CASE NO 543/97

In the matter between

DONN EDWARD JOWELL	**APPELLANT**
and	
THOMAS HOWARD BRAMWELL-JONES	**1st RESPONDENT**
W E BALDERSON INC	**2nd RESPONDENT**
ARTHUR ANDERSON & CO	**3rd RESPONDENT**
JEFFREY RODNEY FLAX	**4th RESPONDENT**
SONNENBERG HOFFMANN & GALOMBIK	**5 t h RESPONDENT**
BRONWYN ALLAN	**6th RESPONDENT**
COOPERS & LYBRAND SERVICES (PTY) LTD	**7th RESPONDENT**

CORAM	**:**	**VIVIER, NIENABER, SCOTT, PLEWMAN JJA *et* FARLAM AJA**
HEARD	**:**	**21 & 22 FEBRUARY 2000**
DELIVERED	:	**28 MARCH 2000**

Claim for pure economic loss - advice wrongfully given to trustee - exception - duty of trustee where trust property comprises shares in holding company - claim for damages by capital beneficiary before termination of trust - claim premature.

J U D G M E N T

SCOTT JA

[1] The appellant is one of four capital beneficiaries in terms of a testamentary trust. He instituted action against eight defendants in the Witwatersrand Local Division for delictual damages for pure economic loss arising out of an alleged reduction in the value of his share of the capital of the trust in consequence of advice and assistance given by the defendants to the trustee. Exception to the particulars of claim was taken on behalf of all but one of the defendants. (The summons could not be served on the third defendant.) Two of the grounds of exception based on a lack of averments necessary to sustain an action were upheld by the Court *a quo*; hence the present appeal. The judgment of Heher J is reported *sub nom Jowell v Bramwell-Jones and Others* 1998(1) SA 836 (W). As the numbering of the respondents on appeal does not coincide with the numbering of the defendants in the Court below and to avoid confusion it is

convenient when referring to the respondents individually to refer to them as the defendants and by the number ascribed to them in that Court.

[2] The second, fourth, sixth and eighth defendants are respectively stockbrokers, chartered accountants, attorneys and, as alleged in the particulars of claim, "a supplier of financial services". The first, third, fifth and seventh are, or were at the relevant time, respectively employees or officers of the immediately following even-numbered defendant. The odd-numbered defendants were alleged to be the persons who in their personal and representative capacities were responsible for the acts and omissions on which the appellant's cause of action is based. Save in the case of the fourth defendant which delivered a notice of its own, each pair of defendants filed a notice of exception so that there were four notices in all. Each contained several distinct grounds of exception, either on the basis that the particulars of claim lacked averments necessary to sustain an action or on the basis that the pleading was vague and embarrassing, or on both bases.

Some of the grounds raised in one notice were repeated in others. The fourth defendant, which did not appear in this Court to oppose the appeal, sought in addition to have the particulars of claim, or parts of it, set aside as an irregular step in terms of Rule 30 for want of compliance with the provisions of Rule 18. After reserving judgment, the Court *a quo*, as I have indicated, upheld two of the grounds of exception. In addition, it ordered certain paragraphs of the particulars of claim to be struck out in terms of Rule 30(3). The remaining grounds of exception and grounds upon which it was sought to have the particulars of claim struck out pursuant to Rule 30 were rejected. The appeal is confined to the two grounds of exception that were upheld. I shall refer to them simply as the first and second exception.

[3] Save for the introductory paragraphs identifying the parties, the appellant's particulars of claim are quoted in full in the judgment of the Court *a quo* (849H - 862E). It is unnecessary to do so again. Nonetheless, to appreciate the

issues raised in this Court, it is convenient to set out in broad terms the facts as alleged in the particulars of claim and to the extent that they are relevant, the conclusions of law based on those facts.

