REPORTABLE JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 10009/2004

In the matter between:

ADV A E HEESE on behalf of ULRICH HANS PETERS Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Appearing for Plaintiff	:	Adv M A Crowe SC
Instructed by	:	Lowe & Petersen Mr B A Lowe
Appearing for Defendant	:	Adv P Eia
Instructed by	:	Cliffe Dekker Hofmeyr Inc Mr R D Barendse
Date of hearing	:	May 2011: 9, 10, 12, 16, 17, 19, 23, 24, 25, 26, 31 June 2011: 1, 2 October 2011: 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 31 November 2011: 1, 2, 7, 8, 17
Date of judgment	:	2 December 2011

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 10009/2004

In the matter between:

ADRÉ ELIZABETH HEESE in her capacity as *curatrix ad litem for* **ULRICH HANS PETERS** Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT DELIVERED ON 2 DECEMBER 2011

BLIGNAULT J:

[1] The plaintiff in this action is Ms Adré Elizabeth Heese acting in her capacity as *curatrix ad litem* for Mr Ulrich Hans Peters ("Mr Peters"). Defendant is the Road Accident Fund. Plaintiff claims compensation from defendant in terms of the provisions of the Road Accident Fund Act 56 of 1996 for damage suffered by Mr Peters as a result of a motor accident that took place in Cape Town on 11 June 2000.

[2] Mr Peters sustained a serious head injury in the accident, comprising diffuse cerebral and cerebellar trauma and a right focal

cerebral injury. As a result thereof he manifested neurophysical problems, including spastic symptoms and cerebellar dysfunction which affected his balance, coordination and smell, persisting neuropsychological problems in the form of cognitive abnormalities, memory difficulties, personality changes and altered behaviour. These impairments rendered him completely and permanently unemployable. The *curatrix ad litem* referred to above was appointed to conduct this litigation on his behalf.

[3] Prior to the hearing of the matter the parties agreed to separate the determination of defendant's liability from the question of the quantum of the compensation to be awarded to plaintiff. The question of defendant's liability was then determined by way of arbitration. It was settled on the basis that defendant would be liable for the compensation of 100% of such damage as plaintiff might prove.

[4] Plaintiff claimed damages from defendant under various heads but they have all been disposed of by agreement except for the claim for the loss of past and future earnings or earning capacity. Plaintiff's claim under this head, as finally formulated,

amounts to 9 845 562 Euro. Defendant's stance is that plaintiff has not proved any claim for damages under this head.

[5] It is trite law that an award of damages for the loss of a claimant's earnings or earning capacity is intended to place him in the financial position he would have been in had not been for the delict. It is in general preferable to quantify such an award by way of an actuarial calculation. See *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113H – 114F. The object of such a calculation is to arrive at a lump sum which, if utilised by the claimant, would allow him to enjoy financial benefits equal to the quantum of the earnings lost by him. The typical method (used in this case) is to compute the notional gross income that the claimant would have earned over the relevant period. This amount is then capitalised at a net discount rate which takes into account the rate at which the claimant would probably have invested the lump sum awarded to him and the likely future inflation rate. The effect of taxation is also taken into account.

[6] During the trial the parties agreed upon a further separation of issues. In the first phase the gross pre-tax notional earnings of Mr Peters, had he not been involved in the accident, would be determined. In the second phase this amount would be adjusted to allow for contingencies, taxation, inflation, an investment rate and the like. This judgment deals with the first phase of these proceedings.

[7] Plaintiff's claim is formulated in Euro ("EU"), the official currency of Germany. At the time of Mr Peters' accident the official currency of Germany was the German Mark ("DM"). The German Mark was converted to Euro with effect from 1 January 2002 at a rate of approximately DM 2 = EU 1. In 2000 (the year of the accident) the exchange rate between the German Mark and the South African Rand was approximately DM 1 = R3,58. According to the South African consumer price index, R1,00 in 2000 is equivalent to about R1,90 in 2011. It follows that DM 1 in 2000 is equivalent to about R6,80 in South Africa at present. The present exchange rate between the Euro and the Rand is approximately 1 EU = R11,20. I propose to use these conversion rates in this judgment in order to provide the current Rand equivalent of some of the amounts involved.

[8] Plaintiff's case was presented along conventional lines, namely to quantify the total amount of the gross pre-tax earnings that Mr Peters would probably have earned during his lifetime. In one respect, however, it is not conventional. The case put forward by plaintiff is that Mr Peters evaded the payment of income tax on a massive scale in the years preceding the accident. He did so by submitting false returns to the tax authorities. In order to determine the quantum of his loss one should therefore have regard to his real income and not to the income disclosed to the tax authorities.

[9] Mr Peters is a German citizen. He was born and grew up in Germany and he was 51 years old at the time of the accident. He carried on the business of selling magazine subscriptions, first as an employee of other companies and then in the name of his own business known as Ulrich Peters Pressevertrieb. As the business was not a separate legal entity I shall refer to it simply as Mr Peters' business. He was still the owner of this business at the time of the accident. He had previously been married to Katrin whom he divorced on 3 March 1998. In May 1999 he formed a relationship with Ms Adriana Holzmann. They later became

engaged. They were together on holiday in South Africa when the accident occurred. She has taken care of him since then.

[10] The nature of the magazine subscription sales business in Germany at the time was described in the evidence of Mr Karl Tank, a German legal and tax consultant. He has extensive experience in providing legal, tax and economic advice to companies in the press distributing industry and to publishing companies. He had acted as consultant to Mr Peters and he had some knowledge of his business.

