EARNING CAPACITY: USE IT (FOR YOURSELF) OR LOSE IT

Rudman v Road Accident Fund 2003 2 SA 234 (SCA)

"For while earnings may generally (and even frequently) be a fair indication of earning capacity, … there are occasions where they part company, and where, therefore, it is important to clarify the real object of compensation" (Boberg *The Law of Delict* (1984) 539).

1 Introduction

In *Rudman v Road Accident Fund* (2003 2 SA 234 (SCA)), the appellant, a mohair farmer, was also a game farmer, hunting outfitter and registered professional hunter. He brought large numbers of foreign hunters to the Eastern Cape and his business was one of the most successful of its kind in the province. Acting on advice from his financial managers, the appellant acquired control in 1977 of a company, Blaauwkrantz Farming Enterprises (Pty) Ltd of which he, his wife and children were directors. Although the farming and hunting activities were done through the company, these activities were in fact performed by the appellant in person. The income generated by the company was thus through the energetic effort of the appellant. Both the hunting and the farming were done on rugged terrain and required considerable physical effort from the appellant. He was an active man who always maintained a high level of personal fitness and this contributed to his success as hunter and farmer.

In May 1998 the appellant was involved in a motor collision which changed his life dramatically. After a lengthy period in hospital he returned to the farm but he would never hunt again and would also not be able to pursue his farming activities with the same vigour as before.

The appellant claimed, amongst other things, past loss of earnings in the amount of R745 882, as well as loss of earning capacity in the amount of R1 380 000 (238 E-F). These claims arose from the physical handicaps such as severe restriction of movement due to miscellaneous injuries suffered by the appellant. The prognosis for recovery was poor and the appellant would, according to the evidence, never again function as a professional hunter, nor would he be able to perform all the farming duties he had performed prior to the accident.

2 The questions

Questions on which the court had to decide were, firstly, whether the appellant had suffered loss of income as a result of the fact that a maintenance manager had to be employed by the company and, secondly, whether there was any loss of future earning capacity as a result of the appellant's permanent incapacity from earning a living as a professional hunter. If the answer to the last question was in the affirmative the question of quantification of the loss of earning capacity would arise. According to the pleadings he would have hunted for 150 days per year at R600 per day until the age of 65 and he was also partially incapacitated as a farmer. In this regard there was evidence to the effect that the company would have to employ a maintenance manager at a salary of R8 000 per month for the next 10 years to supplement this incapacity.

3 The decision

The trial judge (whose decision was confirmed on appeal) dismissed both claims on the ground that "the plaintiff … failed to prove that his patrimony was diminished due to any loss of earning capacity past or future resulting from his injury and consequently he has failed to prove any entitlement to be compensated …" (as quoted by Jones AJA 240A). This decision was reached because, according to the court *a quo* (Liebenberg J), "[a]ny loss which may have occurred as a result thereof (the injuries suffered by the plaintiff) is a loss to the company and not to the plaintiff's private estate" (as quoted by Jones AJA 239H).

4 Discussion

The purpose of this note is the following:

1 To establish whether it is always necessary to prove a diminished patrimony in order to prove loss of future earning capacity and whether the decision of the court in this regard was correct; and

2 If the answer to the first one is negative, whether work done for one's own company may be taken as an indication of earning capacity and whether the court's decision in this regard was correct.

4 1 Loss of past earnings

Loss of past earnings forms part of what is often called special damages and is purely patrimonial. It thus stands to reason that a person cannot claim loss of past earnings if he cannot prove actual patrimonial loss.

There can be little doubt that the company, Blaauwkrantz Farming Enterprises (Pty) Ltd, suffered financial loss because the plaintiff could not

fulfil his duties as a farmer, professional hunter and hunting outfitter after the accident. It may also be true that the plaintiff failed to prove that he suffered financial loss in his personal capacity. ("It is incumbent upon the plaintiff to establish by way of evidence at the trial that the injuries sustained did prevent the earning of a living in the normal way and what the earnings would have been had he or she not been so prevented" (Gauntlett *Corbett: The Quantum of Damages in Bodily and Fatal Injuries Vol 1*(1995) 39).)