[4] The late Dr Alan Jowell died on 20 January 1970. He was survived by his wife and four children, one of whom is the appellant. Clause 3 of his will, which was executed in 1965, made provision for the establishment of a trust in terms of which his wife, Mrs Edna Jowell, was to be the income beneficiary and his four children the capital beneficiaries. Mrs Jowell was also the nominated trustee. The material part of clause 3 reads as follows:

> "I direct that upon my decease all the Shares held by me in Glencordale (Proprietary) Limited, shall vest in my Administratrix/ors or Trustee/s hereinbefore named in Trust, and that my wife, EDNA MAVIS JOWELL (born COHEN) to whom I am married out of community of property, shall be entitled to receive all Income and/or Dividends from such Shares during her lifetime.
>
> Upon the decease of my wife I direct that the Shares shall devolve upon and be bequeathed to my children and any other children that may be born to me hereafter as may survive me, in equal shares, share and share alike ...."

Glencordale (Pty) Limited ("Glencordale") was a holding company which had been incorporated many years previously. Dr Jowell held 75% of its issued shares and Mrs Jowell the remaining 25%. Its sole asset was its shareholding in Trencor Limited. The latter is a public company which is listed on the Johannesburg Stock Exchange and its shares are said by the appellant to enjoy "blue chip" status. During Dr Jowell's lifetime and subsequently Trencor was controlled or managed by his brother and the latter's immediate family. Dr Jowell had for many years invested money in his brother's business which was later incorporated into Trencor. On obtaining shares in Trencor he had caused them to be registered in the name of Glencordale.

[5] It is alleged in paragraph 19 of the particulars of claim that the true subject of the Will Trust was Dr Jowell's "indirect shareholding of the Trencor shares". As the first exception is directed mainly at this paragraph, I shall quote it

in full.

> "In terms of the will (according to its grammatical and ordinary meaning ascertained from the terms of the will itself, alternatively so construed in its contextual setting as set out in paragraph 13 to 16 above, alternatively properly construed in the light of the circumstances therein set out), Dr Jowell's indirect shareholding of the Trencor shares, the property of Glencordale, was in fact and law the true subject of the Will Trust to which clause 3 of the will in particular applied, and Mrs Jowell had no greater power over the Trencor shares than she had over the Glencordale shares, being the property of his deceased estate and thereafter the Will Trust."

Mrs Jowell was duly appointed trustee of the Will Trust. It is alleged that she continues to hold that office and that the rights of the capital beneficiaries to the trust property vested in them on the death of Dr Jowell.

[6] It appears that there was in existence a further trust known as "the Alan Jowell Trust" which had been created by Dr Jowell many years before his death. In the case of this trust, too, Mrs Jowell was the income beneficiary and the four children of the couple were the capital beneficiaries. Mrs Jowell was the only surviving trustee. In 1970 when Dr Jowell died the trust had no assets and had

become dormant.

[7] In 1989 Mrs Jowell decided to emigrate to Canada. She wished to maximise her income emanating from various sources including her personal assets and to have that income remitted to Canada. She lacked knowledge and ability with regard to the financial, accounting, legal and taxation implications of doing so. She also had no knowledge of the exchange laws and their impact upon her as a prospective non-resident of the Republic. In addition, it is alleged that she lacked knowledge as to "the manner and form in which she was required as trustee of the Will Trust to hold the trust's assets and in particular the Glencordale shares and the Trencor shares". The defendants, who professed to have expertise in such matters, were accordingly engaged by her for reward to advise and assist her to lawfully achieve her objective. After investigating her affairs and acting in concert they devised and, with the concurrence of Mrs Jowell, put into effect the following scheme. Glencordale was to sell the Trencor shares. It would thereupon lend the

proceeds of the sale to the Alan Jowell Trust (in the mistaken belief that this was the relevant trust). The Alan Jowell Trust, i e Mrs Jowell in her capacity as trustee of that trust, would use the money so borrowed to acquire Eskom loan stock which was fixed interest - bearing and which would provide a better return than the dividends emanating from the Trencor shares. Glencordale, having sold the Trencor shares, would be liquidated and its asset, comprising its claim to be repaid the loan, would be declared and distributed as a liquidation dividend to the Alan Jowell Trust. In implementing the scheme Glencordale was wound up purportedly pursuant to a special resolution of Glencordale executed by Mrs Jowell in her capacity as trustee of the Alan Jowell Trust (and not in her capacity as trustee of the Will Trust). By virtue of an apparent compliance with the law relating to the winding-up of companies Glencordale ceased to exist and its name was removed from the register of companies.

