CASE NO. 563/93
jvdm/

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LESLEY RADELL APPELLANT

and

THE MULTILATERAL MOTOR

RESPONDENT
VEHICLE ACCIDENT FUND

CORAM: JOUBERT, NESTADT, STEYN,

F H GROSSKOPF et NIENABER, JJA

HEARD: 16 MARCH 1995

DELIVERED: 29 MARCH 1995

JUDGMENT

STEYN, JA/

STEYN JA:

Appellant, ("plaintiff") a citizen of the United States of America, appeals against an order of costs made in the Transvaal Provincial Division on 15 June 1993 in an action in terms of the Compulsory Motor Vehicle Insurance Act, 56 of 1972, against respondent ("defendant") for damages in respect of personal injuries sustained by her in a motor vehicle collision in this country.

By agreement between the parties the record in this appeal was limited to the judgment on costs delivered by Myburgh J in the Court a quo on the said date. That is consequently all that is now before us.

The relevant facts are set out in the judgment as follows:

> "During August 1983 the plaintiff, Mrs Radell, issued summons against President Insurance Co Limited ('President') for the payment of the sum R72 997,20 as damages resulting from injuries sustained by her in a collision on 20 May 1981 with a vehicle insured by President in terms of Act No 56 of 1972. During June 1984 plaintiff amended her claim to increase it to

R611 329,11. On 30 July 1990 the defendant tendered to pay the plaintiff R300 000 and costs in terms of Uniform Rule 34(1). In terms of rule 34(6) the plaintiff had fifteen days within which to accept the tender. The fifteen day period expired on 17 August 1990. On 6 March 1992 plaintiff again amended her claim. She increased her claim and for the first time claimed payment of some of the damages in US dollars. Her claim, in total was for R146 751,92 and $1 066 063,71. In April/May 1992, evidence was taken on commission in the United States of America over a period of about four weeks. The trial commenced before this Court on 26 October 1992 and ran for two weeks. It was then postponed to 15 March 1993. On 13 March 1993 the plaintiff substituted the Multilateral Motor Vehicle Accident Fund ('the Fund') as defendant in place of President, which had been placed in liquidation. On 15 March 1993 the trial resumed. It ran for about two and a half weeks. On 8 April 1993 this Court gave judgment for the plaintiff in the following amounts:

Past hospital and medical expenses	R 20 875,96
Future hospital and medical expenses	$12 945,00
Future loss of earnings	$74 446,00
General damages	R30 000,00"

The tender was then disclosed to the Court a quo. The question of costs was thereafter dealt with. The Court a quo decided

that

> "one has to determine the value to the plaintiff of the tender in 1990 and compare it with the value of the award in 1993"

Having done so, and having found by that method of calculation that

> "the value in real terms of the tender to plaintiff in 1990 exceeded the value to her of the amount of the judgment given in 1993",

the Court a quo came to the conclusion that the tender exceeded the award. The above-mentioned order of costs was then made. In terms thereof respondent was ordered to pay plaintiff her party and party costs until 16 August 1990 (on which date the spatium deliberandi afforded plaintiff by Rule 34(6) expired) and, save for certain exceptions not now relevant, plaintiff was ordered to pay defendant's party and party costs since that date.

The key to the trial Court's order is, to my mind, the fact that plaintiff's claim was partly in US dollars and that the award in her

favour was also partly in that currency. The general principle is that if the amount awarded exceeds that of the tender, an order of costs will, in the absence of special circumstances, be made in favour of the plaintiff and vice versa. Harms: Civil Procedure in the Supreme Court, Section P 8 p 439; Swisstool Manufacturing Co (Pty) Ltd v Omega Africa Plastics (Pty) Ltd 1977 (3) SA 458 (W) at 460C.

The learned Judge dealt in these terms with the effect of the rate of exchange on the award in US dollars:

> "The exchange rates on the three relevant dates and the equivalent in Rands of the amount awarded by the court are the following:
>
> 30 July 1990 2,6072 R278 721,77 17 August 1990 2,5657 R275 095,00
> 8 April 1993 3,2025 R330 745,63
>
> It follows that if the rate of exchange on 8 April 1993, the date of judgment, is applicable, the judgment exceeded the tender by R30 745,63; if the rates of exchange in July and August 1990, when the tender was made and the plaintiff enjoyed a spatium deliberandi, are applicable, the tender exceeded judgment."

