THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
CASE NO 611/2004

In the matter between

ROAD ACCIDENT FUND — Appellant

and

G S O GUEDES — Respondent

Coram: Zulman, Mthiyane and Lewis JJA
Heard: 20 February 2006
Delivered: 20 March 2006

Summary: Damages in respect of future loss of earnings. Misdirection by a court *a quo* and the approach of an appeal court in consequence thereof.

Neutral citation: This judgment may be referred to as Road Accident Fund v G S O Guedes [2006] SCA 18 (RSA)

JUDGMENT

ZULMAN JA

[1] This appeal concerns an award to the respondent by the Johannesburg High Court (Boruchowitz J) of R3 119 048 in respect of future loss of income or earning capacity suffered as a result of a motor vehicle accident. The appeal is brought with the leave of the court *a quo*.

[2] The respondent, a magazine editor, was born on 20 February 1978. She sustained bodily injuries in a motor vehicle accident on 12 November 2000 and claimed damages resulting therefrom from the appellant. The appellant conceded the merits of the respondent's claim. On appeal the appellant has put in issue only the award made in respect of future loss of earning capacity of the respondent.

[3] The award by the High Court was based upon an actuarial calculation prepared for the respondent and accepted by the appellant, save in respect of the contingency deductions suggested. The appeal turns on whether the contingency deductions made by the court were justifiable. Briefly, the actuary had calculated (on the basis of various assumptions) that but for the accident the respondent would have earned R7 954 150 before retirement. Having regard to the accident, his calculation, based also on various assumptions, was that she would earn only R5 770 981. The actuary had suggested that a deduction be made from both sums to take into account unforeseen contingencies – the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors. He had suggested deducting 10 per cent from the value of what she would have earned but for the accident (the commonly termed 'but for scenario') and 40 per cent from the amount that she would have earned having regard to the accident (the 'having regard to scenario'). The High Court considered the deduction of 10 per cent to be correct (I shall deal with this in more detail later in the

judgment) but deducted only 30 per cent from the amount that was calculated having regard to the accident. The amount awarded was thus based upon actuarial calculations, deducting 10 per cent on the 'but for scenario' and 30 per cent on the 'having regard to scenario'. On this basis the court awarded to the respondent the sum of R3 119 048.

[4] The appellant contends that the respondent is entitled only to R155 544 because the judge below erred in deducting the percentages that he did. The figure arrived at is based on the contention that in the 'but for scenario' the deduction should have been 40 per cent, and in the 'having regard to scenario' the deduction should be 20 per cent.

[5] It is clear that a court of appeal in this type of matter, where one is working with various imponderables and must speculate about the future, should interfere only where there has been a material misdirection by the court below, or where the amount awarded is strikingly different from what the appeal court would award. In essence the trial court exercises a discretion, and attempts to achieve the best estimate of a plaintiff's loss: *Southern Insurance Association v Bailey* NO.[1] The appellant in this matter argues both for misdirections, and for striking disparity. Before dealing with these I shall turn to the factual findings.

[6] Based largely on undisputed expert evidence, the court *a quo* found that the respondent had sustained a whiplash injury to her cervical spine, as well as a thoracic sprain and a mild T-7 vertebral compression fracture. The uncontested evidence of the respondent was that until the accident she had never injured her back nor had she suffered pain emanating from the back. After January 2003 the respondent had resumed work on a part-

[1] 1984 (1) SA 98 (A).

time basis, attending two or three full days per week and working the remaining two to three days per week on a half-day basis. On these occasions she would feel herself unable to perform her duties. The whiplash injury has been the main cause of her pain and suffering and discomfort. The respondent is troubled by a stiff and painful neck, pain tends to radiate across the dorsal aspect of the shoulder and down between the shoulder blades. These symptoms are aggravated by a sustained posture, such as sitting in front of a computer, which her position as an editor requires her to do. The respondent suffers from headaches which may last up to three days at a time. She is thus not able to perform her work adequately, and the chances of her gaining promotion in her field are limited. This would not have been the case had she not been injured.