[8] The scheme, "including in particular the sale of the Trencor shares and

the winding-up of Glencordale", is alleged to have been in breach of and *ultra vires* both trusts. The further allegation is made that the scheme was in breach of the Will Trust in as much as it was solely in the interest of Mrs Jowell and in conflict with her duty to the appellant and the other capital beneficiaries in that it resulted in the capital of the Will Trust being distributed to Mrs Jowell and, by maximizing the income flowing from the Will Trust and Mrs Jowell's foreign estate, prejudice to the trust, Glencordale and the capital beneficiaries.

[9] Sometime later the mistake was discovered, *viz* that the owner of the Glencordale shares had been the Will Trust and not the Alan Jowell Trust. Thereafter, and on a date unknown to the appellant, the Alan Jowell Trust transferred the Eskom stock to the Will Trust.

[10] The appellant alleges that in advising and assisting Mrs Jowell to implement the scheme the defendants' conduct was wrongful and that they intentionally and deliberately, alternatively negligently, violated the rights of the

capital beneficiaries. The allegations as to the damage suffered by the appellant in consequence of the defendants' conduct and the computation of the damages claimed are set out in paragraph 43 of the particulars of claim. They are based on the premise that Mrs Jowell was not permitted to cause Glencordale to sell the Trencor shares and that but for the implementation of the scheme Glencordale would have continued to hold the Trencor shares until her death. As the second exception is directed at this paragraph (which is also relevant to the first exception) I shall quote it in full.

> "43.1 As averred above, the plaintiff was vested with the right (as one of four capital beneficiaries), which said right is hereinafter referred to as 'the right', to receive upon Mrs Jowell's death ('the event') one-quarter of the Glencordale shares;
>
> 43.2 On the probable date of Mrs Jowell's death, being December, 2000, and but for the wrongful conduct of the defendants as set out above, the plaintiff would have received during December, 2000, one-quarter of the Glencordale shares;
>
> 43.3 At the said date, taking into account splitting of the shares in Trencor

from time to time to the present, Glencordale would have held 2,535,999 shares in Trencor;

43.4 Accordingly, having regard to the right, the number of Trencor shares attributable thereto was 475,500;

43.5 The value of the said 475,500 Trencor shares in December, 2000, will be the sum of R17 060 940;

43.6 The value of the plaintiff's share in the Eskom loan stock, being 18,75% thereof (taking into account the amount attributable to Mrs Jowell by reason of her ownership of 25% of the share capital of Glencordale) is the sum of R1 304 933;

43.7 Having regard to the terms of the will and the Will Trust, no account is taken of income which would or will accrue in respect of either the Trencor shares by way of dividend or otherwise, or the Eskom stock which will accrue by way of interest;

43.8 The difference between the aforesaid sum of R17 060 940 and R1 304 933 is the sum of R15 756 007;

43.9 The 'present value' as at the probable date of judgment herein (October, 1996), alternatively, as at the date of the defendants' wrongful conduct as set out above, is the sum of R10 844 098;

43.10 In consequence and as a result of the defendants' wrongful conduct,

> the plaintiff has suffered damages, being the loss to his patrimony caused by the damage to the right, in the said sum of R10 844 098 for which the defendants are jointly and severally liable."

(It should be noted that the reference to "Glencordale shares" in paragraphs 43.1 and 43.2 is clearly intended to be a reference to 75% of those shares.)

