THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 21/2017

In the matter between

DRAKE FLEMMER & ORSMOND INC **FIRST APPELLANT**

LE ROUX INC **SECOND APPELLANT**

and

G GAJJAR NO **RESPONDENT**

Neutral citation: Drake Flemmer & Orsmond Inc & another v Gajjar NO (21/2017) [2017] ZASCA 169 (1 December 2017)

Coram: Cachalia and Tshiqi JJA, Makgoka, Ploos van Amstel and Rogers AJJA

Heard: 17 November 2017

Delivered: 1 December 2017

Summary: Contract – breach of mandate by first attorneys in under-settling RAF claim – breach by second attorneys in allowing claim against first attorneys to prescribe – damages to be assessed at notional trial date of RAF claim.

Contract – damages – whether court a quo ought to have reduced damages for delay in bringing claim to trial.

Interest – applicability of s 2A(5) of Prescribed Rate of Interest Act 55 of 1975.

ORDER

On appeal from: The Eastern Cape Local Division of the High Court, Port Elizabeth (Bloem J sitting as court of first instance).

(a) The appeal is dismissed with costs, including those attendant on the employment of two counsel, such costs to be paid by the second appellant.

(b) The cross-appeal is upheld with costs, including those attendant on the employment of two counsel, such costs to be paid by the second appellant.

(c) Para 87.1 of the court a quo's order is set aside and replaced with the following:

'The second defendant is ordered to pay the plaintiff, in his representative capacity, the amount of R9 211 953'.

JUDGMENT

Rogers AJA (Cachalia & Tshiqi JJA and Makgoka, Ploos van Amstel concurring)

Introduction

[1] The main issue in this appeal is the date at which damages should be assessed in an action against attorneys for professional negligence in the conduct of a client's claim against the Road Accident Fund (RAF), where the claim was settled at substantially below its true value. In general terms, the client's damages are the difference between the settlement amount and the true value of the claim against the RAF. In relation to the assessment of the true value of the claim against the RAF, this judgment considers (i) the law to be applied; (ii) the facts and evidence to which regard may be had; (iii) the time-value of money.

[2] The client in this case is Mr Rex Sutherland. Initially he was the plaintiff in his personal capacity. Latterly he has been represented by a curator ad litem, the present respondent. For convenience I refer to Mr Sutherland as the plaintiff. He was badly served by two successive firms of attorneys, the first and second appellants. The first firm, Drake Flemmer & Orsmond Inc (DFO), were the plaintiff's attorneys in his claim against the RAF. They negligently under-settled the claim. The second firm, Le Roux Inc (LRI), were the attorneys whom the plaintiff engaged to sue DFO. They negligently allowed his claim against DFO to prescribe. I refer to the appellants collectively as the defendants.

[3] By the time the case came to trial in November 2015, the defendants had conceded negligence. The plaintiff's only extant claim was against LRI. His evidence was directed at proving the amount he would have been awarded had his RAF claim been properly conducted. For that purpose his claim was actuarially valued as at 1 December 2015. The defendants adduced no evidence. The court a quo substantially accepted the plaintiff's quantification but reduced it by 43.69 per cent because of a supposed delay of about seven years by the plaintiff in suing LRI. This effectively resulted in a valuation date of September 2009. The judge deducted from the reduced sum the actual settlement amount, grossed up to its September 2009 value, and awarded the plaintiff the difference.

[4] With the leave of the court a quo, the defendants appeal to this court, contending that the plaintiff's claim should have been valued at the date of the settlement or at the date of a notional trial against the RAF, and that for this reason his claim should have been dismissed. Also with the leave of the court a quo, the plaintiff cross-appeals against the reduction of 43.69 per cent.

The factual background

[5] The plaintiff and his fiancee were injured in a head-on collision on 2 July 1997. The plaintiff, then 24 and living in King William's Town, was employed as a youth pastor and part-time teacher. They were both hospitalised for some weeks. The plaintiff was treated for fractures of the pelvic ring and right femur. While in

hospital they engaged DFO to pursue claims against the RAF. They married in October 1997.

[6] The plaintiff returned to work in January 1998 but experienced pain and persistent headaches, was forgetful and battled to concentrate, and displayed anger and frustration. He continued to work at the same church until the end of 1999, interrupted by operations in August 1998 and March 1999.

[7] DFO arranged for Dr Mandell, an orthopaedic surgeon, to prepare a medico-legal report, which was dated 8 May 1998. DFO lodged the RAF claim in January 1999. The only injuries mentioned were orthopaedic. The amounts claimed totalled R150 771, including R100 000 for general damages. Nothing was claimed for loss of earnings.

[8] The RAF conceded negligence and made several offers of settlement, the last of which the plaintiff accepted on 21 December 1999 on DFO's advice. The offer was R98 334 (incorporating general damages of R50 000) together with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 (RAF Act) and costs. The undertaking was 'limited to' Dr Mandell's report. The plaintiff's complaint in the court a quo was that DFO not only failed to claim the loss of past and future earnings flowing from his orthopaedic injuries; they also failed to investigate the possibility of brain injury.

[9] At the beginning of 2000 the Sutherlands relocated to East London and the plaintiff started work at a new church on probation. He continued to suffer symptoms which affected his performance. He was not offered a permanent post. In July 2000 they moved to Port Elizabeth. The plaintiff started an appliance business which soon failed. Orthopaedic complications resulted in further operations in April 2000, September 2000 and December 2000. On 19 September 2000 the plaintiff wrote to DFO. Among other things, he asked whether it was possible for his RAF claim to be reviewed

'due to the fact that I am literally losing thousands of rands a month because I am unable to work normally, something that was not taken into account at the beginning of the claim.'

DFO replied, explaining that he could not pursue further claims against the RAF or against the negligent driver.

[10] In July 2001 the plaintiff terminated DFO's mandate and engaged LRI. On 25 April 2002 LRI advised the plaintiff that DFO had negligently under-settled his RAF claim. Unfortunately LRI itself made an elementary error. They assumed that prescription against DFO started to run on 25 April 2002, not 21 December 1999. The commencement of prescription was not, however, dependent on the plaintiff's having knowledge of the legal consequences of the facts (*Truter & another v Deysel* 2006 (4) SA 168 (SCA)).

[11] In the meanwhile the plaintiff's condition was going downhill. He was becoming addicted to analgesic drugs. He was referred to a rehabilitation facility in December 2001. Things did not improve. During the course of 2002 he suffered several epileptic fits. The degree of his addiction and the extent of his behavioural alteration can be gauged from the fact that he began to forge prescriptions. He was seen by a psychiatrist, Dr Zabow, in October 2003, by which stage he was psychotic. He was diagnosed as suffering from depression and epilepsy in consequence of brain damage. Dr Zabow recommended a full evaluation after completion of treatment for drug abuse.

[12] Following criminal charges relating to the forging of prescriptions, the plaintiff spent about three months at a drug rehabilitation facility, Magaliesoord Centre, over the period March to June 2004. The social worker's report regarding the results was not optimistic.

