Reportable

Case No 370/2001

In the Supreme Court of Appeal of South Africa

In the matter between

ARTHUR OLIVER RUDMAN — Appellant

and

ROAD ACCIDENT FUND — Respondent

Coram: Howie, Cameron, Nugent JJA, Jones et Lewis AJJA

Heard: 9 September 2002
Delivered: 26 September 2002
Summary: Delict – damages – loss of earnings and loss of earning capacity – proof of – injured party totally precluded from being a professional hunter and partially disabled from farming – employed by "family" company – whether loss to him.

JUDGMENT

JONES AJA:

[1] The appellant, whom I shall call Rudman, is a farmer of the farm Blaauwkrantz in the Kirkwood district of the Eastern Cape Province. He is a mohair farmer. He is also a game farmer, a hunting outfitter and a registered professional hunter who brings large numbers of foreign hunters to the Eastern Cape. He runs a highly successful operation, one of the most successful of its kind in the Eastern Cape and indeed in the whole country.

His activities were abruptly interrupted on 5 May 1998 when he was involved in a motor collision. He sustained serious bodily injuries, notably bad fracture-dislocations of both lower legs and ankles, fractures of the right arm, the right hand and the ribs, and soft tissue injuries to the head, neck, back, hip and buttocks. After a spell in hospital he returned to the farm. But never again to hunt; nor to resume with the same vigour the role of hands-on manager of a large angora goat farm. He was permanently disabled. He was then 53 years old.

[2] Rudman was an active man until the collision. He was a fine sportsman – in his day, a provincial cricketer. He had always maintained a high level of personal fitness. This was part of his way of life and a necessary ingredient of his activities as a professional hunter and a farmer. His passion was his work. He was brought up on a farm as a child. After he left school his father put him through a farming apprenticeship before he began farming on his own account. In 1970 he purchased a farm in

partnership with his brother and then, in 1972, he purchased a farm on his own account with money borrowed from his mother-in-law. This was the beginning of what would develop into one of the most extensive farming enterprises in the Eastern Cape. By 1977 he had acquired other farms. That year his accountant advised, for reasons of estate planning and income tax strategy, that he should restructure his affairs.

Acting on this advice Rudman formed the Arthur Rudman Family Trust with himself, his wife, his accountant and his attorney as trustees and his two sons as beneficiaries. He is neither a capital beneficiary nor an income beneficiary. At about that time he also acquired control of a company which later became registered as Blaauwkrantz Farming Enterprises (Pty) Ltd. The trust holds 3900 shares in the company and Rudman the remaining 100 shares. He, his wife and his children are the directors. The trust has become the property-owning entity in the Rudman enterprise. The company is the income-producing entity. Rudman is the driving force. Although the farming and the hunting business is done through the company the fact of the matter is that Rudman continued to operate in the same way as he has always done – as if he were a farmer farming for his personal account in his personal capacity. He used the company's banking account, but treated it as a personal account. His wife wrote up the farming books. His auditors saw to the financial statements. He did not bother himself with these things, which he regarded as technical matters. He got on with running his farms.

[3] Today the company owns four farms. It leases sixteen other farms, fourteen from the trust and two which are owned by Rudman personally. These farms are extensive. They form a single farming unit measuring more than 20 000 hectares. Their resale value is said to be about twenty million rand. They are stocked with 11 000 angora goats and 3 000 sheep and boer goats. They are also stocked with 24 species of antelope, about 5 000 head in all, and there are other varieties of game as well. They are situated in rugged terrain – much of it steep mountainous slopes with deep gorges and valleys and thick bush, inaccessible by vehicle.

[4] The motor collision of 5 May 1998 led in due course to a claim by Rudman for compensation in terms of the provisions of the Road Accident Fund Act, Act No 56 of 1996 as amended. The amount of the damages he claimed was R2 340 015,95 which is made up as follows:

past provincial hospital expenses	208,00
past private hospital expenses	6 926,20
past medical expenses	15799,75
estimated future medical expenses	81 200,00
past loss of earnings	745 882,00
loss of earning capacity	1 380 000,00
general damages	100 000.00
	R 2 340 015,95

[5] Summons was issued on 20 October 2000, and the matter proceeded to trial before Liebenberg J in the South Eastern Cape Local Division on 28 May 2001. At the trial the Fund conceded liability on the merits. It also conceded liability to pay for past medical and hospital expenses and submitted to an order that it furnish an undertaking to pay all future medical and hospital expenses as and when they are incurred. The parties went to trial on the claims for past loss of earnings, loss of earning capacity and general damages.

