

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
(REPUBLIC OF SOUTH AFRICA)

Case No: 7410/2009

In the matter between:

GUY BRIAN MILES

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

[1.] The Plaintiff is an insurance broker and financial adviser who is presently aged 52. He was injured in a motor vehicle accident on 21 October 2006. He sustained the following injuries:

- A fracture of the neck of the right proximal humerus
- A fracture of the right acromium
- A comminute fracture of the left patella
- A compound fracture dislocation of the right elbow
- A head injury with hemiplegia
- Left pneumothorax
- A fracture of the cervical spine

- [2.] It is common cause that the Defendant is liable to compensate the Plaintiff for any loss and damage suffered by him resulting from the said injuries in terms of the provisions of the Road Accident Fund Act, 1996¹ (the Act). It is also common cause that the Defendant has already paid to the Plaintiff an amount of R 247 477,36 on account of past hospital and medical expenses, as well as an amount of R 600 000 in respect of general damages. The Defendant has in addition provided the Plaintiff with an undertaking in terms of s 17(4) of the Act, indemnifying him against future hospital, medical and related expenses. I was told by counsel at the commencement of the trial that the only remaining issue was that relating to the Plaintiff's claim on account of past and future loss of earnings, as well as earning capacity.
- [3.] The central issue, as it turned out, relates to whether the earnings of a close corporation, Guy Miles Brokerage CC (the CC) and in which the Plaintiff holds 99 per cent of the member's interest, should be used as the yardstick for assessing the Plaintiff's claim for loss of earnings and earning capacity or whether only the salary from the CC, set out in the Plaintiff's personal IT12 income tax returns, and accounted for in the CC's annual financial statements should be used for these purposes.
- [4.] By way of background to the dispute, I proceed to set out certain facts which are common cause.

¹ Act 56 of 1996

- [5.] The Plaintiff matriculated in 1978. In 1983 he obtained a Bachelor of Agriculture degree. In 1984 he obtained a Bachelor of Commerce (Hons) degree. The Plaintiff was first employed in the life insurance industry as representative, where he received certain training in the particular field. He started his own brokerage in 1999. In 2000, the CC was incorporated. Initially there were four members of the CC, three of whom each held 1 per cent of the member's interest, with the Plaintiff holding the remaining 97 per cent. One of the other three members of the CC is a Mr G.I. Perrett. Since 2003, the Plaintiff held 99 per cent of the member's interest in the CC, with Mr Perrett holding the remaining 1 per cent. That is still the position. The Plaintiff in effect, as shall be explained, conducted his brokerage business under the auspices of the CC. The CC also holds all the necessary registrations and accreditations, for the purposes of conducting the particular business. These registrations, include registration with the Financial Service Board (FSB). Mr Perrett's holding of 1 per cent of the member's interest in the CC is motivated by a practical requirement of FSB in terms of which it is required that the CC has at least two members. This is in order to ensure that there would be continuity of the services rendered to clients, should anything happen to the Plaintiff.
- [6.] The Plaintiff and Mr Perrett have since 2003 been the only trustees of a trust, The Quadrant Finance Trust (IT2095/00) (the Trust). The Plaintiff is, I am told, a discretionary income beneficiary of the Trust.

- [7.] The annual financial statements of the CC, from the 2002 tax year to the 2012 tax year, and those for the Trust from the 2003 tax year to the 2012 tax year, have been put up in evidence. From these the following appears: Mr Perrett throughout the period from 2002 to 2012, held 1 per cent of the member's interest in the CC and during such period he had no loan account in the CC. His nominal interest in the CC was recorded in a "member's investment" account. Neither did he, during such period, receive any salary or fringe benefits from the CC. On the other hand, the Plaintiff, in terms of the CC's annual financial statements had throughout the aforesaid period, a substantial loan account, which was credited with interest, intermittently, in addition to which he was also credited with a salary and travelling costs or expenses. No dividends were declared by the CC. Profits or surpluses generated by the CC were accounted for in the members' net investment account in the annual financial statements of the CC. The single largest operating expense of the CC was an expense styled "administration fees". The evidence shows that these expenses were expenses credited to the Trust. Such expenses were in turn the largest single source of income of the Trust. The Trust, from time to time generated profits or surpluses which were from the 2005 tax year distributed or allocated equally to two other trusts, styled The G&T Family Trust, and The Miles Family Trust, being trusts respectively controlled by Mr Perrett and the Plaintiff.
- [8.] The evidence, which is undisputed, also shows that Mr Perrett, who like the Plaintiff is an insurance broker and financial adviser, conducts a similar business

