\ihg CASE NO: 184/91 AND 401/91

IN THE SUPREME COURT OP SOUTH AFRICA
(APPELLATE DIVISION)

In the matters of:

LOTHAR PAUL NEETHLING	Appellant
and	
MAX DU PREEZ	First Respondent
CAXTON LIMITED	Second Respondent
JACQUES PAUW	Third Respondent
and	
LOTHAR PAUL NEETHLING	Appellant
and	
THE WEEKLY MAIL	First Respondent
W M PUBLICATIONS (PTY) LIMITED	Second Respondent
GAVIN EVANS	Third Respondent

CORAM: CORBETT CJ, HOEXTER, NESTADT, NIENABER JJA et NICHOLAS AJA

DATE OF HEARING: 29 AUGUST 1994

DATE OF JUDGMENT: 27 SEPTEMBER 1994

J U D G M E N T

HOEXTER JA:

In two separate actions in the Witwatersrand Local Division the appellant, as plaintiff, claimed damages for matter defamatory of him which had been published in two weekly newspapers respectively called the Vrye Weekblad ('VWB') and The Weekly Mail ('WM'). Both actions were defended. In each action the defendants filed a joint plea. It is convenient to refer to the action against the VWB as "the VWB case"; and to the action against the WM as "the WM case". In the VWB case there were four defendants. In the WM case there were initially four defendants, but following a settlement between the appellant and the second defendant during the trial, there were three defendants only at the time of judgment.

During the course of the trial the respective pleas filed in each case were amended. Thereafter, and subject to proof of the defamatory nature of the matter complained of, the trial court

(Kriegler J) had to consider in both the VWM case and the WM case the validity or otherwise of:

1) a main defence of justification (that the matter complained of was true and that its publication was in the public interest); and

2) an alternative defence of qualified privilege based on the existence of a duty on the part of the newspaper to publish the defamatory matter and a reciprocal interest on the part of its readers to have the matter communicated to them.

In each case Kriegler J correctly found that the matter published was defamatory of the appellant. However, the learned judge proceeded to find: (a) that in the VWB case the defendants had established the defence of justification; and (b) that in the WM case the defendants had established the defence of qualified privilege. Accordingly the trial court concluded "dat geeneen van die stelle verweerders onregmatig opgetree net", and that the appellant was not entitled to any damages. In both cases the trial court gave judgment

for the defendants with costs, such costs to include the costs of two counsel.

The appellant appealed successfully to this court against the orders made by the trial court in each case. The judgment of this court was delivered on 2 December 1993 and has been reported as Neethling v Du Preez and Others, Neethling v The Weekly Mail and Others 1994(1) SA 708(A).

In the appeal the seven respondents were represented by the same senior and junior counsel. Argument on both sides was confined to the merits. Neither side suggested that if the appeal should succeed this court should itself fix the quantum of damages. On the contrary counsel on both sides agreed that in the event of a successful appeal the matter should be sent back to the trial court to enable it to determine the award of damages.

Having concluded in the course of its judgment that the appeals should succeed, this court (at 786J - 787J) adverted to the

issue of damages. While pointing out (at 787C) that the assessment of damages is a function which lies peculiarly within the province of the trial judge, this court nevertheless expressed the opinion (at 787D) that in the instant case remittal to the trial court might prove inconvenient to all concerned. It went on to say:

> "Subject to further argument thereon our prima facie view is that it would be more fitting that this Court itself should assess the damages to be awarded".

The orders allowing the appeals, and certain ancillary orders, appear at 787E-I of the reported judgment. The latter included (at 787F-H) leave to the parties to file further heads of argument dealing, inter alia, with the following:

3) the reasons, if any, why the quantum of damages should be determined by the trial court rather than by this court;

4) the quantum of damages against the eventuality that this court might decide itself to determine the damages.

In response to the above-mentioned orders there were respectively filed on behalf of the parties: (i) additional heads by the appellant dated 8 February 1994 ("the appellant's first AHA"); (ii) additional heads by the respondents dated 15 March 1994 ("the respondents' AHA"). In the appellant's first AHA it was submitted, for a number of reasons, that a determination of the damages by this court would be appropriate. Various aspects of the two cases relevant to the quantum were explored, and approximate figures were suggested. In the respondents' AHA, on the other hand, it was submitted that this court possessed no original jurisdiction to determine the quantum of damages. In the alternative it was urged that in any case such a determination would here be inappropriate. It was said that the respondents proposed to apply for leave to reopen the two cases, and/or to lead further evidence relevant to the issue of damages, which evidence "has only recently become available to the respondents".