In this regard, one can therefore agree with Jones AJA who states the following (243 C-D):

> "There is … evidence to show that the company has incurred and will in future incur the additional expense of employing others to do what Rudman used to do. However, there is no proof that this produces loss to Rudman."

It should be noted that our courts often, but not always, award damages separately for past loss of earnings and loss of future earning capacity. It is submitted that this is correct. Past loss of earnings (that is earnings lost from the date of the delict to the trial date) are capable of being proven with relative certainty. It is also patrimonial damage and not part of the personal immaterial property right of earning capacity. (See *General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo* 1987 3 SA 577 (A).)

4 2 Loss of earning capacity

Earning capacity is sometimes viewed not as purely patrimonial or non-patrimonial, but as personal immaterial property ("persoonlike immateriële vermoënsgoed". See Neethling "Persoonlike Immaterieelgoedereregte: 'n Nuwe kategorie Subjektiewe Regte?" 1987 *THRHR* 316-320; as well as the ensuing debate as summarised by Neethling "Die Reg op die Verdienvermoë en die Regte op die Korrekte Inligting as Selfstandige Subjektiewe Regte" 1990 *THRHR* 101-105).

If one analyses case law dealing with loss of earning capacity one can distinguish four categories of cases that deal with the loss of future earning capacity:

4 2 1 Loss of earning capacity is equated to loss of future income

Perhaps the most accurate (and least problematic) way to calculate loss of earning capacity is to base such calculation on loss of future income in cases where such loss can be predicted with reasonable certainty. This is the typical case where X earns a salary, is injured to such an extent that he can no longer be employed and where his potential future earnings until his age

of retirement, were it not for the injury, can be predicted with reasonable certainty. This method works for the majority of cases. A few examples will suffice.

In *Santam Versekeringsmaatskappy Bpk v Byleveldt* (1973 2 SA 146 (A)) Trollip AJ said the following with reference to the above mentioned method (174E-F):

> "Basically, it is true, the compensation our Courts award is also for impairment of the capacity to earn, but generally it is measured by reference to the loss of earnings. Where the injured party was in normal employment at the time he was injured and would have continued in it but for his incapacitation, such employment is ordinarily regarded as reflecting his earning capacity. His loss of earnings, actual or prospective, is, therefore, usually taken as the true measure of the impairment of his earning capacity."

(See also *Commercial Union Assurance Co of SA Ltd v Stanley* 1973 1 SA 699 (A) where the court calculated loss of earnings up to a probable date of remarriage; *Jacobs v Santam Insurance Co Ltd* 1974 3 SA 455 (C) where Baker J talked of "loss of earnings or earning capacity" (463A-B); *Shield Insurance Co Ltd v Hall* 1976 4 SA 431 (A); and *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A).)

The emphasis in all these cases is on the patrimonial aspect of earning capacity because it is easy to prove.

In *Dippenaar v Shield Insurance Co Ltd* (1979 2 SA 904 (A)) Rumpff CJ said the following (917B-C):

> "In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate."

The court then went on to say that the monetary value of loss of earning capacity may be proved in a variety of ways, depending on the facts of each case (917E-F).

In the case of *Dippenaar* the court made use of the contract of employment of the plaintiff to ascertain the loss of earning capacity and it decided that a pension, which was also payable in terms of the contract, had to be regarded as part of the earning capacity (which was still intact) and could thus not be regarded as part of the loss of earning capacity (see Boberg's criticism of this aspect of the case *Boberg* 610; and see also *Serumela v SA Eagle Insurance Co Ltd* 1981 1 SA 391 (T) where *Dippenaar v Shield Insurance Co Ltd supra* was followed as well as *Krugell v Shield Versekerings-maatskappy Bpk* 1982 4 SA 95 (T) where Van Dijkhorst R refused to award an arbitrary amount as loss of earning capacity but followed *Dippenaar's*

case (101A-B) and took the contract of employment plus the benefits in terms thereof into account).