to that conducted by the CC. He, however, does so independently from the Plaintiff and the CC. The evidence further shows that for the period 2003 to 2007 (that is before the Plaintiff was injured), the CC achieved an annual growth in turnover of 22,23 per cent, compared to an average annual growth in turnover of Mr Perrett's business of 18,44 per cent. For the tax and financial years from 2008 to 2012 (after the Plaintiff was injured) the average annual growth in turnover of the CC was 0,27 per cent, whereas that of Mr Perrett's business was 14,18 per cent. This appears from the report of the accounting officer of the CC, Mr B.D. Berriman, dated 2 November 2012.

- [9.] The evidence further shows that prior to the Plaintiff being injured the CC offered what was referred to as a suite of financial services or products, which included insurance, investments, medical aid and short term insurance. The Plaintiff himself focused primarily on life insurance investments and medical aid. At the time of the accident the Plaintiff himself fully utilised the services of one full time secretary and half the time of a second secretary in order to service his clients. The short-term insurance side of the CC's business was managed by another broker, one Saloshne Naidoo who focused specifically on the sales and servicing of short-term insurance. She, however, also assisted Mr Perrett with his short-term insurance business. Her services were therefore shared between the Plaintiff and Mr Perrett, as it were. The cost of the services of Ms Naidoo and the two secretaries who assist her are shared pro-rata the revenue they generate from the short term insurance business managed by them, between the CC and the close corporation used by Mr Perrett, to conduct his business.

[10.] It is further evident that the Plaintiff's ability to perform the kind of work for which he is qualified and which he had been doing, independently since 1999, had been compromised. This is evident *inter alia* from a number of opinions by experts. In this regard I mention the views of the following experts:

Dr J. Golek (neurosurgeon)

According to him the most severe injury sustained by the Plaintiff was to the head and cervical spine. He sustained diffuse brain injury and multiple brain contusions, the worst being in the right parietal region. The cervical spine injury was in the form of a fracture of the C4 and C5 lateral masses and facet joints with rotational injury to the neck affecting the spinal cord. The Plaintiff recovered well from the head and neck injuries, but was left with minimal but definite left sided hemiparesis, which is spastic as well as facial residual nerve paresis, some signs of incoordination, a speech problem and numbness of the left side of the body. He also suffers from decreased concentration and poor memory. Although, by the time when Dr Golek examined the Plaintiff on 20 May 2012, had shown some improvement in his condition, he was at that time still left with definite neurological deficit in the form of residual left side weakness, incoordination, slurred speech and some decrease in mental function. His residual physical and mental disabilities were considered to be of a permanent nature.

Dr R.P. Plunkett (neuropsychologist)

According to Dr Plunkett the Plaintiff had become emotionally labile, easily frustrated and impatient. There was evidence that he was becoming mildly to moderately depressed. Behaviourally the Plaintiff demonstrated mild features of disinhibition. He had difficulty in controlling his emotions. Cognitively, the Plaintiff suffered from concentration difficulties and forgetfulness. He was less inclined to self-monitor and thus did not pick up his own errors. He had difficulty keeping track of ongoing activities including, what he was saying. His verbal learning and memory were found to be in the low average range. According to him, the Plaintiff, two years after the accident, continued to suffer from neuropsychological impairments. His core neuropsychological impairments at that time could be regarded as life-long afflictions.