[11] Against this background, I turn to the first exception. It was raised by all the respondents who were represented in this Court, i e the first and second defendants (first and second respondents), the fifth and sixth defendants (fourth and fifth respondents) and the seventh and eight defendants (sixth and seventh respondents). Although formulated differently on behalf of the three pairs of defendants the gravamen of the complaint can be summed up as follows. The particulars of claim disclose no cause of action as the appellant's averments in paragraph 19 (quoted above) to the effect that the true subject matter of the Will Trust was the Trencor shares and that Mrs Jowell was prohibited from disposing of them are unsustainable having regard to the fact that the will is clear and

unambiguous and does not support the construction that the Trencor shares were subject to the Will Trust or to a restraint against alienation.

[12] In upholding this exception the reasoning of the Court *a quo* (at 866 I - 871 J), stated shortly, appears to have been the following. According to the plain meaning of the will the subject matter of the trust was the shares held by the testator in Glencordale; there was nothing in the surrounding circumstances pleaded in the particulars of claim to justify the conclusion that the reference in clause 3 of the will to "the shares held by me" in Glencordale was to be construed as a reference to that company's underlying assets; the latter were the property of another, namely Glencordale, and the testator had no power by means of his testamentary directions to divest the company of any of its assets; in the circumstances there was no restraint upon Glencordale's dealings with the Trencor shares; "nor did such restraint as there may have been upon Mrs Jowell as trustee extend to any steps which she might take directly or indirectly in relation to those shares". The learned

judge accordingly held that "in the result, the collapse of the cornerstone of the plaintiff's case brings down the whole carefully constructed edifice of the claim" and hence the exception had to be upheld. (At 871 I - J.) Notwithstanding certain remarks which suggest the contrary (see 870 H - 871B) the conclusion of the Court *a quo* appears therefore to have been that Mrs Jowell was entitled to use her control over Glencordale to cause it to do as she pleased with its assets and that it was for this reason that the cornerstone of the case had collapsed.

[13] Counsel for the appellant (who did not appear in the Court below or draft the heads of argument on appeal) did not attempt to argue that clause 3 of the will had to be construed as imposing a prohibition on Mrs Jowell as trustee against causing Glencordale to alienate its Trencor shares. However, they resisted any suggestion that Mrs Jowell had a free hand and could cause Glencordale to do with the Trencor shares as she pleased. I think counsel were correct in both respects. The words used in the will "all the shares held by me in Glencordale" are clear and

unambiguous. I can find nothing in the pleaded surrounding circumstances to justify the construction contended for in the appellant's heads of argument that the reference to Glencordale in the will was to be read as a reference to a company holding the Trencor shares so that the latter could not be alienated. The effect of such a construction would be of course that regardless of what the future might hold and even if there were to be a dramatic decline in the fortunes of Trencor the shares in that company could not be exchanged for a better investment. Such a far-reaching prohibition will not lightly be read into a will. The vagaries of the share market are legion. (See for instance the remarks of King J in *Ex Parte Wagner NO: In Re De Bie* 1988 (1) SA 790 (C) at 791 J - 792 A.) Before a restraint of the kind alleged in par 19 of the particulars of claim and advanced in the appellant's heads of argument can be imported into a will, the intention of the testator must, I think, be manifest. In the present case it is not. I am satisfied that counsel's concession was correctly made.

[14] It does not follow, however, that Mrs Jowell could do as she pleased with the assets of Glencordale and that her fiduciary duty to the capital beneficiaries went no further than preserving the share certificates she held as trustee. Glencordale was a holding company. The shares in a holding company represent an investment in its underlying assets and the value of the former is largely dependent on the value of the latter. That being so, a trustee who is vested with shares in a holding company is required to exercise the voting rights which those shares confer in a manner which is consistent with her fiduciary duty to the beneficiaries of the trust. To this extent therefore Mrs Jowell owed a fiduciary duty to the capital beneficiaries in relation to the assets of Glencordale. Indeed, I did not understand counsel for the respondents to contend otherwise.

