FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO : 019/2004

PARTIES:	ROAD ACCIDENT FUND	APPELLANT (DEFENDANT)
	and	
	ADRIAN ERNEST ALBERT OBERHOLZER	RESPONDENT (PLAINTIFF)

RERENCE NUMBERS -

- Registrar: 377/2001

DATE HEARD: 25 MARCH 2004

DATE DELIVERED: 5 JULY 2004

JUDGE(S): NEPGEN J, CHETTY J, PILLAY AJ

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Applicant(s)/Appellant(s): HJ VAN DER LINDE SC
- for the accused/respondent(s): JT WHITEHEAD SC & LA SCHUBART

Instructing attorneys:

- Applicant(s)/Appellant(s): WILKE WEISS VAN ROOYEN AND PRESTON; NETTELTONS
- Respondent(s): GOLDBERG & DE VILLIERS; NEVILLE BORMAN & BOTHA

CASE INFORMATION -

- *Nature of proceedings* : FULL BENCH APPEAL

- *Topic*: DAMAGES FOR LOSS OF EARNINGS

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: CA 377/2001

In the matter between:

ROAD ACCIDENT FUND	**APPELLANT (DEFENDANT)**
and	
ADRIAN ERNEST ALBERT OBERHOLZER	**RESPONDENT (PLAINTIFF)**

JUDGMENT

NEPGEN, J:

[1] During the afternoon of 29 March 1998 the plaintiff (who is the respondent in the appeal and the cross-appellant in the cross-appeal) was riding his motorcycle along Thembani Road, Port Elizabeth when he was involved in a collision with a motor vehicle. As a result of injuries sustained by the plaintiff in this collision he instituted action against the defendant (the appellant in the appeal and the respondent in the cross-appeal) with a view to recovering damages he alleged he

had suffered. On 26 March 2001 the trial commenced before Jansen, J. Liability was disputed by the defendant. The trial Court found that such liability had been established, but held that the plaintiff had also been at fault in relation to the collision. An apportionment of 80% - 20% in favour of the plaintiff was applied.

[2] The damage suffered by the plaintiff was assessed in a total amount of R2 133 008-00 made up as follows:

Past hospital expenses	R 27 255-00
Past medical expenses	R 7 310-00
Loss of earnings	R 2 003 443-00
General damages	R 95 000-00
	R 2 133 008-00

The plaintiff was consequently awarded damages in the sum of R1 706 406-00 (80% of the aforementioned amount) and was also granted an order in terms of an undertaking given by the defendant in respect of future medical expenses. The costs of the action, which included various special costs orders, were awarded to the plaintiff as well.

[3] With the leave of the trial court the defendant appeals against the award made for loss of earnings as well as the orders that the costs were to include the

qualifying expenses of the orthopedic surgeon, Mr. MacKenzie, and the neurosurgeon, Mr. Keeley. The defendant had also, without success, sought leave to appeal against the trial court's finding on liability and the awards for past hospital expenses, past medical expenses and general damages. An application by the plaintiff for leave to cross-appeal was dismissed by the trial court, but the Supreme Court of Appeal granted the plaintiff leave to appeal against the award for general damages as well as the disallowance of the costs of the occupational therapist, Ms M Fourie.

[4] This judgment is concerned only with the award made by the trial court in respect of loss of earnings. The remaining issues with which the appeal and cross-appeal are concerned are dealt with by Chetty, J in a separate judgment.

[5] The plaintiff was born on 20 March 1963 and had therefore turned 35 years of age shortly before the accident. The trial judge described him as "a remarkable young man". This description was fully justified. After the plaintiff matriculated he underwent his military training and while doing this he joined the airforce permanently. It was while he was in the airforce that he started a business, which involved working with fiberglass. He had already, while at high school, gained experience in working with fiberglass by assisting a fisherman with whom he fished to build skiboats and also by building surfboards. While in the airforce the plaintiff again gained experience in working with fiberglass and in fact

received training in that regard. Armed with his experience in this field the plaintiff started manufacturing pedal boats. This was done in a garage of a house where he boarded. What the plaintiff did with the pedal boats he manufactured was to go to caravan parks where there were waterways and he would lease these boats to the caravan park owners who would hire them out at an hourly fee but pay him an annual fee. In 1987 the plaintiff resigned from the airforce because he felt that he would have a better chance of making a success manufacturing the pedal boats than staying in the airforce. The business was then known as Pleasure Boat Hire. After a time the business was moved to other premises, eventually being conducted on the premises from which it now operates. The business diversified in the sense that the plaintiff started manufacturing fiberglass gutters, rainwater tanks, fridge panels, filter covers, artificial rocks and various other items. The name of the business was changed to All Fiberglass in 1991, which was the year in which the plaintiff got married. He and his wife had been living together for some time before that on the premises, which was described as a smallholding, from where the business was conducted and they remained there after their marriage.

