that same concerned erf 902 at all. In any event, the relevant timeline suggests that their discussions did not concern erf 902. Any discussions between Mr Sinden and the plaintiff could in any event not have concerned erf 903, given that the development was signed over in February 2009 at a time when the plaintiff's medical condition was dire. Any suggestion that the plaintiff took key decisions through Mr Sinden or that he could continue with the development in the plaintiff's stead remains unsupported by evidence. The evidence of Mr Sinden was that at the time of the shooting, he was still learning, so he would not have been able to fulfil any or all of the tasks that the plaintiff had performed prior to the shooting.<sup>45</sup> He was not put in charge of the development and could not make decisions on behalf of the plaintiff.<sup>46</sup>

105. As was explained by the clinical psychologist in her report, the plaintiff 'suffers from Post-Traumatic Stress Disorder with panic features as well as a Major Depressive Disorder.'<sup>47</sup> That these eventuated as a result of the

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<sup>43</sup> Transcript, at p 0-319.

<sup>44</sup> His evidence at p 0-230 of the transcript was that '*... I was just fighting for my life...so most of the time [i] was laying on [my] back and could not concentrate on anything that was happening in the business.*'

<sup>45</sup> Transcript p 0-338.

<sup>46</sup> Transcript, p 0-362.

<sup>47</sup> Para 9.2 at p 0006-280 of the record.



shooting, permits of no dispute. In para 7.11 of her report,<sup>48</sup> she made it clear that “Mr Kotze’s state of mind and emotional focus was on surviving the shooting physically and he did not have the psychic energy to go into any corporate struggle. His focus was on family and relationships and tried to hold on to important relationships instead of making sound business decisions. **This is typical of a person that was traumatized and where he almost lost his life...**he had no physical or mental energy to get involved in a business fight...”<sup>49</sup>

106. I agree with the Plaintiff’s counsel that the probabilities militate against a finding that the plaintiff was in complete control of his businesses (including the Gleneagles development) at the time when the development was lost. Why would the Plaintiff, an astute businessman with an exemplary track record, who was allegedly in complete control, sign away an eminently viable development, which was 98% complete? That is highly improbable, if not preposterous.
107. The evidence of Ms Le Roux established that Absa backed the plaintiff personally<sup>50</sup> because of his historical personal track record in business. He was seen by the bank as the jockey behind the Kotze group of companies, the person who led the various entities in the group. Absent a leader, there was no-one to steer or control or manage the business. The following image

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At para 8.7 of her report, she recorded that *‘he would not have thought twice at the time to walk away from all the conflict and tension regarding a cluster housing project he was involved in. Mr Kotze did not have the mental. Emotional or physical energy to make sound business decisions’*

At para 10.1.5 of the report, she records that *‘Mr Kotze showed impairment of his reality testing capacity and this probably contributed to his decision not to fight the bank decisions to withdraw their guarantees, to not fight getting money back that he put into the housing project and to not fight the builder and landowner to retain his position in the development.’*

Her conclusion at par 11.4 of her report is that the plaintiff *‘is no longer able to make decisions as he had before the shooting. He allows decisions to be guided by his emotions instead of his intellect. He is less able to deal with everyday stressors and he has poor stress management skills...This has been and could be detrimental to his business and again is a direct result of the trauma of the shooting.’*

<sup>48</sup> Record, p 0006-240

<sup>49</sup> It should be mentioned that the plaintiff’s son and daughter were manhandled by the robbers during the armed robbery at the plaintiff’s residence on that fateful day. The plaintiff’s daughter was also sexually assaulted. The plaintiff’s wife, who accompanied him in his vehicle whilst trying to flee, was also seriously injured herself in the shooting. All of this would have exacerbated the plaintiff’s trauma.

<sup>50</sup> Transcript, p 0-42.

comes to mind: As a jockey steers a horse and controls the direction in which it travels and the pace at which it moves, so the plaintiff was the driving force behind his businesses. It all depends on the person steering the animal just as the plaintiff's various businesses depended on his steering. As the plaintiff was seen as the driving force behind the development and the personal surety behind bank transactions, Ms Le Roux and other bank officials understandably became very concerned about the bank's exposure. This is because the bank had backed the person (plaintiff) behind the entities within the Kotze group. And as the evidence demonstrated, the plaintiff was the only person at management level who was involved in the development at the time of the shooting.

108. As the evidence of Ms Le Roux established, the bank withdrew approval for the finance because of:
- (i) The ongoing dire medical condition of the plaintiff, even six months after the shooting;
  - (ii) The inherent risks for Absa. The plaintiff was the jockey and sole driving force behind all the entities.<sup>51</sup> He was also the surety behind all the loan agreements with the various entities and Absa; and
  - (iii) The pervading uncertainty as to whether the plaintiff would survive the ordeal and if he did, whether he would make a full recovery to be able to manage his businesses. In short, the bank did not know what was going to happen to the plaintiff and considered it too risky to extend further finance under such conditions.

