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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Appeal Case No: A586/2012
Trial Case No: WCHC10009/2004

In the matter between: Reportable

ADV AE HEESE N.O. (in her capacity as curator ad litem to ULRICH HANS PETERS **APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

Coram: VELDHUIZEN, ROGERS & SCHIPPERS JJ

Heard: **24 JULY 2013**

Delivered: **23 OCTOBER 2013**

JUDGMENT

ROGERS J:

[1] Hans Ulrich Peters ('Peters'), a German businessman then aged 51, was seriously injured in a motor car accident in Cape Town on 10 June 2000. One of his injuries was brain damage. The appellant, an advocate, was appointed as his curator *ad litem* ('the plaintiff') for purposes of pursuing a claim against the respondent ('the RAF'). The curator issued summons against the RAF in October 2004. The merits were referred to arbitration. In June 2007 the arbitrator determined that the RAF was fully liable for any damages suffered by Peters.

[2] The determination of damages went to trial in the high court. By the time of the pre-trial conference held on 15 February 2010 general damages had been agreed in an amount of R500 000 and the RAF had paid past medical expenses of about R1,2 million. When the trial began before Blignault J on 10 May 2011 future medical expenses had also been resolved. What remained in issue was Peters' alleged diminution of earning capacity. At the beginning of the trial the claim for loss of earnings was quantified at a present value of € 9 845 562. The trial ran for 11 days in May/June 2011 and for a further 16 days in October and November 2011. By the close of the trial the present value of the claim was a revised amount of € 10 708 461.

[3] Although I have referred to the present value of the alleged loss, the parties agreed at the beginning of the trial that the determination of damages in respect of Peters' earning capacity would be divided into two phases. In the first phase the trial judge would be asked to determine the gross pre-tax income that Peters would have earned but for the accident. The second phase would address questions of tax, the various issues relevant to arriving at a discounted present value, and contingencies. What was tried over 27 days before Blignault J in 2011 was the first phase. At the close of the first phase in November 2011 the plaintiff asked the trial judge to find that Peters' gross pre-tax income but for the accident would have been € 27 196 269, covering a notional earning period from 1 January 2002 to 30 June 2023 (the latter being the date on which Peters would turn 75). According to an agreed calculation placed before us subsequent to the hearing of the appeal, this would represent a discounted present value as at 2 December 2011 (the day on

which the court *a quo* delivered judgment) of € 10 346 400 (taking German tax and German mortality life tables into account but prior to the application of contingencies).

[4] The case presented by the curator on behalf of Peters had this remarkable feature about it, that Peters' historic profits as a businessman over the period 1991 to 2001, as reflected in his financial statements and tax returns, were said not to be a safe guide to his likely post-accident profits because he had dishonestly evaded tax in Germany by understating his income and overstating his expenditure, particularly in the period 1997-2001.

[5] Blignault J gave judgment on 2 December 2011. He dismissed the plaintiff's claim, finding that Peters had no post-accident earning capacity to which a value could be ascribed. In effect, he determined that Peters' gross pre-tax income over the period 1 January 2002 to 30 June 2023 would have been nil, at least for purposes of quantifying a claim for loss of earning capacity under South African law. The trial judge based his conclusion on two lines of reasoning.

[6] The first line was the following. The judge accepted the plaintiff's argument that Peters' business (the selling of magazine subscriptions through teams of sales representatives) was not unlawful. The capacity to earn money from such a business (as distinct from the earning of money from an unlawful activity – cf *Dhlamini v Protea* 1974 (4) SA 913(A)) could thus legitimately be the subject of compensation if the earning capacity was impaired. Blignault J considered, however, that Peters could not lawfully have continued to conduct the business and earn money from selling magazine subscriptions without disclosing to the German tax authorities that he had evaded tax in the past. If Peters could only earn future income by dishonestly refraining from making a disclosure which he was legally obliged to make, it would be contrary to policy to award him compensation for the loss of the future earnings. And if he did make the necessary disclosure, this would have caused the sterilisation of his earning capacity by virtue of harsh criminal sanctions.

[7] The trial judge's second line of reasoning was that the German tax authorities were in any event closing in on Peters and that he would probably have been arrested and subjected to lengthy imprisonment for tax evasion even if he had not made voluntary disclosure to the tax authorities.

[8] On 24 February 2012 Blignault J refused the plaintiff's application for leave to appeal. On 24 July 2012 the Supreme Court of Appeal on petition granted the plaintiff leave to appeal to a full bench. We heard the matter on 24 July 2013.

[9] At the hearing of the appeal the parties agreed, at the request of the court, to submit calculations on varying assumptions indicated by the court. The scenarios were set out in a letter from the court to the parties' attorneys on the day following the hearing. It was made clear by us at the hearing and in the letter that our request did not imply that we would uphold the plaintiff's appeal or, if we did, that we would adopt any of the scenarios mentioned in the letter. We merely wished, if it should turn out to be material to our decision, to see how significantly the quantification of the claim was affected by the modification of certain key assumptions underlying the model advanced by the plaintiff at the trial. The requested calculations were furnished to us on 12 August 2013. We commend the parties and their experts for attending to our request so promptly. The scenarios include, in each case, the amount of gross pre-tax income which would have been earned on the indicated assumptions and a discounted present value (as at 2 December 2011) determined by Mr Alex Munro, an independent actuary agreed upon by the parties for purposes of our request.

[10] Our request arose in part from a debate with counsel at the hearing of the appeal as to whether, assuming the trial judge had erred in dismissing the claim, there was sufficiently reliable evidence on which to determine a future income stream (which could then be actuarially discounted to a present value and be subjected to contingencies); or whether this might be a rare case where, despite the usual preference for an actuarial model, one should not rather award a lump sum which seemed just and fair in all the circumstances (*Burger v Union National South British Insurance Company* 1975 (4) SA 72 (W) at 77A-C; *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A) at 113F-114E; and see also the recent

application of this approach by a full bench of this court in *Miller v Road Accident Fund* [2013] ZAWCHC 131 paras 47-58). If, in the court's deliberations, we came to the latter view, the range of scenarios for which we requested calculations might be of some assistance in guiding our sense of what might be fair and just. Counsel confirmed at the hearing that if we considered that the trial judge should not have dismissed the claim but if we concluded that there was insufficient evidence to adopt a particular actuarial model, the parties would prefer us to determine a fair and just lump sum rather than remitting the matter to the trial judge for further argument.

Factual overview

[11] Peters' business was that of selling magazine subscriptions in Germany to members of the public. He started working as a sales representative for a Mr Frederick Hengst ('Hengst') in about 1967. He was apparently a very successful seller. He began business for his own account in the 1980s but continued to cooperate with Hengst.

[12] The administration of magazine subscriptions in Germany was handled by a central organisation called Pressenvertiebszentrale GmbH & Co ('PVZ'). PVZ distributed royalties to businesses which held magazine subscriptions procured from the public. A subscriber might terminate or default after a short period; or the subscriber might maintain the subscription for many years. The rate at which new subscriptions of a particular magazine might dwindle over the years was referred to during the trial as the attrition rate.