Ms René Stewart (occupational therapist)

Her view is that the Plaintiff demonstrated moderately compromised occupational performance as a result of a complex combination of physical-, cognitive-, behavioural- and functional deficits which collectively undermined his work potential. Specific aspects which reduced the Plaintiff's efficacy, included reduced efficiency, impaired memory and adaptive functioning, manifesting in a propensity for making errors, difficulty in multi-tasking and working to deadlines. More specifically, impaired deductive reasoning and cognitive flexibility as well as

deficits in associated learning, and below average memory retrieval processes and difficulty in modifying/adapting actions to meet changing task demands all contributed to under performance by the Plaintiff. A further problem was that the Plaintiff was expected to suffer from fatigue resulting in the recommendation that the Plaintiff should work flexi-hours. The Plaintiff was liable to suffer from reduced insight into the *sequelae* of his injuries and the impact which they have in the workplace. This in turn would give rise to mood swings, lowered frustration tolerance, irritability, aggression and a tendency to misinterpret social cues. He was also at risk of suffering from depression and anxiety. In addition, he suffered from communication deficits, such as dysarthritic speech, word-finding problems and loss of verbal fluency.

[11.] It was common cause that had the Plaintiff not been injured, his normal retirement age would have been 65.

[12.] The only two witnesses who gave evidence are Mr Mark Edwards, a financial analyst who gave evidence on behalf of the Plaintiff and a Mr Mario Redelinghuys, a professional accountant, who gave evidence on behalf of the Defendant.

[13.] I turn to the evidence of these witnesses.

[14.] Mr Edwards has a B.Bus.Sci. (Hons, Finance) degree, which he obtained from the University of Cape Town. His basic approach was that the income generated in the hands of the CC should be used as the appropriate yardstick for assessing the Plaintiff's loss of past and future income and earning capacity. According to him, certain adjustments had to be made to the figures reflected in the annual financial statements of the CC in order to arrive at a more realistic picture of the true earnings and particularly profitability of the enterprise, controlled by the Plaintiff. Some of these adjustments were that the revenue earned within the Trust in effect was income earned by the Plaintiff and Mr Perrett, and that the Plaintiff's share thereof had to be added to his earnings. He also explained that the "administration fees" which constituted the bulk of the Trust's earnings reflected in its income statement in the annual financial statements were comprised of amounts arbitrarily "over invoiced" to the Trust, so as to enable the Plaintiff and Mr Perrett, to withdraw monies from the Trust, by way of distributions to pay their respective children's school fees. He also analysed the Plaintiff's personal diary for the period 9 April 2012 to 31 January 2013, a period of some 43 weeks, (with records available for 35 of those weeks), which indicated that the Plaintiff conducted, on average, some 4,6 interviews with clients during each week during such period. According to him, this showed a significant decrease in the number of appointments over any given time period which the Plaintiff previously conducted, prior to him being injured. He also explained that the income stream of the CC, comprised approximately 66 per cent of income

derived from life insurance and investment type business, and 33 per cent of income derived from short-term insurance business.

[15.] Mr Edwards also engaged with a Mr Ismail Simjee, a forensic accountant, employed by the Defendant, and in respect of whom appropriate notices in terms of Rule 36(9) were delivered, and who also prepared a report on the Plaintiff's loss of earnings. According to Mr Edwards, he and Mr Simjee prepared a joint minute of their discussions, which took place on 31 May 2013. The joint minute was received in evidence as exhibit "E". Although I accept that the Defendant is not necessarily bound by what Mr Simjee may have agreed with Mr Edwards, the minute does provide some evidential material, which in my view, may be taken into account, more so, since Mr Edwards gave evidence with regard thereto and endorsed various aspects referred to in the minute, and on which these experts were agreed. In this regard I point out that these experts *inter alia* agreed on the basic approach that the income of the CC was to be used as yardstick to determine the Plaintiff's loss, there was agreement on the actual gross income generated by the Plaintiff on this basis, for the period after the Plaintiff was injured, that is, for the financial years from 2008 to 2013, as well as the net profit (income) after tax (as adjusted), for the same period. They also agreed on the precise amounts by which the Plaintiff's earnings would have increased, had he not been injured during the period 2008 to 2013. They also agreed on the method to be used for calculating the Plaintiff's past loss of income for the period 2008 to 2013. The computation of Mr Edwards in respect of past loss of income

produced a net amount, after tax of R 2 741 746, while Mr Simjee's corresponding figure was R 2 301 430. Messrs Edwards and Simjee also agreed that part of the Plaintiff's loss was the capital loss of the future sale of the enterprise, which was computed as at 28 February 2013. The value of such loss according to Mr Edwards' calculations, was R 2 532 286, whereas Mr Simjee's calculation produced a figure of R 2 154 044. For these purposes, Messrs Edwards and Simjee agreed that an after tax multiple of 3,5 should be used for computing the value of the business. In the event, Mr Simjee was not called by the Defendant and no reasons were advanced as to why he was not called.