[6] I can do no better, in order to describe the extent to which the business developed and the role played by the plaintiff in such development, than to quote from the judgment of the trial judge, where he remarked as follows:

> "In 1990 he moved to a small holding and set up his business in the milking parlour on the site. He completed a course in bricklaying and started to build his current factory on his property. He not only undertook the building himself but also the electrical installations. He personally installed cranes, hoists and compressors. He gained experience in resin transfer moulding and purchased a glass craft resin-injecting machine….Over the years he developed his business, which started in a garage in a back yard, from nothing into a factory occupying a building of approximately 2000 m^2 with a turnover of R4,5 million per year".

[7] The financial statements of the business reflect its growth. In 1994 the business was run at a loss. The same occurred in the year thereafter. However, from 1996 the business started showing a profit. For the financial year ending February 1997, the month prior to the accident in which the plaintiff was injured, the income of the business before tax amounted to R9 938-00. Despite the effects the plaintiff's injuries had on his ability to participate in the affairs of the business, there was a dramatic increase in its earnings over the financial year thereafter, the income earned before tax amounting to R73 528-00. The reason for this increase in the income earned by the business, notwithstanding the plaintiff's inability to take any meaningful part in the affairs thereof, was the fact that the plaintiff had secured a contract with Welfit Oddy to manufacture end caps for their isotank containers and everything had already been put in place prior to the accident for these items to be manufactured on a large scale. Shortly prior to the accident the plaintiff had also secured a contract to manufacture a part, described as a swop body end, for a concern known as Consani. This concern is also a large manufacturer of containers.

[8] The evidence establishes quite clearly that the main reason for the growth of the business was the plaintiff's participation therein. Although other staff members were employed, the plaintiff was the person responsible for the success of the business. He devoted almost all his time to the business, working long hours, at times almost through the night, and during most weekends. He was the one who was qualified and able to make the patterns, from which the moulds were made which were used to manufacture the products that were sold. Through the plaintiff's endeavours the contracts with Welfit Oddy and Consani were secured. The plaintiff attended to the maintenance of the factory and the machinery therein. He was the one who attended to deliveries, also using this as an opportunity to improve his relationship with his clients.

[9] As a result of the injuries sustained by the plaintiff in the collision his participation in the business, as described above, came to an abrupt end. Details of such injuries and their sequelae appear from the judgment of Chetty, J. The plaintiff has been rendered permanently unable to make patterns. He can no longer attend to the maintenance of the machinery and the factory. Because of pain he experiences, he is unable to drive the vehicle which is used to make deliveries. That this is so is not in dispute. In order to ensure the continued operation of the business it has been necessary to make use of the services of a pattern maker, a maintenance man, as well as a driver. Although some of the

cross-examination of the plaintiff was directed at attempting to show that there was not really a need to use three different people, the necessity to do so in the circumstances was clearly established by the evidence.

[10] On 1 March 1999 the business was taken over by a company Cape Composite Manufacturing (Pty) Ltd. At the same time a trust, known as the Oberholzer Family Trust, was established. It is a discretionary trust. The trustees are the plaintiff, his wife and a member of the firm of chartered accountants Fisher Hoffmann Stride PKF. The beneficiaries of the trust are the plaintiff, his wife and their two children. The trust holds all the shares in the company. The directors of the company are the plaintiff and his wife, the plaintiff being the managing director. All this was done on the advice of the plaintiff's accountant in order to achieve tax benefits and for the purpose of more efficient estate planning. It served an additional purpose as well. The plaintiff had set his sights on the export market. This entitled him to an incentive bonus from the Department of Trade and Industry, provided the books of the business were audited. By transferring the business to a company such auditing would necessarily have to be done.