[13] LRI issued summons against DFO on 21 April 2005. Even on their mistaken view of prescription, they cut things fine. In its plea, filed during June 2005, DFO inter alia raised prescription. It is unclear when the plaintiff was told of this. The first explicit reference to prescription in correspondence between LRI and the plaintiff was on 12 July 2007, when the plaintiff – in a letter to Mr Abraham le Roux, the senior member of the firm – said that he was totally confused about what was going on because Mr Dean Niekerk, the attorney handling the matter, told him that

prescription was being raised whereas Mr le Roux had assured the plaintiff that the summons was timeously issued.

[14] In August 2007, more than two years after the filing of DFO's plea, LRI filed a replication alleging that prescription did not start to run until 25 April 2002. A trial date was obtained for 6 November 2007 with a view to determining the special plea. On 2 November 2007 LRI delivered a notice of amendment to introduce into the replication an allegation that from the middle of 2001 until June 2004 the plaintiff had been insane and that completion of prescription had thus been delayed in terms of s 13(1)(a) of the Prescription Act 68 of 1969. This was based on Dr Zabow's report of his examination of the plaintiff in 8 October 2003.

[15] There is no evidence that the plaintiff was told of this amendment. It has all the hallmarks of a desperate attempt by LRI to ward off prescription. Because of the belated notice, the trial date of 6 November 2007 was vacated, the plaintiff being ordered to pay the wasted costs.

[16] Inexplicably, LRI applied for a new trial date but failed to file the amended replication. As a result a new trial date in September 2008 fell away by agreement. Eventually in December 2008 LRI delivered the amended replication. LRI had the plaintiff examined by Dr Zabow in April 2009. The latter's report of 10 May 2009 did not advance the insanity allegation.

[17] LRI continued to handle the matter in desultory fashion. A new trial date in June 2010 was aborted because the parties could not agree on the issues to be tried: DFO wanted the entire defence of prescription to be adjudicated whereas LRI insisted that insanity be dealt with first. LRI was at fault in not ensuring that the question of separation was resolved in time to save the trial date.

[18] In October 2010 a new attorney at LRI wrote to the plaintiff to say that she and counsel were investigating the quantum of his claim and that he would need to be examined by an industrial psychologist. This letter was written more than nine years after the plaintiff engaged LRI. After another five months, in keeping with LRI's

feckless conduct of the case, they told the plaintiff that they had arranged for him to see an industrial psychologist, Mr Whitehead. His report came to hand in June 2011.

[19] On 16 August 2011 LRI notified the plaintiff that the new trial date was 28 November 2011. DFO delivered an application for an order that all issues relating to prescription be dealt with first. LRI brought a counter-application that insanity be determined first. On 7 November 2011 the court granted DFO's application. There was a flurry of expert notices in the first half of November 2011. Reports by a psychologist and psychiatrist engaged on behalf of the defendants lent no support to the insanity defence. LRI had no additional ammunition of its own.

[20] In the run-up to the new trial date, the plaintiff instructed LRI that under no circumstances should the trial be postponed. If necessary, new counsel should be engaged. Shortly before 18 November 2011 LRI consulted a new advocate. He must have given LRI sobering advice because on 18 November 2011 they told the plaintiff that they had been advised to withdraw. In a letter to DFO's attorneys, LRI stated that their new counsel had 'provided a fresh perspective' and had advised them to withdraw and to inform the plaintiff that he should instruct other attorneys. Because the matter could not proceed on 28 November 2011, LRI personally tendered the wasted costs.

[21] The plaintiff then instructed his current attorneys. On 12 June 2012 they delivered an application to join LRI as second defendant. This was granted on 26 July 2012. In its initial plea, LRI declined to admit many of the allegations which it had caused the plaintiff to make against DFO regarding his injuries and their sequalae. LRI also denied that the claim against DFO had prescribed or that LRI had been negligent.

[22] Eventually a new trial date of 26 November 2014 was obtained. The parties agreed that the question of negligence should be determined first. In the event, the trial did not run on 26 November 2014 because the defendants made various admissions formally recorded in a court order. Although the defendants did not admit that the plaintiff had suffered a brain injury, DFO admitted that it had been negligent and that such negligence caused the plaintiff to suffer damages; and LRI

admitted that it had been negligent in allowing the plaintiff's claim against DFO to prescribe. LRI agreed to pay the wasted costs of the aborted negligence trial.

[23] On 20 October 2015 an order was made appointing a curator ad litem to report whether the plaintiff was capable of managing his own affairs. Following the curator's report, and on 5 November 2015, the present respondent, Mr Gajjar, was appointed as the plaintiff's curator ad litem in the present litigation.

[24] The trial was scheduled to start on 16 November 2015. On 13 November 2015 the defendants gave notice of their intention to ask the court to decide a preliminary point. The notice stated that the alleged breach by DFO occurred on 21 December 1999 and that regard could only be had to reports in existence at that date. It was said that the plaintiff had not formulated a cause of action with reference to a later notional trial date of the RAF claim. The court would thus be asked to make a ruling as to the applicable date for determining the damages and regarding the admissibility of evidence.

[25] The matter came before Revelas J who heard argument on the preliminary point. On 19 November 2015 she dismissed it, providing reasons on 24 November 2015. The trial proper started before Bloem J on 23 November 2015. It is mystifying that the preliminary point was heard by a different judge. Revelas J's order did not finally decide anything. Bloem J was entitled to make, and did in fact make, his own decisions regarding the relevant evidence and the proper date for assessing damages.

[26] The court a quo delivered judgment on 11 October 2016. In the meanwhile, and in May 2016, Mrs Sutherland brought an application to have her husband declared unable to manage his affairs. An order to this effect, and appointing a curator bonis, was made on 28 June 2016.

The court a quo's judgment

[27] The court a quo found that the plaintiff had suffered a brain injury in the collision and that if DFO had handled the plaintiff's RAF claim with reasonable care, the fact of the brain injury and its sequelae would have emerged.

[28] In regard to the date for assessing damages, the court a quo accepted that the usual rule was that damages for breach of contract are assessed at the date of the breach. In DFO's case, the date of the breach was 21 December 1999. The court referred to authorities stating that the date of breach is not a rigid rule and that a different date might be selected in the proper application of the fundamental rule that the injured party is to be placed in the position he would have occupied had the agreement been fulfilled.

[29] After referring to the chronology, the court a quo said that the plaintiff's claim should have been finalised a long time ago but that it would be speculation to put a date to 'long ago'. The case called for 'pragmatism and common sense'. It did not lie in DFO's mouth to contend that the plaintiff's damages should be assessed as at 21 December 1999, because it was only due to its negligence that the case was settled on that date. LRI in turn had failed to explain why it took so long to issue summons against DFO. This took one to 21 April 2005. On the other hand, the plaintiff had not explained when he instructed his present attorneys and why the application to join LRI was only made in June 2012. An aggrieved party 'is not entitled to sit back and allow damages to multiply'. The plaintiff had failed to establish that he acted reasonably in the period between April 2005 and July 2012, a period of slightly more than seven years.