Having regard to the stance thus adopted by the respondents this court on 2 June 1994 issued the following directive to the parties:

" (1) Counsel for the appellant may, if so advised, on or before 15 June 1994 file heads of argument in reply to respondents' heads dated 15 March 1994 and more particularly in response to the submission .... that in the absence of the consent of all parties this court lacks the competence to determine the issue of the quantum of damages.

(2) Subject to paragraph (3) below oral argument as foreshadowed in paragraph (C) of the order made by this court on 2 December 1993 will be heard on 29 August 1994. The particular issue..... will be argued as a point in limine.

(3) If in the light of the respondents' heads of argument dated 15 March 1994 the appellant accepts that in the absence of the consent of all parties this court is legally incompetent to determine the damages, or that, for any other reason, the matters should be referred back to the trial court, his attorneys will in writing inform the registrar of this court thereof on or before 15 June 1994. Should the registrar be thus informed then:

(i) the directive set forth in paragraph (2) above will fall away; and (ii) this court will, without further reference to the parties, make a further order that the matters be referred back to the trial court for it to deal with all the issues outstanding".

In response to paragraph (1) of the said directive the appellant filed further heads of argument ("the appellant's second AHA") dated 13 June 1994. Therein the submission is made that this court indeed has jurisdiction itself to determine the damages; and that in all the circumstances of the present matter it should do so. Having regard to the above, further oral argument by counsel became necessary. Such argument was heard by this court on 29 August 1994.

The powers of this court to make orders on the hearing of an appeal to it derive from the provisions of sec. 22 of the Supreme Court Act, No. 59 of 1959 ("the Act"). That section reads as follows:

" 22. The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power -a) on the hearing of an appeal to receive further

> evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require". (My emphasis)

In what follows reference will be made to the words emphasised in paragraph (b) in the above quotation as "the auxiliary provision". In the instant case the trial court decided that the appellant was not entitled to damages. In consequence there was no judgment or order in regard to damages which was "the subject of the appeal" which could be "confirmed, amended or set aside" by this court on appeal. What now falls to be decided is whether in the present situation the auxiliary provision invests this court with the competence itself to

determine the amounts of damages to be awarded to the appellant. If as a matter of substantive law this court lacks such competence then it is bound to remit the matter to the trial court for the damages to be fixed by it. If on the other hand, this court does indeed have such competence, then the further question arises whether in all the circumstances of the case it should exercise the power rather than remit the matter.

Counsel for the respondents submitted that the power conferred upon this court by the auxiliary provision should be construed as being one limited to matters arising directly from the appeal itself - such as, for example, a remittal of the matters to the trial court for the hearing of further evidence or for argument on the quantum of damages to be fixed by the trial court; and that accordingly this court had no competence itself to determine the damages. On the other hand counsel for the appellant urged upon us that when in an action for damages a trial court has non-suited the plaintiff on the merits, then

in a successful appeal against the decision of the trial court this court may, if the "circumstances" so "require", itself determine the damages to be awarded to the appellant plaintiff.

I think that the appellant's submission is correct. Looking at the words of the auxiliary provision in their contextual setting they appear to me to be naturally susceptible of the interpretation for which counsel for the appellant contends. The construction suggested by counsel for the respondents assigns, so I consider, an artificially restricted meaning to the auxiliary provision, which would in practice inhibit the expeditious despatch of litigation. This consequence may be illustrated by reference to situations which not infrequently arise in appeals to this court flowing from actions for damages in which this court concludes that the trial court wrongly found against the plaintiff on the merits; and that the plaintiff is accordingly entitled to damages.

Two examples will here suffice. First, suppose that in such a case this court is firmly of the opinion that the successful appellant

should be awarded damages in no more than a minimal amount. Again, suppose that the trial court in giving judgment against the plaintiff on the merits only, but with an eye to a possible appeal, quantifies the damages it would have awarded the plaintiff had he succeeded on the merits; and that this court considers that having regard to the damages actually suffered by the plaintiff the figure mentioned by the trial court:

a) represents an accurate and appropriate assessment of the amount of damages which should be awarded;

or

b) is glaringly disproportionate either because it is far too modest or because it is grossly excessive.

In each of the above situations a remittal to the trial court would serve no purpose; it would simply involve needless delay and additional costs, both of which would be avoided if this court itself determined the damages.

It is unnecessary, in my view, to enlarge upon the incongruous results flowing from the narrow construction of the auxiliary provision for which the respondents contend. The fact of the matter is that in a number of appeals, each resulting from an unsuccessful action for damages in which the court below has erroneously non-suited the plaintiff on the merits, this court has made orders in regard to the quantum of damages which involve a clear negation of the restrictive interpretation. A survey of its reported decision reflects that in the past, and in the very sort of situation now under discussion, this court has, in appropriate circumstances, itself fixed the damages to be awarded the plaintiff.