[11] The transfer of the business to the company took place by means of a sale. The purchase price had to be market related in terms of the relevant income tax legislation. A Deed of Sale (which no one appears to have seen) must have

been drawn up. The whole transaction was effected by way of book entries. No money changed hands. Everything continued as before, except for the fact that the plaintiff and his wife from then on received salaries, whereas that which they had previously taken out of the business had been reflected as drawings.

[12] It is the intervention of the company in the business affairs of the plaintiff that has caused much of the dispute that has arisen in respect of the plaintiff's claim for loss of earnings. The defendant's contentions in this regard emerged for the first time during cross-examination of the witness Greef, a chartered accountant who testified on behalf of the plaintiff. By then the plaintiff had concluded his evidence. When Greeff was being cross-examined it was specifically put to him that any loss suffered as a result of additional employees having to be employed to perform the work previously done by the plaintiff was the loss of the company and not that of the plaintiff. It appears that there was initially some confusion, when this line of cross-examination was adopted, as to whether or not the company had already taken over the business by the time the accident had occurred. This was clearly not the case. In any event, when the appeal was argued before us we were informed that the very principle on which the defendant relied was the subject of a matter which was going to be heard in the Supreme Court of Appeal, namely **Rudman v Road Accident Fund**, now reported in **2003 (2) SA 234 (SCA)**. After that judgment was delivered, the parties were afforded an opportunity to present further written argument to us,

which they did. Not surprisingly, the plaintiff's counsel sought to distinguish **Rudman's** case, while the defendant argued that it applied fully to the present matter. The applicability of that judgment to this case will be considered later.

[13] The manner in which the trial judge dealt with the claim for loss of earnings appears from the following portion of his judgment:

> "The plaintiff's claim for loss of earning capacity was defended on two grounds. The first defence relates to the position the plaintiff found himself in at the time of the collision being, a partner to his wife in the business, and later on an employer (sic) of a company Cape Composite (Pty) Ltd. It is common cause that the plaintiff was conducting business in equal partnership with his wife up to 1 March 1999, some time after the accident when they sold the business of the partnership to the company for a sum of R449 207-00. The shares of the company vest in the Oberholzer Family Trust, a discretionary trust of which plaintiff, his wife and their two children are the beneficiaries. The argument on behalf of the defendant further goes that the plaintiff's claim for loss of earning capacity, alternatively loss of future income, does not include a claim for damages for past loss of income. The plaintiff's claim therefore has to be calculated from the date of trial. At the date of trial the plaintiff was, so the argument goes, an employee and has not proved that he has lost any income due to him in terms of his contract of employment with the company. This defence is in my view without any foundation. The partnership in which the plaintiff operated at the time of the accident was a family partnership with him and his wife as equal partners. The plaintiff's wife was doing the administration and the plaintiff was responsible for the

> physical work. The plaintiff's inability to continue to do the physical work had a direct impact on the financial position of the partnership. The plaintiff had to employ three people to do his work. It was the plaintiff who lost his earning capacity for the partnership. The loss of earning capacity started at the time when the plaintiff got injured. The fact that the plaintiff decided to start a company and the decision of the partnership to sell the business to the company after the accident does not affect the position at all. Had it not been for the plaintiff's injury he would still have been in a position to do the work, albeit for the company. The remuneration of the three employees, which (sic) had to be employed to do the work which the plaintiff would otherwise have done, had it not been for the accident, constitutes a convenient method of calculating the value of the personal attributes which the plaintiff has lost as a result of the injuries. In my view, the proper method of assessing the plaintiff's loss is to value the extent by which his personal ability to earn an income has been diminished by reason of the disability caused by his injuries. It is common cause that he used to do certain work, that he can no longer do that work, and that people have been employed to do that work. The most accurate method of assessing the plaintiff's loss is to have regard to the costs of replacing his services. At present these costs are represented by the salaries and wages paid to the three employees."

The trial judge then referred to two cased in which it had been held that in certain instances it would be appropriate for the cost of employing a substitute to form the basis of a claim for damages arising from a plaintiff's inability to do the work he had previously done. Thereafter, and with reference to the evidence that had been presented, he concluded that the plaintiff would in all probability have got

someone else to drive for him approximately two years after the accident; that he would probably have employed an additional person to assist him with maintenance work four years after the accident; and that after seventeen years the plaintiff would have employed a pattern maker to enable him, that is the plaintiff, to concentrate on supervision, managing and marketing. I do not propose to repeat the calculations by the trial judge. Save for the failure to discount future damages, those calculations were not attacked on appeal. The calculations resulted in the trial judge arriving at a figure in excess of that claimed and he consequently awarded the plaintiff the amount claimed, namely R2 003 443-00.