[30] This led the court a quo to conclude that the plaintiff was not entitled to receive compensation at 2016 monetary value, otherwise the defendants would be 'saddled with undue hardship' because 'between 2009 and now, there has been a drastic change in the value of money'. To accommodate this change, the judge reduced the plaintiff's damages (valued at December 2015) by 43.69 per cent, being the inflation rate over the seven-year period from September 2009 to September 2016. He grossed up the actual RAF settlement amount to its September 2009 value, deducted it from the reduced RAF damages and added to the resultant difference an amount of 7.5 per cent in respect of the costs of the curator bonis. The results were as follows:

Item	Original amount	Reduced to/ grossed up to
Past loss of income	2 393 330	1 665 620
Future loss of income	4 346 125	3 024 653
Future hospital & medical expenses	1 086 561	756 184
General damages	1 000 000	700 000
Total of above items	8 826 016	6 146 457
Less grossed up settlement award	98 334	[1]117 788
Net amount		6 028 669
Plus 7.5% curator bonis costs on net amount		452 150
Damages awarded:		R6 480 819

[1] This grossed-up figure is clearly wrong. Robert J Koch's CPI table for 1925-2017 shows that inflation from 1999 to 2009 was 180.6 per cent so the grossed up figure should have been R177 591.

[31] If the court a quo had not made the 43,69 per cent deduction, it would have grossed up the December 1999 settlement figure to a December 2015 value. It appears from the plaintiff's notice of cross-appeal that the plaintiff calculated the grossed-up settlement figure as R256 757,[2] leaving net damages before the curator bonis' fee of R8 569 259. With the addition of the curator bonis' fee, the total damages would thus be R9 211 953. That is the amount the plaintiff seeks in its cross-appeal.

What would have happened but for DFO's negligence?

[32] During oral argument before us the defendants' counsel said that the defendants accepted the court a quo's factual findings (i) that the plaintiff suffered a brain injury: and (ii) that, but for DFO's negligence, the brain injury and its sequelae would have come to light during DFO's handling of the claim. This accorded with the unchallenged evidence of the plaintiff's expert, Mr Annandale, who testified that all three of his diagnoses – severe neurocognitive disorder due to traumatic brain injury; secondary change in personality; and secondary psychiatric disorders, including major depressive disorder, adjustment disorder and agoraphobia – would have been evident during 1999 had the plaintiff been properly assessed by a neuropsychologist.

[33] The course which the RAF claim would have taken had DFO not been negligent involves a measure of speculation. Having submitted a claim on 19 January 1999, DFO would have had until 1 July 2004 to issue summons.[3] By not later than August 1999 DFO would have begun the process of investigating the suspected brain injury. (Although there were earlier red flags, the court a quo found that DFO's file contained a consultation note of 19 August 1999 painting an alarming picture of the plaintiff's psychiatric and psychological condition. It matters not for present purposes whether the note was of a consultation which the Sutherlands had with DFO or with the psychiatrist Dr van Wyk – the important point is that the note was in DFO's file.) The investigation would probably have entailed assessment by a

[2] This is the figure grossed-up to 2016, the inflation rate from 1999 to 2016 being 261.1 per cent. If one grossed the figure up to 2015, the grossed-up amount would be R241 017.

[3] Section 23(3) of the RAF Act provides that no claim which has been duly lodged shall prescribe before the expiry of five years from the date on which the cause of action arose.

psychiatrist or neurologist, followed by referral to a neuropsychologist for psychometric testing. According to Mr Annandale, the results would have been substantially the same as those he had obtained 16 years later. Proper consultation with the plaintiff and his employer would have revealed that his work performance was seriously compromised. The emergence of this information would have coincided with the Sutherlands' relocation to East London and the unsuccessful three-month probation at the new church. An augmented claim would probably have been formulated on the basis that the plaintiff was unemployable. This would have required a report by an occupational therapist and an actuary.

[34] It is not unreasonable, in the circumstances, to suppose that an augmented RAF claim would have been lodged by 1 June 2000. A settlement would not have been more likely than a trial. A reasonable timeline would be: the issuing of summons on 1 December 2000; a trial date of 1 December 2002; delivery of judgment on 15 January 2003; and payment of the judgment debt on 1 February 2003. In their supplementary submissions the parties did not take issue with this timeline.

What would have happened but for LRI's negligence?

[35] LRI should have treated prescription as having started to run on 21 December 1999. Having advised the plaintiff of his rights in April 2002, there would have been no difficulty in issuing summons by 1 December 2002. One can thus estimate a trial date of 1 December 2004, delivery of judgment on 15 January 2005 and payment of the judgment debt on 1 February 2005.

The assessment date for purposes of applicable law and evidence

[36] The selection of an assessment date bears on three discrete aspects alluded to earlier, namely the applicable law, the permissible evidence and the time-value of money. Under the present heading I deal with the first two matters.

[37] There are three relevant damages claims in the present case: the plaintiff's claims against the RAF, against DFO and against LRI. His claim against the RAF

was delictual, subject to the relevant provisions of the RAF Act. His claims against DFO and LRI were contractual claims for breach of mandate.

The claim against the RAF

[38] Although delictual damages are normally assessed at the date of the delict, in personal injury claims the court takes into account events occurring up to the date of trial.[4] The claimant is entitled to compensation for all injuries and sequelae which are known or reasonably foreseeable at the trial date. I have estimated that the plaintiff's claim against the RAF would have come to trial on 1 December 2002. Any evidence that would have been available to the plaintiff at that time could have been presented in support of his claim.

[39] The law applicable to the claim against the RAF would have been ordinary delictual principles in December 2002 as supplemented by the then applicable provisions of the RAF Act.[5]

The claim against DFO

[40] The plaintiff's claim against DFO was contractual. The damages claimed was the economic loss suffered by the extinction, on 21 December 1999 through compromise, of his personal injury claim. The ordinary rule is that damages are assessed at the date of the breach but the court a quo was correct in appreciating that our law allows some flexibility.

[41] Where an attorney has all the relevant information for assessing a proper settlement but negligently under-settles, the date of the settlement will be the appropriate date for assessing damages. The decision in *Fourie v Ronald Bobroff and Partners Inc* [2015] 2 All SA 210 (GJ), upheld by this court on appeal – *Ronald Bobroff and Partners Inc* [2017] ZASCA 91 (7 June 2017) – was such a case. Where, however, the complaint is that the attorney settled the case at a time when

[4] See eg *Botha v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1978 (1) 996 (T) at 1004D-1005B; *Beverley v Mutual & Federal Insurance Co Ltd* 1988 (2) SA 267 (D) at 271D-I; *Road Accident Fund v Monani & another* (241/2008) [2009] ZASCA 18; 2009 (4) SA 327 (SCA) para 9.

[5] The amendments brought about by the Road Accident Fund Amendment Act 19 of 2005, which came into force on 1 August 2008, would have played no part.

he had not properly investigated the claim, the date of settlement is inappropriate because it does not meet the essential function of an award of contractual damages, namely to place the aggrieved party in the position he would have enjoyed had the mandate been properly performed. The court a quo was thus correct in rejecting 21 December 1999 as the assessment date.