[11] A substantial part of the acquisition of magazine subscriptions took place through independent magazine distribution enterprises. Mr Peters' business was such an independent enterprise. Magazine subscriptions were acquired by way of door to door canvassing. The administration of such subscriptions was done by a service providing company engaged by the independent enterprises. In the case of Mr Peters' business the administration was provided by a company known as the Pressenvertriebszentrale GmbH & Co. KG ("the PVZ"). The PVZ purchased the magazines from the publishing houses and supplied them to the subscribers. Mr Peters' business did not, however,

deal directly with the PVZ. It had an arrangement with another enterprise named Bitter KG ("the Bitter company") that dealt with the PVZ on its behalf.

[12] The PVZ remunerated individual enterprises on a royalty basis per subscription, after deducting an allowance for administration. The royalty was payable annually until the subscriber terminated his subscription. The net yield on a stock of subscriptions would therefore reduce gradually over time as individual subscriptions are terminated. Each enterprise that engaged the PVZ had one or more accounts with it. These were known as Orga. The subscriptions held by Mr Peters' business were held in Orga that were in the name of the Bitter company.

[13] Mr Tank also provided information in regard to industry standards, prices and rates that were utilised by Mr de Kroon (a chartered accountant who also gave evidence on behalf of plaintiff) in quantifying the notional income that Mr Peters would have earned. This information assisted Mr de Kroon in estimating matters such as the quantities of subscriptions that Mr Peters would have acquired, the attrition rates of stock held by Mr Peters,

the prices of subscriptions sold by him and the operating costs of his business.

[14] Mr Anton Heinrich gave evidence about Mr Peters' early years in the magazine subscription business. He met Mr Peters in 1967 when both of them were in their late teens. They started working as door to door sellers of subscriptions for the business of a Mr Hengst. Mr Peters was very successful as a seller and he soon earned more money than any of Mr Hengst's other sellers. At an early stage of his career he was promoted to the position of a team leader. Mr Peters stayed in the business of Mr Hengst until he established his own independent business in the 1980's.

[15] Mr Bogdan Giesecke testified that he knew Mr Peters since 1991. He described the nature of Mr Peters' business in the years preceding the accident. In 1991 they were conducting similar enterprises and in the middle of 1996 they merged. The business employed individual sellers who went from door to door in order to canvass subscriptions for the magazines that were on offer. The sellers worked in teams. Each team was headed by a team leader. There were also controllers who controlled the paper work

in regard to each subscription. Mr Giesecke described Mr Peters as a very active, hardworking and successful businessman.

[16] Mr Peters had an arrangement with the Bitter company in terms of which he delivered his subscriptions to it. His contact was mainly with Mr Heinz Bitter but he dealt sometimes with his sons Mattheus and Andreas. Mr Peters sold 50% of his subscriptions to the Bitter company and he kept the other 50% on which he then received royalties into the future. The latter would be paid by the PVZ to the Bitter company which in turn paid them over to Mr Peters. Mr Peters met Mr Bitter on a weekly basis and he would then be paid in cash for the subscriptions sold to the Bitter company and the royalties received by it on his behalf. The weekly payments were accompanied by commission statements.

[17] Mr Giesecke originally worked for Mr Peters and he was remunerated in accordance with the number of subscriptions that he brought in. In 1998/1999 he took over as manager of ML Pressevertrieb. This was in name a separate business entity but in fact it was owned and controlled by Mr Peters. The letters ML stood for Marian Lapke, Mr Peters' girlfriend at the time. Ms Lapke was a partner in name only and she was not active in the

business. Mr Peters formed and used ML Pressevertrieb as part of an income tax evasion scheme and he (Mr Giesecke) was aware of that.

[18] From 1999 Mr Peters often went on holidays. In his absence he (Giesecke) would manage the entire business. When he joined Mr Peters the business acquired about 700 – 800 subscriptions per week. At the beginning of 2000 they acquired about 500 – 600 subscriptions per week. After Mr Peters formed a relationship with Ms Adriana Holzmann, he became less active in the business. Mr Giesecke was managing the business when Mr Peters' accident took place in South Africa. He testified that the turnover of the business declined gradually until it was sold in September 2001.

[19] Mr Karsten Heinzmann practises as a certified public accountant, legal advisor and tax consultant in Germany. He acted as an advisor to Mr Peters for many years. From 1991 to 2000 he prepared the annual financial statements for Mr Peters' business and certain related entities and persons. On the basis of the information contained in these financial statements he prepared and submitted tax returns to the German tax authorities. Copies of these financial statements were handed in as exhibits.

He also prepared the liquidation account of Mr Peters' business in 2002. Mr Heinzmann pointed out that all the annual financial statements contained a certificate to the effect that he did the bookkeeping and prepared the annual financial statements in accordance with the documents and the information supplied to him by the client. He did not carry out any audit and he did not examine any documents as to their authenticity or veracity.

[20] Mr Heinzman said that Mr Peters had liquidated his business in 1993. He sold all the subscriptions held by him to the Bitter company. The business was from 1993 to 1996 ostensibly carried on in the name of his wife, Katrin Peters. Mr Heinzmann understood that the purpose of this exercise was to avoid the payment of income tax and trade tax. As far as he knew Mr Peters continued to manage the business as if he were the owner thereof. Katrin Peters was only in name the owner. Mr Heinzmann said that as far as he was concerned the transaction was not illegal in terms of the relevant tax laws. In 1996 the business was transferred back from Ms Katrin Peters to Mr Peters.