[14] It is convenient to refer at this stage to the comment in that portion of the judgment quoted above that it was common cause that the plaintiff was conducting business in equal partnership with his wife until 1 March 1999. The matter was also argued before us on an acceptance that this was the position. Whether this is borne out by the evidence is, to say the least, doubtful. The plaintiff appeared to be uncertain. What does seem clear is that there was never any formal partnership agreement between the plaintiff and his wife. They were marriage partners and ran the business together. In fact, the plaintiff insisted that his wife work in the business with him, apparently because this was something that his parents had done. At no stage when testifying did the plaintiff agree that he and his wife were equal partners. In reply to a question whether he was the

sole proprietor, he replied in the affirmative; yet two questions later his counsel put it to him that he and his wife were partners in the business at the time of the accident, and he replied to this in the affirmative also. Shortly thereafter he again mentioned that "we (it is unclear to who he was referring) were a sole proprietor" until the business was taken over by the company. When asked under cross-examination whether he and his wife were partners, he responded that he could remember that when they got married there was a clause in their antenuptial contract which entitled her to a 20 % share and went on to say that if his memory was correct that related to the business that they were going to conduct together. The financial statements, Exhs "R1" and "R2", reflect the existence of a partnership with the nett income being shared equally between the plaintiff and his wife, but these statements were prepared after the business had been taken over by the company. What probably happened is that when the business was sold to the company, in the manner referred to above, the plaintiff and his wife were reflected as equal partners in the business in the Deed of Sale so that she could, as the plaintiff put it, have "50 % shares" in the company, presumably being a reference to their loan accounts. It can be accepted, in the light of all the evidence, that there was at least a tacit partnership, but I have my doubts as to whether the evidence established that they were equal partners. In conclusion it can be pointed out that some uncertainty as to whether or not there was a partnership between the plaintiff and his wife seems to have remained with defendant's counsel throughout the trial as there are a number of occasions

where he specifically said so. Whatever the position may have been, this does not affect the plaintiff's entitlement to claim compensation personally for his impaired earning capacity.

[15] It is the defendant's contention that the trial judge erred in making any award for loss of income. This contention is advanced, firstly, with reference to the manner in which the claim was formulated in the Particulars of Claim, it being submitted that there was no claim for past loss of income and that the date of trial was the date which should be used to determine whether any such loss had been suffered (it would probably have been more appropriate to refer to the date that the action was instituted, but this makes no difference to the argument advanced); secondly, on the basis of a submission that on the evidence the income earned by the plaintiff did not decrease as a result of his injuries but in fact increased; and, thirdly, on the argument that even if the plaintiff did establish that less income was earned than would otherwise have been earned, such loss would have been a loss to the company Cape Composite Manufacturing (Pty) Ltd and a loss to its shareholder, the Oberholzer Family Trust, but not a loss to the plaintiff.

[16] Insofar as the formulation of the claim is concerned, the defendant relies on what is set out in paragraphs 11.8 and 14.4 of the Particulars of Claim. These paragraphs read as follows:

"11.8 As a consequence the plaintiff has suffered damages in respect of loss of earning capacity, alternatively loss of future income, in the estimated sum of R 2 003 443-00."

"14.4 Estimated loss of earning capacity, alternatively loss of future income R 2 004 334-00."

[17] I do not agree that the manner in which the claim was formulated indicates that it was intended to claim only in respect of future loss of income. The fact that the sum claimed is an estimate does not in itself justify such a conclusion. It is to be noted that the claim is for "loss of earning capacity" and in the alternative "loss of future income". It was specifically alleged, in paragraph 11.5 of the Particulars of Claim, that the plaintiff was unable to do any work in his business for a period of eight months after the collision, apart from some supervisory work for limited periods. In the circumstances I do not consider that there is any merit in the defendant's contention in this regard.