[13] There were various large firms which held accounts with PVZ. One of these was Heinz Bitter KG ('Bitter') in which the leading figures were the eponymous Mr Heinz Bitter and his sons Mattheas and Andreas. Each batch of subscriptions which Bitter held with PVZ was referred to by the German word 'orga' – simply an account, as I understand it.

[14] Peters did not hold orgas directly with PVZ. He dealt with Bitter. There were two ways in which a person in Peters' position could make money from procured subscriptions: [a] he could retain the subscriptions and receive royalties over the life

of the subscriptions, whether short or long ('retained subscriptions'); or [b] he could sell the subscriptions for a lump sum to a firm such as Bitter, in which case Bitter would receive the royalties ('transferred subscriptions'). The price for transferred subscriptions could be expected to take into account the parties' respective views as to the attrition rate of the transferred subscriptions, the expected changes in royalty rates over the life of the subscriptions, the need for the acquirer of the subscriptions to make a profit and so forth. It seems that the procurers of subscriptions generally preferred to retain them as far as possible, since the royalty stream was regarded as more valuable than a negotiated lump sum transfer price. The extent to which a procurer transferred subscriptions to larger intermediaries such as Bitter would depend on the procurer's need for cash to cover his business overheads and on the intermediary's willingness to allow the procurer to retain subscriptions.

[15] In May 1989 Peters sold his entire stock of retained subscriptions to Hengst for DM 1,13 million. There was a suggestion in the evidence that this may have been because Hengst was resistant to the retention of subscriptions by Peters. Thereafter, it would appear, Peters dealt with Bitter.

[16] Mr Bogdan Giesecke ('Giesecke'), who testified at the trial for the plaintiff, was also a procurer of magazine subscriptions. He met Peters in about 1990 since they both dealt with Bitter. They eventually joined forces in 1996 though Peters remained the proprietor of the merged business. Giesecke testified that in addition to the commission which Peters' sales representatives earned on procured subscriptions, he (Giesecke) had an arrangement with Peters in terms of which Giesecke could build up a stock of his own retained subscriptions. These were kept by Bitter in a separate orga for Giesecke's benefit.

[17] The plaintiff's case was that Peters dealt with Bitter on the consistent basis that of all the subscriptions procured by Peters through his selling teams, 50% would be retained for Peters and 50% would be transferred for a lump sum to Bitter. For the retained subscriptions Peters would receive ongoing royalties and for the transferred subscriptions he would receive a lump sum from Bitter at the time of transfer. The subscriptions in question, whether retained or transferred, were held in various orgas which Bitter had with PVZ. The arrangement between Peters and

Bitter was of no concern to PVZ. Peters and Bitter could give effect administratively to the alleged 50/50 arrangement in one of two ways: [a] Peters' 50% retained subscriptions could be held in an orga solely for Peters' benefit, with the 50% transferred subscriptions being held in another orga solely for Bitter's benefit; or [b] 100% of Peters' procured subscriptions could be held in a single joint orga on the basis that Bitter would account to Peters for 50% of the royalties received from PVZ in respect of that orga.

[18] At least since 1991 a German accountant, Karsten Heinzmann (who was also called as a witness for the plaintiff), prepared Peters' annual financial statements and tax returns. He did so on the basis of source documents which Peters provided. Peters' bank statements were of no great significance in this exercise because Peters received all his payments from Bitter (whether royalties on retained subscriptions or lump sum payments for transferred subscriptions) in cash at regular meetings. The source documents were commission statements issued by Bitter to Peters and Peters' expense vouchers. Heinzmann accepted that the commission statements reflected all the remuneration received by Peters and that the expense vouchers were genuine. He did not conduct audits.

[19] On 31 May 1993 Peters sold his entire stock of retained subscriptions (which he had built up again since May 1989) by transferring them to Bitter for DM 1,72 million. Thereafter the business was purportedly started afresh by his then wife Katrien Peters ('Katrien') and conducted in her name until the end of 1996. Although Heinzmann prepared the financial statements and tax returns for this period in Katrien's name, the evidence showed that the business during this time was conducted in truth by and for the benefit of Peters. There was an advantageous tax rate on the proceeds of the sale of the subscriptions transferred to Bitter provided that Peters then ceased conducting business for at least three years. The scheme was designed to take advantage of this tax advantage. In the circumstances, the sale of the subscriptions to Bitter in May 1993 was genuine but the conduct of the business thereafter in Katrien's name was a sham so that Peters could get an illicit tax benefit by pretending to have ceased business. At the trial the litigants correctly approached matters on the basis that the performance of the business during the

period June 1993 to December 1996, insofar as it was germane to the claim for loss of earnings, was Peters' business and the product of his earning capacity.

[20] By implementing this tax scheme, Peters (in the name of Katrien) resumed the business in June 1993 with a nil stock of retained subscriptions. He began to build up a new stock of retained subscriptions in the ensuing years. As noted, the business reverted to his name as from January 1997 (no consideration passed between Katrien and himself – just one manifestation of the sham).

[21] Peters got divorced from Katrien in March 1998 (she was his second wife – he had got divorced from his first wife, Doris, in May 1986). His new girlfriend was Maren Lapke ('Lapke').

[22] At some stage Peters caused to be established a company called ML Pressvertrieb ('MLP'). The letters 'ML' were inspired by the initials of his girlfriend Lapke. Giesecke was appointed as MLP's business manager, and Giesecke and Lapke were at one stage its purported shareholders. Again, it was accepted at the trial that MLP was in truth controlled entirely by Peters. All expenses incurred in Peters' selling business were nominally incurred by MLP which then charged Peters the full amount of those expenses together with a commission. Peters would pay MLP from the income he earned on the retained and transferred subscriptions, in regard to which he continued to deal with Bitter. Certain expenses purportedly incurred by MLP were later disallowed by the German tax authorities which resulted in personal assessments against Giesecke and Lapke as the purported shareholders. Some or all of these expenses were fabricated. In reconstructing Peters' financial affairs in respect of the years prior to the accident, the plaintiff treated MLP as a mere extension of Peters – the separate financial statements prepared by Heinzmann for MLP and Peters were combined to produce consolidated annual financial results.

[23] A sad indictment of the low standard of business morality which prevailed in Peters' business affairs is afforded by Giesecke's evidence that if Peters and Lapke's relationship had run into trouble she could have incriminated Peters and 'the whole thing would have exploded', whereas Peters would have had no such

concern in respect of Giesecke (in other words, Giesecke could be trusted to help Peters pay less tax without risk of his later turning against Peters).[1]

[24] In April 1999 Peters, then 50 years old, met Adriana Holzmann ('Holzmann'), then aged 28 (she was a another witness for the plaintiff). They fell in love, and a month later she moved in with him at his house in Scheessel Germany. He treated her very generously and they enjoyed a lavish lifestyle. Holzmann testified that Peters was honest in his relationship with her but dishonest in business.[2] Peters began to spend less time on the magazine business. Over the period June 1999 to February 2000 they went on no fewer than five overseas jaunts: to Ibiza in Spain; to Majorca, also in Spain; to Tunisia; to Malaysia (for the New Year); and to the Canary Islands. Giesecke testified that he saw Peters less often, and the number of sales representatives declined. In early 2000 one of Peters' two team leaders, Mr Ernst Wögebauer, had a fallout with Peters and left. Giesecke then had to manage both of the teams. Some of the sales representatives left with Wögebauer.

