Republic of South Africa

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

In the application between:

Case no: A 134/2013

QUINTON EDWARD GRANT MILLER Appellant

v

ROAD ACCIDENT FUND Respondent

Court: Mr JusticeBozalek, Mr JusticeBinns-Ward*et*Mrs Justice Cloete

Heard:26 July 2013 and 1 August 2013

Delivered:12 September 2013

JUDGMENT

CLOETE J:

Introduction:

[1] This is an appeal against orders made by the court *a quo* in respect of the appellant's past and future loss of earnings which, it is alleged, were caused as a result of injuries that he sustained in a motor vehicle collision that occurred on 21 June 2004. The appeal is brought with the leave of the Judge President, who heard the application for leave to appeal after the trial judge (Ngewu AJ) had completed her temporary tenure on the Bench. It is no longer in dispute that the negligence of the insured driver concerned was the sole cause of the collision.

[2] The amount claimed at trial by the appellant (*'Miller'*) for past loss of earnings was R2 099 410.85 and the amount awarded was R90 670.86. The amount claimed for future loss of earnings was R4 239 700 and no amount was awarded in respect thereof. The award by the trial court of the sum of R90 670 as a component of the claim for past loss of earnings is not in issue on appeal, and in fact was an amount conceded by the respondent at the trial. The appeal in respect of past loss of earnings thus concerns only the question whether Miller should have obtained an award in an amount exceeding that made by the court a quo.

[3] There was initially a purported cross-appeal by the respondent (*'the RAF'*) but by the time of the hearing that was effectively abandoned. The cross-appeal was in any event not competently lodged, given that leave to cross-appeal had not been obtained.

[4] The claim for loss of earnings (both past and future) was introduced in the action only some two years after the statutory claim for compensation had been submitted in 2006. The major part of the claim was predicated on the alleged consequences of the extent of the depression suffered by Miller post-collision which, it was contended, affected his ability to properly carry out his work as an architect on a major building project (The Decks) in which he was involved at the time of the collision and during the ensuing three years. Miller's case was that hisdeficient performance on The Decks caused him reputational damage, which in turn impacted negatively on his ability to obtain more remunerative work thereafter.

[5] A fundamental difficulty confronting this court on appeal is that many of the material factual findings which we would expect in order to determine the issues before us are not apparent from the judgment of the trial court. Although the evidence and the respective parties' contentions were summarised at some length, the trial court did not analyse them in any meaningful way, refrained from making credibility findings in respect of the lay witnesses, and similarly refrained from determining the areas of conflict in the expert opinion evidence as well as to what extent such evidence was admissible. We thus, somewhat unsatisfactorily for an appeal court, have to work with something of a blank canvas and must consequently determine the appeal on a purely objective impression of the totality of the admissible evidence viewed against the inherent probabilities.

[6] The award by the trial court of R90 670.86 for past loss of earnings was premised on a concession by the RAF that such amount might properly be awarded. It

related to overtime payments made by the close corporation, through which Miller (as sole member) conducted his architectural practice, to certain employees and a colleague for extra work done on The Decks, as well as an unrelated project in Durban, because of Miller's physical indisposition after the collision.

[7] This notwithstanding, the trial court, however, refused to make any award in respect of future loss of earningssolely on the basis of the approach set out in *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) especially at paras [11] and [13]. In *Rudman* the court held that proof of a loss sustained by a corporate entity through which the plaintiff conducted his business and in which he had a proprietary interest did not constitute proof of the diminution, if any, in the plaintiff's patrimony. However the Supreme Court of Appeal made it clear that its conclusion was based on the particular facts of that case which are entirely distinguishable from those in the present matter. In the current matter, unlike the position in *Rudman*, Miller's close corporation was nothing other than a conduit for his sole source of income which was the feesthat he generated as an architect. At the commencement of argument before us senior counsel for the RAF (who did not appear in the court a quo) abandoned reliance on *Rudman* and thus this aspect of the matter requires no further comment.

[8] Although treated in the court *a quo* as a claim for *'future loss of earnings'* it was accepted during argument on appeal that this head of damages is more properly described as a *'loss of earning capacity'*: see for example *Santam*

Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 (AD) at 150B-C; *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 111C-D.

