

THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG  
REPUBLIC OF SOUTH AFRICA

CASE NO: 2483/09 -

In the matter between:

DEYSEL, RIANA

And

ROAD ACCIDENT FUND

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: YES/NO. ?	?
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ?	?
(3) REVISED. <i>Yes</i>	
<i>24.06.2011</i>	<i>[Signature]</i>
DATE	SIGNATURE

JUDGMENT

BIZOS J.A

1. The plaintiff, Ms Deysel, claims damages from the defendant, the Road Accident Fund, for personal injuries sustained as a result of a motor vehicle collision that occurred on 25 November 2004 ('the collision'). The plaintiff suffered a whiplash injury to the neck and back.
2. The defendant conceded the merits of the trial and accepted full liability for the damages sustained in the collision. Both the plaintiff and defendant agreed to the submission of a number of expert reports as the only evidence to be adduced for purposes of quantification of damages.

3. The defendant has furthermore undertaken, in terms of section 17(4) of the Road Accident Fund Act 56 of 1996, to furnish the plaintiff with 100% of the costs of any future accommodation of the plaintiff in a hospital or nursing home as well as the treatment of or rendering of a service to her or supplying of goods due to injuries sustained by her in the collision and the sequelae thereof, after such costs have been incurred and upon proof thereof.
4. The only task of the court is now to quantify the general damages and damages for loss of earning capacity allegedly suffered by the plaintiff.
5. I will condense the facts surrounding the employment of the plaintiff to her current and future employment situations as I believe these are the only facts relevant to the decision of quantum to be made by the court.
6. At the time of the collision, the plaintiff was employed as a bookkeeper by Edison Jehamo Power and had been so employed since March 2003.
7. It is important to note that on 1 May 2005, a few months after the collision, the plaintiff was promoted to her current position of financial manager, at a salary of R210 000 per annum. Her salary has since increased to R575 192.52 per annum, including inflationary increases only until a retirement age of 65 with a 7.6 % contribution by her employer towards the plaintiff's retirement benefit.
8. In 2007, the plaintiff received her B Com from UNISA.
9. The plaintiff avers, with reference to a number of expert opinions, that she currently suffers from a 5% impairment of the whole person function that will increase to 7.5% at the age of 60. The plaintiff avers therefore that she will not be as competitive in the open labour market as pre-collision and that she will be limited in her choice of career. This loss of productivity, according to the plaintiff, should be compensated by an increase in post morbid contingencies.

10. In light of the facts above the plaintiff has claimed R200 000 in general damages, R1150,00 in respect of past medical expenses and R1 774 173,00 in respect of loss of earning capacity.
11. The parties agreed to submit evidence in the form of expert opinions including medical reports, actuarial reports and the like. The information therein is not disputed by the defendant and the plaintiff has submitted her claims with reference to this information.
12. I will now decide on the amount of damages to be awarded to the plaintiff in light of the evidence submitted and relevant law.
13. In coming to this quantification however, I find it imperative to determine whether the loss of earning capacity claimed by the plaintiff is in fact quantifiable at all as separate patrimonial damage or whether it should somehow fall under general damages. This will require me to determine the true nature of such losses.

**The difference between loss of earning capacity and loss of income**

14. Whilst ultimately claiming for loss of earning capacity, the plaintiff quantifies this amount by first submitting a calculation of loss of income (amounting to R1 774 173,00). Practically I see the benefit of this, but there is an underlying confusion between these two concepts that plagues the plaintiff's claim. Although inextricably connected, loss of earning capacity and loss of income are two different concepts. I will now explain this precarious difference and put forward what I believe to be the correct approach.
15. Loss of income arises primarily from a loss of earning capacity. In other words, if the plaintiff loses a certain degree of earning capacity, this will show in that they will lose actual income in future. This is also true in that when a person

loses income due to a damage-causing event, such loss is due to a lowered earning capacity arising from the same cause of action.

16. However, the contentious issue *in casu* is whether one can determine in terms of which form of damage the compensation is being claimed. I do not believe that a person can claim patrimonial damages for loss of earning capacity without proving, through use of the sum formula, that this loss of earning capacity would also lead to an actual loss of income.