[42] In other Commonwealth jurisdictions the prevailing view is that if, but for the attorney's negligence, a personal injury claim against the original debtor would have gone to trial, one assesses damages as at the date of the notional trial against the original debtor.[6] In regard to the law and evidence applicable to the assessment of the damages, this is sound, because if the attorney had not breached his mandate the case would have come to trial and evidence available at the trial date could have been led in support of the claim. In *Johnson v Perez*[7] the High Court of Australia said that too much should not be made of the difficulty surrounding the selection of a notional trial date and that in the majority of cases some variation in this regard would be immaterial.[8]

[43] English courts have been willing to receive evidence of events which occurred after the notional trial date, in keeping with the view that a court should not have to predict what would have happened where subsequent events reveal what actually happened. As I understand the cases, subsequent events cannot be used to fix the attorney with a liability in respect of something which was not reasonably foreseeable at the notional trial date. However, if at the notional trial date an allowance would have been made for a reasonably foreseeable item, subsequent events may be taken into account in order to fix the allowance more precisely than

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[6] England: *Charles v Hugh James Jones & Jenkins* [2000] 1 All ER 289 (CA); *Dudarec v Andrews & Ors* [2006] EWCA Civ 256; *Nicholson v Knox Ukiwa & Co (A Firm) & Ors* [2008] EWHC 1222 (QB); JL Powell and R Stewart *Jackson & Powell on Professional Negligence* 7 ed para 11-297 at 912 and para 11-310 at 922; C Walton *Charlesworth & Percy on Negligence* 12 ed para 9-291 at 686. Australia: *Johnson v Perez* [1988] HCA 64; *Nikolaou v Papasavas, Phillips & Co* [1989] HCA 11; *Rosa v Galbally & O'Bryan (No 2)* [2013] VSCA 154 para 14; *Liddy v Bazley* [2013] NSWCA 319. Canada: *Kelly v Lundgard* [2001] ABCA 185 (CanLII) paras 35, 45-46, 181 and 249(c); *Campbell v Ragona* [2010] BCSC 1339 (CanLII) paras 116-124; and cf *Rose v Mitton* [1994] NSCA 4111 (CanLII) which was a case, like *Fourie v Ronald Bobroff* above, where the appropriate assessment date was the date of the negligent settlement.

[7] Fn 5 above.

[8] Para 14 of the plurality judgment in *Johnson* fn 5 above.

the notional trial judge could have done.[9] In Australia, by contrast, subsequent events can only be used for the limited purpose of piecing together the sort of evidence which might have been available to the notional trial judge.

[44] In regard to the evidence which would have been available as at 1 December 2002, I am satisfied that there would have been sufficient to establish that the plaintiff suffered a brain injury and that the sequelae were those subsequently diagnosed by Mr Annandale. In short, all the evidence which the court a quo received in November 2015 was evidence that would probably have been available to the notional trial court as at 1 December 2002.

The claim against LRI

[45] The plaintiff's claim against LRI was for contractual damages caused by the loss of his claim against DFO. That loss occurred when the claim against DFO was extinguished by prescription on 21 December 2002. But for this negligence, the claim against DFO would have come to trial on 1 December 2004. In determining the value of what the plaintiff had lost, one is concerned with the value of his claim against DFO, which I have dealt with above. No separate question of valuation arises in respect of the claim against LRI.

[9] *Charles* (fn 5 above) at 301d-j; *Dudarec* (fn 5 above) paras 49-50, 56-57 and 64; cf *Hibbert Pownall & Newton (A Firm) v Whitehead & Anor* [2008] EWCA Civ 285 paras 21-25; and cf the discussion of these cases in H McGregor *McGregor on Damages* 18 ed paras 8-086 – 8-090 at 377-379, not altogether supportive of the English cases.

[46] The court a quo thus did not err in relation to the admissible evidence and applicable law. The remaining issue is the time-value of money. But before I deal with this aspect, I must address the appellants' criticism of the court a quo's treatment of future medical expenses.

Future medical expenses

[47] The appellants submitted that the court a quo erred in its assessment of future medical expenses because it ignored the fact that the plaintiff had the benefit of the RAF's s 17(4)(a) undertaking.

[48] The items making up the total future medical expenses were (i) a personal assistant or handyman – R149 430; (ii) orthopaedic shoes – R190 570; (iii) a tripod walker and easy-reach device – R510; (iv) psychotherapy, psychiatric consultations and psychiatric medication – R746 510. Whether these items were covered by the undertaking depends on its interpretation. The costs of services and goods covered by the undertaking were stated to be 'limited to' Dr Mandell's report of 8 May 1998. Item (iv) of the future medical expenses would definitely not be covered.

[49] The other three items were claimed on the basis of the orthopaedic injuries. The plaintiff called an RAF claims manager to give evidence about the interpretation of the undertaking. I doubt if this evidence was admissible and in the event it was unhelpful. The witness correctly acknowledged that if there were a dispute about the scope of the undertaking it would be for a court to decide.

[50] Dr Mandell did not make provision for any orthotic items. The penultimate section of his report was headed 'Provision for Future Medical Care'. The most plausible interpretation of the undertaking is that it was limited to the items set out in that section of the report. The unsatisfactory and limited terms of the undertaking was one of the criticisms of DFO's conduct. The plaintiff should not therefore be prejudiced by potential uncertainty as to the scope of the undertaking. I thus do not think that the court a quo erred in its assessment of the future medical expenses.

The time-value of money

[51] Because of inflation, the value of the RAF claim as determined by the court a quo as at 1 December 2015 was a higher rand amount than it would have been if it had been expressed in the value of money as at 1 December 2002. The court a quo seems to have thought that the defendants would be penalised by expressing the claim in the value of money as at 1 December 2015. Economically, that is fallacious. If the RAF case had been tried in December 2002, the plaintiff would have got a smaller rand amount but the money would have been more valuable.

[52] It appears that, but for the supposed delay by the plaintiff, the court a quo would have expressed the award in the value of money as at 1 December 2015. However, and supposedly to avoid penalising the defendants for the plaintiff's delay, the court reduced the award by seven years' worth of inflation. The deduction was unsound in law and unjustified by the facts. There is no legal principle which entitles a court to reduce a claimant's damages because of delay in bringing a case to trial. If a defendant wants to bring the matter to trial, there are procedural remedies at his disposal.

[53] On the facts, the court a quo had no justification for penalising the plaintiff. From July 2001 until late November 2011, LRI were his attorneys. It was only in November 2011, by withdrawing, that they signalled to him that they had been at fault. They did not advise him at an earlier time that they had let him down. In fact, over the period June 2005 to November 2011 they kept him under the misapprehension that the prescription defence could be defeated.

[54] Throughout the period from April 2002 to November 2011, LRI dealt with the plaintiff's matter deplorably. After advising him of his rights in April 2002, they took nearly three years to issue summons. The delay in progressing the case thereafter was attributable to them, not him. There was, before the court a quo, a file of the correspondence evidencing repeated requests from the Sutherlands for progress reports. Many were rudely ignored. Things got so bad that on 5 June 2007 the Sutherlands lodged a complaint with the Cape Law Society. Although communication then improved slightly, LRI generally reacted to contact from the Sutherlands rather than initiating it. Time and again, scheduled trial dates were jettisoned. LRI either caused or went along with these postponements in apparent

disregard for the plaintiff's desire for finality. When LRI finally did the right thing and withdrew in November 2011, a fifth trial date had to be aborted.

[55] Accordingly, if it was permissible for the court a quo to express its award at a valuation date of 1 December 2015, it should not have made the 43.69 per cent deduction. The defendants' counsel, I may add, did not seek to support the deduction in argument before us.