[9] Earning capacity, as the trial court correctly recognised,*may* constitute part of a person's patrimonial estate and, if it does, its loss may be compensable to the extent that the loss is quantifiable as a diminution in the value of the estate: see *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917B-D.

[10] Miller's complaint is not that he is unable (apart from the six month period immediately following the collision, which has been addressed by the aforementioned award of R90 670 made by the trial court) to practice as an architect as a result of the injuries that he sustained in the collision and his consequent severe depression; it is that because of the alleged consequent damage to his reputation he is not able to earn what he could have earned had there been no collision. This claim is divided into two parts, namely past loss of earnings which is a form of special damages, and future loss of earning capacity which, as mentioned, is a category of general damages. In order to assess Miller's claim I shall first address factual causation and thereafter legal causation which will in turn include a consideration of the two heads of damages.

Factual Causation:

[11] The test for factual causation was explained in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (AD) at 700E-G as follows:

> *'The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a* causa sine qua non *of the loss in question.In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss.'*

[12] It is not in dispute that prior to the collision Miller was a gifted, accomplished architect with a growing practice of his own and particular expertise in the restoration of historic buildings. The Decks project was Miller's brainchild and he had conceptualised it over a number of years before approaching a property development company with his idea.

[13] The project involved combining four historical buildings in the Cape Town CBD into one complex, while at the same time preserving the facades of two of the buildings which, being over 100 years old, fell under the auspices of the Heritage Council, with the attendant red tape that heritage authorisation entails. It was also a large, difficult project that would involve retaining street level retail space, above which would be added nine parking levels and six levels of upmarket residential units. The RAF did not dispute the evidence that The Decks was a pioneer project in the ongoing rejuvenation which was expected to last some years in the Cape Town CBD; nor did it dispute that prior to the accident Miller had performed satisfactorily

on all other projects for which he had been appointed as architect. Miller had previously been a partner in a large firm of architects with a national practice but, after the dissolution of that partnership due to financial problems, he had started his own small practice approximately five years before the collision. At the time of the collision the new practice was staffed by Miller, a young architect employed as his assistant, two draughtsmen and Miller's wife, who attended to the administration. Although the gross income generated by the new practice grew steeply during the aforementioned five year period, The Decks was the first project of a significant scale in which Miller was engaged after he started his own practice.

[14] Miller was severely injured in the collision and was bedridden for a period of three months thereafter at a crucial stage of the project, when he wouldotherwise not only have been actively involved in securing Heritage Council approval but also intricately involved in the pre-construction stage. The weight of the evidence was further that Miller's rolewas pivotal for the successful advancement of the project to completion and that in particular this lay in the fact that much of the concept was *'in his head'*.

[15] There can be little doubt that Miller had a pre-existing psychological vulnerability which, according to him, was severely exacerbated to the point of debilitating depression when he found himself unable to competently fulfil his role in The Decks project as a result of the physical injuries that he had sustained in the collision. The opinion of both of the psychologists who testified for the parties was that the collision itself would certainly have caused acute psychological distress to

a person with Miller's *'goal-directed propensities'*. In essence, Miller's mood and self-esteem were directly dependent upon his professional performance. If his performance was compromised, so too were his mood and self-esteem. Moreover, because of his particular psychological vulnerability the consequences to him psychologically were more severe than they would have been to the average individual.

[16] It was Miller's testimony that The Decks project was important to him because it was to be executed in the most historically sensitive area in the Cape Town CBD and was a pilot project which would also have brought him not only professional esteem, but would also have put him on the map for future developments of this nature. There are only a handful of architects who have this speciality. This evidence was not challenged.