[7] The appellant submits that:

(a) The finding that the respondent would have been promoted and received an income on the highest level is questionable.

(b) The finding that she would not be promoted to any level further than the one which she presently occupies is also questionable.

(c) The correct approach should have been to find that the respondent would have been promoted to the same level pre- and post-accident and subtracted a higher contingency from the 'having regard to scenario' than that for the 'but for scenario,' or to follow the approach of the court *a quo* and subtract a very high contingency in the 'but for scenario' and a low contingency in the 'having regard to scenario'.

(d) If the deductions contended for by the appellant are made this would result in a nett amount of R155 705 in respect of loss of future earning capacity.

[8] It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity (see for example *President Insurance Co Ltd v Mathews*[2]). The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example *Southern Insurance Association Ltd v Bailey NO*.[3] The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just (see for example the *Bailey* case [4] and *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd.*[5] As pointed out by the learned authors Erasmus and Gauntlett[6] with reference to a number of reported cases, the proper approach of an appeal court in appeals against awards of damages has often been set out, and the principles have been stated in different ways, some appearing to favour appellants, others respondents. Some of these principles which are of application in this matter are well summarised, again with reference to reported cases, by the learned authors in these succinct terms:

'(c) Where the amount of damages is a matter of estimation and discretion, the appeal court is generally slow to interfere with the award of the trial court – an

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2 1992 (1) SA 1 (A) at 5C-E.
3 Supra.
4 Supra at 116G-117A.
5 1980 (3) SA 105 (A) 114F-115D.
6 In the title on Damages 7 LAWSA (2 ed) para 117 pp 90-101.

appellate tribunal cannot simply substitute its own award for that of the trial court. However, once it has concluded that interference is justified in terms of the principles set out in (d) below, the appeal court is entitled *and obliged* to interfere.

(d) The appeal court will interfere with the award of the trial court:

> (i) where there has been an irregularity or misdirection (for example, the court considered irrelevant facts or ignored relevant ones; the court was too generous in making a contingency allowance; the decision was based on totally inadequate facts);
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> (ii) where the appeal court is of the opinion that no sound basis exists for the award made by the trial court;
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> (iii) where there is a substantial variation or a striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made. In order to determine whether the award is excessive or inadequate, the appeal court must make its own assessment of the damages. If upon comparison with the award made by the trial court there appears to be a "substantial variation" or a "striking disparity", the appeal court will interfere.'[7]

[9] Counsel for the appellant in an able argument submitted that the court *a quo* was guilty of various misdirections in the contingency deductions that it made. He stressed two of these bearing on the 'but for scenario'. First he drew attention to the following passage in the judgment of Boruchowitz J:

'Counsel for the plaintiff submits that the norm for "but for" contingencies is approximately 10% for a person of the plaintiff's age group. He relies in this regard on what is stated in the *Quantum Yearbook*, 2004 by R Koch, at page 106. The defendant's attorney does not suggest that a contingency deduction of 10% would be wrong or inappropriate, and there is no reason for me not to apply that percentage.'

The author Koch describes his work as 'a publication of financial and statistical information relevant to the assessment of damages for personal

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[7] Supra p 100.

injury or death'.[8] The page in question is headed 'General Contingencies'. It states that when 'assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court; . . . There are no fixed rules as regards general contingencies. The following guidelines can be helpful.' Then follows what is termed a 'sliding scale' and the following is stated:

'**Sliding Scale**: ½ per cent for year to retirement age, ie 25 per cent for a child, 20 per cent for a youth and 10% in middle age (see *Goodall v President Insurance* 1978 (1) SA 389 (W) . . .' .

In the *Goodall* case which is relied upon by Koch for a suggested deduction of 10 per cent the plaintiff was aged 45 whereas the plaintiff in this matter was only 26 at the relevant time. An application of the author's sliding scale to this matter would have led to a contingency deduction of 19.5 per cent. It is true that immediately after referring to the passage in Koch, Boruchowitz J said:

'Having regard to the relevant facts, the plaintiff's age and station in life, I am of the view that in the "but for" scenario a contingency deduction of 10% would be fair and reasonable.'