[56] Commonwealth jurisdictions recognise that if a client were only awarded an amount in the value of the relevant currency as at the notional trial date, he would not be compensated for the fact that, if the attorney had properly performed his mandate, the client would have received the money sooner. Two possible solutions to this hardship are mentioned: (i) award interest from the date of demand (if the jurisdiction permits such interest), followed by interest on the amount of the notional judgment; (ii) valuing the award as at the date of the trial against the attorney. I shall refer to these as the interest-rate solution and the current-value solution.

[57] The interest-rate solution seems to be favoured in the Commonwealth[10] but the focus of the cases has been on the law and evidence to which regard should be had rather than the time-value of the award. Furthermore, there is a debate whether to use the prescribed interest rate or an investment rate. In Australia the prescribed rate is thought to under-compensate claimants for the ravages of inflation whereas in England the opposite seems to be true.[11] As will presently appear, the interest-rate solution is unlikely to under-compensate South African claimants, given the relatively high level at which prescribed interest has been set.

[58] The strongest voices in favour of the current-value solution are those of some of the judges in the Australian case of *Johnson v Perez.*[12] Eleven judges in all dealt with the case – the trial judge, three judges in the intermediate appeal court and

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[10] United Kingdom: *Nicholson* (fn 5 above) paras 105-108; *Neeson v Agnew & Ors* [2009] NIQB 10 para 16; *Jackson & Powell* (fn 5) para 11-297. Australia see para 18 of the plurality judgment in *Johnson v Perez* (fn 5 above) para 118 per the plurality and par 11 per Dawson J. Canada: *Kelly* (fn 5 above) para 196

[11] See *Nicholson* para 106; *Neeson* para 16; cf *Watts & another v Morrow* [1991] 4 All ER (CA) at 958e-g and 960d-e.

[12] See fn 5 above.

seven judges in the High Court of Australia. The four judges in the lower courts and two of the judges in the High Court of Australia (Brennan J and Deane J) favoured the current-value solution. In Deane J's forceful dissent he said that if the value of the lost right of recovery were assessed by reference to the levels of comparable awards at the notional trial date, there could be no valid objection if the amount so assessed were then adjusted to take account of the comparatively lower value of present-day currency. He continued (para 6, citation of authority omitted):

'If such an adjustment were not made however, the assessment would affront logic and short-change the respondent. . . This is because while he lost a right to recover damages assessed by reference to the monetary values applicable at the time when an enforceable award of compensation was made, he would only recover damages assessed by reference to outdated currency values and payable in the debased currency of the present day.'

However, the binding precedent in Australia is established by the contrary view adopted by five of the judges in the High Court.

[59] In South Africa, this court's decision in *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) stands in the way of the current-value solution. The court confirmed the principle of currency nominalism. What was in issue was whether past medical expenses could be grossed up to their trial-date value. In rejecting this approach, E M Grosskopf JA stated his conclusion thus (840G-H)

'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.'

[60] In the present case, we are concerned with the damages the plaintiff suffered in consequence of LRI's negligence. His loss was suffered when, on 21 December 2002, his right to recover damages from DFO prescribed. Whereas his claim against the RAF included a present value for future medical expenses and loss of future earnings caused by personal injuries, his claim against DFO represented a single economic loss equating to the value of the extinguished claim against the RAF; and his claim against LRI represented a single economic loss equating to the value of the extinguished claim against DFO. In determining the recoverable amount, one

cannot, consistently with *Hartley*, adjust the rand amount as at 21 December 2002 to account for inflation between December 2002 and December 2015.

[61] Although, as the court a quo observed, assessing damages at the date of breach is not an inflexible rule, there is no authority in this country for the proposition that one can use this flexibility to counter the ravages of inflation. The flexibility accommodates problems of a different kind. For example, in *Culverwell & another v Brown* 1990 (1) SA 7 (A) this court held that where an aggrieved party cancels a contract because of the other party's repudiation, the damages should be assessed at the date of cancellation rather than repudiation. In *Rens v Coltman* 1996 (1) SA 452 (A) this court held that where the aggrieved party performs remedial work to make good the other party's defective work, the actual cost of reasonable repairs can be claimed as damages – the aggrieved party is not confined to the notional cost of reasonable repairs at the date of the breach. In neither of these cases was it suggested that there could be a further upwards adjustment to account for inflation. Indeed, if a court were entitled to make such an adjustment, every financial claim would have to be assessed in the value of money at the date of the trial, since the value of money is always changing.

[62] Grosskopf JA acknowledged in *Hartley* that the result was unsatisfactory because the claimant suffered the negative effects of inflation and trial delay. At that time the Prescribed Rate of Interest Act 55 of 1975 (Interest Act) did not allow interest to be charged on unliquidated claims for damages prior to judgment. Grosskopf JA said that whether South African courts should be given a power to award pre-judgment interest was a policy choice for the legislature (841G-842B).

[63] The legislature exercised that policy choice by inserting s 2A into the Interest Act with effect from 11 April 1997. That section provides that interest at the prescribed rate runs on an unliquidated debt from the date on which payment was claimed by service of a demand or summons, whichever is the earlier, unless the court in the interests of justice determines a different date or rate. In relation to claims against the RAF, s 17(3)*(a)* of the RAF Act provides that no interest calculated on the amount of any compensation which the court awards shall be payable unless 14 days have elapsed from the date of the court's order. This

provision may trump s 2A of the Interest Act in relation to pre-judgment interest against the RAF[13] but it would not apply to the plaintiff's claims against DFO and LRI.

[64] One must distinguish between interest leviable by law on a principal debt and interest as a form of damages. Although interest of the former kind compensates the creditor for delay, he does not need to prove that he suffered damages in the amount of the interest claimed. Interest as damages stands on a different footing. In *Steyn NO v Ronald Bobroff & Partners* [2012] ZASCA 184; 2013 (2) SA 311 (SCA) the plaintiff claimed damages against her former attorneys for delaying the finalisation of her RAF claim by 14½ months. The claim was quantified at a rate of 15.5 per cent per annum over that period. Bosielo JA (with whom the other members of the court concurred) dismissed the plaintiff's appeal on the merits. Brand JA (with whom the other members of the court likewise concurred) dealt with the question of damages. He drew the distinction I have mentioned and said that in the case under consideration the plaintiff was clearly claiming interest as damages rather than as an ancillary obligation to a principal debt. In order to support her damages claim, the plaintiff needed to prove that if she had received her award 14½ months earlier she would have invested it at a rate of 15.5 per cent per annum. Since she failed to do so, her claim also fell to be dismissed on this account.

[65] The plaintiff did not allege or prove in the present case that, if he had received an award against the RAF or DFO, he would have invested the money at 15.5 per cent or at any other particular rate of return. He was thus not entitled to additional damages in the form of interest.

[66] Although s 17(3)*(a)* of the RAF Act may have precluded the recovery of pre-judgment interest against the RAF, there is no similar prohibition in respect of the plaintiff's claim against LRI. That claim would legitimately have been valued as at December 2002. In terms of s 2A(2)(a) of the interest Act, interest usually runs on unliquidated claims from the date of demand or summons. The plaintiff's earliest demand or summons against LRI was the service of the joinder application in June

[13] *Vermaak v Road Accident Fund* (1976/06) [2008] ZAWCHC 12 (5 March 2008); *Kwezi obo Kwezi v Road Accident Fund* (67671/08) [2011] ZAWCHC 455 (16 September 2011).