[17] Miller testified that after the accident he found it a *'nightmare'* going back to work because *'suddenly from this dream and this excitement there was massive pressure to get the Council drawings finished, to get Heritage approval, to get a contractor on site. And from this dream it suddenly became a huge pressure situation'.* He would attend meetings and return to his office with lists. He said *'I found myself looking at these lists and not knowing what to do with them. I felt paralysed. I felt an inertia. I found it hard to delegate. I didn't know where to start…they were long lists and I found myself panicking because I didn't know how to get from point A to point B. Previously I was an organised person and I didn't panic and I could structure things. And I was quietly confident. But I found myself*

having been out of the picture for three months. I was shocked to come back into it because there was so much activity and so much work to be done that I didn't know how to instruct Barak[his employee who stepped in to assist]*….I lost the confidence to say we need to do this… I remember I would lie down on the floor under the desk and I would go to sleep and my wife would wake me up after half an hour. And I would get back up and she would bring me some coffee and I would start looking at these lists again and then the phone would ring and it would be Mike Bradshaw*[the project manager]*. Can I go to site. Can I attend a meeting. And I didn't have the stamina that I had before... I also was still in pain and … I would get headaches … my stomach would go into a knot … I just wouldn't know how to cope with it so I started to lose my self-confidence and I didn't want anyone to see that because they previously had been looking up to me to lead the design team. Suddenly I was on the back foot. I was playing catch-up in a situation that I couldn't catch up so every week I was getting more and more panicky … I wasn't closing the gap. The gap was getting bigger and bigger.'*

[18] The psychological consequences to Miller were corroborated by the testimony of his wife and Mr Rob Kane (*'Kane'*),who was a director of the property development company involved in The Decks project. Although Kane was obviously not able to directly attribute the change in Miller to the *sequelae* of the collision, he was consistent in his testimony that after Miller returned to work following the collision *'…he was different. It took me some months to realise and I realised two things. One is the detailed design work that we thought was happening was not happening. And two, Quinton Miller was very different. He had lost a lot of – it*

seemed as if he had lost a lot of confidence and I think the term I used once, which I stand by, is that that accident had knocked the stuffing out of him. There was a very material change in the man'.

[19] Kane explained why the developer had not replaced Miller when the problems started surfacing. He testified that not only was it hoped that Miller would recover,but that it was a complicated development and much of the information was in Miller's head. To have another architect replace him would have given rise to serious financial implications (an enormous fee to the new architect); there was the risk that the new architect would not understand some of the designs; and another architect would have been reluctant to take over because if any problems had arisen he would have been the one ultimately responsible for the final product. It was Kane's testimony that due to Miller's condition post-collision the information flow (which increased as the project progressed) suffered materially although the contractor was also causing delays and the structural engineer minor delays. The late information flow gave the contractor the excuse to blame Miller for its own lack of performance. Construction was scheduled to start in June 2004 and to be completed in July 2006, but the main construction only started in February 2005 and the project was only ultimately completed in July 2007. It was Kane's evidence that Miller's lack of performance post-collision*'was not the only problem, but he was a major problem'.*

[20] It was Miller's testimony that his lack of performance on The Decks resulted in Kane refusing to appoint him as an architect in future projects; that word got around in

the industry that he had become a high risk architect and this similarly resulted in him not being able to secure remunerative work of the same standard; and that Mr Chico Mereilles (*'Mereilles'*), who had wished to appoint him as an architectural subcontractor on a large commercial project, had decided against doing so after contacting Kane for a reference. This evidence was corroborated in all material respects by both Kane and Mereilles. At the risk of repetition it was this reputational damage which, it was alleged, resulted in the loss sustained by Miller.

[21] It was the RAF's stance that Miller was already significantly depressed before the collision; that after the collision he was confronted by various serious but unrelated personal stressors which had, at the very least, contributed to his later depression; and that the true reason for his fallout with Kane was an ongoing fee dispute which ultimately resulted in him threatening to walk off site and paying attention to another project when he should have been concentrating on The Decks. It was also contended– variously –that Miller had indeed performed on the project; but to the extent that he might not have performed this had only played a minor role in the delays and had not significantly increased costs in the completion of the project.

[22] However, even if Miller was depressed before the collision there was no evidence to indicate that his condition had impacted on his prior professional performance in any way. In fact shortly before the collision he had completed a show flat for The Decks in record time and Kane in his testimony described Miller's performance as exemplary. The weight of the evidence was rather that the cracks started to show as soon as Miller was physically able to return to work on the project after the

collision and endured for a considerable period of time thereafter. It was also common cause that he was still being treated for depression when the trial took place in 2010. In addition, Miller had dealt with a number of harsh personal setbacks in the past, but none of these had affected his work as an architect. Certainly, those that he faced post-collision (and after his return to work) would no doubt have had some effect on his psychological condition, but the point is that the origin of his heightened state of psychological vulnerability coincided with his return to work after the collision.