[21] In 1998 Mr Heinzmann also prepared annual financial statements for a separate business entity named ML Pressevertrieb. ML Pressevertrieb was closely related to Mr Peters' business. The owners in name were Ms Lapke and Mr Giesecke but the business was in substance controlled and managed by Mr Peters. ML Pressevertrieb paid expenses of Mr Peters' businesses for which it was rewarded by Mr Peters. This structure of Mr Peters' business provided him with considerable tax advantages.

[22] Mr Heinzmann heard about Mr Peters' accident in South Africa. He saw him again in about October 2000 at Bad Segerberg. At that stage Mr Peters did not have the mental capacity to discuss any of his business or financial affairs with him. Mr Heinzmann said that he had no further contact with Mr Peters. He still received documents relating to the business. He assumed that they came mainly from Ms Holzmann. He testified that as far as he knew, all the amounts received from the Bitter company were recorded in the relevant ledgers kept by him as part of his bookkeeping.

[23] Mr Heinzmann prepared an interim liquidation statement for the business as at 2 December 2001. This statement reflected that Mr Peters sold his remaining subscriptions to an entity that was associated with the Bitter company for DM 2,7 million. Mr Peters' business ceased to function after that date.

[24] Mr Heinzmann identified, in the bundles of exhibits, various commission statements which the Bitter company had provided to Mr Peters. They had been used by him in drafting the annual financial statements for Mr Peters' business. He also identified various ledger accounts which he had prepared as part of his bookkeeping for Mr Peters.

[25] Mr Heinzmann explained that the revenue authorities, as a result of an audit report dated 21 May 2002, disallowed certain vehicle expenses claimed by Mr Peters during the years 1991, 1992 and 1993. They totalled DM 249 316 for the three years. As a result of a turnover tax special unit audit report dated 19 June 2002 the tax authorities disallowed expenses in respect of turnover tax for the years 2000 and 2001 in the amounts of DM 86 683,63 and DM 139 470,80 respectively. The problem in these cases was

that accounts of sellers were reflected in the bookkeeping of the business but no record of these sellers could be found.

[26] Ms Adriana Holzmann was Mr Peters fiancée at the time of the accident. She still is. She was 41 years old when the trial took place. She was born and grew up in East Germany. After she had completed her schooling she moved to Bremen in Germany where she became an estate agent. She met Mr Peters in April 1999 and moved in with him on 1 May 1999. She was 28 years old at the time.

[27] Mr Peters treated her very generously and he spent a lot of money on her. They enjoyed a lavish lifestyle. His hobby, for example, was to dine out in top class restaurants and hotels. They did this frequently. He only wore Versace clothes and he owned expensive watches. He drove an expensive Porsche motor vehicle and his home was furnished and equipped with expensive furniture and artwork. He always carried big bundles of cash with him. Ms Holzmann mentioned some of the things that Mr Peters bought for her such as a Cartier watch purchased for DM 15 120, a diamond ring worth DM 3500, a pendant necklace worth USD 9 000 and a Rolex watch worth USD 100 000,00. Shortly after

they met they went on holiday to Ibiza for about 10 days. In August 1999 they went to Majorca and in November 1999 to Tunisia. At the end of the year they went to Malaysia and a month later to the Canary Islands. In March 2000 they came to South Africa for two weeks. On all these holidays they flew first class, stayed in the best hotels and spent a lot of money.

[28] Ms Holzmann produced a detailed schedule with information regarding Mr Peters' lifestyle expenses. These expenses, according to her estimates, came to DM 39 020 per month (equivalent to R265 000 per month at present). She also provided a schedule of Mr Peters' domestic assets and the estimated value thereof. The total value of these assets is approximately DM 3,1 million (equivalent to R21 000 000 at present). The list includes items such as 40 Versace suits with a total value of DM 180 000, 40 pairs of shoes with a total value of DM 60 000, an Audemars Piguet watch with a value of DM 246 000 and a Rolex watch with a value of DM 250 000.

[26] At the time when Ms Holzmann met Mr Peters he had two team leaders in his business, namely Mr Giesecke and Mr Ernst Wörgerbauer. Mr Peters' daily routine was to call Mr Heinz Bitter

and his two team leaders telephonically. He worked from home which was in Scheessel. On Thursdays he had a fixed appointment with Mr Heinz Bitter in Dortmund which was about 300 kilometres from Scheessel. She usually accompanied him on these visits. They met Mr Heinz Bitter (or sometimes his son Andreas) and Mr Peters and Mr Bitter would then talk about the business and the subscriptions. At the end of the meeting Mr Bitter handed documents to Mr Peters and paid him in cash. Mr Peters did not bank the cash. He took it with him. Later that same day he would meet Mr Giesecke and pay him in cash for the expenses which he had incurred. The balance of the cash he put in a safe at home. On Fridays he met Mr Wörgerbauer and paid him in a similar manner for his expenses.

[27] Mr Peters kept vast amounts of cash in the safe. When they came to South Africa on the second occasion he brought DM 500 000 in cash with him. At that stage he had already invested money in a bank in Denmark. He told her that he was putting this money in foreign banks because he did not want to give it to the tax authorities.