2012. However, it would be manifestly unjust for the plaintiff to receive no more than the value of his claim as at December 2002 together with interest as from June 2012. The delay from December 2002 until June 2012 was attributable to LRI, not him.

[67] Section 2A(5) of the Interest Act provides that, notwithstanding the other provisions of that Act, a court may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run. I have no doubt that in the present case justice required that interest should run from 21 December 2002, the date on which LRI became indebted to the plaintiff by virtue of having allowed his claim against DFO to prescribe. This conclusion is fortified by the consideration that, but for LRI's negligence, the plaintiff's summons against DFO would have been issued by 1 December 2002 and such summons would have claimed interest at the prescribed rate of 15.5 per cent from that date until payment; and a similar rate would have applied to the subsequent judgment against DFO.

[68] In summary, the correct approach in the present case would have been for the plaintiff to prove the nominal value of his damages as at the notional trial date of 1 December 2002. That would have been the value of the claim against DFO which LRI allowed to prescribe on 21 December 2002. The time-value of money would have been dealt with by an order for interest in terms of s 2A(5), such interest to run from 21 December 2002. Put differently, s 2A(5) provides the means by which a court in this country can apply the interest-rate solution.

[69] Instead, the plaintiff quantified his damages as at 1 December 2015. Is he to be non-suited on this account? This depends on whether the material in the record allows us to arrive at a reasonable figure for the plaintiff's damages as at December 2002. If so, prescribed interest as from December 2002 would be a matter of arithmetical calculation.

[70] Subject to the question of general damages, on which the defendants have a separate argument with which I shall deal presently, the court a quo's assessment of damages as at December 2015 was a correct assessment as at that date. The

annual rate of inflation between 2002 and 2015 is readily ascertainable. In their heads of argument the defendants' counsel referred to the Consumer Price Index (CPI) table contained in Robert J Koch's well-known *The Quantum Yearbook* and we have subsequently been furnished with the table from the 2017 edition of that work. Inflation would be the primary reason for the substantial difference between an award calculated as at December 2002 and as at December 2015.

[71] In my view, therefore, one could arrive at a fair figure for the plaintiff's damages as at December 2002 by reducing the court a quo's determination as at December 2015 by inflation for the intervening 13 years. Inflation would not account for all the differences in an accurate calculation of damages at the two dates. On the facts of the present case, some of those differences might favour the plaintiff while others might favour the defendants but disregarding them is unlikely to favour the plaintiff:

(i) In an actuarial calculation of future losses, life expectancy (the chance of death in each year of the calculation) is taken into account. If the plaintiff's claim had been valued as at December 2002 rather than December 2015, an annual chance of death (a sliding scale in which the chance becomes greater in each succeeding year) would have been applicable to the lost earnings over the period December 2002 to December 2015. And the annual chance of death in respect of the prospective claims after December 2015 would, if assessed as at December 2002, have been somewhat higher than the annual chance of death assessed as at December 2015. This would have had the effect of reducing the plaintiff's claim by more than simply the time-value of money.[14]

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[14] The plaintiff's actuary used Koch's Life Table 3 (Males). The plaintiff's date of birth was 19 January 1973. For purposes of applying the life table, the plaintiff can be treated as 30 years old at the notional trial date in December 2002 and 43 years old at the valuation date used by the actuary, namely December 2015. According to the relevant life table, of 93 124 males alive at age 30, 88 041 would still be alive at age 43 while 79 875 would still be alive at age 53 (an age I have chosen for illustrative purposes). From this one can deduce that if the plaintiff's prospective losses had been calculated with reference to his life expectancy at age 30, the actuary would have assumed a 5.5 per cent chance of death at age 43 (93 124-88 041 = 5 083 which 5.5 per cent of 93 124) and a 14.2 per cent chance of death at age 53. Because the actuary calculated the plaintiff's prospective losses with reference to his life expectancy at age 43, he would have assumed a 0 per cent chance of death at age 43 and a 9.3 per cent chance of death at age 53. So in the calculations for the income lost during the year in which the plaintiff was 53, the actuary would have allowed 90.7 per cent of the projected income whereas if he had used a valuation date of December 2002 he would only have allowed 85.8 per cent of the projected income.

(ii) In the present case the contingency deductions would not be affected because the court a quo applied the same contingency deductions to past and future earnings.

(iii) On the other hand, if (as I have in mind) one makes a blunt deduction for 13 years' worth of inflation between December 2002 and December 2015, one will inter alia be reducing the past loss of earnings (R2 393 330) by 13 years of inflation even though most of those earnings were lost over shorter periods. For example, to account for the time-value of money, one would only need to reduce the 2004 earnings by one or two years' worth of inflation.

(iv) Furthermore, if the claim had been valued as at December 2002, the future medical expenses the court a quo allowed as from December 2015 would have been allowed as from December 2002. Because of the delay, the plaintiff has had to do without those services.

(v) In addition, the plaintiff would probably have benefited from a curator bonis from an earlier date, which would again have increased his award as at December 2002.

(vi) The plaintiff's financial disadvantage in respect of (iii), (iv) and (v) almost certainly outweigh the defendants' financial disadvantage in respect of item (i).

(vii) Moreover, I have – in respect of item (i) – assumed that the prospective losses as at December 2002 would have been based on the plaintiff's life expectancy as at December 2002. The English cases show, however, that if in principle an allowance should be made for a certain item (for example, loss of future earnings), one can take into account subsequent events to quantify the allowance more accurately. Since the plaintiff was still alive as at December 2015, it is fairly arguable that – even in respect of a claim quantified as at December 2002 – the court was entitled to assess his life expectancy on the known facts as at December 2015. However, it is unnecessary to express any definite opinion on this question.

[72] The defendants submitted that in terms of *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) a court is not obliged to determine damages for loss of earnings by way of actuarial calculation and can instead make a lump-sum 'guesstimate'. They argue that this is the better way to determine the plaintiff's loss of earnings in the present case. I disagree. While the non-actuarial approach may

be legitimate in some circumstances, Nicholas AJA nevertheless said in *Bailey* that an actuarial computation has the advantage of attempting to proceed on a logical basis whereas a judge's 'gut feel' as to what is fair and reasonable is 'nothing more than a blind guess' (114D-E). In the present case, the 'guesstimate' approach is unlikely to provide a safer answer than the discounted value of the court a quo's otherwise correct actuarial determination of the damage to the plaintiff's earning capacity.

[73] In respect of general damages, the defendants argue that simply discounting the court a quo's award of R1 million by 13 years' worth of inflation would not yield a fair figure for the general damages a court would have awarded in December 2002. The court a quo's award of R1 million in 2016 equates to R466 000 in 2002. If the defendants' submission were correct, it would imply that awards of general damages for the sorts of sequelae which feature in the present case have become more generous since 2002. However, the judicial inclination towards higher awards for serious injuries appears already to have been established by 2002.[15] The court a quo cited three cases in regard to general damages. Of those, *Torres v Road Accident Fund*[16] is perhaps the most similar to the present case. The court there awarded R600 000 in March 2007, which the court a quo equated to R1,041 million in 2016.