In this category of cases it seems that the following statement by Boberg still holds true: "The South African decisions reveal a tendency to pay lip-service to the loss of earning capacity, while actually assessing damages on the basis of lost future earnings" (Boberg 539).

4 2 2 Loss of earning capacity is quantified by the cost of supplementary labour skills

In *Blyth v Van Den Heever* (1980 1 SA 191 (A)) Corbett JA considered an award for loss of earning capacity. It was argued on behalf of the appellant, who was a farmer, that this loss should be based on the cost of a semi-skilled assistant to complement the incapacity of the appellant. The court rejected this argument for the following reason:

> "In the ordinary course of his farming activities, appellant would probably have the necessary assistance from his farm labourers in any event. In argument appellant's counsel conceded this and contended that the Court should award an arbitrary amount to compensate appellant for his working disability and his disadvantage in the labour market should he, owing to unforeseen circumstances, be forced to give up farming on his own account. Appellant's counsel suggested an amount of R15 000. Respondent's counsel, on the same basis, submitted that R5 000 would be adequate compensation. In my view, an award of R7 500 would provide fair and adequate compensation under this head" (225G-H).

It should be noted that the R7 500 was awarded for loss of earning capacity and not for general damages (226F-G).

In *Erdmann v Santam Insurance Co Ltd* (1985 3 SA 402 (C)) Fagan J awarded as loss of earning capacity an amount equivalent to the cost of supplementing a woman's work as householder in a case where the woman was injured.

The same approach was followed in *President Insurance Co Ltd v Mathews* (1992 1 SA 1 (A)) where the Appellate Division agreed with the court *a quo* that an award for loss of earning capacity of a farmer who was injured in an accident could be based on actuarial calculations of the cost of employing a person to supplement his inability to do certain things which he could have done before the accident (see also *Muller v Mutual and Federal Insurance Co Ltd* 1994 2 SA 425 (C) where the cost of an assistant to supplement the lost skills of a specialist winemaker, injured in an accident, was used as the basis for determining loss of earning capacity).

4 2 3 Cases where it is impossible to quantify loss of earning capacity with any degree of accuracy

The leading case in this regard is *Southern Insurance Association Ltd v Bailey NO* (1984 1 SA 98 (A)) where the court had to decide on the quantification of loss of earning capacity of a two-year-old child. Nicholas JA emphasised the fact that it is desirable, where possible, to itemise the amounts in respect of pecuniary damage (such as the loss of earning capacity) and non-pecuniary damage (such as loss of amenities *etc*) (113A). The court then discussed the two possible approaches in assessing loss of earning capacity in this type of case, namely, to make a round estimate of an amount which seems to be fair and reasonable or to make use of mathematical calculations on the basis of assumptions resting on evidence. "It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a *non possumus* attitude and make no award" (114A). After considering the court *a quo*'s reasoning, the court then awarded a global amount for loss of earning capacity.

In *Maja v South African Eagle Insurance Co Ltd* (1990 2 SA 701 (W)) Morris AJ awarded an amount for loss of earning capacity to a minor child, injured at the age of 32 months, in spite of the fact that the child was so young. The same approach was followed in *Gallie NO v National Employers General Insurance Co Ltd* (1992 2 SA 731 (C)) where Tebbutt J awarded damages for loss of earning capacity to a minor on the basis that he would not be able to work for the rest of his life (739C-D).

In *Lebona v President Versekeringsmaatskappy Bpk* (1991 3 SA 395 (W)) Flemming J had to decide whether a widow whose husband was killed negligently, but who earned his living illegally, could claim for loss of maintenance, and if so, on what it should be based. The court based its finding of loss of maintenance on an estimate of "earning capacity", although the earning capacity could not be based on the deceased's illegal earnings.

