THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 473/2011

Reportable

In the matter between:

DR R RAATH **APPELLANT**

and

J J G NEL **RESPONDENT**

Neutral citation: *Raath v Nel* (473/2011) [2012] ZASCA 86 (31 May 2012)

Coram: **FARLAM, PONNAN, MALAN, MAJIEDT JJA and KROON AJA**

Heard: **11 MAY 2012**

Delivered: **31 MAY 2012**

Summary: Damages – loss of income and earning capacity – proof of actual patrimonial loss in personal capacity – trust sole shareholder in company suffering loss – trust separate legal entity and not axiomatic that its loss is necessarily that of the plaintiff .

ORDER

On appeal from: North Gauteng High Court, Pretoria (Rabie J, sitting as court of first instance):

1 The appeal is upheld to the limited extent set out below.

2 The respondent is ordered to pay the appellant's costs of appeal.

3 Paragraph 1 of the order of the court below is set aside and substituted with the following:

'The defendant is ordered to pay the amount of R1 187 934.44 to the plaintiff as well as interest thereon at 15.5% per annum from date of judgment to date of payment'.

JUDGMENT

MAJIEDT JA (FARLAM, PONNAN, MALAN JJA and KROON AJA concurring):

[1] This is an appeal against an award of damages by Rabie J, sitting as court of first instance in the North Gauteng High Court, Pretoria. The appeal is with his leave and is limited to the following awards of damages: an amount of R42 366 for future medical and hospital expenses; the sum of R1 642 774 for loss of income and of earning capacity and an amount of R200 000 for general damages.

[2] The respondent, a businessman and game farmer of Mokopane (formerly known as Potgietersrus), sued the appellant, an anaesthetist, for damages in respect of the sequelae of a failed intubation prior to a back operation which the respondent was scheduled to undergo. As a result of the

failed intubation the respondent spent more than a month in the intensive care unit of the Pretoria East hospital. His recovery, both physically and mentally, after his discharge from hospital, was slow and problematic. The claim for damages is for: (a) the loss allegedly suffered as a consequence of the respondent's inability, due to the failed intubation and its sequelae, to attend to the same extent as before to the affairs of one of his companies, Koos Nel Auto (Pty) Ltd, resulting in the company making reduced profits for the period 1 May 2000 (when the failed intubation occurred) and March 2003 (when the respondent had recovered sufficiently to attend fully to the business again), (b) future medical and hospital expenses and (c) general damages. The appellant accepted liability for such damages which the respondent proved or as agreed 'arising out of the complications experienced by the [respondent] in the course of the intubation of 1 May 2000'. Rabie J upheld the claim and made the awards set out above as well as an award of R300 000 for past hospital and medical expenses, which is not appealed against.

[3] The respondent is by all accounts the quintessential 'self made man'. He rose from humble beginnings to become a highly successful entrepreneur and businessman. He is a director of several companies, one of them Koos Nel Auto (in which he was the sole shareholder), primarily engaged in the motor vehicle retail sector. The business philosophy underlying his success is to maintain a hands-on approach in respect of all his businesses. It became common cause at the trial that the respondent is a dynamic, hardworking businessman and the driving force behind his successful business ventures. The springboard to the respondent's success was his ability to acquire ailing businesses at very low prices, turning them around into successful enterprises and then selling them off at prices which provided handsome profits to himself.

[4] There can hardly be any doubt that the failed intubation and subsequent hospitalisation had a dramatic impact on the respondent's life. He was bedridden at home for a considerable period of time after his discharge

from hospital and suffered severely from bedsores for over a year. He virtually had to learn again how to walk unaided and he struggled to fend for himself. He was heavily dependent on others during the initial stage of recuperation to assist him with elementary tasks such as eating, ablutions and brushing his teeth. The respondent's travails were not only physical, but psychological as well. He suffered from depression which deepened after his marriage failed, resulting in him divorcing his first wife in mid 2002. During this time the respondent fled to his remote Bushveld farm where he lived as a recluse with alcohol as his primary (and often, sole) solace. If anything, the rampant alcohol abuse aggravated the respondent's depression so that by the end of 2002 he had completely given up on life and not only contemplated but also attempted suicide. One such failed attempt caused him to be admitted to a psychiatric clinic during December 2002. The treatment there and the use of prescribed medication for his depression stabilised the respondent's mental condition and put him on the road to recovery. It is plain from the evidence, however, that the respondent's gradual physical recovery was not matched by a concomitant psychological recovery; on the contrary, his psychological condition worsened.

[5] The respondent's physical and psychological impairment had the result of his severely neglecting his businesses, particularly that of Koos Nel Auto. Initially he was completely absent but even when, later, he made occasional attendances there his hands-on approach was completely lacking and his short temper, raised irritability, poor levels of concentration and poor interaction with others, particularly customers, did more harm than good. In summary, the respondent became a shell of the vibrant, dynamic, forceful individual he had been before the failed intubation.