One begins by considering the position as it was before the Act was passed. The Act repealed the whole of the Appellate Division Further Jurisdiction Act, No. 1 of 1911 ("the repealed Act"). It is to be noticed that the words of the auxiliary provision, with immaterial modifications, are a repetition of a provision (emphasised in the

in the quotation hereunder) to be found in sec. 4 of the repealed Act.

Sec. 4 read:

> "4. On the hearing of any appeal, the Appellate Division shall have power to remit the case to the court appealed from for further hearing, with such instructions as regards the taking of further evidence or otherwise as may be deemed necessary, and shall have full powers of amendment, and also power to receive further evidence on questions of fact, either orally or by deposition before a commissioner, and may give any judgment or make any order which the case may require: Provided that in exercising the power to receive such further evidence the Appellate Division shall make such order as will secure an opportunity to the parties to the proceedings to appear for the purpose of examining every witness whose evidence shall be so received".

Crawford v Albu 1917 AD 102 was a defamation case in which the trial court upheld a defence of fair comment and dismissed the plaintiffs action for damages with costs. The appeal to this court was allowed by a majority (Innes CJ and De Villiers AJA; Solomon JA dissenting). Having dealt with the merits Innes CJ went on to

say (at 121) (hat a survey of the circumstances satisfied him "that this is not a case for heavy damages". The learned Chief Justice proceeded (at 121-122) to state the essential facts; and he concluded his judgment (at 122) with the following words:

> "And though he [the defendant] overstepped the bounds of fair comment, and refrained from attempting to justify his words, it does not seem to me that he should be mulcted in any substantial penalty. The justice of the case would to my mind be met by awarding 25 damages. And the order of the Provincial Division will be set aside and judgment entered for the plaintiff for that amount with costs in both courts".

Turning to the period subsequent to the passing of the Act a number of decisions relevant to the inquiry are to be noticed. In Botes v Van Deventer 1966(3) SA 182(A) the plaintiff claimed damages based on negligence for the loss of three racehorses with which the defendant's driver had collided. The trial court erroneously concluded that the plaintiff was disentitled from recovering the value

of the animals as racehorses, and awarded damages on their value simply as ordinary horses. On appeal the issue of damages was dealt with by Van Blerk JA (at 191 in fin - 192A) in the following way:

> "Aangesien daar geen evaluasie deur die Verhoorhof van die deskundige getuienis is nie, moet hierdie Hof, of self die waarde van die diere volgens die getuienis vasstel, of die saak terug verwys na die Verhoorhof om die waardasie te maak. Omrede die partye klaarblyklik reeds buitensporige verhoorkoste opgeloop het as gevolg van die uitgerekte verhoor is dit gerade dat in die spesiale omstandighede van hierdie geval hierdie Hof, soos deur beide advokate versoek, die buitegewone stap neem om self die waarde vas te stel". His judgment was concurred in by Ogilvie Thompson and Botha JJA (at 193B); and the orders made by Van Blerk JA (at 193A-B) were concurred in by Rumpff JA (at 193B-C) and by Williamson JA (at 195G-H).

A plea of privilege in a defamation action was upheld by the

trial court in Pogrund v Yutar 1967(2) SA 564(A). On appeal this court found (at 574A-B) that the plaintiff has established animus injuriandi on the part of the defendant, and was accordingly entitled to succeed. The remaining issue of damages was resolved by Beyers JA (at 574B-C) in the following fashion:

> "No evidence was led at the trial on the question of damages. It will therefore serve no purpose if this Court were to send the case back to the trial Court for an assessment of damages. It seems to me that we are in as good a position as the Court a quo to make the award. It is not easy to translate into terms of money the injury sustained by the appellant, but having regard to all the circumstances, including the part played by him in the matter, I have, after careful thought, come to the conclusion that an award of R500 will meet the case".

The judgment of Beyers JA was concurred in by the other four members of the court.