[18] There is no doubt that the income generated by the business increased substantially after the collision, notwithstanding the fact that the plaintiff was precluded from participating therein to any significant extent (as I will endeavour to indicate later). I have referred to the fact that the income earned before tax increased from R9 938-00 for the financial year prior to the accident to R73 528-00 for the financial year during which the accident occurred. When the company took over the business the financial year was extended until end June,

and over the next sixteen month period the income earned before tax amounted to R234 191-00. In my view it is not the correct approach to simply ask whether there has been any increase in the profitability of the business since the plaintiff's injury, and if the answer is in the affirmative, to conclude that the plaintiff has suffered no loss of income. The proper approach is to consider what the profitability of the business would have been had the plaintiff not been injured and to compare that with what its profitability has been since his injury. If the profitability would have been greater, there has been a loss.

[19] While it must be accepted that there has been an increase in the profitability of the business despite the injury to the plaintiff, it must also be accepted, when one has regard to the plaintiff's contribution to the business before his injury, that there would have been at least the same, but probably a greater, increase in profitability had the plaintiff been able to continue doing the work he did prior to the accident. This is so for a number of reasons. Firstly, the increase in turnover, and therefore profitability, was due to events that had taken place prior to the plaintiff's injury, and particularly the fact that the plaintiff had secured the contracts with Welfit Oddy and Consani; and insofar as Welfit Oddy was concerned, had manufactured enough moulds for the end caps to be manufactured on a large scale. The Consani contract did not initially give rise to such profitability because of the loss suffered by the business by reason of the plaintiff not having made the second of two patterns that he had to make. This

was explained fully by the plaintiff and his wife. Furthermore, in order to achieve the continued smooth and efficient running of the business it had become necessary to employ persons to do the work, or at least some of the work, the plaintiff would have done. This resulted in expenses being incurred that would otherwise not have been incurred. Such expenses, incurred in order to achieve the turnover that was or would have been realised, must have reduced the profit by an amount that corresponds with those expenses. Such reduced profit represents a loss. Whose loss that is will be considered hereunder.

[20] A contention that was raised during cross-examination of the plaintiff's witnesses, but not really advanced on appeal before us, was that the increased profitability could only have been achieved if the other persons who had been employed to perform the functions that the plaintiff would have performed, had in other ways contributed to the increase in the profitability of the business and that any expenses incurred in employing such persons would be more than offset by what had been gained on the side, as it were. Nothing more need be said about this contention than that it is based on speculation and has no evidential foundation.

[21] As mentioned above, the defendant argued that if it was accepted that there was some loss to the business as a result of additional employees having to be employed, such loss was a loss of the company and not a loss suffered by the

plaintiff. In my view this argument must fail on the very premise on which it is based. The truth of the matter is that the company has not at any stage suffered any loss as a result of the plaintiff having been injured. The plaintiff was injured before the company took over the business. The plaintiff was never employed by the company as a pattern maker, maintenance man or driver. The injuries to the plaintiff, at the time such injuries were sustained, did therefore not deprive the company of the plaintiff's services in this regard, and it was thus not necessary for the company to employ additional employees to replace the plaintiff and perform the tasks which the plaintiff was unable to perform. The plaintiff had never been in a position to perform those tasks for the company. There is accordingly no question, in this matter, of the plaintiff regarding any loss to the company "as automatically and necessarily equivalent to his personal loss" (see Rudman's case, supra at 243 B), as was argued on behalf of the defendant.

[22] As I mentioned earlier, there can be no doubt that the injuries sustained by the plaintiff have rendered him permanently unable to make patterns, to do the maintenance that he previously did, and to drive a heavy vehicle. Defendant's counsel accepted, correctly, that this resulted in a diminution in the plaintiff's earning capacity. The impairment to the plaintiff's earning capacity was clearly established by the evidence. All that was disputed was whether the plaintiff had suffered patrimonial loss.

[23] In my judgment the evidence clearly indicates that losses were suffered. A loss, not quantified, was experienced in connection with the Consani contract. The plaintiff's father-in-law, who assisted in the business for three months, was remunerated by payment of the sum of R7 000-00, which was an expense that would not have been incurred if the plaintiff had not been injured. A pattern maker, Russell Jones, was employed during July 1998. He was required to do maintenance work as well. He was paid a salary of R4000-00 a month, also an expense that would not have been incurred. He was replaced by Brian Shipp during May 1999, at which stage the company had taken over the business. The company also employed Heine as a driver from September 1999 and Jeacocks as a maintenance man from November 1999. As I have indicated, the employment of the persons after 1 March 1999 cannot be said to represent a loss caused to the company. The fact that the trial judge had regard to the salaries paid to persons employed by the company does not alter the position. He did so in order to assess the plaintiff's loss (see the extract from the judgment quoted above). It was at no stage disputed on behalf of the defendant that this was the appropriate method of determining any such loss if it was established that a loss had been suffered; nor was any alternative method to assess such loss ever suggested.