[16.] Mr Edwards, as a result of his interaction with Mr Simjee, prepared a supplementary report, dated 4 June 2013, in which he accommodated the agreements reached between him and Mr Simjee, and made certain adjustments to the assumptions underlying his previous report.

[17.] The joint minute prepared by Messrs Edwards and Simjee was submitted to an actuary, Mr G.A. Whittaker, who, on 4 June 2013, prepared a report in which he computed the Plaintiff's losses both on Mr Edwards' and Mr Simjee's views, as tabulated in the joint minute. According to Mr Whittaker's report, the Plaintiff's losses, based on the respective views of Messrs Edwards and Simjee, were as follows:

Mr Edwards' views

Past loss

Past loss of income after tax	R 2 741 746	
Capital loss after tax	<u>R 2 532 286</u>	
Gross past loss		R 5 274 032
<u>Future loss</u>		
Value of income uninjured	R 15 361 174	
Value of income injured	<u>R 5 293 176</u>	
Gross future loss		<u>R10 067 998</u>
TOTAL gross loss		<u>R15 342 030</u>

Mr Simjee's views

<u>Past loss</u>		
Past loss of income after tax	R 2 301 430	
Capital loss after tax	<u>R 2 154 044</u>	
Gross past loss		R 4 455 474
<u>Future loss</u>		
Value of income uninjured	R 14 170 351	
Value of income injured	<u>R 5 293 176</u>	
Gross future loss		<u>R 8 877 174</u>
TOTAL gross loss		<u>R13 332 648</u>

[18.] The main thrust of Mr Edwards' cross-examination by counsel for the Defendant was aimed at establishing a basis for contending that it was inappropriate for the earnings of the CC to be used as yardstick for determining the Plaintiff's loss of earnings and earning capacity. Mr Edwards readily conceded that, in terms of the annual financial statements of the CC, the Plaintiff's salary (and other benefits) credited to him throughout the period 2003 to 2012, on average

amounted to 27 per cent of the turnover of the CC. He contended, however, that to merely base any assessment of the Plaintiff's loss of earnings and earning capacity on the salary which was reflected in the annual financial statements of the CC would be an oversimplification. He pointed out that the apportioning of income between the Plaintiff personally and the CC, as reflected in both the Plaintiff's personal income tax returns and accounted for in the CC's annual financial statements was premised largely on what he referred to as considerations of "tax efficiency". He emphasised that it was the Plaintiff and the Plaintiff alone who made all the important decisions affecting the CC and the business. He emphasised the discretionary nature of the apportionment of the income generated by the business not only between the Plaintiff and the CC, but also the distribution of the income of the Trust, in the way described above. He further pointed to the discretionary allocation of interest on the Plaintiff's loan account in the CC, so as to take full advantage of what he referred to as the "interest free allowance" provided for by the Income Tax Act, 1962² in respect of individuals. He emphasised that any profit or surplus of income over expenditure in the CC would be accrued for the Plaintiff's benefit by way of what is referred to in accounting terms as "retained income". Mr Edwards was also challenged in cross-examination with regard to the implications of the fact that about 33 per cent of the CC's turnover was derived from short-term insurance business which, as indicated was dealt with by Ms Naidoo and her support staff. In this regard he pointed out that Ms Naidoo's status was that of an employee, thus subject to the overall supervision and control of the Plaintiff. He further pointed out that the

²

Act 58 of 1962

short-term insurance business, and especially new business, as I understand it, was largely dependent upon leads provided by the Plaintiff personally to Ms Naidoo, which he, that is the Plaintiff, generated through the contact he had with the other clients of the business whom he served. Mr Edwards readily conceded that the formatting of the Plaintiff's business model amounted to tax avoidance. It was never put to him that there was anything improper or illegal with regard to the arrangements concerning the close corporation as well as the Trust or, that such arrangements amounted to tax evasion.