In Areff v Minister van Polisie 1977(2) SA 900(A) a businessman had unsuccessfully sued the Minister of Police for damages arising out of two allegedly unlawful arrests. In regard to

the first incident the trial court held that the Minister had established on a balance of probabilities that the arrest was lawful; and in regard to the second incident that the plaintiff had failed to prove the fact of his arrest. Accordingly the trial court dismissed the plaintiff's claims with costs. On appeal this court agreed with the trial court in regard to the second incident, but in regard to the first incident it concluded that the Minister had not established the lawfulness of the arrest, and that the plaintiff was entitled to damages in respect thereof. The unanimous judgment of this court was delivered by Muller JA. Having stressed (at 914F-H) the gravity of the delict involving deprivation of personal liberty, and after a summary of the salient facts, the learned judge of appeal (at 915A) dealt summarily with the undetermined matter of damages. He stated:

> "Hy [the plaintiff] eis, ten opsigte van die betrokke insident, 'n bedrag van R2 000. Na behoorlike oorweging van al die omstandighede meen ek dat 'n bedrag van Rl 000 redelike en billike vergoeding sal wees."

In Ramsay v Minister van Polisie en Andere 1981(4) SA 802(A) the plaintiff, an attorney, had in the Transvaal Provincial Division unsuccessfully sued the Minister of Police and three police officers for damages for injuria in the sum of R3 000. On appeal this court unanimously decided that the appeal should succeed. The issue of damages was dealt with by Jansen JA (at 815B-C) in the following words:

> "Die enigste oorblywende vraag is waiter bedrag as genoegdoening aan horn toegeken moet word. Dit is 'n ernstige injuria wat horn aangedoen is. Hy is as professionele man en beampte van die Hof in die voorportaal van die Hooggeregshof gekrenk in sy eergevoel en in die uitoefening van sy professie. Aan die ander kant is dit hier nie 'n geval van vryheidsberowing in die gewone sin of aantasting van liggaamlike integriteit of goeie naam nie. Genoegdoening van Rl 500 skyn gepas te wees".

In a separate judgment by Botha AJA (in which the remaining three members of the court concurred) agreement was expressed (at 820H) with the views of Jansen JA "aangaande die bedrag van

genoegdoening waarop die eiser geregtig is".

In Botha v Lues 1983(4) SA 496(A) the plaintiff, having sued unsuccessfully in the magistrate's court in an action for damages for unlawful arrest, appealed to the Orange Free State Provincial Division. The latter found that the plaintiff had failed to prove that his arrest had been unlawful and dismissed the appeal with costs. The plaintiffs further appeal to this court succeeded. Having concluded that the arrest had in fact been unlawful this court proceeded itself to fix the damages payable to the plaintiff. In delivering the unanimous judgment of the court Corbett JA (at 506 in fin) said the following:

> "Wat genoegdoening betref, het respondent se advokaat nie eintlik kapsie gemaak teen die bedrag (nl Rl 000) wat appellant geëis het nie. Na oorweging van al die omstandighede is ek egter van mening dat billikheid en geregtigheid sal geskied as ek genoegdoening ten bedrae van R500 toeken".

Lastly reference should be made to Jansen Van Vuuren and Another NNO v Kruger 1993(4) SA 842(A). This was an appeal

against a judgment in the Witwatersrand Local Division dismissing a claim for damages for an alleged breach of the plaintiffs right to privacy. This court unanimously upheld the appeal and at the same time itself fixed the damages to be awarded to the plaintiff at R5 000.

Harms AJA stated the reasons for the court's decision itself to determine the damages in the following words (at 847 G-I):

> " In the light of its finding the trial Court did not assess the amount of damages suffered. Counsel were agreed that the matter should not be referred back to it for that purpose. There are good reasons for complying with this request. Compare Botes v Van Deventer 1966(3) SA 182(A) at 191 G - 192 B. They are: only general damages are in issue, both parties have closed their case, there are no factual disputes which need to be resolved, the plaintiff has died and the appellants at this stage do not ask for a substantial award and costs of a further hearing ought, if possible, to be avoided".

In the light of the foregoing I conclude that in the instant matter it would be legally competent for this court itself to fix the damages to which the appellant in this appeal is entitled. I proceed

to consider whether in all the circumstances it should do so, or whether the better course would be to remit the matter for determination of the damages by the trial court.

The general rule is that the determination of damages is a function peculiarly within the province of the trial court. Although in a particular case the interests of justice and convenience will best be served by the determination of damages by an appellate tribunal, the exercise of such power by the latter nevertheless represents an encroachment upon a function which is intrinsic to the trial court. In Craig v Voortrekkerpers Bpk 1963(1) SA 149(A) the plaintiff in a defamation action had been non-suited on the merits by the trial court. The appeal to this court succeeded. In setting aside the order of the trial court, the court expressed the view that to bring the case to a conclusion the proper course was to send it back to the trial court. In this connection Rumpff JA, who delivered the unanimous judgment of the court, observed (at 162A):

> "Die vasstelling van die bedrag van skadevergoeding wat respondent moet betaal, is 'n funksie wat besonderlik eie is aan 'n Verhoorhof. Daarby kom dat die advokate, wat voor ons verskyn het, ons nie gevra het nie om self die bedrag van skadevergoeding vas te stel, indien die appèl sou slaag, en die deel van die saak ook nie beredeneer het nie. In hierdie omstandighede is ek van mening dat die aangewese weg is om die saak terug te verwys na die Verhoorhof om die saak op die gebruiklike wyse af te handel, vir sover dit betref die bedrag van skadevergoeding en die koste in die Hof a quo".

