THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 458/95

In the matter between:

FRANSCINA ELIZABETH GHYOOT — Appellant

and

THE MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND — Respondent

CORAM: EKSTEEN, HOWIE, PLEWMAN, STREICHER, JJA and VAN COLLER AJA

HEARD ON: 10 NOVEMBER 1997

DELIVERED ON: 25 NOVEMBER 1997

J U D G M E N T

PLEWMAN JA

On 5 August 1990 appellant, a married woman of 38 years of age, sustained serious injuries in a motor collision. Appellant was a passenger in a truck being driven by her husband, Dr Ghyoot, which collided with a vehicle insured by President Insurance Company Limited. This company has been liquidated and its obligations were taken over by the respondent, the Multilateral Motor Vehicle Accidents Fund (the Fund) constituted in terms of Act 93 of 1989. Appellant duly instituted an action against the Fund in the Natal Provincial Division claiming damages under various heads in an amount of R1 342 344,60. The Fund conceded liability and the only issue for trial was the quantum of appellant's claim. The ambit of the dispute was further narrowed by reason of the Fund furnishing appellant with an undertaking in terms of Clause 43 of the Agreement promulgated in terms of the above legislation and by an agreement concluded between the parties covering appellant's claim in respect of general damages. What was, in the end, in dispute at trial was appellant's claim for a past loss of earnings in the

sum of R59 855 and for loss of future earnings in the sum of R848 625. After a protracted hearing (in regard to which some further comments must presently be made) the learned trial judge awarded appellant the sum of R44 069,20 in respect of her claim for past loss of earnings and R110 000 in respect of her claim for future loss of earnings. Appellant, with leave granted by this Court, appeals against both awards contending that they are inadequate.

The case is an unfortunate one. Appellant and her husband were, it seems, a happy and successful couple. The husband is a qualified medical practitioner who, prior to 1988, had practised in Stanger, Natal, for a number of years. Some two years before the collision they decided to pursue a long standing ambition to alter their lifestyle by acquiring a small farm which, once the venture was under way, appellant would supervise while her husband conducted a medical practice on the farm. In pursuit of this ideal they purchased the farm Maryfield, some 24,9356 hectares in extent situate on the outskirts of the town of Richmond. The

previous owner had apparently farmed there with vegetables and appellant and her husband proposed to do likewise. Appellant's husband would have taken up his medical practice the day after the collision. He too was very seriously injured and is permanently disabled. He has instituted a separate action against respondent. This is still pending. Precisely how the husband's claim has been framed is not known but as far as appellant's case is concerned the two claims still in issue were formulated in the pleadings on the basis that appellant was in partnership with her husband in the farming venture. Her claim for past losses was based on the contention that as a consequence of her injuries certain crops were planted late and others not at all resulting in lost income. Her claim for future loss was based on her continuing incapacity and was quantified on the basis that a suitable measure of her damages was the cost of engaging a manager to perform the tasks which she no longer could. Appellant relied on the decision in this Court in President Insurance Co Ltd v Mathews 1992 (1) SA 1 at 5E-6B as authority for

this mode of quantification. I shall return to this question presently. At this juncture I need only add that the farm was registered in the name of a private company. In the court below it was argued by the respondent that in the circumstances the losses claimed under both heads were not suffered by appellant. This contention was rejected on the basis that the farming venture could, despite this formality, be regarded as a partnership, leaving appellant with a claim for losses sustained by her as a 50% partner in the venture. This objection has not been raised in this Court. Indeed there is no cross-appeal. As a result, in this respect (and in another to be mentioned later), there is no call on this Court to investigate or to consider the correctness of the conclusion of the court below in this regard.

What does arise is whether appellant's circumstances are or were such that the Mathews's case provides (as appellant's legal advisors contend) a proper blue print for the computation of her claim for future loss.

Appellant is of course entitled to be compensated for future losses. The respondent, on the facts of the case, must make good the difference between the value of appellant's estate after the commission of the delict and the value it would have had if the delict had not been committed. A capacity to earn is considered to be part of a person's estate and therefore an impairment of that capacity constitutes a loss if it diminishes the estate. Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A). The value of such loss must be calculated in terms of what she would have earned or received had she not been incapacitated. Such loss (expressed in monetary terms) can be proved in a variety of ways depending on the particular facts of each case. (Dippenaar's case (supra) at 917E-F.) There are often, if not always, imponderables which come into play.