[25] In March 2000 Peters and Holzmann settled upon South Africa as their next holiday destination – in hindsight a tragic choice. They spent two weeks here. They found it to their liking. They got engaged and decided to return for a longer period. According to Holzmann, Peters spoke about business opportunities in South Africa. They leased an apartment in Bloubergstrand for six months as from 1 April 2000. They went back to Germany for a short while, returning to South Africa on 9 May 2000 for an indefinite stay. At least some of their anticipated monetary requirements were catered for by banknotes amounting to DM 500 000 strapped to their bodies (ie not disclosed to the border authorities when they left Germany or arrived in South Africa). Peters shipped to South Africa his new GT 3 Porsche which he had bought in January 2000. On 16 May 2000 he purchased a sectional title unit at Dolphin Beach for R1,15 million as a wedding gift for Holzmann. Later in May 2000 Peters sold his house in Scheessel for DM 1 million (on the evidence, this seems to have been a very low price for a luxury dwelling).

[26] Peters and Holzmann were not only thinking about holiday. During March or April 2000, and no doubt at Peters' instigation, they devised a fraudulent scheme in

[1] 10/851-854.
[2] 21/1954.

which Holzmann would help Peters reduce his taxable income by rendering invoices to him in the name of Adriana Holzmann Pressvertrieb ('AHP') for selling services supposedly rendered by AHP to Peters' business. The first fictitious invoice was rendered on 31 May 2000 (Peters and Holzmann were already in South Africa at this time). Holzmann issued at least nine such invoices over a period of about a year. The bogus expenditure amounted in all to DM 1 219 320. (She testified that she stopped issuing the fictitious invoices following advice from Peters' lawyer Dr Hinzpeter ('Hinzpeter'), though the latter did not want to hear too much about it.[3] Later in evidence she contradicted herself by saying that she stopped the false invoicing on her own accord.[4])

[27] As previously mentioned, Peters was involved in the motor car accident in Cape Town on 10 June 2000. He was in his Porsche, which was being driven at the time by Holzmann. According to a joint minute by two psychologists presented at the trial, it was agreed that prior to the accident Peters was of above average intelligence and was a driven and highly motivated businessman; that the neurophysical sequelae of his injuries included spastic symptoms as well as impaired balance, coordination and sense of smell; that the neuropsychological sequelae included significant cognitive abnormalities, personality changes as well as behavioural changes; and that he would never be fit for gainful employment. It seems to have been accepted on both sides that he was not capable of testifying though he was by no means in a vegetative state. He was able to converse. Holzmann testified at the trial that although Peters had lost his short-term memory he still had long-term memory.

[28] The details of Peters' hospitalisation and rehabilitation, both in South Africa and Germany, are not relevant to this appeal. After initial treatment in South Africa he returned to Germany for further treatment on 21 July 2000. He and Holzmann came back to South Africa for about four months in October 2000 and again for about four months in April/May 2001. After returning to Germany for about two weeks in August/September 2001, they finally returned to South Africa on 11 September 2001 where they have been living ever since.

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[3] 20/1850-1851; 22/1991-1992.
[4] 22/1990.

[29] During their brief time in Germany in August/September 2001, arrangements were made for the sale of Peters' retained subscriptions to Bitter. Holzmann had for some months been receiving advice in this and other respects from Hinzpeter (a tax lawyer who, according to Holzmann, numbered Peters, Bitter and Hengst among his handful of select clients). The subject of the sale, which was later committed to writing in a contract signed on 2 December 2001, were Peters' retained subscriptions numbering 20 561 for a price of DM 2,7 million plus VAT. According to Holzmann, the price was struck in a meeting between Peters and Heinz Bitter while she and Andreas were out of the room.[5] Holzmann testified that she could not say whether the price was fair but she had trusted Bitter. It is extraordinary that the fixing of the price should, from Peters' side, have been settled by Bitter with Peters himself, given the latter's impaired condition, but presumably Holzmann and Bitter believed his faculties were sufficient for this purpose. Heinzmann believed it possible that Bitter had taken advantage of Holzmann and that the price of DM 2,7 million was significantly below commercial value. The plaintiff's industry expert, Karl Tank ('Tank'), thought that perhaps a higher price could have been obtained; he was not willing to say that the price was below true value although it was at the bottom of the range of selling values customary at the time. To this I would add that although the written sale agreement was handed in as an exhibit and reflected a price of DM 2,7 million, neither of the persons who struck the deal (Peters and Heinz Bitter) testified. One would have to take it on faith that DM 2,7 million was the true price. This was a sum on which tax needed to be paid. Given the fact that on the plaintiff's own case Peters was a person who derived no pleasure in paying tax, and that he and Bitter were accustomed to conducting all their transactions in cash, it would not surprise me if some additional consideration was negotiated for Peters. If that was the case and if Holzmann knew about it, she was not the sort of witness on whom one could rely to disclose it to the court.

[30] In the period after the accident Giesecke continued to run Peters' business, though now without the phone calls and occasional visits from Peters. How many sales representatives were in the team or teams managed by Giesecke from time to time (both before and after the accident) is a matter of uncertainty. Giesecke said that there were 50 to 60 sellers when he joined Peters in 1996; that after Peters met

[5] 21/1861-1862; 23/2056.

Holzmann in April 1999 the numbers dropped to about 40; that Wögebauer left with some sales representatives in early 2000; and that by the time Holzmann and Hinzpeter decided to sell Peters' residual retained subscriptions to Bitter there were only between 15 and 18 representatives.[6] Giesecke and Holzmann seem not to have got on with each other and there was thus no or little communication between them. Giesecke continued to manage Peters' business for about a year after the accident – the last subscriptions acquired for Peters were in about July 2001. Giesecke testified that he then took over the remaining sales representatives and two Kombi vehicles and conducted the subscription selling business for his own account until the end of 2002. (Although Giesecke's evidence was somewhat vague in this respect, I gather from the record that in order to take over Peters' sales representatives and the two vehicles he had to pay Bitter DM 200 000, a sum which Bitter apparently had paid to Peters around the time that the retained subscriptions were transferred to Bitter for DM 2,7 million.) He said there was a declining trend, and his heart was not in the business. He had only two sales representatives working for him by the time he gave it up. He said it was not an easy business as one got older.[7]

[31] I pause here to mention that the sale of the 20 561 subscriptions was not the sale of a business as a going concern. It was merely the sale of a block of assets generating royalties. The RAF's contention at the trial that the price of DM 2,7 million should be regarded as fully compensating Peters for the value of his earning capacity was patently fallacious.

[32] In regard to Peters' tax affairs, on 21 May 2002 (subsequent to the accident) the German tax authorities issued an audit report in which expenses in Peters' business for the years 1991 to 1993 in the amount of DM 249 316 were disallowed. There are documents in the record showing that the investigation culminating in this report had been underway since at least 1999. The disallowed expenditure related to the purported costs of transporting sales representatives around Germany and providing them with accommodation. Heinzmann testified that the German tax authorities at one stage doubted whether some of the named sales representatives

[6] 10/749-750; 9/769-770;11/938-939.
[7] 10/882; 11/969-970.

even existed though Hinzpeter apparently was able to persuade them on that point. The evidence as a whole does not clearly establish that the disallowed expenditure was not actually incurred though Peters may not have been able to persuade the tax authorities that it was deductible for tax purposes.