It will be recalled, moreover, that in Botes v Van Deventer (Supra) this court (at 192A) regarded the fixing of damages by itself as a "buitegewone stap"; it was necessitated by "die spesiale omstandighede" to which reference was made; and it was a procedure requested by counsel on both sides.

In the light of the above it seems to me that in the absence of special circumstances this court would be slow to depart from the general rule that damages should be left to the determination of the trial court. More particularly would this be the approach in a defamation case in which compensation is primarily for sentimental loss. Such loss is not easily translated into monetary terms; and it is trite that the trial court has a wide discretion in the assessment of the damages to be awarded.

From an examination of the judgments discussed above it appears that some of the factors which have weighed with this court in its decision itself to fix damages rather than to remit the matter to the court below are:

5) the fact that the damages should be minimal;

6) the fact that the trial court has omitted to make its own assessment of expert testimony which has been adduced in relation to the issue of damages;

7) the fact that the proceedings before the trial court have been protracted and very costly;

8) the fact that before the trial court no evidence in regard to the quantum of damages has been led;

9) the fact that counsel on both sides in the appeal have requested this court so do deal with the matter.

It is impossible to attempt a complete list of those factors which, either individually or cumulatively, would be regarded as circumstances special enough to warrant a departure from the general rule that it is the trial court and not the appellate tribunal which must fix the damages. Each case must be dealt with on its own particular facts. On the other hand it seems to me that a factor operating powerfully against any departure from the general rule would be an objection to the fixing of damages by the appellate tribunal voiced by the one or other (or both) parties to the appeal. Since the determination of damages falls particularly within the domain of the

trial court great weight must be given to a demand by either party to the appeal that damages be fixed by the forum in which the action was heard.

It has already been mentioned that at the stage when the merits of the appeals were being argued counsel on both sides desired a remittal to the trial court in case the appeal should succeed. That remains the wish of the respondents. In mooting the possibility of a departure from the general rule this court considered that such a course might serve the convenience of all the parties. At the hearing of the point point in limine counsel for the respondents informed us that in fact such a course would be inconvenient to his clients; and, as he was entitled to do, voiced a firm objection thereto. In all the circumstances of the present case the respondents' objection must, in my view, operate decisively against any determination of the damages by this court.

In suggesting that a determination of the damages by this court

would be the more appropriate course, counsel for the appellant placed considerable emphasis on the fact that the trial court not only found the appellant to be a deliberately untruthful witness but further that its unfavourable impression of the appellant had adversely influenced its notions as to what order of damages might have been appropriate had the appellant succeeded on the merits. In this connection counsel called our attention to the following observation made by the learned trial judge in the concluding part of his judgment:

> " dat die skade waarvoor verweerders aanspreeklik sou gewees het as die verweer van regmatigheid nie geslaag net nie, by verre nie die gevorderde bedrae sou beloop het nie".

While fairly conceding that upon a remittal the trial judge (I quote from the appellant's first AHA) -

"..... would beyond doubt scrupulously and objectively" apply the findings of this court's judgment on appeal, counsel nevertheless suggested that in regard to the quantum of damages the

trial court might perhaps hold the scales of justice less comfortably than this court. I am unable to agree. I do not think that there is any room for an apprehension that the learned trial judge will not be able to disabuse his mind of such of his own earlier perceptions as are at variance with the judgment of this court.

For the aforegoing reasons I conclude that in the circumstances of the present case it is appropriate for the damages to be fixed by the trial court.

Counsel for the appellant properly conceded that in the event of this court deciding to remit the case to the trial court the appellant should pay the costs involved in the hearing of the further argument on the point.

In the result the case is remitted to the trial court to assess the the appellant's damages and to make an appropriate order for costs in that court. The appellant must pay the costs incurred in this court subsequent to 2 June 1994, including the costs of two counsel. In

respect of the costs incurred in this court between 2 December 1993 and 2 June 1994 no order is made.

G G HOEXTER

CORBETT CJ) NESTADT
JA) NIENABER JA)
CONCUR
NICHOLAS AJA)