[19.] Mr Edwards drew attention to certain mistakes which Mr Redlinghuys made in his calculations to which reference will be made below. Mr Edwards impressed me as a knowledgeable, diligent, thorough and careful expert. He was fair and made concessions where they were due. He also made adjustments to his calculations where it appeared reasonable to do so.

[20.] Mr Redelinghuys holds a B.Com (Hons Acc) degree which he obtained from the University of KwaZulu-Natal. He served his articles with PriceWaterhouseCoopers. Thereafter he was employed by that firm and *inter alia* gained experience in forensic work. He left PriceWaterhouseCoopers during 2011 when he went into commerce. As from 2012, he established his own forensic consulting practice. The central theme of Mr Redelinghuys' evidence was that only the salary which was reflected in the CC's annual financial statements and disclosed by the Plaintiff in his personal income tax returns should be used in assessing the Plaintiff's loss of earnings and earning capacity. He prepared two

reports, both dated 26 February 2013. His first report took into account certain insurance benefits which the Plaintiff received, which it was common cause should not be taken into account for these purposes. His later report made due allowance for the exclusion of such insurance benefits and also had attached to it certain schedules setting out calculations upon which he relied, for the views which he expressed. Mr Redelinghuys divided his calculation of the Plaintiff's loss into three periods, namely (1) the period from 21 October 2006 to 28 February 2008, being the period during which the Plaintiff was occupationally unfit to perform his duties and functions at all; (2) the period from 1 March 2008 to 29 February 2012, during which period, according to Mr Redelinghuys, the Plaintiff operated in his business on an average productivity level of 62 per cent as determined by actual salary as a proportion of estimated salary for such period, and (3) the period from 1 March 2012 to the date of retirement (2021). He calculated that the average percentage turnover increase of the business prior to the accident was 23 per cent, from year to year. He used that average percentage increase to project the turnover of the business subsequent to the accident to 29 February 2012, and used 20 per cent per annum to project the turnover from the period 1 March 2012 to 29 February 2016, basing the latter percentage on an actuarial report by Human & Morris, dated 9 November 2012. From 1 March 2016 to date of retirement (2021), he used a 5,5 per cent per annum growth rate in turnover as reported by Human & Morris. In determining the Plaintiff's loss of income from salary, he used the actual proportion of salaries to turnover for the period from the accident to 29 February 2012, and according

to him, ascertained that the difference between actual salaries and the estimated salaries would result in a loss of income for such period. For the period 1 March 2012 to date of retirement, he computed the estimated loss of salaries on the average actual productivity rate of the Plaintiff, from the period subsequent to the accident till 29 February 2012, which according to him, amounted to 62 per cent. That rate was used to determine the loss of income on 1 March 2012 to date of retirement.

In terms of Mr Redelinghuys' calculations in his corrected report, confirmed by him in his evidence in chief, the Plaintiff's loss of income for the period 21 October 2006 to 28 February 2021, amounts to R 5 137 000, which is calculated as follows:

- Loss of income during the period 21 October 2006 to
28 February 2008 R 184 000
- Loss of income during the period 1 March 2008 to
29 February 2012 R 856 000
- Loss of income during the period from 1 March 2012
to 28 February 2021 R4 097 000

At the conclusion of his evidence in chief, he pointed out that the increase in turnover of the business in the schedule to his revised report, exhibit "F". contained an error in that in determining the increase in turnover from the years

2010, 2011 and 2012, the turnover in those years, had been kept constant at the same figure as in 2009 (R 2 140 959). He stated that the reason for this was his calculation was “formula driven” and he did not ensure that the formula was “pulled across” to the years mentioned.

[21.] Under cross-examination the following emerged from Mr Redelinghuys’ evidence: He acknowledged that Mr Edwards’ investigation and evaluation of the business and affairs of the CC was more thorough than his own, which was largely confined to an analysis of the Plaintiff’s personal income tax returns and the annual financial statements of the CC. He also acknowledged that the mistake he made with regard to the projected turnover of the business for the years 2010, 2011 and 2012, quite clearly had a material impact on his other calculations and views. He further conceded that his projection of the Plaintiff’s income was flawed since he did not take into account the shrinking trend in the Plaintiff’s productivity (assumed by him to be 62 per cent, being the ratio between salary and turnover). In this regard he made the following concession:

“And the next year his productivity has shrunk, and the next year his productivity has shrunk still further, the next year his productivity has shrunk still further, so to fix it is flawed, that is what Mr Edwards said and that is what I am suggesting to you, and you do not deal with the downward trajectory that you did not take into account. And I am suggesting to you that really with hindsight now, looking at it, you should have, do you accept that?..... Yes I accept it M’Lord.”