17. This requirement of proof of patrimonial loss due to loss of earning capacity is set out clearly in the case of *Rudman v Road Accident Fund* [2002] 4 All SA 422 (SCA) at paragraph D where the appeal court referred to the judgment of the court *a quo* as follows: "...where a person's earning capacity was compromised "that incapacity constitute[d] a loss, if such loss diminish[e]d his estate" and that he was "entitled to be compensated to the extent that his patrimony [was] diminished".

18. In my view this does not mean that such plaintiff would be claiming for loss of income and not loss of earning capacity *per se*; it is merely this loss of income that provides evidence of a loss of earning capacity, and *vis-a-versa*. Earning capacity is part of a person's patrimony, but this capacity can only be proven to have been lowered, and the damages for this quantified, by proving an actual loss of income. However, when both of these losses have been shown to exist, then the claim for one is also the claim the other and they appear to be interchangeable.

19. Justification for the view in paragraph 18 above is found in the case of *Bane and Others v D'Ambrosi* 2010 (2) SA 539 (SCA) where the Supreme Court of Appeal held at paragraph 15 that "[t]he essence of the computation of a claim for loss of earnings is to compensate the claimant for his loss of earning capacity."

20. To further advance the argument in paragraph 18 above, I will note that the Supreme Court of Appeal in *Bane* awarded a damages claim for 'loss of earnings'. The wording of the court was clear and, although loss of earning *capacity* was specifically addressed as the loss to be compensated, the court chose to speak of loss of earnings when considering the damages claim instead. Due to this wording, it appears to me that the court, whilst recognising loss of earnings and loss of earning capacity as two different concepts, accepted that they both held a very similar causal connection to the damage-causing event and a claim for damages in this regard serves to compensate the plaintiff for both his loss of capacity and the results of such loss (i.e. a loss of earnings). Therefore, the court recognised the difference between the concepts but also accepted that the award for one is the same as the award for the other, provided that both losses are present.

21. The Supreme Court of Appeal's reasoning in *Bane* as well as in *Rudman*, when applied to my reasoning herein, shows that a causal link has to be established between the damage suffered (*in casu* the loss of earning capacity) and the diminution of the claimant's estate before such damage can said to be compensable. This is true even though earning capacity on its own is seen as a part of one's patrimony. In the same way that a person's home forms part of their patrimony, and damage to this part of their patrimony has to be proved by showing an actual monetary loss caused by such damage – an actual monetary loss must be suffered (i.e. loss of income) before one's earning capacity can be said to have been damaged for purposes of a patrimonial claim under delict. This is, in essence, the difference between patrimonial and non-patrimonial loss.

22. Furthermore, the Supreme Court of Appeal in *Saayman v Rogd Accident Fund* 2010 (2) SA 539 (SCA) also granted an order of this kind using the words 'loss of earnings'. To further point out that the court drew no real distinction between the ultimate effect of an order for loss of income and an order for loss of earning capacity, the learned judge made the following statement [emphasis added]:

Suffice to state that all other claims, save for the one for future loss of income or earning capacity, have been settled by agreement. The appellant claimed an amount of R54 310 264 for his future loss of income or earning capacity'. The court did not discuss these references to both 'future loss of income *or* earning capacity' as being problematic and eventually gave an order of compensation for loss of income not to the exception of the latter. This leaves me to conclude that I can proceed on the basis that I have chosen.

23. In *The Road Accident Fund v Delport* 2005 (1) All SA 468 (SCA), the Supreme Court of Appeal saw fit to confirm an order of the trial court awarding damages for loss of income *earning capacity*. No explanation was given as to why the wording of the order referred to income *earning capacity* and not loss of income and I believe no such explanation was required. This confirms my view that these two claims (and therefore the orders that may be given to satisfy them) are interchangeable, interrelated and dependent on one another to exist for purposes of a patrimonial damages claim.