[23] There was indeed a dispute over fees, but the RAF's attempt to portray this as a burning issue from the inception of the project cannot be accepted. It was the testimony of all of the witnesses who have direct knowledge of the construction industry, namely Miller, Kane and Mereilles, that tough fee negotiations are par for the course in this type of project. It was also the evidence of both Miller and Kane that after the initial fee tussle in 2004 (which pre-dated the collision and the outcome of which Miller, although not happy, accepted) the issue only really reared its head again in the latter half of 2006. This was at a time when all involved in the project were on edge as a result of the delays and significantly increased costs. It seems clear that no-one involved had anticipated what was to come as the development progressed, and that when the shoe really started to pinch it became a matter of protecting oneself against claims while at the same time attempting to extract as much financial benefit as possible.

[24] Although there were tensions between Miller and Kane these were not only financial. There was also the evidence of Mereilles that Kane had never told him that he felt blackmailed by Miller when he threatened to walk off The Decks project over the fee dispute in 2006; nor that Kane had felt angry that Miller by that stage was focusing on a project other than The Decks. His testimony was that Kane's complaint related only to Miller's lack of performance on the project in the period following the collision.

[25] Although at liberty to do so the RAF did not adduce any evidence directly contradicting the testimony of Miller and his witnesses on these aspects. Instead it relied largely on the testimony of Mr Trevor Foster, an expert accountant who appears to have assumed the role of what can best be described as a private investigator and who attempted to interpret the construction records relating to The Decks in conjunction with interviews with Miller, Kane and various others in support of the RAF's version. Much of Foster's testimony on these aspects fell outside of his area of expertise, although some of his evidence concerning the computation of Miller's claim for loss of earning capacity was valuable and led to it being substantially reduced. In addition, the later, qualified opinion of the RAF's expert psychologist, Mr Loebenstein, that Miller's post-collision psychological condition might well have been attributable to various factors raised by Foster, cannot be accepted, given that it was based on conclusions reached by Foster that fell outside of his field of expertise. The same applies to the evidence of the RAF's expert industrial psychologist, Mr Hannes Swart, who *inter alia* expressed opinions

on the degree of complexity of the project, something which he similarly was not qualified to testify about.

[26] Having regard to the aforegoing I am persuaded that, viewed against the totality of the admissible evidence as well as the inherent probabilities, Miller has succeeded in proving that the collision and its *sequelae* were the direct cause of the psychological condition in which he found himself thereafter. That however is not the end of the matter, since it is nonetheless necessary to consider whether the loss allegedly suffered by Miller is sufficiently closely linked to the *sequelae* of the collision.

Legal causation:

[27] In *International Shipping Co (Pty) Ltd v Bentley* (*supra*) the court explained the test for legal causation at 700H-701C as follows:

> *'On the other hand, demonstration that the wrongful act was a* causa sine qua non *of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation". (See generally* Minister ofPolice v Skosana *1977 (1) SA 31 (A) at 34E - 35A, 43E - 44B;* Standard Bank of South Africa Ltd vCoetsee 1981 (1) SA 1131 (A) *at 1138H - 1139C;* S v Daniëls en 'n Ander *1983 (3) SA 275 (A) at 331B - 332A;* Siman & Co (Pty) Ltd v BarclaysNational Bank Ltd *1984 (2) SA 888 (A) at 914F - 915H; S v Mokgethi en Andere, a recent and hitherto unreported judgment of this Court, at pp 18 - 24.) Fleming* The Law of Torts *7th ed at 173 sums up this second enquiry as follows:*

> *'The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.'*

[28] During argument before us Miller's claim for past loss of earnings was revised and reduced to two possible scenarios, and amounts were put forward on the basis of each scenario. It was suggested that the mid-point between these two scenarios represented the appropriate amount to be awarded.