He also conceded that his projections extended to 2021 when the Plaintiff would be 60, and not 65, the latter being the Plaintiff's normal retirement age, which was common cause.

He finally maintained that making allowance for the errors he made, and adopting some of the assumptions made by Mr Edwards, the Plaintiff's loss of income, would amount to some R 8,6 million.

[22.] Regrettably, the conclusion to which I am driven, is that very little reliance can be placed upon the evidence of Mr Redelinghuys.

[23.] During argument, I was presented with a revised calculation prepared by Mr Edwards, based upon the adjustments which Mr Redelinghuys, in his evidence, conceded should be made to his reports and assumptions. Such calculation was received as exhibit "H". The adjustments related to the error Mr Redelinghuys made with regard to revenue growth rates, the ratio of the Plaintiff's salary to the turnover of the business, which was adjusted from 62 per cent to 46 per cent, and with the latter percentage further declining to 11 per cent at retirement age 65, in order to take account of the shrinking trend in the Plaintiff's productivity, as defined by Mr Redelinghuys. Mr Edwards, in preparing the calculations, for illustrative purposes, discounted the figures produced by the calculations themselves, at the rate of 2,5 per cent per annum. In summary, these

calculations, based upon the basic approach propagated by Mr Redelinghuys, showed the following:

SUMMARY OF LOSS OF INCOME		
	Pre-discounting	Post-discounting
Past loss to 28/2/2013	R 1 767 023	R 1 767 023
Future loss	R 18 330 579	R 15 124 774
TOTAL	R 20 097 602	R 16 891 797

I was told during argument that the actual calculations contained in exhibit “H” were not disputed and were common cause between the parties.

[24.] I return to the central dispute between the parties. As point of departure I accept that full recognition and due weight must be given to the following fundamental principles:

24.1. A close corporation, and for that matter a company, has a separate and distinct estate from the estates of its members or shareholders which, for good reason, must be acknowledged and given effect to. The same applies to a trust which has an estate separate from the estates of its trustees or beneficiaries.³

24.2. Under the *lex Aquilia* a defendant is obliged to compensate a plaintiff for the difference between the value of the plaintiff’s estate after the

³ RAATH v NEL, 2012(5) SA 273 (SCA)

commission of the delict and the value it would have had if the delict had not been committed. 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.⁴

24.3. **“A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.”⁵**

In an appropriate case, a plaintiff **“may be able to prove and quantify his personal loss in a delictual claim with reference to the loss of income suffered by the company, provided he does not fall into the trap of regarding the loss to the company as automatically and necessarily equivalent to his personal loss.”⁶**

[25.] In my view, this is indeed a case in which the turnover, profit and performance of the CC, as well as its future prospects, should be used as yardstick for the assessment of the Plaintiff's loss of income and earning capacity. My reasons are as follows:

⁴ DIPPENAAR v SHIELD INSURANCE CO LTD, 1979(2) SA 904 (A) at 917 B - D

⁵ Per Jones AJA in RUDMAN v ROAD ACCIDENT FUND, 2003(2) SA 234 (SCA), para [11] at 241 H – 242 A