The reasoning by way of which the learned Judge came to the aforementioned conclusion appears from the following further passages in his judgment:

> "Mr Peter Solomon, who appeared for the plaintiff to argue this point, submitted that the applicable rate of exchange was the one prevailing on the date of judgment. It was on that date that the Court determined the quantum of the plaintiff's damages and it was on that date that the amount awarded became payable……
>
> I am not, however, persuaded. In my view one has to determine the value to the plaintiff of the tender in 1990 and compare it with the value of the award in 1993. The purpose of the tender is to bring an end to the litigation and to protect the defendant against further costs. In this case it is not surprising that President made a tender in terms of rule 34(1): the merits had been settled, the only issue being the quantum of the plaintiff's damages; the claim was substantial; the plaintiff, an American citizen living in the USA, was entitled to claim for loss of earning capacity and future medical expenses in US dollars and it was inevitable that evidence on commission in the USA would have to be taken, adding substantially to the costs of litigation. It was a prudent step to take. The mechanism of an unconditional offer to settle contained in rule 34(1) and a judgment have these features in common: the aim of each is to compensate the plaintiff for her loss, and, on acceptance of the

offer or on judgment, the lis between the parties is ended. In arriving at the amount of the tender, the defendant would have undergone a similar exercise to the one undertaken by the Court and made an assessment of the plaintiffs loss under each head of damages, erring on the side of generosity in order to ensure that the tender exceeded any amount awarded by a Court in due course. The question which President would have asked itself is: what amount should a Court award the plaintiff to compensate her for her loss? When the plaintiff received the tender, she should have asked the same question. Had she come to the conclusion that the defendant's assessment was accurate or too low, but nevertheless attractive, and accepted the tender, she would have received R300 000 in 1990. She would have been compensated in full for her loss, and had change. On acceptance of the tender, not only would the plaintiff have been compensated in full, she would have received R21 278,23 more than the amount of her loss (as assessed by the Court), being the difference between the tender of R300 000 and the value in rands at that time of the Court's award of R278 721,77 with the consequence that litigation would have been ended (and the parties saved many hundreds of thousands of rands in costs).

Accordingly, the value in real terms of the tender to the plaintiff in 1990 exceeded the value to her of the amount of the judgment given in 1993."

After 6 March 1992 when the dollar claims were

introduced by way of amendment to plaintiffs particulars of claim, both parties were undoubtedly at risk by virtue of the continual fluctuations in the exchange rates between the two relevant currencies. The tender was made in rand and remained unchanged as to currency and amount despite the subsequent introduction of the claims in US dollars. Those claims likewise remained unchanged. A claim in US dollars is, if awarded, made in that currency irrespective of its purchasing power at the date of judgment. It is a case of take the dollar as you get it. This is due to the principle of nominalism of currency explained by E M Grosskopf JA in SA Eagle Insurance Co Ltd v Hartley 1990 (4) SA 833 (A) at 839 D-J in the following terms, in contrast to the so-called "Everson principle" enunciated by Howie J in Everson v Allianz Insurance Ltd 1989 (2) SA 173 C:

> "Now, ex hypothesi, the Rl 000 represents the actual financial loss incurred some time before the trial. Let us assume it was incurred on a single occasion. If judgment had been given a day later an amount of Rl 000 and no more would have been

awarded. That represents 'the number of rands he has lost' in the words of Howie J (Everson's case at 175A). The application of the Everson principle would entail that the plaintiff would be awarded a different number of rands at the trial if it took place some time after the loss was incurred and there had been a change in the purchasing power of the currency in the interim. (In recent decades we have suffered a decline in purchasing power, but the same rule must in principle apply to an enhancement.) The application of the Everson principle would thus 'be tantamount to altering the quantum of the debt according to when the (plaintiff) seeks to exact it' (Cosmopolitan National Bank of Chicago v Steiberg 1973 (4) SA 579 (R) at 581F; Voest Alpine Intertrading Gesellschaft MBH v Burwill and Co SA (Pty) Ltd 1985 (2) SA 149 (W) at 151D).

This result seems to me to be in conflict with the principle of nominalism of currency which underlies all aspects of South African law, including the law of obligations. Its essence, in the Geld of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation. See Farlam and Hathaway Contract:Cases,Material and Commentary 3rd ed at 719 note 2; H J Delport 'Inflation and South African Law' (1982) 4 Modern Business Law 115 and A Spandau 'Inflation

and the Law' 1975 SALJ 31.