[29] The first scenario, on which an amount was postulated of R2 578 494, was described by Miller's senior counsel himself as *'overly optimistic'* and *'the top point'* and it was not suggested that this scenario should be adopted. To my mind, it would, in the circumstances, be artificial to use the first scenario to arrive at any *'mid-point'*. The second scenario – clearly more realistic – was calculated on the basis of three categories of past loss of earnings and an amount was postulated of R703 249.

[30] The first category related to an amount of R270 466 (i.e. R416 102 less 35% tax) which Miller claimed he would have received from the development company represented by Kane (and which I will refer to as *'Vunani'*) at the end of The Decks

project had he fully performed. It was conceded by Miller's senior counsel that this amount represented an alleged contractual entitlement based on the increased cost of the project.

[31] This claim faces aninsurmountable difficulty. On Miller's own version he failed to pursue the enforcement of his contractual rights against Vunani.Miller's counsel sought to argue that a delictual claim co-existed with the contractual claim and that it was a matter of choice which to pursue. While it is correct that the same set of facts can give rise to a damages claim that can be formulated either incontractor in delict (see e.g.*Holzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA), at paras [5] – [7]), thataxiom does not support the notion that a person canelect to forego enforcing a contractual claim and choose to recover its value by surrogate means as delictual damages. Indeed, under questioning by the bench, Miller's counsel were driven to concede that the contractual claim formed part of Miller's patrimony and that to succeed in recovering its value in a delictual action he would have to prove not only the value of the claim, but also that Miller's abilityto exact it against Vunani had been lost as a consequence of the negligent and wrongful actions of the RAF. Miller not only did not pertinently plead the claim (a broadbrush reference in the amended particulars of claim to the content of the reports of his expert accountant Mr Eric De Kroon, and actuary Mr AlexMunro, did not suffice in this regard), he came nowhere discharging the onus to establish it.

[32] It was also in any event apparent from Kane's evidence that, apart from his dissatisfaction with Miller's performance, he did not agree that Miller would

otherwise have been entitled to payment of this amount. Both Kane and Miller testified that there was a dispute towards the end of the project about whether or not he was entitled to a fixed fee or whether his fee was to have varied according to the contract sum as finally determined. The high water mark of Kane's evidence was that, had Miller performed well, he *'believed'* that he would nonetheless have paid Miller something approximating the additional amount as it would have been fair and reasonable to do so. That evidence was entirely conjectural. In the context of a project that was,by the advanced stage of execution that had been reached when the question of additional payment would have presented itself, plainly going to result in a financial loss to Vunani, it is inherently improbable that the company would have been inclined to make *ex gratia*additional payments to professionals engaged on it. The evidence is that additional payments were indeed made to Bradshaw, the project manager, and to Miller. However these additional payments were made because Vunani wished to keep them engaged on the project after the period within which it had been expected the work would be completed had elapsed and not as a matter of generosity, or a token of appreciation. In Miller's case it is evident that Vunani's directors were of the view that it would be considerably more expensive to the company were Miller to walk away from the project thereby forcing them to employ a replacement than it would be to accede to Miller's demand for continued payments of R75 000 per month for the period December 2006 to March 2007.

[33] I would therefore make no award in respect of what I have labelled the first category of Miller's claim for past loss of earnings.

[34] The second category of the claim for past loss of earnings related to the amount that Miller claims he would have been paid by Mereilles had the latter not been dissuaded from appointing him on a project after a poor reference from Kane.

[35] Mereilles is an architect who had been acquainted with Miller professionally for a number of years. Mereilles testified that during 2007 he was contacted by Miller who was seeking work. Mereilles was looking to appoint a senior architect in a subcontractor capacity to assist him with a large commercial project called The Pepper Club, also in the Cape Town CBD. Mereilles had occasion to discuss this with Kane who made clear his dissatisfaction with Miller's performance on The Decks. As a direct result of this conversation Mereilles decided against appointing Miller. Had Miller been appointed he would have been paid between R25 000 and R30 000 per month for a period that was envisaged at that stage to endure for 12 months. However it transpired instead that the project lasted three years (i.e. 2008 to 2010). Mereilles testified that there was a *'very high chance'* that if he had been satisfied with Miller's performance he would have retained him for the full three year period.