⁶ Per Jones AJA in RUDMAN, para [13] at 243 A - B

The Plaintiff owns 99 per cent of the member's interest in the CC. The remaining 1 per cent which is owned by Mr Perrett, has been allocated to him for purely pragmatic reasons. The Plaintiff, on the evidence, is the person who makes all the important decisions affecting the business of the CC. He, in effect, conducts his personal practice or business under the auspices of the CC. The mechanism of crediting the Plaintiff in the books of account of the CC with a salary, is something which the Plaintiff does upon the advice of his accountants, in order to promote the legitimate objective of minimising the overall amount of income tax which is payable by both the Plaintiff and the CC. The fortunes of the CC, quite clearly, are inextricably bound up with the well being as well as the time and effort expended by the Plaintiff on the business. Importantly, the performance of the CC depends vitally on the efficiency with which the Plaintiff conducts and manages the business. The fact that persons are employed in the business, in my view, does not militate against the approach which I propose to follow. This is so, since all these persons are employees. They have no equity interest either in the business, its assets or the CC. They also perform their work under the supervision and control of the Plaintiff. There is therefore almost complete convergence of the interests of the Plaintiff and the CC. The fact that Ms Naidoo is responsible for dealing with the short-term insurance portfolio of the business, also does not detract from the aforesaid approach. Ms Naidoo remains an employee. Her services are shared between the Plaintiff and Mr Perrett and importantly, on the uncontested evidence, the short-term business is derived from

leads generated by the Plaintiff himself. It would be wholly artificial to use the Plaintiff's salary from the CC, as reflected in his personal income tax returns, as the sole basis for determining his loss of income and impairment of his earning capacity.

In my view, the facts of this matter are distinguishable from the facts in cases such as **RUDMAN v ROAD ACCIDENT FUND** and **RAATH v NEL**. In **RUDMAN** there was no proof of the plaintiff, Rudman, actually having suffered a loss as a consequence of his personal injuries. The operations of the company, of which Rudman was a director alongside with his wife and children, continued in the same way as before he was injured. Moreover, Rudman only owned 100 of the 4000 issued shares in the operating company, which conducted the farming operations. The remaining 3900 shares were owned by a trust of which Rudman was a trustee, together with his wife and his attorney. He was neither a capital nor income beneficiary of the trust. It is understandable therefore that both the trial court and the SCA, found that the losses suffered as a result of the temporary decline in the income generated by the professional hunting and professional outfitter operations due to the incapacity of Rudman, were the losses of the operating company, and not of Rudman personally. In **RAATH v NEL**, the plaintiff, Nel, had transferred the business which he ran to a trust for estate planning and tax purposes. Nel was not a capital beneficiary of the trust. He qualified as a potential income beneficiary of the trust by virtue of his relationship to the children of his late son. It is also understandable on these facts that the

SCA held that the separateness of the trust and its assets, including the business which the plaintiff managed, had to be given effect to, and that losses suffered by such business were not to be equated to Nel's personal losses. Unlike the relationship between the plaintiffs in these cases and the businesses which they operated, there is substantial convergence of the Plaintiff's personal interests and those of the CC. This is so because of the Plaintiff's ownership of 99 per cent of the member's interest in the CC, his control of the affairs of the CC, and its dependence on the Plaintiff's personal exertion and performance.

[26.] The facts in this case are more comparable to those in **OTTO v ROAD ACCIDENT FUND**⁷, **ROAD ACCIDENT FUND v RONAASEN NO**⁸ and **ROAD ACCIDENT FUND v OBERHOLZER**⁹. In these cases the Courts held in favour of the plaintiffs in circumstances not dissimilar to those of the present Plaintiff. Each case, however, must be decided on its own facts. It should be borne in mind that on the Defendant's submissions, based as they are, on the evidence of Mr Redelinghuys, the Plaintiff personally had suffered substantial losses. Ultimately, the question is essentially one of adopting the appropriate yardstick or benchmark, for assessing the Plaintiff's losses. For the reasons already given, in my view, it would be artificial and indeed inappropriate in these particular circumstances, to rely merely on the Plaintiff's salary as reflected in his personal income tax returns, and accounted for in the annual financial statements of the CC, in assessing the Plaintiff's loss of earnings and earning capacity. I find

⁷ [2004]2 All SA 328 (W)

⁸ (86/2006) [2007] ZAECHC 153 (22 June 2007)

⁹ 2006(3) All SA 593 (ECD)

therefore, on this aspect of the case, that it is appropriate to use the performance, including turnover, and profitability of the CC, as did Mr Edwards, as yardstick to determine the Plaintiff's personal loss of income and earning capacity.