24. This then raises the question of what is to be done if an actual patrimonial loss cannot be proven. I believe that there is a solution to this situation if the facts of the case show that the plaintiff is nevertheless required to put in more effort and suffer hardship in his or her employment due to the accident (even though this will not affect the plaintiff's actual salary).

25. In the decisions of the Supreme Court of Appeal cited above, I must point out that damages for loss of earnings and/or loss of income were granted in cases where the plaintiff had in fact suffered a true patrimonial loss in that their employment situation had manifestly changed (which is not apparent or alleged by either party *in casu*).

26. However, in the unreported decision of *De Kock v The Road Accident Fund* 2009 9851/07, the High Court was faced with a set of facts similar to this case.

The plaintiff, who was injured in a motor vehicle accident, suffered impairment but did not foresee early retirement or a change in his employment post morbid (as with the plaintiff *in casu*). Instead, the plaintiff foresaw an increased amount of effort that would be required to perform his duties. The joint minute of Drs Fleming and Marais (the latter of whom has provided a very helpful medico legal report *in casu*) confirmed this. Nevertheless, the court awarded patrimonial damages for loss of earning capacity. I am respectfully of the opinion that the court erred in making this award as no true patrimonial loss (as seen in the cited Supreme Court of Appeal cases) had been suffered. The plaintiff should instead have been awarded an additional amount of general damages for the pain and suffering of his added effort. This reasoning will find more detailed application later when I deal with the plaintiff's claim directly.

27. I am therefore of the opinion that a claim for loss of income is effectively a quantified claim for loss of earning capacity and that a claim for loss of future earning capacity cannot be made without the proof and quantification that is found in its resultant loss of future income.

28. The judgments of the Supreme Court of Appeal quoted above confirm my reasoning behind the relationship between a claim for loss of earnings and a loss of earning capacity. The one cannot exist without the other. Therefore, any patrimonial claim of this kind requires:

- a) a loss of earning capacity as a result of a damage causing event; and
- b) an actual patrimonial loss of income as a result of the abovementioned loss of earning capacity. In which case, either the one or the other may be claimed for the same amount.

29. Without a loss of income, the loss of earning capacity becomes a misnomer and remains a non-patrimonial loss at best that cannot be quantified in money because it has not truly led to monetary loss (this is true for future scenarios as well). Likewise, without a loss of earning capacity as a result of a damage-

causing event, it is difficult to say that any patrimonial loss of income was caused by such damage causing event, which makes the issue of liability difficult to resolve. In this way, loss of earning capacity, in my view, acts as somewhat of a causal link between the damage-causing event and the patrimonial loss suffered through loss of earnings. Through this logic, I am of the opinion that loss of earnings and loss of income are part and parcel of the same concept and are vital for each other's existence.

30. In conclusion, without proof of a loss of income, a plaintiff cannot claim for a loss of earning capacity as the only proof that a person's earning capacity has been lowered would be to show that they would or did in fact earn less money.

#### **The plaintiff's claim for loss of earning capacity**

31. In light of my explanation of the difference and relationship between loss of income and loss of earning capacity, it appears as though the plaintiff began on the right course. First, the plaintiff set out a proposed quantity of lost income. Second, the plaintiff claimed this amount in order to compensate her for her loss of earning capacity (which is in line with the logic of the *Bane* decision).

32. I accept the plaintiff's contention and expert evidence to the effect that the plaintiff has suffered impairment of the whole person's function (that will increase with age) but I do not accept that this has led to a loss of earning capacity on the facts. My reasoning is that the plaintiff has failed to prove an actual loss of future income and thus the requirements for such a claim have not been met. I will explain this below.

33. The problem lies in that the plaintiff arrives at a final amount for loss of income of R1 774 173.00 not by way of actual evidence of this diminution of her estate, but instead through the assumption that lowered performance automatically leads to a situation where lowered earning capacity and a lower income come



into existence and interact in the way that I have explained above. This is not the case.

34. The plaintiff has calculated her future loss of income based on her current salary of R575 192.52 per annum, including inflationary increases only until a retirement age of 65 with a 7.6 % contribution by her employer towards the plaintiff's retirement benefit.