The court emphasised (405E-F): "dat die beslissing in hierdie geval nie gegrond is op die enkele feit dat die oorledene die eiseres 'onderhou (het) uit sy nie-regmatige inkomste' nie … maar berus op 'n projeksie omtrent die pligte wat in die toekoms gelê het; die benadering is nie om enige kontrak of ander inkomste 'af te dwing' nie en berus nie 'op grond van gederfde inkomste' terwyl oorledene nie 'n lisensie gehad het nie maar *sy vermoë en plig om te verdien ongeag of hy op grond van 'n lisensie of daarsonder die bepaalde tipe bedrywigheid beoefen het of 'n ander*" (my emphasis).

The court thus embarked on a "calculation of earning capacity" in spite of the fact that it was not based on loss of income.

In *Dhlamini v Multilaterale Motorvoertuigongelukkefonds* (1992 1 SA 802 (T)) De Villiers R established the earning capacity of the deceased for purposes of a claim for loss of maintenance. The Court based its calculation of loss of earning capacity on the illegal earnings as a taxi driver (see also *Minister of Police, Transkei v Xatula* 1994 2 SA 680 (TkA)).

In *Griffiths v Mutual & Federal Insurance Co Ltd* (1994 1 SA 535 (A)) the court had to establish the loss of earning capacity of an attorney who would in all probability have gone to the bar were it not for an accident caused by the negligence of the defendant's insured. Although there was no evidence regarding the plaintiff's probable potential earnings at the bar (546C-D) Vivier JA said, with reference to *Roxa v Mtshayi* (1975 3 SA 761 (A)), that this was not necessarily fatal to her claim (*Griffiths v Mutual & Federal Insurance Co Ltd supra* 546A-B). The court then proceeded as follows (546F-G):

> "In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, although the result be no more than an informed guess (see *Southern Insurance Association Ltd v Bailey NO supra* 113G-114E and the cases cited).
>
> In the present case the plaintiff has, in my view, adduced sufficient evidence upon which a globular award can be made."

Although the court looked at the income of the plaintiff as an attorney it eventually awarded a much higher amount which, according to the court, would represent adequate compensation for the plaintiff's loss of earning capacity (*Griffiths v Mutual & Federal Insurance Co Ltd supra* 547D-E).

4 2 4 Where loss of earning capacity is included under general damages

In *Ncubu v National Employers General Insurance Co Ltd* (1988 2 SA 190 (N)) Galgut J awarded a lump sum of R50 000 for general damages, for pain and suffering, loss of amenities, incapacity, and reduction in earning capacity. He came to this amount with reference to previous cases of similar nature (the unreported cases of *Sotyelelwa v Union and South West Africa Insurance Co Ltd* Corbett & Buchanan vol III 21 and of *Olivier NO v Rondalia Assurance Corporation of SA Ltd* Corbett & Buchanan vol III 31 (199J)). According to the court it was not possible to put a separate value on loss of earning capacity because the plaintiff was not yet four years old at the time of the accident.

The question is whether the principles discussed in the above paragraphs were correctly applied in *Rudman v Road Accident Fund* (*supra*).

5 The approach of the court in *Rudman*

It was argued on behalf of the plaintiff that his diminished capacity to hunt and to perform maintenance on the farm were assets with a measurable monetary value (240D-E). The court *a quo* found, according to Jones AJA, that "Rudman's disability giving rise to a diminished earning capacity was proved, but the evidence did not go further and prove that his incapacity constituted a loss which diminished his estate" (241G-H). In this regard Jones AJA said:

> "I believe that this conclusion is correct. The fallacy in Mr Ekseen's criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured … There must be proof that reduction of earning capacity indeed gives rise to pecuniary loss" (241H-242A).

The court then referred, apparently as the basis for the above statement, to a quote from *Union and National Insurance Co Ltd v Coetzee* (1970 1 SA 29 (A)) where Jansen JA said the following (241E):

> "'n Bepaalde liggaamlike gebrek bring egter nie noodwendig 'n vermindering van verdienvermoë mee nie of altyd 'n vermindering van gelyke omvang nie - dit hang o.a. af van die soort werk waarteen die gebrek beoordeel word."