The trial Court delivered judgment on 18 July 2001. It awarded general damages in the sum of R100 000,00, which included a comparatively large allowance for loss of the enjoyment of hunting. But it dismissed the claims for past loss of earnings and loss of earning capacity. Rudman appeals to this Court against the dismissal of those claims, with leave from the Court *a quo*.

[6] The evidence establishes beyond question that Rudman's injuries have given rise to severe permanent disability. The claims for past loss of earnings and loss of earning capacity arise from the physical handicaps from which he suffers. He has severe restriction of movement caused by the injuries to his ankles, and muscular weakness of the right hand and arm. The prognosis is poor. The parties accept that he will never again function as

a professional hunter, and that he is physically unable to do the maintenance work which he formerly did on the farms.

The pleadings allege that the past loss of income suffered by the hunting side of the operation amounts to R553 882-00 for the years 1998, 1999 and 2000. This is the sum of

(a) the difference between the anticipated turnover for those years and what was actually produced after numerous hunters either cancelled their commitments or did not confirm their provisional bookings because of Rudman's unavailability (R523 882-00); and

(b) additional travelling and marketing expenses which were incurred to regain clients who had cancelled or threatened to cancel their bookings (R30 000-00).

The past loss suffered by the farming side of the enterprise is the cost of employing a maintenance manager to do work which Rudman would have done himself. The manager was employed at a monthly salary of R8 000-00 for the period June 1998 to June 2000. The amount is R192 000-00. This gives a total claim of R745 882-00 for past loss of earnings.

[7] With regard to loss of earning capacity, the pleadings allege that

Rudman is permanently and completely disabled from earning a living as a professional hunter, and permanently and partially disabled in his efficiency as a farmer in that he can no longer do the maintenance work which he formerly did. But for his disabilities he would have continued to do these things until the age of 65 years (that is, for a further 10 years). He would have hunted for 150 days a year at a rate of R600-00 per day. An amount of R900 000-00 is claimed under this head. For the other half of the year he would have continued to perform, *inter alia*, maintenance duties on the farm which will now be performed by a maintenance manager at a salary of R8 000-00 per month. R480 000-00 is claimed under this heading, being half an annual salary of R96 000-00 for the next 10 years. The total claimed for loss of earning capacity is R1 380 000-00.

[8] The trial judge dismissed the claims for past loss of earnings and loss of earning capacity for the following reasons:

> 'On the evidence before me I must conclude that the losses suffered as a result of the temporary decline in the income generated by the professional hunting and professional outfitter operations due to the incapacity of the plaintiff are losses suffered by the company and do not represent a diminution in the patrimony of the plaintiff. I may pause to remark that the fact that the plaintiff personally is registered as the professional outfitter does not change the situation. According to the evidence before me it must be held that he was employed by the company in order to conduct that section of the business. The same holds true of the costs of

> employing a professional hunter to stand in for the plaintiff as well as the employment of the repair and maintenance manager … . These persons are also employed by the company to take over functions performed by the plaintiff and they are paid by the company. Any loss which may have occurred as a result thereof is a loss to the company and not to the plaintiff's private estate. It follows that in real terms the plaintiff's private estate was not diminished due to his incapacity.

…

In my judgment the plaintiff has failed to prove that his patrimony was diminished due to any loss of earning capacity past or future resulting from his injuries and consequently he has failed to prove any entitlement to be compensated in respect of these heads of damages.'

In other words, the learned judge concludes that although Rudman has proved physical disabilities which, potentially at any rate, could give rise to a reduction in his earning capacity, he has not proved that this has resulted in patrimonial loss. He has not proved that the reduction in earning capacity translates into loss in the sense that his patrimony after the delict was less than it would have been if the delict had not been committed.