35. Dr A.C. Strydom states that the plaintiff would, but for the collision, have remained financial manager until normal retirement age, but that there was a possibility that she may have been promoted to financial director in her mid-forties. However, this contention is lost because the calculations of the proposed loss of income put forward by the plaintiff include contingencies based only on her current salary at the position of financial manager until the time of her retirement at 65 (both in respect of the position but for and with regard to the collision).

36. Therefore, I am forced to accept that the plaintiff realistically planned on remaining financial manager until the age of 65 despite the accident and has claimed for loss of earning capacity with regard to this position alone. Had the future position proposed by the plaintiff shown an actual post morbid change in her course of employment and level of salary over the years, the position would have been quite different. Furthermore, her salary increases depend only on inflation and her performance will not affect this amount. The only way that I could see her performance influencing her patrimony is if there was a possibility that the plaintiff could lose her current job and/or be limited in the number and quality of her choices should she decide to find other employment. However, this is not averred in the plaintiff's calculations and expert opinions and I thus cannot decide on a quantum in this regard taking into account any further possible base amounts.

37. In *Dippenaar v Shield Insurance* 1979 (2) SA 904 (A), the Appellate Division held the following (emphasis added): 'If in our law earning capacity is to be considered an asset of a person's estate, it follows that the terms of a contract of employment in a particular case, if relied upon, constitute evidence of such earning capacity at the time the delict was committed...' In line with this dictum, I believe then that the terms of such contract of employment will also provide evidence of said earning capacity from time to time during the existence of this contract.
38. This very important dictum in *Dippenaar* confirms that the earning capacity of the plaintiff has not changed pre and post-morbid. This is because her employment contract as it was at the time of the delict was replaced with a significantly higher profile contract after the accident. If anything, her earning capacity has increased recently. If we are then to operate on her current contract of employment, which the plaintiff submits would be the contract of choice in light of *and* but for the collision, then her earning capacities in both the factual position and the hypothetical position are equal and will remain equal even if her performance reduces as this contract's terms will not change.
39. If this is the case, which I accept it is, then there is no actual difference between her future patrimony with regard to the accident and but for the accident. The plaintiff would have (according to the submitted calculations) earned the same salary, subject to inflation and other factors, for the same amount of time regardless of the collision and thus regardless of the impairment suffered by her. This is in spite of the projected loss of income added to the plaintiff's calculations as these contingencies are based on the circular assumption that the plaintiff's earning capacity has been reduced by her impairment in the first place.
40. Taking into account my reasoning behind the process and requirements of awarding damages for loss of income or loss of earning capacity, I hold that the

plaintiff's claim for loss of earning capacity cannot stand. The plaintiff has failed to prove a current or future diminution of her estate that is connected to her income, thus failing to show a loss of income and consequently failing to prove a compensable loss of earning capacity.

41. However, it would be incorrect to accept that she has chosen continue with her current employment regardless of her impairment without discussing this further. Without discussing the actual percentages and amounts put forward by the experts (as they will only become relevant when the damages are quantified), I accept that the plaintiff has suffered an actual impairment to her whole person and that a commensurate amount of extra effort will be required in future to maintain the quality of work that she strives for in her current position. I also believe that the plaintiff will in fact put in this extra effort and she has asserted as such by showing the intention to continue in her current, high-paying position until her retirement. If this is true, then the plaintiff does not foresee an actual diminution of her patrimony in future, but only an extra amount of effort that will be required to prevent this diminution.

42. As I have stated, I find that the submissions regarding the actual future patrimonial loss of the plaintiff that would manifest as loss of income are incorrect. However, what suddenly becomes clear is that the plaintiff has suffered a non-patrimonial future loss by being forced to endure harder working conditions in order to avoid an actual patrimonial loss.