With regard to the above, the following should be noted:

5 1 The passage quoted from *Union and National Insurance Co Ltd v Coetzee* (*supra*) does not support the statement of Jones AJA. It, in fact, only states that a physical disability does not necessarily diminish a person's earning capacity. It is submitted that the court in *Rudman* had already found that loss of earning capacity had been proven (see the previous paragraph).

5 2 If one accepts the view that earning capacity is personal immaterial property, that is neither purely patrimonial nor non-patrimonial, it stands to reason that, such a right can form an independent part of the estate. If loss of earning capacity is proven, it should then be compensated.

5 3 One of the problems with the court's argument is the finding that there was loss of earning capacity but this loss did not diminish the estate (with reference to *Dippenaar v Shield Insurance Co Ltd supra*). If one reads the passage in *Dippenaar v Shield Insurance Co Ltd* (*supra*), one must come to the conclusion that the court placed too much emphasis on the last part of the quotation. The relevant passage in *Dippenaar v Shield Insurance Co Ltd* (*supra*) reads: "*The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate*." It is submitted that, once a diminished earning capacity is proved, it diminishes the estate because "*the capacity to earn is considered part of*

a person's estate". It is therefore further submitted that, once the court has found that there is a diminished earning capacity, the court must, to the best of its ability, on the basis of the evidence at its disposal, quantify that loss (see the cases discussed in par 2 2-2 4 above where loss of earning capacity was awarded, *eg*, to young unemployed children who, surely, did not suffer losses which *diminished their estate* (*eg Southern Insurance Association Ltd v Bailey supra*)).

If one look at the cases referred to in paragraph 4 above then it seems that Rudman falls in the same category as those cases where loss of earning capacity is quantified with reference to the cost of employing substitute labour to do the work that Rudman would have done had he not been injured. The fact that he did this work for a company should, *per se*, not make a difference. In this regard *President Insurance Co Ltd v Mathews* (*supra* par 4 2 2) springs to mind. Here the Appellate Division calculated loss of earning capacity with reference to the cost of employing a person to supplement the inability of the plaintiff caused by the defendant (see also *Erdmann v Santam Insurance Co Ltd* (*supra* par 4 2) where the court took a similar view and *Blyth v Van Den Heever* (*supra* par 4 2) where the court considered an award based on a supplement but found that no supplement would be needed and then went on and awarded an amount which it regarded as "fair and adequate" (226F-G)). It is submitted that in *Rudman*'s case, the loss of his ability to hunt as well as the inability to manage the affairs of the company as before can indeed be an indication of loss of his earning capacity.

Whether one views earning capacity as personal immaterial property (Neethling's view) or as a personality right (as Van der Merwe and Olivier do) earning capacity is a right, "*the infringement of which has patrimonial consequences* – an entirely sufficient basis for awarding Aquilian damages" (Boberg 540).

5 4 Even if the court had found that it could not quantify the loss of earning capacity with reference to the incapacity to hunt and to manage the affairs of the company it is, in terms of the cases discussed above, the duty of the court to do its utmost to quantify that loss. As Nicholas JA said in *Southern Insurance Association Ltd v Bailey NO* (*supra* par 4 2 3), where the loss of earning capacity of a two-year-old child had to be determined, even if a specific approach involves guesswork to a greater or lesser extent, "the Court cannot for this reason adopt a *non possumus* attitude and make no award" (114A). In this case the loss that "diminished the estate" was the future earning capacity of the child.

In the light of the above, one must conclude that earning capacity is an asset, which forms part of a person's estate, and, once it has been proven that it has been diminished or lost by the wrongful act of another, it is the duty of the court to quantify such loss. In this regard one must disagree with the decision of the court.