[28] Whilst on holiday in Cape Town in March 2000 they decided that they would return to Cape Town for a longer period. They entered into an agreement of lease for an apartment in the Dolphin Beach Hotel in Bloubergstrand for the period of six months from 1 April 2000 with an option of extending it for another six months. Her impression was that Mr Peters saw this as a break between his previous work and a new business. They also decided to sell the house in Scheessel. Mr Peters did mention to her one evening that there were business opportunities in Cape Town with all the Germans here.

[29] After the holiday they returned to Germany and then came to Cape Town on a more permanent basis. They arrived here on 9 May 2000. On this occasion they brought Mr Peters' Porsche with at great expense. Whilst in Germany Mr Peters' house in Scheessel was sold for DM 1 million. They talked about where they might live in Germany but they did not come to any firm decision in that regard.

[30] In March 2000 Mr Peters had asked her to open a fictitious subscription acquisition business which would charge him fictitious expenses. She knew that it was an illegal tax evasion scheme but

she co-operated with him. The business was called the Adriana Holzmann Pressevertrieb. Mr Peters told her not to worry about the scheme because he would take care of it should any problems arise with the tax authorities. She thereafter submitted monthly invoices to Mr Peters' business which reflected such expenses. She continued to do so, even after the accident, until May 2001. Copies of these invoices were handed in as exhibits. The expenses had been entered into the ledger account kept by Mr Heinzmann as expenses of Mr Peter's business.

[31] The tax authorities approached her about this scheme in 2002. She handed the matter over to Dr Heinzpeter, a tax lawyer, and he negotiated on her behalf with the authorities. He told her that the tax investigators had found out that some of the sellers never worked for her. Dr Heinzpeter hinted that the tax authorities saw that this was perhaps part of a grander scheme. She was told by Dr Heinzpeter that she had an option. She could take the blame for the scheme and pay a penalty. If she did not, the tax authorities would follow it up with Mr Peters. She decided to pay the penalty which amounted to EU 250 000. She was also criminally convicted but the tax authorities, according to her, then left Mr Peters alone.

[32] Shortly after arriving in South Africa she and Mr Peters became engaged. They planned to get married on Christmas day in 2000. On 16 May 2000 Mr Peters purchased a sectional title unit at Dolphin Beach for her as a wedding gift which they could use as a holiday home in South Africa.

[33] The accident happened on 10 June 2000. Mr Peters stayed in hospital until they returned to Hamburg on 22 July 2000. He spent about a month in a hospital in Hamburg and then went to a rehabilitation clinic, Bad Segerberger. During this time Ms Holzmann stayed in contact with Mr Giesecke and Mr Heinz Bitter in regard to Mr Peters' business. They undertook to take care of matters for the time being. On 29 October 2000 she and Mr Peters returned to South Africa where they stayed for about four months. They went back to Germany and Mr Peters was again treated at the Bad Segerberger clinic.

[34] Meanwhile the relationship between her and Mr Giesecke was deteriorating and the business was in decline. She realised that she could not run the business on her own. She consulted Dr Heinzpeter and he advised her to sell the stock of the business. She also spoke to Mr Heinz Bitter and he thought it was a good

idea. Dr Heinzpeter arranged the implementation of the sale of the stock and the closure of the business. The stock was sold to a company that was associated with the Bitters. In September 2001 she came back to Germany and the sale of the stock to Mr Bitter was finalised. It was agreed that the sale would be given effect to on 1 December 2001 and that the purchase price would be DM 2,7 million. She did not have the knowledge to decide whether the price was fair but she trusted Mr Heinz Bitter and Dr Heinzpeter.

[35] Ms Holzmann said that she and Mr Peters were living in an apartment in Sunset Beach, Cape Town but that they plan to go back to Europe in due course.

[36] Plaintiff called Mr Eric de Kroon to give expert evidence. He is a South African chartered accountant. At present he is a member of a South African close corporation which provides financial management services. He was instructed to determine what Mr Peters' income would have been had he not been injured in the accident.

[101] Mr Tank provided a framework for the determination of the nett yield of Mr Peters' subscription stock as from 1 June 2000.

He did this on the basis of his knowledge of individual (?) yields. Mr Peters owned 27772 subscriptions on 1 June 2000. Mr Peters would not acquire any new subscriptions and not sell any of his existing stock. The stock would have reduced continuously until 31 December 2015. Based on these assumptions Mr Tank calculated that Mr Peters' net income would have been R2 405 653,00 Euros. (For practical purposes 1 (one) Euro may be regarded as equivalent to 10 (ten) Rand.

[37] Mr de Kroon advanced the thesis, as he called it, that there was a vast difference between the income and profit of Mr Peters' business as disclosed in its annual financial statements on the one hand and its true income on the other hand. The obvious purpose of this under-declaration of income and profit was to evade the payment of income tax. Mr de Kroon then attempted to quantify the true income of the business on the basis of the documentation and information available to him. He used this income as a springboard for the calculation of the likely future income of the business.

[38] For this purpose Mr de Kroon visited Germany where he spoke to various witnesses and perused numerous documents

such as the annual financial statements of Mr Peters' business and the accounting records which had been kept by Mr Heinzmann. He interviewed Messrs Andreas and Mattheus Bitter (the sons of Mr Heinz Bitter) and he obtained from them a set of the commission statements reflecting the amounts paid by the Bitter company to Mr Peters' business for subscriptions sold to the Bitter company and royalties on subscriptions kept by Mr Peters. As the accounts with the PVZ in question were held by the Bitter company, the royalty payments to Mr Peters' business were channelled through the Bitter company. Mr de Kroon also utilised information provided to him by Mr Tank regarding the average values of certain parameters in the magazine distribution industry.