[33] In October 2000 the German tax authorities disallowed various expenses incurred by MLP for its 1998 year which had the effect of converting a loss in MLP of about DM 1 000 into a profit of DM 223 586. The disallowance, according to Heinzmann, related mainly to bogus salary purportedly paid by MLP to Lapke who was not in truth involved in running the business. Heinzmann testified that it was probable that the purported salary remained in Peters' pocket. The tax authorities held Giesecke and Lapke personally liable for the resultant tax in their capacities as shareholders of MLP. Peters apparently settled Lapke's share of the tax and Giesecke expected him to do likewise for Giesecke's share but because of the accident in June 2001 Giesecke was not able to sort this out with Peters. (The inflated expenditure incurred in MLP (and passed on to Peters) was, in this respect, not dissimilar to what Peters subsequently did with Holzmann's connivance – bogus selling expenses billed to him by his then girlfriend which in truth remained in his pocket but reduced his tax.)

[34] On 8 November 2001 (again, subsequent to the accident) Peters became the subject of a sales tax audit in respect of the period September 2000 to August 2001. This led to an audit report of 19 June 2002 in which the tax authorities disallowed what we would know as input credits in respect of 18 sales representatives for Peters' 2000 and 2001 years.[8] The 18 sales representatives were purported employees who could not be traced or denied having worked for Peters or whose addresses did not exist or who denied having issued the invoices in question. Although the audit report related only to sales tax, the audit finding implied that expenditure of DM 226 154 as invoiced by the 18 purported sales representatives was bogus.[9] Heinzmann said he saw no prospect of successfully challenging this assessment. The evidence does not disclose who was responsible for perpetrating this particular instance of tax evasion. The period covered by the audit (September

[8]38/3515-3529.
[9]See the table at 39/3630.

2000 to August 2001) post-dated the accident. Holzmann was not asked whether she was responsible for generating the bogus invoices but it is difficult to know who else would have had an interest in doing so. The most plausible explanation seems to be that these invoices were a perpetuation of a scheme pre-dating the accident. And it is also unlikely that Holzmann would have carried on with the scheme without some sort of communication with Peters (who was by no means completely incapacitated).

[35] Then there were the fictitious invoices issued to Peters by AHP totalling DM 1 219 320. Holzmann said that the tax authorities approached her about this during 2002. She sought the advice of Hinzpeter, who hinted that this might be part of a larger investigation against Peters. The substance of her evidence[10] was that Hinzpeter counselled her to take the blame for the fictitious invoicing scheme lest the tax authorities pursue the matter further against Peters who was a more 'conspicuous' target. On this basis she agreed to pay a 'penalty' of € 250 000 (as at 1 January 2002 Germany's currency had switched from the Deutschmark to the Euro). There was a paucity of evidence about what really happened. Hinzpeter declined to testify – indeed, he refused even to see the plaintiff's legal team when they visited Germany. No documents regarding the investigation were adduced. Holzmann was unable to explain how the penalty of € 250 000 was arrived or when it was paid. One would have expected that if the AHP invoices totalling DM 1 219 320 were fictitious (as they undoubtedly were – Holzmann conceded this), the deduction of those amounts would have been disallowed in Peters' 2000 and 2001 financial years (ie in addition to any penalty imposed). The plaintiff's accounting expert, Eric de Kroon ('De Kroon'), in reconstructing Peters' 'true' financial statements for the years 2000 and 2001, reversed this purported expenditure.

[36] I should mention here that Mr Crowe submitted in argument at the appeal that the sales tax assessment of 19 June 2002 arose from the fictitious AHP invoices, and that the 18 bogus sales representatives were persons whom Holzmann through AHP had purported to employ when invoicing Peters. This submission is not borne out by the evidence. The audit report of 19 June 2002 made no reference to

[10] 20/1809-1810; 20/1814-1815; 22/1972-1977.

invoices issued by AHP, only to invoices supposedly issued by sales representatives directly to Peters.[11] The assessment of 19 June 2002 was dealt with in the evidence and in De Kroon's reports as a separate instance of tax impropriety on Peters' part, ie as distinct from the fictitious AHP invoicing scheme.

[37] Hinzpeter wrote to Peters on 19 January 2003 regarding the investigation by the German tax authorities into Peters' affairs. Since this was after the collision, we do not know precisely what input Peters himself could offer. Holzmann said she entrusted the matter to Hinzpeter. Be that as it may, on 3 February 2003 the German tax authorities obtained a search warrant and attachment order from the Dortmund Local Court in connection with criminal proceedings against Peters for suspected sales tax evasion for the period September 2000 to August 2001, for income and trade tax evasion in the years 2000 and 2001 and for the forgery of documents. Giesecke testified that when the authorities arrived to execute the warrant he told them (truthfully) that Peters was living in South Africa and had been involved in a car accident. He testified that pursuant to the warrant Bitter was also required to show various documents to the tax authorities. Giesecke and Holzmann claimed not to know the outcome of the investigation, and Heinzmann denied all knowledge of the warrant. Hinzpeter, as already mentioned, refused even to see the plaintiff's legal team.

[38] The plaintiff's case was that apart from these known instances of impermissible or dishonest deductions, Peters under-declared his turnover, particularly in the years 1997 to 2001. De Kroon estimated the undeclared income and produced revised financial statements which not only reversed the impermissible deductions but added the estimated undeclared turnover. Stripped to its bare essentials, De Kroon's thesis was that Peters' financial statements for the years 1993 to 1996, which showed modest losses or profits, were not necessarily suspicious (indeed, the parameters used by De Kroon in his revision of Peters' historical financial statements yielded more negative results for that period than Peters' own financial statements). Peters had sold his retained subscriptions to Bitter in 1993 and started from a nil base on 1 May 1993. He would thus have had substantial selling expenses but, at least initially, minimal royalty income from

[11] 38/3515-3529.

retained subscriptions. Royalty income from retained subscriptions is essentially expense-free once the selling expenses of procuring the subscriptions have been met. In the period 1993-1996 Peters would have been using the lump sums received from Bitter on the sale of the 50% transferred subscriptions to fund the business as a whole, including the building up of a stock of retained subscriptions. By 1997, however, so De Kroon considered, the stock of retained subscriptions was sufficiently large to be yielding substantial expenses-free income. One would thus have expected to see growing profitability for the business as a whole; yet for the years 1997 to 2001 Peters' financial statements as submitted to the tax authorities reflected losses in 1997 and 1999 and more modest profits in 1998, 2000 and 2000 and 2001 than De Kroon would have expected. What happened, so De Kroon concluded, was that Peters during this period concealed a large part of the turnover he was receiving in cash on the 50% transferred subscriptions. This was more easy to conceal than income on the retained subscriptions, since the latter were held in one or more orgas for his benefit, of which both Bitter and PVZ would have a record. De Kroon's thesis implies that Peters withheld from Heinzmann, for purposes of the latter's preparation of Peters' financial statements and tax returns, certain of the commission statements issued by Bitter in connection with the transferred subscriptions, or alternatively that Bitter assisted Peters' tax evasion by not even issuing commission statements in respect of the transferred subscriptions which Peters concealed from the tax authorities.