[24] Can the plaintiff, in order to establish that he has personally suffered a loss, rely on the fact that the profitability of the company would have been greater if

the plaintiff had himself been able to render his services to the company? In my judgment this question must be answered in the affirmative. There can be no doubt that the company is a "family" company in the true sense. The evidence makes this abundantly clear. The income derived from the company's business activities is income which, through the company and the trust, is available to the family and therefore the plaintiff. As was pointed out by the trial judge, had the plaintiff not been injured he would have been able to do the work, which he had previously done, for the company. This would have done away with the need to employ the three persons referred to. This, in turn, would have resulted in further income being available to be used by the plaintiff for the benefit of himself and his family. Such income has been lost to the plaintiff. He has thus suffered, and will continue to suffer, patrimonial loss.

[25] It is not really disputed that the plaintiff suffered patrimonial loss until at least end February 1999. As I have mentioned, the defendant's attitude was that damages should be assessed from the date of trial. I have already indicated (in para [17] above) why I disagree. Can it now be said that the mere fact that the company took over the business on 1 March 1999 had the result that the plaintiff, from that date, suddenly found himself in the position that he was able to generate the same amount of income as he would have been able to had he not been injured? The answer appears to me to be self-evident and must be in the negative.

[26] The defendant made reference to the fact that the plaintiff is presently employed by the company as its managing director and that he earns a salary which is equivalent to what he previously drew out of the business. This is indeed so, but it is undoubtedly merely a manifestation of what occurs in a "family" company such as that with which we are here concerned. The evidence makes it abundantly clear that the plaintiff has very few administrative skills. The administration part of the business has always been attended to by his wife. In fact, when asked by his counsel the plaintiff did not even know who the directors of the company were. It is also very apparent from the evidence that the functions performed by the plaintiff are hardly those which one would associate with a managing director of any business, even one that was described by the chartered accountant Daverin as a "small manufacturing environment". The plaintiff does perform certain functions in relation to the business, but it is significant that his description of those functions is quite inconsistent with what one would expect from any managing director. The following extracts from his evidence clearly indicate that:

> "Is it fair to say that you have in fact as a result of the accident lost your ability to do those things which you are trained to do? --- That is correct, yes and not only what I have trained to do, basically what I love doing as well.
> What do you do in your factory now? --- I think you should ask my wife that. She will more likely give you a better answer. Actually I do very little in the factory now. I think I get more on everybody's nerves in the factory

than before obviously because I could do it and I could show them how to do it whereas now I often go in and I see the people doing the wrong thing and I want to try and help them and correct them but because I cannot do it I am virtually no good at it.
If you did not effectively own this business, would you be employed there? --- No I would have been fired. I would have fired myself".

And under cross-examination:

"And on those occasions when you are not visiting clients, are you at the premises? At the factory premises? --- Yes.
Attending to what aspects of the business? --- Depends what is happening. If our fences have fallen down, I will go and ask the boy to put the fences up. If the cows had to be dipped, I would get the guy to dip the cows. If the grass had to be mowed, I would tell the guy to mow the grass. Basic whatever had to be done to keep the place nice and neat and tidy and it all depends what was happening.
Well I was merely referring to the business and not to the cows and the fencing unless they have become part of the business. --- Well our factory is on our smallholding, that is where I live, that is where the business operates from. I am there – what else should I do? There is no point just sitting in the office and getting bored and irritating everybody. I would rather go and ensure that the place is looking good and see what I have got to do, or what can be done".

And also under cross-examination:

"And in this way you keep yourself actively busy to the benefit of your business for the entire day? --- No, I am not actively business (should be "busy") for the benefit of the business. In fact, I am basically a fifth wheel. I try and keep myself personally busy so I do not go and interrupt things inside the factory".