[27.] Counsel for the Plaintiff contended that on the evidence, I should make an award to the Plaintiff, based on the common cause facts, the supplementary report of Mr Edwards, the joint minute of discussions between Mr Edward and Mr Simjee, as well as the actuarial report by Mr Whittaker, dated 4 June 2013. Counsel also made submissions with regard to contingency deductions. On the other hand, counsel for the Defendant submitted that I should merely make findings on those issues which the actuary would require for an appropriate computation of the Plaintiff's losses. He also made certain submissions with regard to contingency deductions.

My view is that it is possible, on the evidential material presented, to make a final computation of the Plaintiff's losses, and for judgment to be granted in an amount of money. It would cause further delays and additional expense, should I merely make a number of findings which would then have to be submitted to the actuary for the purposes of preparing a final calculation.

With regard to general contingencies, I make the following observations: The evidence of Mr Edwards was that the income generated by the business is subject to volatility, by which I understood that it is liable to fluctuate over time.

The report by the industrial psychologist, Dr Sonia Hill, which was placed before me as evidence of its contents, indicates that the financial success of “companies”, such as the business in question is “notoriously unpredictable”. By that I understood that such businesses are exposed to significant risks, including the risks of fluctuating income and turnover. The contingency deductions as set out below, will therefore be made with due regard to these aspects and all the evidence.

The computations set out below are based upon the evidence of Mr Edwards, his supplementary report, as well as the joint minute, and actuarial report by Mr Whittaker dated 4 June 2013.

[28.] In my view, the Plaintiff is entitled to compensation in the amount of R 13 835 895, which amount is calculated as follows:

Past loss of income

Past loss of income after tax	R 2 741 746
Capital loss after tax	<u>R 2 532 286</u>
	R 5 274 032
Less 1 per cent – share of member's interest held by Mr Perrett in the CC	<u>R 52 740</u>
Gross past loss	R 5 221 292
Contingency deduction on past loss at 3 per cent	<u>R 156 638</u>

Net past loss		R 5 064 654
Future loss of income		
Value of income uninjured	R 15 361 174	
Value of income injured	<u>R 5 293 176</u>	
	R 10 067 998	
Less 1 per cent – share of member's interest held by Mr Perrett	<u>R 100 679</u>	
Gross future loss	R 9 967 319	
Contingency deduction on future loss at 12 per cent	<u>R 1 196 078</u>	
Net future loss		<u>R 8 771 241</u>
Net total loss		R13 835 895

[29.] I therefore grant judgment to the Plaintiff as follows:

29.1. Payment of the amount of R 13 835 895.

29.2. Costs of suit, which costs shall include:

29.2.1. The costs consequent upon the employment by the Plaintiff of two counsel.

29.2.2. The qualifying fees and expenses, including where applicable, travelling expenses and the costs with regard to consultations with

such experts and the preparation of their reports, in respect of the following expert witnesses:

- Dr I. Haynes
- Dr B.J. Kauffman
- Dr R. Fraser
- Dr R.P. Plunkett
- Dr J. Golek
- Ms René Stewart
- Dr Sonia Hill
- Mr Ian Morris, actuary
- Mr B. Berriman, chartered accountant
- Mr M. Edwards, forensic and financial analyst
- Mr G.A. Whittaker, actuary

29.2.3. The costs of preparing a transcript of the proceedings which took place during the period 5 to 7 June 2013.

29.2.4. All costs previously reserved.

29.3. Payment of the amount referred to in para 29.1, *supra*, is to be made by the Defendant to the trust account of the Plaintiff's attorneys, Thorrington-Smith & Silver whose banking details are as follows:

Bank: Standard Bank

Branch Code: 04002600 (Durban Main Branch)

Acc No:

C.J. HARTZENBERG AJ

PLAINTIFF'S ATTORNEYS: Thorrington-Smith & Silver, Durban
Locally represented by:
Dawsons Inc
271 Prince Alfred Street
Pietermaritzburg

DEFENDANT'S ATTORNEYS: Tomlinson Mnguni James
165 Pietermaritz Street
Pietermaritzburg

COUNSEL FOR THE PLAINTIFF: Adv M. Pillemer SC
Adv B. Bedderson

COUNSEL FOR THE DEFENDANT: Adv C.J. Snyman

DATE OF TRIAL: 5 – 7 June 2013

DATE OF JUDGMENT: 14 June 2013