[36] Miller's claim for loss of income from Mereilles was predicated on him having been employed at an average monthly fee of R27 500 per month for the full three year period, which equates to R257 400 after deduction of 60% for *'sales and overheads'* and 35% tax. These were the percentage deductions on which Miller himself made his calculations.

[37] In my view Miller succeeded in establishing that but for the reputational damage he had suffered as a consequence of his deficient performance on The Decks he would probably have been employed by Mereilles. I also consider that it has been established that his average gross monthly remuneration in such employment would have been R27 500. It would be appropriate to subject any award calculated on the aforegoing basis to a significant deduction for contingencies; cf.e.g.*A A Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 813C-D. This is so particularly having regard to the computation of the claim with relation to the three year period involved in the completion of the Pepper Club.

[38] It was not canvassed in evidence why the Pepper Club project ran over by two years, nor was there any evidence about what steps could or should have been taken to shorten the length of the project. It is thus conceivable that had Miller been appointed, and performed, he may have been able to direct the project to earlier completion with his particular skill and experience. In addition, one cannot entirely discount the possibility that another, unforeseen event, occurring at any stage of the Pepper Club project, might have had a significantly negative impact on Miller's pre-existing psychological vulnerability, which could independently have affected his work performance.

[39] Taking these factors into account it would be appropriate, in my view, to apply a contingency deduction of 40% to the net amount Miller could have earned had he been subcontracted for three years to Mereilles:

Total gross fee income at R27 500 per month	
x 36 months (mid-2007/2008 – 2010)	990 000
Less: 40% of R27 500 per month x 24 months	264 000
	726 000
Less: 60% cost of sales and overheads	435 600
	290 400
Less: 35% tax	101 640
	188 760

[40] The third category of the claim for past loss of earnings is based on Kane's evidence in chief that had Miller performed on The Decks he would have included him as part of the professional team on three other projects in which Vunani was engaged during 2009 and 2010. These were Jewellery Avenue, 14 Long Street and Wale Street Chambers. The architects appointed were paid R228 000 for Jewellery Avenue, R215 800 for 14 Long Street and, by the time of the trial in 2010, R230 750 for Wale Street Chambers, totalling in all the sum of R674 550.

[41] However during cross-examination Kane accepted that it was normal business practice to *'diversify'* a professional team among projects, and that there was thus no guarantee that Miller would have been the only architect appointed, even though Kane was clear that Miller would have been capable of the work (they were run of the mill projects) were it not for his post-collision condition. In addition it must be borne in mind that, had Miller also been appointed by Mereilles, he would have

been engaged in more than one project at a time over a period of at least 18 months (i.e. January 2009 until mid-2010).

[42] Having regard to the aforegoing, includingMiller's pre-existing psychological vulnerability and the fact that the effect of his employment on the Vunani projects has already been accounted as an adverse contingency in respect of the Pepper Club based computation, it would be appropriate to apply a 35% contingency deduction to this category, with the following result:

Total gross fee income for Vunani projects (2009 – 2010)	674 550
Less: 35% contingency deduction	236 093
	438 457
Less: 60% cost of sales and overheads	263 074
	175 383
Less: 35% tax	61 384
	113 999

[43] The total net earnings from Mereilles and Vunani is thus recalculated in the amount of R303 000(i.e. R189 000 + R114 000). I do not believe that it is appropriate to deduct the actual income earned by Miller over the same period. It can be accepted in his favour that he would have been able to accommodate all of the work, given that his actual work over the period was relatively little.

[44] Lest it might be thought that I have only taken into account negative contingencies and made no allowance for the possibility that successful performance on The

Decks project might have kick-started Miller into a higher income earning bracket on more lucrative projects over the same period, I should perhaps expressly record that this has not been the case. I have accepted that pre-collision Miller was regarded as a gifted architect with a particular talent in an area in which he would only have had to compete with a handful of others; that he had the necessary professional contacts at both the Heritage Council and the local authority; and that The Decks was a unique project at the time. To be balanced against these factors, however, are the industry statistics provided by an economist, Professor Bayat, which both parties accepted and which reflected no fluctuation in earnings in the industry in 2008 but a reduction of 15% in 2009 and a further reduction of 50% in 2010. Based on these statistics it is reasonable to assume that Miller would in any event have had to compete in a falling market at least during 2009 and 2010.