In the present case appellant pleaded the quantification of her respective losses in paragraphs 8(d) and (e) of the particulars of claim as follows:

"(d) ....Eiseres [het] 'n verlies van inkomste gely, synde een helfte van die verlies wat gely is uit die vennootskap wat sy en haar man bedryf, bereken soos uiteengesit in die verslag van J. ING, 'n afskrif waarvan hierby aangeheg is gemerk 'B' in die bedrag van R59 855,00.

(e) <u>EISERES SE TOEKOMSTIGE VERLIES AAN INKOMSTE</u>

As 'n direkte gevolg van die ongeluk is Eiseres nie meer in staat om die plaas te bestuur soos wat die geval sou wees voor die ongeluk nie. Eiseres benodig 'n plaas bestuurder welke 'n jaarlikse salaris pakket van R85 208,00 sal ontvang. Die geskatte toekomstige verlies aan inkomste is die bedrag van R848 625,00 soos meer volledig uiteengesit in die aktuariele verslag van Mnr D G Rolland gedateer 7 Mei 1993 welke beteken is ooreenkomstig die reels van hierdie Agbare Hof."

Paragraph 8(d) raises a simple factual issue. In relation to the amount awarded under this head, the argument on appeal raised a limited and misplaced contention which I will address below. What is alleged in paragraph 8(e) is that appellant's future loss is established by the determination of the cost of employing a "substitute". It is modelled on

the proposition discussed in Mof&ewst case. While there is no objection in principle to this approach the judgment in Mathews's case makes it clear that the assumption is that the cost of employing a substitute will be less than the loss of income or profit which the claimant would otherwise have sustained.

The parties led evidence relevant to the issues as formulated in the pleadings quoted above. The court held that, since the farming venture had not been shown to be viable, no future loss in terms of the claim had been established. The employment of the substitute would not reinstate an income: it would only aggravate an existing loss. The learned judge, however, then proceeded to consider the question on a quite different (and seemingly unpleaded) basis. It is not immediately apparent to me why he did so. Here again, however, the fact that there is no cross-appeal precludes this Court from interfering with the award made. This Court can, in my view, only concern itself with the argument advanced on appellant's behalf that the finding that the farm was not viable was

incorrect and that appellant was entitled to a larger award. Counsel also attempted to argue that the viability of the farm was irrelevant - a contention which is not easy to follow. This argument, however, fell away when counsel conceded (not without some reluctance) that appellant was bound by the pleadings and that her claim had to be considered on the basis there set out and in the light of the evidence led in support of the allegations made in the pleadings.

Save for evidence, touched on only incidentally, relating to appellant's ability or potential ability to earn a income as a nurse/receptionist (a calling which she had up to some point pursued earlier in life) there is no other evidence on record relevant to a claim for future loss of earnings. The evidence with regard to the earnings of a nurse was seized upon by the court below to make an award in respect of future loss. It must immediately be said that in so doing the court seems in any event to have misread the evidence to the extent of doubling the amount of the appellant's potential earnings. On what basis

this computation was, given the state of the pleadings, justified is not clear. A curious feature of the arguments before this Court was the fact that respondent supported the award while appellant's heads of argument include the submission that "[a]ppellant's true earning capacity is linked to her skills as farmer/manager and not as a nurse/receptionist." Here, again, this Court is faced with the fact that there is no cross-appeal. It is therefore concerned only to decide whether, on the case as presented, the award for future loss should be increased to the sum which represents the cost of employing a manager.

It will be convenient to deal first with the award for past loss. Counsel for appellant (if I correctly understood the argument) raised two questions, namely, whether the learned judge was justified, as he states in the judgment, in seeking a via media between appellant's witness (Mr Ing) and respondent's witness (Professor Nieuwoudt) and in applying a contingency factor of 30% to the amount suggested by this "compromise". The submission that a compromise was struck between

two conflicting contentions is not correct. For the purposes of this award the learned judge accepted Mr Ing's computation but adjusted it so as to bring it more into accord with what he conceived reality to be by reducing the amount contended for by Mr Ing by a 30% allowance for contingencies. Once the claim was computed on the basis of Mr Ing's figures it cannot be argued (as appellant sought to do) that the court erred in having regard to Professor Nieuwoudt's evidence on the topic. Since the award is not questioned by respondent there is also no need to examine the justification for the learned judge's relying on Mr Ing's figures. As far as the contingency allowance is concerned it has often been held that the trial judge has "a large discretion to award what under the circumstances it considers right". Legal Insurance Co Ltd v Botes 1963 (1) SA 608 (A) at 614F. A discount for contingencies is one of the elements in the exercise of that discretion. It is often largely an arbitrary assessment depending on the judge's impression of the case.