[9] Mr *Eksteen's* argument on behalf of Rudman is that on a proper reading of the authorities to which he refers the learned trial judge's reasoning fails to distinguish between a claim for loss of earnings (past or future) and a claim for loss of earning capacity.[1] He says that Rudman's capacity to earn a

[1] *Santam Versekeringsmaatskappy Bpk* v *Byleveldt* 1973 (2) SA 146 (A); *Dippenaar* v *Shield Insurance Co Ltd* 1979 (2) SA 904 (A); *Commercial Union Assurance Co* v *Stanley*

living as a professional hunter and his capacity to perform the maintenance necessary for a large farming concern are assets in his estate which have a measurable monetary value, and that the value of his estate has necessarily been diminished when that capacity is eliminated or impaired. He argues further that Rudman does not have to rely on his contract of employment with Blaauwkrantz Farming Enterprises (Pty) Ltd to place a monetary value on his loss,[2] especially where, as here, his earnings from the company bear no relationship to the value of his services. Indeed, at an early stage in the pleadings Rudman expressly disavowed any reliance on his drawings from the company, asserting that they have no bearing on his earning capacity. In so far as past loss is concerned, he is entitled to use the loss to the company as a measure of his personal loss, and his future loss may in these circumstances be quantified by the costs of employing substitute labour to do the work which Rudman would have done if he had not been injured.[3]

[10] Mr *Eksteen*'s submission is correct that on the facts of this case the nature of the loss (if Rudman has indeed suffered loss under these heads) is his diminished earning capacity. In *Santam Versekeringsmaatskappy Bpk* v *Byleveldt*[4] Rumpff JA states the principle in the following terms:[5]

> 'In 'n saak soos die onderhawige word daar namens die

1973 (1) SA 699 (A) 705 A-C.

2 *Dippenaar's case supra* (footnote 1) 917F*; President Insurance Co Ltd v Mathews 1992 (1) SA 1 (A) 5 D.*

3 *Muller* v *Mutual & Federal Insurance Co Ltd and another* 1994 (2) SA 425 (C) 451 J – 452 B; *Mathews'*s case *supra* (footnote 2) at 7 C; *Blyth* v *Van den Heever* 1980 (1) SA 191 (A); and *Estate De Villiers* v *Bell* (1975 RAD) reported in Corbett and Buchanan, *The Quantum of Damages in Bodily and Fatal Injury Cases* vol 2 at 454, especially at 457 and 458.

4 *Supra (*footnote 1 paragraph 9).

5 at 150 B – D.

> benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoënsposisie van die benadeelde vóór die onregmatige daad en daarna. Kyk, bv., *Union Government* v *Warneke*, 1911 AD 657 op b1. 665, en die bekende omskrywing deur Mommsen, *Beiträge zum Obligationenrecht*, band 2, b1. 3. Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie.'

The same learned judge of appeal again dealt with the principle in *Dippenaar* v *Shield Insurance Co Ltd.*[6] He says:[7]

> '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. This was the approach in *Union Government*

6 *Supra (*footnote 1 paragraph 9).

7 at 917 B – D.

(Minister of Railways and Harbours) v *Warneke* 1911 AD 657 at 665 where the following appears:

> "In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between the *universitas* as it was after the act of damage, and as it would have been if the act had not been committed (*Greuber* at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland."

See also *Union and National Insurance Co Ltd* v Coetzee 1970 (1) SA 295 (A) where damages were claimed and allowed by reason of impairment of earning capacity.'

[11] In my opinion the learned judge in the Court *a quo* has not misdirected himself in his understanding of these authorities or in his application of the law to the facts. His judgment correctly emphasizes that where a person's earning capacity has been compromised, "that incapacity constitutes a loss, <u>if such loss diminishes the estate</u>" (Rumpff CJ in the above quotation from *Dippenaar's* case) and "he is entitled to be compensated <u>to the extent that his patrimony has been diminished</u>" (Smalberger JA in *President Insurance Co*

Ltd v *Mathews*).[8] (The underlining is from the trial judge's judgment.) In his view, Rudman's disability giving rise to a diminished earning incapacity was proved, but the evidence did not go further and prove that his incapacity constituted a loss which diminished his estate.

I believe that this conclusion is correct. The fallacy in Mr *Eksteen*'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. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss. Thus, in *Union and National Insurance Co Ltd* v *Coetzee,*[9] which is referred to in the passage quoted above from *Dippenaar*'s case[10] and which deals with a lump sum award for loss of earning capacity, Jansen JA makes the point[11] that " 'n [b]epaalde 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". (My underlining.)[12] This is what is emphasised by the

8 *supra* (footnote 2 paragraph 9) at 5 C – D.