[74] The defendants' counsel, in a supplementary note, referred us to cases decided over the period 1989 to 2003 which in their submission pointed to the likelihood of a significantly lower award in December 2002 than R466 000. The older cases may predate the more generous approach and two of the awards were unreasoned. In some of the cases the claimants were considerably older than the plaintiff in the present case (the claimants were aged 39 and 53 respectively) and in another case the claimant's catastrophic injuries left her with a life expectancy of only 18 months. More advanced age or reduced life expectancy is a factor which tends to suppress general damages since the period over which a claimant can derive solace from money is shorter. In one case the claimant's brain injury did not

[15] *Du Pisanie NO (obo JG Rabe) v De Jongh* C & H Vol 5 B4-109 at 144-145; and see on appeal *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) para 60.
[16] *Torres v Road Accident Fund* 2010 (6A4) QOD 1 (GSJ).

result in intellectual impairment or personality change though it affected his vision and hearing which a hearing aid would only partially ameliorate. Perhaps the most comparable case cited by the defendants is the 2003 decision in *Adlem*[17] where the claimant was awarded R400 000, equating to a 2002 award of R376 000.

[75] The plaintiff's counsel, in their supplementary submissions, unsurprisingly referred us to other cases which supported a higher award. For example, reference was made to *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) where this court awarded R175 000 just for orthopaedic injuries not dissimilar to those suffered by the plaintiff. An additional substantial alliance for the plaintiff's brain injury and its sequelae would, the plaintiffs argued, have resulted in a total award in the present case of at least R400 000 in 2002. The plaintiffs also mentioned decisions dating back to 1964 and 1974 which, when updated for inflation, would have come to just under R400 000 in 2002. In both these cases the claimants were considerably older than the plaintiff (their ages were 43 and 62 respectively). The plaintiffs' counsel also cited the court a quo's decision in *Du Pisanie*[18] where R400 000 was awarded (fortuitously) in December 2002. They argue that the plaintiff's orthopaedic injuries were more severe than in that case and that the plaintiff was also younger. I should point out, though, that on appeal the award in *Du Pisanie* was reduced to R250 000.[19]

[76] My conclusion is that R466 000 would have been a generous award in December 2002 but I cannot say it would not have been within the permissible range. One must bear in mind the difficult exercise a trial judge would have in attempting to assess general damages in accordance with an earlier mindset – in this case, an approach to damages prevailing 13 years before the case was ultimately tried. Strictly speaking, the trial judge should have attempted to determine what a judge, trying the notional case between the plaintiff and DFO in December 2004, would have thought a judge, trying the notional case between the plaintiff and the RAF in December 2002, would have awarded as general damages. In a slightly different context, the English courts have said that in professional negligence cases

[17] *Adlem v Road Accident Fund* C & H Vol 5 J2-41.
[18] Fn 14 above.
[19] Fn 14 above.

of this kind the court should tend towards generous assumptions in favour of the claimant, bearing in mind that it was due to the fault of the negligent attorney that the claimant lost the opportunity of actually running the case at the proper time.[20] In any event, and as will appear from my quantification exercise below, a reduction of the general damages to a 2002 award from R466 000 to, say, R250 000 would not affect the ultimate result.

[77] The defendants submitted that no professional advice would have existed in December 2002 justifying the appointment of a curator bonis and that this item should be left out of account. I disagree. In late 2001 the plaintiff was referred to a drug rehabilitation facility in a state of extreme stress. He subsequently experienced panic attacks and epileptic fits. His condition had deteriorated significantly over the period 1999-2002. The court a quo accepted Mr Annandale's evidence that if the plaintiff's brain injury had been appropriately investigated during 1999, a specialist would have reached the same conclusions as Mr Annandale did in his report of October 2015. This is all the more so if one assumes an updated assessment shortly before the notional trial date in December 2002 I have already referred to Mr Annandale's three broad diagnoses. His report concluded with the firm opinion that due to the 'clear evidence of cognitive decline and significant functional impairment' resulting from brain injury, the plaintiff required the protection of his funds by way of the appointment of a curator bonis

[78] Accordingly, I think the court a quo's assessment of damages can be used as a fair guide to the damages the plaintiff would have been awarded in December 2002 by adjusting for the time-value of money. The reduced amount is 46,6 per cent in the case of general damages and 49.6 per cent in the case of the other heads of damages which were valued as at December 2015. By the same token, the settlement amount of December 1999 must be grossed up to a value as at December 2002 (121.6 per cent). The results are as follows:

Item	**Original amount**	**Reduced to/ grossed up to**
Past loss of income	2 393 330	1 187 092

[20] *Mount v Barker Austin (A Firm)* [1998] EWCA Civ 277; (1998) PNLR 493 at 510-511; *Sharif & Ors v Garrett & Company (A Firm)* [2001] EWCA Civ 1269 paras 18 and 38-39.

Future loss of income	4 346 125	2 155 678
Future hospital & medical expenses	1 086 561	538 934
General damages	1 000 000	466 000
Total of above items	8 826 016	4 347 704
Less grossed up settlement award	98 334	[21]119 574
Net amount		4 228 130
Plus 7.5% curator bonis costs on net amount		317 110
Damages to be awarded:		4 545 240

[79] If the court a quo had awarded the plaintiff damages of R4 545 240 as at December 2002, interest should, as I have explained, been awarded in terms of s 2A(5) as from 21 December 2002. The prescribed rate at that time was 15.5 per cent, resulting in simple interest over 13 years of R9 158 656. The capital and interest would thus be R13 703 896 as at December 2015 and even more if one continued the interest calculation to the date on which the court a quo gave judgment in October 2016, which would be the logical approach. This exceeds the court a quo's December 2015 assessment of R9 211 953 by more than R4,49 million. I point out that the simple interest rate which would cause capital of R4 545 240 to grow to R9 211 953 over 13 years is 7.9 per cent. And if interest had been awarded at 15.5 per cent from any date earlier than March 2010, the resultant interest would likewise have caused the award to exceed R9 211 953 as at October 2016 when the court a quo gave judgment.[22] Since DFO pleaded prescription in June 2005, LRI should have realised long before June 2009 that they had failed the plaintiff and allowed his claim to prescribe.

[80] The court a quo did not have occasion to consider s 2A(5) because it expressed damages in December 2015 terms. I am entirely satisfied, however, that

[21] I have grossed up the full amount of the settlement. In their supplementary submissions the plaintiff's counsel say that only the component of the settlement relating to general damages, ie R53 000, should be taken into account because the balance of the settlement related to medical expenses which were excluded from the claim against LRI. This is probably correct but in the plaintiff's notice of cross-appeal the calculations were performed on the basis that the full settlement amount was to be grossed up and that is thus the approach I shall follow. The difference is not material.

[22] The amount of interest that has to be added to the capital of R4 545 240 to reach R9 211 953 is R4 666 713. At 15.5 per cent simple, the annual interest on R4 545 240 is R704 512, so it would take six years and seven months to earn interest of R4 666 713. Counting back six years and seven months from October 2016, one gets to March 2010.

if the court a quo had instead expressed damages in December 2002 terms, the only just order would have been to apply s 2A(5) so as to shield the plaintiff from the corroding effects of delay for which LRI, not he, was responsible. There is no question of onus in relation to s 2A(5). The court, having regard to all the facts of the case, gives effect to its own view as to what would be just (*Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA) para 15). It is unnecessary to decide whether in the circumstances of the present case the court should have reduced the prescribed rate from 15.5 per cent to prevent over-compensating the plaintiff. What is incontrovertible is that there would have been no legitimate grounds to reduce the rate to a figure lower than that which would cover intervening CPI inflation (a simple interest rate of 7.9 per cent). The plaintiff does not ask for more.