[6] The respondent's business interests were primarily centred around a property company, Noordex (Pty) Ltd, motor vehicle dealerships, Koos Nel Auto, and a game farm, Bivack Game Lodge. For present purposes only the

business of Koos Nel Auto requires mention. Two dealerships, EI Auto and Bonus Motors, were conducted under this entity. The respondent was the sole shareholder in Koos Nel Auto until 1 April 2001 when he sold his shares and loan account in that company and all his other business assets to the Koos Nel Trust. The respondent's claim for loss of income is, as stated, confined to losses allegedly suffered by Koos Nel Auto, due to the respondent's absence. Extensive evidence was led on this aspect and reliance was placed in particular on the evidence of a forensic auditor, Mr Regenass, who, with reference to Koos Nel Auto's financial statements for March 2001 to March 2003 (the relevant period), sought to demonstrate the loss of profits of the business.

Causation

[7] Before turning to the substantive issue in this appeal, it is necessary to dispose briefly of an argument raised by counsel for the appellant. He submitted that as a matter of legal causation the appellant should not be held liable for the future medical expenses claimed. I fail, however, to understand the basis on which these consequences should not be imputed to the appellant. They are certainly not too remote. In my view the trial judge cannot be faulted in his finding that the evidence overwhelmingly established that although the respondent experienced emotional setbacks later because of his failed marriage and due to his son's death, he did not develop depression as a result thereof, but as a consequence of the failed intubation. I am satisfied that the failed intubation is factually a cause of the respondent's depression. In my view sufficient evidence was led to establish that the depression caused the respondent to neglect the business of Koos Nel Auto, resulting in losses to that entity.

Loss of income and earning capacity

[8] The thrust of the appellant's case is that any loss that may have been

suffered was not suffered by the respondent personally. For estate planning and estate duty considerations, the respondent sold all his assets, including his shares and loan account in Koos Nel Auto, on 1 April 2001 to the Koos Nel Trust. It was contended with some force on behalf of the appellant in this court, as at the trial, that any loss suffered by the respondent's businesses was not the respondent's personal loss. The argument was that any loss that may have been suffered by Koos Nel Auto or by the trust after its establishment on 1 April 2001 pertained, not to the respondent, but to those entities. In this regard, the appellant placed strong reliance on this court's decision in *Rudman v Road Accident Fund*.[1] The court below distinguished *Rudman* on the facts.

[9] Rudman, a mohair and game farmer and professional hunter, operated his business through a 'family' company. It was common cause that Rudman was the driving force behind the company. Rudman restructured his affairs for estate planning and income tax reasons by establishing a family trust with himself, his wife, attorney and accountant as trustees and his two sons as beneficiaries. Rudman was neither a capital nor an income beneficiary of the trust. The trust held 3900 shares in the family company and Rudman the remaining 100 shares. Rudman sued for damages resulting from injuries sustained in a motor vehicle collision. Two of the heads of damages were in respect of past loss of earnings and loss of earning capacity on the basis that, due to Rudman's incapacity, the family company suffered loss and would continue to do so in future. According to the claim such losses pertained to a reduction in the income generated. This court upheld the trial court's central finding that any loss suffered was a loss of the company, and not of Rudman personally.

[10] In delivering judgment in *Rudman* Jones AJA stated:[2]

'For present purposes I am prepared to accept the proposition (without pronouncing

1 *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA).
2 Para 13.

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…* [T]here 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*.' (My emphasis.)

In this instance, the question is whether the loss suffered by Koos Nel Auto prior to 1 April 2001 and by the trust thereafter over the relevant period can be characterised as the respondent's loss.

[11] As I have said, the respondent as sole shareholder and director in Koos Nel Auto, sold all his shares and his loan account in it to the trust on 1 April 2001. The trust was established on 19 January 2001 with the first trustees being the respondent, his late (first) wife and his auditor. After the death of his first wife, the respondent's daughter was appointed as trustee in her stead. The trust was established on his auditor's advice for estate planning and estate duty tax purposes. As the respondent himself put it in evidence:

'Die grootste rede was vir boedelbeplanning, want ek het begin 'n boedelbelasting probleem in die gesig staar. Die rede vir die oprigting van die trust sou dan wees dat die kapitaalgroei van my bates in die trust vestig om sodoende eendag boedelbelasting te bekamp.'

The respondent is not a capital beneficiary of the trust but he is, in the discretion of the trustees, a potential income beneficiary thereof.