9 1970 (1) SA 29(5 (A).

10 See footnote 7, paragraph 10.

11 At 300 A

12 See also *Krugell* v *Shield Versekeringsmaatskappy Bpk* 1982 (4) SA 95 (T) per Van Dijkhorst J at 99 E: "Die blote feit dat 'n besondere betrekking verloor is of 'n besondere rigting vir 'n eiser geslote is, beteken nog nie noodwendig dat sy vermoë om te verdien daardeur geheel of gedeeltelik vernietig is nie. Dit hang van die omstandighede af."

learned trial judge in the passages quoted from his judgment which he has underlined.[13]

[12] The case made by Rudman and his accountant Van der Ryst in their evidence is that the company is for all practical purposes Rudman's alter ego. According to Rudman, the auditors prepare the company's annual financial statements from the company's cash-book and cheque-books. They advise on the amount of directors' fees, rentals, interest and the like that should be reflected in the financial statements in any given year. They consolidate the loan accounts. They work out the taxes. Rudman has little or no understanding of most of this. He is a down-to-earth farmer. The fact of the matter is that over the years he has virtually single-handedly produced the company's income. He deposits the income in the company's banking account. He pays all the expenses and other farming costs from the company's banking account. He also makes whatever drawings he needs from the company's banking account for his living and other requirements and those of his dependants. There is no difference between the way he operates and the way a farmer operates who farms solely for his own account, except that the banking account and the farming operation is not in his own name.

The argument on Rudman's behalf in the Court below, particularly with regard to the claim for past loss of earnings, was that he is the person who felt the pinch because there was less money coming in to the company. He is the person who in fact suffered the loss incurred by the company. He is the

[13] They are reproduced earlier in this paragraph.

person who should be compensated. The counter-argument, which was accepted by the learned trial judge, is that this ignores entirely that the company is a separate legal entity with its own personality and its own estate, which is distinct and separate from Rudman's estate.

Mr *Eksteen* has not pressed this argument before us. He has submitted instead that in the circumstances of this case it is appropriate to use the loss to the company as a method of placing a monetary value on Rudman's personal loss.

[13] For present purposes I am prepared to accept the proposition (without pronouncing finally upon it) that in appropriate circumstances a farmer in Rudman's position, who operates through a "family" company, may be able to prove and quantify his personal loss in a delictual claim with reference to the loss of income suffered by the company, provided that he does not fall into the trap of regarding the loss to the company as automatically and necessarily equivalent to his personal loss. In the present case, there is evidence to show that the company has lost income because, by reason of Rudman's injuries, it did not achieve the increases in hunting income that were confidently and reasonably expected. There is also 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. There is no evidence, for example, that the value of his shares in the company is less, or even that he received less from the company by way of dividends or fees or drawings because of the

company's reduced income, or that he will do so in the future. Rudman's financial statements, the company's financial statements, and the trust's financial statements for the years 1997, 1998, 1999 and 2000 do not show any loss to Rudman at all, and neither does Rudman's evidence nor the evidence of his accountant.

[14] There is another fallacy in Mr *Eksteen*'s argument. It does not consider Rudman's earning capacity as a whole. His earning capacity is a complex of abilities which together make up an asset in his estate[14] and which becomes part of the *universitas* of his rights and duties which has allegedly been compromised and for which compensation is sought.[15] Mr *Eksteen*'s argument isolates individual elements of Rudman's ability to earn a living which have been compromised and places a monetary value on them, without considering whether they bring about a diminution in his earning capacity as a whole. Rudman is not employed as a maintenance man or as a professional hunter on a game farm, and his earning capacity is not to be confined or compartmentalized as if he were. Although he might have performed these and other functions which he can no longer perform, 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,

[14] See *Dippenaar*'s case *supra* (footnote 7 paragraph 10): "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."