[10] Nevertheless one cannot avoid concluding that the learned judge was inadvertently influenced by, or at least drew comfort from, what he incorrectly understood Koch had stated, namely a 10 per cent contingency deduction for a person aged 26. The fact that the defendant's attorney did not suggest that a contingency deduction of 10 per cent would be wrong or inappropriate does not necessarily mean that the appellant consented to such a deduction. It is to be noted that the record regrettably reveals a singular lack of competence on the part of the

[8] Cover page.

defendant's attorney in the conduct of the defendant's defence. This only served to increase the burden placed on the learned judge. I accordingly believe, even if one reads the remarks of the court *a quo* in their full context, that the court *a quo* misdirected itself by exercising its discretion upon a wrong guideline in making the deduction of 10 per cent.

[12] The second respect in which the court below is argued to have erred is in accepting the evidence that but for the accident the respondent would have risen rapidly to the top in her field. I do not, however, believe that the appellant is correct in contending that the court *a quo* was wrong to 'fast track' as it were the plaintiff's income to the highest level. The evidence in this regard was not disputed by the appellant in the court *a quo*. The evidence reveals that the respondent only had two levels of promotion to attain in the publishing field. In the specialised field in which she works such as Information Technology (IT) it is not unusual for outstanding or even merely competent young people to make rapid progress, sometimes even meteoric progress. Indeed the evidence reveals that the respondent was also not left at virtually the lowest level but was left at the level which she is at present, that of an editor. This is already a management level that she had reached in only five years from entering the profession as a journalist. She was particularly successful when compared with her peers in that she had progressed to the level of editor in a comparatively short space of time. I accordingly believe that the court *a quo* was correct in finding that she would in all probability have been promoted to a publisher. This probability flows from the uncontested evidence of the respondent herself and her employer, Regasek, combined with her track record, and taking into account her intelligence and personality traits. Regasek furthermore testified that the skills that the respondent has are scare in the industry so that when the

opportunity presented itself to employ her, he did so although he did not have a suitable position for her at the time. He had hired her nonetheless on the basis that he was 'making an investment in her'. The conclusion of the court *a quo* that the respondent, had it not been for the injuries sustained by her as a result of the accident, would have been promoted is a reasonable one on the facts which were presented to the court.

[13] The third alleged misdirection stressed by the appellant's counsel related to the 'having regard to scenario'. Counsel submitted that the court *a quo* was too pessimistic in regard thereto and that a far too high contingency deduction (30 per cent) was made. More particularly, it was argued that the court *a quo* did not give sufficient weight to the evidence of Dr Shevel, a specialist psychiatrist called by the respondent. Dr Shevel expressed the opinion that with adequate psychiatric treatment, the respondent should be able to return to her pre-accident level of functioning both socially and occupationally within the limitations set by her physical injuries. He indicated that any adverse effects of her injuries ought to be strictly due to her spinal injuries.

[14] Yet Dr Scher, an orthopaedic surgeon, expressed the view in a medico legal report that the respondent's residual spinal disability may have compromised her work output or productivity to a limited extent which may have a bearing on the potential earnings and that she 'will probably benefit from future management . . .'. The respondent had testified, however, that it was difficult to find the time while working to get medical treatment such as physiotherapy, and that she could not use painkillers or medication that might alleviate her discomfort because they had an adverse effect on her stomach. This was confirmed by a gastroenterologist, Dr Strimling, in a medico-legal report (the parties

agreed that the reports of the respective experts would serve as evidence and that the court was to attach such weight thereto as was necessary). Strimling expressed the opinion that:

'Assuming that her present gastrointestinal complaint is due to a peptic ulcer, NSAID gastropathy or gastro oesophageal reflux, I would expect complete symptom resolution with appropriate treatment such as Proton Pump Inhibitor therapy. If however her complaint is due to non-ulcer dyspepsia, this condition can run an unpredictable course with prolonged periods of abdominal pain in spite of treatment. In view of the uncertainty as to the exact nature of the complaint, it would be reasonable to allow for a potential loss of earning ability.'