It is well settled that this Court does not interfere with awards of

damages made by a trial court unless there is "a substantial variation" or "a striking disparity" between the award of the trial court and what this Court considers ought to have been awarded. (Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A) at 109H.) In the present case, what the court was concerned with was a loss of agricultural produce in the form of vegetables. Even without evidence, though the subject was in fact fully canvassed, it would be obvious that production of vegetables is a venture particularly prone to risk. Not only the normal problems which plague this country, such as too little rain or too much (with crops under irrigation the latter may be the more serious) or hail or pests, but also all the manifest problems related to marketing, unseasonal weather, oversupply, price fluctuations and other obvious risks must be considered. In the area in question political unrest was at the time a particularly significant factor, a by-product of which was serious losses of produce by theft. Given this situation, I can see no reason to interfere. The judge erred, if at all, on the side of generosity

in accepting Mr Ing's figures. He did not, fail in my view, to give effect to all the factors which should properly have entered into the assessment or make any error in principle or misdirect himself. There is thus, particularly in the light of the respondent's acceptance of features which may have tended to unduly inflate the award, no basis to interfere with the award of the court below.

I turn then to the claim for future loss of earnings or earning capacity and to consider the learned judge's finding that the farm was not viable. At this point some adverse comment on the manner in which the case was conducted in the court below is unavoidable. The trial court sat from 7-11 March 1994, 25-27 May 1994 and then again in July 1994. In the course of all this, appellant's case was closed only for the appellant to apply to reopen her case on two occasions. In addition witnesses were allowed to stand down to be recalled at later stages for the purposes of further examination or for cross-examination. The inevitable result was that the parties tended to regroup from time to time.

The testimony of Mr Ing, appellant's principal witness, is found at three separate places in the record. Having given his evidence-in-chief and been cross-examined, he was recalled after the respondent's three principal witnesses, Mr Krause, Professor Nieuwoudt and Mr Papenfus had given evidence. In the course of his evidence on his return to the witness box, appellant's case was reformulated by Mr Ing. In consequence, the defendant's case was also reopened. Additional witnesses were led and Mr Krause recalled to give evidence related to the amended formulation of appellant's case. Much of this muddle is, I think, to be laid at counsel's door but greater firmness on the part of the trial judge may not have come amiss. The result was of course a little unfair to all concerned. Mr Ing's attempt to reassess the appellant's farming prospects was an unacceptable change of stance. There are numerous other criticisms which can be discussed in relation to his evidence, most of which originated in the ever changing playing field. I mention only some examples. In order to do so it should be understood

that Mr Ing is an agriculturist and not an accountant (as Mr Krause is) or an economist (as Professor Nieuwoudt is). Mr Ing's evidence dealt with the type of product which could be cultivated, the suitability of the area for such endeavours, the yields which could be expected and the number of crops which could be planted in a year. He also expanded on the consequences of drought and the fact that droughts were indeed experienced on the farm in the five years during which appellant and her husband fanned the property. Much of this evidence was of a very general nature and unrelated to the actual results achieved by appellant and her husband. Mr Ing also made no analysis of the farm's cost structure. Mr Krause's evidence, on the other hand, involved a careful examination of the financial results of the farm. This showed that over the years it operated at a loss. Mr Ing confessed that he was unable to deal with the statistical financial data unearthed by Mr Krause. Its relevance he simply suggested was questionable because he could point to natural phenomena, such as water restrictions, which accounted (it

seems to me only in a general way) for the losses incurred. But certain of Mr Krause's observations are not so easily disposed of. Fundamental to his conclusion that the farm was not viable was the demonstrable fact that the bank account was overdrawn and that the overdraft was rising. The cost of servicing this overdraft was likewise growing and was always a very significant factor. In Mr Ing's initial evidence no regard was paid to such factors and he assessed the potential of the farm at a level which was insufficient to staunch the ongoing losses. It was only after the implications of Mr Krause's evidence were (so it seems) understood that an effort was made to counter it. This took the form of the preparation of an amended planting programme intended to show that a turnover could be achieved which would cater for the cost of employing a manager. This planting programme is exhibit H. Again there are a number of criticisms to be made, valid in themselves, but not necessarily crucial. Mr Ing, for example, included in his programme the planting of potatoes (as a significant contributor to his envisaged