[81] The plaintiff tendered an amount of R500 000 in respect of past loss of earnings. It was not argued at the appeal that this should be taken into account in any revised order we make.

[82] I thus consider that justice would be done by dismissing the defendants' appeal and upholding the plaintiff's cross-appeal. Technically, the amount of R9 211 953 reinstated by the cross-appeal comprises damages of R4 545 240 plus interest of R4 666 713 in terms of s 2A(5), such interest being the minimum amount of interest to which the plaintiff would have been entitled on the correct legal approach. Economically, the plaintiff has succeeded in defending the full amount awarded by the court a quo prior to the unwarranted reduction of 43.69%.

The in duplum rule

[83] The correct analysis of the position does, however, raise the potential application of the in duplum rule, since the interest needed to sustain the full amount assessed by the court a quo exceeds the capital. In *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) Joubert JA concluded, after a learned treatment of the authorities, that the in duplum rule is not confined to moneylending transactions but applies to all contracts in terms of which a capital sum is owing and which attracts interest at a prescribed rate (482I-483A). In the present case the plaintiff's claim is for contractual damages. Whether this is a capital sum owing in terms of a contract within the meaning of the authorities is debatable. I

have not found any case dealing with the applicability of the rule to interest on damages, perhaps because, until relatively recently, interest could not be recovered on unliquidated debts prior to the date of judgment and because, even now, such interest is not ordinarily awarded from a date earlier than the date of demand or summons.

[84] It is unnecessary, however, to decide these matters because the problem can be disposed of on a different basis. In *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA) a contract for the sale of land provided that the seller was to repay the purchase price, together with interest at a stipulated rate, if a certain rezoning application failed. The rezoning application having failed, the buyer sued to recover the capital and agreed interest which exceeded the capital. This court held that the in duplum rule only applied to arrear interest. Because the interest in *Ethekwini Municipality* only became owing once the rezoning application failed, the interest was not arrear interest and was not hit by the rule.

[85] In the present case, the interest the court a quo could have imposed in terms of s 2A(5) would not have been arrear interest. Until the court invoked its power in terms of s 2A(5), the only interest that would run on the unliquidated debt would, at most, be interest in terms of s 2A(2)(a), ie interest from date of demand or summons. Upon the court's exercising its power in terms of s 2A(5), additional interest in respect of the earlier period would there and then become owing. Stated differently, the in duplum rule is concerned with the running of interest, the effect of the rule being to cause interest to stop running once the unpaid interest equals the capital. In a case such as the present, the interest which the court can award in terms of s 2A(5) in respect of the period prior to demand or summons is not interest which was running at that earlier time.

[86] The practical effect of this is that, by way of s 2A(5), the court can – if this is just – order interest to be paid which exceeds the amount of the unliquidated debt. Because this accords with the general principle of the common law rule as expounded in *Ethekwini Municipality*, it is unnecessary to decide whether s 2A(5) does not in any event confer a power on the court to override the in duplum rule.

[87] Since the court a quo's assessment of R9 211 953 must be understood as comprising R4 545 240 capital plus interest of R4 666 713, the further question arises as to (i) the amount on which further interest is to be computed and (ii) whether such further interest can run in the light of the in duplum rule. The answer to the first question is that, where a court awards a capital sum together with pre-judgment interest, the interest that runs on the judgment itself in terms of s 2(1) of the Interest Act is interest on the sum of the capital and the pre-judgment interest (*Paulsen & another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC) paras 99-100 and 106), ie in the present case post-judgment interest will run on the amount of R9 211 953. As to the second question, it is well-established that post-judgment interest can again run until such interest reaches the amount of R9 211 953.

Conclusion

[88] In summary, where an attorney's negligence results in the loss by a client of a claim which, but for such negligence, would have been contested, the court trying the claim against the attorney must assess the amount the client would probably have recovered at the time of the notional trial against the original debtor. Where the original claim is one for personal injuries, the evidence available and the law applicable at the notional trial date would determine the recoverable amount. The nominal amount in rands which the client would have recovered against the original debtor represents the client's capital damages against the negligent attorney. If justice requires that the client be compensated for the decrease in the buying power of money in the period between the notional trial date and the date of demand or summons against the attorney, the remedy lies in s 2A(5) of the Interest Act. If s 2A(5) were invoked, the court would not necessarily apply the prescribed rate but might choose instead to adopt a rate which would neutralise the effect of inflation.

[89] A similar approach applies where, as in the present case, a second attorney has allowed the claim against the first attorney to prescribe. Generally in such a case the client's claim for damages against the second attorney is determined by the amount the client would have obtained against the first attorney; and that amount in turn is to be ascertained in the way summarised in the preceding paragraph. Section 2A(5) again provides the mechanism, if justice so dictates, for

compensating the plaintiff for delay in the receipt of the amount he would have recovered against the first attorney.

[90] Where s 2A(5) is invoked, the in duplum rule does not preclude the court from ordering an amount of interest which exceeds the client's nominal capital loss. Where such interest is ordered, post-judgment interest will run on the sum of the capital and the pre-judgment interest.

[91] In the present case, the plaintiff, in the absence of clear authority, approached the matter differently, valuing his claim as at the date of the trial against LRI rather than as at the date of the notional trial against the RAF. We have found it possible, on the material before us, to determine the amount which the plaintiff would probably have recovered as at the notional trial date and are satisfied that the amount we have determined is unlikely to err in the plaintiff's favour. The total amount which the court a quo assessed as being the plaintiff's damages as at 1 December 2015 does not exceed the capital value of the plaintiff's claim as at the notional trial date together with the minimum amount of interest which it would have been just to award the plaintiff in terms of s 2A(5). It is for that reason that the defendants' appeal fails.

[92] The circumstances of the case are exceptional there was an absence of clear authority and the plaintiff had already been badly let down by two earlier sets of attorneys. This is not a licence for claimants in future cases to approach matters as the plaintiff did here. The capital damages should be assessed as I have summarised above and pre-judgment interest should be formally claimed in terms of s 2A(5).

[93] Finally, I need to make clear that in the present case there was no dispute that the plaintiff would have succeeded on the merits of his claims against the RAF and DFO. We have thus not considered the approach a court should take where it is uncertain whether the client's lost claim would have succeeded on its merits. In particular, we have not been called upon to decide whether in such cases there should effectively be a trial within a trial of the original claim and whether the claimant must prove on a balance of probability that his original claim would have

succeeded or whether, as in England, one assesses the client's prospects of success in accordance with 'loss of a chance' principles and thus allows a certain percentage of the proved value of the lost claim.

[94] I thus make the following order:

(a) The appeal is dismissed with costs, including those attendant on the employment of two counsel, such costs to be paid by the second appellant.

(b) The cross-appeal is upheld with costs, including those attendant on the employment of two counsel, such costs to be paid by the second appellant.

(c) Para 87.1 of the court a quo's order is set aside and replaced with the following:

'The second defendant is ordered to pay the plaintiff, in his representative capacity, the amount of R9 211 953'.

OL Rogers

Acting Judge of Appeal

APPEARANCES

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