[39] I should emphasise that the accurate reconstruction of Peters' financial statements for the period 1993 to 2001 (and eventually De Kroon also included a calculation for 1991 and 1992) was not directly relevant to the quantification of the claim for loss of earning capacity. The plaintiff did not, through De Kroon, advance the case that an average profit derived from the historical period should be used as the profit Peters would have continued earn as from 2002. De Kroon settled upon a number of assumptions (such as the number of sales representatives Peters would have employed, the numbers of subscriptions which each sales representatives would generate per a year, the attrition rate of the subscriptions, likely royalty rates on the subscriptions and so forth) which he used to determine the profit which Peters would have earned as from 2002. The reconstruction of Peters' historic financial statements seems really only to have served the purpose of showing that

the true historic position (ie corrected for impermissible expenditure and undeclared turnover) was not out of line with the future profit predicted by De Kroon.

[40] De Kroon's calculations underwent changes prior to and during the course of the trial. His final calculation reflected that for the full years 1997 to 1999 and for the first five months of 2000 (ie up to the time of the accident) the difference between the profit disclosed by Peters in his financial statements (and thus to the tax authorities) and the profit as calculated by De Kroon was DM 2 446 180, increasing the net profit for the period from DM 65 038 to DM 2 511 218.[12] At a tax rate of 47,8634% this would represent evaded tax of DM 1 170 824.

[41] If one were to take De Kroon's final figures for the whole period 1997 to 2001, the difference between the profit disclosed by Peters and the profit calculated by De Kroon would be DM 3 920 523. On this approach, the tax evasion for the period June 2000 to the end of 2001 would amount to DM 2 749 699. Mr Crowe's position was that Peters could not have been responsible for any tax evasion after his faculties were impaired in the accident on 10 June 2000. The fictitious invoicing scheme which Peters no doubt initiated and which Holzmann through AHP perpetuated after the accident would only account for DM 1 105 687 of this amount[13] and the bogus invoices in respect of the 18 sales representatives would account for a further DM 226 154. The balance of the discrepancy (DM 1 417 858) would have to be explained either by tax evasion perpetrated for Peters' benefit by others (though whether Peters after the accident was altogether incapacitated from communicating with Holzmann on such matters is not altogether clear) or by substantial errors in the assumptions used by De Kroon in reconstructing the historical financial statements.

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[12]These figures are taken from the disclosed profit and calculated profit respectively in version 3 of De Kroon's annexure 18 at 6/518, being his final calculation. De Kroon did not himself provide a figure which separated the first five months from the rest of the year. Mr Crowe, in his heads of argument for the appellant, arrived at the figure for the first five months of 2000 by taking 5/12^{ths} of the full figure for the year, and that is the figure I have used.

[13]DM 1 219 320 (the full amount of the nine fictitious invoices) minus DM 113 633 (being the pre-accident invoice dated 30 may 2000).

The trial judge's reasoning

[42] Although Mr Crowe criticised the trial judge's two lines of reasoning as being wrong in legal principle, I do not accept that criticism. If it appears from evidence that a claimant's supposed earning capacity would as likely as not have been sterilised and rendered worthless by some or other event over the future period covered by the claim, the court could properly conclude that a claim of diminution in earning capacity has not been established on a balance of probability. The future event could in principle be lengthy imprisonment. It is a factual question whether the earning capacity would have been rendered worthless or been diminished in value by a future event such as imprisonment.

[43] Mr Crowe referred us to *Sil & Others v Road Accident Fund* 2013 (3) SA 402 (GSJ) where Sutherland J was confronted with a breadwinner's claim. The deceased's bank statements and lifestyle reflected an income in excess of the income declared in his tax returns. The learned judge said (para 7) that the RAF's anxiety about disregarding the tax returns was not misplaced and that the evasion of tax by the deceased 'certainly leaves a sour taste in the mouth':

'However, it is up to the revenue authorities to pursue their remedies against the estate if they so choose, and the exercise in which this court is engaged does not require a permit a judgment on the deceased's conduct. The upshot is that the tax data is not worth anything….'

I do not think that this case assists Mr Crowe. The learned judge was not considering, and made no reference to, the possibility that but for the deceased's death in the accident his earning capacity might have been sterilised as a result of incarceration for tax evasion. The judge also had no occasion to consider that question under the heading of contingencies, having regard to the manner in which the amended s 17(4) of the Road Accident Fund Act operated in that case.

[44] Similarly, and on grounds of public policy, a South African court would not make an award for diminution in earning capacity if the only way in which the earning capacity could remain productive was by a failure on the part of the claimant post-accident to comply with his legal duties to the tax authorities. The payment of tax is an inevitable part of conducting business. The lawful conduct of business

requires, *inter alia*, compliance with fiscal legislation. I must emphasise that I am not saying that a claimant would fail merely because, but for the accident, he would probably have continued to commit tax evasion. This does not in itself make the future earnings unlawful though an award would have regard to the fact that the lawful future earnings would attract tax. The court would approach the post-accident period on the supposition that he had the capacity lawfully to earn the post-tax income. (This was the approach followed in the English case of *Newman v Folkes & Another* [2001] All ER (D) 340 (QB) paras 46-48, approving the earlier decision to similar effect in *Duller v South East Lincs Engineers* [1985] CLY 585. *Newman* itself was upheld on appeal in this respect: [2002] EWCA Civ 591 para 14.) However, if the evidence shows that the honest and lawful post-accident exploitation of the earning capacity would have required the claimant to make disclosure of pre-accident tax evasion, a South African court would, on grounds of public policy, only award such amount as was consistent with compliance by the claimant with this duty of disclosure. Policy does not permit one to award damages where the exploitation of the earning capacity is dependent on illegality. If such disclosure post-accident would have sterilised the earning capacity because of harsh criminal sanctions, the court could properly decline to make an award for diminution in earning capacity. This was not a question touched upon in the English cases I have mentioned earlier in this paragraph but it is unremarkable at the level of policy. It is a similar policy to the one which led a majority of the English Court of Appeal in *Hewison v Meridian Shipping Pte & Others* [2002] EWCA Civ 1821 to find that no amount should be awarded in respect of future earnings which the injured person could only have continued to earn by deceiving his employers.

[45] My difficulty in this case is at a factual level. The case does not appear, from the RAF's side, to have been run on the basis that Peters' earning capacity was worthless on either of the grounds found by the judge and there is thus relatively little evidence directed to the points on which the judge relied.

[46] The trial judge's first line of reasoning rested on the premise that post-accident Peters would have been required to make disclosure of pre-accident tax evasion. However, there was no evidence as to what duties, if any, German tax legislation imposed on a taxpayer in respect of past evasion or prior tax years. If

German law only required Peters to make an honest return for the current year, one cannot say that an honest post-accident return would have imposed on Peters the duty to disclose pre-accident tax evasion. A court assessing a claim for diminution in earning capacity would simply assess the claim on the basis that it was possible for Peters post-accident to have conducted his business lawfully by making honest post-accident tax returns (even if on the probabilities he would not have been honest in his tax affairs).