[15] Having in effect abandoned reliance on paragraph 19 of the particulars of claim, counsel for the appellant submitted that the remaining allegations in the particulars of claim were wide enough to establish a breach of trust on the part of

Mrs Jowell (on the advice and with the assistance of the defendants) in essentially two respects. The first is that the scheme was in conflict with her fiduciary duty in that the scheme was solely in her own interest and was devised and implemented to maximize her income to the detriment of the capital beneficiaries. The second was that the deregistration of Glencordale constituted an obvious breach of the trust provisions of the will.

[16] It is no doubt true, as submitted by counsel for the fifth and sixth defendants (fourth and fifth respondents), that whether the scheme amounted to a breach of her fiduciary duty or not depends on a balancing of conflicting interests. A trustee must generally speaking avoid as far as possible a conflict between her personal interests and those of the beneficiaries (see *Honoré's South African Law of Trusts* 4 ed 260). But in the present case such a conflict was created by the will itself. Mrs Jowell is both income beneficiary and trustee for the capital beneficiaries. The mere fact that a particular transaction may appear to favour her rather than the

capital beneficiaries does not necessarily mean there was a breach of trust. But such a transaction will be "narrowly scrutinized". (*Colonial Banking and Trust Co Ltd v Estate Hughes and Others* 1932 AD 1 at 16; see also *Harris v Fisher NO* 1960 (4) SA 855 (A) at 862C). A further complication arises by reason of Mrs Jowell's personal 25% shareholding in Glencordale. Nonetheless, I am satisfied that the allegations contained in the particulars of claim are capable of supporting evidence which would establish a breach of the trustee's fiduciary duty. As far as the deregistration of Glencordale is concerned, there can be no doubt that this constituted a breach of trust.

[17] The difficulty that arises with what in effect is an alternative basis for establishing liability on the part of the defendants is that the breaches of trust relied upon cannot be related to the allegations in paragraph 43 of the particulars of claim (quoted above). It is clear from that paragraph that both the damage suffered and the computation of the damages claimed are directly related to and dependent on

the allegations in paragraph 19 to the effect that the Trencor shares could not be disposed of. As far as the deregistration of Glencordale is concerned, there is no apparent link between that fact and the damage alleged in paragraph 43. The two are unrelated. Had, for example, the Trencor shares simply been transferred from Glencordale to Mrs Jowell in her capacity as trustee it is difficult to imagine what damage could have been suffered by the appellant. To the extent that the deregistration of Glencondale may have caused damage, that would have to be alleged. The respondents point out that no such allegation is made. They contend that the same difficulty arises if reliance is placed on some other alleged breach of Mrs Jowell's fiduciary duty, *viz* that the scheme was solely in her own interest. They argue that once it is acknowledged that she was not prohibited from causing Glencordale to dispose of the Trencor shares the allegations in paragraph 43 become wholly inapplicable. The reason, they say, is that the damage alleged in that paragraph is premised on an obligation on the part of the trustee to ensure that

the Trencor shares were retained until her death; or expressed differently, once it is acknowledged that Mrs Jowell is entitled in appropriate circumstances to sell the assets of Glencordale and reinvest the proceeds it follows that the content of the appellant's right to a quarter of the capital (and whether there will be any loss at all) cannot be determined until the death of Mrs Jowell.

[18] It follows from the aforegoing that the effect of the alternative argument in relation to the first exception advanced in this Court is to shift the focus of the respondents' complaint to the damage alleged to have been suffered by the appellant. That, however, is the subject matter of the second exception which is similarly affected by the concession made by counsel with regard to paragraph 19 of the particulars of claim. In the result there is a degree of overlapping between the two exceptions and it is convenient to proceed to the second exception which I consider to be decisive.

[19] The point taken in the second exception is that the appellant's claim

for damages (and that of the other beneficiaries) will only "accrue" on the death of Mrs Jowell and as she is still alive the appellant has suffered no actionable loss and the action is premature. The exception was taken by the first and second respondents as well as by the fourth and fifth respondents. It is dealt with at 889 E to 891 G of the Court *a quo*'s judgment.