[15] The argument that Dr Shevel's opinion that she could be helped with psychiatric treatment was not given sufficient weight is not in my view correct. It disregards the uncontested evidence of the respondent's employer Mr Regasek that the respondent did not seem to have sufficient energy to do her work adequately, this despite her natural skill and competence. It is fair to conclude that it is at least questionable as to how much of the respondent's lack of energy, stress levels and difficulty in coping are as a result of her physical problems and how much as a result of psychological problems. It is noteworthy that the respondent said in her evidence that when she was on holiday she experienced virtually no pain, but there is nothing to suggest whether that was because she was in a less stressful environment or because she was not working on a computer.

[16] At present the respondent suffers pain daily. Her future as a journalist is precarious. Regasek testified that he had been compelled to appoint two people to take over the revenue driving and networking portion of her position and so put more resources into the magazine that she works for than he would have done otherwise. An industrial

psychologist, Mr Schmidt, who gave evidence, expressed the opinion that if the respondent is unable to comply with all her responsibilities it is unlikely that she would be able to further progress in regard to promotion. Again the evidence of Mr Schmidt was not contested by the appellant. There was thus no misdirection in this regard.

[17] Thus in my view there is no substance in the appellant's argument that the court *a quo's* contingency deduction of 30 per cent in the 'having regard to scenario' was incorrect. The uncontested evidence of the respondent's employer, and that of the medical experts, was that her working capacity, and therefore her earning capacity, had been severely compromised by her injuries and their consequences. The possibility that increased psychological intervention and further medical treatment might assist appears to me to have been taken into account in making the contingency deduction of 30 per cent rather than the 40 per cent suggested by the actuary.

[18] In the light of the misdirection in the 'but for scenario' it becomes unnecessary to consider the other alleged misdirections referred to by the appellant's counsel in regard to the contingency deduction of 10 per cent in the 'but for scenario'. In the circumstances this court is bound and indeed obliged to intervene and to correct the contingency deduction made by the court *a quo* in the 'but for scenario' and to make a deduction that it considers appropriate (*Hulley v Cox*,[9] *Legal Insurance Co Ltd v Botes*[10] and *Swart v Provincial Insurance Co Ltd.* [11] In my view having regard to all of the relevant factors, a contingency deduction of 20 per cent and not 10 per cent in the 'but for scenario' of the value of the

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9 1923 AD 234 at 246.
10 1963 (1) SA 608 (A) at 618C-D.
11 1963 (2) SA 630 (A) at 633A-C.

respondent's income of R7 954 150, is appropriate, namely R1 590 830.

[19] Although the award made by the court *a quo* is undoubtedly high I do not believe, if proper regard is had to all of the relevant factors, and if a correct contingency deduction is made in the 'but for scenario', that there remains a substantial variation or striking disparity between the award made by the trial court in the exercise of its discretion and the award which this court considers ought to have been made entitling this court to interfere upon that basis alone (cf *Protea Assurance Co Ltd v Lamb*[12] and *Road Accident Fund v Marunga*[13]).

[20] In the result I would allow the appeal to the extent of altering the contingency deduction in the 'but for scenario' from R795 415 to R1 590 830. This would result in the respondent being entitled to R2 323 633 in respect of her net prospective loss of future earning capacity arrived at as follows:

Value of income but for accident	R7 954 150
20 per cent contingency deduction	R1 590 830
	R6 363 320
Value of income having regard to accident	R5 770 981
30 per cent contingency deduction	R1 731 294
Total	R4 039 687

[21] The appeal is allowed with costs, including the costs of two counsel. Paragraph (a) 3 of the order of the court below is replaced with the following:

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12 1971 (1) SA 530 (A) at 535A-B.
13 2003 (5) 164 (SCA) para 23.

‘(a)…

3 R2 323 633 in respect of future loss of income or earning capacity.’

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R H ZULMAN
JUDGE OF APPEAL

CONCUR:) MTHIYANE JA
) LEWIS JA