[47] Heinzmann could have answered questions about the German tax system but was not asked about this particular issue. I do not think an assumption can be made that German tax legislation required current disclosure of past misdemeanours. There was no evidence that the prescribed tax returns called for information in regard to prior years. I am not aware even that South African tax law imposes such a requirement nor is there a general legal principle in our country that a person who has perpetrated a crime must confess it to the authorities.

[48] It is possible that with further exploration the premise of the trial judge's first line of reasoning might have been established, though perhaps in a way different from that envisaged by him. At the date of the accident (10 June 2000) Peters' most recent financial statements and tax return were in respect of his 1998 year (the calendar year). Those financial statements were signed in September 1999. His first post-accident tax return would thus have been for the 1999 year, which would have been submitted during or after the last quarter of 2000. The question is whether an honest tax return for the 1999 year would have required Peters to disclose the tax evasion which the plaintiff says was perpetrated by him in 1998 and earlier years. As I have said, there was no evidence that German law laid down such a requirement. Nevertheless, Peters' financial statements for each year reflect comparative figures for the prior year. If one assumes that the 1999 financial statements (the first post-accident financial statements) had been honestly prepared to support the 1999 tax return, it is quite possible that the figures for 1998 would have needed to be re-stated and that this would have led to the discovery of the tax evasion. However, I do not think it would be right, in the absence of evidence regarding German legal and accounting standards, to find that this is necessarily the case. Possibly it would not have been obligatory to re-state the prior-year figures or perhaps it would have

been permissible and sufficient to submit financial statements which reflected only current year figures. We simply do not know.

[49] The trial judge's second line of reasoning was that the German tax authorities were in any event closing in on Peters. This is, I consider, apparent from the facts which I have summarised. Holzmann was deliberately vague and evasive as to the circumstances surrounding the tax authorities' investigations. Heinzmann's professed ignorance of the investigation was not convincing. Peters' (and later Holzmann's) lawyer, Hinzpeter, refused even to see the plaintiff's legal team, which exacerbates one's suspicions about the severity of the position in which Peters may have found himself.

[50] It is clear, to my mind, that at very least the fictitious AHP invoicing scheme would probably have resulted in criminal proceedings against Peters. He was the instigator of the scheme and it was essentially for his benefit. It is so that it was perpetuated by Holzmann after the accident but one can assume with complete confidence that even if the accident had not happened the fraudulent scheme would have continued as it did and that Peters would have been criminally responsible for the full tax evasion. The trial judge opined that the failure of the tax authorities to pursue the matter against Peters was that they were persuaded 'on compassionate grounds to leave him alone'. The more probable explanation, I respectfully consider, is that the accident rendered Peters permanently unfit to stand trial. But for the accident, it is highly probable that he would have been prosecuted at least for the AHP scheme. The notion that Holzmann could with Hinzpeter's assistance have successfully persuaded the German tax authorities that she was the sole responsible person strikes me as ludicrous – Peters, as the proprietor of the business to whom the fictitious invoices were being rendered and by whom they were paid, obviously had to be part of and indeed the primary instigator of the crime. Even superficial investigation into the relationship between Peters and Holzmann would have revealed this.

[51] Whether, but for the accident, Peters would have faced prosecution in respect of the 18 bogus sales representatives whose purported invoices were the subject of the audit report of 19 June 2002 is more problematic. Those bogus invoices were

generated post-accident over the period September 2000 to August 2001 at a time when Peters must be assumed already to have lacked criminal responsibility. However, if the bogus invoices in question were the perpetuation of a scheme pre-dating the accident, this would increase the likelihood that but for the accident the bogus invoices would in any event have been issued as they were with Peters' full complicity. I repeat my view that it is most unlikely that Holzmann or some unknown third party would have generated the bogus invoices so as to reduce Peters' tax unless this was the perpetuation of a scheme which Peters already had in place prior to the accident. If that is the most plausible inference, the audit report of 19 June 2002 makes it highly likely that Peters would but for the accident have faced prosecution in regard to the scheme: the report indicated that some of the purported sales representatives were deceased; that others denied having ever issued invoices and that the signatures on the invoices did not match theirs; that others could not be traced to the addresses reflected on the invoices; and that in some instances the addresses did not even exist.

[52] Whether criminal prosecution would have involved charges going beyond the AHP scheme and the 18 bogus sales representatives is difficult to say. The Dortmund warrant of 3 February 2003 seems to have been confined to the period 2000-2001 and may thus have been prompted by and focused on the AHP invoicing scheme and the 18 bogus sales representatives. There is no evidence (assuming that Peters was guilty of tax evasion by under-declaring his revenue, as postulated by De Kroon) that the German tax authorities suspected this. The tax authorities would not, but for the accident, have enjoyed the friendly cooperation of witnesses to build the case which it suited the plaintiff in this matter to advance. The investigative powers of the German tax authorities in all likelihood would have compelled Peters and others to supply information and answer questions – such statutory powers are routinely reposed in tax agencies. In assessing damages one must, for reasons I have already explained, assume that Peters would have supplied honest information (or, to put it differently, one cannot award him damages for a diminution in earning capacity dependent on the supplying of dishonest information). However, whether questions would have been asked which would have required answers exposing the alleged tax evasion of 1997-2000 is unknown; and whether in German law the answers would have been admissible against Peters in criminal

proceedings (as distinct from tax recovery proceedings) is also unknown. There was a material risk that Peters would eventually have faced larger tax evasion charges than merely the AHP scheme and the 18 bogus sales representatives but I do not think it can be said that such an outcome was as probable as not.

[53] On the assumption (which I regard as safe) that Peters would, but for the accident, have faced some criminal charges, including at least his participation in the AHP invoicing scheme and the 18 bogus sales representatives, there was no evidence before the trial court as to when charges were likely to have been instituted, how long the trial would have taken and what sentence was likely to be imposed. If the German tax authorities only issued the Dortmund warrant in February 2003 one can infer that a criminal trial would have taken place some considerable time thereafter. Regarding a likely sentence, the sole evidence before the trial judge was a response from Tank to a proposition from the judge that in South Africa under-declaration of income to evade tax to the extent postulated by De Kroon would be a massive fraud attracting a long prison sentence – the judge asked whether it would be the same in Germany, and Tank answered yes. Although Tank was a qualified tax and legal advisor he did not profess expertise in German criminal law and I do not think that much weight can be attached to his answer. The trial judge referred to South Africa's minimum sentencing legislation but again I do not believe, with respect, that our domestic legislation can assist in determining what sort of sentence Peters would have faced in Germany [a] for tax evasion on account of the AHP scheme and the 18 bogus sales representatives; [b] for wider tax evasion encompassing not only the AHP scheme and the 18 bogus sales representatives but also, say, the MHP scheme and the under-declaration of revenue. Mr Crowe in argument referred us to certain sentences apparently imposed by German courts on other fraudsters, including Jurgen Harksen (a man not unknown to the courts of this land), but this is evidential material which it would not be right to receive in argument.