turnover) when appellant's evidence was that this crop had been abandoned. In addition, a good deal of Mr Ing's evidence was based on the fact that appellant had, in or after 1992, installed a freezer plant which it was hoped would relieve the farm of the burdens associated with selling fresh produce. At no time between the installation of the plant and the commencement of the trial was the farm able to produce sufficient to employ the freezer plant properly and throughout the period appellant purchased produce from outside sources in order to make use of the installation. Appellant's case, however, was that with proper management and in particular by the employment of a manager the farm would produce enough to justify the installation of the freezer plant and (that is in addition) the employment of the manager. It is here that Mr Ing's evidence broke down. By his new planting programme Mr Ing predicted (no changes other than the employment of the manager being made) that a turnover of 1 000 to 1 200 tons of produce per year - the equivalent of R1 125,000 in revenue - could be achieved. This

proposition was advanced with no regard to his evidence (at the earlier stage of the hearing) to the effect that a manager (that is a single individual) could not, in the circumstances of this farm, oversee a production or turnover yielding more than R500 000 per annum. His earlier evidence is then destructive of the later evidence as a basis for the contention that the farm could become a viable enterprise.

Quite apart from this, however, it seems clear on a proper appreciation of the evidence of Mr Krause that the failure of the Ing case (for want of a better phrase) lay in the fact that the overdraft on the farm account was substantial - in excess of R328 000 - and growing. The farm losses over five years amounted to R811 000 odd. The records showed that there was no prospect of the farm earning a sufficient income to contribute materially to the cost of servicing the bond. In addition the Ing case made no allowance for remuneration to the appellant and her husband ("ondememersloon"). If an allocation of resources is made to either of these items on the undisputed figures

produced by Mr Krause, the farming venture sinks into further irretrievable losses. It is significant that the farm losses were at their lowest in the two periods in which planting was reduced (after the collision and because of the need to outsource vegetables). Viewed in this light the conclusion of the trial court that the farm was not viable cannot be faulted.

The only answer by appellant was an unfounded contention that a previous owner of the farm had farmed the property successfully. This was evidence of a plainly hearsay nature which was objected to. The validity of the objection was conceded. What this does illustrate, however, is that, if true, evidence ought to have been available of the productivity of the farm in years where the picture was not clouded by problems such as the suggested "learning curve" which appellant had to undergo or by water shortages. No such evidence was led by appellant.

In his reasons the learned judge in the court below hardly attempted to follow the ebb and flow of the evidence. In the light of the

fact that the parties were engaged in a process of adapting to changes in the other's approach he could scarcely do so. In my view he correctly eschewed detail and endeavoured to isolate the aspects critical to a determination of the question before him. In essence he viewed matters in the manner I have outlined. Mr Ing's approach he held to be too simplistic and he drew three conclusions from the evidence, namely, (1) that the losses over five years amounted to R811 945, (2) that the farm income was insufficient to contribute to the fixed cost which had to be met; and (3) that to justify the employment of a manager the farm income would have to double or its costs be reduced by half. In drawing these conclusions he relied on the evidence of the financial returns as confirmation of evidence to the same effect which was given by the agriculturists called as witnesses. The argument in this Court amounted to no more than that set out in appellant's heads namely that the making of consistent and heavy losses in agricultural production is a known pattern but one "very often followed by enormous profits". I find this an

unhelpful generalisation. In my view there is no fault to be found with the learned judge's conclusion that it had not been shown that the farm losses could be contained.

I therefore conclude that the admissible evidence was insufficient to establish the appellant's future loss of income as being the amount required to employ a manager. For the reasons already given this Court cannot deal with the alternative assessment of this loss. The appeal must also fail on this leg.

It remains only for me to say something about the appeal record. It is poorly indexed and annotated rendering the necessary references to exhibits difficult, time consuming and in some cases nigh impossible. It includes, quite unnecessarily, many pages of counsel's argument at interim stages of the proceedings. It contains the entire record of the application to this Court for leave to appeal - that is the petition and all the supplementary notices and documents. A minimum of 281 pages of such documentation is included - as much as three normal appeal

volumes. All this is to be laid at appellant's door. But for the outcome of the appeal a special order for costs on a punitive scale may well have been called for. The order I now make, however, renders it unnecessary to take this matter further.

The appeal is dismissed with costs including the costs of two counsel.

C PLEWMAN JA

CONCUR:

EKSTEEN JA)
HOWIE JA)
STRETCHER JA) VAN
COLLER AJA)