[39] Mr de Kroon analysed Mr Peters' business' annual financial statements for the years 1991-2001 which had been prepared by Mr Heinzmann on the basis of information supplied to him by Mr Peters. Mr de Kroon adjusted the figures disclosed in the annual financial statements to include the income and expenses of the business when it ostensibly belonged to Katrin Peters from 1993 to 1996 and to account for the shifting of income and expenses to the ML Pressevertrieb. His analysis showed that the business operated at a net loss over the period from 1991 to 1999. On the

strength of information obtained from Mr Andreas Bitter, Mr Giesecke, Mr Tank and Mr Stueckenschneider, however, Mr de Kroon estimated that a business such as that of Mr Peters would have made a net profit before tax of at least 30% of sales.

[40] In the year 2000 in which Mr Peters was injured, however, the net operating profit of the business rose to DM 1 200 043 and during a period of 7 months in 2001 before the closure of the business, it rose to DM 936 321. Mr de Kroon pointed out that this ostensible recovery occurred at the time when the income from the Bitter company was no longer received in cash by Mr Peters but deposited into the bank.

[41] Mr de Kroon also carried out a lifestyle audit based on the information that he obtained from Ms Holzmann. It is quite obvious, he said, that Mr Peters would not have been able to finance his lifestyle expenditure from the income reported in the annual financial statements of his business.

[42] Mr de Kroon found that the vast majority of all costs reflected in the financial statements for the years 1999, 2000 and 2001 related to the acquisition of new subscriptions by way of the

door to door sales. The income reflected in the annual financial statements, however, consisted mainly of royalty income on kept subscriptions. The royalty income exceeded by far the reported income from the sales of subscriptions to the Bitter company. This showed, he said, that the under-declaration of income related mainly to the income earned on sold subscriptions as opposed to royalty income. The under-declaration of income from sold subscriptions is further demonstrated if the income for that period is compared with the reported selling costs incurred in generating such income. This comparison shows that Mr Peters expended DM 1 679 317 on selling costs in order to generate a total income from sold subscriptions of DM 574 823. This meant that expenses in excess of 292% of the reported income were incurred. That would be a commercial aberration, he said, of what was by all accounts a successful business.

[43] Mr de Kroon next embarked on an exercise to measure the extent of Mr Peters' understatement of the net income of the business. He calculated first the probable sales staff for the years 1998, 1999, 2000 and 2001. An analysis of the commission invoices of the sales staff in 2001 showed that on average a single salesperson would sell approximately 15,6 subscriptions per week.

From these figures he could calculate the total annual new subscription sales for 1998, 1999, 2000 and 2001. He applied the subscription attrition rates in the industry which he had obtained from Mr Tank. On the basis of these figures Mr de Kroon calculated what income the business probably earned during the years 1999, 2000 and 2001 from sales of subscriptions to the Bitter company and royalty income. The difference between such income and the disclosed income reflected the extent of Mr Peters' understatement of income over that period.

[44] In order to calculate the true expenditure of the business Mr de Kroon deducted the fictitious expenditure reflected in the invoices submitted to the business by the Adriana Holzmann Pressevertrieb. These amounted to DM 995 470,00 in 2000 and DM 223 850,00 in 2001. He then reconstructed Mr Peters' income statements for the years 1999 – 2001. The adjusted profit rates before tax as a percentage of sales over this period was 49% for 1999, 71% for 2000 and 58% for 2001. The rate of 49%, he said, could be regarded as typical. The figures for 2000 and 2001 were not typical as they had been affected by the accident. The selling costs of the business declined but the royalty income continued.

The reconstructed financial statements, he said, was a reasonably accurate reflection of Mr Peters' earning capacity.

[45] Mr de Kroon's calculation of Mr Peters' notional earnings takes the beginning of 2002 as starting point. He assumed that Mr Peters would have retired at the end of 2013. During this period he would have employed 50 sellers. Each seller would have sold on average 15,6 subscriptions per week which means that Mr Peters would have acquired 39 000 subscriptions per year. He assumed that 50% of this quantity would have been sold to the Bitter company at a price of EU 106,40 per subscription and he applied an attrition rate of 30% during the early stages of the subscriptions. On these bases he calculated the annual income that Mr Peters would have received from subscriptions sold to the Bitter company. The amount arrived at was increased by 1,5% per year to provide for inflation. Mr de Kroon also calculated the royalty income that Mr Peters would have received over the period from 2002 to 2023. In this regard he relied upon the general attrition rates that applied in the industry which had been provided by Mr Tank.

[46] Mr de Kroon then calculated the business costs for the years 2002 to 2013 which he deducted from the notional income over that period in order to arrive at the notional net annual profit. He assumed that Mr Peters would have sold the residue of the subscriptions still in his possession in 2023 for EU 3 681 776. He deducted the amount of DM 2,7 million that was received on the sale of the stock on 3 December 2001. On the basis of these calculations Mr de Kroon arrived at an amount of EU 27 196 269 that represented Mr Peters' total loss of profit. This sum was discounted by way of an actuarial calculation to arrive at the amount claimed namely EU 9 845 562.

[47] I do not find it necessary to provide particulars of all the assumptions and calculations that underlie Mr de Kroon's computation of the amount of EU 27 196 269. Suffice it to say that his calculations are comprehensive and supported by detailed analyses. Mr de Kroon's calculations, furthermore, were not serious challenged in the evidence adduced on behalf of defendant.