[45] It is recognised by our courts that it is not necessary for damages to be assessed with mathematical precision, and that a court's task in estimating damages is always a difficult one: see *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (DCLD) at 287D-F where it was said that:

> *'Basically, one has evidence as to the plaintiff's affairs, but when, in addition, the future has to be scanned, the Court is virtually called upon to ponder the imponderable. However, no better system for assessing damages has yet been evolved, and the Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have only to add that the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense.'*

[46] The aforementioned amount of R303 000 determined in respect of the claim for past loss of earnings falls to be added to the amount of R90 670 awarded by the trial court, which is unaffected by the issues dealt with on appeal. The total award for past loss of earnings will therefore now be in the amount of R393 670. (It should perhaps be noted that insofar as *mora* interest on the past loss of earnings award is concerned, interest shall be payable on the aforementioned component of R90 670 with effect from 14 days after the date of the judgment of the court a quo, and in respect of the balance of R303 000 with effect from 14 days after the date of this judgment.)

[47] I shall now deal with Miller's claim for loss of earning capacity. During argument before us Miller's senior counsel,advisedly in my view, abandoned any reliance on a mathematical or actuarial approach and submitted that it would be appropriate to make a globular award which is fair and reasonable in the circumstances. On the other hand senior counsel for the RAF urged us to make no award at all. However there can be little doubt that Miller's reputational damage in the years that followed after The Decks is sufficiently directly linked to the effect of the injuries as not to be too remote. This notwithstanding, and for the reasons that follow, I am not persuaded that Miller is entitled to compensation in an amount of anything near to the sum of R4.2 million claimed by him in the court *a quo.*

[48] Miller had left another firm to commence practice for his own account during 1999. The evidence was that in the following five year period leading up to the collision his practice had grown in leaps and bounds and his income was on a sharp upward

trajectory. However this is only to be expected when an experienced professional starts a new practice and it does not necessarily follow that the trajectory, which started from a very low base and by the time of the collision had still reached only a relatively modest level, would have continued. In a small practice the capacity to increase earnings would become limited by resources within a reasonably short period. Only so much can be done within a certain time by one person. There was no evidence to indicate that Miller intended to expand his practice into a large concern. Indeed, his evidence of his experience of over-extension at his previous firm would have provided a disincentive to following that course.

[49] As regards future Vunani projects, Kane's evidence did not establish any reliable basis for postulating an estimate of what Miller might have earned going forward. Although Kane clearly tried to put a positive spin on his predictions, in reality they boiled down to the following. There was a project in Salt River where a feasibility study and preliminary drawings had been completed. Up to that point the architects had worked on risk. The total value of the project was estimated to be R230 million and Kane's testimony was that *'I would say our chance of success is certainly more than 50%, probably 65, 70%, but it's difficult to say. We do a lot of abortive work. This year I've probably looked at 20 projects, but not all of them will come off… there's another* [project] *in Maitland… low income residential… the building value is about R7 million but it needs extensive renovation work done to it'.* Kane estimated that, but for his performance on The Decks, Miller would have received 50% of the work for any Vunani project in Cape Town going forward.

[50] During cross-examination Kane referred to the Salt River project as *'the R230 million development that I am negotiating on now'.* His evidence was further that *'now I am getting back into the market because I believe by the time I have finished building those units* [i.e. in Salt River] *in 18 months, 2 years' time, the market will be back. And I hope I am right'.* He also testified that *'I anticipate doing approximately R110 million worth of development work in Cape Town per annum. That may vary. It may be larger, it may be smaller, it depends on the projects that I find and the value of those projects. At the moment I am looking at one large project, for R230 million'*.

[51] Kane's predictions were thus at best speculative and there was no other direct evidence to indicate that Miller would in the future have definitely obtained other lucrative work.