The court then dealt with "another fallacy" in the argument on behalf of the appellant (*Rudman v Road Accident Fund supra* 243E). According to the court counsel for the appellant did not consider the appellant's earning capacity as a whole. "Earning capacity is a complex of abilities which together make up an asset in his estate" (243E). According to the court one cannot isolate "individual elements of Rudman's ability to earn a living which have been compromised and place a monetary value on them, without considering whether they bring about a diminution in his earning capacity as a whole" (243E-F). According to the court

> "his real function was and is that of chief executive officer of a large farming undertaking. He still performs that function. He remains the driving force behind the entire enterprise. On the evidence before us the disabilities from which he suffers, serious and real though they are, do not impair his capacity to do what matters most – to see that the Rudman empire which he has developed continues to flourish in all its spheres for the benefit for himself, the trust, the company and, through the trust and the company, the rest of his family" (243G-H).

One can find little fault with this argument, were it not for the previous finding that loss of earning capacity had been proven. The court now, in contrast with its earlier finding, finds that, taking all the evidence into account, Rudman's earning capacity *as a whole* was not impaired. "[H]is disabilities do not give rise to loss any more than a stiff ankle or the loss of part of the little finger diminishes the estate of a bank teller" (244D-E).

5 5 Another, and perhaps the most significant, aspect of the decision in *Rudman*, is that the Supreme Court of Appeal with its interpretation of the passage from *Dippenaar v Shield Insurance Co Ltd* (*supra*) brings clarity insofar as it decided that loss or reduction of earning capacity is legally relevant only insofar as it is in fact utilised (or will probably be utilised in future) *for oneself* (my emphasis). Thus "the skilled medical missionary wrongfully detained from his benevolent activities might be awarded damages on a different scale from those which would result from the wrongful detention from work of a professional man of like abilities engaged in a lucrative practice" and the highly skilled engineer who preferred to pursue a less remunerative hobby of watch-repairing will be entitled to claim loss of earning capacity on the basis of his actual, not potential earnings (examples from other jurisdictions mentioned by Boberg 1973 *Annual Survey* 182).

One may, however, ask whether the effect of this approach is again that the non-patrimonial aspect of the right to earning capacity is ignored and the following statement by Boberg referred to above still holds true:

> "The South African decisions reveal a tendency to pay lip-service to the loss of earning capacity, while actually assessing damages on the basis of lost future earnings" (Boberg 539).

6 Conclusion

What then can be concluded with regard to the loss of earning capacity as a basis for a claim in delict after the decision of the Supreme Court of Appeal in the decision of *Rudman v Road Accident Fund* (*supra*)?

1 Earning capacity is a *sui generis* right, the object of which is the capacity to earn money. One can agree with Visser and Potgieter that the legal object of the right contains elements of patrimony but is also related to a person's bodily integrity (Visser and Potgieter *Law of Damages* 2003 407). It has patrimonial as well as non-patrimonial elements and as such it can be classified as personal immaterial property (2001 Neethling, Potgieter and Visser 53 fn 70 – where reference is also made to *Hawker v Life Offices Association of South Africa* 1987 3 SA 777 (C) where the court refers to the non-patrimonial elements as "factors of personality").

2 The right to earning capacity comprises a complex set of abilities which together make up an asset in the estate of a person and it must be assessed as a whole. The loss of an ability, for instance the ability to hunt, does not necessarily give rise to loss of earning capacity, but can give rise to an award for loss of amenities of life as part of general damages as was indeed awarded by the court *a quo* in *Rudman v Road Accident Fund* (*supra* 238H-I).

3 Once loss of earning capacity is proven it is the duty of the court, from the evidence at its disposal, to quantify that loss (see par 4 1-4 3 above).

4 Since *Rudman v Road Accident Fund* (*supra*), the loss of earning capacity has become irrelevant if it is not proven that one utilised one's earning capacity for oneself.

> "The *Dippenaar* doctrine may perpetuate the prevailing dualism of proclaiming that the loss is one of earning capacity while in fact awarding damages for loss of future earnings" (Boberg 539).

It seems that this prophecy Boberg made 20 years ago has finally become a reality.

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