[48] Defendant called only one witness, Mr D Seaward, a chartered accountant. He has been practising as such for about

ten years. Mr Seaward had perused the relevant documentation in this matter and he had listened to much of the evidence given by plaintiff's witnesses. The gist of his evidence was that the annual financial statements prepared by Mr Heinzmann should be regarded as an accurate reflection of Mr Peters' earnings. He said that Mr Heinzmann had been Mr Peters' adviser for many years and he would have had a close knowledge of his business. Mr Heinzmann's assistant, Ms Bock, had processed Mr Peters' accounting work for 18 years and she reportedly kept an orderly record of his financial transactions.

[49] On the strength of Mr Seaward's assumption regarding the reliability of the annual financial statements he calculated that over the period from the date of the accident to the date when the stock was sold in December 2001, Mr Peters would not have earned more than what the actual earnings of the business were. The purchase price of DM 2,7 million represented, according to him, the capitalised amount of the income that Mr Peters would have received in the future. He accordingly concluded that plaintiff had not shown that Mr Peters suffered any loss of earnings.

[50] Before discussing the issues in the matter I propose to give my impressions of the witnesses. Mr Heinzman and Mr Giesecke gave factual background evidence. There are no grounds for doubting their credibility. Mr Heinzmann came across as a typical accountant, careful and precise. One has no reason to doubt the accuracy of the documents prepared by him insofar as they were based on the information supplied to him by Mr Peters. As to Ms Holzmann, the fact that she candidly confessed to fraudulent conduct to the extent of in the amount of R , without even a hint of remorse, speaks for itself. I would not accept her evidence on any contentious issue without proper corroboration. Mr de Kroon was an impressive witness. The research underlying his thesis and his calculations is detailed and comprehensive. The principal elements of his evidence were furthermore not contradicted by Mr Seaward. Mr Seaward, on the other hand, was not an impressive witness. The crux of his evidence is a statement that annual financial statements should in general be regarded as reliable documents. Mr Seaward made no attempt to grapple with any of the major elements of Mr de Kroon's evidence. He did not even challenge his arithmetic.

Discussion

[51] It is necessary to deal at the outset with an argument by Mr P C Eia, who appeared on behalf of defendant. He objected to the admissibility of various documents that had been produced in evidence by plaintiff such as the Bitter company commission statements, the PVZ statements, the seller's lists and the like. These documents, he submitted, are hearsay statements and inadmissible. Their veracity, authenticity and reliability have not been established.

[52] I do not agree with Mr Eia's submission. It seems to me that the complaint regarding the authenticity of the documents is met by the answer that the parties agreed at a pre-trial conference held on 9 May 2011 that the documents contained in six trial bundles to be handed in as exhibits, might be admitted in evidence on the basis that they are what they purport to be but without admission of the truth of the contents thereof.

[53] Insofar as the objection is based on the hearsay rule, it is necessary to have regard to the definition and scope of hearsay

evidence. In *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 it was formulated as follows:

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made."*

[54] Schmidt *Law of Evidence* 18–26 explains in this regard that a person's state of mind may be proved by relevant evidence. *State of mind* includes what a person knows, what he intends, what he fears, what motivates him. In such a case evidence of that person's state of mind is not tendered to establish the truth of what is stated but as circumstantial evidence from which appropriate inferences as to the existence of certain facts may be drawn. The admissibility of such evidence is, like any other evidence, subject to the requirement that it must be relevant to the issues in the matter.

[55] The application of these principles to statements of third parties is illustrated by the following judgments:

- In *Estate De Wet* v *De Wet* 1924 CPD 341 evidence of bookkeeping entries made by a person was admitted to prove his state of mind at the time when they were made.
- In *International Tobacco Co (SA) Ltd v United Tobacco Cos (South Africa)*1953 (3) SA 343 (WLD) evidence of rumours reflecting on the quality of the plaintiff's cigarettes was admitted, not to prove the truth of these statements but to prove the fact that they were made.
- In *S v Holshausen* 1984 (4) SA 852 (AD) evidence of a statement made by the accused that he intended killing the deceased, was admitted as it was relevant to the state of mind of the accused.

[56] A question that arises at the outset is whether Mr Peters would have returned to Germany or stayed in South Africa if he had not been involved in the accident. Plaintiff made no effort to prove that Mr Peters' earning capacity would have had any value in South Africa. In para [11] of the *Rudman* judgment it was made quite clear that a reduction in earning capacity only results in a loss if it gives rise to a pecuniary loss. Mr Peters was 51 years old

at the time. He had no professional or technical qualifications or experience other than his experience running his business. There was no realistic possibilty of his starting a business in South Africa.

[57] Plaintiff's claim is therefore dependent upon proof that Mr Peters would have returned to Germany and continued to run his business there. Ms Holzmann's evidence was vague and rather inconclusive in this regard. She said that they were both at a point in their lives where they wanted to start something new. They liked South Africa and they decided to stay here for a year and see how it works.

[58] It seems to me, however, that the probabilities favour the contention of Mr Crowe (who appeared on behalf of plaintiff) that Mr Peters would have returned to Germany after say a year and resumed managing his business. Mr Peters was described as an active and energetic person. In my opinion he would have become bored after a while if he was not actively involved in business. There was no realistic possibility that he could have built up a successful business of any kind in South Africa. His business in Germany was still profitable. Remote control of this business would not have been a feasible option in the long run. The

dominant driving factor, however, would have been greed. In the few years before coming to South Africa he earned a fortune on which he paid virtually no tax at all. He would have realised that he would not be able to continue financing his lavish lifestyle indefinitely without earning income again. In the circumstances it would have made sense for him to return to Germany.