Significantly, the defendant did not adduce any evidence to gainsay the evidence of Ms Le Roux.

109. The evidence of Ms Le Roux was criticized for lacking credibility, in that the reason advanced for the withdrawal of the credit facility could not be

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accepted as true and was in any event improbable, firstly, because the plaintiff retained mental capacity to sign a document to change the signatories on the bank accounts, having understood the purpose therefore - he could thus be engaged on business decisions; secondly, if the plaintiff could make another official in the business available to manage the bank account, then the bank could have obtained any information it needed to assess whether or not the credit facility could be managed as required; Thirdly, the witness testified that the project remained 98% on track for completion at the time of the shooting. In other words, the development remained as good after the shooting as the bank had initially assessed it when it extended the credit facility and approved the bond. The bank had valued the development at R25 million and there was thus no reason to have cancelled the funding; Fourthly, the bank was satisfied with the financial position of the plaintiff's businesses when it approved the loan in respect of the development. The plaintiff's financial position was also such that he remained financially able to cover any financial shortcomings should any problem arise in the development project. So despite the plaintiff's hospitalisation, the businesses themselves were unaffected and continued to generate income as before. Ultimately, the defendant contends that the bank had no reason to 'pull the plug' as all relevant objective information concerning the project was already available to the bank, which served to confirm that the development was financially sound. It was this decision by the bank that therefore ultimately caused the plaintiff's loss.

110. As regards the first contention, the plaintiff never suggested that he had *no* mental or contractual capacity. The plaintiff's case was that he was extremely, severely injured and that he was fighting for his life. He was in a terrible state and it remained unclear, even in February 2009, whether or not he was going to survive. He was certainly not in a position to manage any of his businesses in 2008 or 2009. His own evidence was to the effect that he

lacked the wherewithal to conduct business or to participate in any legal challenge due to his injuries and related trauma and other sequelae, all of which occurred as a direct consequence of the shooting incident. One of the injuries sustained was an organic brain injury, which, as the relevant expert reports set out, also adversely impacted his capacity for resilience, acumen, drive and clear thinking. As regards the second contention, the undisputed evidence was that the signatory had to be changed precisely because of the plaintiff's condition, so that smaller invoices could be paid in the normal course of business, in order to keep the businesses going in the interim. In any event, the bank account involved was not established in evidence to have been that of Tsiris CC. The fact that another person had access to the bank account had nothing with the bank's decision to withdraw finance in respect of a company that was for all intents and purposes, a rudderless ship. As to the third contention. Ms Le Roux testified that the Plaintiff's business was suddenly left without a head by virtue of the shooting which resulted in the plaintiff's injuries and dire medical condition, and the bank considered it too risky to continue to back a project that was left without a head. The bank withdrew the funding precisely because Tsiris CC became a rudderless ship and its captain's life was in jeopardy. That meant that the bank's security was also at risk. Ultimately, the funding was not withdrawn because the bank wanted or needed outstanding information that could not be provided. The bank's decision is understandable and cogent reasons were given therefore. The facility was withdrawn because of the condition the plaintiff was in and not because the bank could not get and did not get information from the plaintiff. As to the fourth contention, namely, that the plaintiff's businesses themselves were unaffected and continued to generate income as before, notwithstanding the shooting and all its consequences, was simply not borne out by the evidence.

111. Ultimately, Ms le Roux testified that from a commercial and risk point of view, the bank would have made the same decision today. The bank was criticized on moral and equity considerations for withdrawing the approval of mortgage bond finance. But as was submitted on behalf of the applicant, the issue in this matter is not whether the bank's decision was correct or not but whether the test for causality has been met.
112. Ironically, the defendant contends in its heads of argument that it 'is not for this court or anyone for that matter, to speculate about what could have been the real reasons for the withdrawal of the financing by ABSA. That is not the issue before this court. It is for the court to accept the evidence as presented to it and make sense of it in so far as whether causation has been established or not.' I say 'ironically,' because the defendant saw fit to speculate in its heads about what could have been the real reasons for the bank's withdrawal of financing, contrary to the reasons d by Ms Le Roux, none of which were gainsaid in evidence.
113. If, by contending that the plaintiff waived his rights to the development, which decision caused his loss, the defendant meant to convey that the plaintiff waived the right to claim for loss sustained by him, then all that needs be said is that such contention is not sustainable on the facts established in evidence, or in law. A party who relies on waiver bears the onus of alleging and proving same on a balance of probabilities.<sup>52</sup> The defendant did neither. The defendant failed to prove that when the plaintiff allegedly waived his right to claim damages from the defendant, he did so with full knowledge of the right that was being abandoned, as would have been required of it.<sup>53</sup>

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<sup>52</sup> *Borstlap v Spangenberg* 1974 (3) SA 695 (A).