43. The perplexing situation now is that, should the plaintiff give in to her impairment and her impending lowered performance, she may suffer the patrimonial loss that would come with her possibly being demoted or worse. In this hypothetical situation (which the plaintiff has not put forward) she would have suffered a loss of income, simultaneously proving that she had also suffered a loss of earning capacity. On the other hand, if she fights her impairment and maintains her current job and income as she intends (thus

sustaining her patrimony), she would have done so at the price of having to work harder than would have been required but for the accident. Ultimately, the plaintiff was faced with the choice of sacrificing her patrimony, or sacrificing something that does not form part of her patrimony (time and effort). As explained before, the plaintiff has shown her intention to do the latter through her calculations (however legally flawed they may be). However, this difficult choice was forced upon her by the damage-causing event for which the defendant has accepted liability, and the consequences of this fall to the latter.

44. Therefore, the pain and suffering sustained through the plaintiff's injuries exists not only in the impairment itself and its effect on her day to day functioning, but also in the specific required amount of extra effort that the plaintiff intends on putting into her career to maintain her position.

45. Let it be clear that I do not intend awarding the plaintiff damages for loss of income or earning capacity by including this amount in an award for general damages so as to avoid the many legal questions surrounding the viability of such a claim. I have already answered these questions and pointed out that I believe that no such patrimonial claim exists *in casu*. However, I fully accept that the damage that the plaintiff incorrectly interpreted to manifest as loss of income or earning capacity, does exist but manifests instead as non-patrimonial damage in the form of pain and suffering and shall form part of the quantum of general damages to be awarded.

46. This reasoning is also contained in the commendably detailed medico legal report of Dr Louis Marais at page 12. He states the following: 'Taking all the information at my disposal into account, I do not foresee the need for Mrs Deyzel to retire prematurely, before her official retirement age of 60 years despite the documented impairment, provided treatment that has been advocated in this report is granted and adhered to. Work will no doubt, however, require extra effort and will be associated with more than normal frustration on the part

of the accident victim over the years. Such continued and persistent work effort by an individual with a documented impairment and disability is usually favourably considered when General Damages are awarded even if no explicit loss of earnings is anticipated during the remainder of the occupational lifespan.

47. Dr Marais has clearly anticipated my intent in this matter and I also believe that the probable impairment of function put forward by him in the above report of an initial 5% impairment that will increase to at least 7.5% with age is a reasonable and acceptable observation that I will take into account in determining quantum.

48. Despite the astute observation of Dr Marais in this regard, it is still apparent that the plaintiff has not foreseen this possibility and has claimed damages relating to her income earning capacity separately. Therefore, I feel it is safe to believe that the plaintiff's original claim for general damages did not take into account the possibility of a 'favourable consideration' as a result of the effect of her injuries on her career.

49. In light of this, I believe that the claim for general damages in casu of R200 000, when not considering the career-related pain and suffering that I have identified, would otherwise have been excessive. However, if one is to accept that the extra amount of effort required to maintain the plaintiff's current career level manifests not as loss of income but instead as pain and suffering in addition to that already alleged by the plaintiff, then I find that the plaintiff's claim for general damages is not excessive.

50. I therefore make the following order:
- a) The plaintiff's claim for loss of earning capacity/loss of income is dismissed.

- b) The defendant is ordered to pay the plaintiff the amount of R200 1150 (being in respect of R200 000 for general damages and R1150,00 for past medical expenses).
- c) The defendant is ordered to pay interest on the amounts set out in paragraph b) at the prescribed legal rate, from a date 14 days after the date of this judgment to date of payment.
- d) The defendant is ordered to pay the plaintiff's costs of suit, including the qualifying expenses of:
  - i) Dr L. Marias
  - ii) Mrs Enid Kruger
  - iii) Dr A.C. Strydom
  - iv) Mr Gen van der Linde
- e) It is recorded that the defendant undertakes, in terms of section 17(4) of the Road Accident Fund Act 36 of 1996, to furnish the plaintiff with 100% of the costs of any future accommodation of the plaintiff in a hospital or nursing home as well as the treatment of or rendering of a service to her or supplying of goods due to injuries sustained by her in the collision and the sequelae thereof, after such costs have been incurred and upon proof thereof.

G. BIZOS

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ACTING JUDGE OF THE HIGH COURT

Heard on 15 April 2011

Delivered \_\_ June 2011

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