[12] Clause 5 of the trust deed provides that there must at all times be at least three trustees in office. The respondent has the right to remove a trustee and to appoint someone else in his or her place. Decisions of the trustees are, in terms of clause 8.2, taken by ordinary majority vote, save that a unanimous decision is required for, inter alia, the distribution of income or capital. The

trustees are clothed with the requisite powers to deal with the trust assets according to what they, in their sole discretion, deem necessary to control the trust's funds to the best advantage of the beneficiaries.[3] A trustee may not dispose of any trust assets for his benefit or that of his estate and a fiduciary duty is imposed on him or her in dealing with trust assets.[4] Lastly, clause 28 provides that decisions concerning the trust must be taken at meetings, provided that a written resolution signed by all the trustees has the same force and effect as one taken at a meeting.

[13] It is plain from the above that the trust is of the type which has become very popular for estate planning and tax purposes (as was the case in *Rudman*). It is undoubtedly a convenient and useful tax and estate planning vehicle, but the caution sounded by this court in the past is apposite here. In *Nieuwoudt & another NNO v Vrystaat Mielies (Edms) Bpk*,[5] Harms JA raised a concern about business trusts where a trust is formed for estate planning purposes, or to escape the constraints of corporate law, and yet everything else remained as before. A similar concern was raised in *Land and Agricultural Bank of South Africa v Parker & others.*[6] There, as is the case here, the dispute revolved around a family trust. This court reaffirmed that a trust estate, comprising of an accumulation of assets and liabilities, is a separate entity, albeit bereft of legal personality. It emphasized that the core concept of a trust is the separation of ownership or control from enjoyment, ie that even though 'a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another'.[7] And Cameron JA pointed out that:

'The courts will themselves in appropriate cases ensure that the trust form is not abused. The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law… This power may have to be invoked to ensure that trusts function in accordance with principles of business

3 Clause 11.2.
4 Clause 16.7.
5 *Nieuwoudt & another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) paras 16 and 17.
6 *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA).
7 Para 19.

efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them.'[8]

[14] Applied to the present matter, the separateness of the trust estate must be recognised and emphasised, however inconvenient and adverse to the respondent it may be. What the respondent seeks, in effect, is the advantage of both a reduction in estate duty (which is perfectly legitimate) but also the continued retention of control and advantages of ownership of the trust assets. The respondent is by virtue of the common law and statute[9] compelled to keep the trust assets separate from that of his own personal estate. He has an obligation in law to preserve the trust assets. He is not a capital beneficiary. He qualifies as a potential income beneficiary by virtue of his relationship to the children of his late son, Jacques. But even then a unanimous resolution of the trustees is required in terms of clause 13 to allocate to the respondent income from the trust.

[15] Counsel for the respondent contended that the loss to the respondent's personal estate consists of his loss of the power to dispose of an asset in his estate, namely the right to dispose of money to either himself (as a potential income beneficiary) or to his grandchildren (as income beneficiaries). But the rudimentary flaw in this argument is that such a power does not form part of the respondent's patrimony. I know of no authority to this effect, nor could counsel point us to any. The respondent's patrimony consists of the universitas of his rights and duties.[10] The power to dispose of a right or other asset is not part of a person's universitas. Much was made of the iniquity and unreasonableness of the conclusion that the trust, and not the respondent personally, had suffered a loss. The answer is twofold, first, nothing prevented the trustees from suing in their representative capacities for the damages suffered. And, secondly, the respondent could quite simply have accessed his loan account in the trust if, as he lamented in evidence, the trust was meant to provide for his 'oudag'. He could have done so without violating the legal

8 Para 37.
9 Section 12 of the Trust Property Control Act 57 of 1988.
10 *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665.

principles pertaining to a trust outlined in the preceding paragraph, particularly in respect of the separateness of the trust estate.

[16] The trial judge regarded as artificial the approach that the loss to the trust is not in reality that of the respondent. He found that the business and the trust were in reality built up by the respondent for his old age and for posterity and that he had lawful control over the trust. The fact that no dividends had been declared and paid out, held Rabie J, had no relevance when the bigger picture was considered. These findings are, for the reasons enunciated above, legally untenable. They are symptomatic of the very misconception which Jones AJA warned against in *Rudman.*

[17] No evidence was led concerning the respondent's personal loss in the nature of, for example, a reduction in drawings or dividends or a reduced salary after 1 April 2001. The court below therefore erred in distinguishing *Rudman* and in upholding the claim for this particular period. I must add that we were forcefully reminded by the respondent's counsel that *Rudman* has been distinguished on several occasions by our courts. But that is hardly surprising, nor does it prove any point. As Jones AJA correctly pointed out in *Rudman*, it is not axiomatic in these circumstances that the company's loss is the individual's personal loss, even if he is the sole shareholder and/or the driving force behind the company. Proof of the individual's personal loss is still required. It is therefore not necessary to embark on an excursus on the cases in which *Rudman* has been distinguished. The appeal in respect of the claim for loss of earning capacity after 1 April 2001 (until March 2003) must consequently be upheld.