The evidence of the plaintiff's wife was also to the effect that the plaintiff has no

administrative skills and that he "does very little" at the factory. There can be little doubt that it is only because of the fact that the plaintiff still considers the business to be his, and that it is a family business, that the plaintiff is the designated managing director. It is for the same reason, and for only that reason, that the plaintiff gets paid the salary he received. By no stretch of imagination can it be said that the amount presently earned by the plaintiff provides a true reflection of his residual earning capacity.

[27] A further submission made in the written argument submitted by the defendant was that an acceptance of the argument advanced on behalf of the plaintiff would have the result of isolating individual elements of the plaintiff's ability to earn a living without considering whether they brought about a diminution in his earning capacity as a whole, with reliance being placed on what was set out in Rudman's case, supra at 243 E in para [14].

[28] A consideration of the facts of the present matter and of what is set out in that portion of the judgment referred to clearly illustrates, in my view, the distinction between the present case and Rudman's case. Jones, AJA said the following:

> "There is another fallacy in Mr *Eksteen's* argument. It does not consider Rudman's earning capacity as a whole. His earning capacity is a complex of abilities which together make up an asset in his estate and which

> becomes part of the *universitas* of his rights and duties which has allegedly been compromised and for which compensation is sought. Mr *Eksteen's* argument isolates individual elements of Rudman's ability to earn a living which have been compromised and placed a monetary value on them, without considering whether they bring about a diminution in his earning capacity as a whole. Rudman is not employed as a maintenance man or as a professional hunter on a game farm, and his earning capacity is not to be confined or compartmentalised as if he were. Although he might have performed these and other functions which he can no longer perform, his real function was and is that of chief executive officer of a large farming undertaking. He still performs that function. He remains the driving force behind the entire enterprise. On the evidence before us the disabilities from which he suffers, serious and real though they are, do not impair his capacity to do what matters most -–to see to it that the Rudman empire which he has developed continues to flourish in all its spheres for the benefit of himself, the trust, the company, and, through the trust and the company, the rest of his family. Whether or not he no longer does things which he formerly did, those things will still be done by his sons and his employees under his direction and supervision".

In the present matter the plaintiff's real function was never that of chief executive officer of a large undertaking. In fact, while he may have been in charge of his business he could hardly have been described as the chief executive officer. He now holds the position of managing director which, as I have indicated, is really a misnomer when one has regard to what he does. What the plaintiff did that mattered most was to make patterns, manufacture moulds, maintain the factory and the machinery, and do deliveries. He cannot be said to have built up an empire. He was in the process of building up his business. While the business will benefit, probably not to the same extent, from the duties now performed by the additional people that have been employed, this will occur at an expense which would not have been incurred had the plaintiff not been injured. In all the

circumstances there has, in my judgment, clearly been a diminution of the plaintiff's earning capacity, which has resulted in him suffering a loss. In fact, the position of the plaintiff is more akin to that of the disabled banana farmer in the case of **Union and National Insurance Company Limited vs Coetzee 1970 (1) SA 295 (AD)** who, as Jones, AJA pointed out in Rudman's case supra at 244 D:

> "had been on the threshold of his career as a farmer and about to begin the development of his empire".

[29] It is necessary to deal with one further point taken by the defendant. This was that the damages awarded for loss of income should be reduced because the trial judge, when calculating such damages, erred in not capitalising the amounts on which he calculated the damages. It is apparent that the trial judge failed to discount the future loss to is present value. That he should have done so, is not disputed. On behalf of the plaintiff it was submitted that the failure to discount future damages should not result in any reduction in the amount awarded because the trial judge, so it was contended, made allowance for unrealistically short periods in fixing the time by when the plaintiff would in any event have employed other persons to do some of the work he was doing at the time of the collision but was now unable to do.

[30] There is no cross-appeal against the trial judge's determination of the

periods referred to above. However, that does not mean that the plaintiff cannot seek to support the amount awarded by relying on the fact that the trial judge had, in arriving at such an amount, failed to have proper regard to what the evidence established; and to contend that if the matter had been approached properly, an amount of not less than that awarded would in any event have been arrived at. (cf Bay Passenger Transport Limited vs Franzen, 1975 (1) SA 269 (AD) at 277H-278D; Mufamadi and Others vs Dorbyl Finance (Pty) Limited, 1996 (1) SA 799 (AD) at 803GH).