Nominalism is the norm in the common law of Western States with similar systems to our own. Thus in Deutsche Bank Filiale Nürnberg v Humphrey (1926) 272 US 517 at 519 the United States Supreme Court said:

> 'An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it..... Obviously, in fact a dollar or a mark may have different values at different times, but to the law that established it it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account.'"

At 840 G-H the learned Judge applied that principle as follows to the claim there under consideration:

> "The principle of currency nominalism is in my view to be applied as follows in the present case. The respondent suffered a loss of income, expressed in rands, prior to the trial. That loss had to be made good by the appellant by paying to the respondent the number of rands which he has lost, irrespective of whether the purchasing power of the rand has varied in the

interim."

This principle and its mode of application are clearly applicable to the present matter.

It is now settled law that the Court a quo had the power to award plaintiff damages in US dollars in respect of her claims for loss of earning capacity and future medical expenses. Under the circumstances it was appropriate that this was done. Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A) at 774F-775A.

As to how and when such an award may be satisfied Corbett CJ said the following in the Nedperm Bank case, supra, at 777 CD.

> "I accordingly conclude that the damages to be awarded in this case should be expressed in US dollars. It is implicit in any order to this effect that the judgment debt may be satisfied in South Africa by payment in the foreign currency or by the payment of its equivalent in rand when paid. (Compare the

> Elgin Brown case at 674J, and see also the English cases of Miliangos v George Frank(Textiles)Ltd [1985] 1 All ER 1076 (CA) at 1086b; The Despina R [1977] 3 All ER 874 (CA)at 902/1) Any other conversion date could render meaningless the award in the foreign currency."
>
> [my emphasis]

The learned Chief Justice here clearly applied the principle of currency nominalism.

The date of payment could certainly never be earlier than that of the award and will certainly here be substantially subsequent thereto. At date of payment the conversion rate could, and under the circumstances pertaining in this matter, would most probably be different to that at date of judgment due to the constantly fluctuating rate of exchange between rand and dollar. This may be to the advantage of either party. In the present matter it is, however, quite improbable that at date of payment the conversion rate would be such that the rand equivalent of the dollar award would be less than the amount of the tender.

To decide whether the tender exceeded the award or not, the dollar portion of the latter had of necessity to be converted into rand because that was the currency in which the tender was made. For purposes of payment such conversion, in accordance with the judgment of the Chief Justice, has to be made at the date of payment. In order to determine the issue of costs, the date of payment, which depends partly on the defendant's decision, would not, however, be practical. The only practical date closest to the date of payment, is the date of judgment. A defendant who decides to tender must, in assessing the amount of his tender, take into account the possible delay between the date of tender and the date of judgment; and, if he makes his tender in a different currency from that in which the claim is couched, the possible fluctuations in the exchange rate. Those are the risks inherent in this form of procedure.

The learned Judge a quo was, therefore, undoubtedly wrong in taking the date of the tender as the conversion date and in

concluding on the strength thereof that the tender amount exceeded that of the award. In the light of this Court's decision in Nedperm Bank, supra, the award clearly beat the tender.

The order of costs made by the learned Judge, cannot, therefore, remain in force and must be set aside. The appeal is consequently successful to that extent, and must be allowed with costs. That is not, however, the end of the matter. The question of the costs of the trial remains to be considered. In that respect Rule of Court 34(12) provides as follows:

> "(12) If the court has given judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender; Provided that nothing in this sub-rule contained shall affect the court's discretion as to an award of costs."

A knowledge of all the relevant facts is necessary for the proper exercise of such a discretion. The learned Judge a quo

expressed his concern at the disturbingly high costs of the trial. By virtue of the limited nature of the record before us, this Court is not in possession of all the relevant facts. It is not, therefore, in a position to make any order as to the costs of the trial. Plaintiffs counsel requested that the matter be remitted to the trial court to consider those costs and to make such order thereon as, in the exercise of its discretion, is deemed proper. His request must, to my mind, be acceded to.

The following orders are made:

(1) The appeal is allowed with costs;

(2) The order of costs made by the Court a quo on 15 June 1993 is set aside;

(3) The matter is remitted to the trial Court to make such order as to the costs of the trial as it, in the exercise of its discretion,

deems proper.

M T STEYN JA

JOUBERT JA) NESTADT JA) F
H GROSSKOPF JA) concur
NIENABER JA)