[20] Although the appellant has a vested right in 25% of the capital of the trust his right of enjoyment is postponed until the death of Mrs Jowell. The damages he claims are accordingly calculated with reference to that future date, *viz* the difference between the estimated value of the Trencor shares which the trust would have held on the "probable" date of Mrs Jowell's death and the estimated value of the Eskom stock on that date. Because the payment is sought in advance the difference is reduced to reflect its "present day value". Once, however, it is accepted that Mrs Jowell was not prohibited from selling the Trencor shares and reinvesting the proceeds it necessarily follows that there is nothing to preclude her

from selling the Eskom stock and reinvesting the proceeds in the future. There is no allegation in the particulars of claim that she will not do so; nor in fairness could this allegation reasonably be made. In the absence of such an allegation no alternative basis is alleged for the value of the Trencor shares serving as a benchmark to demonstrate whether a loss, if any, will be suffered. What would have to be alleged (and proved at the trial) is that up until the death of Mrs Jowell, a prudent trustee would have retained the Trencor shares. In other words, nothing would happen to cause her reasonably to do otherwise.

[21] The truth of the matter is that the vagaries of the share market and the uncertainty of what the future holds are such that neither allegation could reasonably be made, or if made, be supported by evidence of sufficient cogency to discharge the onus of proving on a balance of probabilities that there will be a loss. The imponderables are too many. In short, the difficulty that faces the appellant is not simply the absence of allegations necessary to establish the quantum of his claim,

but the absence of allegations necessary to establish that he will suffer any loss at all. Before the death of Mrs Jowell there may be a sharp decline in the value of the Trencor shares. The Eskom stock may be sold and the proceeds used to repurchase the Trencor shares on some fortuitous future occasion and at a bargain price, or used to purchase shares which rise in value to an extent which exceeds the performance of the Trencor shares by far. By the same token the loss it is alleged will be suffered may turn out to be far in excess of the amount claimed. What will happen in the future is a matter for speculation.

[22] The element of damage or loss is fundamental to the Aquilian action and the right of action is incomplete until damage is caused to the plaintiff by reason of the defendant's wrongful conduct (see *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 590; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 SA (A) at 838 H - 839 C). This applies no less to claims arising from pure economic loss than it does to claims arising from bodily injury or damage to

property (see *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 911 B - D). Whether a plaintiff has suffered damage or not is a fact which, like any other element of his cause of action and subject to what is said below, must be established on a balance of probabilities. Once the damage or loss is established a court will do its best to quantify that loss even if this involves a degree of guesswork. (See *Turkstra Ltd v Richards* 1926 TPD 276 at 282 - 283.)

However, a distinction must be drawn between accrued or past damage or loss on the one hand and prospective damage or loss on the other, the latter being damage or loss which has not yet materialised. Delictual actions which include claims for prospective loss are not uncommon, particularly in the case of actions arising out of bodily injuries where the prospective loss is inevitably accompanied by some accrued or past loss. When dealing with such claims, however, the courts have not required the plaintiff to prove on a preponderance of probability that such a loss will occur or arise; instead they have made a contingency allowance for the

possibility of the loss. (See *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 225 E - 226B where Corbett JA cites with approval a passage in the judgment of Colman J in *Burger v Union National South British Insurance Company* 1975 (4) SA 72 (W) at 75 D - G.) The underlying reason for such an approach is probably the "once and for all" rule which compels a plaintiff who has suffered accrued or past damage to institute action in order to avoid the running of prescription; in other words he is precluded from waiting to see if the prospective loss will occur. In *Coetzee v S A Railways & Harbours* 1933 CPD 565 it was held that a person cannot sue solely for prospective damages. Gardiner JP, with whom Watermeyer J concurred, expressed himself at 576 as follows:

> "The cases, as far as I have ascertained, go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future. Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independent force as ground of action."