[52] In addition Miller's claim for future loss of earnings in the court *a quo* was based on the assumption that he would retire either at the age of 65 in 2016 or at 70 in 2021. At the time of trial in 2010 Miller was 59 years old, and on his own version he thus anticipated working for a maximum of a further 11 years.

[53] The evidence was also that during the period between The Decks and the trial Miller had in fact - albeit largely unsuccessfully – marketed himself, but had nonetheless completed a project in Hout Bay, been involved in a hotel development project in Swellendam (which ground to a halt for reasons unrelated to Miller), and had been the architect on a few residential projects (which also

came to an end when the client passed away). These setbacks cannot be laid at the RAF's door. There was also no suggestion that Miller had not performed well on these projects. It is thus probable that the reputational damage which he suffered as a consequence of The Decks is something that Miller will be able to overcome and it accordingly has to be given diminishing effect over time.

[54] Further the economic decline in the industry would undoubtedly have played a role in Miller's future earning capacity and in particular his involvement on large commercial projects. Also, as previously mentioned, it is not a given that Miller would not have had a career setback as a result of an unrelated event or events which would have impacted negatively on his pre-existing psychological vulnerability.

[55] On the other hand there was the evidence that other successful architects had been able to rely on the momentum from prior large projects to see them through the economic downturn for the reason that these projects take so long to design and build. Miller had lost out on these opportunities (particularly the surge of big commercial projects leading up to the 2010 FIFA World Cup) and thus on the momentum which other architects had relied upon going forward thereafter. It was also common cause that Miller was a gifted architect with a particular talent and it was never suggested that he would in any event have been compelled to scramble along with mediocre professionals to secure work.

[56] As to the late introduction of the claim for loss of earnings in 2009, it was Miller's evidence that he had only come to realise the full extent of the reputational damage during 2008. I have no difficulty in accepting this despite the RAF's contention that the entire claim was nothing other than opportunistic.

[57] In *Burger v Union National South British Insurance Co* 1975 (4) SA 72 (WLD) at 74H-75A it was stated that:

> *'I do not think, however, where the available evidence established a likelihood of some fact, situation or event as a consequence of the collision which is incapable of quantification within narrow limits, that I am obliged, because the* onus *is on the plaintiff, to act on the possibility least favourable to her. Causation is one thing and quantification is another, although I readily concede that it is not always possible to distinguish clearly between them in cases like the present one. It has never, within the range of my knowledge and experience, been the approach of our Courts, when charged with the assessment of damages, to resolve by an application of the burden of proof such uncertainties as I have referred to. I am not dealing with a case in which the plaintiff could have called evidence to remove the uncertainty, but neglected to do so. I am referring to cases like* Turkstra Ltd.v. Richards*, 1926 T.P.D. 276, in which the plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the* quantum *of damage. The Court, in such a case, does the best it can with the material available. If it can do no better, it makes the "informed guess" referred to by HOLMES, J.A., in* Anthony and Another v. Cape Town Municipality*, 1967 (4) S.A. 445 (A.D.).'*

[58] Applying this approach and having regard to all of the factors set out above I am of the view that an amount of R250 000 would represent adequate compensation for Miller's future loss of earning capacity and that he is entitled to be awarded this amount which is fair and reasonable to both parties.

Conclusion:

[59] In the result the following order is made:

1. **The appeal is upheld with costs, including the costs of two counsel.**
2. **The award of the court *a quo* to the appellant for past loss of earnings is set aside and replaced with an order awarding R393 670(three hundred and ninety-three thousand six hundred and seventy rand) for past loss of earnings.**
3. **The respondent shall pay to the appellant the sum of R250 000 (two hundred and fifty thousand rand) in respect of his claim for loss of earning capacity.**
4. **Interest at 15,5% per annum a tempore morae shall be payable on the aforementioned amounts, subject to the provisions of s 17(3) of the Road Accident Fund Act 56 of 1996 and the observation in parenthesis at the end of paragraph [46] of this judgment.**

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J. I. CLOETE
Judge of the High Court

We concur:

_____
L. J. BOZALEK
Judge of the High Court

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A. G. BINNS-WARD
Judge of the High Court