[54] In my opinion, the trial judge erred in finding that criminal sanctions against Peters would in themselves have completely sterilised his earning capacity. The claim covers a notional earning period starting on 1 January 2002 and ending on 30 June 2023. It does not seem likely that Peters would have faced criminal charges

until the latter part of 2003 at the earliest. Subject to any other constraints, he could have continued to exploit his earning capacity for several years pending the outcome of the trial. Whether he could have continued to exploit the earning capacity after serving any imprisonment imposed on him would depend on the duration of the sentence and the feasibility of his resuming business after an interruption of (say, for example) five years. He would have suffered a severe blow to his reputation and would have had to assemble afresh (in his late 50s) a new team of sales representatives. It may have been difficult though not impossible to get back into the game.

[55] There is nevertheless no doubt that the considerations underlying the trial judge's reasoning cast a significant negative shadow across the claim for loss of earning capacity. And, importantly, these considerations do not stand alone – I shall consider in the next section of this judgment the question whether Peters would in fact have returned to Germany to conduct the business. At very least, a risk of a future partial interruption or even a future permanent sterilisation of the earning capacity due to criminal sanctions would need to be taken into account as a contingency deduction against any actuarially calculated sum or in the assessment of a fair lump sum (if the actuarial approach were jettisoned).

Would Peters have returned to Germany?

[56] The trial judge found that Peters had no professional or technical qualifications or experience other than in the German magazine subscription business. There was no realistic possibility of his starting a business in South Africa. His claim was thus dependent on proof that he would probably have returned to Germany to run his business. The trial judge said (correctly) that Holzmann's evidence on the point was 'vague and rather inconclusive'. To that I would add that she was by her own admission a dishonest person, and it suited her to refrain from conceding (if that were the truth) that their plans were to remain long-term in South Africa. The trial judge nevertheless found that Peters would probably have returned to Germany after a year or two (ie some time in 2001 or 2002) as it would not have been feasible for him to run the subscription business remotely. Peters was not only

an active and energetic person but would have been driven by greed, ie a realisation that he could not maintain his lavish lifestyle without continuing to earn money.

[57] I feel far less confidence on this point than did the trial judge. The trial judge's finding on this aspect seems to me to leave out of account a critical consideration, the very one on which he ultimately dismissed the claim, namely looming tax investigations with the concomitant risk of criminal proceedings. This would have been a powerful inducement for Peters to remain in South Africa or at least to refrain from returning to Germany. The fear which would have operated on Peters' mind would have extended to the full range of whatever tax evasion he had committed in the past because he was not to know precisely what evasion and other unlawful conduct the authorities would or would not uncover.

[58] The decision by Peters to come to South Africa for an indefinite period may itself have been prompted by a concern on his part that things were going to catch up with him sooner or later. It was not shown that he had ever done something like this in the past. Although he was in love with Holzmann, he had also in the past been in love with other women but he had not uprooted himself on those occasions. The assessments which the German tax authorities issued in October 2000 in respect of MLP must have been preceded by a period of audit and investigation of which Peters could not have been ignorant.

[59] The indefinite move to South Africa was also accompanied by other features of relevance. The first is Peters' sale of his house in Scheessel, apparently his only fixed property in Germany. He sold the house for DM 1 million. The estate agent who brought the property to market was none other than Holzmann, and her father was given a power of attorney to handle the sale proceeds. Heinzmann described the property as very large and very beautiful. He said Peters told him at some stage that he had paid more than DM 1 million for the property though Heinzmann professed ignorance as to why Peters sold it. According to a long-standing friend of Peters, Anton Heinrich (whom the plaintiff called as a witness), Peters had owned the property for about 20 years. It was under construction when Heinrich saw it at the time of purchase (this would have been around 1980). He said Peters spent far in excess of DM 1 million on the property, furnishing it to the very highest standards.

Mortgage bonds totalling DM 2 million were registered over the property (though according to Heinzmann nothing was outstanding on the bonds by the time the property was sold).

[60] At the trial Holzmann testified that the decision to sell the house in Scheessel and to travel to South Africa was prompted by the re-emergence of Peters' divorced wife Katrien and the possible threat she posed to Holzmann's relationship with Peters. Holzmann also said that she did not want to live in a house associated with Katrien. Peters, she claimed, wanted her to become more involved in the subscription business, just as Katrien had apparently been, but she did not like the business. This was somewhat different to her evidence at the arbitration on the merits, where she testified that they came to South Africa because they were both at a point in life where they wanted to start over new, they liked South Africa and wanted to try it for a year to see how it worked. She also said in that testimony that they wanted to keep the business in Germany but had in mind to try the same thing in South Africa. When asked at the trial how this could be in view of the fact that she disliked the business, she gave the extraordinary answer that the joint business she had in mind between Peters and herself was his royalty business 'and me obviously falsifying invoices and helping him'.

[61] Be that as it may, there was no explanation as to why Peters was prepared to sell the property for only DM 1 million in May 2000. Given the trait of dishonesty which the plaintiff's case ascribes to Peters, one possibility that has occurred to me (though it was not raised at the trial) is that the true price for the property was higher than DM 1 million and that Peters arranged to receive additional consideration in some other way. If DM 1 million was the true price, all indications are that for some reason Peters was willing to accept a very low price. This could only be because he wanted to achieve a quick sale. No reason for haste occurs to me apart from a desire on Peters' part to denude himself of assets in Germany for fear that they might become liable to seizure by the tax authorities.

[62] The second consideration is that Peters not only sold his property in Germany but in the same month (May 2000) bought a sectional title unit at Dolphin Beach in Cape Town for R1,15 million. There was no evidence that he had ever

bought foreign property before. He and Holzmann had, on their first visit to South Africa in March 2000, leased a Dolphin Beach apartment for six months. The purchase of the sectional title unit two months later was definitely of a more permanent nature.

[63] The trial judge thought that the primary force that would have driven Peters back to Germany was greed, ie the desire to maintain a lavish lifestyle. However, and quite apart from the counterbalance which a fear of prosecution would have provided, the plaintiff's argument (which the trial judge accepted on this point) presupposed that at the age of 50 Peters did not already have sufficient assets to fund a long-term life in South Africa. I do not see why it should be assumed that he did not. He had started work as a youngster in about 1967. He was by all accounts very successful and was trading for his own account by the 1980s. If tax evasion was in his blood, it is probable that throughout his career he was retaining a greater portion of his revenue than was legitimate. In addition to his ordinary income, we know that he disposed on several occasions of his entire stock of retained subscriptions – in 1989 for DM 1,13 million and again in 1993 for DM 1,72 million. He sold his Scheessel home in Germany in May 2000 for DM 1 million (assuming the true price was declared). When he and Holzmann came to South Africa on 9 May 2000 they were carrying DM 500 000 strapped to their bodies (this could not have been from the sale of the Scheessel property since in terms of the purchase agreement the price was only payable on 8 June 2000). At that time Peters also had a stock of 27 744 retained subscriptions which (though subject to attrition) would have continued to yield him royalty income (the documentary exhibits reflected that the monthly royalties on the stock over the period August to December 2000 ranged from DM 110 000 to DM 150 000[14]) or which he could have sold to Bitter for a considerable price (as indeed the reduced number of 20 561 subscriptions were sold to Bitter in December 2001 for DM 2,7 million). How much money Peters had stashed away over the years is not known – Holzmann referred in her evidence to bank accounts in Denmark, England and Dubai. When asked by Mr Crowe in chief if Peters ever told her why he was putting his money in all these foreign banks her

[14] 34/3087-3091 (commission statements) and 36/3352-3354 (bank statements). Because of Peters' injuries and his resultant inability to attend meetings for the purpose of receiving cash from Heinz Bitter, Bitter began to pay all amounts due to him, including royalties, by deposit into Peters' bank account. This is why, in respect of these particular royalty payments, one can reconcile the commission statements to the bank statements.

answer was: ‘Because he had lots of cash and because he didn’t want to give the money to the tax authorities.’