[18] The claim for loss of income and earning capacity prior to 1 April 2001 (ie from 1 May 2000 until 31 March 2001), however, stands on a different footing. Regenass's brief was to calculate only the losses sustained by Koos Nel Auto. At the trial his results were shown in table form for each of the

financial years, starting with the year ending in March 2001 and concluding with the one ending in March 2003. He also produced a graph depicting the loss. He used 2000 as base year for his calculation, when the company's profit was R1 013 519. Taking into account the profit in 2004, he established the average growth rate to have been 20.848% over the relevant period, a figure regarded as realistic when compared with the figures for motor vehicle sales as supplied by Statistics South Africa. His calculations show the expected or anticipated income as opposed to the actual income, the difference being the loss suffered for each year during the relevant period. For the financial year ending at the end of March 2001, the difference between expected and actual income, ie the loss, was R645 568.44. I am satisfied that this figure can be accepted as realistic, since it was computed in applying reliable figures and a growth rate consonant with the prevailing growth rate for the motor vehicle retail sector. It also accords with the overall figures over the relevant period.

[19] It was contended on behalf of the appellant that the respondent had to establish what the value of his shares and loan account was before the failed intubation and what they were worth thereafter and that he would have sold them to the Koos Nel Trust on 1 April 2001 for the reduced value. The agreement in terms of which the respondent sold his shares and loan account in Koos Nel Auto was concluded on 18 March 2002 but with its effective date being 1 April 2001. The price for both the shares and loan account was R4 831 590 of which R300 represented the purchase price for the shares and the balance of R4 831 290 the price for the loan account. It follows that, had no loss been suffered by Koos Nel Auto in 2001, the respondent's shares would have been worth more. The trust did not make actual payment of the purchase price as agreed, but instead a loan account was created in the trust in the respondent's favour. But for the failed intubation and his concomitant absence from and neglect of Koos Nel Auto's business, the respondent's loan account in the trust would have been worth R645 568.44 more. This is a loss suffered by the respondent in his personal estate, ie a reduction in his patrimony. In this respect therefore, unlike the post 1 April 2001 period, the

respondent had succeeded in proving his personal loss in the court below and the claim was correctly upheld to this extent.

Future hospital and medical expenses

[20] The award in this respect is for the cost of the respondent's treatment in future for depression. Dr David Shevel, a psychiatrist, concluded that the respondent suffered from post-operative depression and from ongoing cognitive deficits. According to him, the respondent will require anti-depressant medication on a lifelong basis. He quantified the cost of future hospital and medical expenses at R42 366 which includes the cost of medication, follow-up psychiatric consultations and which made provision for two relapses. I can find no fault with the award and with the trial judge's finding that Dr Shevel's forecasts and approach were rather conservative and that his evidence can be accepted. A joint minute between Dr Shevel and the appellant's expert psychiatrist, Prof Vorster, largely confirmed Dr Shevel's own observations and conclusions. Prof Vorster did not testify, but I am in any event satisfied that Dr Shevel's viewpoint is to be preferred in those instances where they disagree. The award for future hospital and medical expenses must therefore be upheld.

General damages

[21] Rabie J awarded an amount of R200 000 for general damages. If anything, this amount is somewhat on the conservative side, bearing in mind the catastrophic effect which the failed intubation had on the respondent's life. He had been a successful, dynamic businessman and an avid hunter and game farmer. The devastating loss to his self-esteem and of his dignity and of the amenities of life as well as the pain and suffering he endured are unquestionable. No cogent reasons were advanced justifying the lesser amount of R150 000 proposed by the appellant and no interference on appeal is warranted.

Costs

[22] The appellant has been substantially successful on appeal in respect of the claim for loss of income and loss of earning capacity and he is consequently entitled to his costs on appeal. But the respondent was compelled to litigate and he succeeded in proving his damages. The costs order in the court below should therefore remain unchanged.

Conclusion

[23] There is lastly an aspect which regrettably requires mention. The trial was adjourned on 18 August 2009. Judgment was reserved but delivered only some 21 months later, on 17 May 2011. No reasons for this lengthy delay appear from the judgment. Where good reasons exist for a delay of this duration, they should be set out in the judgment. As matters stand, in the absence of any reasons one can only deprecate the delay. Litigants are entitled to expeditious adjudication, even more so in a case of this nature where a man has been left devastated by an act of a professional person who had admitted liability for damages proved or agreed.[11]

[24] The following order is issued:

1 The appeal is upheld to the limited extent set out below.
2 The respondent is ordered to pay the appellant's costs of appeal.

3 Paragraph 1 the order of the court below is set aside and substituted with the following:
'The defendant is ordered to pay the amount of R1 187 934.44 to the plaintiff

11 See: *Exdev (Pty) Ltd & another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) para 25.

as well as interest thereon at 15.5% per annum from date of judgment to date of payment'.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

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