<sup>53</sup> See *Feinstein v Niggli* 1988 (2) SA 684.

114. In *International Shipping Co (Pty) Ltd v Bentley*<sup>54</sup> the Appellate Division provided guidance on how to apply the but-for test when determining factual causation. It held:

“In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff’s loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff’s loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability.

The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called ‘legal causation’ ”

115. Had it not been for the shooting, the plaintiff would not have been seriously injured. And, had he not been injured, the bank would in all likelihood not have withdrawn the finance, given that it had already been approved at the time of the shooting, with the result that the purchase price for the sale of erf 902 would have been paid and in consequence, plaintiff would have continued with the development, which would in all probability have been a resounding success.
116. From a factual causation point of view, the unrefuted evidence was that Absa withdrew the finance purely as a result of the Plaintiff’s ongoing dire medical condition as a result of injuries sustained by him, all of which occurred as a direct result of the shooting incident. At the time, without the loan, the development was doomed to fail and did in fact fail. As a result of

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<sup>54</sup> *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) aaaaaat 700E-I.

his condition, the plaintiff effectively had no choice but to let the development go at great personal cost to him.

117. The next enquiry is that of legal causation to determine whether the wrongful act [shooting] was linked sufficiently closely to the loss for legal liability to ensue.
118. The uncontroverted evidence was that as a direct result of the plaintiff having been shot:
- (i) He spent many months in recovery from his injuries, some of which have resulted in permanent sequelae;
  - (ii) He was not in a position to attend to the property development and the issues relating thereto as a direct result of his ongoing dire medical condition;<sup>55</sup>
  - (iii) Due to the dire medical condition he was in and the ongoing uncertainty surrounding his recovery, Absa withdrew the loan and the registration of a bond;
  - (iv) The property development the plaintiff was working on failed.
119. In *Russel*,<sup>56</sup> the deceased sustained brain injuries causing depression in a motor vehicle accident. Whilst suffering from depression, he committed suicide. The Fund argued that the suicide was a *novus actus*. The Supreme Court of Appeal disagreed and found that the condition the plaintiff found himself in led to the suicide which flowed from his injuries and sequelae thereof.
120. Likewise, the condition the plaintiff found himself and which prompted him to take the decision to let go of the development flowed from the injuries he

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<sup>55</sup> As testified by the plaintiff: "I was busy with another fight at that time...I was fighting for my life."

<sup>56</sup> *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA)

sustained in the shooting incident. As such, the loss suffered is not too remote so that legal causation is established.

121. I agree with the plaintiff's submission that the defendant's argument that the bank's withdrawal of finance and the plaintiff's decision to sign over the development constituted a *novus actus interveniens*, is bad, in that it is not only unsupported by the evidence tendered at trial, but in fact, the evidence tendered at trial directly contradicts it.
122. The evidence showed that as a direct result of the shooting incident and the severely compromised position the plaintiff was in (at that stage, he was fighting for his life), (i) the bank withdrew the approval for the finance and (ii) the plaintiff signed over the development as he was simply not in a fit position to rescue the development pursuant to the shooting incident.
123. Furthermore, the plaintiff submits that the question is simply whether it is reasonably foreseeable that a property developer, who is in the middle of a property development, could lose the property development pursuant to being shot, severely injured and unable in consequence to continue with the property development. The answer, says the plaintiff, is plainly yes. I agree. That was what the unrefuted evidence established at trial.
124. For all the reasons given, the plaintiff has succeeded in establishing his claim for loss of earnings/earning capacity. There is no merit in the suggestion that the plaintiff has failed to prove that his loss is causally connected to the shooting incident. The contrary is, in my view, true. The total capital amount payable by the defendant is, in summary, the following:
- |                        |                              |
|------------------------|------------------------------|
| Costs of an assistant: | R9,460,095.20                |
| Development loss:      | R40,434,540.00               |
| <b>Total:</b>          | <b><u>R49,894,635.20</u></b> |



125. On the facts of the matter, I am satisfied that the defendant should, in terms of the general rule, namely, that a successful party should be awarded costs, pay the Plaintiff's costs of the action.

126. Accordingly an order in terms of the draft attached hereto is granted:

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

Dates of hearing: 27/2/2023 to 8/3/2023 & 17/4/2023  
Judgment delivered 10/11/ 2023

*This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 10 November 2023.*

APPEARANCES:

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Instructed by: N. Van der Walt Inc Attorneys

Counsel for Defendant: Adv M. Simelane SC  
Instructed by: State Attorney, Johannesburg