This approach has been the subject of some criticism. Boberg , *The Law of Delict* at 488, contends that there is no reason why a person cannot sue solely for prospective loss provided he can establish the future loss on a balance of probabilities, although not necessarily the quantum of his claim. (See also Corbett *The Quantum of Damages* Vol 1 4 ed (Gauntlett) at 9 where the same criticism is made.) The advantage of the approach adopted in the *Coetzee* case is of course the certainty it provides. If an action for loss which is prospective is completed only when the loss actually occurs, prescription will not commence to run until that date and a plaintiff will generally be in a position to quantify his claim. To the extent there may be additional prospective loss the court will make a contingency allowance for it. On the other hand, if the completion of an action for prospective loss entitling a person to sue is to depend not upon the loss occurring but upon whether what will happen in the future can be established on a balance of probabilities, it seems to me that the inevitable uncertainty associated with such an

approach is likely to prove impractical and result in hardship to a plaintiff particularly in so far as the running of prescription is concerned. However, it is unnecessary to finally decide the point. As indicated above, the allegations contained in the particulars of claim are incapable of supporting evidence that would discharge the burden of proving on a balance of probabilities that there will be a loss on the termination of the trust, nor could such allegations reasonably have been made. Moreover, the argument advanced by counsel on both sides proceeded on the premise that some form of past or accrued loss was an essential element of the appellant's cause of action.

[23] Counsel for the appellant submitted that although Mrs Jowell was not prohibited from selling the Trencor shares, the particular circumstances in which she disposed of them amounted to a breach of trust which deprived the appellant of the opportunity of participating in the fortunes of those shares and in this sense caused the appellant an immediate loss. That being so, as I understood the

argument, the appellant's cause of action would have been completed upon the implementation of the scheme and as far as the future uncertain events were concerned the trial Court would be entitled to apply a contingency factor when determining the quantum of the appellant's damages. In support of this argument counsel placed particular reliance on the English cases of *Chaplin v Hicks* [1911] 2 K B 786 (CA) and *Forster v Outred & Co* [1982] 2 All ER 753 (CA). I think neither is of assistance. In the former, the plaintiff as a result of a breach of contract had been deprived of the chance of winning a prize. It was held that the loss of the chance constituted an immediate loss on which, although with difficulty, a monetary value could be placed. In the *Forster* case the defendants alleged negligence had resulted in the execution of a mortgage bond over the plaintiff's property. It was held that the execution of the mortgage bond had resulted in a quantifiable loss which served to complete her cause of action even although the quantum of damages would depend on subsequent events. On the particular facts

of each case, therefore, the court found that there had been some past or accrued loss. The facts are distinguishable from the present case, as are the facts in *Sasfin (Pty) Ltd v Jessop and Another* 1997 (1) SA 675 (W) on which appellant's counsel similarly sought to rely.

[24] The appellant's right of enjoyment of his share of the capital of the trust is postponed until the death of Mrs Jowell. As I have sought to show, pending the termination of the trust the appellant can suffer no past or accrued loss. Whether or not he will indeed suffer a loss will only be known on some future date.

[25] It follows that in my view the appellant's action was premature and the second exception was correctly upheld by the Court *a quo*.

[26] There remains the question of costs. It is true that the seventh and eighth defendants (sixth and seventh respondents) did not take the second exception. Nonetheless and having regard to the extent to which the argument on the two exceptions overlapped, I do not think they should be deprived of their

costs. As far as the order of costs in the Court below is concerned, counsel for the appellant suggested that Heher J erred in awarding the respondents their costs in full having regard to the time wasted on various grounds of exception in respect of which they were unsuccessful. The learned judge, after carefully considering the time spent on each ground, decided in the exercise of his discretion to grant the respondents all their costs. I am unpersuaded that there is any basis for interfering with that decision.

In the result the appeal is dismissed with costs.

D G SCOTT
JUDGE OF APPEAL

VIVIER JA)
NIENABER JA)
PLEWMAN JA) - CONCUR
FARLAM AJA)