[59] I find therefore that Mr Peters earning capacity should be valued on the assumption that he would have returned to Germany after a period of say one or two years in South Africa and then resumed his former business activities.

[60] The next issue concerns the effect of Mr Peter's tax evasion activities on plaintiff's claim. Mr Eia relied on the judgment in *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) for the contention that income illegally earned by a claimant cannot serve as a basis for the calculation of the damages to be awarded to him for his loss of earnings. In that case the Supreme Court of Appeal (as it is now known) refused to award compensation to the plaintiff for an alleged loss of earnings suffered by her because she had traded unlawfully as a hawker without the requisite licence from the local authority. The ratio for

the decision is that it would be against public policy to compensate a claimant for a loss of illegal earnings.

[61] The approach in *Dhlamini en 'n Ander v Protea Assurance Co Ltd supra* has been criticised. See the article by Mervyn Dendy entitled *Illegal income and remunerative loss* in 1998 THRHR 564 and 1999 THRHR 34 and 169. The basis for much of the criticism is the principle, now firmly established, that a claim sometimes described as one for the loss of earnings, is in fact a claim for a loss of the claimant's earning capacity which is an asset in his estate. See *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) para [10]:

> *"[10] ...on the facts of this case the nature of the loss ... is his diminished earning capacity. In Santam Versekeringsmaatskappy Bpk v Byleveldt 1 973 (2) SA 146 (A) Rumpff JA states the principle in the following terms, at 150B – D:*
>
> > *'In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoënsposisie van die benadeelde vóór die onregmatige daad en daarna.'*
>
> *The same learned Judge of Appeal again dealt with the principle in Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A). He says at 917B – D:*

'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.'"

[62] Mervyn Dendy's contention (see 1998 THRHR 581) is that once it is accepted that it is the loss of the claimant's earning capacity that falls to be compensated, then the mere fact that he had in the past earned his living in an illegal manner, does not necessarily imply that he would not have been capable of earning it in a legal manner or at least partially in a legal manner. If, on the other hand, the claimant has no earning capacity other than that based on his unlawful activities, he would not be able to recover any damages.

[63] The approach to focus on the claimant's loss of earning capacity in judging the effect of any illegal manner in which he had earned his income in the past, has been followed in a number of reported judgments:

- In *Lebona v President Versekeringsmaatskappy Bpk* 1991 (3) SA 395 (W) the court held that although the deceased had earned his income in an unlawful manner, the dependant's claim for loss of support had to be determined with reference to the deceased's earning capacity and not

with reference to his actual income. The deceased's capacity to earn (which was distinct from the question of how much he could have earned legally) was dependent upon his physical and mental condition, as well as his qualifications, job opportunities, etc.

- In *Dhlamini v Multilaterale Motorvoertuigongelukkefonds* 1992 (1) SA 802 (T) the earnings of the deceased had been derived from illegal taxi-driving. The court held that this was a relevant factor but it was probable that he would have changed over from illegal to legal tax-driving. The court dealt with this as a contingency factor.
- In *Minister of Police, Transkei v Xatula* 1994 (2) SA 680 (TkA) the court quoted the following passage in Kemp and Kemp *The Quantum of Damages* 4th ed part II paras 25-006--25-008 with reference to the question whether a dependant is entitled to damages only on the basis of what the deceased could have earned legally:

> *"it does not follow that the award would fully reflect the amount of the dependancy enjoyed prior to the deceased's death. For as was pointed out in Bagge's case the Court is entitled, in appropriate cases, to take into account the uncertainty of a criminal calling and the possibility of long*

and unprofitable spells in prison. In other cases, one may be able to say that if the illegality had ever been discovered it could never have been repeated and the deceased would have had to turn to lawful pursuits; in these cases the possibility of discovery and its consequences will be a factor in assessing the damages. Finally, the Court can take into account the possibility that the deceased might have seen the error of his ways and have voluntarily given up his illegal activities; but where he had for many years successfully pursued them without detection, the chance of sudden reform is unlikely to be great."

[64] I respectfully agree with Mervyn Dendy's contention and the similar approach reflected in the judgments mentioned above. It seems to me, moreover, that there is no real difference in principle between that approach and the judgment in *Dhlamini en 'n Ander v Protea Assurance Co Ltd supra.* The evidence in that case was that the plaintiff's claim for loss of earnings was entirely based on her occupation as a hawker without a licence. The decision was based on the finding that there was no evidence whatever to suggest that the plaintiff could or would have earned any income in any other legitimate way. In fact therefore Ms Dhlamini had no earning capacity at all that could be employed in a legal manner.

[65] Mr Crowe's answer to the defence that Mr Peters earned his income illegally is that his tax evasion activities, whether in the past or in the future, are irrelevant. There was nothing illegal about his business or the manner in which he ran it. His income had therefore been acquired in a legitimate manner in the past and would have been acquired in the same manner in the future. The illegal tax evasion, according to this argument, did not taint the legitimacy of his income producing activities. It is a matter between him and the tax authorities which does not concern defendant or his claim.