[64] I think the trial judge was right to find that the business could not have been conducted remotely for any length of time. Giesecke’s evidence was that after Peters met Holzmann in April 1999 and attended less assiduously to the business, things declined. He himself seems to have been running out of steam. He said at one point in his evidence:[15]

‘As a rule you have someone like me, a co-worker, and the owner of the company, Mr Peters, would also be there and when I started in 1996/1997 that was the case. We worked together and we wanted to expand, until approximately 1999. And then he did a little personal change or took time off and then I thought okay let’s see how long this can carry on but the times that he was not working increased and I did not want to work that much. That was not all that – it didn’t fulfil me.’

Things could not have been helped by the departure of Wögerbauer in early 2000.

[65] It is important to emphasise that the value of Peters’ business was inextricably linked to his persona. He did not have unique intellectual property nor was there evidence that Giesecke or the sales representatives were bound to him under long-term arrangements. On the contrary, Giesecke said that sales representatives tended to come and go so that one constantly needed to be recruiting new sales representatives. The latter were described in the evidence as being drawn from the ranks of people who were uneducated, rough and untrustworthy. Giesecke described them as ‘quite terrible’, explaining that ‘[t]hey work incorrectly, they lie, they are dishonest, they falsify subscriptions’.[16] These were the very ranks from which Peters and Giesecke themselves emerged. Peters was a successful sales representative and later had the force of personality to keep the sales representatives who worked for him in harness. This would involve driving around with them to various towns and living with them in a hotel. If Peters could not be personally present for most of the time so as to stamp himself on the operation, it would inevitably have languished and failed. There was no reason for Giesecke and the sales representatives to carry on working indefinitely for the benefit of Peters as

[15] 11/970-971.
[16] 8/661-662.

an absentee owner. Giesecke could as well have broken away and resumed conducting business on his own account (as he had done prior to 1996). We know that after the accident Giesecke did take over two vehicles and some sales representatives but his heart was not in it and the business fizzled out after barely a year of his taking it over.

[66] I thus consider that it is at least as likely as not that Peters would have remained in South Africa indefinitely so as to avoid criminal proceedings against him in Germany and that his business would in the absence of his direct control have crumbled (as it did) during 2001. There may have come a time when he thought it safe to return to Germany but I am not satisfied that by that stage (whenever it was) Peters would or could have started business afresh.

[67] In order to succeed it was not sufficient for the plaintiff to show that Peters' abilities which had enabled him previously to be successful in the magazine subscription business were impaired to the point that he could not continue to work. It also had to be shown on a balance of probability that the impairment of his earning capacity gave rise to pecuniary loss (*Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) paras 11 and 16). As observed in *Rudman* para 11, the fact that a physical disability which impacts upon earning capacity also reduces the patrimony of the injured person may follow readily in some cases but it did not follow in the *Rudman* case, and for the reasons I have given I also do not think it follows in this case.

Conclusion

[68] It is thus unnecessary to consider at any length the model on which the plaintiff sought, mainly through the evidence of De Kroon and Tank, to predict the profit which Peters would have generated from the continuation of the subscription business in Germany over the period 2002 to 2023. I wish merely to observe that had it been necessary to reach that stage I doubt whether I would have accepted De Kroon's model or indeed any of the alternative scenarios for which this court requested calculations. I accept without reservation the trial judge's description of De Kroon as an impressive witness but ultimately his model could only be as reliable

as its main assumptions. De Kroon could not himself attest to the reliability of the assumptions. He was dependent on sketchy and incomplete records which precluded him from establishing with any confidence from documentation the number of sellers whom Peters employed in the years immediately preceding the accident, and the true revenue generated and expenditure incurred by Peters during those years. The factual input of Giesecke, Holzmann and Heinrich was either unreliable or at a level of generality which was not of great assistance. The model was very sensitive to changes in key assumptions, as the calculations requested by the court reflect.

[69] Given all those uncertainties, I would have been inclined, if we had reached the question of damages, to award a fair lump sum (erring on the side of conservatism) rather than adopting a set of assumptions for which there was no firm grounding and then subjecting them to potentially savage contingency deductions. Both parties were content for us to follow that course if we thought it just. However, I think the proper conclusion is that the plaintiff failed to prove on a balance of probability that there was a patrimonial loss associated with the impairment of the abilities which previously enabled Peters to generate income.

[70] Subject to one qualification, I would thus dismiss the appeal with costs. The qualification relates to the form of order granted by the trial court. The learned trial judge granted judgment in favour of the defendant and dismissed the plaintiff's claim, with the plaintiff to pay the defendant's costs. While the plaintiff's claim for damages in respect of diminution of earning capacity was, in my view, correctly dismissed (though my reasons differ somewhat from those of the trial judge), the plaintiff's claim did not fail in its entirety. As noted earlier, by the time the trial on loss of earnings began the RAF had agreed to pay general damages of R500 000 and past medical expenses of about R1,2 million. We do not have information as to whether all questions of costs relating to these matters have been resolved. If not, the plaintiff might be entitled to certain costs, even though the overwhelming proportion of the costs would relate to the trial on earning capacity. I thus consider that our confirmation of the dismissal of the action with costs should be provisional to the extent of permitting the parties to make written submissions on any residual aspects of costs other than those relating to the claim for loss of earnings.

VELDHUIZEN J:

[71] I concur. The following order is made:

[a] Subject to [b] to [d] below, the appeal is dismissed with costs.

[b] The resultant confirmation of the trial court's order dismissing the action with costs is provisional to the limited extent that the appellant (the plaintiff in the court below) shall be entitled, within two weeks of delivery of this judgment, to file written submissions as to whether the precise form of order (including the order as to costs) made by the trial court should be varied to account for the fact that after the issue of summons the respondent (the defendant in the court below) paid or tendered to pay certain amounts in respect of general damages and medical expenses.

[c] If written submissions as aforesaid are filed on behalf the appellant, the respondent shall be entitled, within one week of receipt of the appellant's submissions, to file replying submissions, where after this court shall determine whether any variation to the trial court's order should be made.

[d] If no submissions as aforesaid are filed on behalf of the appellant, the order in [a] above shall become final.

SCHIPPERS J:

[72] I concur.

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VELDHUIZEN J

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ROGERS J

_____

SCHIPPERS J

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