[31] It is my view that the failure to have discounted the future damages does not, in this case, justify any reduction in the amount awarded. There are a number of reasons for this. The main reason is that I consider that the trial judge's approach in assuming that a driver, a maintenance man and a pattern maker would in any event have been employed after two years, four years and seventeen years respectively, was unduly favourable for the defendant. The determination of the periods mentioned finds no support in the evidence, apart from the speculative views expressed by Swart, an industrial psychologist called by the defendant.

[32] Insofar as the employment of a pattern maker is concerned, the trial judge determined the period of seventeen years by "taking into account the expected grown of the business, Mr Swart's evidence, and what is commonly known in

practice", stating that after such time the plaintiff would wish "to concentrate on supervision, managing and marketing". I am unable to agree with these views. The plaintiff is not the type of person who would be content to be a supervisor, general manager or marketing manager. He is a "hands on" person. When regard is had to the high standards set by him, the pride he took in his work, and the enjoyment and feeling of achievement he derived therefrom, I do not believe that there can be any justification for a finding that the plaintiff would at any stage have employed a pattern maker rather than do what was required in that regard himself. After all, it is not as if pattern making was or will be an everyday occurrence in the business. While the making of a pattern involves work of high intensity, the need therefore is infrequent.

[33] A further reason why it is unlikely that the plaintiff would have employed a pattern maker is to be found in his evidence concerning the problems encountered as a result of a particular pattern having to be changed. His evidence in this regard was to the following effect:

> "Just this morning we had a predicament, like I said our mould or our part was sticking out of Iso for Consani by 2 mm and when I spoke to Brian this morning I said to him Brian, maybe what we need to do is actually build another fibreglass pattern, sand it down by 2 mm and have a pattern and a mould ready for tomorrow morning and his first words to me were no, it cannot be done but in the past it would have been done because I would have done it and we would have worked until it was done. Now you cannot force them to stay at the factory and work and leave their family at home while you are actually with your family but in the past I would have

> done it and it would not have been a problem and the job would have been done correctly".

[34] In addition to all this, as has already been pointed out, the plaintiff is just not the managerial type. While it may be that the plaintiff would have employed someone to assist with the maintenance, I do not think that it can be said with any certainty that he would have done so. What cannot be accepted, in my view, is that he would have taken such a step when he had not yet turned 40 years of age.

[35] While it would seem probable that the plaintiff would at some stage have employed a driver, I consider it unlikely that this would have occurred within the very short period allowed by the trial judge. After all, the plaintiff did deliveries himself for a dual purpose, the one being the actual delivery and the other being to ensure that he kept contact with his clients.

[36] Various calculations (which it would serve no purpose to set out), based on assumptions which are in my view far more in accordance with what the evidence establishes, indicate that there is no basis for reducing the amount arrived at by the trial judge. This is so even if one ignores the cost associated with the employment of a maintenance man and a driver. Thus the failure to have discounted future damages does not provide a basis for a reduction of the award. In addition, the trial judge's calculations do not take into account the

losses suffered by reason of the fact that the plaintiff was prevented from making the second half of the pattern in respect of the Consani contract and the fact, which was mentioned in evidence, that outside contractors had to be employed to attend to the expansions to the factory which would otherwise have been attended to by the plaintiff.

[37] By reason of all the aforegoing I am of the view that there is no basis for holding that the trial judge erred in making an award for loss of earning capacity. There is also no reason for reducing the amount awarded.

[38] With regard to the other issues with which the appeal and cross-appeal are concerned, I agree with the conclusion reached by Chetty, J and with his reasons therefore.

[39] The following order is made:

1. The appeal is dismissed with costs.
2. The cross-appeal succeeds with costs, and the order of the trial court is amended as follows:

    2.1 By substituting the amount of R1 734 406,40 for the amount of R1 706 406,00 in paragraph 1 thereof.

    2.2 By the addition in paragraph 3.3 thereof, of the following: “3.3.8 Ms M. Fourie”.

3. The costs referred to in paragraphs 1 and 2 above are to include the costs attendant upon the employment of 2 counsel.

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J.J. NEPGEN
JUDGE OF THE HIGH COURT

CHETTY, J:

I agree.

_____

D. CHETTY

JUDGE OF THE HIGH COURT

PILLAY, AJ:

I agree.

_____

L. PILLAY
ACTING JUDGE OF THE HIGH COURT