[66] It seems to me however that Mr Crowe's argument loses sight of the probable sequence of events had Mr Peters returned to Germany and continued to run his business. He would have earned income and he would have been obliged to pay tax on that income. Whether he would have continued with his former fraudulent conduct or decided to turn over a new leaf and pay tax on his income is not particularly relevant.

[65] In either event one can safely assume that he would not of his own accord have informed the tax authorities of his tax evasion activities. Mr Peters' illegal conduct was, however, not simply a

contravention of fiscal legislation. It was nothing less than common law fraud. Fraud is defined in South Africa as the SNYMAN

Misrepresentation

Continuing offence

There is no evidence before me to suggest that fraud has a different meaning or different elements in German law.

A misrepresentation may also be made by conduct or by silence in circumstances where there is a legal duty to disclose the fact in question. See *S v Mbokazi* 1998 (1) SACR 438 (N) at 445fg.

[66] Having defrauded the fiscus for many years of millions of German Marks, it seems to me that he would have been legally bound to disclose these facts to the tax authorities. The tax authorities have a public duty to collect tax and investigate tax evasion. Mr Peters had a concomitant duty not to thwart them in the execution of their. The continuation of the business in these circumstances and the submission of tax returns without any mention of the former misleading understatement of his taxable income would amount to a perpetuation of the fraud. The relevance of this fraud is not that it rendered the business per se

illegal. The relevance is that it would have served to prevent the collapse of the business once the fraud became known.

[67] It is in any event clear from the evidence presented by plaintiff that the German tax authorities were closing in on Mr Peters. Ms Holzmann's evidence was that the tax authorities had investigated and uncovered the Adriana Holzmann Pressevertrieb scheme. They knew that Mr Peters was the principal author of this scheme but for some or other reason they did not pursue the matter against him immediately. The reason for this is not clear. Ms Holzmann must have known what happened but she suggested that Dr Heinzpeter handled everything on her behalf and that she was only told by him about the options that were given to her. Dr Heinzpeter, according to plaintiff's counsel, was not prepared to come to South Africa to testify in this matter. That may be so but there was no explanation why the information could not have been obtained from him in Germany. He acted as legal adviser to Mr Peters and Ms Holzmann at the time and he would have been obliged to provide the information to them or their legal representatives. The only plausible reason for the failure of the tax authorities to pursue the matter against Mr Peters or his estate is

that they were persuaded, on compassionate grounds, to leave him alone.

[68] One of the documents placed before the court by plaintiff is headed "*Search warrant and order of attachment*". It is dated 3 February 2003 and it emanated from the Dortmund Local Court. It was issued in criminal proceedings against Mr Peters for suspected sales tax, income tax and trade tax evasion in the years 2001 and 2002 and the forgery of documents. The search warrant authorised the search of the premises of the company Dietrich OHG in Dortmund. This is the company to whom the stock of Mr Peters' business was sold in December 2001.

[69] Plaintiff's witnesses did not provide any information in regard to the execution of this search warrant or the further consequences thereof. Nor was any information provided in regard to the criminal proceedings mentioned in the warrant. Ms Holzmann would have known what the outcome of these proceedings was but she did not provide any information in this regard to the court. Plaintiff's representatives would have been able to get the relevant information from the tax authorities or the court that authorised the warrant but they did not place any such information before the

court. One can only assume again that the tax authorities were persuaded to withdraw the criminal proceedings against Mr Peters on compassionate grounds .

[70] Had Mr Peters not been involved in the accident there can be little doubt that the criminal proceedings would not have been withdrawn. Nor can there be any doubt as to the likely outcome of such proceedings. The extent of Mr Peters' fraud over a three year period was DM (R in current terms). In South Africa the minimum sentence for fraud of this magnitude is 15 years imprisonment in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1977. In the present case the blatancy and magnitude of the fraud would have been aggravating factors. Mr Peters paid virtually no tax at all. Instead he wasted his money on things such as 40 Versace suits and ridiculously expensive watches. I have no reason to believe that a German court would have imposed a more lenient sentence than a South African would.

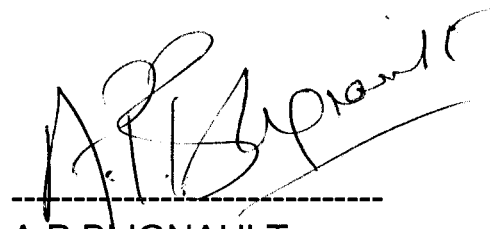
[71] There is no evidence before me from which I can infer that Mr Peters would have been able to earn any income whilst incarcerated. There is also no evidence from which I can infer that

he would have been able earn anything after discharged from prison after serving say 10 years of his sentence. He would have been 61 years old. There would have been nothing left of his business. His financial reserves would have been depleted. He would have had no contacts in the industry. Building up a new business in these circumstances would have been highly problematical. The stigma attaching to him as a result of his detention would have made it difficult for him to build new business relationships. He did not have had the skills or experience for any other vocation or profession.

[72] In the circumstances I am of the view that it has not been proved that Mr Peters had a residual earning capacity with any value at the time of the accident. It follows that plaintiff has not proved any loss of an earning capacity.

[73] Defendant has been successful and it is entitled to its costs. Although defendant called Mr Seaward as an expert witness I do not, in the absence of any meaningful contribution by him to the resolution of the issues in the matter, propose to make a special order that his preparation fees and expenses be paid by plaintiff.

[74] In the result, judgment is granted in favour of defendant and plaintiff's claim is dismissed. Plaintiff is ordered to pay defendant's costs.



A P BLIGNAULT