[15] See *Dippenaar's* case *supra* (footnote 7 paragraph 9) quoting from *Union Government* v *Warneke*: "… property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the [Aquilian] action was to recover the difference between the *universitas* as it was after the act of damage, and as it would have been if the act had not been committed."

serious and real though they are, do not impair his capacity to do what matters most – to see to it that the Rudman empire which he has developed continues to flourish in all its spheres for the benefit of himself, the trust, the company, and, through the trust and the company, the rest of his family. Whether or not he no longer does things which he formerly did, those things will still be done by his sons and his employees under his direction and supervision. He is in a different position from the disabled banana farmer in *Coetzee'*s case,[16] in respect of whom Jansen JA makes the following observation:

> 'Dat die eiser se beweeglikheid ingekort is en verder ingekort sal word, is duidelik. '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. Die verlies van die eerste lit van die linkerhand se pinkie kan vir 'n kassier, wat verdienvermoë betref, onbeduidend wees maar vir 'n pianis noodlottig; so ook 'n stywe enkel vir die kassier teenoor die geval van 'n balletdanser. Dat die eiser se soort ongeskiktheid, sy verlies aan beweeglikheid, egter 'n boer, en bepaaldelik 'n piesangboer, se werkvermoë nadelig sou aantas, en aldus sy verdienvermoë, is deur die Hof a quo aanvaar en is in die lig van die getuienis kwalik te ontken.'

Rudman's disabilities may well have constituted a loss for which he would be

[16] *Supra* at 301 C – D (footnote 7 paragraph 10).

entitled to compensation if his injuries had been incurred when, like the plaintiff in *Coetzee*, he had been on the threshold of his career as a farmer and about to begin the development of his empire. But he is not in that position, and his disabilities do not give rise to loss any more than a stiff ankle or the loss of part of a little finger diminishes the estate of a bank teller.

[15] Mr *Eksteen's* alternative argument is that Rudman should in any event be awarded a globular amount to compensate him for his general handicap on the open labour market. This is to cater for the possibility of his no longer being able to offer his services as a professional hunter should it ever become necessary for him to seek a livelihood in that capacity. Compensation is sometimes awarded for this sort of contingency.[17] An example is *Union and National Insurance Co Ltd* v *Coetzee.*[18]

[16] The question is whether or not Rudman has proved that he is entitled to an award of this nature. Like the plaintiff in *Coetzee's* case,[19] his mobility is restricted and he suffers from other physical handicaps as well, but this does not necessarily translate into a reduction of earning capacity causing loss. Has he proved such a reduction? What is the probability of Rudman ever leaving his farm in order to seek a livelihood elsewhere? The answer involves a consideration of a variety of possibilities. In considering them it

17 *Burger* v *Union National South British Insurance Co* 1975 (4) SA 72 (W).
18 *supra* (footnote 7 paragraph 9 and footnote 16 paragraph 14).
19 *supra* (footnote 7 paragraph 9 and footnote 14 paragraph 15).

must be remembered that in the final analysis an award cannot be based upon speculation. It must have an evidential foundation.[20] There is in this case no evidence at all that Rudman may for some reason be forced to have recourse to the open labour market to earn a living. The evidence indicates the contrary. The Rudman enterprise continues to flourish under his stewardship. The chances are that this will continue. The evidence of experts is that the future prospects for the professional hunting industry in the Eastern Cape are good, better than anywhere else in the country. There is every reason to suppose that the Rudman game farms will continue to generate profits. There is no reason to suppose that the future prospects for the Rudman mohair enterprise, which is described as one of the largest, if not the largest in the world, are anything but sound. The financial statements of the trust and the company show continued growth and a healthy relationship between assets and debts, one which makes it unlikely that this farming empire will disintegrate for financial reasons. Rudman's personal liabilities are small in relation to his assets. The Rudman family – father, mother, two sons and a daughter - is closely knit and supportive. All contribute to the family farming operation. All appear to accept the family policy of working for the good of the family as a whole, rather than concentrating on an increase in personal wealth. There is no hint of the possibility of Rudman branching off on his own for personal family reasons. On the facts, the risk of Rudman ever being forced to seek a living on the open labour market, or the possibility of his ever choosing to do so, is so remote that in my view it must be disregarded.

[20] See *Monumental Art Co Ltd* v *Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) 118 E and, for example, the approach of Jansen JA in C*oetzee's* case *supra* (footnote 4 paragraph 10) at 301 D – E.

[17] My conclusion is that Rudman has failed to discharge the onus of proving that he has suffered a diminution in the value of his patrimony. It is therefore unnecessary to consider the evidence and arguments dealing with the quantification of loss.

[18] In the result the appeal is dismissed with costs.

RJW JONES
Acting Judge of Appeal

HOWIE JA

CAMERON JA

NUGENT JA

LEWIS AJA concur